

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD714/2020
File Title:	WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) & ANOR v VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 7/09/2020 5:49:54 PM AEST

Registrar

### Important Information

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**Wells Fargo Trust Company, National Association (As Owner Trustee) & Anor v VB  
Leaseco Pty Ltd (Administrators Appointed) & Ors**

**Federal Court of Australia Proceeding No. NSD 714 of 2020**

**RESPONDENTS' SUBMISSIONS ON STAY APPLICATION**

**A. Introduction**

1. On 3 September 2020, the Court delivered its judgment in these proceedings: *Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (administrators appointed)* [2020] FCA 1269 (the **Judgment**), and at the same time made final orders (**Orders**).
2. The Respondents intend to shortly file a Notice of Appeal from the Judgment, together with an application for expedition. The Respondents now apply for a stay of Orders 5, 6, 8 and 12, until the hearing and determination of their appeal, or further order (**Stay Application**). Filed copies of the appeal documents will be provided to the Court and to the Applicants in advance of the hearing of the stay application at 4:30pm on 8 September 2020.
3. These submissions are filed in support of the Stay Application. The Respondents rely upon the Affidavit of Salvatore Algeri, sworn 7 September 2020 (**Algeri Affidavit**) in support of their Application.

**B. Principles governing the Stay Application**

4. The Stay Application is brought under r 36.08(2) of the *Federal Court Rules 2011* (Cth). The principles governing such an application are settled.
5. As the New South Wales Court of Appeal held in *Alexander v Cambridge Credit Corp Ltd (Receivers Appointed)* (1985) 2 NSWLR 685 at 694-5, a decision which has been repeatedly applied by this Court in the context of applications under r 36.08(2) of the *Federal Court Rules*,<sup>1</sup> in an application for a stay of orders pending appeal:

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<sup>1</sup> E.g., *Fair Work Ombudsman v Priority Matters Ltd* [2016] FCA 1415 at [20]; *Wooldridge v Australian Securities and Investments Commission* [2015] FCA 3459; 106 ACSR 551 at [9]; *Flight Centre Limited v Australian Competition and*

- (a) the onus is on the applicant to demonstrate a proper basis for a stay that will be fair to all parties, and the filing of an appeal will not, of itself, provide a reason or demonstrate an appropriate case, nor will it discharge the onus which the applicant bears;
- (b) the Court has a discretion whether or not to grant the stay and, if so, as to the terms that would be fair;
- (c) in the exercise of its discretion, the Court will weigh the balance of convenience and the competing rights of the parties before it;
- (d) where there is a risk that, if a stay is granted, the assets of the applicant will be disposed of, the Court may, in the exercise of its discretion, refuse to grant a stay;
- (e) it is not at all unusual for the Court, in the exercise of its discretion, to grant a stay on terms that the appellant give to the judgment creditor security in terms defined by the Court as appropriate to the fair adjustment of the rights of the parties;
- (f) where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay. Thus, where it is apparent that unless a stay is granted an appeal will be rendered nugatory, this will be a substantial factor in favour of the grant of a stay;
- (g) although Courts approaching applications for a stay will not generally speculate about the appellant's prospects of success, this does not prevent consideration of the specific terms of a stay that will be appropriate fairly to adjust the interests of the parties, from making some preliminary assessment about whether the appellant has an arguable case.

6. As to the final point, Middleton J in *Wooldridge v Australian Securities and Investments Commission* (2015) 106 ACSR 551; FCA 349 observed at [18] that, in exercising its discretion, "the Court will need to make some assessment of the prospects of success of the appeal, but only to the extent necessary (which would not normally involve a

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*Consumer Commission* [2014] FCA 658 at [9]; *Seafolly Pty Ltd v Madden (No 3)* [2013] FCA 316 at [19] and the cases cited therein.

detailed consideration of the merits of the appeal). If the prospects of success of the appeal are so strong or overwhelming that the interests of justice could only be served by granting a stay, a stay would be the appropriate order.”

