

FEDERAL COURT OF AUSTRALIA

Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) [2020] FCA 571

File number: NSD 464 of 2020

Judge: MIDDLETON J

Date of judgment: 24 April 2020

Date of publication of reasons: 29 April 2020

Catchwords: **CORPORATIONS** – application under ss 443B(8) and 447A of the *Corporations Act 2001* (Cth) and s 90-15 of the Insolvency Practice Schedule (Corporations) 2016 in Sch 2 to the *Corporations Act 2001* (Cth) – existing laws made or authorised by Federal or State Parliaments to be adhered to and enforced by courts – restrictions on movement and behaviour of people arising from COVID-19 pandemic as a reason to apply flexibility in the application of existing laws, and exercise of a court’s discretion

CORPORATIONS – holding creditors meetings by video-link or telephone, rather than in person – sending notices by email – how notice of meetings required to be given under *Insolvency Practice Rules (Corporations) 2016* (Cth), including rr 75-15 and 75-225(1), and under any provision in Part 5.3A of the *Corporations Act 2001* (Cth), Part 5.3A of the *Corporations Regulations 2001* (Cth) and the Insolvency Practice Schedule (Corporations) 2016, including in relation to meetings the subject of r 75-40(4) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) – reference to ‘place’ in rr 75-15(1)(a), 75-30(1) and 75-35(1)(a) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) – notice of electronic facilities for meetings under r 75-35 of the *Insolvency Practice Rules (Corporations) 2016* – participating in meetings by electronic means under r 75-75 of the *Insolvency Practice Rules (Corporations) 2016* – creditors who wish to participate at meetings held by telephone or audio-visual conference to lodge specific proxy forms containing the information in r 75-35(2)(b) of the *Insolvency Practice Rules (Corporations) 2016*

CORPORATIONS – formation of a single committee of

inspection – members of the committee of inspection be selected by administrators from nominations made in advance of, or at, the first meeting of creditors – meetings of the committee of inspection to be held by video-link – members of the committee of inspection to send and receive notices by email – proposal in accordance with s 75-40 of the Insolvency Practice Schedule (Corporations) 2016 and r 75-130 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) as modified to be put to creditors by notice – creditors not to be permitted to object to proposal being determined without a meeting of creditors as otherwise provided for by r 75-40(2)(d)(ii) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) – time for creditors to respond to notice of proposal as provided for by r 75-130 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) – where proposal passed by creditors in accordance with r 75-130 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) – where proposal not passed in accordance with r 75-130 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) – rationale and proposal for regime regarding selection of committee of inspection, to the extent not permitted specifically by r 80-5(3) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) accepted

CORPORATIONS – right of creditors to request information, reports or documents from external administrators under ss 70-45 and 70-50 of the Insolvency Practice Schedule (Corporations) 2016 – time in which external administrators are to respond to requests of creditors under r 70-1 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) – extension of time in r 70-1(2)(a) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) granted

CORPORATIONS – extension of the period for administrators to give notice to lessors of property – principles governing the Court's power to extend time under s 443B(8) of the *Corporations Act 2001* (Cth) – rationale for granting extension of time for administrators to decide whether to give notice to landlords limiting personal liability – Court to have regard to the best interests of the creditors – time in which administrator may give notice to lessor under s 443B(3) of the *Corporations Act 2001* (Cth) – extension of time granted for administrators to give notice to lessors of leased property – personal liability of administrators under ss 443A(1)(c) and 443B(2) of the *Corporations Act 2001* (Cth) – personal liability of administrators excluded during set period

Legislation: *Corporations Act 2001 (Cth)*
Insolvency Practice Rules (Corporations) 2016 (Cth)
Insolvency Practice Schedule (Corporations) 2016

Cases cited: *In the matter of BBY Limited* [2015] NSWSC 974
In the matter of Mothercare Australia Limited (administrators appointed) [2013] NSWSC 263
Jahani, in the matter of The Ralan Group Pty Ltd (administrators appointed) [2019] FCA 1446
Quinlan, in the matter of Halifax Investment Services Pty Ltd (Administrators Appointed) [2018] FCA 1891
Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2) [2020] FCA 472

Date of hearing: 24 April 2020

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Category: Catchwords

Number of paragraphs: 52

Counsel for the Plaintiffs: Dr R C A Higgins SC with Mr D Krochmalik

Solicitor for the Plaintiffs: Clayton Utz

ORDERS

NSD 464 of 2020

**IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD
(ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS**

**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)**

First Plaintiffs

**VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS
APPOINTED) ACN 100 686 226**

Second Plaintiff

**VIRGIN AUSTRALIA INTERNATIONAL OPERATIONS
PTY LTD (ADMINISTRATORS APPOINTED) ACN 155 859
608 (and others named in the Schedule)**

Third Plaintiff

JUDGE: MIDDLETON J

DATE OF ORDER: 24 APRIL 2020

THE COURT ORDERS THAT:

1. The Originating Process filed on 23 April 2020 be made returnable at 10.15am on 24 April 2020.
2. Pursuant to section 447A(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and section 90-15 of the Insolvency Practice Schedule (Corporations), being Schedule 2 to the Corporations Act (**IPSC**), Part 5.3A of the Corporations Act is to operate, *nunc pro tunc*, in relation to each of the Second to Thirty-Ninth Plaintiffs as if any notice (**Notice**) required to be given pursuant to rules 75-225(1) and 75-15 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (**IPR**) will be validly given to creditors of the Second to Thirty-Ninth Plaintiffs by reason of the following steps having been taken at least five business days prior to the date of the proposed meeting:
 - (a) where the First Plaintiffs:

