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Details of Filing

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Important Information

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In the matters of Virgin Australia Holdings Ltd (Administrators Appointed) & Ors

Federal Court of Australia Proceeding No. NSD 464 of 2020

Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes, in their capacity as joint and several voluntary administrators of each of Virgin Australia Holdings Ltd (Administrators Appointed) and the Third to Forty-Second Plaintiffs

First Plaintiffs

& Ors

PLAINTIFFS' OUTLINE OF SUBMISSIONS

A. OVERVIEW

1. The Interlocutory Process filed by Broad Peak Investment Advisers Pte Ltd (**Broad Peak**) and Tor Investment Management (Hong Kong) Ltd (**Tor**) on 11 August 2020 seeks relief to enable: (a) the consideration of rival deeds of company arrangement (**Rival DOCAs**) at the second meeting of creditors (**Second Meetings**), and (b) the appointment of a facilitator to assist in assessing the Rival DOCAs and providing information to creditors before the Second Meetings.

2. The relief should be refused. It will provide no benefit to creditors, while imposing a cost on them. It risks disrupting the orderly administration process, while jeopardising the sale to BC Hart Aggregator, L.P. and BC Hart Aggregator (Australia) Pty Ltd (**Bain Capital**). It is apt to operate as an impermissible fetter on the statutory powers of the Administrators. While ostensibly procedural in form, the application is substantive in its effects.

3. The Administrators have exercised their power of sale under s 437A(1)(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**). They have done so in the best interests of creditors and in the discharge of their fiduciary obligations to the companies under administration (**Virgin Companies**), in circumstances of great uncertainty in the aviation industry, by selling the business and assets of the Virgin Companies to Bain Capital.

4. That sale process has been unanimously endorsed, on more than one occasion, by the Committee of Inspection (**COI**). The COI is made up of 36 creditors (including the

Commonwealth as an observer) from a number of different stakeholder groups, including employees, bondholders, secured creditors, landlords, and trade creditors.

5. While a company's creditors decide the company's future in accordance with s 439C, the range of options available to the creditors can be circumscribed by the exercise of the broad powers conferred on administrators for the benefit of the company under administration in accordance with s 437A. The authorities recognise that the proper exercise of the power to dispose of the whole or part of a company's assets and business will necessarily exclude any decision of creditors as to whether to approve a deed of company arrangement that attaches to them.

6. The proposed deed of company arrangement (**DOCA**) being promoted by Bain Capital (**Bain DOCA**) is a mechanism to complete the sale of the Virgin Companies' assets. If the Bain DOCA is not passed by creditors, the Second Meetings, scheduled for 4 September 2020, will be adjourned and the sale to Bain Capital will complete as an asset sale**:** affidavit of Vaughan Neil Strawbridge dated 14 August 2020 (**Ninth Strawbridge Affidavit**) at [54].

7. Broad Peak and Tor have not brought an application to set aside the sale with Bain Capital. Such an application would require them to seek to restrain the completion of the sale by obtaining an interlocutory injunction and, in the usual course, establish a *prima facie* case and provide an undertaking as to damages. Absent such a challenge, any alternative DOCA sought to be put forward by Broad Peak and Tor—to the extent it involves a recapitalisation of the Virgin Companies and the continued operation of the business under new ownership—lacks utility.[1]

8. Even if the creditors were somehow to vote in favour of a proposal advanced by Broad Peak and Tor, *that DOCA could not be completed*. The resulting uncertainty, including as to funding, would likely result in the Virgin Companies going into liquidation. There is, accordingly, no basis for orders to be made which would require the Administrator to place the Rival DOCAs on a "ballot" or otherwise appointing a facilitator. That is particularly so where Broad Peak and Tor have not led any direct or admissible evidence of, and have not previously provided the Administrators with information as to, their

[1] Hearing, 10 July 2020 at T 10.5-11, 10.32-35

ability to fund their alternative restructuring proposal. That requires approximately $800 million of capital to be injected into the Virgin Companies, as well as funding of the day-to-day operations of the companies, in a uniquely revenue-constrained aviation market.

9. Finally, the proposal advanced for the appointment of a facilitator is inchoate and inappropriate, especially in circumstances where the cost is required to be borne by the Virgin Companies (that is, the creditors) without an undertaking or any indemnity being proffered by Broad Peak and Tor.

B. THE EXERCISE OF THE ADMINISTRATORS' POWER OF SALE

B.1 The sale process carried out by the Administrators

10. The Administrators have undertaken an extensive process for the sale or recapitalisation of the business and assets of the Virgin Companies (**Sale Process**): Ninth Strawbridge Affidavit at [33]-[36].[2]

11. In summary, this has involved the following steps (Ninth Strawbridge Affidavit at [36]):

    (a) retaining investment banking and insolvency advisers;

    (b) establishing a secure data room containing documents regarding the business and the financial position of the Virgin Companies (**Data Room**);

    (c) preparing and distributing an information memorandum;

    (d) calling for and reviewing several non-binding indicative offers and, thereafter, forming a shortlist of interested parties;

    (e) arranging virtual meetings, presentation and "Q&A" opportunities and "roadshows" between the interested parties and management personnel of the Virgin Companies;

    (f) sharing more detailed financial and operational information, including provision of vendor due diligence prepared by the Administrators' legal advisors, Clayton Utz;

    (g) facilitating meetings between the interested parties and as many aircraft financiers, aircraft lessors, real property landlords, suppliers, unions and other key stakeholders of the Business as could be managed in the available time;

