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TRANSCRIPT OF PROCEEDINGS

O/N H-1251417

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

MIDDLETON J

No. NSD 714 of 2020

WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) and ANOTHER

and

VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) and OTHERS

MELBOURNE

10.17 AM, FRIDAY, 31 JULY 2020

MR C. WARD SC appears with MR P. SANTUCCI for the applicant
DR R. HIGGINS SC appears with MR R. YEZERSKI and MS K. LINDEMAN for the respondent

THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

HIS HONOUR: Before I take appearances, I need to make a procedural order, which I will now do. The Court notes that section 17(1) of the Federal 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 not be delayed indefinitely pending the end of the current viral pandemic. The best practical arrangements in the circumstances of the pandemic have been put in place to allow interested members of the public or the press to observe or listen to the hearing. These arrangements are identified in paragraph 1 of the orders below.

It would 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 of that would be that the hearing 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 on 31 July 2020 other than by the following arrangements:

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

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

(2) Members of the public 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 or listen to the hearing, but are in no circumstances to participate in the hearing.

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

    (c) advise that any failure to observe conditions A and B may constitute a contempt of court and would be punishable as such.

I will now take appearances. Mr Ward?

MR C. WARD SC: May it please the Court, my name's Ward. I appear with my learned friend MR SANTUCCI for the applicants.

DR R. HIGGINS SC: May it please the Court, I appear with learned friends MR YEZERSKI and MS LINDEMAN for the defendants.

MR WARD: Your Honour, I was going to say, particularly given the technical manner in which this hearing has to be conducted and in light of your Honour's email – or your Honour's associate's email to use, I propose to not traverse in any depth at all the matters that have been well and truly exposed in the written submissions of each of the parties. What I propose, if it's convenient to the Court, is a procedure – in particular noting that I think Mr Dunbier is present – that I think we, or at least I, would dispense with that opening, given the fact that your Honour would be well aware of the issues from the written submissions, but instead move simply to read the evidence from our side, then, with your Honour's agreement, allow my learned friend to read the evidence of the respondents. We seek to cross-examine Mr Dunbier briefly – I anticipate it will take between probably 15 minutes and half an hour – and the move to submissions.

HIS HONOUR: That would be very convenient, so let's identify what the evidence is first and then Mr Dunbier will be happy for that to occur. Let's do it that way. So if you identify exactly what is the material that I have before me evidentiary-wise – you can do it compendiously if you like. I have a court book with a court book index, so is - - -

MR WARD: Yes.

HIS HONOUR: All the material that you have filed, is that the material you wish to rely upon?

MR WARD: It is, your Honour. I was proposing to tender the two volumes of the court book, and move, obviously, on the amended originated process dated 28 July 2020. And within the court books, your Honour will find the affidavits upon which we rely, being the affidavit of Dean Poulakidas, P-o-u-l-a-k-i-d-a-s, sworn on 29 June 2020. That's behind tab 6. The affidavit of Garry Failler, F-a-i-l-l-e-r, affirmed on 8 July 2020, behind tab 7. And the affidavit of Derych Warner, D-e-r-y-c-h, sworn 22 July 2020, behind tab 10. I would tender the two volumes of the court book, and I will be making reference to some parts of it, your Honour, on the way through this morning's oral submissions, and ..... should also tender as a formality the statement of agreed facts, which I think your Honour's associate should have the most recent version, I think, provided this morning.

HIS HONOUR: Thank you. Yes, Dr Higgins?

DR HIGGINS: Your Honour, I read the affidavit of Salvatore Algeri, sworn on 17 July 2020, which is at tab 8 of the court book, and I tender it to exhibit SA2, which is otherwise within the court book. Can I also read your Honour the affidavits referred to in Mr Algeri's affidavit at paragraph 7B? Those are affidavits which have been filed and read in the Virgin proceedings and provided to our learned friends. Can I identify them, then? They are the four affidavits of Vaughan Strawbridge of 24 April 2020, 11 May 2020, 2 July 2020 and 9 July 2020.

HIS HONOUR: Are they the affidavits that were also provided to me, I think, this morning?

DR HIGGINS: That's correct, your Honour, and your Honour should also have received the affidavit of Mr Algeri on 22 May 2020, also part of the Virgin proceedings.

HIS HONOUR: Let me just make sure I've read that.

DR HIGGINS: There should be four - - -

HIS HONOUR: What date was that? 22 May?

DR HIGGINS: That's correct, your Honour, of Mr Algeri.

HIS HONOUR: All right. Now, I take it that these materials are relied upon for the purposes of informing me what was involved with the engagement and is still currently involved with the engagement of the aircraft lessors. Is that what they're for?

DR HIGGINS: Yes, your Honour, and certain aspects of the background of the administrations which your Honour is well familiar from the other proceedings.

HIS HONOUR: Yes, all right. I understand then what they're about. I take it there's no objection, Mr Ward, to that material being relied upon? Mr Ward? I take it that there's no objection to the material that has just been referred to of Mr Strawbridge and Mr Algeri being relied upon?

MR WARD: There is no objection to the material described in paragraph 7B of Mr Algeri's affidavit. There are a very small number of objections to some parts of Mr Algeri's affidavit filed in these proceedings.

HIS HONOUR: All right, well, we will need to deal with that before we go any further. I'm assumed you've vetted these objections, Mr Ward, as being matters of important principle, not just individual sentences that could be dealt with as to weight?

MR WARD: Could I describe it this way, your Honour? If I take your Honour to the first one and then ask if your Honour were to rule, if it would be dealt with as a matter of argument and submission, not evidence, I will be content with the balance.

HIS HONOUR: All right. I will come back to that, then. Thank you, Mr Ward. I will let Dr Higgins finish her recitation of the evidence.

DR HIGGINS: Your Honour, could I indicate for clarity that while we read the affidavits of Mr Strawbridge and Algeri just identified, we do not tender their exhibits.

HIS HONOUR: Not the exhibits?

DR HIGGINS: Yes, your Honour.

HIS HONOUR: All right, thank you.

DR HIGGINS: Your Honour, I also read the affidavit of Darren William Dunbier, affirmed on 17 July 2020 along with its annexures, and your Honour finds that at tab 9 of the court book.

HIS HONOUR: 95?

DR HIGGINS: Tab 9, your Honour.

HIS HONOUR: Tab 9. Yes, sorry, page number 95. Yes, I have that.

DR HIGGINS: And your Honour should also have received a current version of the Records Open Items List referred to as the ROIL, as at 30 July 2020 which is the current form of the document - - -

HIS HONOUR: So this was an email I received at 9.32 am on 31 July, attaching copies of – other than the proposed minute of the order, the email of Declan Canaine. Is that right?

DR HIGGINS: That's so, your Honour. And - - -

HIS HONOUR: All right. So you want the email, and whatever's attached, in evidence?

DR HIGGINS: Yes, your Honour, and the attachment just says to your Honour that the current version of the Records Open Items List, other versions of - - -

HIS HONOUR: And where's that hidden in – not "hidden", sorry – where's that in the court book?

DR HIGGINS: Earlier versions of that are in tab 62 to 65, your Honour.

HIS HONOUR: 52 to 55?

DR HIGGINS: 62 to 65, yes.

HIS HONOUR: 62, sorry. Thank you.

DR HIGGINS: And we've notified our learned friends of this tender.

HIS HONOUR: All right, thank you. All right, that's the evidence from your point of view?

DR HIGGINS: Yes, your Honour.

HIS HONOUR: All right. Let's go back to Mr Ward and deal with this objection. So where's the best way to deal with the first one?

MR WARD: If your Honour turns to page 78 of volume 1 of the court book, your Honour will see there both paragraphs 18 and 19.

HIS HONOUR: Yes.

MR WARD: Your Honour, halfway down paragraph 18, your Honour will see the words – there's a closed brackets after the words "aircraft property", and then the words:

> *to be borne by the Virgin companies when such costs would ordinarily need to be met by the lessor or financier, following the issuance of a notice under section 443B(3) of the Corporations Act.*

HIS HONOUR: I have that.

MR WARD: That, in our submission, your Honour, would be an arguable submission, not evidence, as would be in paragraph 19, the assertion that – in the second sentence, following the opening words:

> *the redelivery framework is in general tailored to the particular nature of aircraft property –*

and then the words:

> *and is more favourable to lessors and financiers than the usual right to recover property of on a strict as-is, where-is basis under 443B.*

There's a number of varieties of those propositions scattered through this affidavit. I'm very happy for them to - - -

HIS HONOUR: All right. Well, Dr Higgins, I could just treat them as a submission, could I? It's not going to take the matter any further whether Mr Algeri is right or wrong about them. It's probably something which is a mixture of fact and law, isn't it?

