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TRANSCRIPT OF PROCEEDINGS

O/N H-1238324

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

MIDDLETON J

No. NSD 464 of 2020

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

MELBOURNE

10.15 AM, FRIDAY, 10 JULY 2020

MR I. JACKMAN SC appears with MR P. KULEVSKI and MR R.J. PIETRICHE for the applicants
DR R. HIGGINS SC appears with MR D. SULAN, MR R. YEZERSKI and MR D. KROCHMALIK for the plaintiffs
MR M. IZZO SC appears with MR J. BURNETT for BC Hart Aggregator, L.P. and BC Hart Aggregator (Australia) Pty Ltd

HIS HONOUR: Before I take appearances, I need to make an order, which I will do now. The court notes that section 17(1) of the Federal Circuit Court of Australia Act 1976 requires that the jurisdiction of the court be exercised in open court, but section 17(4) of the Act allows for the public to be excluded if the court is satisfied that their presence would be contrary to the interests of justice. The court must balance the importance of this matter being heard and determined and open justice. Justice requires this hearing to be conducted as soon as reasonably possible and that it is not to 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. The arrangements are identified in paragraph 1 of the orders I propose to make. It would be contrary to the interests 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, because the result would be that the hearing would be deferred indefinitely.

The court orders that (1), pursuant to section 17(4) of the Act, the public be excluded from this hearing, listed at 10.15 am on 10 July 2020 other than by the following arrangements: (a) any member of the public is available to join the hearing via the Microsoft Teams by providing an email address to the associate to Middleton J as stipulated in the court notice of proceedings, and (b) any member of the public is able to listen to hearing via the Microsoft Teams platform by dialling the number and ID allocated to hearing published on the court list; (2) members of the public other than the media representatives who attend the hearing via the methods in paragraph 1 of these orders do so on the condition that they are (a) permitted to observe and 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, and (c) advise that any failure to observe conditions (a) and (b) may constitute a contempt of court and be punishable as such. So I will now take appearances.

MR I. JACKMAN SC: May it please the court, I appear for the applicants with my learned friends MR KULEVSKI and MR PIETRICHE.

HIS HONOUR: Thank you, Mr Jackman. Yes, Dr Higgins.

DR R. HIGGINS SC: May it please the court, I appear with my learned friends MR SULAN, MR YEZERSKI and MR KROCHMALIK for the plaintiffs.

HIS HONOUR: Yes. Mr Izzo.

MR M. IZZO SC: Thank you, your Honour. I appear with My learned friend MR BURNETT for BC Hart Aggregator LP and BC Hart Aggregator Australia Proprietary Limited.

HIS HONOUR: Thank you. Can you – everybody hear me clearly?

DR HIGGINS: Yes, your Honour.

MR JACKMAN: Yes.

HIS HONOUR: Yes. All right. Well, I can hear you, so, so far, the system is working. The technology anyhow. Is there anybody else who is online that seeks leave to intervene or to address the court? If I hear nothing, I will assume there is no one. All right. Now, you can all assume that I have read the affidavit material and the submissions that have been filed. To the extent I was not familiar with some of the principles, I've educated myself since I've received those submissions. Principles of law, that is. I don't think there's, really, much dispute about that application of them.

And, obviously, you all know I'm familiar with the background of this administration. So we should work on that basis, if you wouldn't mind, to deal with it as efficiently as we possibly can in the circumstances. So I take it, Mr Jackman, you're starting off?

MR JACKMAN: Thank you, your Honour. And thank you for the indication as to what your Honour has read. We're grateful for that. Can I ask your Honour to begin with the interlocutory process filed on 7 July. There's one significant aspect which I've informed my learned friends I won't press. If your Honour has that to hand. Paragraph 4 of the interlocutory process sought to extend the time generally in relation to any proposed variation of the orders that your Honour made on 2 July. I won't press paragraph 4. It's taken up at some length in my learned friend's written submissions in opposition to us concerning, in particular, the importance to them of the 588FM order. So that aspect is not pressed.

HIS HONOUR: Well, thank you for that, because that did concern me, I must say. But, in any event, that's not a matter I need to adjudicate on anymore.

MR JACKMAN: That's so. Order 5 is pressed. It contains a typographical error, which I would ask your Honour to correct. It refers at the end of the second line to order 7. That should have been a reference to order 8. And the effect of that is – it's very minimal. It simply seeks that any notice by the administrators of any application to vary or discharge the orders of 2 July be given to us, as well as being given to the court. And we continue to press that.