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[2] Hearing, 10 July 2020 at T 10.31-40; Hearing, 11 August 2020 at T 16.44-47

(h) calling for and reviewing five final non-binding indicative offers and, thereafter, selecting a shortlist of two preferred bidders, Bain Capital and Cyrus Capital Partners, L.P (**Cyrus Capital**);

(i) conducting extensive negotiations with Bain Capital and Cyrus Capital (over a period of approximately 10 days) in relation to all aspects of a proposed transaction, including the form of the documents to give effect to a transaction;

(j) calling for and reviewing final binding offers from Bain Capital and Cyrus Capital;

(k) considering a back-up recapitalisation proposal from Broad Peak and Tor, two beneficial holders of the unsecured notes issued by the Second Plaintiff, Virgin Australia Holdings Ltd, which was only received by the Administrators on 24 June 2020; and

(l) ultimately, on 26 June 2020, following a detailed consideration and assessment of the competing proposals, and the subsequent withdrawal by Cyrus Capital of its offer, accepting the offer submitted by Bain Capital.

12. The Sale Process involved a considered assessment by the Administrators. They formed the view—in light of the cash constraints facing the Virgin Companies, the impact of the COVID-19 pandemic, the magnitude of the business of the Virgin Companies, and the need to retain key contracts, assets, employees and regulatory approvals to preserve the business—that the Sale Process ought be conducted on an expedited timeframe so as to culminate in a satisfactory and binding transaction as soon as reasonably practicable: Ninth Strawbridge Affidavit at [35].

13. The Administrators' entry into the Bain Transaction (defined at [16] below) involved a careful commercial decision taken by them. The Bain Transaction was the most favourable transaction available for the benefit of the Virgin Companies and their creditors. It provided the greatest prospect of the business remaining intact and otherwise provided the likely greatest return to creditors: Ninth Strawbridge Affidavit at [42]. The risks posed to the value and viability of the Virgin Companies if they remained in insolvent external administration for an extended period (especially in light of the disruption to the aviation market caused by the COVID-19 pandemic and in circumstances where the survival of the business of the Virgin Companies was at stake)

made it unfeasible to wait until the Second Meetings before executing a binding transaction: Ninth Strawbridge Affidavit at [43]. Ensuring certainty and security of ongoing funding was critical, and if the Administrators had delayed executing a transaction until the Second Meetings, there was a very real risk that no transaction would ultimately have been achievable: Ninth Strawbridge Affidavit at [43].

14. The Bain Transaction was also critical to ensuring that interim funding was made available for the Administrators to continue to operate the Virgin Companies during the administration period: Ninth Strawbridge Affidavit at [44].

15. In that context, it is plain that the power of sale was exercised consistently with the objects of Part 5.3A of the Act: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 (***Patrick Stevedores***) at [60].

16. To give effect to the transaction proposed under the offer made by Bain Capital (**Bain Transaction**), the Administrators executed a number of documents including the Sale and Implementation Deed (the **Sale Deed**).

17. The Sale Deed is confidential. As was observed by Middleton J in *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 (***Virgin No 4***) at [10]-[11], in deciding to make confidentiality orders in respect of the Sale Deed (among other documents):

> The terms of the Sale Deed and other transaction documents in connection with the sale are subject to confidentiality provisions and undertakings and contain commercially and market sensitive information pertaining both to the Virgin Companies, the Purchasers and Bain Capital, which is not presently in the public domain and is not otherwise publicly available.
>
> I accept that public disclosure of that material could result in harm being suffered by those persons, or the relevant transactions being prejudiced. That includes a risk that, due to the complexity of the transaction and the significant number of steps and conditions precedent that must be satisfied, unauthorised disclosure of some or all of the terms of the transaction may lead to misapprehension or confusion on the part of creditors or other stakeholders as to the implications of the transaction. These matters will be later addressed in the Administrators' statutory report to creditors.

18. Notwithstanding their legitimate interest in maintaining the confidentiality of the Sale Deed, in light of Broad Peak and Tor's Interlocutory Process, the Administrators formed the view that they should seek Bain Capital's consent to disclose of certain of the terms of

the Sale Deed in advance of the issue of the report to creditors under s 75-225 of the *Insolvency Practice Rules (Corporations)* (**IPR**). That consent was granted: Ninth Strawbridge Affidavit at [39].

19. This approach is directed to facilitating an efficient and proper ventilation of issues on this application, and involves a disclosure by the Administrators and Bain Capital of certain confidential matters before the time contemplated by the Court in *Virgin No 4* and in *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 5)* [2020] FCA 986 (***Virgin (No 5)***).

20. These provisions are referred to in the confidential affidavit of Vaughan Neil Strawbridge dated 14 August 2020 (Applicants and BC Hart Aggregator) (**Confidential Strawbridge Bain Affidavit**).

21. It is evident, from [10] to [16] of the Confidential Strawbridge Bain Affidavit, that the Bain DOCA is an instrument that will enable the Bain Transaction to be completed in a manner that is more advantageous to the Virgin Companies and their creditors than will occur if the Bain DOCA is not approved and effectuated. If that does not occur, the Administrators and the Virgin Companies will still be obliged to complete the Bain Transaction pursuant to the terms of the Asset Sale Agreement: Ninth Strawbridge Affidavit at [40]-[41].

