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

**Federal Court of Australia Proceeding No. NSD 464 of 2020**

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

First Plaintiffs

**& Ors**

**FIRST Plaintiffs’ Outline of Submissions**

**A. INTRODUCTION**

1. These are the submissions of the First Plaintiffs, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte (together, **the Administrators**), in their capacity as administrators of each of the Second to Fortieth Plaintiffs (the **Virgin Companies**), with respect to the Interlocutory Process filed on 22 May 2020.
2. On 24 April 2020, the Court made orders extending the time, in s 443B of the *Corporations Act 2001* (Cth) (**Corporations Act**), in which the Administrators were to give notice to lessors of all property leased by the Virgin Companies as to whether to retain or give up possession of that property, together with a corresponding extension of the period in which the Administrators did not have personal liability for obligations under those leases. That extension of time was until 26 May 2020: Order 9 of the orders made on 24 April 2020 (**24 April Orders**).
3. The Administrators now seek a further extension of that time, to 16 June 2020, but only with respect to a limited class of property being, aircraft, aircraft engines and other aviation equipment used, occupied or in the possession of the Virgin Companies which are the subject of finance and operating leases (**Aircraft Leased Property**).
4. Each of the relevant counter-parties of the Aircraft Leased Property has been given notice of this application (both directly and to their solicitors, where applicable): see affidavit of Salvatore Algeri dated 22 May 2020 (**Algeri Affidavit**) at [35] and Affidavit of Kassandra Suzann Adams dated 24 May 2020.

**B. conduct of the ADMINISTRATION with regard to the aircraft leased property**

1. The evidence in support of the application is set out in:
   1. the affidavit of Vaughan Neil Strawbridge dated 23 April 2020 (**First Strawbridge Affidavit**);
   2. the affidavit of Vaughan Neil Strawbridge dated 11 May 2020 (**Second Strawbridge Affidavit**) and its exhibit marked “VNS-2” (**Exhibit VNS-2**); and
   3. the Algeri Affidavit and its exhibit marked “SA-1” (**Exhibit SA-1**).

**B.1 The Aircraft Leased Property**

1. The Virgin Companies’ fleet includes 142 aircraft that are the subject of Aircraft Leased Property, with approximately 73 lessors and financiers (collectively, **Aircraft Lessors**) of that property in total: Algeri Affidavit at [9].
2. Following the 24 April Orders, the Administrators reached the conclusion (and remain of this view) that causing the Virgin Companies to remain in possession of the Aircraft Leased Property is in the interests of the Virgin Companies: Second Strawbridge Affidavit at [94]-[96]; Algeri Affidavit at [10], [41]. This is because:
   1. it is necessary to retain an operational fleet of leased and / or financed aircraft to permit the business of the Virgin Companies to continue operating as a going concern (to the extent possible) through the administration process;
   2. retaining that property would promote the successful recapitalisation or sale of the business on a going concern basis, as:
   3. it would permit an acquirer of the business to recommence operations following a relaxation of the COVID-19 restrictions from a moving start rather than a standing start; and
   4. the cost and time associated with the acquisition, financing and mobilisation of new aircraft would, for a number of reasons, make a sale impractical.
3. The aggregate monthly liability payable to the Aircraft Lessors is in excess of $40 million per month: Algeri Affidavit at [11]. The Administrators have been unwilling to take on personal liability for the substantial debts and obligations that would be imposed by continuing to use aircraft, in circumstances where the COVID-19 travel restrictions have significantly reduced the gross revenue generated by the operating fleet (compared to pre-COVID-19 levels) to a comparatively insignificant sum of about $25 million per month (before associated direct costs including fuel, wages, landing charges, navigation charges and air services fees): Second Strawbridge Affidavit at [94]; Algeri Affidavit at [11], [24].
4. Since their appointment and following the 24 April Orders, the Administrators and their staff at Deloitte have undertaken extensive efforts in identifying the property leased by the Virgin Companies: Algeri Affidavit at [13]. With respect to real property leases and other equipment leases, the Administrators were able to form a concluded view as to whether the Virgin Companies ought to continue to remain in possession of that property (having regard to the importance of that property for the ongoing viability of the business) and were able to complete negotiations with those lessors: Algeri Affidavit at [12]. However, as set out below, that process has been more complex and protracted with respect to the Aircraft Leased Property.