Paragraph 6 is the principal matter for your Honour today, seeking a variation to the suppression orders that your Honour made. Then paragraph 7 is a matter as to which we are completely indifferent, concerning the suppression of parts of Mr Catchpool's affidavit and exhibit. We included it as a matter of good faith, acknowledging that there is a concern on the part of our opponents as to confidentiality, but we will approach paragraph 7 as being a matter for them to argue, rather than us putting

forward a positive argument on it. So, as I say, paragraph 6 is the principal matter in contention.

HIS HONOUR: Before you go any further, Mr Jackman, I may just then ask what the attitude of Mr Izzo and Dr Higgins is to your paragraph 7. You're not pressing it. Is anyone else pressing it, is what I want to know.

MR IZZO: Your Honour, I'm not, because I don't have the confidential exhibit. I don't complain about that. I just take my position. I just don't know what's in it.

HIS HONOUR: All right. Thank you.

MR IZZO: I ..... the affidavit and I don't have any complaint about that.

HIS HONOUR: All right. Dr Higgins, what's your position?

DR HIGGINS: Your Honour, it is, of course, relief that our learned friends seek. There are materials in the exhibit to Mr Catchpool's first affidavit we understand are necessarily confidential, in particular, the application to the takeovers panel itself. So it may be that there is a proper scope of confidentiality that must be maintained, but we certainly would be open to narrowing the scope of that order, so that only material that is genuinely confidential and otherwise ought not be public ..... the subject of it.

HIS HONOUR: All right. What I will do is I can understand just from my reading there would be some material that would be confidential, not necessarily in your client's request, Mr Jackman, but generally just having regard to what the information is. So, in relation to confidentiality orders, to the extent I will be making any in relation to material before me today, I would ask the parties to confer about that. And then each one – or whoever is relevantly wanting the order to propose it. You would all notice what I did on 2 July.

Effectively, we have two – which are done in many cases, obviously. We have two sets of submissions and two sets of affidavits, so one is completely open and the other one is redacted. So that's the best way to do it. So if you could work on that when I finish and then make – it's easier to make them – produce them as separate orders for me and I will make them as separate orders, irrespective of what else I do today.

MR JACKMAN: May it please the court.

HIS HONOUR: All right. Thank you.

DR HIGGINS: Yes, your Honour. And can I indicate, your Honour, that the parties have created an exhibit which is labelled MCR-3 – MRC-3, rather, which does extract, to the best of our understanding, the confidential material.

HIS HONOUR: Yes.

DR HIGGINS: So we should be able to do that quickly.

HIS HONOUR: All right. Whilst we're talking about the confidential material and the takeovers panel, the relief that is being sought before the takeovers panel, is that confidential? And Mr Jackman may be the one to answer that.

MR JACKMAN: I shouldn't think so, because I think it's already the subject of a media release by the panel, but - - -

HIS HONOUR: Yes. I thought I had read it somewhere in the media, too. I will assume, unless you tell me otherwise and you get some instructions as to – anyone gets instructions about it – I will assume that the relief sought is not confidential. And it may be something I will need to refer to in my reasons. And I prefer my reasons to be unredacted as far as possible. All right. Thank you. Yes.

MR JACKMAN: Now, the evidence in support is in two affidavits of my instructing solicitor Mr Catchpool. And I read, first, the affidavit of Michael Russell Catchpool of 6 July 2020. And I tender the exhibit to that affidavit, MRC-1. And the second affidavit is Mr Catchpool's affidavit of 9 July 2020. And I tender, also, annexure MRC-2 and exhibit MRC-3 to that affidavit.

DR HIGGINS: Your Honour, the plaintiffs have some limited objections in the first instance as to admissibility and thereafter as to weight in respect of the 6 July 2020 affidavit.

HIS HONOUR: Yes. Are they really necessary? Is it really going to affect – I'm just – I don't know. I haven't heard them yet, but we want to filter any unnecessary time to any objections to evidence, unless they go right ..... of the point, really.

DR HIGGINS: What I might do, your Honour, in light of that indication, for which I'm grateful, is return to them only to the extent that they arise in substantial argument as to weight.

HIS HONOUR: Let's do it that way. I didn't see anything in that would cause a difficulty to anybody if I treated it as sometimes a statement of view or I will put it into weight. So let's deal with it that way and we will go from there. Yes. No one else – any other objections to ..... Mr Jackman or Mr Izzo?

