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TRANSCRIPT OF PROCEEDINGS

O/N H-1259876

FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA REGISTRY

MIDDLETON J

No. NSD 464 of 2020

APPLICATION IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) and OTHERS

ADELAIDE

10.46 AM, MONDAY, 17 AUGUST 2020

DR R. HIGGINS SC appears with MR ZUEN, MR HOTCHIN and MR KROCHMALI for the applicant
MR I. JACKMAN appears with MR KOLESKI and MR PEATRIDGE for the respondent
MR PETERS appears with MR BURNETT for BC Hart Aggregator
MR McGRATH appears with MS PETCH for Alexander Funds Management, Morgans Financial, Blackstone Wealth Management, Mason Stevens, Escala Partners, Yarra Funds Management, Realm and Cameron Hanson Private
DR MOORE appears for the Commonwealth of Australia

THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

HIS HONOUR: Call the matter for hearing, please.

COURT OFFICER: Calling matter NSD464/2020. In the matter of Virgin Australia Holdings.

HIS HONOUR: Now, before I take appearances I need to make a procedural order which I will now do. Section 17(1) of the Federal Court of Australia Act requires that the jurisdiction of the court be exercised in open court but 17(4) of the Act allows the public to be excluded if the court is satisfied that their presences will be contrary to the interest to the justice. The court must balance the importance of the matter being heard and determined and open justice. Justice requires a hearing to be conducted as soon as humanly possible and that it not be delayed indefinitely pending the end of the current viral pandemic.

The best practical arrangements in the circumstances of the pandemic have been put in place to allow interested members of the public or the press to observe or listen to the hearing. These arrangements are identified in paragraph 1 of the orders below. It would contrary to the interest of justice for the public to have access to the hearing other than in accordance with the arrangements identified in paragraph 1 of the orders below but the result of that would be to have the hearing deferred indefinitely. The court orders that:

(1) Pursuant to section 17(4) of the Act the public be excluded from this hearing listed at 11.15 am on 17 August 2020 other than by the following arrangements;

(a) Any member of the public is able to join the hearing via the Microsoft Teams platform by providing an email address to the associate of Justice Middleton as stipulated in the court notice of proceedings; and

(b) Any member of the public is able to listen to the hearing via the Microsoft Teams platform by dialling a number and ID allocated to the hearing.

ADJOURNED **[10.49 am]**

RESUMED **[10.51 am]**

HIS HONOUR: Sorry about that. Is everybody there? My battery went flat. Anyhow, I will continue on with the procedural order which I was up to order 2.

(2) Members of the public are to attend the hearing via the methods of paragraph1 of these orders do so on the condition that they are:

(a) Permitted to observe or listen to the hearing but are in no circumstances permitted to participate in the hearing;

(b) Prohibited from making any recording or photographic record of the hearing or any part thereof by any means whatsoever with the exception of media representatives; and

(c) Advise that any failure to observe conditions in (a) and (b) may constitute a contempt of court and be punishable as such.

So I will now take appearances. Mr Jackman.

MR JACKMAN: May it please the court. I appear for the applicant ..... with my learned friend Mr KOLESKI and Mr PEATRIDGE.

HIS HONOUR: Thank you. Dr Higgins.

DR HIGGINS: May it please the court. I appear with my learned friend Mr ZUEN, Mr HOTCHIN, and Mr KROCHMALIK for the plaintiff, the respondent to the application.

HIS HONOUR: Mr Peters.

MR PETERS: If your Honour pleases. I appear with Mr BURNETT for the Bain parties; the BC Hart Aggregator.

HIS HONOUR: Yes. Mr McGrath.

MR McGRATH: It if please the court. I appear with Ms PETCH for interested parties; Alexander Funds Management, Morgans Financial, Blackstone Wealth Management, Mason Stevens, Escala Partners, Yarra Funds Management, Realm, and Cameron Hanson Private.

HIS HONOUR: And, Dr Moore.

DR MOORE: If your Honour pleases. I seek leave to appear on behalf of the Commonwealth.

HIS HONOUR: Mr Turner, are you there?

MR TURNER: Yes I am. Good morning, your Honour.

HIS HONOUR: Yes, Mr Turner. Thank you. Is there anyone else that seeks to – either leave to appear or wish to make any representation that I haven't mentioned? I take it silence means no. All right. Just a couple of things procedurally again we need to deal with. Mr Peters, Mr McGrath, and Dr Moore, you're all interested parties. Probably if I haven't given it to you, you require leave to appear so I see no reason why you shouldn't be given leave to appear having regard to your interests so I will grant leave for those parties to appear. Now, Mr Turner, you're in a different category. I have had the opportunity of reading what you have put to the court and that material will actually be made public because what we do with anything that's put before me in this matter is put on a public portal. Do you have any personal reason or any other reason why you do not want that to occur; that's the first question I have for you.

MR TURNER: No, I do not, your Honour.

HIS HONOUR: All right. Thank you. Mr Turner, your issues are ones that I understand entirely the grievance that you have on behalf of yourself and your wife, but they are primarily matters for the Administrative Appeals Tribunal and not so much matters that deal with the administration and matters that I have before me as to what needs to be done leading up to the second creditors meeting.

MR TURNER: I understand, your Honour.

HIS HONOUR: All right. Well, you will need, as I say, you will need to take this battle up with the Administrative Appeals Tribunal. I see you had a response from the administrators. I see that you're not completely satisfied with that but it's something which I would not be entering a debate about in the context of what is within my purview at the moment.

MR TURNER: Understood, your Honour. I was more focused with respect to the Federal Court matters in relation to seeking clarity, not so much in relation to each of the individual situations but with respect to the misinformation that is getting out there and causing confusion in relation to the – in particular the bond holders DOCA and what the administrators are allegedly saying and stating to the media in relation to those matters. And I'm also interested as to whether or not the court can make a determination with respect to whether or not the administrator is personally liable for costs associated with those Administrative Appeals Tribunal matters at this particular point in time.

HIS HONOUR: Well, in relation to your first matter hopefully by the time we've been through this process with all the submissions I'm receiving and when I deliver my reasons in relation to what I decide in the next week there will be clarity about the first issue. And you presumably haven't had the opportunity of reading a lot of the material that has come in over the weekend and this morning whereby the administrators set out further material, so further clarity is in that given and I anticipate will be given.

MR TURNER: Fantastic. Thank you, your Honour.

HIS HONOUR: All right. Then as to your second matter dealing with the Administrative Appeals Tribunal – I'm not quick sure what you want me to – what order you want from me.

MR TURNER: I'm sorry, your Honour. Presently there are a large number of applications before the Administrative Appeals Tribunal involving a large number of Virgin employee injured workers. A lot of those matters are currently stalled as a consequence of not knowing whether the respondent in those matters has the capacity to honour any obligation to pay court costs if those matters are found in the applicant's favour. Now, we had been stalling our own matters until after the next creditors meeting. I understand that creditors meeting is now going to occur at a later date which has required us at presently to stall those matters further and we're looking to get those matters on foot because while these matters are stalled and suspended the injured worker continues to suffer.

HIS HONOUR: I understand that. Again, it's not within my purview to direct the administrators to respond directly in relation to that request within this proceeding. It may be something that the Administrative Appeals Tribunal may take up; I do not know. I don't know sufficiently enough about the stage of that proceeding, what costs jurisdiction it is. So again, I'm afraid that's not going to be something which you're going to get an answer for today or in the course of this proceeding.

MR TURNER: Understood, your Honour. I think if the documents are made available publicly, as you have indicated, there will be other questions ventilated that might result in a response.

HIS HONOUR: Yes, all right. Well, as I say, all submissions that are not confidential and affidavit material is put on the portal which anyone can access, and I will let you go from there. So, Mr Turner, you can either remain listening if you wish or you can leave.

MR TURNER: Thank you very much, your Honour.

HIS HONOUR: Now, probably this is a question to you, Dr Higgins, and you, Mr Peters. I have received confidential material in the form of submissions as well as affidavit material and I sent, through my associate, an email at 4.05 yesterday, 16 August, wishing you to think about this confidential material. And the email may have been a little elliptic but there are perhaps two things I could explain that I had in the back of my mind. One is that I wasn't sure whether within the confidential material part there was anything left that was confidential – having regard to what was out in the public anyhow about the conditional nature of the agreement and is involved in the agreement with the purchasers.

But secondly – and I suppose this was my main concern – if there is to be an informed meeting at the second creditor's meetings they – that is, the people who are

attending the meeting – will need to be informed about the nature of the sale agreement, its – the conditions – and more importantly, what is the significance of whatever vote they make in relation to the DOCA. And I think it's critical for me to understand now and maybe make a decision about it as to the nature of that agreement. Because if it's a ..... and one way or the other it's going through, that has – in my view at the moment without being further education maybe by Mr Jackman, probably – a significant role to play in the sense of it sets the landscape for the meeting – the second creditor's meeting. And some things can't be changed by the ..... of time or by entering into arrangements.

So it just seemed to me that was critical – so there are two issues there, maybe. One is: What is really confidential and in any event can you protect that confidentially having regard to the fact that the creditors need to know and be fully informed. And the second is: Is there any real debate that the agreement – the sale agreement – will go ahead one way or the other – either by the approval of a DOCA which is put forward by the administrators or, alternatively, by an adjournment – which I know some people don't like – if that doesn't go through. I need to know that pretty much up front, I think. Anyhow, Dr Higgins, you can go first about those observations.

DR HIGGINS: Of course, your Honour. Now, I begin with a question of disclosure. Consistent with your Honour's observations in version 4 and version 5, when the report to creditors is published – which is now only a week or so away – all of the critical information will be disclosed consistent with the argument on that occasion?

HIS HONOUR: ..... Dr Higgins, you've muted yourself.

DR HIGGINS: Did your Honour hear any of that?

HIS HONOUR: No.

DR HIGGINS: ..... Your Honour, can I begin with disclosure. Consistent with your Honour's observations in version 4 and version 5, when the report to creditors is made – which will be very shortly – all of the critical information around the ..... transaction will be disclosed and the returned creditors will be disclosed and that material will be before the body of the creditors at all of the second meetings. As your Honour also appreciates, for the purposes of today's application some limited material concerning the ..... has been disclosed to the applicants to seek to facilitate the hearing of their application. So ..... been disclosed in advance of the time your Honour had in mind in version 4 and version 5 that the creditors will be informed of all of that material in the report to creditors.

Can I come then your Honour's third observation – and I might let Mr Peters deal with the question of what is really confidential. As your Honour apprehends, it is the ..... position which having regards to their submissions are shared by ..... that the administrators have exercised the statutory power of ..... The transaction will go ahead either by asset sale agreement or by DOCA. Since DOCA produces a

preferable return to creditors and a better outcome for creditors the transaction will complete in one of those two ways. And it is ours to submit there is a binding deal between ourselves and Bain. I can develop each of those points obviously in argument, your Honour. But I wanted to at least answer the key proposition your Honour had raised. I may – if given you would allow Mr Peters to deal with the question of what is truly confidential.

HIS HONOUR: Yes, Mr Peters. Part of my concern has gone away from what Dr Higgins said, if I understand her correctly. But that which is confidential before me at the moment will not remain confidential before the creditor's meeting. In other words, it will be disclosed in the report that is given to creditors and therefore they will be fully informed of all the details and ins and outs of the agreement. So that was my main concern. I'm not too concerned about keeping it confidential now for the purposes of these court proceedings as long as Mr Jackman has seen it and he obviously has, as I understand it. So he is in a position to address me on it. I take that to be the case, Mr Jackman?

MR JACKMAN: Well - - -

DR HIGGINS: Your Honour can I – can I clarify – we've disclosed certain clauses to Mr Jackman but not the totality of the documents. So my learned friend hasn't seen the entire sale date. He's seen what's in the evidence - - -

HIS HONOUR: ..... again, Dr Higgins. So the affidavit that's marked confidential on the – the confidential parts Mr Jackman and his team haven't seen, is that right.

DR HIGGINS: No, they have seen all of that material. But what Mr Jackman has not seen is a full copy of the sale .....

HIS HONOUR: All right, thank you. All right - - -

MR JACKMAN: ..... Yes, we have received the confidential affidavit of Mr Strawbridge in which he sets out a paraphrase – no more than that – of a couple of clauses in the agreement. We haven't seen any of the clauses of the agreement, we've only seen Mr Strawbridge's paraphrase. We are at a considerable disadvantage if there's any issue of construction concerning the contract with Bain and indeed, we would submit there's a lack of procedural fairness in that agreement being kept from us in circumstances where there may will be an issue of construction concerning that contract. All we can do at moment, in the light of your Honour's suppression order of the contract itself is to take Mr Strawbridge on trust in terms of his paraphrase of a couple of clauses of the agreement. And my hand's been tied in that respect, I will approach the matter today on that basis noting that we will regard this as involving a lack of procedural fairness.

HIS HONOUR: Is there any reason, Dr Higgins, why the legal team couldn't see the agreement? And Mr Peters will have something to say about this I suppose, we

will come to that in a moment. So we have a copy – not his client – his client doesn't have to see it for the moment, I don't think.

DR HIGGINS: Your Honour, I may defer that question to Mr Peatridge given the obligation the administrators have under the deed.

HIS HONOUR: Right.

DR HIGGINS: But can I advocate that – one further fact I should inform your Honour of is the report to creditors will be published on 25 August. So that is eight days away. So that your Honour understands the timeframe that we are presently discussing.

HIS HONOUR: Yes, I understand. Yes, Mr Peters. What's your client's position in relation to the last matter I raised? Mr Jackman's legal team having a look at it on a confidentiality basis so he can just satisfy himself about things?

MR PETERS: If your Honour pleases, I have instructions to disclose the substantive parts of the document, being the terms of the sale implementation deed, and schedule 6 to that document being the asset sale agreement. One matter which remains sensitive, your Honour, are the purchase price details in a schedule numbered 2. And although it's only seven days or eight days, that confidentiality still pertains to matters that are going on now – steps taken by my client now to negotiate with others. We're prepared - - -

HIS HONOUR: ..... doesn't need to know the prices or the figures, he just needs to know what the construction is of the agreement as to whether it's a fail or not.

MR PETERS: Yes, your Honour. Well, we're content to disclose it to – on the usual undertakings to solicitor and counsel, being the sale implementation deed together with schedule 6 which contains the asset sale agreement. As your Honour appreciates, the structure of the agreement is it's an asset sale with the option for the creditors to pass a DOCA, as Mr Strawbridge described, giving a better financial return.

HIS HONOUR: Yes. Well, I understand, Mr Peters. Well, I think that is very helpful. So Mr Jackman, that will give you all the information you need. You don't need to know the price.

MR JACKMAN: Well, we are grateful for anything that your Honour is prepared to allow us to see.

HIS HONOUR: Yes. Well, no, I want a bit more from that, Mr Jackman. I don't want procedural fairness issues hanging over a hearing. If you get all the documents to enable you to determine whether it was a sale or not, that would be sufficient, wouldn't it, for the purposes of this – today.

