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Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
File Number: NSD464/2020
File Title: APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 15/08/2020 5:43:46 PM AEST

Registrar

Important Information

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Form 59
Rule 29.02(1)

Affidavit

No. NSD 464 of 2020

Federal Court of Australia
District Registry: New South Wales
Division: General

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

**BROAD PEAK INVESTMENT ADVISERS PTE. LTD. (FOR AND ON BEHALF OF BROAD
PEAK MASTER FUND II LIMITED AND BROAD PEAK ASIA CREDIT OPPORTUNITIES
HOLDINGS PTE. LTD.) AND TOR INVESTMENT MANAGEMENT (HONG KONG) LTD**

Applicants

**VAUGHAN STRAWBRIDGE, SALVATORE ALGERI, JOHN GREIG AND RICHARD
HUGHES, IN THEIR CAPACITY AS JOINT AND SEVERAL VOLUNTARY
ADMINISTRATORS OF THE SECOND TO FORTY-SECOND PLAINTIFFS** and others named
in the schedule

Respondents

Affidavit of: **Mark Russell Clifton**
Address: Level 32, 161 Castlereagh Street, Sydney NSW 2000
Occupation: Solicitor
Date: 15 August 2020

I, Mark Russell Clifton of Level 32, 161 Castlereagh Street, Sydney NSW 2000, solicitor, say on oath:

- I am a partner of Herbert Smith Freehills, the solicitors for BC Hart Aggregator, L.P. and BC Hart Aggregator (Australia) Pty Ltd (**Purchasers**) in respect of these proceedings. Herbert Smith Freehills also acts for Bain Capital Private Equity LP, Bain Capital Credit LP and their related investment entities and funds (**Bain Capital**). The Purchasers are

Filed on behalf of BC Hart Aggregator, L.P. and BC Hart Aggregator (Australia) Pty Ltd.
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subsidiaries of the Bain Capital funds that are participating in the transaction described in this affidavit.

2. I am authorised to make this affidavit on behalf of the Purchasers and Bain Capital.
3. I was admitted as a solicitor of the Supreme Court of New South Wales on 1 July 1988 and have practised in restructuring, insolvency and commercial litigation since 1989 and have specialised in the area of restructuring and insolvency for more than 20 years.
4. The statements made in this affidavit are made from my own knowledge and belief unless otherwise stated.
5. In this affidavit, where I refer to matters of information I have been informed of those matters by Barnaby Lyons, Managing Director and Head of Bain Capital Credit Asia. Where I refer to that information I believe that information to be true.

Nature of Bain Capital's business

6. I am informed by Mr Lyons that Bain Capital is one of the world's largest alternative investment firms. It has approximately US\$100 billion (as of 31 March 2020) of assets under management across a multitude of asset classes. Bain Capital has been an active investor in the Australian market for over 20 years and manages more than A\$10 billion (as of 31 March 2020) of capital for Australian investors. Bain Capital is also an active investor in the aviation sector. It has US\$3 billion (as of 31 March 2020) funds under management in the aviation sector managed by professionals with specific aviation investing expertise and has been involved in several airline restructurings globally.

Response to administration of Virgin Australia Companies

7. On 20 April 2020, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes (**Administrators**) were appointed as voluntary administrators of Virgin Australia Holdings Limited (administrators appointed) (**VAH**) and the other companies listed in schedule to this affidavit (**Virgin Australia Companies**).
8. I am informed by Mr Lyons that soon after the Administrators announced to the Australian Stock Exchange (**ASX**) their intention to undertake a process for the restructure and refinance of the Virgin Australia Companies' business and "bring [the Virgin Australia Companies] out of administration as soon as possible" on 21 April 2020, Bain Capital contacted the Administrators to express its desire to participate in that process.
9. On 30 April 2020, the Administrators announced to the ASX that the indicative timetable for the sale and/or recapitalisation process which the Administrators were implementing for the Virgin Australia Companies (**Sale Process**) was:




- (a) mid-May 2020 for the receipt of indicative offers;
- (b) binding offers to be provided in June 2020; and
- (c) a target date for achieving a sale was by the end of June 2020.