22. As a result of this mechanism, absent an order of the Court setting aside the Bain Transaction, nothing other than the sale of the assets and business to Bain Capital can eventuate. Completion will occur either by way of the Bain DOCA or by an asset sale. This is dealt with further in Section C below.

B.2 Endorsement by the COI and the NCC

23. The Sale Process, culminating in the Bain Transaction, was unanimously endorsed by the COI: Ninth Strawbridge Affidavit at [23]. The Bain Transaction was also discussed at a Noteholder Consultative Committee (**NCC**): confidential affidavit of Vaughan Neil Strawbridge dated 14 August 2020 (Applicants only) (**Confidential Strawbridge Applicants Only Affidavit**) at [13].

The COI

24. The COI, as noted, is constituted by 36 different members (representative of various different classes of creditors, plus the Commonwealth): Ninth Strawbridge Affidavit at [21]. Mr Strawbridge has explained that the COI is the largest he has ever dealt with in an external administration: Ninth Strawbridge Affidavit at [21]. The Administrators have consulted extensively with, and sought guidance from, the COI, which has been a key sounding board for decisions taken by the Administrators in respect of the administrations of the Virgin Companies Ninth Strawbridge Affidavit at [45].

25. The COI has at all times supported the Sale Process (including the timeline within which the Sale Process was conducted) and the Administrators' decision to enter into the Bain Transaction: Ninth Strawbridge Affidavit at [23], [45] and Schedule 2.

26. Pursuant to section 80-35 of the *Insolvency Practice Schedule (Corporations)*, the Committee of Inspection has a number of functions, including: (a) to advise and assist the administrators; (b) to give directions to the administrators; and (c) to monitor the conduct of the administration. In *Onefone Australia Pty Ltd v One.Tel Ltd* (2008) 69 ACSR 290; [2008] NSWSC 133 at [40]-[45], Barrett J (as his Honour then was) noted authority to the effect that Committees "exercise a general power of inspection, and would provide the liquidator with a body of persons with whom he could consult on questions of policy and other matters of difficulty" and concluded that the Committee's prerogatives include "to be consulted, to advise and to warn".

27. The unanimous endorsement, by the COI, of the Bain Transaction is a matter of some significance.

The NCC

28. The NCC is a separate representative and consultative committee of 11 different bondholders, which was established by the Administrators at an early stage of the administrations: Ninth Strawbridge Affidavit at [24]. Its functions include to engage with, and facilitate communications and information sharing between, the Administrators and representatives of holders of different categories of bonds issued by the Virgin Companies, provide the bondholders' views on matters arising in the

administrations, and provide a forum for noteholders' interests to be represented: Ninth Strawbridge Affidavit at [24].

29. There have been four meetings of the NCC, at which Mr Strawbridge has provided updates on matters of interest to bondholders, the Sale Process and the Bain Transaction: Ninth Strawbridge Affidavit at [26]. The specific subjects of discussion at the NCC meetings are set out in the Confidential Strawbridge Applicants Only Affidavit at [13].

B.3 Bain Capital's assumption of economic risk

30. As a consequence of the Bain Transaction Documents, on and from 1 July 2020, Bain Capital assumed economic risk for the financial position of the Virgin Companies: Ninth Strawbridge Affidavit at [37].

31. That included the provision by Bain Capital of $125 million in interim funding that has been drawn down by the Administrators to assist in conducting the affairs of the Virgin Companies during the balance of the administration period: Ninth Strawbridge Affidavit at [37].

B.4 The consequences of the exercise of the power of sale

32. Section 437A(1)(c) of the Corporations Act confers broad powers on an administrator, including to dispose of the whole of the business and assets of the company.

33. In *Re Keystone Group Holdings Pty Ltd (recs and mgrs apptd) (admins apptd)* [2016] NSWSC 1604 (***Keystone***) at [15], Black J said this:

> I also have regard to the fact that s 437A of the Corporations Act confers on the administrator a power to dispose of all or part of the business and dispose of property through the administration in certain circumstances, which may be a proper course for an administrator to take notwithstanding that will necessarily exclude any decision of creditors as to whether to approve a deed of company arrangement which might attach to that property: compare *Re Eisa Ltd* [2000] NSWSC 940; (2000) 35 ACSR 394. Mr Rich points out, and I accept, that s 437A of the Corporations Act goes to the question of power not to the question of the justification of the decision of an administrator. However, the question of justification requires attention to several of the matters to which I have already referred, including the Administrators' assessment of the likely outcome of the transaction, the comparison of the transaction and its prospects of coming to completion with the deed of company arrangement foreshadowed by GLC and the Administrators' assessment, applying their expertise, that the transaction is in the interests of creditors.

34. As his Honour correctly observed, the exercise of the administrator's power of sale may necessarily foreclose other recapitalisation options, including approval of any DOCA that is premised on the assets and business remaining in the company under administration.

35. That is precisely what has occurred in the present case.

36. In *Virgin (No 5)*, Middleton J noted, at [26], that no application had been brought by Broad Peak and Tor to set aside the Administrators' sale to Bain Capital.

37. That remains the case and the Bain Transaction remains on foot.

38. Any such application would require Broad Peak and Tor to impugn the business and commercial judgments of the Administrators with which, generally speaking, courts are reluctant to interfere: *Hausmann v Smith* (2006) 24 ACLC 688 (Barrett J, as his Honour then was); *Robit Nominees Pty Ltd v Oceanlinx Limited (in liq) (Receivers and Managers Appointed), in the matter of Oceanlinx Limited (in liq) (Receivers and Managers Appointed)* (2016) 111 ACSR 427; [2016] FCA 225 at [187]-[188] (Yates J).