MR JACKMAN: Whether it was a sale, and what conditionality there is about the sale. Yes.

HIS HONOUR: Yes. That is what you need.

MR JACKMAN: Yes.

HIS HONOUR: Yes, all right. Well, that – you're going to be given that.

MR JACKMAN: Could my learned friend indicate when he is going to give us that?

MR PETERS: Your Honour, I would have to get instructions obviously about the timing. I thought steps were in process. It's just a question of I am here in Melbourne, and others are in Sydney. I'm very lonely in my chambers. Perhaps I need a moment just to confirm the timing issue, if your Honour would bear with me on that issue.

HIS HONOUR: Yes. No, I fully understand. Obviously, we need to be done as soon as possible.

MR PETERS: I'm thinking in terms of minutes, your Honour.

HIS HONOUR: All right. All right. Well, then - - -

MR PETERS: Let me – perhaps if your Honour could deal with other matters, and I will - - -

HIS HONOUR: If you could deal with that. Yes. Thank you, Mr Peters. All right. Well, then that seems to deal with that issue of confidentiality, and giving everybody the material. I wasn't going to include you in this, Mr McGrath. Do you need to see this document?

MR McGRATH: No, your Honour.

HIS HONOUR: All right. Thank you. And Dr Moore, you don't need to see this document, do you?

DR MOORE: No.

HIS HONOUR: All right. So it's just Mr Jackman we need to put into the loop. Now, timing. Let's see how far we go in the hearing this morning, about how far we progress and pronunciation of orders. There are some things that we will be able to determine even if I don't pronounce orders, indicate what is going to happen, and then I need to start obviously providing some reasons for some of the things that we were going to be proceeding with. But I do think an important factor is the extent to which the sale agreement is conditional, and what extent is conditional. So we may

not be able to determine that until Mr Jackman has an opportunity to have a look at it and consider that. It may change his argument, depending on what view he takes about it. All right. Well, then Mr Jackman, could we start with you?

MR JACKMAN: Well, can I formally read the affidavits. Sorry for the brief delay.

HIS HONOUR: Yes.

MR JACKMAN: The first is Cameron Cheatham's affidavit of 11 August 2020. I read that affidavit, and I tender exhibit CJC1 to that affidavit. And the confidential exhibit CJC2, and I would ask for a suppression order in relation to exhibit CJC2.

HIS HONOUR: I will make that order, subject to anybody seeking to argue it at another time.

MR JACKMAN: May it please the court. Then I read the confidential affidavit of Sandy Gupta of 15 August 2020, and I tender exhibit SG1, and I would ask for a suppression order in relation to the affidavit and the exhibit SG1.

HIS HONOUR: I will make an order in relation to that in – as a confidentiality order. When I make these orders, I wonder if the parties' instructing solicitors will provide to my chambers, a form of order which will cover that eventuality of being confidential on the grounds of the interests of justice, and identify precisely what is confidential, and I will make those orders formally.

MR JACKMAN: Yes.

DR HIGGINS: We will do that, your Honour.

HIS HONOUR: Thank you.

MR JACKMAN: Then I read the affidavit of Willy Wong of 15 August 2020, and I tender the exhibit WW1, and again I ask for a suppression order in relation to the affidavit and the exhibit.

HIS HONOUR: I will make that order.

MR JACKMAN: Please the court. Then I read the affidavit of Cameron Cheatham of 16 August 2020, and I tender the annexure to that which are marked as CJC3. That is not the subject of any confidentiality.

HIS HONOUR: Yes.

MR JACKMAN: And finally, I read the affidavit of Cameron Cheatham of 17 August 2020, and I tender exhibit CJC4. And again, that is not confidential.

HIS HONOUR: Thank you.

MR JACKMAN: And that is the evidence for the plaintiff – for the applicant, rather.

HIS HONOUR: Thank you, Mr Jackman. So maybe we should go to what evidence there is before the court, so you're the next Dr – litigant, I think.

DR HIGGINS: Yes, your Honour. I read the affidavit of Von Neil Strawbridge of 14 August 2020, and tender its exhibit VNF6. I also read the confidential affidavit of Von Neil Strawbridge of 14 August 2020, which contains the provisions of the sale deeds which are confidential to them. That affidavit is confidential to the applicants and them. Thirdly, your Honour, I read the confidential affidavit of Von Neil Strawbridge of 14 August 2020, which contains material confidential to ..... That is confidential, with access only to the applicants. I read the supplementary affidavit of Von Neil Strawbridge of 16 August 2020. I read the supplementary confidential affidavit of Von Neil Strawbridge of 16 August 2020, which is confidential to the applicants only. And I also, your Honour, read the affidavit of Cassandra Adams of 16 August 2020, annexing correspondence. And that's our evidence, your Honour.

HIS HONOUR: All right. Now, Mr Peters, you don't have any evidence I don't think you're seeking to rely upon, other than what is before the court?

MR PETERS: Your Honour, we have one short affidavit by Mark Russell Clifton of 15 August 2020.

HIS HONOUR: Yes. Thank you.

MR PETERS: Which deals with the nature of Bain Capital's business, etcetera, and other issues.

HIS HONOUR: Thank you. Mr MrGrath, you have an affidavit of Ms Merrick, don't you?

MR McGRATH: Yes, your Honour. I read the affidavit of Katherine Allison Merrick, affirmed 16 August 2020, and the four annexures to that which are marked KM1, KM2, KM3 and KM4.

HIS HONOUR: Right. And Dr Moore, I don't think you have any evidentiary material you're relying on? Thank you. All right. Well, then that puts all the evidentiary material before me. So that's the court's record, for the purposes of the application. Well, then Mr Jackman, do you want to proceed? I've had the – just so you know where I'm up to, I had the opportunity of reading all the submissions as carefully as I can. Affidavits have been coming in as you know, fast and furious, yesterday afternoon and some this morning. I have had an opportunity of reading them, but if there's any particularly important part, then I wouldn't mind you taking me to them, obviously. I don't think I need to be taken, unless there's anything in particular, to the case law. You have identified, everybody, relatively clearly what the case law is. I don't foresee there to be too many issues of principle between you,

quite frankly. It's a matter of applying the relevant principles. So with that information, I will hand it over to you, Mr Jackman.

MR JACKMAN: May it please the court. Can I begin with the Corporations Act part 5.3A, and just identify what we regard as being the salient aspects. First of all, in section 437A, of which the administrators place reliance. Subsection (1)(c) gives the administrator power to disclose of all or part of the business, and may dispose of any of the quantity of company. Then going to 439C, what the creditors may decide at the second creditors meeting, includes in paragraph (a) that the company execute a DOCA and that DOCA can differ from the proposed deed, if any details of which accompanied any notice of meeting. The important point is that below, the creditors will be guided by – and will no doubt read and take into account what the administrators say in their report for creditors, in that sense it might be regarded as something of a guided democracy.

The ultimate decision is that of the creditors themselves as the High Court was at pains to emphasise in the Lehman Brothers case which we've given your Honour reference to. And it's the creditors who make the decision about whether to enter into a DOCA and if so whether that should be the DOCA which was set out in the notice of meeting or something different. And it was certainly common ground at the hearing on 10 July that the creditors are entitled to impose a different DOCA and that they need sufficient information to make an informed decision in that regard.

We suspect there might have been a little backsliding in the last few days from that proposition but, in our submission, the proposition is correct as was recognised on 10 July. Then assuming that a DOCA is approved at the second creditors meeting, one then moves to section 444A which applies where the creditors have result a company executed DOCA. 444B then has provisions in terms of the execution of the instrument within 15 business days after the creditors meeting or longer period if the court so allows. And then the administrator himself in subsection (5) executes the instrument. And then importantly in 444C(2):

> *In so far as a person will be bound by the deed, if it had already been so executed, the person:*
>
> *(b) must not do anything inconsistent with the deed except with the leave of the court –*

And that, of course, includes doing something inconsistent with the deed even if it may have been in performance of a contract to contrary effect. In other words, the statute will override any contrary contractual promise that is inconsistent with the DOCA and that contract will be discharged by reason of what would be a supervening legal impossibility or a supervening illegality. So, for example, if a DOCA is resolved upon by the creditors at the second creditors meeting which is inconsistent with the Bain contract then it is the DOCA which will prevail and 444C(2) will prevent any inconsistent act pending execution, even if it happened to be in performance of some other contract.

And the appropriate legal conclusion is that the Bain contract would then be discharged to the extent of the inconsistency by reason of, as I've said, the supervening legal impossibility. Now, one provision which strikes us as probably germane to what is being contemplated by the Bain contract is 444GA which refers to the administrator of a DOCA transferring shares in the company if the administrator has obtained relevantly the leave of the court and what we suspect is that there is a strong preference in the Bain contract for a DOCA rather than an asset sale because it will open the door – the DOCA will open the door to an application to the court under 444GA for the transfer of shares to the Bain group of companies.

And it's understandable that there is a preference for a DOCA on the part of Bain and on the part of the administrator because it then makes available an application under 444DA. Now, in advance of receiving the relevant parts of the Bain contract, as I say, will operate on the basis of Mr Strawbridge's paraphrase. If I could ask your Honour to go to the non-confidential affidavit of Mr Strawbridge of 14 August 2020.

HIS HONOUR: Yes.

MR JACKMAN: And if your Honour goes to paragraph 53 which appears under the somewhat argumentative heading, there is no utility in the relief sought in the ..... being granted. Paragraph 53 expresses an opinion that what is called the adjournment obligations means that there is no utility in granting the relief sought in our application. To see what that term means one has to go to the confidential affidavit, paragraph 11, and although we're deeply respectful of the confidentiality of this and I will respect the confidentiality that has been ordered and simply refer your Honour to paragraph 11 that sets out in paraphrase the adjournment obligation. And then if one goes to paragraph 54 of the non-confidential affidavit. Mr Strawbridge says:

> *That even if details of one or more alternative DOCA proposals, including my client's one, are put to creditors as proposed in our application and then included on ballot to give creditors the opportunity to vote on them, it would not, in practice, be possible for any alternative proposal to be approved by creditors at the second meetings. This is because if the Bain Capital DOCA is not approved the administrators are contractually bound to adjourn the second meetings and proceed to complete the transaction by way of the Bain Capital asset sale agreement.*

And then there's reference to there being a termination writing paper of Bain Capital. Now, what appears from that is that the DOCA is clearly the preferred course of action by both Bain and the administrator. There is something of a conditional asset sale, it would appear, the condition being rejection of the Bain Capital DOCA and an adjournment of the meeting which is why it all hinges in Mr Strawbridge's paraphrase on the adjournment obligation. Now, that central aspect of the conditionality of the asset sale is also its Achilles heel for two reasons. The first reason is that the adjournment obligation so-called is void and we've referred your

Honour in our written submissions in paragraph 46 to Barrett Js decision in McCurley v Drill Search Energy.

There's a slip in the second line of paragraph 46 where it refers to a meeting of company directors. In fact, it was a meeting of the shareholders. And the case concerned an advance agreement or commitment by the chairman of that meeting of the companies members to exercise the chairman's discretion in a particular way in relation to adjournments. And as Barrett J said:

> *One aspect of the requirements of good faith and proper purchase is that decision whether and if so how the power should be exercised can only be made upon adequate assessment of the relevant tax that may exist at the time of exercise. And advance agreement or commitment can not properly be made as to how the power will be exercised at some future time if the requirements of good faith and proper purpose are not observed, the purported exercise of the power is void by closing the advance agreement or commitment as to the manner of exercise is void.*

So with great respect to Mr Strawbridge, he's wrong to regard himself as bound by his advance agreement or commitment to adjourn the meeting and he's wrong again in paragraph 57 of his affidavit when he says as the person presiding at the second meetings "I will implement the adjournment obligation". Now, if Mr Strawbridge is to act lawfully in accordance with his duties as chairman he will wait until the meeting and consider all the facts that are before him at the meeting. He is simply not entitled to bind himself in this way in advance of the meeting in order to render the meeting – as he would seem to have it – a fait accompli. And we also refer in our written submissions, paragraph 47, to the true purpose of the chairman's powers to a meeting which are to facilitate debate. Not to shut debate down. Not to stifle debate. Not to ram something through irrespective of what the creditors may wish, but rather to facilitate a proport debate on these matters.

Now, once one recognises that the adjournment obligation is void and that any decision to adjourn the meeting will have to await the circumstances of the meeting itself, there is no reason for Mr Strawbridge's view that our application lacks utility. Rather, at the second creditors meeting when the creditors are being asked to consider the Bain Capital DOCA it is completely open to the creditors to resolve instead on a different DOCA. It's not open to Mr Strawbridge to close the meeting down just because he didn't get his way with the Bain Capital DOCA and any attempt to adjourn the meeting by reason of having contracted in advance to do so is void and a breach of his duties as chairman.

Now, once one gets to that position as a matter of law where the administrators cannot contract out of their statutory duties and nor can they subvert the clear language of the statue when it comes to the creditors approving an alternative DOCA – it's clear that that alternative DOCA, when raised by creditors, has to be able to be put to the vote and the chairman's powers must be used to facilitate debate on the relative merits of the rival proposals. Now - - -

HIS HONOUR: How does that, Mr Jackman, play through – assuming you're right that the chairman has to consider at the meeting what to do having regard to the conduct of the meeting and presumably also having regard to the – any particular voters to the conduct of the meeting that may be moved by anybody from the – usually I would say by the floor but, I mean, now virtually. So if the DOCA put forward by the administrators is not accepted by the creditors and there's a vote on that and it fails then what happens on that day. What's to occur?

MR JACKMAN: Well, what is to occur is that there will be a vote on the DOCA which we put up. Now, I'm going to come in due course as to how that ballot might be designed in light of the voting arrangements which have been necessitated by the pandemic, but there will then be – either before, at the same time or after there will be a vote on our DOCA. In reality it's all going to happen at the same time because creditors are going to vote in advance of the meeting. The US noteholders have to vote in advance of the meeting and voting is going to be open and encouraged on the part of other creditors before the meeting. They are going to have to lodge proxies three days in advance and at some point the ability of creditors to vote on the halo platform is going to be shut down.

Now, we don't know when that is going to be. Perhaps it will be due in the meeting itself. We don't know when that will be and creditors – in order to be certain that their vote is going to count – are going to have to vote in advance of the meeting which means a ballot which can be filled in by way of electronic voting in advance of the meeting which means the voting all happens at the one time. What we envisage is that there will be resolutions as to the entry into of the two alternative DOCAs and creditors will vote according to whether they prefer one or the other or neither and they will then lodge their vote electronically on the halo platform all before the meeting takes place.

Now, the chairman at the meeting will then have available to him those votes. And let it be assumed for argument sake that 30 per cent of creditors favour the Bain DOCA and 60 per cent favour my client's DOCA. It would be a grossly improper exercise of the chairman's duties as chairman to say well, I'm going to adjourn the meeting because I don't like the way you voted. Particularly in circumstances where it's this creditors decision, not his, as to which DOCA should be adopted and the creditors having approved the bondholder's DOCA – my client's DOCA on this assumption. One then moves to section 444B and so on – 444A, 444B, 444C – as to the legal consequences of the vote in favour of my client's DOCA.