Bain Capital's involvement in the Sale Process

10. On 1 May 2020, Bain Capital signed and provided to the Administrators a Non-Disclosure Agreement concerning the Sale Process which imposed confidentiality obligations on Bain Capital with respect to information provided to Bain Capital by the Administrators, placing restrictions on Bain Capital from discussing the confidential information or the proposed transaction with stakeholders of the Virgin Australia Companies without the consent of the Administrators for 2 years from the date of the agreement and requiring the return or destruction of all confidential information on written demand by the Administrators. In my experience, a non-disclosure agreement of this type is a standard requirement for participation in a sale process in a restructuring context.
11. I am informed by Mr Lyons that it was Bain Capital's expectation and understanding that all other parties participating in the Sale Process would be required to execute a non-disclosure agreement on the same or substantially similar terms and that the Administrators would take appropriate steps to enforce those obligations for the benefit of the parties participating in the Sale Process and, ultimately, the successful purchaser. I am informed by Mr Lyons that Bain Capital participated in the Sale Process on that basis and would not have done so otherwise.
12. I am informed by Mr Lyons that it was Bain Capital's understanding, and it was also my own understanding, of the Sale Process that:
 - (a) it was the only process which the Administrators intended to conduct to give effect to the sale and restructure of the business of the Virgin Australia Companies;
 - (b) the timetable for the Sale Process was adopted by the Administrators having regard to the financial and cash position of the Virgin Australia Companies, the uncertainty of the operating environment for the Virgin Australia Companies in the context of the COVID-19 pandemic, the need to confirm a restructuring plan for the business within that context, and the Administrators' opinion that it would be necessary to secure interim funding by no later than 30 June 2020 to enable the business to continue trading through to completion of a sale or recapitalisation; and




- (c) the terms and conditions of the Sale Process, including the Administrators' timetable for bids and desire to have a sale effected by 30 June 2020, were clear to all parties who participated in the process.
13. The Sale Process consisted of 3 phases with the number of participants in each phase being reduced until the third phase consisted of 2 participants of whom Bain Capital was one. The Applicants in the Interlocutory Process filed on 11 August 2020 in these proceedings were not participants in phase 3 of the Sale Process.
14. A feature of the sale process was that only limited access to stakeholders was provided during phase 3 and the detailed negotiations required with stakeholders to restructure the business of the Virgin Australia Companies and formulate the terms of any deed of company arrangement (including in relation to the contractual claims to be affirmed or released under the deed) was required to take place after the entry into a binding transaction and before the date of the second meeting of creditors, which at that time was required to be held no later than 26 August 2020.
15. I understood, and I am informed by Mr Lyons that he understood, that the very nature of that process, requiring the negotiation and entry into separate agreements with a myriad of stakeholders (as described in more detail in paragraphs 28 to 31 below), meant that there was no sensible way that multiple potential deed of company arrangement proponents could negotiate and implement their own unique restructuring of the business at the same time. The timetable for completion of the transaction proposed by the Administrators during the Sale Process contemplated that these steps would necessarily occur after the execution of a binding agreement and before the convening of the second meeting of creditors.
16. I am also informed by Mr Lyons that the vast majority of stakeholders with whom Bain Capital communicated during the Sale Process said that they were unwilling to advance discussions in respect of the future trading arrangements for the restructured Virgin Australia group unless and until a binding agreement had been entered into between Bain Capital and the Administrators to ensure certainty of outcome of those negotiations.
17. The outcome of the Sale Process, as determined by the Administrators, was that none of the other participants provided an offer more favourable or more certain in terms of the return to the creditors of the Virgin Australia Companies than Bain Capital's offer. Accordingly, it was Bain Capital that was the successful bidder in the Sale Process and it was with Bain Capital that the Administrators entered into a binding Sale and Implementation Agreement (**SID**) to acquire the business and assets of the Virgin Australia Companies by either an asset sale or, if approved by creditors, one or more



deeds of company arrangement involving a sale of the shares in the Virgin Australia Holding Limited, subject to court approval under section 444GA of the *Corporations Act 2001* (Cth).