**B.2 Dealings with Aircraft Lessors during the administration period**

1. The Administrators have undertaken a significant amount of work to identify, and engage in discussions with, the Aircraft Lessors.
2. On 1 May 2020, the Administrators proposed to each Aircraft Lessor a set of protocols (**Aircraft Protocols**) in relation to the ongoing possession, maintenance and preservation and, where applicable, usage of the aircraft and engines by the Virgin Companies: Second Strawbridge Affidavit at [90]-[98]; SA-1 at Tab 2.
3. The key features of the Aircraft Protocols at that time included: Algeri Affidavit at [22]:
   1. a limitation of the Administrators’ personal liability in relation to the Aircraft Leased Property and any debts incurred by reason of entry into the Aircraft Protocols;
   2. a standstill by the relevant Aircraft Lessors in relation to certain rights under the applicable leases of the Aircraft Leased Property;
   3. an extension of the time periods for repossession of the aircraft under the Cape Town Convention and Protocol, where applicable (addressed further below);
   4. an undertaking by the Administrators to use reasonable endeavours to identify, as soon as practicable, whether the property is surplus to the Virgin Companies’ business requirements and to notify the Aircraft Lessors as soon as reasonably practicable after such a determination is made (to enable them to repossess their aircraft and engines and to remarket them);
   5. the provision of information to the Aircraft Lessors;
   6. payment by the Administrators of a usage charge for the aircraft and engines that are being used by the Virgin Companies during the administration period at a specified rate;
   7. certain undertakings by those Virgin Companies that are lessees in relation to usage of the aircraft and engines and registration of the aircraft with the Civil Aviation Safety Authority;
   8. provision for maintenance of the aircraft and engines by the lessees;
   9. maintenance by the lessees of insurances over the aircraft and engines; and
   10. detailed schedules in respect of these matters and additional details for the property (such as calculating the applicable usage charges and a regime for the provision of the information about the property).
4. On 6 May 2020, Aircraft Lessors were provided with access to a data room containing key information with respect to Aircraft Leased Property and permitting the Aircraft Lessors to make arrangements with the Administrators for physical inspections of the relevant aircraft, engines and accompanying electronic records: Algeri Affidavit at [28]; SA-1 at Tab 4.
5. On 14 May 2020, the Administrators sent further correspondence to the Aircraft Lessors to address certain questions, comments and issues raised by Aircraft Lessors in relation to the Aircraft Protocols: Algeri Affidavit at [31]; SA-1 at Tab 6.
6. There were then further, and extensive, dealings between the Administrators’ solicitors and the solicitors for the Aircraft Lessors with respect to the terms of the Aircraft Protocols: Algeri Affidavit at [33]-[37]. On 21 May 2020, further communications were issued to the Aircraft Lessors and their representatives setting out the desired timeframe to finalise the negotiations on the Aircraft Protocols and foreshadowing this application: Algeri Affidavit at [35]; SA-1 at Tabs 9 and 10.
7. Negotiations with the Aircraft Lessors have been advanced to the point where in-principle agreement has been reached with the lessors of the vast majority of the Virgin Companies’ fleet, and constructive discussions are ongoing to finalise the Aircraft Protocols: Algeri Affidavit at [38].
8. The delays in reaching final agreement on the Aircraft Protocols, which have meant that the negotiations have not concluded within the time period contemplated in the 24 April Orders (being up to 26 May 2020), have largely been attributable to:
   1. the large number of Aircraft Lessors with whom negotiations have been conducted;
   2. the location of Aircraft Lessors across multiple different time zones;
   3. the relatively complex and commercially unique terms of the Aircraft Protocols, and the challenges facing all of the negotiating parties, particularly in the context of the COVID-19 pandemic;
   4. negotiations on the form and scope of the Administrators’ limitation of liability and/or personal liability;
   5. the fact that a number of Aircraft Lessors have sought specific amendments to the Aircraft Protocols, and the desire of the Administrators to adopt a consistent approach in dealings with all counter-parties;
   6. the negotiation and preparation of bespoke amendments to the schedules to the Aircraft Protocols specific to the relevant Aircraft Lessor counterparties; and
   7. the commercial scale of the negotiations, having regard to the capital value of the Aircraft Leased Property and the scale of the ongoing liabilities arising under the leases.
9. Although the negotiations for the Aircraft Protocols are very advanced, further time is needed to reach a binding agreement with each Aircraft Lessor, including having regard to the following: Algeri Affidavit at [46]:
   1. finalisation of the bespoke amendments to the schedules to the Aircraft Protocols for particular Aircraft Lessors;
   2. the need for certain Aircraft Lessors to obtain credit committee or other internal approvals; and
   3. practical arrangements to be made for each of the Aircraft Protocols to be executed by the various counter-parties and exchanged with the Administrators (given the extensive number of Aircraft Lessors).