DR HIGGINS: Your Honour, can I indicate this: what your Honour says is false. These are also produced by a highly experienced administrator in the context of this proceeding. I'm at the disadvantage of not having a prior notice of these objections, and I would submit that if your Honour were to treat material of the kind identified in paragraphs 18 and 19 of Mr Algeri's affidavits as a submission, your Honour would be required to read Mr Failler's and Mr Poulakidas' affidavits in the same way. And can I just give your Honour another example of that in Mr Failler's affidavit, which is behind tab 7?

HIS HONOUR: Can you give me the page number as well?

DR HIGGINS: Yes, page 57 of the court book, your Honour.

HIS HONOUR: Yes, what - - -

DR HIGGINS: Paragraphs 20 to 21. Paragraph 21 is a good example. There's a generality of facts dated at 21, and a conclusion of general law at paragraph 21. And your Honour would ..... statements of that kind as the ones in paragraphs 18 and 19 if your Honour adopted that approach, but I don't intend the submission that the opinions Mr Algeri expresses are those ..... But returning to ..... nothing much is - - -

HIS HONOUR: Let me just have a read of 18 in context and I will come back to you both. Yes, well, in a sense, any conclusion of law in interpretation of a protocol or a document is a matter really for me, but I really don't think we should spend half an hour or an hour deleting where some conclusions are made of that type. So I'm going to, Mr Ward and Dr Higgins, leave similar matters where there are so conclusions given but work on the basis that I will be the one determining what the protocol provides and what needs to be determined, other than what the witnesses say. It's sort of like a patent case where you have an expert who gives you the construction of the patent which we let through, but at the end of the day, it's for the Court to decide these things. So if we work on that basis, are you content, both of you?

MR WARD: I am, your Honour, although I do need to make the submission that the technical evidence of Mr Failler in paragraphs 20 and 21, as an expert, he lives his life dealing with aircraft and the regulatory requirements surrounding them is not a conclusion of law, but a statement of fact by that expert. But I'm content with your Honour's approach.

HIS HONOUR: So just give me that – what page is that - - -

MR WARD: The objection was foreshadowed at page 67, paragraphs 20 and 21.

HIS HONOUR: 67. I see, yes. But just take 21:

> *A failure to comply with the manufacturer's requirements can be a failure to comply with the FAA regulator requirements.*

So - - -

MR WARD: He's not there, your Honour, asserting that there is any particular result from a particular set of facts. He's stating to your Honour as an expert who spends his life dealing with regulatory issues surrounding the aircraft that he operates that a failure to comply with manufacturer requirements can, in some circumstances, be a failure to comply with regulatory requirements under the FAA, which is what we're concerned with in this case. And for that reason, the manufacturer's requirements, particularly relating to transport in this case, take on a particular hue and importance and significance.

HIS HONOUR: All right. Well, I understand how you put that.

MR WARD: Thank you, your Honour.

DR HIGGINS: For our part, your Honour, we're very content with the commissioner's report.

HIS HONOUR: All right, thank you. All right. Well then, apart from the cross-examination of Mr Dunbier, that deals then with all the evidence before the Court?

MR WARD: Yes, your Honour.

DR HIGGINS: It does, your Honour.

HIS HONOUR: All right. Now, where is – Mr Dunbier's evidence is at page 95. Is that right?

DR HIGGINS: Yes, tab 9, commencing at page 95.

HIS HONOUR: All right. Now, in the circumstances we're in, I will take it that Mr Dunbier has already been sworn in and the cross-examination can proceed on that basis, Mr Ward?

<DARREN DUNBIER, ON FORMER OATH [10.34 am]

<CROSS-EXAMINATION BY MR WARD

HIS HONOUR: Mr Dunbier – can you hear me, Mr Dunbier?---I can, your Honour.

All right. Well, what I have just indicated to counsel is that I am taking your affidavit as having been sworn. So you're under oath when you're answering the questions of Mr Ward, so you have to tell the truth and the whole truth. Do you understand that?---Fully understood, your Honour.

All right, excellent.

DR HIGGINS: Your Honour, could I raise one matter before the cross-examination begins, which is that Mr Dunbier has a hearing aid. So if my learned friend could speak very clearly, that would be of assistance to the witness especially.

HIS HONOUR: All right. Mr Dunbier, did you hear me clearly enough?---I can hear you, your Honour. Some of the others are a little bit echoey, but I'm doing okay. Thank you.

All right. Well, you're now going to be cross-examined by Mr Ward?---Yes.

I will turn off my mic unless I have to go back in, because that sometimes helps. Now, Mr Ward, you will have to take it slowly, as I'm sure you will. And we do find – I'm not suggesting this will occur with you – some counsel get a little excited and move around a lot. We find that does not assist in the audio, so if you can try and keep it still, that would be of assistance. Off we go.

MR WARD: I will, your Honour. I will, your Honour, and I'm well away from the microphone so hopefully paper rustles won't be too big a problem.

Mr Dunbier, can you hear me clearly enough?---Yes, I can, and if it's okay I will let you know if I don't.

Thank you, and may I thank you for making yourself available at such short notice for these questions this morning. Now, Mr Dunbier, do you have a copy of your affidavit in front of you?---I do.

Could you just turn to paragraph 1, which is at page 96?---Yes.

You are the CASA Continuing Airworthiness Manager at Virgin Australia Airlines. That's correct, isn't it?---Correct.

And in that role, would you agree that you have had to liaise with the Civil Aviation Safety Authority of Australia in relation to the regulatory requirements that are necessary to keep the fleet of Virgin aeroplanes flying safely and in accordance with regulation?---Constantly.

And you are very familiar, aren't you, with the requirements of the Civil Aviation Safety Civil Aviation Safety Authority of Australia in relation to the continuing maintenance that is necessary to ensure the safe operation of aircraft engines onboard the 737s, or attached to the 737 fleet?---I understand the framework very well. The

specifics of the maintenance program is undertaken by other approved persons, but I understand the framework very well.

And you have – in your role, you have dealt previously and over many years with private companies and entities in the position of my client; that is, the ultimate owners of aircraft objects, as you call them, being engines and other parts that form part of an aircraft?---On occasion. Not fluently, but I have been involved, yes.

Yes. You know, don't you, that there is a nominated operator for any particular aircraft for the purposes of Australian law?---Yes. Yes.

And who is the operator of the four aircraft that we are concerned with in this proceeding?---The four aircraft that the engines – the Willis engines are fitted to? Is that what you refer - - -

Yes. Yes?---The aircraft – look, there's one of them that might still be under Tigerair Australia, for which I provide continuing airworthiness management controls, but they are the operator. I think there's one in – in Tigerair registration. The other three are Virgin Australia, but they're all – all of their procedures and all of the continuing airworthiness processes are within my department.

And does that mean that in paragraph 1 where you say that you're the individual that CASA holds responsible for Virgin Australia Boeing 737 aircraft, that would include the aircraft that is apparently operated by Tiger airlines?---I provide the services. There's an – there's an individual Continuing Airworthiness Manager for Tigerair. That's Robin Thurber.

And you would certainly be aware, wouldn't you, of the historical operator records that are required to be kept throughout the operation of an aircraft's life and the large components of the aircraft?---Very familiar with the civil aviation regulation requirements for the – for the upkeep of continuing airworthiness records, as defined within the regulations, and our obligations to meet them. I'm not expert in each individual lease that may have additional requirements in it for a lease return provision. I can't claim to be expert to that, I'm sorry.

And you know, don't you, what is meant by a reference to part 121 of the FAA regulations?---I'm not fluent with part 121 of the FAA. I'm fluent with the civil aviation safety regulations in Australia.

You've heard of part 121 and part 145 before, haven't you, in your position?---I'm fluent – I was fluent with FAA part 145, and I don't expect it to have moved very much. I'm not – I'm aware that there's a part 121 and I understand it to be operator's requirements, but I'm not – not at all familiar with the FAA rules in that area.

Do you happen to have a copy of the court books in front of you?---No, I do not. I'm sorry.

Your Honour, I was going to take the witness to the latest version of the ROIL, R-O-I-L, document that was circulated by my learned friend this morning. Is it possible for a copy to be sent to the witness in some way? I can ask the mother questions while that's occurring.

HIS HONOUR: I'm told you can share the screen.

MR WARD: Yes.

HIS HONOUR: Have you got someone who can do all that?

MR WARD: No, your Honour, not conveniently and easily and electronic.

HIS HONOUR: All right. Can I just – what is the document, Mr Ward, that you want – just remind me. This is the one that was tendered – is this the one that came in in the email, 31 July at 9.32 am? Is that the one?

