Federal Court of Australia

Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 9) [2020] FCA 1652

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| File number: | NSD 464 of 2020 |
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| Judgment of: | **MIDDLETON J** |
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| Date of judgment: | 10 November 2020 |
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| Date of publication of reasons: | 13 November 2020 |
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| Catchwords: | **CORPORATIONS** – voluntary administration – application for leave to transfer shares pursuant to s 444GA of the *Corporations Act 2001* (Cth) – leave granted |
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| Legislation: | *Corporations Act 2001* (Cth), ss 435A, 444G, 444GA(1), 447A, 606 and 655A  *Insolvency Practice Rules (Corporations) 2016* (Cth), r 75-225 |
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| Cases cited: | *Re Kupang Resources Limited (subject to Deed of Company Arrangement) (receivers and managers appointed)* [2016] NSWSC 1895  *Re Mirabela Nickel Ltd (subject to deed of company arrangement)* [2014] NSWSC 836  *Re Nexus Energy Ltd (Subject to Deed of Company Arrangement) (2015)* 105 ACSR 246  *Re OrotonGroup Limited (Subject to Deed of Company Arrangement); Application of Strawbridge and Kanevsky* [2018] NSWSC 1213  *Re Paladin Energy Limited (subject to Deed of Company Arrangement)* [2018] NSWSC 11  *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* (2020) 144 ACSR 347  *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927  *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 8)* [2020] FCA 1344  *Tucker, in the matter of Black Oak Minerals Ltd (Subject to a Deed of Company Arrangement) (in liq)* (2019) 134 ACSR 472  *Weaver v Noble Resources Ltd* (2010) 41 WAR 301 |
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| Date of hearing: | 10 November 2020 |
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| Counsel for the Plaintiffs: | Dr R C A Higgins SC with Mr J Hutton And Mr D Krochmalik |
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| Solicitor for the Plaintiffs: | Clayton Utz |
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| Counsel for the First and Second Interested Persons (BC Hart Aggregator LP  and BC Hart Aggregator  (Australia) Pty Ltd) | Mr J W S Peters AM QC |
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| Solicitor for the First and Second Interested Persons (BC Hart Aggregator LP  and BC Hart Aggregator  (Australia) Pty Ltd) | Herbert Smith Freehills |
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| Representative of the Third and Fourth Interested Persons (Shelleycom Pty Ltd and  Tymar Pty Ltd) | Mr A Collopy |
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| Fifth Interested Person | Ms R Chen |

ORDERS

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|  | | NSD 464 of 2020 |
| IN THE MATTER OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226 & ORS | | |
| BETWEEN: | VAUGHAN STRAWBRIDGE, SALVATORE ALGERI, JOHN GREIG AND RICHARD HUGHES, IN THEIR CAPACITY AS JOINT AND SEVERAL VOLUNTARY ADMINISTRATORS OF EACH OF VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED)  First Plaintiff  VIRGIN AUSTRALIA HOLDINGS LTD (ADMINISTRATORS APPOINTED) ACN 100 686 226  Second Plaintiff  VIRGIN AUSTRALIA INTERNATIONAL OPERATIONS PTY LTD (ADMINISTRATORS APPOINTED) ACN 155 859 608  Third Plaintiff | |

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| order made by: | MIDDLETON J |
| DATE OF ORDER: | 10 nOVEMBER 2020 |

THE COURT ORDERS THAT:

1. An order pursuant to section 444GA(1)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**) that the First Plaintiffs, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes, in their capacities as joint and several deed administrators (**Deed Administrators**) of the Second to Forty-Second Plaintiffs (together, the **Companies**) be granted leave to transfer all of the existing shares in the capital of the Second Plaintiff, Virgin Australia Holdings Ltd (Subject to Deed of Company Arrangement) ACN 100 686 226 (**Company**) (**Shares**) from the members (as defined in the Corporations Act) to BC Hart Aggregator, L.P., or its nominee (**Bain Capital**) in accordance with clause 10.3 of the deed of company arrangement dated 25 September 2020, entered into by the Deed Administrators, Bain Capital, and certain of the Companies (**Deed**).
2. An order pursuant to section 447A(1) of the Corporations Act and section 90-15(1) of the *Insolvency Practice Schedule (Corporations)* set out in Schedule 2 to the Corporations Act that any of the Deed Administrators may, jointly or severally, in their capacity as Deed Administrators:
   1. execute share transfer forms and any other documents ancillary or incidental to effecting the transfer of the Shares referred to in Order 1; and
   2. enter or procure the entry of the name of Bain Capital or its nominee into the share register of the Company in respect of all Shares transferred to Bain Capital or its nominee in accordance with Order 1.
3. An order that the Deed Administrators' costs of and incidental to this application be costs and expenses in the deed administration of the Company.
4. An order that the Court’s orders be entered forthwith.

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

REASONS FOR JUDGMENT

MIDDLETON J:

# INTRODUCTION

1. On 10 November 2020, I made orders in this proceeding. These are the reasons for those orders.
2. On 4 September 2020, at the second meeting of creditors of each of the First Plaintiff, Virgin Australia Holdings Ltd (subject to deed of company arrangement) (‘**VAH**’) and certain of its subsidiaries that were in external administration (together, ‘**Virgin Companies**’), the creditors of each of the Virgin Companies resolved that Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte Financial Advisory Pty Ltd (‘**Deloitte**’), as the then administrators of each of the Virgin Companies (‘**Administrators**’), execute a number of interrelated deeds of company arrangement that had been proposed by BC Hart Aggregator, L.P (‘**Bain Capital**’) as a mechanism to complete the restructure of the Virgin Companies with Bain Capital (‘**Bain DOCA Proposal**’).
3. On 25 September 2020, the various deeds of company arrangement were executed by the Administrators (also the ‘**Deed Administrators**’), Bain Capital and the applicable Virgin Companies (‘**Bain DOCAs**’).
4. Pursuant to the terms of the deed of company arrangement between the Deed Administrators, Bain Capital, VAH and the Third, Seventh to Tenth, Thirteenth, Fifteenth, Eighteenth to Thirty-First, Thirty-Forth, Thirty-Seventh to Thirty-Ninth and Forty-First to Forty-Second Plaintiffs (‘**Primary DOCA**’), and as a condition precedent to completion of the Primary DOCA, the Deed Administrators are obliged to make an application for leave to transfer the shares in VAH to Bain Capital or its nominee.
5. Accordingly, the Applicants, being VAH and the Administrators, seek orders under s 444GA(1)(b) of the *Corporations Act 2001* (Cth) (‘**Corporations Act**’) for leave to transfer the shares in VAH to Bain Capital or its nominee (‘**Share Transfer**’). Machinery orders are also sought under s 447A of the Corporations Act to permit the Deed Administrators to give effect to the proposed Share Transfer.
6. In support of the application, the Applicants rely on:
7. the affidavits of Mr Strawbridge sworn on 20 October and 6 November 2020;
8. the affidavit of Mr John-Henry Eversgerd of FTI Consulting (Australia) Pty Limited (‘**FTI**’) sworn on 26 October 2020;
9. the affidavits of Mr Matthew Carr of Deloitte affirmed on 6 and 10 November 2020
10. On 20 October 2020, I made orders in this proceeding requiring the Applicants to give notice of the application to all interested parties, including the creditors of VAH, the members of VAH, and ASIC. A total of four interested parties opposed the application, including two parties that appeared before me on 10 November 2020. I will address the submissions of these parties in detail below.