**B.3 Sale Process**

1. The Administrators remain of the view that the continued trading of the Virgin Companies’ business as a going concern during the administration period, and remaining in possession of the Aircraft Leased Property, with a view to achieving a sale of the Business and assets of the Virgin Companies or a restructure through a deed of company arrangement, maximises the chances of the business continuing in existence or may result in a better return to creditors than an immediate winding up: Algeri Affidavit at [10], [50].
2. On 15 May 2020, the Administrators received non-binding indicative offers in relation to the assets and business of the Virgin Companies: Algeri Affidavit at [42]. The Administrators are now working with a shortlist of interested parties on the next intensive phase of the sale process, including: facilitating virtual meetings, presentation and “Q&A” opportunities and “roadshows” between the interested parties and management personnel of the Virgin Companies, sharing more detailed financial and operational information with the interested parties, and facilitating meetings between the interested parties and as many of the Aircraft Lessors, real property landlords, suppliers, unions and other key stakeholders of the business as possible: Algeri Affidavit at [42].
3. Final binding offers are due to be provided to the Administrators by 12 June 2020. The Administrators are not in a position to determine which of the Aircraft Leases any prospective purchaser may wish to continue: Algeri Affidavit at [43]. Moreover, as long as the sale process is continuing, there is a prospect that the purchaser will want to retain existing Aircraft Leased Property on the terms of the current leases, or enter into new leases with the Aircraft Lessors, all of which will reduce the Aircraft Lessors’ potential claims as creditors of the Virgin Companies: Algeri Affidavit at [47]. If a sale of the business of the Virgin Companies or a restructure by way of deed of company arrangement can be achieved, there will also be an opportunity for the Aircraft Lessors to renegotiate the lease or financing terms with the successful bidder: Algeri Affidavit at [47].
4. Ultimately, it is only when the sale process reaches a very advanced stage that the Administrators will be in a position (in conjunction with the input of the proposed acquirer of the business) to identify which of the Aircraft Leased Property may remain in the possession of the Virgin Companies: Algeri Affidavit at [47]. The Aircraft Lessors have been made aware of the interaction between the sale process and the ongoing possession of the Aircraft Leased Property. For example, in the letter of 14 May 2020, the Administrators explained that the Aircraft Protocols are “*required to progress the sale/recapitalisation of the business for the benefit of all creditors, including aircraft lessors and financiers*”: SA-1 at Tab 6.
5. Therefore, as developed below, the underlying basis for the further extension of time sought under s 443B(2)-(3), is the nexus between the sale process for the assets and the business of the Virgin Companies and the ultimate decision to be made as to the future of the Aircraft Leased Property (in circumstances where the Administrators are unwilling to assume personal liability for the obligations to the Aircraft Lessors given the magnitude of the liabilities and the trading disruption occasioned by the COVID-19 pandemic).