- (i) have an email address for a creditor, by sending the Notice by email to each such creditor;
 - (ii) where the First Plaintiffs do not have an email address for a creditor but have a postal address for the creditor (or have received notification of non-delivery of a notice sent by email in accordance with (a)(i) above), by sending the Notice by posting a copy of it to the postal address for each such creditor;
 - (b) by causing the Notice to be published on the Australian Securities and Investments Commission (ASIC) published notices website at <https://insolvencynotices.asic.gov.au/>; and
 - (c) by publishing the Notice on the website maintained by the First Plaintiffs at <https://www2.deloitte.com/au/en/pages/finance/articles/virgin-australia-holdings-limited-subsidiaries.html>.
3. Pursuant to section 447A(1) of the Corporations Act and section 90-15 of the IPSC, if, pursuant to any provision in any of Part 5.3A of the Corporations Act, Part 5.3A of the *Corporations Regulations 2001* (Cth), the IPSC, or the IPR, the First Plaintiffs are required to provide any other notification to creditors during the administration of each of the Second to Thirty-Ninth Plaintiffs, the applicable notice requirements will be satisfied if the First Plaintiffs give such notice by taking the following steps:
- (a) where the First Plaintiffs:
 - (i) have an email address for a creditor, by notifying each such creditor of the relevant matter via email;
 - (ii) do not have an email address for a creditor but have a postal address for that creditor (or have received notification of non-delivery of a notice sent by email in accordance with (a)(i) above), by notifying each such creditor in writing of the relevant matter via post;
 - (b) by publishing notice of the relevant matter on the website maintained by the First Plaintiffs at <https://www2.deloitte.com/au/en/pages/finance/articles/virgin-australia-holdings-limited-subsidiaries.html>; and

- (c) to the extent the matter relates to a meeting that is the subject of rule 75-40(4) of the IPR, by causing notice of the meeting to be published on the ASIC published notices website at <https://insolvencynotices.asic.gov.au/>.
4. Pursuant to section 447A(1) of the Corporations Act and section 90-15 of the IPSC, to the extent not permitted specifically by rules 75-30, 75-35 and 75-75 of the IPR, the First Plaintiff be permitted to hold meetings of creditors during the administration of each of the Second to Thirty-Ninth Plaintiffs by telephone or audio-visual conference at the place of the Administrators' offices (without creditors of the Second to Thirty-Ninth Plaintiffs being able to attend physically at that place), with such details of the arrangements for using the telephone or audio-visual conference facilities to be specified in each of the notices issued to creditors.
- 4A. Pursuant to section 447A(1) of the Corporations Act and section 90-15 of the IPSC, Part 5.3A of the Corporations Act is to operate in relation to the Second to Thirty-Ninth Plaintiffs as if the First Plaintiffs have validly convened the first meeting of the creditors of the Second to Thirty-Ninth Plaintiffs (**First Meeting**) in accordance with section 436E(3) of the Corporations Act, by the notice issued by the First Plaintiffs on 21 April 2020 (**Notice of First Meeting**), notwithstanding that the Notice of First Meeting referred to the location of the meeting as 'Virtual meeting only'.
5. Pursuant to section 447A(1) of the Corporations Act and section 90-15 of the IPSC, to the extent not permitted specifically by rule 75-35(2)(b) of the IPR, the creditors of each of the Second to Thirty-Ninth Plaintiffs who wish to participate at any meetings of each of the Second to Thirty-Ninth Plaintiffs held by telephone or audio-visual conference at the place of the Administrators' offices (without creditors of the Second to Thirty-Ninth Plaintiffs being able to attend physically at that place), must lodge with the First Plaintiffs, no later than the second last business day before the day on which the meeting is held, specific proxy forms containing the information in rule 75-35(2)(b)(i)-(iii) of the IPR (with liberty to notify the First Plaintiffs of the withdrawal of that specific proxy and amended vote following any discussion at a meeting, in advance of a resolution being passed).
6. Pursuant to section 447A(1) of the Corporations Act and section 90-15 of the IPSC, Divisions 75 and 80 of the IPSC and Division 75 of the IPR are to operate as if:

- (a) the requirement in sections 80-10 and 80-15 of the IPSC for the creditors of a company to resolve that a committee of inspection be formed and to appoint members of the committee of inspection, be dispensed with;
 - (b) a single committee of inspection be formed in respect of the Second to Thirty-Ninth Plaintiffs;
 - (c) subject to (d)-(e) below, the members of the committee of inspection be persons proposed by the First Plaintiffs from nominations made to them in advance of, or at, the First Meeting;
 - (d) no later than three (3) business days after the First Meeting, the First Plaintiffs put a proposal (**Proposal**) to the creditors of the Second to Thirty-Ninth Plaintiffs (by giving notice in conformity with the orders in paragraph 3 above and, subject to (iii)-(iv) below, otherwise in accordance with rule 75-40 of the IPR):
 - (i) that the members of the committee of inspection be those persons proposed by the First Plaintiffs;
 - (ii) inviting the creditors of the Second to Thirty-Ninth Plaintiffs to vote either 'Yes' or 'No' on the Proposal;
 - (iii) the option of the creditors being permitted to object to the Proposal being determined without a meeting of creditors, be dispensed with; and
 - (iv) the time in rule 75-130(3) of the IPR be abridged from 15 business days to 5 business days; and
 - (e) if the Proposal is taken to have passed in accordance with rule 75-130(2)(a)-(b) of the IPR, then the members of the committee of inspection be those persons proposed by the First Plaintiffs.
7. Pursuant to section 447A(1) of the Corporations Act and section 90-15 of the IPSC, to the extent not permitted specifically by rule 80-5(3) of the IPR:
- (a) a meeting of the committee of inspection may be convened by electronic notice sent to an email address specified by each of the members of the committee of inspection; and
 - (b) a meeting of the committee of inspection may be permitted to be held by telephone or audio-visual conference (only, and in place of a physical

meeting) with such details of the arrangements for using the telephone or audio-visual conference facilities to be specified in each of the notices issued to, or by, the members of the committee of inspection. dispersed