# RELEVANT BACKGROUND

## The course of the administrations

1. The background to the administration of each of the Virgin Companies has been canvassed in a number of earlier judgments in the proceedings, including: *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* (2020) 144 ACSR 347 at [2]-[29]; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927 at [2]-[3] and [14]-[17]; and *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* *(No 8)* [2020] FCA 1344 (‘***Virgin No 8***’) at [9]-[11].
2. Relevantly for the purposes of the present application, the following is a summary of the sale of the assets and business of the Virgin Companies, the endorsement of the Bain DOCA Proposal by the creditors of the Virgin Companies, and the terms of the Bain DOCAs.
3. In April 2020, immediately following their appointment, the Administrators commenced a process for the sale of the business and assets of the Virgin Companies, which involved:
4. the establishment of a secure data room containing documents regarding the business and the financial position of the Virgin Companies;
5. the preparation of an information memorandum and its distribution to possible purchasers;
6. the formation of a shortlist of interested parties, who had an opportunity to perform detailed due diligence, including by attending meetings with stakeholders including management personnel, unions and contractual counter-parties;
7. the receipt of non-binding indicative proposals and the subsequent selection of two final preferred bidders; and
8. extensive dealings with the two final preferred bidders in relation to all aspects of a proposed transaction, including the form of the documents to give effect to a transaction, leading to intensive and comprehensive negotiations over a period of approximately 10 days.
9. That sale process culminated in the acceptance of an offer by Bain Capital for the acquisition of the business and the assets of the Virgin Companies and the execution of a number of binding transaction documents on 26 June 2020 (‘**Bain Transaction**’).
10. As noted in *Virgin No 8* at [9]-[11], the effect of the Bain Transaction was that a binding agreement came into force for the sale of the business and assets of the Virgin Companies to Bain Capital, with two different pathways for completion of the sale and restructure. The first pathway was pursuant to the terms of an agreed asset sale agreement (‘**Bain ASA**’) and the second pathway was through the proposal of the Bain DOCAs and their subsequent execution and proposed effectuation.
11. Following the entry into the Bain Transaction, Bain Capital developed its proposal for the various deeds of company arrangement. Under the Bain DOCA Proposal:
12. a creditors’ trust would be formed and a creditors’ trust fund would be established (‘**Trust Fund**’) to meet the claims of creditors of the Virgin Companies (other than excluded claims for which Bain Capital would assume liability);
13. Bain Capital would make a cash contribution of between $447.2 million and $572.2 million to the Trust Fund and it would comprise separate ‘pools’ or ‘pots’ of money, each with different eligibility criteria and depending in certain cases on which of the Bain DOCAs proceeded;
14. the shares of VAH would be transferred to Bain Capital or its nominee subject to the leave of the Court;
15. the shareholders of VAH would receive no payment from the Trust Fund and no other payment in return for the transfer of their shares to Bain Capital or its nominee;
16. Bain Capital would assume control of the business of the Virgin Companies and continue to trade the Virgin Companies as a going concern;
17. continuing employees of the Virgin Companies would be paid in the normal course of their employment (with their existing entitlements remaining unaffected) and those employees whose employment with the Virgin Companies would not continue would have their entitlements paid out in full;
18. Bain Capital would provide customers who hold, or who are entitled to, a conditional credit (under the conditional credit policy implemented by the Administrators) with a new credit to be available to be used on a future flight for an amount equal to any remaining value on any conditional credit, with such future flight credits being made available for flights booked in the period to 31 July 2022 and for travel in the period to 30 June 2023; and
19. Bain Capital would also assume:
    1. certain liabilities accrued by the Virgin Companies from the date of the Administrators’ appointment up to 30 June 2020 (totalling approximately $35 million), including unearned revenue and accrued leave entitlements of employees;
    2. liability for a loan owing by the Virgin Companies of $150 million to Velocity Rewards Pty Ltd as trustee for The Loyalty Trust, another entity in the Virgin group of companies that is not in external administration; and
    3. liability for all travel credits and unearned travel revenue relating to the conditional credits offered by the Administrators (totalling approximately $394 million).
20. On 25 August 2020, the Administrators issued their report to the creditors of the Virgin Companies pursuant to r 75-225 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (‘**75-225 Report**’) and convened the second meeting of creditors (‘**Second Meetings**’).
21. The Administrators recommended that, at the Second Meetings, the creditors of the Virgin Companies vote in favour of the Bain DOCA Proposal and the associated resolutions that the Administrators enter into the Bain DOCAs, on the basis that the completion of the Bain DOCAs would provide the greatest return to creditors.
22. On 4 September 2020, the Second Meetings were held concurrently. The creditors of the Virgin Companies overwhelmingly endorsed and voted in favour of the Bain DOCA Proposal. With respect to the Primary DOCA, 99.03% by number of voting creditors and 97.72% by value voted in favour of the resolution. The resolutions with respect to the other proposed deeds of company arrangement for the other Virgin Companies were also overwhelmingly passed by creditors.
23. On 25 September 2020, the Bain DOCAs (including the Primary DOCA) were executed.