MR WARD: That's the one, your Honour, yes.

HIS HONOUR: All right, so - - -

DR HIGGINS: Your Honour, to assist your Honour, I understand that Mr Dunbier does have a copy of that document.

HIS HONOUR: All right. That's what I was going to say. He may have one which is not in the court book, if you know what I mean.

DR HIGGINS: Yes.

HIS HONOUR: So Mr Dunbier, I note – Dr Higgins, you will be allowed to direct the witness, as it's your witness, to where that document is in front of you and what it is.

DR HIGGINS: Your Honour, I understand it's an email of a Mr Andy Simons, send yesterday, the one which Mr Dunbier was ....., attaching ..... in the current form of the ROIL.

HIS HONOUR: All right.

THE WITNESS: Yesterday at 3.15 pm?

DR HIGGINS: Yes, I believe that's it?---I'm sorry, what time was it yesterday? On mute.

MR WARD: I'm sorry about this, your Honour.

DR HIGGINS: Just trying to confirm that, Mr Dunbier?---I think I have it, if it's titled WFC Records Open Items.

MR WARD: In terms of the third page of the Records Open Item List, third tab?---Just trying to – just trying to open it, and it may not open on my home computer. Just let me open a laptop.

Mr Dunbier, I think I can possibly do it this way?---I have the file open.

Thank you, Mr Dunbier. If you look at - - -?---I think it is correct. I think it is correct, if it's the WLFC Records Open Item List for the ESN engines since yesterday.

And then – and then I might get you to look at tab 3. It should be the record for engine number 896999?---Yes.

And at item – at item 36, you see there that there is a record which is described as the component - - -

HIS HONOUR: I'm sorry, Mr Ward, I don't know if I'm with you. So I'm looking at what was tendered in evidence is the later versions of tab 62 to 65.

MR WARD: That's right.

HIS HONOUR: Is that what I'm supposed to be looking at?

MR WARD: There should be a tab which is entitled Records Open Item List, and there are four tabs - - -

HIS HONOUR: Yes, I've got on page 3 of 8, down the bottom it says "3 of 8." It has at the top:

Records Open Item List. Note that there are four tabs to this document.

And I - - -

MR WARD: That's right, your Honour. I want the third of those tabs.

HIS HONOUR: The third of those tabs. I think – all right, you refer to item 36?

MR WARD: Yes, which is about two-thirds of the way down the page.

HIS HONOUR: I am now with you. All right.

MR WARD: Thank you, your Honour. Mr Dunbier, you will see that the first tab describes this item as "components replacement certificate"?---Yes

Now, first of all, you would be well aware, wouldn't you, from your role that whenever a component is replaced in an aircraft engine, the necessary documentary certifications surrounding that replacement is an essential part of the replacement process?---It is a prerequisite requirement for a part 145 organisation to install a part, correct. It does not form part of the continuing airworthiness records.

That's right, but it's part of the – a necessary part of the part 145 records?---Yes, not the operator records, correct.

And the item that we are talking about in line – or tab 36, is a hydromechanical unit. Is that right? Described HMU?---HMU, that's the acronym for HMU, correct.

Can you just tell his Honour what a hydromechanical unit is?---Look, I'm not a technical expert on that level. It's a significant component in the aircraft. It's a mechanical – a mechanical unit driving, I forget what it is, vanes or – I think it – I think it drives the vanes in the engine. I'm not an engine specialist, I'm sorry, but I'm familiar with having to – having to have them replaced in aircraft.

HIS HONOUR: You used the word, a "significant" component. Does that – did I understand that correctly?---It's a reasonable size component, correct.

Yes, thank you.

MR WARD: And Mr Dunbier, do you agree that there are two documents relating to the HMU that are not yet provided? One is a work order and the other is what is called a dual release in relation to the HMU?---I'm guided that that's the situation, but I'm – I'm not – not familiar with each and every document, correct.

Thank you. Mr Dunbier, in your current position, do you have oversight of the acceptance by Virgin of aircraft and aircraft components with respect to their documented, certified safety requirements?---Yes.

You would agree, wouldn't you, that provision of documents of the type that are sought by my client is an essential step before any aircraft component in the nature of an engine could be placed into service?---It's one method, correct.

And - - -?---Recertification is another

Recertification would require several quite expensive steps to be taken, wouldn't it, Mr Dunbier?---Yes.

Could I ask you this, Mr Dunbier: would you, in your role of Virgin – in your role in Virgin, would you have been prepared to accept an aircraft into your fleet as an operational engine if your safety team had not been able to get access to the historical records relating to that engine?---The 145 would not be able to install it, correct.

Thank you. You understand, don't you, that at the end of a lease of aircraft component, the operator records for the aircraft component are also an essential part of the ability to continue to use that aircraft component somewhere else?---Yes, the – the paragraph relates for each part replaced, and then it mentions one specific. I doubt that we would have to release documentation for each part. Those would be held within many other organisations, and then a top cover release would be given. We wouldn't have release certificates for every part. If we installed the HMU, then our system would require that we have that document.

Well, one of the things that – if you look back at the document that we were looking at in the Record Open Items List, one of the documents that are described as pending is at item 19, a statement described a "non-incident statement." You know what that means, don't you, Mr Dunbier?---I'm familiar with them on aircraft, not with engines, but I expect they have the same intent – that the aircraft has not been involved in accident or fire.

Yes, and that would be very important for a future user of that either aircraft or aircraft component to know, wouldn't it?---I'm not expert in that, but I assume so.

When you – have you been involved in the return of either aircraft or aircraft components at the end of lease prior to this – these four items?---Peripherally, yes, and around the expense involved in correcting some to full lease return conditions. I haven't physically performed the activity, but I've provided regulatory guidance to my team and I have overall awareness of the process.

And you know, don't you, that the end of lease records are entirely routine? That is, there is nothing non-routine about a requirement that they be provided at the end of the lease?---That's not my understanding. There's the regulatory requirement to hold aircraft records to be able to demonstrate continuing airworthiness, and that is – that's provided with every aircraft under the regulations, every returning aircraft or engine, and that's the mandated, continuing airworthiness records. On many occasions, lease companies require over and above that, and they vary within the particular lease. But in the regulatory sense, the Civil Aviation Safety Authority defines exactly what the "must hand over" items are, and they're defined in the regulations as the "continuing airworthiness records" for the aircraft.

And they would include - - -?---They have a specific definition.

You have looked, I think, at Mr Failler's affidavit because you refer to it in paragraph 18 of your affidavit?---Correct.

And you note there that Mr Failler, in paragraph 25 of his affidavit, describes various documents that are required?---He does, and then he infers at 26 that they are a regulatory requirement, and I don't agree with that statement.

Well, at 26, he's talking about something called a "serviceable tag." That's a different matter, isn't it?---I would have to refresh, but yes, possibly correct, yes.

And so you say that you've taken all – at paragraph 18 of your affidavit, you say that you've taken, you think, all reasonable steps to locate the document described in paragraph 25 of Mr Failler's affidavit. What steps have you taken in relation to all of those documents?---As has been repeatedly stated and – to all these companies that we deal with, we will give you absolutely everything that we've got. Every record that we have, continuing airworthiness record for the aircraft or the engine. We understand that they're of high desire for the lease companies to be able to remarket their product. We've got no hesitation at all not to provide something that we have as a record. When we get into paragraphs about "all parts in store", I just can't – we can't give that. We don't have it. I can't manufacture it. We will give you everything we've got, but I can't give you what I don't have.

What would stop you giving a non-incident statement today, Mr Dunbier, in relation to the four aircraft engines we're dealing with?---For airlines that are not in administration, that would be given as part of the end of lease process, which does end up – I'm sure your clients will be aware, it ends up a negotiation process around how quickly you want the aircraft, or you don't, or your engine – same – same – same process – whether the lease company and the operator concede certain items or not to achieve the commercial outcome. We would engage in that in a lease return process. "We're not in a lease return process" is the guidance I'm given by our administrator, that as we are under administration, the administrator cannot incur risk or similar during the period of administration, and their guidance to me is that I cannot – cannot issue that whilst we're under administration. And my understanding is, they act as my board, and it's like an instruction from the board.

And Mr Dunbier, if you were not in administration and had not been directed by the administrators not to provide the non-incident statements, are you saying that there would be no impediment to you doing so - - -?---That would be a normal practice for us, as part of the individual lease return negotiation process.