7. With those principles in mind, it is convenient to turn to the circumstances of the present proceedings.

**C. Submissions in favour of a stay**

8. Each of orders 5, 6, 8 and 12 of the Orders should be stayed, for the following reasons.

**C.1 *The appeal may be rendered inutile absent a stay***

9. The central matter in issue in the Respondents’ appeal will be whether or not the Respondents are required to redeliver the Applicants’ aircraft objects to the Applicants in the United States. Orders 5, 6 and 8 of the Orders require the Respondents to redeliver the Applicants’ aircraft objects to the Applicants in the United States by no later than 15 October 2020, in accordance with the detailed regime set out in s to the Orders.
10. It follows that, if Orders 5, 6 and 8 are not stayed, in all likelihood, the Respondents will have already redelivered the Applicants’ aircraft objects to the United States (or be significantly advanced on that course) prior to the final determination of the Respondents’ appeal, even assuming expedition is granted.<sup>2</sup> As such, if a stay is not granted, the very obligation in issue in the appeal may be performed prior to the determination of the appeal. In those circumstances, a stay should be granted to avoid the appeal being rendered inutile.
11. It is no answer to this submission to say that, if the Respondents complete redelivery of the Applicants’ aircraft objects prior to the determination of the appeal but are ultimately successful on appeal, they may simply recover the costs of redelivery (and the costs of the proceedings at first instance) from the Applicants. This is so for the reasons given in the Algeri Affidavit at [9](b)-(d). In short, the Respondents hold real concerns as to their ability to recover costs expended on redelivering the aircraft objects

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<sup>2</sup> Algeri Affidavit at 9[(a)].

to the Applicants, in circumstances where the Applicants are based in the United States and, to the best of Mr Algeri's knowledge, have no or no significant assets in Australia, other than the aircraft objects themselves.<sup>3</sup>

12. If the Stay Application is refused, but the Respondents' appeal is successful, the Respondents may have to take steps in the United States or another foreign jurisdiction to recover the costs of redelivery and the costs of the proceedings at first instance. As Mr Algeri explains, given that the administration of the Virgin Companies is an interim regime, that may not be practically achievable while the companies remain in external administration<sup>4</sup>, and may cause detriment to the unsecured creditors of the Virgin Companies<sup>5</sup>. On any view there is a significant measure of uncertainty associated with the Respondents' ability to recover those costs.
13. A stay of orders 5, 6, 8 and 12 is accordingly necessary and appropriate to ensure that the appeal has practical utility. If a stay is not ordered, there is a real risk that the Respondents will not be able to be placed in the position they would have been in had they not redelivered the Applicants' aircraft objects, should they succeed on appeal.

### *C.2 Likely delays in reimbursement favour a stay to preserve the status quo*

14. Further, as Mr Algeri explains at 9(c), even if costs expended on redelivering the Applicants' aircraft objects and the costs of the proceedings at first instance could ultimately be recovered from the Applicants should the appeal succeed, there would likely be a substantial delay in recovering such costs by reason of the enforcement steps required.
15. Such delays may give rise to significant practical challenges to the Administrators, in circumstances where the administration of the Virgin Companies may be complete by the time such costs are recovered. This is a significant detriment that would be imposed on the Administrators absent a stay, and weighs heavily in favour of the grant of a stay.

### *C.3 Avoidance of satellite litigation*

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<sup>3</sup> Algeri Affidavit at [9(b)].

<sup>4</sup> Algeri Affidavit at [9(b)].

<sup>5</sup> Algeri Affidavit at [9(c)].

16. If the Stay Application is refused, but the Respondents are ultimately successful on appeal, there is a real possibility that further dispute will arise between the parties as to the extent to which costs expended by the Respondents on redelivery are recoverable.<sup>6</sup> It should be observed, in this context, that the Applicants have taken care to avoid accepting that the redelivery regime provided for in Schedule 3 to the Orders represents the most cost-effective and efficient means of redelivering the aircraft objects. It would appear that the Applicants have thus preserved their ability to argue, at a later stage, that costs incurred in redelivering the aircraft objects in accordance with the regime in Schedule 3 were not properly incurred. In those circumstances, the possibility of the parties bringing satellite litigation to resolve a dispute over the reimbursement of redelivery costs seems to be a real one. In addition to imposing a further burden on the Court, such litigation would likely further delay the reimbursement of delivery costs expended by the Respondents.
17. The possibility of further dispute with respect to the reimbursement of the Respondents' costs thus weighs heavily in favour of a stay, as a stay would avoid the possibility of such dispute arising, and thereby avoid the resulting burden on the Court, and delay in the Respondents being reimbursed.