MR JACKMAN: No. No, thank you, your Honour.

HIS HONOUR: All right.

MR JACKMAN: And that's the evidence for the applicants, your Honour.

HIS HONOUR: Thank you, Mr Jackman. Now, Dr Higgins, you – what affidavits do you rely upon, just to make sure I get the record correct?

DR HIGGINS: Your Honour, I read the affidavit of Vaughan Strawbridge of 9 July 2020 and also the confidential affidavit of Vaughan Strawbridge of 9 July 2020. We will provide your Honour with appropriate orders to preserve the confidentiality of that second affidavit - - -

HIS HONOUR: Yes .....

DR HIGGINS: - - - in due course.

HIS HONOUR: I'm prepared to make that – I'm prepared to make those orders in relation to that affidavit.

DR HIGGINS: Thank you, your Honour. Your Honour, we also rely, for the purposes of the application, on the first to six Strawbridge affidavits and the Algeri affidavit that have already been read in the proceedings before your Honour.

HIS HONOUR: Mr Izzo, I didn't notice any evidence you have.

MR IZZO: No. We don't have any, your Honour.

HIS HONOUR: Yes. All right. Mr Jackman, off we go.

MR JACKMAN: Thank you. The question in relation to paragraph 6 of our interlocutory process is whether it is necessary to prevent prejudice to the proper administration of justice for my clients and the others involved in the takeovers panel proceedings to be denied access to the sale agreement which has been entered into between the administrators and the Bain Capital companies.

I emphasise that we are not seeking disclosure to the public at large, nor are we seeking what is referred to in Mr Strawbridge's affidavit as widespread disclosure. It's in fact a very narrow targeted disclosure that relates to my clients and others involved in the takeovers panel proceedings. There are two important matters of context. The first is that we've been told unequivocally by the administrators that in about a month's time we will be informed of the transaction and of its implications and effect on creditors in the report to creditors which will be provided before the second creditors meeting in August.

In other words, the question of disclosure is, really, one of timing, not one of content. And the difficulty for my clients is that that timeframe will simply be too short for them to formulate an alternative DOCA to be considered at the second creditors meeting. That takes me to the second matter of context of importance, which is that my clients seek to put an alternative DOCA to the second creditors meeting with a view to an improved return to creditors while also seeking to ensure the future viability of the company.

Now, it should be uncontroversial that we have a statutory right to do that. It's a right which is expressly recognised in - - -

HIS HONOUR: I don't need to be persuaded of that at the moment. I would have thought you have a right as a creditor to put a proposal, to put changes to whatever DOCA there is or put another DOCA. Unless someone - - -

MR JACKMAN: Indeed.

HIS HONOUR: - - - is going to argue against that, you can proceed I will work on that basis, Mr Jackman.

MR JACKMAN: Thank you, your Honour. And I should emphasise at this point that we are not contending that the administrators themselves are obliged to put two competing DOCAs to the second meeting of creditors. We saw in Mr Izzo's submissions a reference to the Ten Network judgment of Black J, a somewhat – if I may say so, with great respect, a somewhat selective quotation from paragraph 39 of Black Js judgment. His Honour there was considering an argument which his Honour said he wouldn't determine in the judgment. But the argument was that the administrators in that case were obliged to put two competing offers to the second meeting of creditors. We're not arguing for that and we can well understand why Black J held that there's no such obligation on the administrators.

The administrators will no doubt put forward a DOCA that reflects the Bain transaction at the second meeting of creditors. And we, for our own part, intend to propound an alternative DOCA. We're not asking the administrators to put it forward or to analyse it in the report to creditors. We will ourselves propound that alternative DOCA, as I say, with a view to improving the return to creditors, as well as ensuring the future viability of the company.

Now, a good deal of the evidence that is before your Honour concerns the earlier bid process. And your Honour will have seen that my clients did in fact make an offer on 24 June as part of that process. Your Honour will have seen that there was a demand by the administrators for an extremely large amount of cash to be provided within 24 hours across international borders, which simply couldn't be met in the timeframe imposed upon us. And your Honour will have seen that there are various factual issues as to what was said at various times by the administrators to my clients.

That, in our respectful submission, is not necessary to resolve. It's important simply to note that my clients have had a longstanding interest in propounding an alternative transaction. But the particular controversies between Mr Catchpool's affidavit and Mr Strawbridge's are not particularly germane to the present application. What is important is the legal proposition, which is uncontroversial, is that the second meeting of creditors is the occasion when the decision-making process closes and competitive bids by way of rival DOCAs can always be considered by creditors at the second creditors meeting.