8. Pursuant to section 447A(1) of the Corporations Act and section 90-15 of the IPSC, rule 70-1(2)(a) of the IPR is to operate in relation to each of the Second to Thirty-Ninth Plaintiffs as if:
 - (a) the words '5 business days after receiving the request' be read as '10 business days after receiving the request'; and
 - (b) the First Plaintiffs may provide the information, report or document requested by a creditor by publishing that information, report or document on the website maintained by the First Plaintiffs at <https://www2.deloitte.com/au/en/pages/finance/articles/virgin-australia-holdings-limited-subsidiaries.html>, and by referring the creditor to that website.
9. Pursuant to sections 443B(8) and 447A(1) of the Corporations Act and section 90-15 of the IPSC, Part 5.3A of the Corporations Act is to operate in relation to each of the Second to Thirty-Ninth Plaintiffs as if:
 - (a) the First Plaintiffs' personal liability under sections 443A(1)(c) and 443B(2) of the Corporations Act begins on 26 May 2020, such that the First Plaintiffs are not personally liable for any liability with respect to any property leased, used or occupied by any of the Second to Thirty-Ninth Plaintiffs (including amounts payable pursuant to any leases entered into by any of the Second to Thirty-Ninth Plaintiffs), from any lessors, in the period from 28 April 2020 to 26 May 2020 inclusive; and
 - (b) the words 'within five business days after the beginning of the administration' in section 443B(3) of the Corporations Act instead read 'by 26 May 2020'.
10. The First Plaintiffs must take all reasonable steps to cause notice of these orders to be given, within two (2) business days of the making of these orders, to:
 - (a) the creditors (including persons or entities claiming to be creditors) of each of the Second to the Thirty-Ninth Plaintiffs, in the following manner:
 - (i) where the First Plaintiffs have an email address for a creditor, by notifying each such creditor, via email, of the making of the orders and

providing a link to a website where the creditor may download the orders and the Originating Process;

- (ii) where the First Plaintiffs do not have an email address for a creditor but have a postal address for that creditor (or have received notification of non-delivery of a notice sent by email in accordance with (a)(i) above), by notifying each such creditor, via post, of the making of the orders and providing a link to a website where the creditor may download the orders and the Originating Process; and
- (iii) placing scanned, sealed copies of the Originating Process and the orders on the website maintained by the First Plaintiffs at <https://www2.deloitte.com/au/en/pages/finance/articles/virgin-australia-holdings-limited-subsiidiaries.html>; and

(b) ASIC.

11. Any person who can demonstrate a sufficient interest has liberty to apply to vary or discharge any orders made pursuant to paragraphs 2 to 9 above, on 1 business day's written notice being given to the Plaintiffs and to the Associate to Justice Middleton.
12. The Plaintiffs have liberty to apply on 1 business day's written notice to the Court in relation to any variation of these orders or any other matter generally arising in the administrations of any or all of the Second to Thirty-Ninth Plaintiffs.
13. The Plaintiffs' costs of the application are to be treated as costs in the administrations of each of the Second to Thirty-Ninth Plaintiffs, jointly and severally.
14. These orders be entered forthwith.

THE COURT NOTES THAT:

15. When the First Plaintiffs provide further details of how creditors of the Second to Thirty-Ninth Plaintiffs may attend the First Meeting by electronic means, the First Plaintiffs will indicate that the place of the First Meeting is to be at the offices of the First Plaintiffs at Level 9 Grosvenor Place, 225 George Street, Sydney NSW 2000, Australia (but that creditors are not permitted to attend the meeting in person at that place).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MIDDLETON J:

INTRODUCTION AND OVERVIEW

- 1 On 24 April 2020 I made a number of orders on the application of the Plaintiffs in this proceeding. These are the reasons for those orders.
- 2 The Plaintiffs, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte (together, the ‘**Administrators**’), in their capacity as administrators of each of the Second Plaintiff, Virgin Australia Holdings Ltd (Administrators Appointed) (‘**Virgin**’), and the Third to Thirty-Ninth Plaintiffs, which are subsidiaries of Virgin (together, the ‘**Virgin Subsidiaries**’), sought various orders in the Originating Process filed on 23 April 2020. Virgin and the Virgin Subsidiaries are, together, referred to as the ‘Virgin Companies’.
- 3 Virgin is a public company whose shares are listed on the Australian Securities Exchange. On 20 April 2020, the Administrators were appointed as joint and several administrators of each of the Virgin Companies.
- 4 The application primarily seeks orders:
- (1) permitting meetings of the creditors of the Virgin Companies, including the first meeting of creditors scheduled for 30 April 2020 (the ‘**First Meeting**’), to be conducted exclusively by video-link or telephone (and not in person) and providing a regime by which creditors are to provide proxies to the Administrators in advance of such meetings;
 - (2) permitting notices to be sent by email to those creditors for whom the Administrators have email addresses;
 - (3) for the formation of a single committee of inspection for the Virgin Companies, with the members of the committee of inspection to be selected, in the first instance, by the Administrators from nominations given to them prior to or at the First Meeting and, thereafter, for the Administrators’ selection to be ratified by the creditors;
 - (4) permitting meetings of the committee of inspection to be held exclusively by video-link or telephone (and not in person) and also permitting members of the committee to send and receive notices by email;

- (5) permitting the Administrators to have 10 business days to respond to requests for information from creditors (being an increase from the statutory default period of 5 business days); and
- (6) for a 4 week extension of the time, in s 443B of the *Corporations Act 2001* (Cth) (the ‘**Corporations Act**’), in which the Administrators are to give notice to lessors of property leased by the Virgin Companies as to whether to retain or give up possession of that property, together with a corresponding extension of the period in which the Administrators do not have personal liability for obligations under those leases.