18. In accordance with the requirements of the Administrators for the successful bidder, following entry into the SID:
- (a) the Purchasers took economic risk for the trading losses of the business of the Virgin Australia Companies from 1 July 2020;
 - (b) BC Hart Aggregator L.P. advanced A\$125 million to the Virgin Australia Companies pursuant to an interim funding facility for the purpose of funding the trading operations of the Virgin Australia Companies during the administration.
19. I am informed by Mr Lyons that having regard to:
- (a) the significant transaction costs that would necessarily be incurred in connection with the implementation of the transaction;
 - (b) the economic risk required to be assumed by Bain Capital in funding the business through to completion of the transaction;
 - (c) the requirement to implement its preferred restructuring of the business without interference from other potential bidders; and
 - (d) the opportunity cost of diverting significant financial and human resources to the implementation of the transaction, including the allocation of capital to fund the acquisition and guarantee the entitlements of the employees of the Virgin Australia Companies,

Bain Capital would not have proceeded with its participation in the Sale Process in the absence of the Administrators committing to a final, binding and exclusive transaction with Bain Capital at the conclusion of the Sale Process.

Bain Capital's resourcing of the Sale Process

20. The Bain Capital team involved in the Sale Process is comprised of professionals from both its Private Equity Business, which invests in companies to drive long term operational and strategic improvement and its Distressed and Special Situations Group, which is a specialised sub-group of its credit business with expertise in investing in distressed companies and navigating the Australian insolvency and administration processes.




21. Since commencing its work in late April 2020, Bain Capital has allocated a very significant level of internal and external resources to enable it to submit a binding bid in compliance with the Sale Process and time line that was proscribed by the Administrators for all bidders.
22. In connection with the Sale Process, and since the transaction was agreed by the Administrators, Bain Capital has engaged a large number of external advisor firms and allocated in excess of 20 full time internal resources from Bain Capital Private Equity and Bain Capital Credit for the purposes of:
 - (a) conducting due diligence;
 - (b) participation in the bidding processes;
 - (c) negotiation of the binding transaction agreed with the administrators;
 - (d) negotiation with key stakeholders of the Virgin Australia Companies; and
 - (e) implementation of the transaction agreed with the Administrators.
23. The Bain Capital team engaged on the transaction are working across 24 core work streams, including for example, matters relating to employees and unions, government and regulatory matters, aircraft fleet negotiations and review of contracts. Team members working on the transaction are located in Sydney, New York, Boston and Hong Kong, and includes at least 7 team members that have relocated to Brisbane for an indefinite period the purposes of the transaction.
24. In addition to its internal resources, Bain Capital has engaged external advisers to assist and support its involvement in the Sales Process, including the following:
 - (a) Herbert Smith Freehills as Australian legal advisers;
 - (b) Goldman Sachs for financial and investment banking advisory services;
 - (c) KordaMentha and 333 Capital as financial and restructuring advisers;
 - (d) PricewaterhouseCoopers advising on taxation, stamp duty and financial matters;
 - (e) Bain & Co for consulting services;
 - (f) Alton Aviation as specialist aviation fleet consultants;
 - (g) Norton White as Australian aviation legal regulatory specialists;
 - (h) Russell McVeagh as New Zealand legal advisors;
 - (i) Kirkland & Ellis LLP and Paul, Weiss, Rifkind, Wharton & Garrison LLP as US legal advisors;



- (j) Ropes and Gray LLP as Hong Kong legal advisors;
 - (k) Willis Tower Watson as insurance advisors; and
 - (l) other consultants and industry experts as required.
25. I am informed by Mr Lyons that the resources committed by Bain Capital to the Sale Process for the Virgin Australia Companies have been extensive, in terms of personnel, expertise and cost. In particular, I am informed by Mr Lyons that the Bain Capital team engaged in the Sale Process is one of the largest teams assembled by Bain Capital in response to a transaction, and that this matter is one of the most complex and comprehensive transactions in which Bain Capital has engaged in its history.
26. I am informed by Mr Lyons that the costs incurred by Bain Capital in the engagement to date have involved a commitment of tens of millions of dollars in transaction fees in connection with the Sale Process and implementation of the agreed transaction.
27. In respect of the Herbert Smith Freehills team assisting Bain Capital on this matter, it has involved, at various points throughout the transaction timetable, around 100 staff from across eight specialist practice areas (including restructuring and insolvency, corporate, commercial, regulatory, banking and finance, aviation finance, competition, employment, property and consumer law). Currently there is a core team of approximately 45 solicitors engaged in the implementation of the transaction.