**C. FURTHER EXTENSION OF THE PERIOD IN SUBSECTIONS 443(b)(2)-(3)**

**C.1 Principles**

1. In the Court’s earlier reasons concerning the administration of the Virgin Companies, *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* [2020] FCA 571 (**Prior Reasons**), Middleton J at [44]-[46] set out the principles that apply with respect to an application for an extension of the period in subsections 443B(2):

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

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

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

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

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

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

The Administrators here seek orders under s 443B(8) of the Corporations Act or alternatively under s 447A which, in effect, extend the time for the giving of notice of an intention not to exercise rights in respect of the relevant properties to 5 March 2013, a month from today. A number of factors relevant to making such an order were identified in *Silvia v Fea Carbon*, including that there may be a large amount of paperwork to review; factual uncertainty in relation to the leases; or the administrators’ inability to form a view within the five business days allowed by the section as to whether it was necessary or desirable to exercise rights over the relevant property for the purpose of maximising the chances that some or all of the members of the companies can continue in existence or maximising the return to creditors.

1. Those principles apply equally to the further extension of time now sought.
2. However, there is also a particular regime that applies to aircraft, by reason of the Convention on International Interests in Mobile Equipment (**Convention**, commonly referred to as the Cape Town Convention) and the Protocol to the Convention (**Protocol**).
3. Both the Convention and the Protocol are incorporated into domestic law by the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth). By reason of s 8 of that Act, the provisions of the Convention and the Protocol prevail over the Corporations Act to the extent of any inconsistency.
4. Article XI of the Protocol deals with the moratorium on recovery of property that applies in a corporate insolvency. Article XI Alternative A relevantly provides that, upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of: (a) the end of the “waiting period”; and (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply. (Paragraph 7 permits the insolvency administrator or the debtor to retain possession where all defaults are cured and the insolvency administrator or debtor agrees to perform all future obligations under the agreement.)
5. Australia has made a declaration that it will apply Article XI, Alternative A in its entirety to all types of insolvency proceeding and that the “waiting period”, for the purposes of paragraph 3 of Article XI, shall be sixty (60) calendar days.[[1]](#footnote-1)
6. These provisions prevail over the statutory moratorium in s 440B of the Corporations Act and, as a result, Aircraft Lessors are entitled to possession of their property by 19 June 2020, which is 60 days from the commencement of the administration on 20 April 2020, unless the Administrators cure all outstanding defaults and agree to perform all future obligations under the leases.
7. Thus, it can be seen that the further extension of time sought by the Administrators to decide whether the Virgin Companies ought to continue to remain in possession of Aircraft Leased Property continues to fall within the waiting period prescribed by the Protocol.