There's a line of argument that's sought to be pursued by our opponents to the fact that the competitive process ended when the bid process conducted by the administrators ended. We just don't understand how that can be so, given the operation of part 5.3A. Now, there's no jurisdictional difficulty in varying the order. Our present application falls under two of the grounds in rule 39.05, namely an order made in our absence, and also that the order is interlocutory.

There is a line of argument pursued by our opponents that disclosure of the Bain sale agreement to my clients runs the risk of disrupting the Bain transaction. And, in a sense, that's right, because we do seek to propound what we regard as being a superior proposal in the interests of creditors. And we do seek to exercise our statutory right of proposing such an alternative irrespective of the process already undertaken. It has surprised us that the administrators have taken a contrary view of the law. And your Honour will see that in Mr Catchpool's first affidavit, if I can ask your Honour to go to that.

The – your Honour will see in paragraph 28 of Mr Catchpool's affidavit that the administrator's solicitors sent a letter on 26 June indicating what is set out in paragraph 28, more or less a fait accompli in terms of a sale to Bain. And then, in paragraph 29, there's undisputed evidence of a conversation in which my clients ask Mr Strawbridge if we could propose a DOCA. And we were given an unequivocal negative answer to that. And it was conveyed to us that that was by reason of the transaction entered into by Bain. And then in paragraph - - -

HIS HONOUR: Just stopping you there, though, Mr Jackman, that can't be right, can it?

MR JACKMAN: No. It can't.

HIS HONOUR: So does it really matter what Mr Strawbridge things, if he's wrong about that, which I'm inclined to think he is? Does that matter?

MR JACKMAN: Well, we then go on to paragraph 32. And it might matter, depending on how the Bain transaction is structured. Your Honour will see in paragraph 32 a reference to a meeting of the noteholders consultative committee on 2 July. There's then reference to the terms of reference for that committee. At the foot of the page, your Honour will see that Mr Lou Kasuski asked for clarification as to whether he had heard the administrator correctly and his understanding was correct, that if the Bain proposal is rejected by the second meeting of creditors, it would still be binding, to which Mr Strawbridge said:

> *The vote of the second meeting would not, effectively, change the outcome of the sale, as an asset sale would occur in that scenario.*

And then goes on to say that all will be revealed in the report to creditors. Now, that does raise a question in our minds as to precisely how the Bain transaction is structured. What, to our way of thinking, doesn't appear to have been contemplated

is that the second meeting of creditors might positively vote in favour of an alternative DOCA. And if that were to be so, the company and the administrator would be duty-bound to execute that DOCA and will be duty-bound not to act inconsistently with that alternative DOCA, pending execution.

But we are confused as to how the administrator, no doubt with advice, has come to the conclusion that it is a fait accompli and whatever happens at the second creditors meeting can't change the asset sale to Bain. Now, your Honour quite rightly, in your Honour's judgment of 3 July, spoke of the importance of seeking to avoid confusion and misapprehension, but the – and your Honour has the advantage of us, because we haven't seen the Bain transaction and we don't know how it is structured. But we are confused and there is a misapprehension on either our part or on the administrator's part as to what happens at the second creditors meeting if, not only do the creditors reject the Bain proposal, but they positively vote in favour of an alternative proposal.

Now, coming back to the question of ..... for us to exercise our statutory right of putting forward an alternative DOCA, we need meaningful information in sufficient time to develop and propound a transaction which will be superior to any interests of creditors. And to do that we need to know what the Bain transaction involves, we need to know how it is structured in order to ..... how Mr Strawbridge could have come to the view that he expresses in paragraph 32. And we need to know what will be involved in unwinding the Bain transaction if our alternative DOCA is approved by the creditors.

In ..... to my clients to the Bain agreement, we would promote ..... of part 5.3A by noting ..... meaningfully to exercise our statutory rights. And, therefore, it will advance the administration of justice. Now, we don't have to go that far. We don't have to show that disclosure would advance the interests of justice. It's a matter for the administrators to persuade your Honour that it is necessary in the interests of the proper administration of justice for the evidence to be suppressed and kept confidential from, because, of course, access is the norm, suppression is the exception. And necessity in the section is a very strong word and casts, in our submission, a very heavy onus on the administrators to discharge. And it would be, in our submission, an extraordinary thing for us to be, effectively, shut out of the opportunity to exercise our statutory rights to proposing an alternative by denying us access until the Eleventh Hour when we receive the report to creditors just before the meeting when all will be revealed to us and we will know exactly what the implications of the agreement are.