#### *C.4 Expenditure should not be incurred pending appeal*

18. It is of course the case that, pending a successful appeal, the Respondents are bound by the Orders and the Judgment. However, the Respondents are also companies involved in a large and complex insolvent external administration. The effect of Order 4 is that the costs of the redelivery of the Applicants' aircraft objects will be borne by unsecured creditors of the Respondent companies. In circumstances where the Administrators are presently forecasting a return of 9c to 13c on the dollar for ordinary unsecured creditors if the deeds of company arrangement approved by creditors are successfully effectuated<sup>7</sup> (with no anticipated return to unsecured creditors if they are not), carrying out the redelivery and thereby diminishing assets available to unsecured creditors,

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<sup>6</sup> Algeri Affidavit at [9(d)].

<sup>7</sup> Algeri Affidavit at [9(e)].

when those costs would not need to be expended at all if the Respondents' appeal succeeds, is not appropriate, and instead the status quo ought be preserved.

#### ***C.5 The appeal has reasonable prospects***

19. The Court should accept that the Respondents' appeal has, at least, reasonable prospects of success. As the Court observed at [189] of the Judgment, the issue before the Court in these proceedings "involved a question of construction not otherwise considered by a court". That question raised issues concerning the proper construction of an international instrument, the interaction between that instrument and domestic law, the relevance of extraneous materials, ranging from the *travaux préparatoires* to foreign and domestic judgments and academic material, and the implications of such materials, if relevant, to the question of construction. It is clear, on the face of the Judgment, which runs to 48 pages, that the question in issue was one of some complexity, and that its resolution was not straightforward or free from uncertainty. In those circumstances, the Court would accept that the Respondents' grounds of appeal, as set out in the Notice of Appeal, have, at least, reasonable prospects of success, and generally support the grant of a stay.

#### ***C.6 Detriment to the Applicants***

20. Against the factors that weigh in favour of a stay, is the detriment caused to the Applicants in having the redelivery of their aircraft objects delayed until the determination of the appeal. It is important to appreciate that delay in receipt of the aircraft objects is the *only* detriment that would be suffered by the Applicants should a stay be granted, given that: (a) the Respondents have not sought a stay of order 7 of the Orders, which requires the Respondents to continue maintaining and insuring the Applicants' engines until redelivery or further order; and (b) the corporate Respondents will, if the appeal is unsuccessful, have sufficient funds to redeliver the aircraft objects to the Applicants in Florida,<sup>8</sup> such that there is no risk that the Applicants will be unable to vindicate what they say is their right to redelivery if the stay is granted, and the appeal ultimately fails.

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<sup>8</sup> Algeri Affidavit at [9(h)].

21. As Mr Algeri explains at [6], the Respondents will seek to have their appeal heard on an expedited basis, and the Applicants consent to that application for expedition<sup>9</sup>. In those circumstances, there is unlikely to be any significant detriment to the Applicants caused by a stay.

**C.7 Balance of convenience**

22. Turning to the balance of convenience, it is submitted that the factors in favour of a stay, and in particular the real risk that the Respondents' appeal will be rendered inutile absent a stay, outweigh the detriment caused to the Applicants by reason of a stay.

23. Accordingly, the Stay Application should be granted.

**D. The Redelivery Regime**

24. At [16] of the Algeri Affidavit, Mr Algeri explains that the redelivery regime set out in Schedule 3 to the Orders can no longer be given effect to.

25. As Mr Algeri explains at [18], this is a matter that the Respondents propose to address, initially by putting forward an alternative redelivery proposal to the Applicants and, if agreement cannot be reached, through exercising their liberty to apply in respect of the Orders, should the Stay Application be refused.

26. Accordingly, the Court does not need to revisit Schedule 3 as part of the Stay Application.

**7 September 2020**

Ruth C A Higgins

Robert A Yezerski

Kate Lindeman

Counsel for the Defendants

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<sup>9</sup> Algeri Affidavit at [7].