## Completion of the restructure

1. The restructure of the Virgin Companies involves a transfer of the shares in VAH, the parent company of the Virgin Companies, to Bain Capital or its nominee.
2. A condition precedent to effectuation of the Primary DOCA is that the Court makes orders granting the Deed Administrators leave to transfer the shares in VAH to Bain Capital or its nominee.
3. As a company whose shares are listed on the Australian Securities Exchange (‘**ASX**’), VAH is subject to the prohibitions on certain acquisitions in s 606 of the Corporations Act. On 24 September 2020, the Deed Administrators applied to ASIC for exercise of ASIC’s powers under s 655A(1)(a) of the Corporations Act to provide relief from s 606 so as to facilitate the transfer of all the issued shares in VAH to Bain Capital or its nominee. This application was also a condition precedent to effectuation of the Primary DOCA.
4. On 16 October 2020, ASIC made an “in-principle” decision to provide that relief. Such an approach is ASIC’s usual practice in applications of this kind: *Re Paladin Energy Limited (subject to Deed of Company Arrangement)* [2018] NSWSC 11 (‘***Paladin Energy***’) at [12] (Black J).
5. On satisfaction of the various conditions precedent, Bain Capital will pay monies into the Trust Fund. The precise amount to be paid into the Trust Fund depends on certain variables but, in broad terms, Bain Capital will make a cash contribution of $575 million (inclusive of the $125 million of interim funding advanced shortly after the Bain Transaction was entered into).

## The alternative to completion of the Bain DOCAs

1. In the event that the Primary DOCA is not effectuated, completion of the Bain Transaction through the transfer of shares in VAH will not proceed. The Deed Administrators will instead be obliged to complete the Bain Transaction via a sale of the assets of the Virgin Companies. In that scenario, following completion of the Bain ASA, the Deed Administrators are obliged to call a meeting of the creditors of VAH and the other Virgin Companies. The evidence before me is that, if that were to occur, it is overwhelmingly likely that each of the Virgin Companies would then be wound up.
2. In the event that the Bain Transaction is not completed through the Bain DOCAs and is instead completed under the Bain ASA, the evidence is that:
3. asset realisations are estimated to be substantially lower;
4. realisation costs are expected to be substantially greater; and
5. the time taken to complete the restructure is expected to be much longer (and possibly as long as three years).
6. That is essentially because all assets and securities would be purchased by Bain Capital in accordance with the Bain ASA on completion, which would require the Deed Administrators to transfer or novate contractual agreements to new entities associated with Bain Capital, thereby creating operational challenges and difficulties prior to completion.
7. Accordingly, under the Bain ASA, returns to creditors would be smaller. In that scenario, ordinary unsecured creditors are estimated to receive between 4 and 7 cents in the dollar. In contrast, under the Bain DOCAs and associated Trust Deed, ordinary unsecured creditors are estimated to receive between 9 and 13 cents in the dollar.
8. As set out in more detail below, in either scenario there is not expected to be any return to the shareholders of VAH and, as such, their shares have no economic value.
9. The same conclusion is expressed in an Independent Expert’s Report prepared by FTI dated 19 October 2020 (‘**Independent Expert’s Report**’). This report is addressed in more detail below. However, the ultimate opinion reached by FTI is that, in a liquidation scenario (and, indeed, even in a going concern scenario), the shares in VAH are of no value.