5 I should make one observation at the outset relating to the current circumstances in which the application by the Administrators is made to the Court. The COVID-19 pandemic is causing great disruption to the whole Australian community and the economy. Nevertheless, existing laws that are made or authorised by Federal or State Parliaments must be adhered to and enforced by the courts. However, the COVID-19 pandemic, and the consequent restrictions on the movement and behaviour of people, is a reason to apply flexibility in the application (and perhaps adaption) of existing laws, and to exercise any discretion residing in a court to ensure that the Australian community and economy are supported during this time of crisis.

FACTUAL BACKGROUND

- 6 The Administrators rely on the affidavits of Vaughan Strawbridge, one of the Administrators, sworn on 23 April 2020 and 24 April 2020, Kassandra Suzann Adams, sworn on 24 April 2020 and Matthew James Carr sworn on 24 April 2020.
- 7 The Virgin Companies are part of a corporate group comprised of companies incorporated and operating in Australia, New Zealand and Singapore (the ‘**Virgin Group**’). The Virgin Group operates a domestic and international passenger and cargo airline business, offering a variety of aviation products and services to the Australian aviation market, including corporate, government, leisure, low cost, regional and charter travellers and air freight customers (collectively, the ‘**Business**’). It offers airline passenger services under both of the well-known ‘Virgin’ and ‘Tiger’ brands, employs approximately 10,000 employees nationally, and operates a fleet of 144 aircraft.
- 8 The Administrators have currently identified that the Virgin Companies have approximately 10,247 known creditors in total (other than bondholders). However, the Administrators

expect that the total number of creditors (other than bondholders) is estimated to be over 12,000. The creditors identified thus far comprise the following:

- (1) 26 lenders under secured corporate debt and aircraft financing facilities, who are together owed approximately \$2,283,639,303;
- (2) unsecured bondholders who are together owed approximately \$1,988,250,000;
- (3) 1,070 trade creditors, who are together owed approximately \$166,704,086;
- (4) 50 aircraft lessors, who are together owed approximately \$1,883,914,848;
- (5) 81 landlords, who are together owed approximately \$71,209,929; and
- (6) 9,020 employees, who are together owed approximately \$450,777,961.

9 The COVID-19 pandemic has led to a substantial downturn in the operations and revenue of the Virgin Companies.

10 Between 18 March 2020 and 5 April 2020, various steps were taken by Commonwealth, State and Territory Governments that placed severe restrictions on overseas and inter-state travel; and similar restrictions were adopted worldwide to reduce the spread of COVID-19.

11 These actions have resulted in a significant reduction in the demand for international and domestic air travel, which is a significant part of the business operations of the Virgin Companies. The COVID-19 pandemic has had a considerable adverse impact on the revenues of the Virgin Companies.

12 Since the appointment of the Administrators, they have sought to continue to trade the Virgin Companies on a 'business as usual' basis, albeit that, due to the travel restrictions arising from COVID-19:

- (1) the airline is not operating any international passenger routes and is operating only limited domestic passenger routes;
- (2) the business will not be operated at full capacity; and
- (3) it is likely that the Virgin Companies will continue to generate losses throughout the administration period whilst these restrictions are in place.

13 The Administrators are assessing viable options to continue to keep the business operating and to maximise the prospect of a sale of the business and assets of the Virgin Companies as

a going concern (in respect of which substantial positive interest has already been shown by potential purchasers, including sophisticated parties).

14 The Virgin Companies make up a very significant enterprise with substantial operations, complex affairs, considerable assets and a very large number and type of creditors; accordingly, the administrations are likely to be sophisticated and complex.

15 In circumstances where the Administrators have only recently been appointed, it is inevitable that the Administrators will have been unable to undertake any detailed review of the operations of the Virgin Companies.

16 In addition, the COVID-19 pandemic has made the Administrators' investigations into the affairs of the Virgin Companies more challenging.

17 Moreover, responses to the pandemic have the potential to lead to an additional burden being placed on the Administrators' staff in terms of arranging correspondence to be sent to creditors by post in hard copy.

18 In this context, it can be understood that it will be necessary for the Plaintiffs to move quickly in circumstances of great complexity, while remaining astute at all times to protecting, and not prejudicing in any way, the interests of creditors.

HOLDING MEETINGS BY VIDEO-LINK OR TELEPHONE (RATHER THAN IN PERSON) AND SENDING NOTICES BY EMAIL

19 The First Meeting is scheduled for Thursday, 30 April 2020.

20 The Administrators seek orders to enable the First Meeting, and any subsequent meetings of creditors, to be conducted solely by video-link or telephone (rather than in person).