And the same would apply, would it, to the FAA or EASA serviceable tags that should be applied to the aircraft components?---Well, when you say "should be applied", there is no regulatory obligation to provide such, even though it's inferred in the affidavit. The regulations require that document for an installation, not for a removal. We don't have the ability, legally, to issue such a document, and the Australian equivalent, the Civil Aviation Safety Authority here, inhibit us from – from issuing one, because we don't have the ability to prove serviceability on the wing. We don't have an engine approval. We're an operator, not an engine shop. So I can't physically, legally issue one, regardless of what people's interpretation of the rules in FAA are.

You understand, don't you, that it's a term of the leases in relation to these engines that FAA or EASA serviceable tags be put on the engines at the end of the lease?---I – I'm – I haven't read every individual lease, but I expect that it would be there as part of a normal lease return process, yes.

Would you put an engine on a Virgin aeroplane if it didn't have a serviceable tag on the engine when it arrived?---The regulations would not permit me or any other to have a 145 organisation install the engine without an application release document, recognised within the countries for which the engine's being installed.

Yes, I've got no further questions, your Honour. Thank you.

HIS HONOUR: Mr Dunbier, would you mind going to paragraph 25 – or you may not have it - - -?---Yes.

- - - of Mr Failler's affidavit of 8 July?---Yes.

And what I want to ask you is: put aside any direction you're being given in this particular situation because of the administration. Just put yourself in the normal position where there is being a return of an aircraft. That's the mindset I want you to put in?---Yes. Yes.

You've already indicated to Mr Ward, as I understand it, that a non-incident statement you would normally expect you would want if you're getting an engine back, for obvious reasons. Looking at the other – A to L, and assume also that there's no illegal impediment to you acting as you would think is prudent and reasonable in the circumstances. So forget about any – of that nature. Are there any of the examples given of the types of documents in 25 that you would not reasonably need or want?---I would have to just refresh myself, your Honour, if I may, just for a moment, to go down through the paragraphs.

No, no. Please take your time?---In the majority, yes, your Honour. There are some that – that are not really defined. Item C, combination statement. I don't know. A, we would give every – every piece of history that we have. Item F would be done in conjunction with the engine manufacturer, so we would give clearance for those – that data to be collated for us to go back with the engine, but it can't be done until the very last running of the engine. So you just can't physically do that until you're at handover point. Other than that, generally, yes.

All right. Thank you very much. What you're giving me the impression – and you've said it a number of times, I think – is that we're not just talking about handing over, like a car, a key and a service manual. It involves other people being part of the process, and a stage process, I take it, like the last example you gave me seemed to be a stage process. So it's not going to be done in one day?---Correct.

It may take weeks or months. Is that correct? Am I getting the right flavour?---You are, your Honour, and in lay terms, I liken it to the transfer of a motor vehicle where a certificate of roadworthiness or safety certificate has to be – has to be part of an application for the next registration. And the rules don't – in this case, the rules don't deal with who issues it. It's just a must-have before you can use again.

Yes, so it's a - - -?---It's the nearest lay term.

Yes. So there's a mixture of what is obviously rules because of civil aviation safety, and there is what is commercially needed for a person to take back an engine to then use it themselves. So that's something which may be above the rules that is imposed normally by the agreement?---Correct, and it if was a motor vehicle example, there might be the mechanic that has to check the brakes or check for oil leaks or other conditions, and then certify that that is – that meets the standard. But the person going and registering the vehicle has to provide that certificate to the registration agency, and that's very similar to aircraft. How you obtain that, they don't regulate. They just regulate that you have to have one.

Yes, and I also understand, but correct me if I'm wrong, that in the course of a handover or return or giving possession, whatever phrase one wants to use, there has to be some communication between the relevant parties and a bit of give and take on – something may not be able to be found, or given, but something else could be done in its place that will satisfy one party or the other. Is that a fair statement of how it all works in reality?---I think you've hit it on the head in what happens at the end of a release return process, and my experience is, the willingness to accept a document or a condition on the product is usually predicated on how quickly the lease company has its next customer. In their – their willingness to accept what we might consider reasonable is usually governed by their next business for that product, how they can lease it again. Now, that's just the reality of the process that we go through of negotiation. If they have a customer, they're more willing to accept what we feel is reasonable. If they don't have a next customer, then it's not in their interests to settle early. It's in their interests to hold off and charge rent. So that's the practicalities of what happens with aircraft, and I suspect it's similar on engines, even though I haven't been involved with them.

All right. Let me go back to a concrete example in paragraph 25. Let's pick on the non-incident statement?---Yes.

And – if I told you today that you are to ignore the fetters that you think you're being put upon by the law or your – or the administrators, and that all best endeavours should be undertaken to give a non-incident statement - - -?---Yes.

- - - what would that involve?---For me, it's a – have my staff review the records to make sure that the product, whether its an engine or an aircraft, has not been involved with an onboard fire or been involved in a crash, or major event of that nature, of which none of the Virgin Australia fleet has. So we've had one ATR600 with an engine – external engine fire, but no CFM56 incidents at this time.

All right, so - - -?---So it's an – it's an – it's an affirmation that that has not occurred, whilst it's in our care.

So I get the impression that that could be done relatively quickly, having regard to the knowledge you already have?---That's correct.

All right. Can you – looking down that list of 25, there's the – I know there are examples. Are there any there that, again, if it was a reasonable best endeavours requirement on your part or whoever you direct to do it – are there any there that - - -?---Yes.

- - - would be impractical in a practical sense to get?---Just – just going down. The history statements, so we've just gone through. That's A. The history statement is easy for where the aircraft has been used. Non-incident is easy. "Combination statement" I don't understand. It doesn't have a regulatory term I'm familiar with, so I would have to get some clarity on that. Life-limited parts status – we have to control – to understand when parts be removed. Now, sometimes lease companies want that on their specific form. Large operators don't work on paper. We work in complex, regulatory-approved computer systems, so we have to generate reports and then certify the reports, but that's a normal practice for us to provide the report. I think in this case there has been a position taken by Willis that – that it has to be on their specific form, so we would work through that just to get the desired outcome. AD status in E would be the same. We will provide it in a certified – we can provide it in a certified report. ECM data, I'm pretty sure we need the manufacturer to provide the final reports after the last engine runs, or positioning flights. Oil consumption data is something that we - - -

Just stop on that one. Sorry, just stop on F?---Yes.

So you need to get the manufacturer to cooperate with that. Is that normally – is that a problem – have you experienced a problem with doing that in other cases?---There shouldn't be, as long as there hasn't been a loss of data flow, which I would not expect. It's just that they can't physically run the last data for some – until the last – at the end of the process.

All right. Yes, all right. Go to G?---Oil consumption data, we monitor. Preservation documentation is that – so that's an activity where the engine is removed and then you – you preserve the engine for transportation. You put preservative oil in the fuel system, you put desiccant bags in and you bag it up appropriately to – for a set period in accordance with the manufacturer's guidance. So that's a – that's a last activity you do before shipping as well. On-wing maintenance cast cards is not something I have been asked for before. It's not – it's not a continuing airworthiness record handover for engines that I'm aware of. We just have to size – each and every task that we've done on the engine, I think has no material value to its ongoing use after the certificate is issued. Most of those are repeat occurrences, so if I liken it to once every six weeks or so, we change filters on the engine. Once you change a filter, you've superseded the previous event. So you don't provide all of the records for every six weeks of – for the many years that you've had it. You provide what's necessary for – for continuing airworthiness. And similar on pilot reports or tech logs. We will provide the major ones related to the product, not a copy of everything on the aircraft.

And then K and L?---I'm sorry. Service bulletin status is another report that we would generate and certify, and component certificates for replacement parts – we would hand over what we have. If we don't have it, because it come as a subset with another activity, we don't have to hand over. But typically, we hand over copies of everything that we reasonably can. We've got no desire to retain anything. It doesn't add us any value other than continuing records cost.

Yes, and I think – looking at 26 and 27, you've already answered Mr Ward's questions in relation to serviceability tags, which are required at the end, I take it?---Well – well, "required." What requires it? Because the rules don't require it. It is – we come back to the certificate of roadworthy for a vehicle. You're not require to hand a vehicle with one. You just need one before you can register it again. So – so I'm agreeing with the content, but not the requirement.

All right, I understand. So it will take away the requirement, but nevertheless, in a commercial world where you're giving something back so it's of some use to be used again, it's – again, using an analogy to a roadworthy certificate, it's – a serviceability tag would be required in that context?---Under the lease condition, correct.

Yes, all right, thank you. All right, Dr Higgins, any questions you want to ask arising out of what Mr Ward's asked or what I've asked?

DR HIGGINS: No, your Honour. There's no re-examination from me.