The adjournment will simply neither come about and Mr Strawbridge's misplaced confidence that he has the whip hand because he can adjourn the meeting if the Bain Capital's offer isn't approved is simply wrong. Now, I should deal - - -

HIS HONOUR: If, Mr Jackman, the position is clear at law and the creditors accept it – that there actually has been a sale of the asset and it's not one after the other – so in other words the sale will go ahead irrespective of the DOCA that were put forward

by the administrators – or supposedly put forward by the administrators. How's that all to pan out?

MR JACKMAN: Well, I can't answer that question based – all I've got at the moment is Mr Strawbridge's affidavit where he says the Bain Capital DOCA is going to put up. If that sort of proves the meeting will be adjourned and then there will be an asset sale. The asset sale is conditional on rejection of the Bain DOCA and the adjournment.

HIS HONOUR: Well, assume that's not right.

MR JACKMAN: Well, I assume, your Honour - - -

HIS HONOUR: Assume that is not – now just play with me for a little while Mr Jackman. Assume that is not right. Assume that on the construction of the document there is an asset sale which has been completed and they want to go through the DOCA process. If they can't go through a DOCA process they don't care – in a sense of they would like it for probably the reason you have indicated, but as far as the legal document is concerned the asset sale will go ahead hell or high water.

MR JACKMAN: Well, then - - -

HIS HONOUR: What if that's the position.

MR JACKMAN: And I'm assuming also at the meeting that my client's DOCA has been approved by the creditors.

HIS HONOUR: Assume that for the moment.

MR JACKMAN: Then, 444C will prevent the company or the administrator from acting inconsistently with my client's DOCA.

HIS HONOUR: But it's not inconsistent because there has already been an asset sale on my hypothesis so that – and you accept that the administrator can have an asset sale – it's all over and done with and the condition is not a condition subsequent it's a – you can call it – sorry precedent. It's a matter of looking at what the asset sale agreement says, I must say, but if there wasn't any of these conditionalities that you're worried about and it was a complete asset sale, that's the end of it as far as that asset is concerned.

MR JACKMAN: But I'm – only on Mr Strawbridge's affidavit and it is not an absolute out and out fail according to him.

HIS HONOUR: Yes. Well that's what we've got to find out don't - - -

MR JACKMAN: The sale will only arise if the Bain Capital DOCA is rejected - - -

HIS HONOUR: Yes.

MR JACKMAN: - - - and we look forward to reading the terms of this agreement and I regret that I can't advance the argument at the moment given the constraints that we're under. Can I move on and come back to that when we do have access - - -

HIS HONOUR: Yes, of course. Yes.

MR JACKMAN: - - - to the agreement.

HIS HONOUR: And, Mr Jackman, don't misunderstand me. I understand the constraint you're under. I put it on on the basis of asking you to assume something for the purposes of argument.

MR JACKMAN: Yes. Now, if your Honour goes back to our written submissions - - -

HIS HONOUR: Yes.

MR JACKMAN: I just want to deal a little more with the basing procedure and the way in which the circumstances can be best brought into line with the regulatory statutory provisions. Paragraph 40 summarises the framework for the conduct of the second meeting of creditors according to the insolvency practice rules. We will draw attention to the rule of attendees of the meeting must be permitted to propose any relevant resolutions, reasonable time to debate proposed resolutions or amendments to those resolutions must be allowed and those resolutions must be put to a face at the meeting and it's incumbered upon the administrators to include with the notice of the meeting the details to any preposed DOCA.

Now, there are, of course, changes to the way in which that will operate in light of the orders that your Honour made last week whereby voting is going to be byway of ballet on the Halo system – it will have had commenced before creditors receive the report at creditors and the US Note/Bondholders, Mr Orr, says in paragraph 24, "we'll all have voted in advance of the meeting and other creditors, they're going to be encouraged to vote before the meeting and, at some point, that voting is going to be cut off. We don't know precisely at what point."

Now, the fact that voting is going to be taking place before the meeting, is what drives us towards the procedures that we outline in my interlocutory process, whereby there will be a ballot which we include both our DOCA and also the Bain Capital DOCA and there will be sufficient information and opportunity to debate for rival merits of those proposals in advance of the meeting at the time that people are being called upon to vote. Now, we do say in our interlocutory process, that there should be a fair opportunity in the ballot for creditors to vote in favour of any of the DOCA proposals – that's paragraph 1G – and – I'm sorry, in the short minutes – draft short minutes, it's paragraph 1G and we hadn't been prescriptive as to what that fair opportunity would involve but we have some examples which are collated in Mr

Cheatham's affidavit of this morning, which I want to take your Honour to if your Honour has Mr Cheatham's affidavit of 17 August.

HIS HONOUR: Yes.

MR JACKMAN: The relevancy in paragraph 5 that Mr Cheatham agrees with Mr Strawbridge that it's rare for competing DOCAs to be put to a meeting of creditors, however, in circumstances where it does occur, administrators generally include an assessment of a non-recommended DOCA or DOCAs and they report the creditors ahead of the meeting and tell them the comparison of the estimated return to creditors and include the competing DOCAs on the proxy form for voting and allow the base in discussion at the meeting and allow resolution of creditors for the approval of the non-recommended DOCA to be put to creditors.

Paragraph 7 refers to the research undertaken by Ms Everie of 11 administrations where that process was undertaken and was very helpful schedule which appears just after the text of the affidavit clearly on page 4 and one model is the first one that is the Westbus Administration, where your Honour will see ..... for the administrators. Not Mr Strawbridge, it was his colleague, Mr Loam, and the administrator's recommendation from the second column was for a DOCA in the terms proposed by NBC. There was a rival DOCA proposed by Transmode and your Honour will see in the right-hand column that the resolutions were put to the meeting and then the order of the Transmode DOCA, which was not recommended, and that was defeated by the majority and then the NBC DOCA was proposed and that was carried and ..... went about the task we would submit in an exemplary fair-minded way, putting the non-recommended one first to allow a proper opportunity for debate and decision making before putting their own proposal, which they recommended. And another model is in item 2 on page 5, the JB Financial Group, where ..... were the administrators and your Honour will see in the second column, the administrators recommendation was in favour of a Dabong DOCA and in the right-hand column, there were, in fact, three DOCAs proposed for that meeting.

The first one proposed was the shareholder DOCA; that failed. The next one was the Lonrow DOCA; that failed. And the next was the Dabong DOCA, and that was carried; once again, the administrators putting their recommended DOCA last on the list. And a third model is on page 6, the Baseline Constructions Administration and your Honour will see in the middle column the relevant resolutions on the proxy form was set out. There were two DOCAs being proposed and the resolution was that the company execute one of the following deeds of company arrangement. Now, there are various ways of doing it but in our submission, the minimum which is necessary is that the ballot which is going to be taken before the meeting must include our DOCA, and there must be sufficient opportunity for discussion and debate in advance of the meeting given that the votes are going to be made before the meeting takes place for the – a very limited – extremely limited opportunity at the meeting and, we're also told, that people won't be able to change their votes at the meeting, so they won't be able to be persuaded by what is actually put at the meeting, so they will set out – you know, and properly process what we regard, as

being a fair impartial way for creditors to be informed and make an informed decision on the rival proposals.

HIS HONOUR: Mr Jackman, can I just pick you up on the – so I fully understand where we're at as far as the voting at the meeting – I take it, from what you have said, you accept the reality that – in fact, I think you embrace it, and hence want this way in which to be able – you want us to proceed, that a lot of the work will be done before the meeting; a lot of the debate, a lot of the working out which way people are going to go will be done before the meeting.

MR JACKMAN: Yes.

HIS HONOUR: The second thing is, though, that there is, as I understand it, there will be an opportunity if someone wants to, at the moment anyhow, to vote at the meeting, they can do so.

MR JACKMAN: Well, maybe – well, we don't really know. We have to go – all we have got on that, is Mr Orr's affidavit, if I can take your Honour to that. It's an affidavit of 6 August, that was made of the orders as to the recent procedure.

HIS HONOUR: Yes.

MR JACKMAN: And if your Honour goes to paragraph 20?

HIS HONOUR: Yes.

MR JACKMAN: Sorry, it really begins at paragraph 16. Paragraph 18 then amputates on the issue and with the report to creditors resolutions will be put to creditors through the Halo platform as a voting event. Paragraph 20, once the vote has been submitted it can't be amended, except by request to the administrators. Ms Merrick's affidavit refers to a draft protocol, which is somewhat more strongly worded. Then, paragraph 22:

> *The Halo platform was intended to allow creditors to vote in advance of the second meetings, up until the time the voting has been disclosed by the chairperson at the second meetings.*

But we don't know when in the meeting that's going to be.

HIS HONOUR: I think I took that – I remember that passage. I took that to be that the voting event would at least continue until the meetings were held. So whether it's half an hour into the meeting or one hour into the meeting, but I assume it would be at the time of the meeting whether that's 4 September or whatever date. That's what I took that to be, I must say, but we can get that clarified.

MR JACKMAN: Yes. Well, it reads as though it will be some time during the meeting, but we don't know when. But the creditors don't know when either. So the

creditors are going to have to vote in advance of the meeting if they want to have a practical certainty that their vote will count. Otherwise, I don't know when the cut-off will be.

HIS HONOUR: Yes. But you don't complain about – besides the definition of voting event, and assuming it's going to be some time during the meeting – the reality is – and I assume you don't complain about this, and this is, I assume, why we're here. But all the important activity and all the intellectual debate and intellectual thinking is going to occur the meeting starts, effectively.

MR JACKMAN: Quite. Quite. That's why the ballot must include the rival proposals.

HIS HONOUR: Yes.

MR JACKMAN: And that it will all take place before the meeting.

HIS HONOUR: Yes, all right. And I just didn't want to have – there to be any debate about what actually happens in the meeting, because I think we have to try and live in the real world. Putting aside the issues that have risen because of the pandemic, these problems arise without that particular issue, because you may have large companies that have general meetings that are – have so many people that, really, the reality is that a lot of it's done by informing people before the meeting. It's not a new problem, I must say.

MR JACKMAN: Well, anyway. There are some key differences between this Halo platform and ordinary meeting procedure. We're trying to work within those parameters for the Halo platform. But we don't want the Halo platform to be the occasion for us to be shut out of a fair opportunity to put out proposals.

HIS HONOUR: No.

MR JACKMAN: And ultimately, we embrace what your Honour said in your Honour's judgment number 5 which was quoted in our written submissions at paragraph 15. That:

> *It's important proper preparation be made for the meeting which will require the administrators to be full and frank with creditors, to provide special information to enable creditors to make an informed decision on the matters for resolution at the meeting. If a creditor needs more time to consider their position, it could be a reason to adjourn. If special information is not provided which is material, it could be a ground for the court later terminating the DOCA.*

And we agree, neither of those scenarios is desirable, and we're seeking to avoid the prospect of an adjournment of that creditors meeting or a subsequent legal challenge. We don't shrink from the possibility that if we're denied a fair opportunity now of

putting our alternative proposal, then those eventualities may come about. But we share the desire for a timely resolution of these controversies and the desire to avoid, if possible, challenges down the road or adjournments of the meeting.

Now, there are a number of other issues which have been raised by the administrators which, in my submission, could never be proper reasons for shutting us out of putting a proposal arranged from matters, such as doubting the bona fides and the financial wherewithal of my clients, which we've gone to pains to demonstrate is ample for the purpose, to complaining that we didn't participate in a timely way in the bid process for an asset sale. Now, we deal with those matters in our written submissions. Can I draw your Honour's attention to the particular places where your Honour will find that material.

In our written submissions in paragraph 30 we summarise the evidence which your Honour has on a confidential basis from Mr Gupta and Mr Wong. The first thing they address is financial capacity. And then in paragraph 30(b), they deal with the structure of their proposal, being a DOCA rather than the administrative sale process. Proposition C refers to the way in which my clients were hampered by insufficient access to due diligence materials, and proposition D refers to the evidence about my clients devoting time and resources to the development of their proposal. And then, if your Honour goes through to paragraph - - -

HIS HONOUR: The all simple point about that, is it's all irrelevant as to whether you can put a alternative DOCA proposal. You could have come along at any time, and you've got to persuade the creditors it's a good bargain. Doesn't really matter whether you – I take this is with your submission – doesn't really matter whether you're involved in the sale process or not, or how it was conducted.

MR JACKMAN: Right.

HIS HONOUR: You have still got a right to put a DOCA, and off you go.

MR JACKMAN: Right. And we rely upon that statutory right. Your Honour will see in paragraph 51 that we've summarised what we regard as being Mr Strawbridge's purported justification for opposing the procedures that we set out in our interlocutory process, and we deal with those one by one in the following paragraphs, going through to paragraph 56. And, I will take those as read, if I may, and assume that your Honour has had an opportunity to ..... - - -

HIS HONOUR: Yes.

MR JACKMAN: - - - that material. None of that in our submission is a reason for denying us the opportunity to fairly put our proposal, with a procedure along the lines as we have submitted. When – I will part if I may, any more detailed submissions, on the Bain contract and its proper construction. I'm not sure quite where Bain is up to in terms of the delivery of that document, but I'm told we

haven't received it yet. Can I just draw attention to the draft for units of order, which we have provided. I hope your Honour has a copy of those.

HIS HONOUR: I do.

MR JACKMAN: There's been a slight tweak to a couple of the dates, given that we're debating this today, so that we have amended the date in order 1A to Wednesday 19 August. In order 1C, we've amended the date to 27 August. As I say, in order 1G, we haven't been prescriptive as to the form of the ballot paper, but I've drawn your Honour's attention to several models which have been used in the past, including by Deloitte. And, we haven't put in the name of the facilitator. We've proposed Mr Joseph Hayes, and as we understand it, there's no objection to Mr Hayes being appointed as the facilitator. If your Honour is otherwise minded to make the order, but I will stand to be corrected if there is some objection that we haven't heard about in that regard. And so, as I say, for argument about the proper construction of the agreement when we receive it – unless there is anything further on which I can assist your Honour, those are our submissions.

HIS HONOUR: Just looking – thank you, Mr Jackman. Just looking at your proposed orders, if we didn't go with a facilitator, you can still have your orders that may facilitate what you want in 1A to G, by taking away the facilitator.

MR JACKMAN: Yes.

HIS HONOUR: The reason I say that is that, just in the last few days, people have progressed a great deal with information. There's going to be a lot more information out in the next few days, and then – what is it, I think it's 25 August, is going to be the report which I anticipate may have even more, more information, that including all the confidential agreement, you see. So, I will hear Dr Higgins about this and Mr Peters. But if I saw some utility, or some benefit in setting this sort of process that you have in 1A without the facilitator, what – would you have anything to say about the form of order? That would work, wouldn't it not?

MR JACKMAN: Yes. 1(a) to (g) would work even without the facilitator.