So, for those reasons, in our submission, with the variation to order 2 which your Honour made on 2 July – and, as I say, the other aspect of the application, which is still live, is order 5, seeking a variation to order 8, which is, really, of a mechanical nature, ensuring that notice is given to my clients, as well as to the court, of any application for variation or discharge by the administrators. Your Honour, if I can be

- - -

HIS HONOUR: Thank you, Mr Jackman. Dr Higgins, two things I need to ask you. Just taking the last point of Mr Jackman and the affidavit paragraphs 29 and 32, there can't be any doubt, can there, that if an – that a creditor can put forward another DOCA if they want to or vary the DOCA or whatever, and secondly, that the creditors before the meeting – and it's all about timing, as Mr Jackman says. But under the insolvency rules, the administrator has to get information sufficient for the creditors to make an informed decision about how they're to operate and how they're to vote. So is Mr Strawbridge wrong when he says what he says, at least in paragraph 29?

DR HIGGINS: Not in practical terms, your Honour, no.

HIS HONOUR: What - - -

DR HIGGINS: Can I address - - -

HIS HONOUR: Does that mean that, in practical terms, no other DOCA can be put forward? I mean, that can't be right, surely.

DR HIGGINS: No, that's not the case, your Honour. Can I take a step back - - -

HIS HONOUR: Yes.

DR HIGGINS: - - - and can I – I will answer your Honour's question, but can I first submit this: this was brought and is now abandoned as an application to vary orders under section 588FM of the Act. What we are now interrogating is a quite different topic, which is, with respect, unrelated to the relief sought on 2 July 2020, and it is now a quite collateral application. Now, I stress that and I will come back to that, but I do want to directly address the question your Honour has put to me.

What has occurred is that the administrators have exercised their power of sale under section 437A of the Act, which is wholly orthodox. It remains open to our learned friends to seek to put together an alternative DOCA, but the power of sale has been exercised and our learned friends would have to take other steps to seek to undo that sale. Now, this is not that application, and that, your Honour, is the burden of my first submission. There has been no attempt to enjoin this sale notwithstanding that our learned friends were ..... between 25 June and 26 June that a sale would occur. No application to enjoin. There is no application in truth directly to challenge the steps taken to date by the administrators, and any such application would have to deal with ..... of the Act.

There is likewise a faint submission in our learned friends submission that we ought to have sought directions in advance of the sale. That again is misconceived. There is no requirement that that be sought. So, your Honour, there is a confusion at the heart of the application and what it's seeking to achieve. It is not currently a challenge to the sale. It is, in truth, an attempt by our learned friends, as an unsuccessful underbidder, to obtain access to the entirety of the confidential material

that constitutes the Bain transaction in order – as Mr Jackman candidly put it – to put together a superior proposal.

Now, that, we say, heterodox. If our learned friends wish to challenge the sale, there are means available to them. But seeking to reopen orders under 588FM of the Act is not that avenue.

HIS HONOUR: I don't have a problem with anything you've just said, but let's get back, though, to the issue of what Mr Jackman's clients are able to do. They're able to put forward a new DOCA – that's the first step – if they want to.

DR HIGGINS: Yes.

HIS HONOUR: To do that at the second creditors' meeting in August or to be able to vote one way or the other, Mr Jackman's clients have to be given sufficient information for them to know what options are available on the table.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: And they can bring their own option or they can watch and see what other options there are to vote on. So all that's, I think, uncontroversial. All you're - - -

DR HIGGINS: That is so.

HIS HONOUR: All right. So all you seem to be telling me is there has been a process entered into lawfully, and there's no challenge and I accept there's no challenge in these proceedings about that before me today. And so be it; that has happened and everybody has to live with that when they move forward. That's, I think, what you're telling me.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: All right.

DR HIGGINS: That is putting it bluntly.

HIS HONOUR: Well, let's be blunt about it. We're dealing with a very important business decision, so let's be as clear as we possibly can as to where we're going. All right. Well, that's the first thing I wanted to ask you about, and I don't need to - - -

DR HIGGINS: Your Honour, can I pick up one aspects of your Honour's comments, and it's this: in their capacity as unsecured creditors in any event, our learned friends' clients would receive a report to creditors under section 75-225 of the rules and a report under section 439A of the Act. And that is the ordinary means by which creditors receive information that facilitates their ability to propound an

alternative DOCA. What does not happen is early access to the totality of confidential transaction documents.