HIS HONOUR: All right, thank you, Mr Dunbier. You're excused if you want to go offline. If you want to stay and listen, you are more than welcome?---Thank you.

<THE WITNESS WITHDREW [11.10 am]

HIS HONOUR: All right. Mr Ward?

MR WARD: Yes, thank you, your Honour. It seems to us that there are three issues for determination today when you break down what currently is before the Court. The first is what I can describe as the construction question of the Convention of protocol as given force of law in Australia by the ..... Act. The second issue we think is the liberty and effect of the 443B notice, and any consequential liability of the administrators or the airline for rent for the aircraft objects. And then finally, there's the issue which has belatedly arisen about ..... which we think we should spend little time on, in all the circumstances, given the way the first two, perhaps, should be addressed. What I propose to do, your Honour - - -

HIS HONOUR: Well, can I just - - -

MR WARD: Yes, your Honour.

HIS HONOUR: They're the three issues, and I thought two were on the table. Can I just check with Dr Higgins, are they the three issues that you have on your agenda too, Dr Higgins?

DR HIGGINS: Yes, your Honour.

HIS HONOUR: All right. Now, I have read carefully the submissions of the parties in relation to the construction issue, and I wonder if the parties are really that far apart about all this, because whether we're going to have an argument construction about "shall give possession", or "you come and take where it is", or "make available", it seems to me that the important thing, whatever phrase one is adopting, to work out the content of what has to be done. So if I did decide "shall deliver possession" means just that, that you shall deliver to the person the possession of the engines – we will get to the documents later – because it's just not like handing over a bit of paper or glass or something, or giving a gift of that sort, it requires to be given content.

MR WARD: Sorry, your Honour. I'm sorry, your Honour, we lost the last – I lost the last 25 seconds of what your Honour was saying.

HIS HONOUR: All right. So it's quite different than just handing over a glass, or giving possession of a glass, or some object like that. It involves more, and that's why you've got to work out what is involved in making available or giving possession in a situation like this. And the evidence we've just heard and is in the affidavit material cries out that that has to be the situation that has to occur.

MR WARD: Yes.

HIS HONOUR: So if I give a declaration, I will have to explain what that means in delivering up or even making available – has to be more than just taking something. So I really wonder whether or not the parties are too far apart on that issue. Everyone seems to suggest that has to happen, whatever construction is taken.

MR WARD: Your Honour, I certainly don't disagree that the content of the obligation, however it be described, is ultimately the issue your Honour will have to grapple with. We do say that there's a way of resolving the determination of that content, and I might walk through very – it won't take me long, but I was going to walk through how we see the dispute has arisen and the solution to what I will describe as the content determination; that is, however the obligation be described, what is its actual meaning? Would your Honour – it will probably be useful if your Honour has Mr Algeri's affidavit open, and perhaps we might start with paragraph 12?

HIS HONOUR: Yes.

MR WARD: Yes. Could I start by saying this to your Honour: it is very clear that the administrator has been dealing with a situation which we would all accept is

unprecedented. This is not a normal insolvency. It's an insolvency in a time of some global crisis, and both the administrator, and to some extent, the Court through your Honour have been working to try and deal with these circumstances. And we apprehend that it's for that reason, based upon the ..... evidence that's just ..... 7B of this affidavit, which is ..... that your Honour extended the normal ..... both initially and then again to be taken up to 16 June. ..... retain as much aircraft property as possible, for ..... to enable a deal to be done, if a deal could be done, as ultimately it has occurred.

And so our starting point is that the administrator approach our property on the basis that he had continuing values in the company, even though it could not be used to fly commercial flights, or was not being used to fly commercial flights. Could I then take your Honour to – I should just in passing note the proposition which is put against us at paragraph 15 of Mr Algeri's affidavit. It's a significant proposition which pops up more than once; that is, that other lessors have signed aircraft protocols. We need to be very careful here to distinguish between the Convention aircraft protocol and Mr Algeri's aircraft protocol, which is essentially a contract that he proffered to various owners of aircraft property.

It is said against us repeatedly that other owners have signed up to this deal, and those that haven't have collected their property in some way or another. But your Honour has not given any evidence as to the nature of the property in question in the other protocols, nor whether there were foreign transport issues, nor whether it was difficult or easy to continue to use the property, or relocate the property, or obtain the property. And your Honour would put very little weight on that as a matter of evidence.

Could I then turn today to where we think that the approach taken by the administrators has come off the rails – and in exactly the way that Mr Dunbier has now put to your Honour, and what I think your Honour has just put to all of us, which is that this is not, in your Honour's example, the return of a glass or a cup. It's not even the return of a piece of heavy earth moving equipment. This is a very specialised area of property, and the approach taken by the administrator is revealed quite only in paragraphs 24 and 25 of the affidavit.

What has informed the administrator's approach is his understanding and experience as a registered liquidator who is highly experienced in Australian liquidation, highly experienced in 443B and these issues. But his understanding, as revealed in paragraph 24, is entirely wrong in relation to aircraft property. That is, he has always understood that the lessor must collect their property on as-is, where-is basis, and bears all of the risks and costs associated with the collection process.

He says at paragraph 25 that he has not previously dealt with the Cape Town Convention. He notes that the aircraft protocol – which is a reference to his aircraft protocol, not the Convention one – in effect, assumes that the collection processes under section 4 or 3B will apply to any aircraft property. It's not required by the business on the completion of the transaction. So the administrator has, in our

submission, quite incorrectly equated the Cape Town Convention processes and requirements with his very experienced understanding of the administration and liquidator processes domestically that he has previously been involved with.

Now, Mr Algeri then proceeded entirely consistently with that understanding that he expressed in 24 and 25; that is, he assumed that the correct approach was to say to my clients in the section 443B notice, "Here are the aircraft scattered around Australia upon which your engines are located. I won't stand in the way of you coming to get the engines, as long as you pay for it", and even, extraordinarily, "as long as you go to Adelaide, where one of the aircraft is located, and find some way of flying it from Adelaide to Melbourne, where facilities might be to actually take the aircraft engine off the aircraft."

Now, none of that is – that is entirely consistent with the "take it as-is, where-is" propositions that Mr Algeri believed informed his approach, but it is entirely inconsistent with the nature of the obligation and the content of the obligation that I will now come to, required by the Convention and the protocol. What we have, your Honour, in the Convention, for all of the reasons that we put in our detailed written submissions both in-chief and in reply, is the requirement of a positive act of giving in a commercially reasonable manner. But there is a even greater content to be given when one looks at the Convention as a whole. And could I ask your Honour to open the Convention?

HIS HONOUR: Yes.

MR WARD: If we turn first to the Convention itself, in the table of authorities that is behind tab 4 – tab 5, in my document - - -

HIS HONOUR: Yes.

MR WARD: And I do this, your Honour, because I end with the solution to your Honour's initial problem. Would your Honour turn to item 6?

HIS HONOUR: Yes, I have that.

MR WARD: Your Honour sees one must read the Convention and the protocol together as a single instrument, although the protocol prevails over any consistency between the Convention and the protocol. While we're in the Convention, would your Honour then turn to article 12? Well, perhaps if we started at article 10. There are remedies contained within the Convention itself; that is, these are remedies identified by the contracting parties as appropriate for creditors or lessors.

Article 10 provides for remedies of conditional seller or a lessor. And one of the remedies there stated, pursuant to an event of default, is the ability of taking possession of control of the object. That's one possible remedy noted in the Convention. Article 11 provides that an event of default is expressly capable of being that agreed in writing by the parties. I can tell your Honour that – your Honour

will find it at page 161 of the court book, but an event of default, unsurprisingly, in our leases includes an insolvency event of the type that has occurred.

Would your Honour then look at article 12, which provides for additional remedies? And we place some significance on this. The Convention expressly recognises that:

> *Additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised unless they're inconsistent with the mandatory provisions of the Chapter set out in article 15.*

Now, the stress that we – the emphasis that we highlight here are the words:

> *any remedies agreed upon by the parties.*

So the Convention identifies that the parties may agree between them remedies to be triggered by an event of default. If your Honour then turns to tab 7 of our bundle of authorities, which is the aircraft – the protocol to the Convention, and we've referred in our written submissions at some length to both article 11 but also to article 9. I want to take you up to article 9, because article 9, in our submission, is the solution to your Honour's problem of content.