HIS HONOUR: Yes.

MR JACKMAN: One consequence would be that our DOCA would be more conditional than a rebuttal, than it would otherwise be, and although we do look forward to reading the report to creditors it almost certainly won't descend to the level that we would need to descend to on a due diligence exercise. Essentially, what we're trying to do is to resolve upfront, before the vote is taken at the meeting, as many of the issues as we can rather than having issues lingering after the meeting.

But as your Honour is quite right to observe that 1(a) to (g) could work without the facilitator being appointed, but it would not be nearly as desirable or as efficient, or as timely in the long run as making the orders for the facilitator as well.

HIS HONOUR: Well, you will know quite a lot about the proposal, putting forward. You know of course what your proposal is because you can put forward out as much detail as you want to put forward and there's no reason why you can't put out something, I assume there's no reason you can't put out something, an independent document or try to persuade the creditors to your point of view .....

MR JACKMAN: Indeed. One thing we would like to avoid if possible is having to make multiple applications to your Honour for access to information in the run up to the vote. And we had envisaged the facilitator as a rather more efficient way of dealing with those difficulties in getting access to material rather than troubling your Honour about it.

HIS HONOUR: Well, and I'm grateful, Mr Jackman, but it's where I started from at the beginning of the day. The creditors will need to be informed pretty much about everything that the sale is about, which is the real issue. So we may just have to wait for 25 August when the report comes out and if there's a complaint about that I will have to deal with it I suppose.

MR JACKMAN: Well, there may or may not be a complaint about the report to creditors, but the report to creditors won't give my clients what they need by way of due diligence. What my clients need is access to the data room, which is the books and records, detailed books and records of the company, and we need the ability to speak with third parties, including company management and some of the creditors to the company.

HIS HONOUR: What gives you the entitlement to get into that sort of cross-examination and detail before the next meeting?

MR JACKMAN: ..... Well, it's ordinary due diligence which we can either do before we've prepared our DOCA or we can do it afterwards, protected by conditions subsequent. But before one binds oneself to a transaction of this magnitude one needs to know exactly what the position of the company is and what management of the company regard as its near-term prospects in relevant respects.

HIS HONOUR: Well, I think the creditors can work all that out, can't they, based upon the information you say insufficient, but I'm not entirely sure that the due diligence in the way in which you want it needs to be done, or should be done in the way you want it before the meeting. But anyhow, I will think about that.

MR JACKMAN: Well, it's certainly an opportunity which Bain Capital have availed themselves of, and one doubts very much that the Bain group have put forward the transaction that they ended up putting forward and are currently agreeing to, without having done conventional due diligence in the data room and with the company's management.

HIS HONOUR: But that was a sale process though, wasn't it, Mr Jackman? We're talking a different environment now.

MR JACKMAN: We are talking a different environment but what we're trying to do is to proceed as efficiently as we possibly can and propose a rival transaction with as few conditions as possible. But if it be the case that we're shut out of access to this material, then our proposal will just have to be more conditional than it would otherwise have been.

HIS HONOUR: Yes. I understand. I think that's understandable.

MR JACKMAN: And we will postpone to a later date and conceivably the controversy that surround the relevant information.

HIS HONOUR: Yes. All right. Thank you. Sorry, Mr Jackman, one other thing which is on the agenda I think was this request; yes. So it's in the order that any – it's order one of the plaintiffs about which we put off to today that the proxies, without the written – express written consent of the administrators, cannot be amended. We left that to a debate today I think.

MR JACKMAN: Yes.

HIS HONOUR: You don't think that's too draconian?

MR JACKMAN: Well, it is draconian. It's not only draconian but it gives the administrator a power of veto over the creditors votes, which is wholly inappropriate, and there's no evidence which justifies it or comes close to try to justify it, in our submission.

HIS HONOUR: What would happen in the normal course of events if I have a – if I give a proxy and I turn up at the meeting then the proxy just lapses, that's the first, in the normal course of events, as I understand it, if I give a proxy until the vote is taken I think I can also – I can withdraw it; can't I?

MR JACKMAN: Yes.

HIS HONOUR: As long as I notify, before the vote is taken, the chairman. I can't remember the law in the normal situation, the chairman, whether he has the discretion to allow the withdrawal.

MR JACKMAN: No.

HIS HONOUR: I would have thought if a withdrawal is given properly then it's withdrawn, it's not a matter of the chairman to decide that, that's my instinct.

MR JACKMAN: That's our submission, yes.

HIS HONOUR: Yes. So what happens – that's in a normal situation where you've got a normal meeting and everybody is there and everyone can see what's happening,

actually see, one on one, here though we all seem to accept that nearly everything is going to be done before the actual meeting.

MR JACKMAN: Yes.

HIS HONOUR: So – and it's probably unlikely that anyone is going to try and amend or replace, just having regard to the players that we have, and stakeholders. But if we didn't have this particular clause, which I do, I must say, have some worry about, the chairman could – would – may have to rule upon whether a proxy is acceptable or not if someone wants to amend it, and that would be up to the chairman to rule that anyhow and that would be of course if he made the wrong ruling reviewable; but that's how it would work, wouldn't it, Mr Jackman?

MR JACKMAN: Yes. But in the present case the chairman may be conflicted in that regard because he regards himself as being duty bound in certain ways to Bain to conduct the meeting in a particular way, so it's not going to be for Mr Strawbridge to kind of prearrange in discretion, which it ought to be.

HIS HONOUR: Well, if I don't make any order along the lines of what is sought then someone has to make a decision about proxies if there is an issue about it, and that would normally be the chairman. So we can't take that away from him, no one is suggesting that Mr – that he shouldn't be chairman on that. So when I say "no one is suggesting" there's no application before me that he shouldn't act as chairman.

MR JACKMAN: No, no. But his written consent to someone changing their vote shouldn't be required.

HIS HONOUR: No, no. I'm pretty much with you on that, Mr Jackman, at the moment. So subject to Dr Higgins telling me that I wasn't going to make this order, but what I was saying is that I don't make that order, the reality is that it's a matter to be determined at the meeting if there is a change, and the person that makes that determination is normally the chairman as I understand it, and I think you agreed with me that's the normal way.

MR JACKMAN: That – yes.

HIS HONOUR: All right. Well, I think that that's how I – I will speak to Dr Higgins about it but that's how I thought it would pan out. I don't envisage this to be a real problem I must say, but it may be with individual, smaller shareholders, but let's see. All right. Thank you, Mr Jackson.

MR PETERS: Could I give your Honour an update on the disclosure process?

HIS HONOUR: Yes, Mr Peters. Yes.

MR PETERS: We're about to send the document, it's only a minute or two away as I understand it, I might be wrong, but I just wish to confirm the basis on which it's

being sent, your Honour, and we're all in agreement, there's no need for an order at this stage. It's an order in the form that your Honour has made previously, but to the effect that the disclosure of the document in the form provided to the legal representatives, to Broad, Peak and Tor, be kept confidential and be prohibited from disclosure to any person other than your Honour and your Honour's staff, the plaintiffs and their legal representatives, my clients obviously, and the Broad, Peak and Tor legal representatives. That shouldn't be controversial but I just wanted to check.

HIS HONOUR: I have and it's fine. You're happy with that at first instance, Mr Jackman, that you get hold of in your legal team.

MR JACKMAN: Yes, your Honour.

HIS HONOUR: All right, thank you. Would you mind also getting your solicitors to send through the form of the document you send to Mr Jackman to my associate.

MR PETERS: Yes, your Honour. In effect, your Honour, it will be the sale implementation deed and schedule 6 which is the asset sale agreement.

HIS HONOUR: All right. I'd just like to have the exact form of what you've deleted so I don't make any mistakes.

MR PETERS: Thank you, your Honour.

HIS HONOUR: All right, thank you. All right. Yes, Dr Higgins.

DR HIGGINS: Your Honour, I note the time. Is it convenience to begin after lunch or does your Honour wish me to commence and then resume.

HIS HONOUR: Well, I think if we're happy to go a bit longer because we've got the other application of Wells Fargo at 2.15. I know they're all connected but let's go a bit further and - - -

DR HIGGINS: Yes, your Honour.

HIS HONOUR: - - - try and identify – how about we go for half an hour – let's go to 1.15.

DR HIGGINS: Yes, your Honour, if it please the court.

HIS HONOUR: All right. With – can I – can I may be – Dr Higgins I don't want to cut you off from anything you want to say. Let's get all the sum issues and see if we can get them out of the road. Paragraph 1 of your applicational orders about what I was just talking to Mr Jackman about written – express written consent. I'm not happy to make that order I must say Dr Higgins. It seems to me that it could be left

to the chairman at the time to make a decision about what to do with anyone who wants to amend or replace.

DR HIGGINS: Your Honour, can I indicate – I understand the indication your Honour has given. Can I explain the reasoning and the felt - - -

HIS HONOUR: Yes.

DR HIGGINS: - - - necessity for the order. The order is intended to respond to the prospect of changes in special proxies that are lodged before the meeting on the halo platform. It would not affect persons who launched general proxies. And the concern, your Honour, which is identified in the affidavit of Mr Orr of 6 August 2020 at paragraph 20 is that the halo platform does not straightforwardly permit changes to votes after they've already been lodged. So it is a focus upon special and not general proxies in the first instance but, your Honour, in addition to that there is a concern about the large volume of creditors potentially seeking to change their vote. It is directed at a problem of volume that might arise in the operation of the platform. It's not meant to confine or constrain it's meant really to deal with mechanical and logistical and scale issues that might arise on the day by reason of the technology.

HIS HONOUR: What's the – the proxy lodgement date could you just remind me how earlier that is before the meeting.

DR HIGGINS: I believe, your Honour, that it's five business days before the meeting.

HIS HONOUR: Yes that rings bells, I think.

DR HIGGINS: I will have that confirmed but that's my recollection your Honour.

HIS HONOUR: How do we deal with a situation where someone genuinely wants to change their mind and – either by mistake or reflected because they have had more discussion with someone. How do you deal with that problem?

DR HIGGINS: Can I – before answering that, your Honour, can I clarify that the proxy lodgement date is the third business day before the said meetings.

HIS HONOUR: Yes, all right.

DR HIGGINS: Can I correct that earlier answer. And the short response to your Honour's question is that a genuine change of mind – the creditor would be required to ask the administrators for their consent to effect a change on halo. So that request would go to the administrators and would be considered and would be granted if appropriate. So there is a mechanism in a circumstance of genuine change of mind that the administrators would separately deal with while trying to control the volume issues on the platform.

HIS HONOUR: If – all right.

DR HIGGINS: The gravamen of the order, your Honour, really is directed at a technological burden.

HIS HONOUR: I understand that. We can't replicate exactly what is going to happen at a meeting where there are a limited number of people actually present in a room and things could be done that way – this is quite a different circumstance but at the same time I've got to keep in mind the principles that relate to proxies and the principles that allow people to amend or replace them before the actual vote has taken place. But I understand the practical administrative problems and they're important also because if they're not looked after the meeting won't be conducted in an appropriate manner. So - - -

DR HIGGINS: Yes, your Honour.

HIS HONOUR: - - - there's attention – there's attention - - -

DR HIGGINS: Yes, your Honour.

HIS HONOUR: So. All right. Well, I will come back to that. I thought that would be the easiest thing to deal with, but it obviously turned out not to be.

DR HIGGINS: Yes, your Honour. And over the lunch adjournment, your Honour, we will turn our mind as to whether there are changes that could be made to that order that might ameliorate the concerns your Honour has while achieving the outcome that the administrators seek to achieve. We understand your Honour's concern.

HIS HONOUR: It's the express written consent I – is what I'm worried about. There may be another – I would be obliged if they'd think of some other way in which to deal with your technical problem, which I fully understand.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: Thank you. Now, let's just go to the suggestion I made to Mr Jackman. I'm not in favour of a facilitator having regard to ..... So I heard what Mr Jackson has said and I've carefully considered his submissions about that but I will not be using a facilitator so – but I do think, in the circumstances we've now arrived at – and the reality is that another DOCA proposal is going to be put forward by Mr Jackman's client, that's their intention and they're clearly hear today to make sure that that facilitated as the best possible way for them. Now, that doesn't cut across any of the submissions I thought you'd made, Dr Higgins, you say you're not obliged – or your clients aren't obliged to put up an alternative DOCA proposal but it doesn't stop someone else from putting up another one. And - - -

DR HIGGINS: Yes, your Honour.

HIS HONOUR: And everyone knows that I'm trying to quell disputation as much as possible. I don't think – I'm not going to quell all disputation but let's see how far we get. So you may like to think about (a) to (g) over lunch too, but they seem to me – if you take away the facilitator – that they would be a useful mechanism on which to inform creditors and it at least puts a schedule in and would, in fact, assist your clients, I think, as to knowing exactly what the schedule is as to what people have to do at a certain time. So you may like to get instructions on that if you would.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: This is just a matter between you and Mr Jackman. I don't think Mr Peters necessarily has any interest necessarily – indirect interest in this particular matter. He's saying he doesn't by shaking his head in a negative way. So it's just the two of you, I think. All right. So where are we up – what else do you need to talk to me about, Dr Higgins.

DR HIGGINS: Your Honour, can I begin with another proposal that you made to Mr Jackman towards the end of your discussions with him which was "why not wait until 25 August". Now, with respect that is what your Honour said on the last occasion that Mr Jackman's clients were before the court. We have already disclosed more than your Honour contemplated by way of confidential information to seek to facilitate this hearing. Mr Jackman says he doesn't want to bring multiple applications before your Honour for confidential information but that is precisely what this application is. It is an application in advance of the time your Honour indicated on the last occasion seeking more information.

The administrators have been very clear that there will be full and frank disclosure in the report to creditors consistent with your Honour's indication on the last occasion. So we say that is the wholly appropriate course and one that this application ought not leapfrog. There is, your Honour – and this relates to where your Honour began today's hearing and it overlaps a little with your Honour's proposal at paragraph (a) to (g) of my learned friend's orders being made. At the very heart of this application is, as your Honour understands, a question of construction as to whether or not the assets have, in fact, already been sold. Now, if that is the case – which we say it is and which Bain says it is and Mr Jackman will soon have an ability to appreciate – we do say it circumscribes what can meaningfully happen at the second meeting of creditors. And the administrator do not acquiesce in a state of affairs which appears to put options before creditors that are not genuinely before creditors.

HIS HONOUR: And I understand that, and I accept the submission to a certain extent. But then it seems to me though, is it really for me to discount something as not being any utility, when really that should be a matter for the creditors, as long as the creditors are properly informed. Now, it seems to me that if you summarise all the submissions before me in the material, that is a good way to inform the creditors. I mean, I'm not telling the administrators how to inform the creditors. It's entirely a matter for them, and they take the consequences. But all the points you will make,

you will make for the creditors, won't you, in the argument as to why they should – in this case, your opponents should be discounted.