39. In circumstances where the Bain Transaction remains on foot, any alternative DOCA proposal that is premised on the assets and business remaining in the Virgin Companies could not be effectuated. Further, as part of the commercial bargain reached with Bain Capital, the Administrators have promised not to encourage any person in relation to a competing proposal, or to negotiate with, or participate in any negotiations or discussions in relation to, or which may reasonably be expected to encourage or lead to a competing proposal: Confidential Strawbridge Bain Affidavit at [10]. Any such step which would frustrate, prevent or delay the implementation of the Bain Transaction would lead to a likely termination of the Bain Transaction and an action in damages against the Virgin Companies. That is a consequence of the manner in which the Administrators have exercised their statutory powers. The effect of the orders now sought by Broad Peak and Tor seek to gainsay and go behind the exercise of those powers without restraining the sale.

40. Such a course is not merely undesirable, but is impermissible insofar as the orders now sought would fetter the manner in which the Administrators have already exercised their statutory powers under s 437A. As Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ observed in *Patrick Stevedores* at [60]-[62] (citations omitted):

> … But s 437A confers on the Administrators a power to be exercised in their discretion to continue or to desist from trading. That power is to be exercised in the interests of those affected (general creditors as well as employee creditors and shareholders) and having regard to the object of Pt 5.3A …
>
> The orders made by North J fettered the discretion. In particular, order 5 precluded the Administrators from deciding whether, if trading were resumed, it would be feasible to retain the whole workforce of the employer companies. Decisions of that kind are for the Administrators to make, not the Court. They are to be made having regard to all of the circumstances known at the time.
>
> It was submitted on behalf of the employees that if the Administrators wanted to exercise their powers they could always approach the Federal Court pursuant to the liberty to apply that was reserved. If they could justify their proposed course of conduct, the orders could then be varied to permit it. This contention identifies an error in the orders made by the courts below. The Administrators cannot be deprived of the discretion which the Corporations Law reposes in them. True, they must obey the general law in exercising their discretions, including the law governing the dismissal of redundant employees, but that is not to say that their discretionary power is subject to court approval. No doubt, a decision made by an administrator may be challenged by appeal under s 1321 of the Corporations Law but there is a radical difference between a challenge to an exercise of discretion under s 1321 and a denial of the administrator's discretionary power without the court's prior approval.

B.5 There is no "statutory right" to propose a deed of company arrangement that attaches to the business and assets of the company

41. The relationship between a voluntary administrator, the company, its creditors and members is a statutory construct: *Viscariello v Macks* [2014] SASC 189 at [82] (Kourakis CJ), in comments implicitly approved on appeal in *Macks v Viscariello* (2017) 130 SASR 1 (***Macks***) at [225]).

42. That is why, for example, no duty of care is owed by an administrator to creditors in the management of the company's business affairs, including the sale of some or all of its assets, the compromising claims for and against it and the negotiations of a DOCA: *Macks* at [202]-[213]; *Seaman v Silvia* [2018] FCA 97 at [36] (Derrington J).

43. It may be accepted that it is the creditors who decide on the future of the company, including whether a DOCA, if proposed, is to be approved or the company is to be wound up: *Patrick Stevedores* at [48]-[49]; *Re Ten Network Holdings Limited (Admins Apptd) (Recs and Mgrs Apptd)* [2017] NSWSC 1247 (***Ten Network***) at [38].

44. However, nowhere in Part 5.3A of the Corporations Act is there conferred any statutory right to put forward a DOCA that attaches to the assets and business of the company. Such a right could not exist alongside the wide-ranging powers to deal with the property of the company that s 437 confers on administrators. As Black J observed in *Keystone* at [15], those powers may be exercised in such a way as to "necessarily exclude any decision of creditors as to whether to approve a deed of company arrangement which might attach to that property".

45. As Middleton J correctly observed in *Virgin No 5* at [14], s 439C(a) of the Corporations Act authorises the creditors to approve a deed of company arrangement which is different from the one which accompanied the notice of meeting.[3] But the statutory scheme does not require an administrator to put forward any competing DOCA proposal if inutile: *Macks* at [237]-[253]; nor does it require an administrator to adjourn a creditors' meeting to permit an alternative DOCA proposal to be finalised and put to creditors: *Promnitz v Indochine Mining Limited (Subject to a Deed of Company Arrangement); In the Matter of Indochine Mining Limited (Subject to a Deed of Company Arrangement)* (***Indochine***) (2015) 108 ACSR 134; [2015] FCA 857 at [83]-[88] (Foster J).

46. For example, if the proposed alternative DOCA is legally ineffective because, say, an administrator has exercised the power of sale under s 437A and sold all of the company's property or receivers have been appointed and have taken the same course, an administrator would not be bound to put the proposed alternative DOCA to the creditors if it involved a third party purchasing the property that had already been sold. Indeed, taking that course could be inappropriate, because it may suggest to creditors that that proposal is a viable and feasible alternative when it is not.