HIS HONOUR: I understand that, and Mr Jackman has fairly put it, this is really all about timing. So let's just be – understand where we're going with it. All right. I don't need to hear you anymore on the confidentiality aspect of what is being sought. Let's go, then, to Mr Jackman's clients being given some notification where there's to be a variational discharge of the orders made on 2 July. That's his application in paragraph 5.

DR HIGGINS: Before your Honour moves on to that, can I stress one matter that your Honour may already apprehend, but it arises from what your Honour has just observed. We say this is more than a matter of timing. We say that the access that our learned friends seek is not access to which they would ordinarily be entitled or they would ordinarily receive. So it's not a question of timing; it's a question of substance and content as to what they receive access to. And it's in that context that I made the submission about section 75-225 and section 439A.

HIS HONOUR: All right.

DR HIGGINS: This is not just a question of timing.

HIS HONOUR: Well, when I'm talking of timing, I'm talking – in the test I've got to – which Mr Jackman again – there seems to be no argument about what I've got to make sure I do – is unless it's in the interests of justice, the burden being upon your client to satisfy me of that, then the orders should be varied, and now that I – now that the matter has been agitated. So that's where I'm going to be exercising the process of the court. When I say timing, I've got to deal with the situation as now. In three weeks time, two weeks time or when the report is given, the administrators – and I will come to this in a moment – may have to make some rather hard decisions as to how much they do disclose information for the purposes of the second creditors' meeting. And I will come back to that, but if they take a particular approach, the second creditors' meeting may become litigious.

DR HIGGINS: Yes.

HIS HONOUR: And we all know that if the creditors don't get enough information for them to make a decision, then either there could be an enjoining of the meeting from proceeding if I take the view that not information is around, or if the DOCA is entered into and it turns out that it's inappropriate, then it can be terminated. So I'm just – warning is putting too fine a point on it, I may say. But one has to look at where we're leading with all this in the interest of the creditors and the companies and maybe even broader interests. But I think I'm looking at the interest of the creditors primarily at the moment.

DR HIGGINS: Yes, your Honour. Can I indicate there was nothing in any of that with which the administrators disagree and there is no proper basis for a concern at the moment that insufficient information would be given in those ..... - - -

HIS HONOUR: I'm not suggesting that. I did turn my mind – I'm not going to do this now, so you don't need to give me a submission on it. I did turn my mind to whether or not, having regard to where the battle is now between Mr Jackman's clients and yourself and Mr Izzo's clients, whether or not there should be some facilitator so that the air could be cleared and people could clear – find out what's going on in that sort of way so to alleviate people's concerns. But I've decided I won't order that now because I think I can dispose of this application today based upon what I had before me. But I'm just indicating it's in everybody's interests for as much communication to alleviate people's concerns, but more importantly, to gather all the information and all the options that will be available for the second creditors' meeting. And that's the important thing.

The next point I wanted to come to, Dr Higgins, is the relief sought in paragraph 5, which effectively is a procedure order that Mr Jackman's client gets some notification if you're going to come back to the court and want to change orders or make an application to the court for one reason or another. And I'm inclined to make that order, because we have to deal with the reality. Mr Jackman's clients obviously are showing an interest. He's told me that, on his current instructions, that they propose – at least, their current intention is to perhaps put another DOCA to the meeting. So I know we're not giving notice to every other unsecured creditor, but I'm inclined to think that it would be appropriate in this case to give at least notice to Mr Jackman's clients. So do you want to say anything against that?

DR HIGGINS: Your Honour, there is a difficulty in this application in that it's slightly Janus-faced. On one hand, Mr Jackman comes as an unsecured creditor no different from any other unsecured creditor and, on the other hand, is an unsuccessful bidder. So we do say, especially with the abandonment today of any attempt to vary and any attempt to identify a basis to vary the 588FM order, their standing in respect to this is utterly obscure.

Now, consistent with – notwithstanding that submission, rather, I appreciate the pragmatic perspective that your Honour is adopting and the sensible approach that the court wishes to promote. On that basis, we don't oppose the order, but we would consider it appropriate also to inform others, because Mr Jackman's client does not find himself in any different position than those other creditors. So Mr Strawbridge and the administrators would, I think, be required to notify more broadly than that order provides.