**C.2 The extension should be granted**

1. The extension of the period in subsections 443B(2)-(3) of the Corporations Act is designed to extend the time, to 16 June 2020, for the Administrators to decide whether to cause the Virgin Companies to remain in possession of leased property in accordance with the terms of *existing* *agreements* in place at the commencement of the administration period (and to exclude the Administrators’ personal liability for the obligations of the Virgin Companies under those leases in the interim).
2. The Administrators’ personal liability under *future* *agreements*, including with respect to the Aircraft Protocols, is governed by the Court’s orders of 15 May 2020: Order 2(a)(i) of the orders made on 15 May 2020, in the case of the Aircraft Protocols. This application does not relate to such future agreements and there is nothing in the orders now sought that will excuse the Virgin Companies from being liable to pay usage charges under the Aircraft Protocols (once agreed). Nor do the orders derogate from the rights of Aircraft Lessors under the Convention and the Protocol, given that the further extension now sought (to 16 June 2020) is still within the 60 day “waiting period” prescribed by paragraph 3 of Article XI of the Protocol.
3. As set out above, the further extension of time is only sought with respect to the Aircraft Leased Property. For the reasons that follow, that further extension should be granted.
4. *First*, aircraft, engines and other associated aviation equipment are a species of property with peculiar characteristics. Obviously enough, ongoing possession of this type of property is critical to the continuing viability of any airline business, including the Virgin Companies.
5. *Secondly*, as set out above, the Administrators have been negotiating with the Aircraft Lessors with a view to reaching agreement on the form of the Aircraft Protocols. Given the number of Aircraft Lessors, this has been a complex process. However, substantial progress has been made and the Administrators are close to finalising the arrangements with the counter-parties: Algeri Affidavit at [38]. The further extension will facilitate agreement being reached with the counter-parties, governing future dealings over the course of the administration period.
6. *Thirdly*, the timing of the proposed further extension is harmonised with that of the sale process. Final bids are expected by 12 June 2020 and the prospective bidder(s) are expected to be in a position to provide an indication as to which specific aircraft are sought to be retained following a sale or restructure of the business of the Virgin Companies: Algeri Affidavit at [43]. Accordingly, by 16 June 2020, the Administrators are likely to be in a position to ascertain which specific aircraft may not be required for the business. Ultimately, given the nature of the property in question, that is a decision the Administrators can only be expected to make in conjunction with a proposed purchaser of the business and assets of the Virgin Companies.
7. *Fourthly*, the liabilities associated with the Aircraft Leased Property are significant, exceeding $40 million per month. The Administrators are not willing to take on personal liability for those liabilities and, if that were to occur, the Aircraft Lessors would be entitled to take possession of the property before 19 June 2020 (as otherwise permitted by the Protocol), which would be detrimental to the prospects of the Virgin Companies remaining as a going concern (especially this critical stage of negotiations for a sale or restructure of the business): Algeri Affidavit at [27].
8. *Fifthly*, there is unlikely to be any material prejudice to the Aircraft Lessors from the further extension. The Aircraft Leased Property is insured and properly maintained, with the Aircraft Lessors being kept regularly informed of these matters and having had the opportunity to inspect electronic records and the aircraft in their physical form: Algeri Affidavit at [28]. Moreover, once the Aircraft Protocols are agreed, payments will be made to Aircraft Lessors in cases when the Administrators cause the Virgin Companies to use the particular aircraft as part of the operation of the business: Algeri Affidavit at [47]. Also, having regard to the significant travel restrictions in place during the COVID-19 pandemic, as a matter of commercial reality it is not apparent that the return or surrender of Aircraft Leased Property to the Aircraft Lessors will enable the relevant lessors and financiers to derive any better financial return for their property in the short term.
9. *Sixthly*, in light of the matters above, Mr Algeri, an experienced insolvency practitioner, has deposed that: (a) the Administrators consider that they require the further three weeks to finalise the Aircraft Protocols; and (b) the extension of time is designed to preserve and enhance the value of the Virgin Companies’ business as part of a sale or positive restructure of the business as a going concern: Algeri Affidavit at [44]-[45]. The case law recognises the significance of attending to an administrator’s own considered view of what is in the best interests of creditors, including with respect to an orders sought extending the time under s 443B in a complex administration: *CBCH Group* (above) at [48]; *Eagle, in the matter of Techfront Australia Pty Limited (administrators appointed)* [2020] FCA 542 at [43(2)].
10. *Seventhly*, as set out above, it is necessary for the Court to have regard to the best interests of the creditors of the Virgin Companies as a whole. An extension of time under s 443B maximises the prospect of preserving (either in whole or in part) the business of the Virgin Companies with a view to a sale or restructure of the business as a going concern. That is in the creditors’ best interests (including those of the Aircraft Lessors as it also increases the prospect that there will remain a counter-party in place with respect to existing aircraft leases): *Techfront Australia* (above) at [43(3)]; Prior Reasons at [49].
11. *Eighthly*, to the extent that the Aircraft Lessors are adversely affected, the orders sought are framed in such a way to permit those persons to apply to the Court for a variation of the orders: *Currie, in the matter of The Country Wellness Group* [2018] FCA 1455 at [29]; *Techfront Australia* (above) at [43(6)]; Prior Reasons at [51].

**D. Conclusion**

1. The Court should make orders in the form of the short minutes of order provided on 22 May 2020.

**23 May 2020**

Ruth C A Higgins SC

David R Sulan

Daniel Krochmalik

Counsel for the First Plaintiffs

1. See: <https://www.unidroit.org/meetings/464-instruments/security-interests/cape-town-convention-aircraft-protocol-2001/depositary-functions-aircraft-2001/454-article-xxx-3-declarations-deposited-under-the-protocol-to-the-convention-on-international-interests-in-mobile-equipment-on-matters-specific-to-aircraft-equipment-regarding>. The relevant qualifying declarations are identified in the Explanatory Memorandum (House of Representatives) to the *International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendmenrs) Bill 2013* at [1.17]. [↑](#footnote-ref-1)