# RELEVANT LEGAL PRINCIPLES

1. Section 444GA(1) of the Corporations Act provides:

*(1) The administrator of a deed of company arrangement may transfer shares in the company if the administrator has obtained:*

*(a) the written consent of the owner of the shares; or*

*(b) the leave of the Court.*

1. The applicable legal principles are well settled. They were set out at length by Black J in *Paladin Energy* at [28]‑[35] and were, in turn, summarised by Banks-Smith J in *Tucker, in the matter of Black Oak Minerals Ltd (Subject to a Deed of Company Arrangement) (in liq)* (2019) 134 ACSR 472 (‘***Black Oak***’) as follows:

*[32] As noted in the Explanatory Memorandum to the* Corporations Amendment (Insolvency) Bill 2007 *(Cth), the requirement that the transfer not unfairly prejudice shareholders is intended to direct the Court to consider the impact of a compulsory sale on shareholders where there may be some residual value in the company.*

*[33] As Martin CJ noted in* Weaver v Noble Resources Ltd *[2010] WASC 182; (2010) 41 WAR 301:*

[79]… [t]he notion of unfairness only arises if prejudice is established. If the shares have no value, if the company has no residual value to the members and if the members would be unlikely to receive any distribution in the event of a liquidation, and if liquidation is the only alternative to the transfer proposed, then it is difficult to see how members could in those circumstances suffer any prejudice, let alone prejudice that could be described as unfair. …

[80]… So, something more would have to be established before it could said that unfair prejudice to the members of the company could arise.

*[34] As White J explained in* Lewis, in the matter of Diverse Barrel Solutions Pty Ltd (Subject to a Deed of Company Arrangement) *[2014] FCA 53 at [19]:*

Whether or not ‘unfair prejudice’ will result from a transfer of the shares is to be determined having regard to all the circumstances of the case and to the policy of the legislation. Relevant matters would seem to include whether the shares have any residual value which may be lost to the existing shareholders if the leave is granted; whether there is a prospect of the shares obtaining some value within a reasonable time; the steps or measures necessary before the prospect of the shares attaining some value may be realised; and the attitude of the existing shareholders to providing the means by which the shares may obtain some value or by which the company may continue in existence. A relevant comparison will be between the position of the shareholders if the proposal does not proceed and their position if leave to transfer shares is granted.

*[35] According to* Re Nexus Energy Ltd (Subject to Deed of Company Arrangement) *[2014] NSWSC 1910; (2015) 105 ACSR 246 at [27] (Black J), there is an evidentiary onus on the shareholders to raise any consideration telling against the exercise of the discretion, but the ultimate onus of satisfying the court that the discretion should be extended remains on the Deed Administrators. This requires that the Administrators prove that the transfer would not unfairly prejudice the interests of the company.*

1. Accordingly, the fact that shares are to be transferred without compensation is not sufficient, in itself, to establish unfair prejudice: *Weaver v Noble Resources Ltd* (2010) 41 WAR 301 at [80]. See also *Re Mirabela Nickel Ltd (subject to deed of company arrangement)* [2014] NSWSC 836 (‘***Mirabela Nickel***’) at [39].
2. The question of whether shareholders hold any residual equity of value in a relevant sense (for the purpose of assessing the existence and nature of any unfair prejudice) is determined by comparison with the position of the shareholders in a winding up, at least where that is the likely or necessary consequence of the transfer of shares not being approved: *Mirabela Nickel* at [42]; *Paladin Energy* at [31]. That makes it necessary to consider a valuation of the assets and liabilities of the company by reference to a liquidation scenario, rather than as a going concern: *Paladin Energy* at [7]; *Re OrotonGroup Limited (Subject to Deed of Company Arrangement); Application of Strawbridge and Kanevsky* [2018] NSWSC 1213 (‘***OrotonGroup***’) at [28].
3. There would not ordinarily be any prejudice, or at least no prejudice that has the requisite quality of “unfairness”, if the shares to be transferred would receive no distribution in the event of a liquidation as the only realistic alternative to the proposed transfer: *Re Kupang Resources Limited (subject to Deed of Company Arrangement) (receivers and managers appointed)* [2016] NSWSC 1895 at [16].
4. Thus, as White J observed in *OrotonGroup* at [37], if liquidation is the only realistic alternative to a proposed transfer of the shares, and the shares would have no value in a liquidation, then there is no prejudice, or no unfair prejudice, to the interests of members if leave is given pursuant to s 444GA(1)(b) of the Corporations Act. That conclusion is apposite to the present case.
5. The Applicants bear the legal onus of proving that the discretion to allow the share transfer should be exercised in their favour: *Re Nexus Energy Ltd (Subject to Deed of Company Arrangement)* (2015) 105 ACSR 246 (‘***Nexus Energy***’) at [27] (Black J). However, as noted above, shareholders bear an evidentiary onus to establish the facts relevant to any prejudice on which they rely in such an application: *Nexus Energy* at [27] (Black J); *Paladin Energy* at [33] (Black J).
6. Finally, orders may be made under s 447A of the Corporations Act to provide the machinery by which a proposed transfer of shares in the subject company may be put into effect. This includes orders permitting administrators of a deed of company arrangement:
7. to execute and lodge share transfer documents; and
8. to ensure the entry of the acquirer’s name on the company’s register of members:

see *Black Oak Minerals* at [39]-[40]; *McWilliam’s* at [17]-[19].

# CONSIDERATION

1. I have determined to make the orders sought by the Applicants for the following reasons.

## There is no unfair prejudice to members

1. VAH is a public company, the shares of which are listed on the ASX. It has five major shareholders – Etihad Airways (which has approximately 20.03% of the total share capital), Singapore Airlines Ltd (20.01%), Nanshan Group (20.01%), HNA Group (19.86%) and Virgin Group Ltd (a company incorporated in the United Kingdom and not otherwise related to VAH other than through its shareholding) (10.02%) (‘**Major Shareholders**’). Between them, the Major Shareholders own approximately 90% of the equity of VAH. In addition to the Major Shareholders, VAH has 19,181 other shareholders.
2. For the reasons that follow, I do not consider there will be unfair prejudice to the Major Shareholders or the residual shareholders upon the transfer of their shares to Bain Capital or its nominee.
3. The Virgin Companies are insolvent (and were likely to be insolvent from 22 March 2020, and possibly as early as 18 March 2020). The reasons for the insolvency of the Virgin Companies include that: they suffered substantial reductions to capacity and projected revenue due to travel restrictions announced by the Commonwealth and various State Governments in response to the COVID-19 pandemic; they had suffered continual losses in the 2019 financial year and the portion of the 2020 financial year prior to the appointment of the Administrators; and they were unable to access further debt or equity funding (including from the Major Shareholders).
4. Critically, the Deed Administrators have expressed the opinion that there is a substantial deficiency in assets available to meet the debts and claims owing to the creditors of the Virgin Companies. As noted in the 75-225 Report:
5. the total value of available assets in the winding up, after taking into account liquidation expenses, to meet the claims of unsecured creditors is estimated to be in the range of:
   1. $207.2 million to $310.1 million in the event that the Bain Transaction completes under the Bain ASA; and
   2. $52.4 million in the event that the Bain Transaction does not proceed at all and the assets of the Virgin Companies are realised on a piece-meal basis; and
6. the total estimated unsecured creditor pool in the winding up is estimated to be $6.007 billion.
7. These opinions are supported by the analysis and conclusions detailed in the Independent Expert’s Report.
8. In the Independent Expert’s Report, FTI has undertaken a valuation of the equity in VAH on a liquidation basis and on a going concern basis. As noted above, given that the alternative to completion of the Bain DOCAs is a winding up of the Virgin Companies (likely with an asset sale to Bain Capital), the going concern valuation is not the relevant counter-factual on which the valuation ought to proceed.
9. With respect to the liquidation valuation, the Independent Expert’s Report considers two scenarios. First, where the business and assets of the Virgin Companies are sold as a whole (for example, to Bain Capital or another purchaser); and secondly, where the assets of the Virgin Companies are sold separately in a piece-meal fashion.
10. The Independent Expert’s Report concludes that:
11. if sold as a whole, the enterprise value of the Virgin Companies is between $1.6 billion and $2.1 billion, plus a further $289 million to $343 million for VAH’s stake in the Velocity Frequent Flyer (‘**Velocity**’) business and $35 million for surplus cash; and
12. if sold on a piece-meal basis, the business and assets of the Virgin Companies are valued at between $2.4 billion and $2.8 billion.