21 The relevant provisions of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (the '**Insolvency Practice Rules**'), which deal with the manner in which meetings may be held, are as follows:

75-15 How notice of meetings to be given

(1) *Notice of a meeting must:*

- (a) *specify the date, time and place of the meeting; and*
- (b) *specify the purpose for which the meeting is being convened; and*
- (c) *state the effect of section 75-85 (entitlement to vote as creditor at meetings of creditors); and*

(d) *be in the approved form.*

75-30 Time and place of meetings

- (1) *The convenor of a meeting must convene the meeting at the time and place that the convenor thinks are most convenient for the majority of persons entitled to receive notice of the meeting.*
- (2) *Subsection (1) does not prevent a meeting from taking place at separate venues provided that technology is available at the venues to give all persons attending the meeting a reasonable opportunity to participate.*

75-35 Notice of electronic facilities for meetings

- (1) *This section applies if:*
 - (a) *facilities for participating in meetings by electronic means are expected to be available at the place where a meeting is to be held; and*
 - (b) *the convenor of the meeting considers that, having regard to all the circumstances, it will be appropriate to use those facilities.*
- (2) *The notice of the meeting must:*
 - (a) *set out the arrangements for using the facilities; ...*
 - ...

75-75 Participating in meetings by electronic means

- (1) *This section applies if:*
 - (a) *facilities for participating in a meeting of creditors by electronic means will be available for the meeting; and*
 - (b) *a person, or a person's proxy or attorney, has given the convenor of the meeting a statement in accordance with paragraph 75-35(2)(b).*
- (2) *The convenor of the meeting must take all reasonable steps to ensure that the facilities are available and operating during the meeting.*
- (3) *The person, or the person's proxy or attorney, is responsible for accessing the facilities during the meeting.*
- (4) *A person who, or whose proxy or attorney, participates in the meeting using the facilities is taken to be present in person at the meeting.*

22 In my view, a meeting conducted as envisaged by the Administrators and authorised by the Court's orders will satisfy the requirements of the Insolvency Practice Rules. The Notice of Meeting specifies the 'place of the meeting' – namely the offices of the Administrators at Level 9 Grosvenor Place, 225 George Street, Sydney NSW 2000, Australia. In the circumstances, this is the 'place' that the Administrators (as convenors) think is the most convenient for the majority of persons entitled to receive notice of the meeting. At least in rules 75-15(1)(a), 75-30(1) and 75-35(1)(a) of the Insolvency Practice Rules the reference to

‘place’ refers to a building or spot devoted to a specified purpose: see the relevant definition in the Shorter Oxford English Dictionary. There is in this sense no ‘virtual’ meeting place – there is a specified physical place of the meeting, which has been convened by the Administrators as convenors in accordance with the Insolvency Practice Rules and authorised by the Court’s orders.

23 Once the place of the meeting is specified in the notice convening the meeting, in light of the COVID-19 pandemic and the consequent restrictions on public gatherings, the Court can then make orders confirming that meetings of creditors can be conducted by video-link or telephone.

24 I note that Mr Strawbridge’s view is that:

- (1) he has previously conducted meetings of creditors that have provided a video or telephone conference service for creditors;
- (2) the Administrators have already sourced suitable information technology, through Microsoft Teams Live Events, to ‘live stream’ the First Meeting to as many as 20,000 (and, if necessary, 100,000) different creditors; and
- (3) arrangements have been made to ensure that all creditors have the ability to ask questions at the First Meeting by way of a moderated question and answer function provided as part of the Microsoft Teams Live Events platform.

25 In my view, there is no practical impediment to meetings of creditors (including the First Meeting) being held by electronic means and it is appropriate (if not necessary) that this occur, with the place of the meeting being as designated in the notice convening the meeting as authorised by the Insolvency Practice Rules and the Court’s orders.

26 An additional order will be made requiring that, in respect of any creditor who wishes to participate in, and vote on, resolutions that are put to creditors at a meeting (to the extent that this may occur at meetings subsequent to the First Meeting), special proxies must be provided to the Administrators no later than the second last business day before the meeting is held (although giving liberty to any creditor providing such a proxy to withdraw those voting instructions in advance of the resolution being passed).

27 As to notices of meetings being given by email, it is now common-place for orders to be made, including at a very early point in an administration, permitting external administrators to give notices to creditors by email and other electronic publication.

28 In *In the matter of BBY Limited* [2015] NSWSC 974 at [7], Brereton J (as his Honour then was) said:

Courts have become increasingly willing to make orders such as those sought in this case in respect of the manner in which notices may be given of meetings of creditors of companies under external administration, both to save costs and to save time, and thus to conserve the limited available assets for the benefit of creditors. As Black J has pointed out, most recently in In the matter of Creative Memories Australia Pty Limited (administrators appointed) [2013] NSWSC 732 (at [8]), this no doubt reflects, amongst other things, the fact that electronic means of communication are now widely accepted in the investing and commercial communities. There are now many decisions in which the Courts have made orders in respect of meetings of creditors permitting notice to be given by electronic means to those for whom e-mail addresses are available and otherwise by notice, for example, on an administrator's website, or by newspaper advertisement: [see ABC Learning Centres Ltd (Administrators Appointed) (Receivers & Managers Appointed) ACN 079 736 664 v Honey [2010] FCA 353; Silvia, in the matter of FEA Plantations Ltd (Administrators Appointed) [2010] FCA 468; Carson, in the matter of Hastie Group Limited [2012] FCA 626; Carson, in the matter of Hastie Group Limited (No 2) [2012] FCA 717; In the matter of Mothercare Australia Limited (administrators appointed) [2013] NSWSC 263, [8] (Black J); In the matter of Creative Memories Australia Pty Limited (administrators appointed) [2013] NSWSC 732].

29 These remarks were endorsed and similar orders made in *Quinlan, in the matter of Halifax Investment Services Pty Ltd (Administrators Appointed)* [2018] FCA 1891 at [12]-[14] (Yates J) and *Jahani, in the matter of The Ralan Group Pty Ltd (administrators appointed)* [2019] FCA 1446 at [22] (Gleeson J).