So the creditors will have the proposal put before them, all the arguments as to why they should vote in favour of the DOCA your clients are proposing, and Broad, Peck and Tor's DOCA will have all the arguments in favour, and then they will make up their mind. And as long as it doesn't turn out – I don't know if I should use this example, as a breadth example where people are not informed, and things may go off the rails. If they are properly informed, hopefully it's the right decision we made. And isn't that what this is all about? That is why it's a democratic vote, informed democratic vote guided by the administrators because they do have a role to play. So it just seems to me, to be left that way.

DR HIGGINS: Your Honour, with respect we said as well - - -

HIS HONOUR: Right.

DR HIGGINS: - - - the administrator's position is that they have always intended, and will identify and commit on the existence of an alternative DOCA in the reports to creditors. The proposed orders in the course, your Honour, proposes it's problematic with respect to because the alternative DOCA we seek cannot successfully be voted up by creditors. It cannot ever successfully be completed, and that is because the assets have been sold, your Honour. Now - - -

HIS HONOUR: But can't you – isn't that exactly what you could tell the creditors? Why do we need to do that – you will put forward your – the administrators will put forward their DOCA. They will put forward a report to say why it's good. I assume if there's another DOCA put up by someone else, they will comment on that in the creditor's report. Why does that tie the hands of the administrators?

DR HIGGINS: Well, what would tie the hands of the administrators, your Honour, is any orders that seeks impermissibly to settle the manner in which the chairman of the second meeting conducts those meeting. That we see is what our learned friends really seeks. We see it's not the will of the court to do that, and we have addressed that, your Honour, in our supplied submissions which your Honour should have received this morning.

HIS HONOUR: Yes, I have.

DR HIGGINS: At paragraphs 5 to 7.

HIS HONOUR: All right. Let me have a re-read. I did read those, this morning. What I suppose is that I do understand that point, Dr Higgins. But what I probably don't understand and you need to inform me, is that if I'm a creditor and I want to put a DOCA in, then I think we've passed the point of saying, "I've got a right to do that." So I think we all agree that that is to be done. So presumably, if I did that in a normal way, the administrators would – if they've got an alternative DOCA they

support, would have to comment on my DOCA, and would say that it's not as good as the one they're proposing. So that's going to happen anyhow, isn't it? That is going to happen in this case, that the alternative DOCA is going to be commented upon by the administrators.

DR HIGGINS: Yes, your Honour, can I clarify this. As your Honour appreciates, we do not accept there's a statutory right to put forward an alternative DOCA, but we do accept that a person can propound a DOCA, and it is the case that the administrators will comment upon the Broad, Peck and Tor DOCA if it is advanced in the reports to creditors. What causes a difficulty is the treatment of that DOCA at the second meeting of creditors, in circumstances where the administrators' position is that they have sold the assets in any scenario. And as your Honour understands, the whole of the DOCA in this case is only to seek to procure a better return to creditors. It does not change the circumstance that the business has been sold.

And were the DOCA to be voted down, the asset sale would occur anyway, and that is the concern the administrators have because if we are right, your Honour, about procedure and construction, what would happen at the meeting is that the Bain DOCA would be put in the ballot and would be voted on. The administrator cannot, we say be compelled to put the Broad, Peck and Tor DOCA on the ballot. That would impermissibly fetter their statutory discretions as administrators. If the Bain DOCA is voted up, that will be the end of it and there will be a better return to creditors on the asset sale. If the Bain DOCA is voted down, Mr Strawbridge will then adjourn the meeting, consistent with his power conferred by section 75-70 of the IPR, in order to negotiate – rather, in order to conclude the asset sale. So there's not a circumstance in the procedure as we understand it, your Honour, for the bondholder DOCA to be voted on at that second meeting. It's seeking to avoid the impression that that could occur that we're interested to avoid.

HIS HONOUR: Well, can I just unpack a few of the things you said. When you say "propound a DOCA," the – are you saying simply that the administrators do not have to propound alternative DOCAs, even one put up by – let's say by Broad, Pec and Tor. Is that the point – the first point?

DR HIGGINS: Yes, your Honour.

HIS HONOUR: The second point though, that if I was a creditor, I could put forward my own DOCA at the meeting.

DR HIGGINS: Yes. Yes, any party can at the meeting, your Honour. Yes.

HIS HONOUR: So we can do that.

DR HIGGINS: Yes.

HIS HONOUR: All right. Well, then why – I don't understand then, why I'm tying the hands of the administrators who will conduct a meeting. I'm not thinking, at the

moment, of doing any directions about the conduct of the meeting. All I'm working out is that if there's a resolution for – if there's a proposed resolution, it be organised in this way. You say that that is somehow directing the administrators to do things prior to the meeting. Surely, I can do that.

DR HIGGINS: Your Honour, I didn't catch I think for – didn't catch all of that, your Honour.

HIS HONOUR: Yes. Sorry, all right. So at the meeting, clearly the administrators at the actual meeting, have to have a certain amount of discretion and they should run the meeting without a court looking over their shoulder all the time about that. So I accept that, for the moment. But the orders 1 to (g) are preparatory, in a sense, to the meeting where the reality is we know that a proposal is going to be put for a second DOCA. Not by your clients, but by someone else. So why shouldn't we, in the circumstances we're in, make an orderly preparation for that? That's all. That's all I'm trying to do.

DR HIGGINS: I think – I thank your Honour. I heard all of that, and I understand what your Honour is putting to me. We agree that an alternative DOCA can be put. It need not be recommended or endorsed by the administration that will not be – what our concern is, is that that alternative DOCA cannot succeed because the assets have been sold. And it is that circumstance that creates the futility and the difficulty of purporting to present it under that assets to creditors.

HIS HONOUR: Well – and I understand what you're saying about that, but also as I understand it – I don't think we're trespassing anything that was confidential on this case, is that there's two avenues. There is if the DOCA is approved, and the administrators wanted to go through. That is the preferred course of conduct of Mr Peters' client and the administrators, and is proposed to be as I've said, in the best interests of all the creditors. But that may not occur, and if it doesn't occur then the sale will go through – will still go through on your construction, but there are different consequences presumably which arise and they have to be thought out. So isn't there a utility in working out whether or not the creditors want it to go through as a DOCA or whether they say well, don't worry about that. We don't want this DOCA. We may not even want any DOCA. They may not approve any DOCA. That's another alternative.

DR HIGGINS: Yes, your Honour. What we say is that the truth of the circumstance at the second meeting is that if the Bains DOCA is not approved, as your understands and we will adjourn the meeting. So really the true choice that confronts creditors at the second meeting is does the sale complete by way of DOCA or asset sale agreement once the creditors have a full understanding of the benefits and detriments of each of those courses. And we say because of the exercise of the statutory power of sale by the administrators would have occurred that is the totality of the choice that confronts the creditors and we are reluctant to pursue any course that suggests otherwise.

HIS HONOUR: Well, if you're worried about misleading the creditors, if everything is put out as clearly as can be about ..... then there's no misleading of creditors, is there. You've told them that this is the reality and you have to understand this reality, and the only question is whether that's right or not, but hopefully the agreement sets that out clearly, and so you can't mislead them. All you're doing is informing them and if they come to the same conclusion you were pressing upon me then everybody from your camp and from Mr Peters camp is happy. But the process has gone through in an appropriate way, I think, if I must say, without impinging too much on the administrator's role and their responsibilities. Anyhow - - -

DR HIGGINS: Can I clarify, your Honour, it may be that the precise details of what your Honour has in mind matter. Your Honour referred to the process. At the heart of the issue I'm raising is that an aspect of that process cannot be more than one DOCA being on a ballot.

HIS HONOUR: I see. All right. So that's the issue you're concerned about.

DR HIGGINS: Yes, your Honour. We accept that our learned friends can propound a DOCA. We will discuss it in the report to creditors. We will not endorse it. But we say we also cannot purport to present it as an option to creditors in circumstances where the truth of the choice creditors confront is, does the sale which has occurred complete by way of DOCA and preferential terms are by way of asset sale on more detrimental terms.

HIS HONOUR: Well, then I don't understand this and you may need to enlighten me. If I'm a creditor though, haven't I got a right to put a proposal resolution of any kind with the creditors meeting, which, if I get sufficient support, whether it's a second or whatever, needs to be put to the meeting or am I missing something. That's what I thought we're dealing with here where, as Mr Jackman's client will propose something, they will get some support and then it has to be put to the meeting. That's what I thought would happen. Nothing to do with the administrators in that sense other then they have to deal with it because they're chairing and running the meeting. But am I missing something, Dr Higgins?

DR HIGGINS: I do believe so, your Honour, but if I'm stuck against the central issue of what your Honour began of have the sale occurred and the reality of the position as we addressed in our submissions-in-chief is that the exercise of the proper exercise of the administrators powers of sale can ..... the options that are available to creditors at a second meeting. And your Honour has, in our submissions, both the extract and decision of Barrett J in Keystone and in Tane, and also in our reply submissions the decision of White J, as his Honour then was, in Carter v Global Food Equipment Pty Ltd.

HIS HONOUR: I'm working on the basis that's the correct matter and that's why I started we have to work out what the sale agreement says. But if that's right, I don't have a problem whether it's the landscape that has to be accepted before the meeting.

So I don't have a problem about that but all I'm saying is accepting that's the landscape someone is also entitled to put forward a resolution which has to be dealt with and that will be dealt with at the creditors meeting; that's all I'm saying. So if there's a resolution put forward that's inoperative and leads no where then that can be voted on and dealt with at the meeting, can't it? And you just tell all the creditors that's the case.

DR HIGGINS: It depends, your Honour, on the nature of the resolution under the circumstances of the meeting and that is for this reason. As your Honour likely understands, because of the adjournment obligation to which Mr Jackman referred and which we say is not void for the reasons against why in our reply submissions at paragraph 570, by reason of that obligation and pursuant to section 75 70 of the IPR if the Bain DOCA fails the meeting will be adjourned. Now, there may be other resolutions properly put at the meeting but there could not, as the contractual arrangement stand, be a circumstance in which the Bain DOCA fails and an alternative DOCA is put up and that is by reason of the adjournment obligation, your Honour.

HIS HONOUR: Well, the adjournment – I can understand the adjournment obligation. What Mr Jackman says which I must say as a statement of law would seem to be correct, you can't have a chairman and an administrator fetter his or her discretion at a meeting and chairing the meeting. So I thought you were putting that this wasn't – what has been agreed with Bain isn't doing that other than saying the actual consequence is there's nothing else to do but adjourn. It's fettering but not the administrator fettering, if you know what I mean. That's a typical balance. But let's put it this way, if the meeting decided not to adjourn, let's say some of them said they don't want to adjourn, what would happen? There would be a vote on whether you adjourn or not.

DR HIGGINS: Your Honour – your Honour, can I ask if you hear me.

HIS HONOUR: Yes.

DR HIGGINS: We have a strange symbol on our screen. Your Honour, the short in answer to your Honour's point is this and your Honour sees this in our written reply at paragraph 6.

HIS HONOUR: Yes.

DR HIGGINS: Your Honour sees in particular the sentence commencing this will occur by operation of, etcetera.

HIS HONOUR: Yes.

DR HIGGINS: Now, the unilateral adjournment power is a recently introduced statutory power and your Honour sees that in the footnote. The prior law was that an adjournment requires a consent of the creditors. The law has changed and what the

administrators now have and the chairman of the meeting has is a statutory power to adjourn like the statutory power of sale and like the statutory power to have a casting vote in certain circumstances. So that power would properly be exercised without requiring the consent of the creditors and that is a circumstances that we say will occur. And we don't believe there is an improper fettering and there would be no wrongful exercise of power in exercising the statutory power in that way.

HIS HONOUR: All right.

DR HIGGINS: And especially, your Honour, when it's in aid of a sale that has occurred in the proper exercise of the administrators statutory powers. And paragraph 12 of our reply submissions, your Honour, also goes to that point.

HIS HONOUR: All right.

DR HIGGINS: And that in short is this. Where there is no criticism made of the administrators exercise of the power of sale under section 437A the administrators cannot be criticised for agreeing to exercise their power to adjourn the second meeting to complete that sale. Now, of course, the administrator's strong preference is that the DOCA go through because that is better for creditors but it's well to pause, your Honour, and understand an oddness at the heart of Mr Jackman's submissions which is, I can accept, the administrator could sell the assets of a business. We say that is what has occurred. Our learned friend says the introduction and interposition of a DOCA changes this in some way but it does not – the assets are sold and it is perverse to suggest that a better outcome for creditors should be prevented from occurring. And that is all that will occur through the voting out of the DOCA at the second meeting.

HIS HONOUR: All right. So if your main issue is about the ballot, you still don't like one to G because – well, I think the only argument you put to me at the moment is that it may lead to a misleading impression if the first plaintiffs put all this out that there's utility in having a second DOCA. That seems to be the bottom line.

DR HIGGINS: Yes, your Honour. Can I confirm if your Honour is discussing subparagraph (a) to (g) of paragraph 3 of my learned friend's interlocutory process.

HIS HONOUR: I'm actually looking at the short minutes of order which is paragraph 1.

DR HIGGINS: Thank you, your Honour. Thank you.

HIS HONOUR: Which I assume is the same form as that.

DR HIGGINS: Your Honour understands our submission and our position.

HIS HONOUR: Yes, I understand.

DR HIGGINS: - - - with the fact that the alternative DOCA will be publicised; its terms will be identified – cannot be endorsed by the administrators. We say it cannot be voted on at the second meeting, and as a consequence, could not be put on the ballot for the second meeting.

HIS HONOUR: Is there anything to stop Mr Jackman from doing all these things as he wants to do it? Or as his client wants to do it? They can publish details, I suppose, for consideration of creditors, and explanatory memorandums and material?

DR HIGGINS: Absolutely, your Honour. There's nothing to prevent him doing that. And to be more precise in my answer to your Honour, the real difficulty we have is with 1(f) and (g) as your Honour will understand.

HIS HONOUR: Yes. I understand that. All right - - -

DR HIGGINS: And to take up what your Honour has just put to me, of course Mr Jackson's client can do all of those things. We do say that there are real difficulties in the DOCA that still sits before your Honour's regard which is last amended on 17 July. But that's ultimately a matter for our learned friends. And we do say that we will include in the report to creditors a full and fair description of what this DOCA is.

HIS HONOUR: Yes, all right. What other issues are there for you to address, Dr Higgins?

DR HIGGINS: Your Honour, if you would be convenient to adjourn at that point. And I can - - -

HIS HONOUR: All right.

DR HIGGINS: - - - crystallise – there's a number of matters my learned friend raised that I should respond to including ..... aspects of Mr Cheatham's affidavit of this morning.

HIS HONOUR: Well, maybe we can pick out – one thing that I said to Mr Jackman, which he probably didn't like, was that the history of his client's involvement really has no relevance as to whether or not – and the extent to which he can put a DOCA proposal. It may have relevance to other matters. That is, the bona fides, or the way in which the administrators are now acting having regard to the relationships and all the things they did. And that's a separate issue which I'm not entirely sure I need to worry about, quite frankly. But the history can't impact upon what his clients want to do now. If they want to come along now and put a proposal, they can do so. It doesn't really matter whether they were part of a sale process or not. That's correct, isn't it?