13. It is significant that the valuation of the assets of the Virgin Companies is supported by a separate independent valuation of the aircraft fleet owned by the Virgin Companies, which has been carried out by David Crick of DavAir Group.
14. Because the debts of the Virgin Companies exceed $5 billion, the equity in the VAH is between:
15. negative $2.5 billion and negative $3.2 billion, on the assumption that the assets and business are sold as a whole and there are certain assumed liabilities by the purchaser; and
16. negative $5.6 billion and negative $6.1 billion, on the assumption that the assets are sold in a piece-meal fashion and all liabilities to creditors will be provable in the winding up.
17. In other words, the Independent Expert’s Report concludes that the equity in VAH is of no value in practical terms (because VAH is a limited liability company).
18. This conclusion is supported by the cross-check taken of bids received by the Administrators during the campaign for the sale of the business and assets of the Virgin Companies. None of these was sufficient to discharge the claims of creditors, thereby confirming that the value of the equity in VAH is nil.
19. There are two further matters that suggest that a conservative approach must be taken to any valuation of the business and assets of the Virgin Companies (and therefore to an assessment of the value of the equity in VAH).
20. First, a valuation of any airline business at present is necessarily affected by the current COVID-19 pandemic. As noted in the Independent Expert’s Report, the impact of the pandemic on the airline industry has been severe, with global airline revenue expected to contract by more than 50% in 2020 and passenger traffic (by kilometre travelled) not expected to return to 2019 levels until 2025. The pandemic also introduces obvious uncertainty as to the prospect of increased airline travel by business and leisure passengers, both domestically and internationally.
21. Secondly, even before the pandemic, the Virgin Companies (and other entities in the Virgin group that are not presently in external administration, such as Velocity) suffered collective losses of over $1.2 billion in the period between 1 July 2016 and 30 June 2019.
22. The ineluctable fact is that the shares in VAH have no economic value. Thus, the members of VAH would be in the same financial position regardless of the mechanism by which the Bain Transaction is completed (or, indeed, even if the Bain Transaction does not complete at all and the assets of the Virgin Companies are sold to other parties in a winding up). As explained by the Deed Administrators, the members of VAH can never stand to receive any return from their shareholding. Thus, there is no prospect of unfair prejudice being suffered by shareholders from a transfer of their shares to Bain Capital or its nominee.
23. Importantly, though, completion of the Bain Transaction by the effectuation of the Bain DOCAs is expected to provide a better return to creditors in comparison with the Bain ASA. That is principally because the Bain DOCAs enable completion of the sale to occur on a more expedited and streamlined basis (through a retention of the existing corporate structure premised upon the transfer of the shares in VAH to Bain Capital or its nominee), thereby avoiding transaction costs associated with an asset sale.
24. In other words, although the method of completion of the Bain Transaction makes no financial difference to VAH’s shareholders (because their shares are worthless), the proposed Share Transfer and the subsequent effectuation of the Bain DOCAs will provide a materially better outcome for creditors. That strongly favours the making of orders to permit the Share Transfer to proceed.