47. In *Ten Network*, Black J in *dicta* said this on that issue at [38]-[39] (emphasis added):

> I should, however, also add several tentative observations as to that question, although they are not necessary to my decision, which may be of practical importance to the manner in which complex administrations are conducted. First, there is no doubt that, at the second meeting of creditors convened under s 439A of the Act, it is the creditors and not the administrators who decide whether the relevant company should execute a deed of company arrangement specified in the resolution before that meeting (even if it differs from any proposed deed that accompanied any notice of

[3] This is the position accepted by the Administrators at the Hearing on 11 August 2020 and the notion of a statutory right to propose a DOCA was rejected by the Administrators: T 16.37-41

meeting) or alternatively that the administration should end or that the company should be wound up. The creditors and not the administrator have the power to make that decision, because s 439C of the Act so provides, although the administrator has a casting vote if the majority of creditors by number and value reach a different result. The Administrators did not suggest to the contrary in this case.

It is perhaps difficult to see why, in a complex administration, the administrators should not or do not have power to take steps to negotiate a deed of company arrangement which will be put to creditors for approval, even if their doing so potentially narrows the range of other options that may be available to creditors. The administrators have wide statutory powers while a company is under voluntary administration, under s 437A of the Act, including control of the company's business, property and affairs, power to terminate or dispose of the company's business and power to exercise any power that the company or any of its officers could have exercised if the company were not in administration. **Where a company's assets are under the control of receivers, there would be no utility in putting a deed of company arrangement proposal to creditors unless the receivers would cooperate in its implementation. Where a bidding process for assets is conducted by receivers and administrators, one might expect that bidders would generally not make their best offer until that offer can lead to a concluded (although potentially conditional) transaction, and not if that offer would simply be the starting point for further negotiations at or after a second meeting of creditors.** I emphasise, however, that these observations are tentative and not necessary to the decision in this matter.

48. Similarly, in *Indochine*, the administrator refused to adjourn the second creditors' meeting to allow a competing DOCA proponent enough time to refine its own proposal and secure funding. The meeting went ahead and the principal DOCA proposal was approved by creditors, even though the competing proposal held out the prospect of a greater return to creditors. Foster J, at [83]-[88], upheld the administrator's decision not to adjourn the creditors' meeting.

C. BROAD PEAK AND TOR'S ALTERNATIVE PROPOSAL IS UNFEASIBLE

49. No effect can be given to any alternative DOCA proposal insofar as it involves a restructure of the business and assets of the Virgin Companies: Ninth Strawbridge Affidavit at [53].

50. As noted at [54] of the Ninth Strawbridge Affidavit, even if a Rival DOCA were put to creditors and included on "ballots" provided to them in advance of the Second Meetings, in practical terms, it would not be possible for any alternative proposal to be approved by creditors at the Second Meetings. This is because, if the Bain DOCA is not approved, the Administrators are contractually bound to adjourn the Second Meetings and proceed to

complete the Bain Transaction by way of the Asset Sale Agreement: Ninth Strawbridge Affidavit at [54] and [57]; Confidential Strawbridge Bain Affidavit at [12].

51. And, even if a Rival DOCA were somehow passed, to the extent that that alternative proposal requires the assets and business of the Virgin Companies to be the subject of the property of the DOCA (for the purposes of s 444A(4)(b) of the Corporations Act), then that property would not be available, because it would be the subject of the Asset Sale Agreement with Bain Capital.

52. That is precisely the situation with respect to the draft DOCA proposal advanced by Broad Peak and Tor. It involves a restructuring of the Virgin Companies premised on a preservation of the entirety of the existing assets and business. This is disclosed by the outline of the proposal: affidavit of Cameron John Cheetham affirmed 11 August 2020 (**Cheetham Affidavit**) at pp. 18-24. It is apparent from the proposed DOCA itself: see the definition of "Assets" at p. 72 of the Cheetham Affidavit. Put simply, Broad Peak and Tor are proceeding on a misapprehension that there are "assets" of the Virgin Companies which can form part of the estate to be dealt with under their DOCA proposal: Ninth Strawbridge Affidavit at [56].

53. In other words, the draft DOCA proposal advanced by Broad Peak and Tor is one that can never be effectuated according to its own terms. It would inevitably fail and the Virgin Companies would be wound up (even apart from the additional obstacles identified in Section D below), which would be a poor outcome for all stakeholders (including the bondholders): Ninth Strawbridge Affidavit at [61].

D. BROAD PEAK AND TOR'S LACK OF FINANCIAL CAPACITY

54. To date, the draft Rival DOCA proposed by Broad Peak and Tor and associated Creditors' Trust does not disclose the amount that the Deed Proponents (that is, Broad Peak and Tor) would be prepared to contribute to purchase the business of the Virgin Companies. To this end, annexed to the Cheetham Affidavit are:

    (a) a draft DOCA at CJC-1, p 66; and

    (b) a draft Creditors' Trust Agreement at CJC-1, p 107.

55. The Fund Amount is defined in the draft DOCA as "the total of Pool A Cash Amount, the Pool B Cash Amount and the Pool C Cash Amount as defined in the Trust Deed": CJC-1, p 74.

56. The Creditors' Trust Agreement remain in draft. The defined terms appear as "Pool A Cash Amount ##" and "Pool B Cash Amount $50,000,000". There is currently no definition of "Pool C Cash Amount": CJC-1, p 112.

57. In other material, the amount of capital that Broad Peak and Tor suggest they will underwrite funding is said to be "circa $800m". To this end, Broad Peak and Tor have provided a document entitled "Summary of [DOCA] proposed by Broad Peak and Tor", at CJC-1, p 18. The document includes the following (emphasis added):

> New funding support (in the form of a convertible note) for operations and payouts under the DOCA, of circa $800 million to support the business and the restructured airline. **This will be underwritten by Broad Peak and Tor but will be offered on a pro-rata basis to all the compromised unsecured creditors**.