Article 9, paragraph 3, and the words – the preparatory words have no meaning to do in – or no work to do in the current circumstances. Article 9, paragraph 3 provides that:

> *Any remedy given by the Convention in relation to an aircraft object –*

and we refer back to article 12 of the Convention and the reference to "agreements" or "remedies agreed by the parties" –

> *Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner.*

So your Honour has some work to do to identify what is "commercially reasonable" by reference – not at large, not to Mr Algeri's understanding of Australian corporations law, but in our submission, by reference to the agreement of the parties. And that's made even clearer by the next words:

> *A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement, except where such a provision is manifestly unreasonable.*

So, your Honour, in our submission, the starting point for your Honour's – what is the content of the return obligation is, as we've put in our written submissions, the written agreement of the parties. The content of the obligation are those described in the leases, and it is precisely for the reasons that Mr Dunbier has now correctly but transparently exposed. These are not cars. These are not glasses. These are not

bulldozers. These are highly complex pieces of extraordinarily expensive equipment which cannot be reused unless they are dealt with both through the life of the lease, but on the end of lease, in very precise and particular ways.

And the precise and particular ways that they must be dealt with, particularly at the end of lease, are those ways that are set out in the agreement of the parties to which article 9 gives effect, unless they are manifestly unreasonable.

HIS HONOUR: Mr Ward, I did look at that provision, article 9(3), and the only issue that I had with reference to that was – is that incorporated within the operation of article 11? So I just have a little difficulty of working how it all put together. So you've got the remedies on insolvency in article 11, which is where we have this issue of "give possession." And we're talking alternative A. And then somehow you want me to go back to article 9(3), and I got a little bit confused with the first sentence:

> *Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention –*

and I think I read somewhere that "convention", when referred to, refers to the Convention and the protocol, but that can't be quite right, though maybe I misunderstood that. But could you just help me – how this all fits together, in your submission?

MR WARD: Yes, your Honour. Article 8(3) refers back to article 8(1), and it gives particular remedies in relation to chartees of ordinary objects, but it does not – expressly is carved out the application of article 8(3) to aircraft objects. That that the only application of "remedy" that your Honour needs to be concerned with is article 9(3), after the words:

> *shall not apply to aircraft objects.*

HIS HONOUR: I see.

MR WARD: Because what is ..... is for any remedy given by the Convention in relation to an aircraft object, is now subject to this overriding test of commercial reasonableness, and commercial reasonableness - - -

HIS HONOUR: But didn't we also have in the Convention "commercial reasonableness"? I thought I read that too as a criteria for looking at matters, putting aside aircraft, but maybe I misread that. But in any event, you don't need to worry about that. You say you look at article 9(3), we're talking about "a commercially reasonable manner." That has to be interpreted in the context of this document, not any other document that – like a document as the corporations law in Australian domestic law. And then you refer to – it's deemed to be reasonably manner if the agreement has a provision dealing with it, unless it's manifestly unreasonable. That's the analysis, isn't it?

MR WARD: That's correct, your Honour. Your Honour, just so you know, your Honour broke up a little bit at the start of that but I think I got the gist of it.

HIS HONOUR: All right.

MR WARD: Could I say to your Honour that we agree as well, in principle, with the fact that the article 11 remedy of "give possession" also imports the obligation of commercial reasonableness, but it does so by reference, as we've said in our written submissions, to the parties' written agreement because of the existence of article 9(3). And one has to read the entirety of the convention and protocol together. Under article 31 of the Vienna Convention on the Law of Treaties, one construes the treaty instrument as a whole. Your Honour will also see at article 11, paragraph 10, a further restriction upon the possibility of an agreement by the insolvency event in the agreement that has already been raised between the parties.

Your Honour will see that article 11, paragraph 10 provides that no obligations of the debtor under the agreement may be modified without consent of the creditors. And of course, that's precisely what is proposed against us: that there be a substantial modification of the procedures that have been carefully put in place by these parties to ensure the correct result upon – not at random, but precisely upon the occurrence of an insolvency event of the type of which we are now concerned.

Could I then take your Honour that enlivened with ..... and so in light of the evidence that we have led, your Honour will, in our submission, think that what is proposed in the agreements put in these parties is in fact commercially reasonable, let alone not manifestly unreasonable. Would your Honour look first to page 140 of the court book, volume 1 of the court book? ..... which is applicable to these engines in paragraph 7, A, B, C and D. The written requirements agreed between the parties for the provision of the written records which my client now seeks – there is nothing unreasonable about the provision of these records.

Mr Dunbier accepted in the paragraph 25 analysis your Honour took him to that all of those matters, I think, with one exception being the combination statement he hadn't heard of, but he seemed to accept that all of them were entirely ordinary and reasonable requests which would have been complied with were it not for the direction of the administrator. Presumably, the direction he has received not to provide records is a direction that has been given to him by Mr Algeri, and I will come back to Mr Algeri's affidavit, where it is clear to us – and we hope it will become clear to your Honour – that there is a commercial almost hostage situation being promoted by the administrator in relation to these records.

But could I stay with the lease for the time being? Your Honour will see that the obligation in A is to deliver on the delivery date following the insolvency event, giving rise to an event of default – all records, relevant access and login codes for the engine that are requested in writing which are in the possession of the lessor. Importantly, in 7B, there is no dispute and should be no doubt that all of the records

maintained in the English language for each engine are deemed to be part of the equipment from the time of generation of each of the records.

This is not a situation, your Honour, where the engines, as my learned friend would have you believe, the engines are some standalone piece of metal machinery surrounded by ancillary things that aren't part of the equipment. They rise or fall together, for the reasons that Mr Dunbier has made clear. Without – in my words, has made clear. Without the written records, the engines are commercially worthless.

Paragraph C imposes a very reasonable obligation upon redelivery of engine records, and paragraph D defines the matters that – the nature of the records that are sought. If your Honour then turns to pages 157 to 158, there are provisions in clause 18.3 which are, in our submission, entirely commercially reasonable which require redelivery in a particular manner. Your Honour will see in clause 18.3F:

> *Upon expiration of the lease term, to a location unspecified in the applicable lease –*

which of course in this lease is to Florida –

> *or to such other location in the continental United States, or such other location as the parties may be duly agreed.*

If your Honour would – noting those clauses, including G being the serviceable tag and H being the manner in which the shipment is to take place, then turn to page 188? Your Honour, this is one of the four engines – this is one of the four aircraft in the leases. They're all in relatively identical form, at least in this respect. This is in relation to engine number 897193, which your Honour sees at the foot of the page. And your Honour sees that the delivery and redelivery locations expressly identified as being the facility of the Willis Engine Repair Centre in Coconut Creek, Florida in the United States.

Now, there are very, very good reasons, your Honour, and for all the reasons that we have put in our written submissions, for redelivery obligations to be honoured in precisely the form in which they have been agreed upon an insolvency event. What Mr Algeri's approach would have your Honour accept is that these highly movable objects could be located anywhere in Australia, or indeed, potentially anywhere in the world, and by the simple act of disclaimer, the administrators could say, "Well, it might be in Timbuktu. Go find it." We are dealing, your Honour, with aircraft engines manufactured, I think we say without any dispute, either in the United States or in Europe, but certainly not manufactured locally in Australia.

If Australian airlines want to have access to aircraft engines, they will be coming from overseas. If they are leased engines, the owners of the aircraft engines must have the protection of knowing that they will not, at the end of the lease, due to an insolvency event, have to fish around on an aircraft that might be located in

Adelaide, find a crew to fly the aircraft where there might be a mechanic, pay for the costs of taking the engine off the wing, and then transporting the engine back to the United States. Because there is no dispute between parties that that process is extraordinarily expensive. It is not a cost that was in the contemplation of my clients at the time this lease was entered into.

And the Cape Town Protocol, designed specifically to deal with air craft objects that are movable and expensive in light of these sorts of problems, gives the solution. The parties are protected – my clients are protected by reason of the agreements that they have entered into which provide for readability in terms that informed the price that they charged for the engine lease during the duration of the agreement.

Now, your Honour, I think that's all I should say in chief in relation to what we say the construction point is. In our submission, your Honour was correct at the start to identify the problem as being one of content of obligation, however the "give possession" or "take possession" issue ultimately be determined. "Take possession", in the context of an aircraft object of this complexity, must mean more than what has been offered. "Give possession" we would accept must be exercised in a reasonable manner. But the reasonableness is expressly dealt with in article 9 in terms of that agreement of the parties.

And in our submission, it only modifies the provisions that I have taken the Court to as manifestly unreasonable that your Honour will be interested at all in varying on the terms of the agreement, noting that the variation from the agreement is expressly prohibited by article 11 and sub-paragraph 10 that I took your Honour to. Your Honour, we have given you lengthy, I think, written submissions about what we say about the inadequacy of the section 443B notice. In our submission - - -

HIS HONOUR: I just wonder, Mr Ward, before you go to that, I think I will hear Dr Higgins on this first point.

MR WARD: Yes, your Honour. Yes, your Honour.