## Opposition to the application

1. Finally, opposition to the application has been expressed by four separate parties. Anthony Collopy appeared before me at the hearing on 10 November 2020 on behalf of shareholders Shelleycom Pty Ltd ACN 113 671 266 (‘**Shelleycom**’) and Tymar Pty Ltd ACN 006 856 159 (‘**Tymar**’). In oral submissions and in separate correspondence to the Administrators, Mr Collopy raises five issues:
2. the impact of the COVID-19 pandemic;
3. the need to consider the (best) interests of all shareholders;
4. the suggestion that there may be value in the shares of VAH, because Velocity is not in external administration and because of goodwill in the company;
5. the absence of direct consultation with smaller shareholders in the restructure or sale process; and
6. lack of communication with smaller shareholders about the application.
7. The first issue concerns the circumstances of the COVID-19 pandemic in which the application has been made. As I have already observed, the COVID-19 pandemic and consequent travel restrictions have impacted airline businesses globally and have contributed to the insolvency of the Virgin Companies. However, I am not persuaded that the uncertainties as to the future of the airline industry are sufficiently short-lived so as to justify not granting the application or putting it off any further. As set out above, the sale process begun in April 2020. The Bain DOCAS (including the Primary DOCA) were executed on 25 September 2020. It is now November 2020. In light of the time that has already passed, I do not see a basis for any further delay, particularly in circumstances where, as noted above, global airline revenue is not expected to return to 2019 levels until 2025.
8. The second and fourth issues may be considered together. The interests of members are necessarily subsidiary to creditors in the context of an external administration where there is a deficiency of assets to meet the claims of creditors. Members have no entitlement to participate in the restructuring process and are bound by the Bain DOCAs pursuant to s 444G of the Corporations Act. Further, members were informed of the progress of the administration by various ASX releases that were issued during this period.
9. The second issue raises the question of the value of the equity in VAH. It is correct that VAH’s stake in Velocity is a valuable asset. As noted above, it is valued at between $289 million to $343 million in a liquidation scenario. It is also correct that goodwill is a valuable intangible asset, and this was recognised in the Independent Expert’s Report. However, the shares in VAH have no economic value because the total value of VAH’s assets (including both its shareholding in Velocity and goodwill) is substantially outweighed by its total liabilities.
10. The fourth issue concerns the timing of notice of the application having been received. It is not in dispute that Mr Collopy only received notice of the application by post on either 2 or 3 November 2020. Mr Collopy submits, and I accept, that the material was lengthy and would have taken some time to digest. However, as I have already observed, notice of the application was given by the Deed Administrators by uploading material to the ASX website and the Deloitte website and by sending relevant correspondence (by email and post, as applicable) on 23 October 2020. This material included an Explanatory Statement, together with the Independent Expert’s Report. In these circumstances, I consider that the shareholders were given sufficient notice of the application and that the Administrators adequately informed all interested parties as to the sale process.
11. The concerns raised by Mr Collopy were similar to those raised by other shareholders: Ms Rebecca Chen, Mr Alex Norquay and Ms Lydia Wlodarczyk. Ms Chen did appear at the hearing. Mr Norquay provided correspondence to the Court that raised procedural concerns, as well as concerns about the valuation of the shares in VAH. Mr Norquay also suggested that there should be a clause in the takeover contracts for payment to be made to former VAH shareholders if the value of Qantas stocks goes up in the next six to nine months. I am not persuaded that any of these concerns warrants the Court not making the orders sought.

## Other considerations

1. Two further considerations favour the conclusion that leave should be granted to permit the Share Transfer.
2. First, as noted above, ASIC has granted “in-principle relief” from the relevant takeover provisions in Chapter 6 of the Corporations Act. ASIC was provided with the Explanatory Statement and Independent Expert’s Report and has had an opportunity to scrutinise the restructure and raise any objection that it considers may be warranted. The fact that it has not done so provides an indication that there is no principled concern arising with respect to the transaction.
3. Secondly, the transaction contemplated by the Principal DOCA and the Trust Deed advances the objects of Part 5.3A of the Corporations Act (as embodied in s 435A), insofar as it provides for a continuation of the business of the Virgin Companies. These benefits are potentially at risk if the transaction does not complete. Further, as noted above, creditors will be in a substantially worse position if the Share Transfer does not occur, the Bain DOCAs are not effectuated and VAH is wound up.

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| I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Middleton. |

Associate:

Dated: 13 November 2020