DR HIGGINS: ..... as to that, may benefit from reflection, your Honour.

HIS HONOUR: All right. Well, perhaps – I gave it to you at 1.13 and you can ..... over lunch, if you like.

MR PETERS: Your Honour, could I correct something I said just before.

HIS HONOUR: Yes.

MR PETERS: We adopt and support our learned friend's submissions regarding paragraphs (a) to (g), in particular, paragraph (g) of the opportunity to vote on DOCA proposals. We've dealt with this in our submissions, but there's a particular clause of the agreement that deals with what has to happen at the meeting in clause 12.

HIS HONOUR: All right. I may like to hear a little bit more about this fettering issue. But we will come back to that after lunch. Now, Dr Moore, your only interest is the facilitator; isn't it? You don't want to delay the process longer than it has to be delayed, for one reason or another. Is that right?

DR MOORE: That's so, your Honour. And I was going to ask, having regard to what passed between your Honour and my learned friends before - - -

HIS HONOUR: Yes.

DR MOORE: I understood your Honour won't be ordering a facilitator.

HIS HONOUR: As I said, I had heard Mr Jackman; I've read his submissions. But I won't be going down that track.

DR MOORE: Yes. Given that indication, your Honour, I seek to be excused from here.

HIS HONOUR: Of course, yes. That's fine. Thank you, Dr Moore.

DR MOORE: Thank you, your Honour.

HIS HONOUR: All right. All right, well. It's 1.14, so let's adjourn and Dr Higgins you can get some instructions of there's a sale agreement which is coming through.

DR HIGGINS: Yes.

HIS HONOUR: But I'm trying to finish off this proceeding before we go to Wells Fargo. The reality is, quite frankly, I haven't had a look at all the details of Wells Fargo, particularly the schedules. So - - -

DR HIGGINS: Your Honour may not be the only one.

HIS HONOUR: And there's still disputation about that. We will adjourn this case till 2.15. Who else is in – there's only one other – there's no intervenors in the Wells Fargo matter. It's just you and Mr Ward; isn't it, Dr Higgins?

DR HIGGINS: Yes, your Honour, that's all. If it's convenient to the court, we can notify Mr Ward that the matter will be stood down until later this afternoon.

HIS HONOUR: I think that's the easiest. So why don't we say 3.15?

DR HIGGINS: Yes, your Honour.

HIS HONOUR: If you wouldn't mind doing that. And then we will send new invitations to people, I think we – no, we don't need to that, I'm told. That's all good. It all works without having to have that be done. So we will adjourn that Wells Fargo to 3.15. And today and will come – this matter, sorry, come back at 2.15. Thank you.

DR HIGGINS: May it please the court.

HIS HONOUR: Adjourn the court.

ADJOURNED **[12.45 pm]**

RESUMED **[1.45 pm]**

HIS HONOUR: Yes, Dr Higgins.

DR HIGGINS: Yes, your Honour. Your Honour, can I begin with order ..... of our – paragraph 15, of our interlocutory process by which your Honour asked certain questions earlier.

HIS HONOUR: Yes.

DR HIGGINS: I invocate to your Honour what the passage of that order was and it was intended as a practical solution to assist with a potential volume of changes. We don't press that paragraph of our interlocutory process in light of your Honour's concerns but what the administration will do, is if creditors seek to amend in the days before the meeting, they will seek to address it. If amendments occur during the meeting, it may be necessary to adjourn the meeting to deal with that if it's in a sufficient volume, and that was one circumstance that the order sought to avoid but the administration will try to avoid any adjournment of the meeting in any event but we will seek to deal with it in real time at the meeting, so we don't press that paragraph, your Honour, and administrators will deal with it accordingly.

HIS HONOUR: Thank you. I hope there won't be too much of that happening but thank you for that. All right, well, that's one issue gone away.

DR HIGGINS: Your Honour, can I come then to the other matters that I wish to address, and there's four or five of them and they may need to be necessary depending on whether Mr Jackman hasn't a proper opportunity to read it to address your Honour on the sale of administration's deed and come directly to the question of expanding status and, at that point, your Honour, it may be necessary to close the court, these are the certain persons. But before coming to that exercise, in light of any indication that Mr Jackman gives of the capacity to address, can I address certain matters that they did not come to this morning? The first, your Honour, is this: in truth, what our learned friend seek, is an indulgence that upsets normal course and let me explain what I mean by that. This is in truth of procedural issue which is created by the need to hold the meeting virtually. In the ..... course of the physical meeting, the conduct of the meeting would be at the discretion of the administrator in accordance of the Act. There would be no obligation of administrator to put something on a ballot and accelerate it's consideration by the creditors, it would be in the discretion of the administrator as to what was raised when. The most that would occur in a physical meeting, is that Broad, Peck and Tor could put up an alternative DOCA if they're entitled to do so, I should say, of persons falling within 7570 of the IPR, and if it were put it would be voted down or voted upon, rather.

HIS HONOUR: I think that may be the pivotal target, Dr Higgins, ...

DR HIGGINS: It will be voted up or down, I was going to say. As your Honour appreciates, the difficulty here is that in the ..... there was a power to adjourn, which is the power to ..... statute on the administrators, so we say what is happening here, what the administrators propose is wholly orthodox and what our learned friend propose is a mode of upsetting the normal procedure in an attempt to centre the manner in which the meeting is won by the administrators. And your Honour, in our written reply submissions, which your Honour has, in paragraph 17 we make a further point about the real prejudice that might arise through the companies by adopting the course that our learned friends suggests. And can I ask your Honour, simply, to read that paragraph?

HIS HONOUR: Yes, I have read that.

DR HIGGINS: So we say there is nothing unorthodox that what we propose to do, it's fully orthodox. Our learned friends seek a deviation from the normal course, our learned friends seek to say to the administrator's conduct as a meeting. Can I come, then, to a question your Honour asked me as to whether there is any relevance to the present application of the historical conduct of Broad, Peck and Tor and can I say this, we don't suggest that that conduct affects what we now do in the future, including sitting to propound a DOCA at the second meeting if they are eligible to do so.

We do say that the historical conduct properly informed the administrator's assessment of that proposed transaction, and we also see that it does inform your Honour's consideration of the grand relief to the extent, that that really is discretionary. And let me explain what I mean by that, your Honour. Our learned friends have never sought to enjoin the sale that has occurred. The announcement to the NSX on 26 June, stated that a sale had occurred. When we came before you, your Honour, on 10 July, I said to your Honour, the power of a sale has been exercised, and our learned friends needed to set that aside if they are to continue.

And my learned friend suggested there has been backsliding; there has not been. We have been candid and complete throughout. On 11 August, I've said precisely the same to your Honour and Mr Jackman, that the power of sale has been exercised, and our learned friends would need to set – attempt to set aside the sale. Now, why that is relevant is that, there was a time and a place if our learned friends sought to challenge the sale, and it was some time ago. Our learned friends were on notice that a decision was to be made by the end of June; they had an opportunity to enjoin the sale before it occurred. What has happened in the interim, your Honour, is that Bain has gone in economic risk. The clear completion restructuring steps under clause 7 of the FID have been materially progressed.

The law has changed under the custodianship of Bain. So, we say that the delay and the conduct, in the way that the applications have been brought before this court, does veer upon the exercise of your Honour's discretion. And your Honour, in that context, a matter that is important to bear steadily in mind, in which we've addressed both in evidence and submissions, is that the committee of inspection of the Virgin companies, is one of the largest Mr Strawbridge has ever been involved in. It has 36 participants in the Commonwealth as an observer, who would have been involved in every step of this transaction, in having it explained, to it endorsing the sale that has occurred.

And, as recently as Friday, endorsing that this motion brought by our learned friends ought be opposed. So there has been rigorous oversight throughout this by the Committee of Inspection, which is truly representative of the creditor body. And can I take your Honour very briefly to one set of the minutes, and your Honour finds this at tab 3 of the exhibit to Mr Strawbridge's ninth affidavit, which is DNS6.

HIS HONOUR: Yes.

DR HIGGINS: What your Honour should have there is a copy of the minutes of meeting of 1 July 2020. It's worth remembering that our learned friends also have these. And if your Honour – does your Honour have that?

HIS HONOUR: Yes.

DR HIGGINS: And if your Honour turns to, in the first instance, to page 5 of 17, which is at the top left-hand corner, your Honour.

HIS HONOUR: Yes.

DR HIGGINS: Your Honour sees about a quarter of the way down the page, the chairperson made the following comments around the alternative approval put forward by the bondholder group. And if your Honour drops down to the sixth bullet point under that chapeau, can I ask your Honour to read the chairperson's comments on the administrator's assessment of the alternative bondholder proposal. Critically, there was no committed funding in circumstances; the Virgin company needed funding from 1 July. And if your Honour then turns to the next page, page 6 of 17, your Honour will see a question from Mr ..... towards the bottom of the page. And can I ask your Honour to read bullet 3 bullet points, the response to Mr ..... question.

HIS HONOUR: Yes.

DR HIGGINS: If your Honour sees that – finally, if your Honour flips over to page 7 of 17, your Honour will see quite the way down, a question from Ms Winterbottom. And can I ask your Honour to read the answer to that question.

HIS HONOUR: Yes.

DR HIGGINS: And it is important to recall, especially in a context where no challenge has been brought to this sale, but submissions are made about the propriety of the administrative conduct, that there has been complete and detailed disclosure to a complex and representative committee of inspection, of precisely what has happened here. And her thoughts would be, as your Honour knows, the noteholder consults to the committee, which is not prescribed by statute, but has been introduced by the administrators due to the complexity of this administration.

Your Honour, can I then come to the question of fetter that your Honour mentioned before the luncheon adjournment. We say this to your Honour, which you're going to be well aware they appreciate. The conduct for the second meeting will in part be a consequence of the in which the power of sale has been exercised. The exercise of that power of sale can circumscribe the options available to creditors and it will do so here. Earlier my friend went to 437A but it's well to remember section 451C. The choice that will fall before the creditors at the second meeting is about the mode of completion and also 439C, your Honour. ..... begins at 439C.

HIS HONOUR: Yes. Yes, I have that.

DR HIGGINS: Those are the matters the creditors may resolve at the meeting convened under section 439A. And that is all that the statute provides. And your Honour sees also section 451C to which I also referred at the hearing on 2 July. To either say properly as to your Honour, there isn't a fetter because to speak of a fetter predicates that there is still a decision to be made but what has occurred is the exercise of the power of the sale.

HIS HONOUR: Yes. I have a little unquiet about this aspect, I must say, Dr Higgins, that there could be – if there are two resolutions before the – let's just take 439C in its terms.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: It seems to be at a deed of company arrangements justified in the resolution so you could have two resolutions. One proposed by Mr Jackman's clients and one proposed by the administrator who are able ..... say that can happen. Do you accept that?

DR HIGGINS: Your Honour, with respect, no, your Honour. We don't accept that at the meeting that will occur. As I say, the meetings that would be a possibility because if the Bain DOCA were voted down the chairman would exercise his power to adjourn the meeting.

HIS HONOUR: But, as I said to you before, if I'm a creditor under the rules aren't I – I'm permitted to propose a resolution and if I propose it I don't even need a seconder and it has to be voted on doesn't it? So how do you get around that particular, I'm looking at 75-70 of the infactus rules.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: This is probably what I had in mind to leave it to Mr Jackman's client to get ready and prepared and do whatever they want to do and send out whatever they think is appropriate to creditors and then they propose a resolution of the type that they want, which will involve their DOCA, and that doesn't need to be seconded and then it has to be put to the meeting and there has be reasonable debate upon it. All that applies, doesn't it? And you say though because of this agreement that's precluded from being able to be exercised because it's of no utility, but isn't that for someone else to determine at this stage? That's what I have trouble with.

DR HIGGINS: Well, what we say is this, your Honour. The first vote that would go before the creditors and be a vote on the Bain DOCA. Now if that is voted up that would be the end of matters. If that were voted down the way the contractual instruments operate and consistent with the statutory power conferred on the administrator under the Act, the meeting would be adjourned to allow the sale to complete by way of asset sale.

HIS HONOUR: So if I insisted on having my resolution put before the meeting on the – let's say 4 September, then one way to deal with that you would say is you, your client would let the Bain proposal be voted on. If it's voted on then you would adjourn – you would also have to adjourn my resolution which has to be accepted for the 45 days. I suppose that's one way of dealing - - -

DR HIGGINS: Precisely, your Honour. Yes, that is precisely so. So it would not be negative it would also be adjourned pending the 45 day adjournment.

HIS HONOUR: Yes.

DR HIGGINS: And then returned before the meeting.

HIS HONOUR: But you've got to let creditors put their resolution .....

DR HIGGINS: Yes. Quite, your Honour. What I didn't want to convey to your Honour was that that resolution couldn't be voted on at the second meeting on that date.

HIS HONOUR: All right. Well, when you say couldn't be voted on, as things currently stand it couldn't be voted on on the way in which you put it but I can't envisage things happening. But there has to be – anything could happen on the day, I suppose, so there has to be a residual discretion in the presiding officer – the person presiding it's called, to carry on or adjourn for lesser time than 45 days if they want to, for instance.

DR HIGGINS: That's correct, your Honour. I don't dispute that, your Honour. I agree with that.

HIS HONOUR: Yes. So it's a sort of starting point maybe.

DR HIGGINS: Yes.

HIS HONOUR: Yes. All right.

DR HIGGINS: And we say any other resolution put forward by a creditor under section 75-70 would likewise be adjourned to the resumed meeting.

HIS HONOUR: Yes.

DR HIGGINS: So the creditor would not be deprived of that right to the resolution when it resumes. But we otherwise agree, your Honour, that there must be a residual discretion because anything might happen on the day.

HIS HONOUR: Yes. Now, what was that adjournment of meetings of creditors 75-100. So a meeting may be adjourned by resolution or by the person presiding at the meeting. So we've got the meeting itself can resolve to adjourn or the ..... can adjourn.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: And then there's a limitation of time limits which that all fits in.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: I don't see that, I must say, as really impacting upon the fact that the presiding person has to exercise the discretion in good faith and in accordance with law. All it's doing is giving the presiding person the power to do it which would not normally maybe the situation; I don't know.

DR HIGGINS: ..... again - - -

HIS HONOUR: .....

DR HIGGINS: I respectfully agree, your Honour.

HIS HONOUR: All right. All right.

DR HIGGINS: It did effect a change to the previous law which whereby the power to adjourn required the consent of creditors.

HIS HONOUR: Yes.

DR HIGGINS: It's now disjunctive and that is the change that was effected.

HIS HONOUR: Yes. I see. But otherwise the normal principles apply. All right. All right. So where are you up to now, Dr Higgins.