58. There is no direct evidence from any authorised representative of Broad Peak and Tor that they will underwrite the "circa $800m", or that they have the financial capacity or relevant authorisations to do so. Mr Gupta, who has written extensively to Mr Strawbridge on behalf of Broad Peak and Tor, has not provided an affidavit confirming the financial position of the funds or their ability and willingness to underwrite the "circa $800m" in respect of an insolvent airline.

59. Further, despite the time that has elapsed since the sale to Bain Capital on 26 June 2020, no primary financial records of Broad Peak and Tor have been provided to the Administrators, such as financial accounts and the like. Nor have Broad Peak or Tor provided evidence of their investment mandates or authorisation processes that would presumably be necessary to enable them to underwrite "circa $800m" of cash.

60. Mr Strawbridge holds the well-founded concern that Broad Peak and Tor have not provided adequate evidence of their financial capacity to execute a transaction or to support and fund the business of the Virgin Companies following the completion of any Rival DOCA: Ninth Strawbridge Affidavit at [60(b)]. Broad Peak and Tor's failure to

substantiate their ability to fund a recapitalisation, despite having been requested to do so over several months, is both telling and concerning.

61. Further, as observed in the Ninth Strawbridge Affidavit at [60(c)], Broad Peak and Tor state that they will not be seeking to control the business of the Virgin Companies after the mooted recapitalisation, something Mr Strawbridge notes is "highly unusual" for the proponent of a DOCA investing a significant amount of money. It is commercially unlikely that Broad Peak and Tor would be prepared to risk significant amounts of the capital that they manage without requiring control of the business.

62. Finally, there is no evidence that Broad Peak and Tor would be able to access the funding required in any expeditious manner. One of the conditions of their Rival DOCA proposal is that the Commonwealth Government does not object to the Transaction and that the "Deed Proponent has received a written notice under the FATA by or on behalf of the Treasurer": CJC-1, p 80. This may not be able to occur with alacrity. The Commonwealth may be required to consider the ownership structure given the somewhat opaque nature of ownership of the Funds.

E. NO ORDER SHOULD BE MADE REQUIRING BROAD PEAK AND TOR'S ALTERNATIVE PROPOSAL TO BE PUT ON THE BALLOT

63. It is apparent from submissions made by Broad Peak and Tor's Senior Counsel, at the hearing on 11 August, that Broad Peak and Tor have in mind a regime that will effectively compel the Administrators to include on the ballot (which is to be made available electronically to creditors in advance of the Second Meetings) an opportunity to vote in favour of their Rival DOCA at the meetings. The basis for that position is that creditors must be given "a genuine choice between the rival deeds of company arrangement" and are not "going to have a binary choice between the Bain Capital DOCA and nothing else, such as liquidation": Hearing, 11 August 2020, T 13.26-40.

64. The only Rival DOCA that has been suggested is the proposal from Broad Peak and Tor. There is no suggestion that, in the absence of any mooted Rival DOCAs, the proposed regime would be appropriate.

65. The regime sought by Broad Peak and Tor should not be imposed. It would not be in the interests of the Virgin Companies or their creditors. The orders sought will not *in*

substance give creditors a choice between the Bain DOCA and any alternative DOCA. They will instead create the *illusion* of creditors having such a choice. There is no utility in the proposed regime, which is apt to harm the interests of the companies and their creditors.

66. The orders sought concerning the Rival DOCAs and the Ballot ought not be made for the following reasons.

67. *First*, in the circumstances as they subsist, the orders sought by Broad Peak and Tor are apt to operate as an impermissible fetter on the Administrators' statutory power: *Patrick Stevedores* at [60]-[62]. The orders require the Administrators to: notify creditors of certain matters; issue ballot papers in a particular form; and allow votes to be cast in a particular way. This cuts across the Administrators' obligation to conduct the Second Meetings in the manner they see fit consistent with their statutory duties.

68. *Secondly*, as explained above in Sections B and C, the Rival DOCA is not a real option for the creditors to consider. The terms of the Sale Deed preclude it. The present situation is what Black J contemplated in *Keystone* and *Ten Network*. The Administrators have, in the exercise of their power to dispose of any of the companies' property under s 437A(1)(c), entered into the Sale Deed. They did so because they considered that course to be in the best interests of the Virgin Companies and their creditors. Broad Peak and Tor's proposal, even if it were otherwise credible, would have no utility because the Virgin Companies are contractually committed to complete the sale of their assets and business under the Sale Deed either with or without the Bain DOCA.

69. It follows that, as the Administrators have repeatedly and publicly stated — including at the hearing in *Virgin (No 5)* on 10 July 2020; in the letter of 7 August 2020 referred to in the Cheetham Affidavit at [31], and again at the hearing on 11 August 2020 — while it may technically be open to any party to submit an alternative DOCA proposal, such an alternative cannot be considered by the Administrators, or recommended to creditors, given the binding agreement already in place with Bain Capital. Perhaps more fundamentally, it could not be entered into without the companies breaching their obligations to Bain Capital, having regard to the terms of the Sale Deed.