30 I observe that there is an incredibly large number of creditors of the Virgin Companies and the Administrators have an email address for the vast number of those creditors.

31 The proposed orders for notice to be given by email and publication on the appropriate website not only fulfil the objective of notifying as many creditors of the Virgin Companies as quickly and cheaply as possible, but (in view of postage and associated costs) also of conserving the assets of the Virgin companies for the benefit of creditors.

32 As the notice of the First Meeting has already been sent, only by email, in the case of those creditors for whom the Administrators have an email address, the orders permitting notice by email will be made *nunc pro tunc*.

COMMITTEE OF INSPECTION

33 The Plaintiffs seek orders that – in place of the ordinary procedure by which the creditors (at the First Meeting) vote on the formation of a committee of inspection and the members of the committee – a regime to the following effect be established:

- (1) a single committee of inspection, for all of the Virgin Companies, be formed by order of the Court;
- (2) members of the committee of inspection be selected, *in the first instance*, by the Administrators from nominations made in advance of, or at, the First Meeting;
- (3) shortly after the First Meeting, a proposal (in accordance with section 75-40 of the *Insolvency Practice Schedule (Corporations) 2016* (the ‘**Insolvency Practice Schedule**’) and rule 75-130 of the Insolvency Practice Rules, as modified in the manner set out in (4) and (5) below) be put to the creditors by notice sent by the Administrators (and without requiring a further meeting to be held) permitting the creditors to vote ‘yes’ or ‘no’ on the whole composition of the committee proposed by the Administrators (that is, a single vote rather than separate votes on each proposed committee member) (the ‘**Proposal**’);
- (4) the creditors not be permitted to object to the Proposal being determined without a meeting of creditors (as is otherwise provided for by section 75-40(2)(d)(ii) of the Insolvency Practice Schedule);
- (5) the time for creditors to respond to notice of the Proposal, as provided for by rule 75-130 of the Insolvency Practice Rules, is abridged to 5 business days;
- (6) if the Proposal:
 - (a) is passed by the creditors in accordance with rule 75-130 of the Insolvency Practice Rules, then the members of the committee of inspection will be those as selected by the Administrators and referred to in the Proposal; and
 - (b) is not passed by the creditors in accordance with rule 75-130 of the Insolvency Practice Rules, then the Administrators will consider approaching the Court or convening another meeting of the creditors to clarify who are to be the members of the committee.

34 I accept the rationale for this regime, as supported by the evidence of Mr Strawbridge, is that:

- (1) ordinarily, for administrations as large-scale and complex as those of the Virgin Companies, it would be appropriate and prudent for a committee of inspection to be formed at the First Meeting;
- (2) however, in the present case, because of both the COVID-19 restrictions that prevent a meeting from being held where creditors can be physically present at the meeting place and the very large number of creditors of the Virgin Companies, there are

practical limitations on the Administrators being able to put resolutions to creditors to be voted on at the First Meeting (and, if necessary, for a poll to be taken);

- (3) the Administrators have sought to investigate options for conducting a poll at the First Meeting; while a survey-type process (by email) may be available, there are a number of inefficiencies and challenges in relation to the arrangement, including:
- (a) the need for extensive manual data input;
 - (b) the need to ascertain email addresses for those creditors in respect of whom the Administrators do not currently have such details;
 - (c) an inability to deal with complex proofs of debt, such as where a participant at the meeting is a creditor of more than one of the Virgin Companies;
 - (d) a difficulty in maintaining the integrity of any voting process such as ensuring that only creditors or their proxies cast votes; and
 - (e) the Administrators have not been able to find an information technology system that meets these challenges;
- (4) thus, a practical alternative must be developed to permit creditors nevertheless to be involved in selecting the members of the committee of inspection.

35 I have no doubt that the Court has the power under section 90-15 of the Insolvency Practice Schedule to make orders giving effect to that proposed regime (including to dispense with provisions of the Insolvency Practice Schedule and the Insolvency Practice Rules that use the word 'must').

36 In the circumstances, I accept the submissions of the Administrators that the proposal for the formation of the committee of inspection is a practical and efficient manner in which to proceed.

37 Whilst the Administrators will, in the first instance, select the proposed members of the committee of inspection, as a last resort, there is the ability of creditors to apply to the Court to vary or discharge the orders and thus have further input into the selection of committee members.

38 It also seems to me, based on the opinion of the Administrators, that:

- (1) the best interests of the creditors favour the formation of a committee of inspection;

- (2) the ordinary procedures in which creditors would be able to vote at the meeting on the formation and composition of the committee of inspection are not practicable in the current environment;
- (3) the proposed orders strike the appropriate balance between the prompt formation of a committee and the involvement and oversight of the creditors in selecting the members of the committee.

39 In addition, orders will be made permitting meetings of the committee to be held by video-link or telephone (rather than in person), and permitting notice of meetings to be given to, or by, members solely by email.

EXTENSION OF TIME TO RESPOND TO CREDITORS' ENQUIRIES

40 Sections 70-45 and 70-50 of the Insolvency Practice Schedule permit creditors to request information, reports or documents from external administrators. Rule 70-1 of the Insolvency Practice Rules provides that the default position is that the external administrator is to respond to the request within 5 business days.

41 Given the significant number of creditors in the administrations of the Virgin Companies and the potential number of information requests, the Administrators seek an order extending that time to 10 business days.

42 Given the magnitude of the business operations conducted by the Virgin Companies, and the additional logistical difficulties faced by the Administrators and their staff in liaising with the management team and other employees of the Virgin Companies by reason of the response to the COVID-19 pandemic, it is inevitable that the Administrators are likely to need further time to respond to queries from creditors.