DR HIGGINS: Your Honour, can I very briefly, and I stress briefly, address Mr Cheatham's ..... affidavit of this morning and it's in a table of DOCAs. We say only this, your Honour, and we've only had a limited time to review this. On a brief review the exhibit does not support the statement in the affidavit that it contains a ..... instance of the second meetings of creditors but the non-recommended DOCA was put to the vote let alone the assertion that the non-recommended DOCA is normally put to the vote for the recommended DOCA. Can I give your Honour an example of that and it commences at page 51 of the exhibits. It's a baseline constructions administration. And if your Honour turns to page 51 rather, and then turns through to page 62. The administrators recommended DOCA 2. The creditors were told that it would be voted on first and if not passed there would be a vote on liquidation.

HIS HONOUR: Yes.

DR HIGGINS: The recommended DOCA was approved in a pole and no further votes on the liquidation took place.

HIS HONOUR: Yes.

DR HIGGINS: And no vote at all took place on a non-recommended DOCA.

HIS HONOUR: Well, I must say, whilst it's interesting to see how different people manage meetings and get some guidance of them, it will all depend upon the situation of all the presiding officer and the meeting, won't it, and I think everybody

agrees this is quite a different sort of administration in regard to the situation we're in, and just put aside a pandemic, it's a big administration anyhow.

DR HIGGINS: Yes, your Honour. Yes.

HIS HONOUR: All right. All right.

DR HIGGINS: Your Honour, the only other matter that it would – I was proposing to address was to take your Honour through a sale implementation date to make good our submission that it binds the parties. That is contingent on that being fair to my learned friends Mr Jackman and your Honour.

HIS HONOUR: Well, let me ask Mr Jackman where he's up to with reading that document or getting some instructions on it or – Mr Jackman - - -

MR JACKMAN: I'm waiting to address it.

HIS HONOUR: All right. Ready to address it, so – I wonder the best – well, I don't like closing the court particularly in the circumstances we're in. We all have the document; well, you can refer to paragraphs, can't you, without actually reading them out, Dr Higgins? At least .....

DR HIGGINS: Can your Honour give me moment to check whether that will be feasible.

HIS HONOUR: All right.

DR HIGGINS: I ..... Mr Peters – with Mr Peters isn't going to be heard on that before I persevere, your Honour.

MR PETERS: Your Honour, I'm content to proceed on the basis that the parties refer to paragraphs. If there's any issue that comes up that necessitates closing the court because of the disclosure of something confidential, we can deal with it at that time. I think if we simply our address our attention to the relevant paragraph and the concepts, without detailing the substance?

HIS HONOUR: Yes. All right, thank you, Mr Peters. Let's see how we go, Dr Higgins, and we will go from there.

DR HIGGINS: Thank you, your Honour. Did your Honour have a copy of the documents that were provided to Mr Jackman, so we all work from the same base?

HIS HONOUR: I do.

DR HIGGINS: As your Honour appreciates, we submit that by entry into the FID, the administrators have exercised the power of sale and have agreed to sell the Virgin assets to Bain. Pursuant to this agreement, a restructure of Virgin is presently

occurring, including by development of the pre-completion restructure. And can I ask your Honour to turn to clause 7.2(a) which your Honour finds on page 23 of the document.

HIS HONOUR: On what page, sorry?

DR HIGGINS: 23, your Honour. 23.

HIS HONOUR: Thank you. Yes, I have that.

DR HIGGINS: I would invite your Honour to read paragraph 7.2(a).

HIS HONOUR: Yes.

DR HIGGINS: The structure of their arrangement is as follows, your Honour. The deal will ultimately be implemented either by the transfer of shares to Bain under section 444GA if the creditors vote in favour of the Bain DOCA or by way of an asset sale under an asset sale agreement. That condition, your Honour, by a consideration of clause 3.2 of the deed, which is at page 15.

HIS HONOUR: Yes.

DR HIGGINS: ..... paragraph (a) and (b).

HIS HONOUR: Is it paragraph 15?

DR HIGGINS: No, sorry, your Honour. It's page 15, paragraph 3.2(a) and (b).

HIS HONOUR: Yes.

DR HIGGINS: If your Honour could read all of 3.2(a) and (b).

HIS HONOUR: Yes. Yes.

DR HIGGINS: And if your Honour also then looks at clause 3.3(a) - - -

HIS HONOUR: Yes.

DR HIGGINS: Your Honour will see that clause 3.2(a) and (b) combined with clause 3.3 offer it to require the administrators to enter into the ASA. If your Honour then drops down to clause 3.4(a) to (c), your Honour will see that they operate such that the administrators will not be obliged to enter into the ASA if the Bain DOCA is approved and effectuated.

HIS HONOUR: Yes.

DR HIGGINS: Now, as your Honour appreciates, 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 otherwise. If the Bain DOCA is not passed by creditors at the second meeting, there will be an adjournment to allow the sale to be in capital to complete as an asset sale. I've made submissions to your Honour in that respect already. And if your Honour turns to clause 12 which is on page 36.

HIS HONOUR: Yes.

DR HIGGINS: And 12.12(b) in particular – 12.2(b).

HIS HONOUR: Yes.

DR HIGGINS: And does your Honour appreciate that the full detail of this is not disclosed in this variation in consideration changes depending upon which of those modes of completion occurs?

HIS HONOUR: Yes.

DR HIGGINS: Can your Honour excuse me for one moment? If your Honour could then turn to what should be – just turn straight to the end of that agreement, which goes up to page 71 - - -

HIS HONOUR: Yes.

DR HIGGINS: Your Honour will then find a copy of the asset bill agreement?

HIS HONOUR: Yes, I have that.

DR HIGGINS: Now, the key term of that agreement, is supposed to be point 1.

HIS HONOUR: Yes.

DR HIGGINS: And if your Honour will read that. Because as the key provision of the ASA, can I ask your Honour then to return to the ASIC and can I take your Honour only by reference to order the benefits and obligations of that agreement. In addition to certainly and price, the administrators obtained a number of economic and other benefits under the sale implementation deed. If your Honour turns to clause 5 on page 19, and if I could ask your Honour to read the paragraph interim funding.

HIS HONOUR: Yes, yes. Yes.

DR HIGGINS: Other material benefit is clause 8.2.

HIS HONOUR: Yes.

DR HIGGINS: Which is the detail, your Honour, of what we describe as being going on economic list.

HIS HONOUR: Yes.

DR HIGGINS: And if your Honour then turns through to page 3 and clause 10.3?

HIS HONOUR: Yes.

DR HIGGINS: That's another various significant benefit.

HIS HONOUR: Yes.

DR HIGGINS: To the Virgin Company and their employees. Now, the quid pro quo of those benefits, your Honour, and the quid pro quo of the certainty of a sale are certain other commercial deterrence, can I draw your Honour's attention to them, if your Honour turns to clause 3.5 on page 16.

HIS HONOUR: Yes.

DR HIGGINS: And your Honour sees that. And another quid pro quo, your Honour, was clause 4.2(d) – your Honour finds the body of 4.2 on 18 and (d) on 19.

HIS HONOUR: Yes. Yes.

DR HIGGINS: Now, your Honour, in the event the termination of this agreement were to occur, a number of fees may become payable by the companies, and can I just direct your Honour to clauses without description: 4.2(a).

HIS HONOUR: Yes.

DR HIGGINS: 4.1(f).

HIS HONOUR: Yes.

DR HIGGINS: Now, your Honour, that is – those are the salient provisions of the two arrangements and probably the level of detail I can safely go into in an open court. There may be one other clause I should take your Honour to. Sorry, your Honour.

HIS HONOUR: That's all right.

DR HIGGINS: Yes. Can I also draw your Honour's attention to clause 6.2(b)(ii).

HIS HONOUR: Is this in the sale agreement - - -

DR HIGGINS: In the sale – yes, your Honour. In the SID clause 6.2.

HIS HONOUR: Page 14 – make sure I've got the right one.

DR HIGGINS: Yes.

HIS HONOUR: Yes. Thank you.

DR HIGGINS: It should be on page 21 your Honour.

HIS HONOUR: Hold on.

DR HIGGINS: On page 21, clause 6.2(b)(ii).

HIS HONOUR: Hold on one second Dr Higgins. Yes. 6.2(b).

DR HIGGINS: Yes, your Honour, on page 21. Thank you. So, your Honour, we say there is a concluded agreement. We say that the transaction will occur by asset sale if it does not occur by DOCA. It may be that my learned friend, Mr Peters, wishes to add to those submissions in respect of the position of Bain. But, your Honour, it does throw it back on this situation that the parties to this contract believe they have a concluded arrangement and we believe that's a correct construction on it. It remains the case that if Mr Jackman's client wishes to challenge it, or to challenge the interior proposition of the finding, a challenge needs to be brought to the sale and this is again not that application. But, your Honour, in open court I believe that's all I can say about the sale implementation deed and it may be that my learned friend, Mr Peters, will take us back to that.

MR PETERS: You're welcome.

HIS HONOUR: Well, you've taken these are relevant provisions you rely upon to say it's a concluded agreement and the asset sale is "complete".

DR HIGGINS: Yes, your Honour, those are the key provisions, yes. Before we go to Mr Jackman, Mr Peters do you want to add anything in relation to that submission on that point?

MR PETERS: Only, your Honour, to identify one other clause that's the product of certainty and is, as Dr Higgins put it, part of the quid pro quo which is clause 3.5 of the sale and implementation deed – the exclusivity provisions.

HIS HONOUR: Yes.

MR PETERS: And in particular 3.5(b)(iii). That clause – and the other clauses that Dr Higgins has taken you to – is in the context of the economic risk undertaken by Bain, including interim funding of this administration, keeping employees involved, committing to the agreement, committing to paying out the other benefits. If you look at this agreement it reflects the typical commercial arrangement where Bain has committed substantial resources – extraordinary resources – for certainty to the

administration and that can be put in contra distinction to the bondholders who had the opportunity to participate – I will come to this when I get to my submissions – but the opportunity to participate and didn't. And I will deal briefly with that in the question of discretion that affects your Honour's power today.

HIS HONOUR: Fine. Thank you. Right back to you Dr Higgins. Does that complete what you wanted to make submissions on?

DR HIGGINS: I'm being told not, your Honour, can you only give me a second to find out why that is so.

HIS HONOUR: Yes.

DR HIGGINS: Right, there's one other matter that I should bring to your Honour's attention and it's in the confidential affidavit of Mr Strawbridge of 14 August. Which is the one that is confidential to the applicants and Bain.

HIS HONOUR: Yes.

DR HIGGINS: And if I can invite your Honour to read paragraph 14 of that affidavit which we say is also a material matter.

HIS HONOUR: Yes, thank you.

DR HIGGINS: I believe that's everything your Honour.

HIS HONOUR: All right. Thank you. Mr Peters, maybe we should go over to you before Mr Jackman responds.

MR PETERS: Yes. Yes, your Honour. Obviously we rely on our written submissions but we note your Honour has the impression to exercise in respect to the orders sought by Mr Jackman's clients. We've submitted what your Honour should take into account but could I remind your Honour, and I read the affidavit of Mr Clifton of 14 August.

HIS HONOUR: Yes.

MR PETERS: It deals with the history of the matter, and could I just identify some broad matters that are important as to the risks to the companies and the creditors if the discretion of the administrators is bound as to act in a certain way about a meeting that is yet to be called. Paragraph 14, your Honour, it's quite clear that Bain's point of view is that this is a binding transaction and it intends to enforce it. If your Honour looks at paragraph 12 you will see the timetable of the sale process in which Mr Jackman's clients have the opportunity to participate. It involved an urgent need for cash. It involved a binding transaction in paragraph 14 that was required to fund.

Paragraph 15, a purchaser was needed who had the ability to negotiate with a binding arrangement; that's paragraph 15 and 16. Paragraph 17, Bain was the most favourable offer. And paragraph 18, Bain went on risk of the substantial obligations, substantial is probably too light a word for the economic risk Bain has gone on risk for under the transaction. And paragraph 18 really is the fact that the administrators wouldn't have had a purchaser and wouldn't have had an ongoing administration without Bain committing on the basis of the final binding and exclusive transaction. What we have as the key point of our learned friends is that the primacy – there's a primacy of the second meeting of creditors that should trump the valid exercise of an administrators power of sale.

Now, I say valid, your Honour, because there is no step and no coherent argument has been put, let alone any argument, that the administrators have done the wrong thing in entering into this agreement. And nor could there because the employees might be able to say well, without that we might not have been funded, or have something in an ongoing administration. Could I deal, your Honour, very briefly – your Honour, I should say I presume those briefing me would like me to speak at length about the economic risk and the benefit to the administration and I could, but your Honour has been taken to the paragraphs.

HIS HONOUR: Yes. Thank you, Mr Peters. No, you can assume I will read all that and most of it I have read already.

MR PETERS: Could I say something about the chairman's casting vote – the administrator's casting vote as chairman.

HIS HONOUR: Yes.

MR PETERS: We adopt Dr Higgins' submissions. We note that the bond holders – Mr Jackman's submissions at paragraph 47 refer to the purposes of the power include certain matters. And we accept the power has to be exercised in good faith as we must. But concepts of good faith involve honouring contractual obligations which were undertaken for benefits. And the powers exercised being the power of sale have it as an incident providing certainty to a purchaser as to the transaction concluding. Now, the court should not hold or order the chairman to hold a vote on any alternate transaction. That should be left to the chairman's discretion.

If the matter is adjourned the vote may occur on an alternative transaction if events transpire, if that's appropriate, at a later time. But the chairman's power must be exercised in light of the contractual obligations binding the companies to the administrators. And the orders sought by Dr Jackman's clients seek to require the chairman to breach its obligations under the agreement. Your Honour, there's no concept of creditors being shut out in this case, which is put in a, we would say, colourful language. What has happened here is a matter of contract to obtain an agreement to get the best value for creditors as the administrators have sworn to; the best value for creditors in an urgent, complex, and very difficult administration.

And in terms of anybody being shut out, someone was definitely not shut out and those are the bond holders who seek to bind or alter the chairman's discretion today. They had the opportunity to participate and they did participate to the extent they saw fit at the time. Now, your Honour, I note the time and I note your Honour has another matter. If there is anything in our submissions that we can deal with I will but those are our submissions in response.

HIS HONOUR: No. Thank you, Mr Peters. You've covered the area, obviously, which you're interested in so I don't have any further questions of you. Before I go to Mr Jackman, Mr McGrath, I've read your submissions. You're wanting proper process but I'm not quite sure which side of the line you're dropping on as to who's the proper process.

MR McGRATH: Proper process from the point of view of those who will be expected to vote on this.

HIS HONOUR: Yes.

MR McGRATH: And I guess it comes down to the two stages. The first is the extent of the information that's provided to us and also if there is truly, which we presume there to be, an alternative DOCA that's going to be put up by the applicant here that there is an ability to actually exercise a vote meaningfully in relation to that. So the important points from our perspective is that if the alternative is put up we want to have the comprehensive detail in respect of the alternative proposal. We would want to ensure that we got it in a timely fashion so that it could be considered and your Honour would have seen the material in the affidavit of Ms Merrick indicating the various bond holders have representatives who may or may not have the discretion to exercise to vote but they have to do so in consultation with the bond holders that they represent in certain instances.