70. *Thirdly*, the Rival DOCA is not viable on its own terms. It could not be implemented if approved. Broad Peak and Tor have not provided the Administrators with adequate evidence of their financial capacity to execute a transaction and/or to support and fund the Business following the completion of any Rival DOCA, including, relevantly, evidence of the critical funding necessary to continue the day-to-day operations of the Virgin Companies during the period the convertible note issuance contemplated by the Broad Peak and Tor proposal is pursued: Ninth Strawbridge Affidavit at [60(b)].

71. *Fourthly*, the Administrators' view is that it would be against the interests of the Virgin Companies and their creditors (and also contrary to an administrator's duties) for the Administrators effectively to propose Rival DOCAs in circumstances where, in effect, any alternative to the Bain DOCA is premised on the Bain Transaction being set aside or otherwise not proceeding: Ninth Strawbridge Affidavit at [62]-[63]. It would be misleading to creditors to put the Broad Peak and Tor proposal on any ballot, because that would imply suggest that alternative restructuring proposals remain viable, which is not the case: Ninth Strawbridge Affidavit at [64].

72. *Fifthly*, nothing in Part 5.3A of the Corporations Act prescribes the manner or order in which competing DOCA proposals are to be put to creditors. It would be open to the Administrators to frame a resolution that invited votes for or against the Bain DOCA or invited creditors to choose between the Bain DOCA and either the ending of the administration under s 439C(b) or winding up under s 439C(c).

73. Contrary to the Cheetham Affidavit at [6(d)], it is rare for competing proposals to be put to the vote at a second meeting of creditors. An administrator would generally take all steps possible to caution against what he or she considers to be a deficient or inferior proposal being put to the vote having regard to the overall interests of the insolvent company and its creditors: Ninth Strawbridge Affidavit at [57]. Rather, if there are competing proposals, the ordinary course is for the proposal which the administrator has recommended to be put to a vote first, in line with the administrator's view that it will deliver the best outcome for the company and its creditors: Ninth Strawbridge Affidavit at [57]. Ultimately, this is a matter on which the Administrators exercise their discretion.

74. *Sixthly*, the Corporations Act provides remedies for creditors or other interested persons with respect to a company's execution of a DOCA. For example, Divisions 11 and 13 of Part 5.3A (and ss 75-41 to 75-44 of the *Insolvency Practice Schedule (Corporations)*) expressly preserve parties' rights to challenge the outcome of any process at the second meeting of creditors that culminates in a DOCA. Section 445D of the Corporations Act empowers the Court to set aside a DOCA if the jurisdictional preconditions in subsection (1)(a) (such as material omission or unfair prejudice or unfair discrimination) are enlivened and the Court exercises its discretion to do so.

F. NO ORDER SHOULD BE MADE FOR THE APPOINTMENT OF A FACILITATOR

75. Broad Peak and Tor seek orders for the appointment of an "independent practitioner" as a facilitator.

76. It is proposed that the facilitator confer with the Administrators in relation to access to information in relation to the Bain DOCA and any Rival DOCA proposals, prepare a limited report for inclusion in the report to creditors in respect of each Rival DOCA proposal, report to the Court in relation to the work done by the facilitator, and apply to the Court for directions if the facilitator sees fit to do so.

77. The appointment of a facilitator is advanced on the basis that it will assist in enabling or encouraging effective communication between the Administrators and creditors concerning the Bain DOCA and any Rival DOCA: Hearing, 11 August 2020, T 13.39-46.

78. However, the proposed appointment of a facilitator will, in the circumstances that subsist, provide no benefit to creditors, while imposing a cost on them.

79. *First*, it is not suggested that the appointment of a facilitator is necessary or appropriate, save for the purpose of ensuring creditors are properly informed about the alternative proposal sought to be advanced by Broad Peak and Tor. But that proposal is not a feasible alternative. There would be no utility in appointing the proposed facilitator.

80. *Secondly*, even apart from the facilitator's appointment being inutile, the involvement of a facilitator is unnecessary. Section 438A of the Corporations Act and s 75-225(3) of the IPR impose a duty on an administrator to make investigations and form an opinion on which course of action should be taken in respect of the company's future and to report that

opinion to creditors: *Brian Rochford Ltd v Textile Clothing & Footwear Union of New South Wales* (1998) 47 NSWLR 47. That means that:

(a) the report to creditors should contain information enabling creditors to make an informed decision whether the best interests of creditors would be served by a deed of company arrangement: see the Harmer Report, referred to in *Le Meilleur Pty Ltd v Jin Heung Mutual Savings Bank Co Ltd* (2011) 256 FLR 240; [2011] NSWSC 1115 at [329] and *Ten Network* at [43]); and

(b) creditors must be put in a position where they are adequately informed at the second meeting of creditors: *Re Pan Pharmaceuticals Ltd* (2003) 46 ACSR 77; [2003] FCA 598 at [41]; *Ten Network* at [44].

81. The Administrators have made repeated public statements that they intend to comply with those obligations to ensure that creditors are properly informed (including with respect to any proposal by Broad Peak and Tor). No allegation is made (and it could not properly be made) that there is an apprehension that the Administrators will not comply with their statutory obligations. Nor is there is any reason to think that they will fail to do so. Indeed, that is squarely the conclusion reached by Middleton J in *Virgin No 5* at [25], where his Honour stated:

> The Applicants will in their capacity as, and along with other, creditors, be provided with the Administrators' report under s 75-225 of the Insolvency Practice Rules (Corporations) 2016 (Cth) prior to the next meeting of creditors of the Virgin Companies. The information in that report will need to provide to the creditors material as to the Bain transaction and the likely or expected return to creditors. However, there is no reason to prioritise the interests of the Applicants above those of other creditors at this time.