Negotiations with stakeholders

28. During the Sale Process, and following the entry into the binding transaction with the Administrators, Bain Capital and its advisors have engaged, and continue to engage, in extensive negotiations with the Administrators, management of the Virgin Australia Companies, key creditors and other stakeholders with a view to reaching renegotiated arrangements for the operation of the business of the Virgin Australia Companies following completion of the transaction.
29. The counterparties and stakeholders with which Bain Capital remains in active discussions include, among others:
- (a) aircraft lessors and financiers in respect of the lease or financing arrangements for the Virgin Australia fleet;
 - (b) airports in respect of leasing and supply arrangements for the restructured Virgin Australia business;
 - (c) major suppliers, trade partners and licensors;




- (d) trade unions representing Virgin Group employees and other key stakeholders;
 - (e) financial institutions in connection with the group's transactional banking and finance facilities;
 - (f) the trustee of the Velocity Rewards Program;
 - (g) the owner of the Virgin brand and trademarks;
 - (h) government, government regulators (including the Civil Aviation Safety Authority (CASA) and government investors; and
 - (i) lessors of real property.
30. As an example, the contract review work stream referred to in paragraph 23 involves a team from Bain Capital, Virgin representatives, and external resources assessing, considering and/reviewing over 1,500 contracts from across the Virgin Australia Companies' business, including varying levels of engagement with contractual counterparties to update, amend, renegotiate or terminate arrangements as required for the further operation of the business of the Virgin Australia Companies following the completion of the transaction.
31. I am informed by Mr Lyons that the outcome of the extensive negotiations which have been engaged in to date, and are ongoing, will have a significant impact on the future prospects of the restructured Virgin Australia business following implementation of the transaction.
32. I am informed by Mr Lyons that a number of key stakeholders have already expressed confusion as to the status of the Bain Capital transaction following media statements regarding the actions of the Applicants. I am informed by Mr Lyons that this confusion has resulted in delays to the successful conclusion of those negotiations, and that those actions jeopardise the extensive process that is underway to preserve the value of these stakeholder relationships.
33. I am further informed by Mr Lyons that the orders sought by the Applicants requiring the Administrators or a facilitator to provide access to the Applicants to engage with the same stakeholders with whom the Purchasers are completing negotiations in accordance with the exclusivity provided to the Purchasers under the SID, would seriously undermine and disrupt the Purchasers engagement with those stakeholders and ability to complete the transaction contemplated by the SID in a manner that produces the most favourable return for creditors and maximises the future prospects of the Virgin Australia Companies.



Sworn by the deponent
at Sydney
in New South Wales
on 15 August 2020
Before me:

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Signature of deponent



Signature of witness **NICOLE ESTHER SMYTHE**
AUSTRALIAN LEGAL PRACTITIONER

Schedule

No. NSD 464 of 2020

Federal Court of Australia
 District Registry: New South Wales
 Division: General

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

Respondents

First Plaintiffs:	Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes, in their capacity as joint and several voluntary administrators of each of the Second to Fortieth Plaintiffs
Second Plaintiff:	Virgin Australia Holdings Ltd (Administrators Appointed) ACN 100 686 226
Third Plaintiff:	Virgin Australia International Operations Pty Ltd (Administrators Appointed) ACN 155 859 608
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

Fortieth Plaintiff: Tiger International Number 1 Pty Ltd (Administrators Appointed) ACN 606 131 944

Forty-first Plaintiff: VAH Newco No. 2 Pty Ltd (Administrators Appointed) ACN 160 881 354

Forty-second Plaintiff: VB Investco Pty Ltd (Administrators Appointed) ACN 101 961 095

Date: 15 August 2020