43 An extension of the time in rule 70-1(2)(a) of the Insolvency Practice Rules, from 5 business days to 10 business days, is therefore appropriate.

EXTENSION OF THE PERIOD FOR THE ADMINISTRATORS TO GIVE NOTICE TO LESSORS OF PROPERTY

44 The principles governing the Court's power to extend time under section 443B of the Corporations Act were usefully summarised by Markovic J in *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 472, where her Honour said this at [39]:

Section 447A(1) of the Act also gives the Court ample power to alter the operation of s 443B(2) and (3) of the Act: see In the matter of Mothercare Australia Limited (administrators appointed) [2013] NSWSC 263 at [6]. Alternatively, s 443B(8) gives the Court an additional power to alter the operation of s 443B(2) and (3): see Silvia v FEA Carbon Pty Ltd (2010) 185 FCR 301 (Silvia v FEA) at [13]. The usual rationale behind the extension of the five business day period in s 443B(2) and (3) or the exercise of the power in s 443B(8) is because the administrator has had insufficient time to conduct the necessary investigations to decide whether he or she thinks it best to retain or give up possession of leased property: see Silvia v FEA at [12]-[13]. Further it seems that s 443B(8) allows the Court to excuse the administrator from liability to pay rent even after the five business day period has passed (see Silvia v FEA at [13]-[14]) or that s 447A enables a court to amend the operation of Pt 5.3A of the Act retrospectively (see Australasian Memory v Brien at [26]). (Emphasis in original)

45 In that decision, her Honour went on to note, at [52] and [57], that when considering an extension of this type, it is important to balance the interests of different creditors (particularly in the circumstances of a complex administration).

46 In *In the matter of Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263, Black J canvassed the rationale for granting an extension of time for administrators to decide whether to give notice to landlords limiting their personal liability, and made the following pertinent comments, at [2]-[4]:

The first issue which arises is the application for an extension of time in order to give any notice to lessors under s 443B(3) of the Corporations Act. That section broadly deals with the circumstances in which an administrator becomes subject to personal liability for rental or other amounts payable by a company under a lease. In broad terms, the section provides that the administrator is liable for rent payable by a company under administration for the period which begins more than five days after the administration begins, but may avoid that liability by giving notice that specifies the property and states that the company does not propose to exercise its rights in relation to the property. That section will operate in a relatively straightforward manner in circumstances that, for example, a company occupies a single or a small number of properties, and assumes that the administrator will be in a position, by the exercise of appropriate diligence, to form a view as to whether the company should continue to occupy the premises and whether or not to assume personal liability in respect of the premises within that period.

However, a situation may arise where there are obstacles to the administrator forming that view within that period. Such a situation was considered in Silvia v FEA Carbon Pty Ltd (ACN 009 505 195) (admins apptd) (recs and mgrs apptd) [2010] FCA 515; (2010) 185 FCR 301, where Finkelstein J noted the policy behind the section and that the section was intended to allow the administrator the opportunity to avoid personal liability for rental payable by giving notice within the five day period, but also recognised the possibility that that period may be too short in a particular case. His Honour noted that the Court can either excuse such liability under s 443B(8) of the Corporations Act or extend the time for investigation under s 447A of the Corporations Act.

The Administrators here seek orders under s 443B(8) of the Corporations Act or alternatively under s 447A which, in effect, extend the time for the giving of notice of

an intention not to exercise rights in respect of the relevant properties to 5 March 2013, a month from today. A number of factors relevant to making such an order were identified in Silvia v Fea Carbon, including that there may be a large amount of paperwork to review; factual uncertainty in relation to the leases; or the administrators' inability to form a view within the five business days allowed by the section as to whether it was necessary or desirable to exercise rights over the relevant property for the purpose of maximising the chances that some or all of the members of the companies can continue in existence or maximising the return to creditors.

47 In the present case, the Administrators have been unable to form a view as to whether the Virgin Companies ought to continue to remain in possession of property the subject of leases held by the companies, including both real property leases and chattel leases. The purpose of the extension of time is to afford the Administrators additional time in which to make that determination.

48 I accept that the Administrators will require further time to consider the ongoing value to the Virgin Companies of the various property the subject of the leasehold interests and, accordingly, that the extension of time is designed to assist in identifying and retaining assets that are necessary to preserve and enhance the value of the Virgin Companies' operations as part of a positive restructure of the business.

49 It is obviously necessary for the Court to have regard to the best interests of the creditors of the Virgin Companies as a whole. Given that an extension of time under s 443B of the Corporations Act maximises the prospect of preserving the business of the Virgin Companies with a view to a sale or restructure of the business as a going concern, then that is in the creditors' best interests (including those of the lessor creditors as it also increases the prospect that there will remain a counter-party in place with respect to existing leases).

50 I am satisfied on the evidence before me, it is appropriate to make the orders sought by the Administrators. Nevertheless, I observe that there are issues that may arise in relation to the length of the extension and any conditions that should be imposed upon the extension granted which some creditors may wish to consider and present submissions on to the Court.

51 To the extent that the lessors are adversely affected, the orders sought are framed in such a way as to permit persons who are affected by the orders (such as lessors of the property) to apply to the Court for a variation of the orders made by the Court.

52 I consider it is appropriate to extend the time to 26 May 2020 (although this is a significant time extension) for the Administrators to give notice to lessors of property leased by the

Companies and the personal liability of the Administrators should be excluded during that period.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton.