82. *Thirdly*, as set out in Section G below, the proposal for a facilitator is likely to create confusion for creditors, disrupt the progress of the administrations and the process for the restructure of the Virgin Companies that Bain Capital has commenced.

83. *Fourthly*, the scope of the proposed facilitator's functions is unclear and inchoate. It is not clear precisely what their role will be. That can be contrasted with other cases. In cf *Jahani, in the matter of Northern Energy Corporation Ltd (Administrators Appointed) (No 2)* [2019] FCA 382, special purpose administrators were appointed with a clearly defined role and mandate. In *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed)*

(Receivers and Managers Appointed) (2017) 252 FCR 519, an additional insolvency practitioner was appointed specifically to prepare a limited report for inclusion in the report to creditors in advance of the second meeting as to the incumbent administrators' involvement with the companies prior to their appointment.

84. Having regard to the presently ill-defined role of the proposed facilitator, it is necessary to recall that there is no statutory power to appoint a special purpose administrator for the purpose of investigating and reporting to the court on the original administrators' conduct of their administration: *Honest Remark Pty Ltd v Allstate Explorations NL* (2006) 234 ALR 765.

85. *Fifthly*, the cost of the proposed facilitator is sought to be imposed on the Virgin Companies (that is, in substance, their creditors). That is prejudicial to creditors, especially when there is no mechanism by which those monies can be recovered from Broad Peak and Tor if, as is inevitable, their proposal is not approved and effectuated.

G. OTHER DISCRETIONARY MATTERS

86. There are three other discretionary considerations which count against the orders sought by Broad Peak and Tor.

87. *First*, there is no suggestion by Broad Peak and Tor that they are seeking to enjoin the sale to Bain Capital. Such an application would, of course, may require them to give an undertaking as to damages and demonstrate an arguable case. They have declined to take that step. Nevertheless, this anterior application could still have the effect of frustrating the Bain Transaction in a manner equivalent to the grant of an injunction while relieving Broad Peak and Tor of these financial and forensic burdens.

88. *Secondly*, the Court should take into account that the interests of Broad Peak and Tor comprise a small proportion of the unsecured creditors. Paragraph 11 of the Cheetham Affidavit states that "the Applicants hold approximately $300m of unsecured notes issued by the Second Plaintiff". There is no documentary support for the assertion made by Mr Cheetham, presumably on information and belief (although without identifying the source of his knowledge), notwithstanding that evidence in that form was previously criticised by the Plaintiffs: submissions dated 9 July 2020 at [34]. Nevertheless, assuming the amount held is $300m, this represents some 4.4% of the likely value of unsecured

creditors as at the appointment date: Ninth Strawbridge Affidavit at [47]. In contrast, as noted above, the COI—which is more representative of the creditors as a whole—has endorsed the Bain Transaction.

89. *Finally*, but significantly, as is explained the Ninth Strawbridge Affidavit at [65]-[68] and summarised below, the effect of the orders now sought by Broad Peak and Tor risks disrupting the orderly administration process and potentially jeopardises the Bain Transaction:

(a) there are costs associated in carrying out the process of including any Rival DOCA on ballots provided to creditors and introducing a facilitator – these are costs that the Virgin Companies ought not be required to bear given the futility of the Broad Peak and Tor proposal;

(b) the Administrators and Bain Capital have been working diligently to finalise arrangements with hundreds of separate counterparties as part of the future operations of the Virgin Companies, including:

(i) extensive discussions between Bain Capital (and its advisers) and the Administrators (and their advisers);

(ii) negotiations with stakeholders such as aircraft lessors and financiers of aircraft fleet, lessors of other real property occupied by the Virgin Companies, unions, employees, management personnel, key contractual counterparties and service providers, the Commonwealth, and regulatory bodies; and

(iii) the preparation of contractual documentation as a consequence of those discussions;

(c) these negotiations have been conducted on the basis that, following the Sale Process, the Administrators entered into a binding arrangement with Bain Capital for the sale of the assets and undertaking of the Virgin Companies, and, consequently, parties are concluding agreements with the Administrators and Bain Capital on the express understanding that Bain Capital will control the assets of the Virgin Companies and deliver on the promises made in those agreements;

(d) since the Bain Transaction was executed on 26 June 2020, many steps taken by the Administrators, the Virgin Companies and Bain Capital in implementing the restructure cannot now be undone, including:

(i) the ongoing process of returning aircraft property to lessors and financiers in accordance with Bain Capital's plans for the future of the Virgin Companies' fleet; and

(ii) negotiations with suppliers of products, services and facilities;

(e) if the relief sought by Broad Peak and Tor is granted, confusion will be created as to whether the Bain Transaction is binding and it may create the impression (albeit unfounded as a matter of fact) that such agreements are conditional or subject to being unwound in the future; and

(f) the creation of uncertainty will be detrimental to all stakeholders, especially employees whose future employment status is not clear.

H CONCLUSION

90. The Court should dismiss Broad Peak and Tor's Interlocutory Process, with costs.

91. An order should also be made in the terms of prayer 15 of the Plaintiffs' Interlocutory Process filed on 7 August 2020.

15 August 2020

Ruth C A Higgins SC
David R Sulan
James J Hutton
Daniel Krochmalik

Counsel for the Plaintiffs