HIS HONOUR: Yes, Dr Higgins.

DR HIGGINS: Your Honour, can I begin immediately by addressing the principal content with which Mr Ward began? And if your Honour returns to the Cape Town Convention at article 12 – does your Honour have that?

HIS HONOUR: Yes.

DR HIGGINS: The short point, your Honour, in respect of article 12, is that no application is brought before your Honour for a remedy under that provision, nor is any remedy sought under article 10 of the Cape Town Convention. What is before your Honour, and your Honour sees this in the amended originating process in the court book at tab 4, page 25, paragraph 2 – what is before your Honour is an

application under article 11 of the protocol. So, your Honour, I propose to say no more about that. It is extraneous to the dispute brought before the Court.

Can I turn, then, your Honour, to the protocol and the point that my learned friend raised about article 9? And if your Honour has that, your Honour sees that article 9 falls within chapter 2, which is Default Remedies, Priorities and Assignments. And article 9 is then the modification of the default remedies provisions, and it's important, your Honour, to have regard to the architecture of the protocol and the different circumstances in which it is affording remedies. Article 9 modifies the default remedy provisions. My learned friend went to article 9(3). Your Honour and my learned friend discussed the opening sentence concerning article 8(3). It then states:

> *Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner.*

Now that, plainly enough, is an obligation imposed on the lessor and not the lessee. There was then a deeming provision in effect that commercial reasonableness will be engaged where a remedy is exercised in accordance with the provision of an agreement, unless that provision itself is manifestly unreasonable. Now, so much is apparent and so much, we submit, is irrelevant. Because the critical question is the anterior question of: are the terms of an underlying agreement in any way relevant to the remedy sought in this application, which is a remedy under article 11(2) of the protocol? So it's really about an anterior question of: is an underlying agreement relevant to this at all that must be answered? And with that, can your Honour turn to article 11?

HIS HONOUR: Sorry, Dr Higgins, can we just go back to article 9(3)? So this is dealing with default remedies, priorities and assignments under chapter 2. So you say that's different from a remedy of insolvency. So article 11 is a code dealing with remedies of insolvencies. Is that basically what you're saying?

DR HIGGINS: In effect, yes, your Honour.

HIS HONOUR: Yes, all right. So if that's right, then I get distracted by, you would say, looking at article 9.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: But why do you say, assuming that's not the complete answer, which it may well be, what does the second sentence – you say that just relates to a lessor:

> *Any remedy given by the Convention –*

So when it says "the Convention", it's referring to the Convention there, not the Convention and the protocol, presumably.

DR HIGGINS: I think it should be read as both, your Honour.

HIS HONOUR: All right.

DR HIGGINS: Including – yes, my submission is that it's both.

HIS HONOUR: In the first sentence, it can't be both, can it?

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

HIS HONOUR: All right. So that's where I got my confusion. So you say in the first sentence, "Convention" means "the Convention." In the second, it means "Convention and protocol."

DR HIGGINS: Yes, your Honour.

HIS HONOUR: So:

> *Any remedy given by the Convention and protocol in relation to an aircraft object shall be exercised in a commercially reasonable manner –*

and are not take that out of this particular – article 9, and use that in article 11. That's your point?

DR HIGGINS: Yes, your Honour, and can I put that point in two ways? The first is, as your Honour apprehends, that the same article 11 is a code. In any event, even if that were wrong or the ..... that's not so, if your Honour were to import this article 9(3) to article 11, what your Honour would need is a textual predicate way to do so. And the nature of that textual predicate would be a permissible reliance upon the terms of an underlying agreement in giving content to the exercise of a remedy under article 11. And we say that is also absent. And can I come to that, your Honour? If your Honour takes up article 11 - - -

HIS HONOUR: Yes.

DR HIGGINS: And can I say in passing, your Honour, it has the flavour of a code. One can adopt alternative A or alternative B, and they're exhaustively stipulated. If your Honour turns to alternative A, which is the one adopted, of course, by Australia, your Honour sees under sub-paragraph 2 – your Honour's well familiar:

> *Upon the occurrence of an insolvency-released event, the insolvency administrator or debtor shall, subject to paragraph 7, give possession of the aircraft object to the creditor –*

and then there's a temporal marker –

> *no later than the earlier of two events.*

Now, what your Honour does not see there is any reference to an underlying agreement. And plainly enough, this remedial provision is superadded to and distinct from any contractual agreement between the parties. It is not related in terms to any agreement. And your Honour, there is a contrast in the language here with other articles in article 11. Your Honour sees alternative A at paragraph B nowhere refers to an agreement. If your Honour then looks at paragraph IV, there is there a reference to an underlying agreement:

> *unless and until the creditor is given the opportunity to take possession under paragraph 2, the insolvency administrator shall preserve the aircraft in accordance with the agreement.*

And if your Honour turns over to article 11(7), likewise:

> *The insolvency administrator may retain possession –*

and it continues –

> *and has agreed to perform all future obligations under the agreement.*

Now, what we say emerges really very plainly from the text of article 11 is naturally enough. When an insolvency administrator remains in possession of an object, its obligations must be performed in accordance with an underlying contract. But that hinge is broken once possession is to be given under sub-paragraph 2. And there is there no reference to an underlying agreement. Now, the lack of a link, your Honour, between "giving possession", the final opportunity to take up possession of an object, and an underlying agreement, we say is wholly explained by the preamble to the Convention, which identifies objectives of ensuring predictability and uniformity in the insolvency remedies available to creditors in respect of aircrafts.

HIS HONOUR: What do you say about sub-article under alternative A, 13?

> *The Convention, as modified by article 9, shall apply to the exercise of any remedies under this article.*

DR HIGGINS: That, your Honour – what I say in that respect is the second of the arguments that I put to your Honour earlier, that even in the event that 9 were held to apply, what your Honour still needs to find is some textual predicate to engage the terms of an underlying agreement. For my learned friend's argument to be right, your Honour has to pick up the terms of the agreement, and we say that – that - - -

HIS HONOUR: Don't you do that – going back to 9(3):

> *shall be exercised in a commercially reasonable manner.*

Then it goes on and says:

A remedy shall be deemed to be exercised in a commercial reasonable manner where it is exercised in conformity with the provision of the agreement, except where it is manifestly unreasonable.

So don't you get back to your starting point as the agreement?

DR HIGGINS: We say not, your Honour, because the terms of article 11 itself clearly disclose a distinctive treatment of the terms of an agreement in circumstances of retaining possession and giving possession. The express reference in article 5E and article 7 to the terms ..... indicates clearly that in the ..... possession, ... the agreement.

HIS HONOUR: All right. Well, look, let's just assume that you're right about that, and assume against your position, "give possession", "shall give possession", I interpret in the way in which the applicants want me to interpret it as a matter of construction, so it requires positivity of action. And I can't ignore the evidence that's before me as to what's involved in, on that approach, on giving possession of an aircraft, which everybody seems to agree is not like handing over a glass or some object like that. It involves – you can say I'm wrong about this, it relies on the evidence – but it involves giving records.

Even if I wasn't taken to the lease agreement, just looking at the evidence independently of any agreement, there's more than just flying an engine over to another country, which is probably difficult in itself. So you would have to accept – one way or the other, I've got to identify what is "giving possession" of this particular object in a commercial, practical way, don't I?

DR HIGGINS: Your Honour, can I address one matter relating to the previous discussion I had with your Honour before I come to this now, then I will directly answer your Honour's question?

HIS HONOUR: Yes.

DR HIGGINS: There is one additional submission that should be borne in mind in looking at the intersection of articles 9 and 11, and it's this: there are two distinct questions. One is: what is the remedy? What is the remedy given to, in the circumstance, a lessor? And secondly, what is the manner of exercise of that remedy? And it's imperative not to conflate those. The principal and anterior question is: what is the remedy that article 11 gives to our learned friends? And then there are questions about reasonable exercise, but only then, and if the contractor is not engaged, compliance with the terms of the contract cannot be deemed to be commercially reasonable.

Your Honour, having made that submission, can I indicate this: the answer to your Honour's question, as if often the case, is yes. What your Honour ultimately has to do is ultimately determine what is a commercial, practical resolution to the giving of possession of these items. But we say that that cannot be divorced from the

constructional exercise in which your Honour is engaged as to what "give possession" means, and we say that's particularly so given the intricate structure of article 11, given its antecedents in United States bankruptcy law, and given that the meaning that your Honour gives to those words, we say, will circumscribe what is ultimately commercial and practical, because it will indicate to your Honour what is not required of our client.