There must be ample opportunity to be able to raise various questions. But importantly, one of the matters that does concern the bond holders who we represent is that they should not be required to exercise a pre-vote because as matters currently stand that is one of the elements in the Halo voting procedure. And that would enable someone who, even if they had exercised the pre-vote or if they hadn't exercised the pre-vote, to be able to see whether or not any new information emerged at the time of or during the course of the second meeting.

HIS HONOUR: That's unlikely, isn't it.

MR McGRATH: I know it's unlikely but the important point here is that if you are required to pre-vote and information arises after the time that you have pre-voted you want still to be able to exercise a change in that vote.

HIS HONOUR: Well, I don't – I think we're – I'm not sure. Let me go back. Most of your clients will be voting by proxy, I take it.

MR McGRATH: That's probably – yes, that's probably correct.

HIS HONOUR: All right. So that will be done before the meeting.

MR McGRATH: Yes.

HIS HONOUR: As in probably. I pregame more than probably. Highly likely if not mere certainty. So what will be will be a change of mind since the giving of the proxy and the meeting because there's some information that has come to light.

MR McGRATH: Correct.

HIS HONOUR: Now, it's not being pressed that particular order that talks about proxies having to be consented to be withdrawn any longer.

MR McGRATH: Yes.

HIS HONOUR: So an then we have the voting event which will be, as I understand it, will be at sometime at the meeting. So it will be on the day of the meeting.

MR McGRATH: Yes.

HIS HONOUR: Now, that will be a moment when the presiding person decides that presumably it will be to the time when the vote is taken on the resolution. So that's as much as your clients could be offered, isn't it. Going back to a few other things you said. Let me just go through it. I took your three issues to be people want the complete information; as much as possible.

MR McGRATH: Yes.

HIS HONOUR: So I think we're going to tick that off in one way or the other. Not to eh satisfaction of Mr Jackman maybe but by the way in which information has either come out in this proceeding or will come out on 25 August. So just assume for the moment that that's going to happen. Then your clients need time to consider.

MR McGRATH: Correct.

HIS HONOUR: So that's going to happen before the meeting based upon the information. So that can't obviously happen at the meeting. Then you didn't want to be corralled into one particular option. In other words, they wanted to have a choice. Well, you've heard the debate about that and that's going to be looked at by me and that may just depend upon whether there has been asset sale and whether the meeting has to live with whatever that asset sale is and I will hear Mr Jackman about that but there's nothing you can do about that.

MR McGRATH: Yes. That's right.

HIS HONOUR: It's trapped in stone one way or the other. And then, well, you are concerned about the voting mechanism. Well, the voting mechanism now, without taking away that – by not pressing that matter that they had to get permission to change, I don't think we could do anything better for you, I must say, in the circumstances. That's what worries me.

MR McGRATH: Yes. There may be a further issue in relation to those people who hold the US dollar denomination bonds where they should, in fact, be given the same time as the others to provide their vote because, as matters stand at the moment, they should not be required to cast their vote in circumstances where they have perhaps less information than everyone else does through the course of the whole process just because they hold a different denomination of bond.

HIS HONOUR: Well, I understand, and that's a tactical issue I don't know if the administrators have thought about that but that makes a lot of sense which may just need to be – give them a little bit more consideration but I don't know. Dr Higgins, have you ..... which I do remember being raised.

DR HIGGINS: Your Honour, this matter is addressed in one of the affidavits. I stress one of. I will need to work out which one. I think it's Mr Orrs' affidavit. It should also be in one of the Strawbridge affidavits from this application. Can your Honour give me one moment to get that reference.

HIS HONOUR: Yes.

DR HIGGINS: If your Honour picks up in the first instance Mr Strawbridge's open affidavit of 14 August 2020.

HIS HONOUR: Yes.

MR McGRATH: And if your Honour turns through to paragraph 28 of that, this is in the context of the NCC meetings. Mr Strawbridge addresses communications from Aberdeen and from the Bank of New York and describes in paragraph 30 the DTC process ..... to the US dollar, note holders are to be taken pursuant to master ballot and beneficial ballot process. So that's the procedure that administrators have in mind. And the US note holders, as your Honour will recall, have been accepted from certain Halo orders for that reason.

HIS HONOUR: Yes, all right.

DR HIGGINS: And, your Honour, just for completeness, Mr Orr's affidavit of 6 August 2020 was read on the Halo application also addressed as a matter at paragraphs 23 and 24. But that again is the DTC process that I just described to your Honour.

HIS HONOUR: Yes. All right. Thank you. All right. Well, that may or may not be satisfactory in all of its details but at least it's giving consideration to the unusual position that those particular people are in, I think, Mr McGrath.

MR McGRATH: Yes, your Honour.

HIS HONOUR: Did you want to raise anything else in the circumstances of where we're at?

MR McGRATH: No, your Honour. I think your Honour's observation is correct. It all depends on what your Honour's view is in relation to the sale agreement.

HIS HONOUR: Yes. All right. Thank you. All right, Mr Jackman.

MR JACKMAN: Your Honour, can I address the sale and implementation deed which you've been provided with.

HIS HONOUR: Yes.

MR JACKMAN: And we maintain our submission that any sale of assets is conditional upon the Bain DOCA being rejected by creditors, that there won't be an asset sale unless and until the Bain DOCA is rejected, and having seen the agreement we also submit that there is no binding contract of the sale of assets at this stage.

MR JACKMAN: Now, the provisions that I want to draw your Honour's attention to, first in the sale and implementation deed, if your Honour goes to page 12.

HIS HONOUR: Yes.

MR JACKMAN: On page 12 it has a definition for "target signing date".

HIS HONOUR: Yes.

MR JACKMAN: And I ask your Honour to note the number of business days referred to there, which of course is one day short of the adjourned meeting.

HIS HONOUR: Yes.

MR JACKMAN: And there won't be a signed agreement until then. Then your Honour was taken to clause 3.3, there's some words that I should emphasise in the first line of 3.3, namely "subject to clause 3.4(a)", and 3.4(a) does deal with the purchaser's DOCA being approved. It then talks, in 3.4(a)(i), of "the entry into the asset sale agreement", that's something that happened in the future, and if signed, and of course it won't be for a couple of months yet, the asset sale agreement will terminate. In other words, going back to 3.3(a), those words "subject to clause 3.4(a)" indicate expressly that there is not going to be a sale of the asset if the purchaser's DOCA was approved. Indeed, it would be absurd for there to be a sale

of assets if the purchasers DOCA was approved because the shares are going to be transferred, as Dr Higgins said, under 444GA.

Now, then if one goes to clause 7.2, Dr Higgins referred your Honour to clause 7.2, but what she didn't emphasise is that this is no more than an agreement to agree. Your Honour will see that in the first two lines of 7.2(a), and this is of absolutely fundamental importance. Because if one goes ahead to the draft asset sale agreement, at page 11, there's an important condition precedent in clause 2.1, the clause doesn't become binding on the parties and is of no force and effect unless and until the following condition has been satisfied or waived, and then you've got the pre-completion restructure, or the minimum business critical ..... And going back to 7.2(a), the pre-completion restructure at this point is simply an agreement to agree, it may or may not culminate in an agreement, but at this stage one just doesn't know.

Then in clause 7.5 we don't know who the purchasers are of these assets at the moment. 7.53 talks about an allocation of market values to be performed at some point. In 7.4(iv) implies, as your Honour can see, seems to be added so that there's something in executable form; we're a long way short of that. 7.5(d) then gives the asset, Holdco, which is a Bain company, the sole discretion to decide – and I will refer your Honour to (i). So we don't know what the assets are. We don't know who the purchasers are. We don't know what the assets are and, of course, we're not privy to anything concerning price so I can't deal with that. And then if your Honour goes to clause 12. 4.1 level B replicates clause 3.5 which Mr Peters gave a good deal of emphasis to. While I'm dealing with that and 12 – that are over in clause 3.5(b)(iii) that we just went to. They're in 12.1(b) – it doesn't matter which one one adopts. Mr Peters' fundamental theme is that this is a contract in order to get the best value for the creditors.

But that submission must be heavily qualified because there's no calve out for a superior proposal which is a standard feature of exclusivity obligations. But be that as it may, can I go to 12.2 – implementation and 12.2(a) deals with the DOCA at the second meeting. 12.2(b) deals with the alternative scenario. Then there's going to be an adjournment. Now, this is a fettering of the chairman's discretion – the administrator's discretion as chairman – there are no two ways about it. It's void but what the contract provides for is for an adjournment for 45 days which, of course, is one day longer than the target signing date. And they don't want a vote on other alternatives until then as your Honour can see.

So we submit on the basis of that there is no binding contract for sale as yet but to the extent that there might be any sale of the assets is entirely conditional on the Bain DOCA being rejected at the second creditors meeting and the creditors meeting being ..... So the argument that we began with today we maintain is correct having seen these extracts from the Bain contract.

HIS HONOUR: Yes. Thank you, Mr Jackman, on that.

MR JACKMAN: Now, the only other thing that I wanted to deal with. Your Honour has indicated in clear terms that your Honour won't be appointing a facilitator. Can I just draw attention to an aspect of the Commonwealth submissions on this point in paragraph 7 in which the Commonwealth submitted that any difficulty in obtaining information could be addressed by appropriate orders without the appointment of a facilitator and I indicated that one of the advantages that we saw in there being a facilitator was dispensing with the need to trouble your Honour to deal with such orders. But the Commonwealth, in our submission, is right in the sense that in the absence of a facilitator the appropriate course is for us to be applying to your Honour.

Now, I'm not the person to do that today, quite apart from the time constraints that we're facing, but your Honour will find in Mr Cheatham's affidavit of 16 August at page 13 in the annexures the latest request that we made for specific information in putting together our alternative DOCA. It's principally in paragraph 4. And that was rejected by the administrators at page 18 simply on the basis that they've already sold the assets. So they were ..... so we submit that not only is as a matter of law but there is, at page 13, our outstanding request.

Now we didn't anticipate, sadly, that the administrators were going to respond favourably to that request and I do foreshadow that in the very near future, we will be making an application for orders from your Honour to grant us the applicant that we sought in that letter and consistently with what the colour was foreshadowed, the likely outcome of there being no facilitator, our instructions will be to make that application as soon as possible and we will hope that your Honour may be able to deal with it later this week. I don't know if your Honour's in a position to indicate what availabilities there may be but it is an urgent matter and we're really left with little option other than your Honour.

HIS HONOUR: Well, I think the best way to deal with it, Mr Jackman, is formulate your application and get me the papers and then I can work out to fit it in – which I all – I will seat all applications as early as I can possibly deal with them but when I know what type of matter that we're dealing with and I can work out how long we need.

MR JACKMAN: May it please the Court.

HIS HONOUR: All right. One thing – this probably – this leads on from what I was going to ask you about anyhow – one thing you didn't get a chance to reply upon was, I think, when I last left you, Mr Jackman, out of contemplating your minute of order 1A to G without a facilitator and I heard submissions about that and probably the borders passed now, I – my current indication is now to make those orders and I will give reasons for all of these matters that I'm deciding in due course but it seems to me that the appropriate way that you want to proceed with a proposal, you have the ability – your client has the ability to put a proposal; it should be in accordance with the principles that I'm working on, that would have to be put as a resolution that will have to be dealt with at the meeting in the appropriate way – whatever the

appropriate way is may need to be fleshed out later but that's for your client to do, in my view, and having reading to what you all just said, if they need further information and think it's appropriate that they get it, then you can make an application to the Court. But having said that – did you want to say anything about what I have just said to you about why 1A and G, do you want to put forward any further submissions or are you content with what you have already put to me?

MR JACKMAN: There's nothing further we wish to put. We look forward to reading your Honour's reasonings and we will make such further applications we are advised to make.

HIS HONOUR: All right. Is there anyone else that wishes to say anything, I think we have given everybody the chance to reply or deal with matters that need to come up? All right, now, timetable-wise so the – I think you said to me, Dr Higgins, that 25 August is when the creditor's report goes out?

DR HIGGINS: That's correct, your Honour.

HIS HONOUR: All right.

DR HIGGINS: Thank you.

HIS HONOUR: Well, then you work on the basis I have just indicated for the moment; I will have to formulate orders that you – that the application put by Mr Jackman's client is rejected, there will be no orders made in relation to ballots and proxy voting as he seeks in his proposed order 1, nor will it be a facilitator, nor will objects 3 or 4 follow their part of objection to the facilitator, I think, and I think I will just – I'm not making any – reserving my decision, so that will be all I will be doing today. What is the urgent timeline – if the facilitator's not put in place, we don't need to worry about that timeline. You – your client is presumably working on repairing the report? I can't hear you, Dr Higgins.

DR HIGGINS: In relation to the order, is the answer .....

HIS HONOUR: Mr Jackman has foreshadowed an application so we will deal with that if and when it comes if that can't be worked out between the parties. I should explain, as I did right at the beginning, that I do expect the parties to try and resolve whatever they can before they come to Court; sometimes that can't be done, that's fine but as best you can. No – nothing – what other – you don't require any orders do you, at the moment, to facilitate anything, Dr Higgins?

DR HIGGINS: No, your Honour. The only outstanding order was our paragraph 15, which we don't press.

HIS HONOUR: You don't press. All right. Well, I will - - -

DR HIGGINS: Does your Honour want to hear from the parties on call, or is that a matter your Honour will address in the Judgment?

HIS HONOUR: Well, I assume that in relation to Mr Jackman – might as well deal with that now – I just assumed that Mr Jackman's application was dismissed in its entirety then the order would be that his clients pay the costs.

DR HIGGINS: May it please the Court.

HIS HONOUR: Where do they get paid to? To the administrators or the companies, how does that work, I have never looked at that.

DR HIGGINS: To the plaintiffs, your Honour.

HIS HONOUR: The plaintiffs, all right. Mr Jackman, is there any reason why that shouldn't occur if the Court views that your application be dismissed?

MR JACKMAN: No, your Honour.

HIS HONOUR: All right.

MR PETERS: Would your Honour hear me on – on my client's costs? I know we're interveners but the orders sought to interfere with our rights, our contractual rights.

HIS HONOUR: Yes. Well, I have been very assisted, Mr Peters, by your submission but I think we will leave the cost between the parties, at the moment, I think at this stage.

MR PETERS: If your Honour pleases. Your Honour - - -

HIS HONOUR: Mr McGrath, I was going to let your costs fall to the – fall to which is on your client.

MR McGRATH: Yes, I don't think I have anything to say to the question, your Honour.

HIS HONOUR: All right. The only issue will be then – so that's dealt with. So getting back to you, Mr Jackman, just as quickly as you can after you have had consultation with the administrators, get your material together and I will facilitate the appropriate hearing.

MR JACKMAN: Yes, your Honour.

HIS HONOUR: All right. I thank you for your assistance. We will adjourn the Court, maybe, for 5 minutes.

MATTER ADJOURNED at 2.51 pm INDEFINITELY