HIS HONOUR: You do already, don't you, under my orders, normally have to send the orders off to everybody, don't you, within one business day? Order 6, I think, of 2 July, which is the standard order I think we make, don't we?

DR HIGGINS: That's so, your Honour. That's precisely so.

HIS HONOUR: Yes.

DR HIGGINS: So the short point is we do anyway. We don't, especially with the 588FM abandonment today, see how Mr Jackman's client is in .....

HIS HONOUR: All right.

DR HIGGINS: But we are ..... pragmatic and commercial. The notice would, however, be broader than that order seeks.

HIS HONOUR: All right. Thank you. Mr Izzo, I don't know if I need to hear from you unless there's a point that is not in your written submission that you may have considered this morning in some – a moment of anew thought.

MR IZZO: It's very generous of your Honour. No, there isn't. Your Honour, the only thing I was going to say is this: is that I am conscious that your Honour has been asking questions about the operation of the transaction documents in light of what the administrators have said about them. It is difficult for us to give your Honour further assistance in that regard without, in effect, pre-empting the very question which our friends want to challenge and examine and have the document to challenge. And we adopt what Dr Higgins has said about the timing at which that should occur. But because I'm conscious that your Honour is asking about it, and to the extent that your Honour considers it relevant to any decision your Honour would wish to make, I would want your Honour to know, if you like, the clause where your Honour can find how it works. I can't do that in open session, but I would like to give your Honour the opportunity to have that understanding.

HIS HONOUR: You could give me the clause number, couldn't you?

MR IZZO: Yes, I could. And I can give it - - -

HIS HONOUR: Well, I don't think that's going to disclose anything to anybody, really.

MR IZZO: No. So it is clause number 12, and I will just double-check to tell your Honour that I've said the right thing. Yes.

HIS HONOUR: I didn't hear the number, Mr Izzo, so you need to tell me again.

MR IZZO: It's 12.

HIS HONOUR: 12. All right.

MR IZZO: Yes.

HIS HONOUR: Thank you. Anything else you want to say?

MR IZZO: No, your Honour.

HIS HONOUR: All right. Mr Jackman, is there anything you want to say in response to what Dr Higgins said? You're on - - -

MR JACKMAN: I'm sorry; I was on mute.

HIS HONOUR: No - - -

MR JACKMAN: Yes. And I'm saying this is in a position of very considerable disadvantage, because I'm the only one who – together with my team, the only ones who don't have access to the sale agreement. But my learned friend Dr Higgins says that what has been done is an exercise of the power of sale under section 437A, which, of course, authorises the administrator to dispose of the business undertaking of the company. But from what we've been told about this transaction by the administrator, it just does not seem to be a straightforward exercise of the power of sale under 437A, because we've been told that the administrator will be propounding a DOCA. So it's not a case where the business undertaking is sold and the company is now just a cashbox which might as well be wound up and the cash distributed. We're told that there will be a DOCA.

Now, we don't know what clause 12 says. Your Honour, of course, does have access to it. But it appears to us that it involves the propounding of a DOCA at the second creditors' meeting, and we wish to exercise our right to propound an alternative. I can't take the matter further in the absence of knowing what the agreement provides for. And if we're going to be told the structure of the agreement in the report to creditors, we must be told at least that. So the effect of clause 12 is going to have to be revealed to us. But there is a desire by our opponents – who leave it until it's simply too late for us to make use of that information other than for the simple purpose of voting on the one DOCA that the administrator wants to have put forward.

It's true that we have not applied to set aside the sale transaction, but one asks rhetorically how on Earth could we when we don't know what the sale transaction provides for? Now, the other aspect of this, which is very important to us, is that, of course, the panel is still deliberating over the question whether to conduct proceedings, and it would not be consistent, in our submission, with the proper administration of justice to shut out the panel from dealing with the question whether the denial of access to us of the sale agreement constitutes unacceptable circumstances.

The practical effect – if your Honour were to not vary the suppression order that your Honour made on 2 July, the practical effect would be to make it ..... for the panel to make an effective declaration of ..... circumstances with remedial orders in circumstances where the document itself has been ordered to be suppressed by the Federal Court. And that, in our submission, is not in the interest of justice. The

panel ought have the opportunity to consider the circumstances free of any inhibition arising from orders which this court has made.