Associate:

Dated: 29 April 2020

SCHEDULE OF PARTIES

NSD 464 of 2020

Plaintiffs

- Fourth Plaintiff: VIRGIN AUSTRALIA INTERNATIONAL HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED) ACN 155 860 021
- Fifth Plaintiff: VIRGIN AUSTRALIA INTERNATIONAL AIRLINES PTY LTD (ADMINISTRATORS APPOINTED) ACN 125 580 823
- Sixth Plaintiff: VIRGIN AUSTRALIA AIRLINES (SE ASIA) PTY LTD (ADMINISTRATORS APPOINTED) ACN 097 892 389
- Seventh Plaintiff: VIRGIN AUSTRALIA AIRLINES HOLDINGS PTY LTD (ADMINISTRATORS APPOINTED) ACN 093 924 675
- Eighth Plaintiff: VAH NEWCO NO.1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 160 881 345
- Ninth Plaintiff: TIGER AIRWAYS AUSTRALIA PTY LIMITED (ADMINISTRATORS APPOINTED) ACN 124 369 008
- Tenth Plaintiff: VIRGIN AUSTRALIA AIRLINES PTY LTD (ADMINISTRATORS APPOINTED) ACN 090 670 965
- Eleventh Plaintiff: VA BORROWER 2019 NO. 1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 633 241 059
- Twelfth Plaintiff: VA BORROWER 2019 NO. 2 PTY LTD (ADMINISTRATORS APPOINTED) ACN 637 371 343
- Thirteenth Plaintiff: VIRGIN TECH PTY LTD (ADMINISTRATORS APPOINTED) ACN 101 808 879
- Fourteenth Plaintiff: SHORT HAUL 2018 NO. 1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 622 014 831
- Fifteenth Plaintiff: SHORT HAUL 2017 NO. 1 PTY LTD (ADMINISTRATORS APPOINTED) ACN 617 644 390
- Sixteenth Plaintiff: SHORT HAUL 2017 NO. 2 PTY LTD (ADMINISTRATORS APPOINTED) ACN 617 644 443
- Seventeenth Plaintiff: SHORT HAUL 2017 NO. 3 PTY LTD

(ADMINISTRATORS APPOINTED) ACN 622 014 813

Eighteenth Plaintiff: VBNC5 PTY LTD (ADMINISTRATORS APPOINTED)
ACN 119 691 502

Nineteenth Plaintiff: A.C.N. 098 904 262 PTY LTD (ADMINISTRATORS
APPOINTED) ACN 098 904 262

Twentieth Plaintiff: VIRGIN AUSTRALIA REGIONAL AIRLINES PTY
LTD (ADMINISTRATORS APPOINTED) ACN 008 997
662

Twenty-first Plaintiff: VIRGIN AUSTRALIA HOLIDAYS PTY LTD
(ADMINISTRATORS APPOINTED) ACN 118 552 159

Twenty-second Plaintiff: VB VENTURES PTY LTD (ADMINISTRATORS
APPOINTED) ACN 125 139 004

Twenty-third Plaintiff: VIRGIN AUSTRALIA CARGO PTY LTD
(ADMINISTRATORS APPOINTED) ACN 600 667 838

Twenty-fourth Plaintiff: VB LEASECO PTY LTD (ADMINISTRATORS
APPOINTED) ACN 134 268 741

Twenty-fifth Plaintiff: VA HOLD CO PTY LTD (ADMINISTRATORS
APPOINTED) ACN 165 507 157

Twenty-sixth Plaintiff: VA LEASE CO PTY LTD (ADMINISTRATORS
APPOINTED) ACN 165 507 291

Twenty-seventh Plaintiff: VIRGIN AUSTRALIA 2013-1 ISSUER CO PTY LTD
(ADMINISTRATORS APPOINTED) ACN 165 507 326

Twenty-eighth Plaintiff: 737 2012 NO.1 PTY. LTD (ADMINISTRATORS
APPOINTED) ACN 154 201 859

Twenty-ninth Plaintiff: 737 2012 NO. 2 PTY LTD (ADMINISTRATORS
APPOINTED) ACN 154 225 064

Thirtieth Plaintiff: SHORT HAUL 2016 NO. 1 PTY LTD
(ADMINISTRATORS APPOINTED) ACN 612 766 328

Thirty-first Plaintiff: SHORT HAUL 2016 NO. 2 PTY LTD
(ADMINISTRATORS APPOINTED) ACN 612 796 077

Thirty-second Plaintiff: SHORT HAUL 2014 NO. 1 PTY LTD
(ADMINISTRATORS APPOINTED) ACN 600 809 612

Thirty-third Plaintiff: SHORT HAUL 2014 NO. 2 PTY LTD
(ADMINISTRATORS APPOINTED) ACN 600 878 199

Thirty-fourth Plaintiff: VA REGIONAL LEASECO PTY LTD

(ADMINISTRATORS APPOINTED) ACN 127 491 605

Thirty-fifth Plaintiff: VB 800 2009 PTY LTD (ADMINISTRATORS
APPOINTED) ACN 135 488 934

Thirty-sixth Plaintiff: VB LEASECO NO 2 PTY LTD (ADMINISTRATORS
APPOINTED) ACN 142 533 319

Thirty-seventh Plaintiff: VB LH 2008 NO. 1 PTY LTD (ADMINISTRATORS
APPOINTED) ACN 134 280 354

Thirty-eighth Plaintiff: VB LH 2008 NO. 2 PTY LTD (ADMINISTRATORS
APPOINTED) ACN 134 288 805

Thirty-ninth Plaintiff: VB PDP 2010-11 PTY LTD (ADMINISTRATORS
APPOINTED) ACN 140 818 266