HIS HONOUR: Mr Jackman, the difficulty I have with that approach – and I fully understand what you're saying and you've put it in your submissions – is that we're now only dealing with the confidentiality regime that I put in place, are we not?

MR JACKMAN: Yes.

HIS HONOUR: And that is until further order. If a panel – it comes into existence – and I must say, I would be little surprised if it did, because the court is now – the Federal Court of Australia has been involved in dealing with the administration. Any aspect of misbehaviour, if that's what wants to be brought before an appropriate body can be brought before the court, but anyhow, that's not my decision. The panel will make up its own decision as to whether it should proceed. But if it does proceed, that's a different circumstance. And if the panel is going to look into this and an order is required to vary what I have done so that certain people can see it, there's no reason why you can't come to back to this court or someone else can't come back to the court as interest in that proceeding. I'm not precluding that.

MR JACKMAN: I take your Honour's point. Finally, can I take up the question of the content of access? My learned friend Dr Higgins advanced the submission that there are parts of the agreement which are confidential in the sense of being commercially sensitive. That, in our submission, might open the door to a different application by the administrators for certain parts of the sale agreement to be the subject of a suppression order while leaving other aspects, such as, for example, the broad structure of the agreement, the effect of clause 12 that Mr Izzo has talked about, leaving those aspects as matters to which we do have access.

So we're certainly not contending for a position where something which might be genuinely commercially sensitive should be suppressed, but we have no idea what the agreement contains and, in our respectful submission, it's a matter for the administrators to themselves propound a variation of the suppression order so as to preserve what they claim is of a genuinely confidential nature. And, of course, nothing that we say today and nothing that your Honour decides now can preclude them from making that application if they're minded to do so. May it please the court.

HIS HONOUR: Thank you, Mr Jackman. Well, that was partly what I was – had in the back of my mind when the administrators really should, as much as they possibly can, communicate and inform as much as they possibly can your client, having regard to where we're at. So we will see what the administrators do. They've heard what you've asked for and I think I've made my position clear that we've got to prepare as much as possible a ground for the creditors' – second creditors' meeting, which you're obviously going to be an active part in for one reason or another, so I hope to leave it up to the good sense of the parties for the moment. And if otherwise, we go from there. All right. Anything else, Mr Jackman? Mr Jackman, looking at

your application, paragraph 5, for giving notice, you will get notice already as an unsecured – as a creditor under 6 of my orders I made on 2 July, and I think I usually make these orders in the same form. So you will get notification anyhow, Mr Jackman.

MR JACKMAN: That's, I think, after the event. So after your Honour makes orders, we then get - - -

HIS HONOUR: I see. I see. All right. Yes.

MR JACKMAN: ..... notice in advance of the orders being made. And as I understand it, there's no resistance now to that, and it's a matter of indifference to us whether creditors beyond us are notified. The administrators are welcome to notify as many people as they like as long as we're included in that, and as I understand it, there's no opposition now to that.

HIS HONOUR: All right. Well, I will – your point – I will do the reverse favour. You've made your point about that.

MR JACKMAN: May it please the court.

HIS HONOUR: So there looks to be no objection to 5. I will limit it to your application. If the administrators want to tell other creditors in light of my making this order in your favour, then the administrators can do so. I will leave it to them to do that.

MR JACKMAN: May it please the court.

HIS HONOUR: All right. Well, Mr Jackman, it probably has been – you've become aware I'm not going to accede to your application. I will refuse the application other than make the order sought in paragraph 5. You're no longer pressing paragraph 4. And in relation to paragraph 7, which deals with the confidential exhibit, I'm going to leave that to the parties. I think the parties will talk about that as to what extent I need to make a confidentiality order in relation to Mr Catchpool's affidavit.

MR JACKMAN: Indeed. May it please the court.

HIS HONOUR: So the order will be as I have done, otherwise the interlocutory process brought 6 July brought on behalf of the applicants be dismissed. Any reason why it shouldn't be dismissed with costs, Mr Jackman?

MR JACKMAN: No, your Honour.

HIS HONOUR: No. All right. Thank you. The – it will be dismissed with costs. Is there anything else that needs to be brought to my attention? I will provide reasons for these orders and I will endeavour to do that in the early part of next week.

MR JACKMAN: May it please the court.

DR HIGGINS: May it please the court.

HIS HONOUR: All right. We will now adjourn the court. I thank you for your assistance.

MATTER ADJOURNED at 11.09 am ACCORDINGLY