HIS HONOUR: Well, again, if I don't accept your construction analysis and I take the view along the lines I've indicated to you, then I have to say, "Well, what" – it's no use my just giving a declaration, "shall give possession", and then have my reasons explained: "I prefer that construction to another construction than yours or any other ones." I then have evidence, don't I, now – and I thought, if I may say so, Mr Dunbier's answers reflected he's obviously a man of great experience and knows how to deal with these particular – giving possession, or handing back, or redelivery, whatever word you want to give.

I would then either set out: "This has to be done", or "Best endeavours has to be done." Give a list as to what is practicable. Some things may not be able to be within the full control of your client, and we would have to allow for that. But that's the way we would have to go, wouldn't we, Dr Higgins, assuming that I'm against you on the construction?

DR HIGGINS: Again, can I answer your Honour's immediate question then return to the premise? That is so – if the declaration were to be useful, that must be so, your Honour, because the bare statement of construction, especially given the history of the matter, is unlikely to advance things.

HIS HONOUR: Yes.

DR HIGGINS: Your Honour, I appreciate the indication that your Honour has now given me twice as to matters of construction.

HIS HONOUR: Yes.

DR HIGGINS: Given that our learned friends have advanced extensive, and we say, new constructional arguments in reply, they've metamorphosed a little from delivery up to transfer of possession, can I address your Honour briefly on the questions of construction?

HIS HONOUR: Yes.

DR HIGGINS: What I propose – your Honour has our written submissions, they were lengthy. Your Honour has our learned friend's reply. What I propose to do, your Honour, is to address the points raised in reply by our learned friends in respect of our constructional arguments, and I will endeavour to do so as briefly as possible, your Honour. If your Honour could have open simultaneously our written submissions at paragraphs 34 to 35 - - -

HIS HONOUR: Yes.

DR HIGGINS: - - - and our learned friend's reply submissions, generally. And if your Honour has then, can I step through the six constructional matters that we raised – and I will identify each of them, your Honour, then identify for our learned friends, address them in reply, and indicate to your Honour our response to those issues. And we say that when the Convention and the protocol are construed together, having regard to admissible antecedent law, our construction is to be preferred and our construction does drive the conclusion that the administration's conduct to date does satisfy the requirements of article 11(2).

Can I take them efficiently in turn, your Honour? The first matter your Honour appreciates we relied upon was the ordinary meaning of the text. The plaintiff's deal with that argument in their reply submissions at paragraphs 10 to 13, ... And your Honour sees that the plaintiffs contend that our construction gives no account of the context of article 11 in the strong form alternative A insolvency regime. Now, I will come shortly to the fact that the context supports our construction. But the reference there to "context" otherwise says nothing about the ordinary meaning of the language of "give possession."

At paragraph 11, your Honour, the second point that the plaintiffs make is that we interpose language into the clause by speaking of an opportunity to take possession. That is not so. That submission reflects the commercial realities that you cannot compel someone to take possession of something. You can only give a person an opportunity to take possession of something, or, put differently, allow them to do so, which opportunity they must take up.

And what is more, your Honour, that notion of "opportunity" does find a textual basis in the Convention and in the protocol. And if your Honour takes up the protocol at article 11(5), your Honour sees there that it says:

> *Unless and until the creditor is given the opportunity to take possession under paragraph 2 –*

So this language is not an interloper. It's in the text, and we submit that it's the plaintiff's construction that requires your Honour to draft language into the text. In the construction in-chief, the text your Honour was required to insert was:

> *redelivering aircraft objects to the creditor in accordance with - - -*

HIS HONOUR: Can I just interrupt you? I know this is not dealing with the constructions in a literal sense, but just humour me with my theme. If I did decide that giving possession was the same as the opportunity to take possession, why would that be any – when I then went to the second step, which you also have to do, to work out the content, the opportunity to take something realistically in a commercial way may be the same obligation as giving possession in the circumstances of this case?

DR HIGGINS: Yes, your Honour, I understand what your Honour's asking. In a sense, it comes back to our learned friend's submission that "give" is active, and it's an active term. And I think what continues to separate the parties in reality is: can possession be taken by furnishing the objects and all records, and allowing them to be collected, in effect, or does it require their physical delivery to a precise address in Florida? Ultimately, that is what the - - -

HIS HONOUR: All right. I wondered if that was the issue, because we're talking about money here. So then – just delving down into that, there's that issue of actually getting the objects to a different location which involves their transport and, on the evidence, that seems to be quite an elaborate – and has to be done carefully, and is therefore expensive, and - - -

DR HIGGINS: Yes, your Honour, and can I add one matter, with respect, your Honour?

HIS HONOUR: Yes.

DR HIGGINS: What was apparent from Mr Dunbier's evidence is that in the ordinary course of the end of a lease, it is done collaboratively between lessor and lessee, necessarily. And that would also have to be the case here.

HIS HONOUR: Yes. Undoubtedly so, but I can make orders about people acting in good faith and best endeavours to make sure that no-one misbehaves. Not that I suggest anyone would be. But then the second thing is not only getting the engines to a different locality, but then we have the records that are required, because the opportunity to take possession has to be a useful opportunity.

So I will just highlight this to you: irrespective of – and I know I'm diverting you, but just to give you this thought – even if I accepted your construction, I'm finding it a little bit difficult as to why the records, as indicated in paragraph 25 or maybe beyond that, shouldn't be encompassed with an opportunity to take possession in a realistic sense. And that doesn't seem to be a particularly difficult task according to the material that was said this morning to me, and it's done, and coincidentally, I may get a little bit of extra comfort by saying it's a reasonable thing to do because it's in the agreement, even if you don't want me to look at it. So have a think about that.

DR HIGGINS: Can I say this, your Honour: we wholly agreed with the observations your Honour has just made. The majority of the records have been provided to our learned friends, and their evidence records that fact. Mr Dunbier was plain this morning that he wants to give everything he has, he cannot give what he does not have, and there's certain things he has been told not to give. Now, the category of those things, your Honour, is actually very narrow. And in this respect, can your Honour take up tab 8 at page 34, which is Mr Algeri's affidavit?

HIS HONOUR: What page, sorry?

DR HIGGINS: 84, your Honour.

HIS HONOUR: 84, all right. Yes.

DR HIGGINS: Now, can I ask your Honour to read paragraph 36?

HIS HONOUR: All right.

DR HIGGINS: So what your Honour sees there is that everything has been provided at 24 and 25, save those which require signatures by the administrators, on the basis that there was a concern that that act of signing exposed the administrators to risk. And your Honour also finds within Mr Warner's affidavit, which is at tab 10, relevantly, page 110, and paragraph 18, your Honour - - -

HIS HONOUR: What page, sorry, Dr Higgins?

DR HIGGINS: It's tab 10, page 110, paragraph 18.

HIS HONOUR: Yes. Yes.

DR HIGGINS: So the short point is, your Honour, the vast majority of these documents have been given. Those which required a signature have not been given for the reason identified by Mr Algeri at paragraph 36, and what Mr Dunbier candidly said to your Honour is – and unsurprisingly, what has also not been given is that which cannot yet be given because it is that which is given in the circumstance of the end of a lease. And your Honour will recall in particular there, by reference to Mr Failler's affidavit at 25, sub-paragraph F - - -

HIS HONOUR: What page again, sorry, Dr Higgins?

DR HIGGINS: Page 68, behind tab 7, paragraph 25F. Your Honour will recall that the ECM data was one of the categories that Mr Dunbier indicated simply can't be given yet because it's a circumstance of the end of the lease relationship. So it would be a mistake to conclude that the - - -

HIS HONOUR: But, sorry, I don't understand that. I thought the evidence with F was that he needs to go to a manufacturer to get information, but he can do that.

DR HIGGINS: Yes, your Honour. But the factual step that would enable that information to be given has not yet occurred, is the short point.

HIS HONOUR: What do you mean? The lease is never going to come to an end, because it's come to an end by operation of law, effectively, hasn't it? I don't understand what you're saying about that. If, in fact, as a matter of fact, it can be done, even though it may take time and it does involve a third party, why shouldn't I order, if that's one of the only documents left, that they're all reasonable endeavours and in good faith, the administrators seek to get that document?

DR HIGGINS: Yes, your Honour. I don't oppose that suggestion in any way. My submission is a much narrower one: that we haven't given it yet, because it doesn't exist yet.

HIS HONOUR: Well, I understand that.

DR HIGGINS: That is not to order that it comes into existence, but – for example, one plane would need to be flown to Melbourne to remove the engine. So there are events that have to occur before these exist. So I think your Honour understands my submission, and I, with respect, your Honour's.

HIS HONOUR: I understand. I understand. Now, I have diverted you, but usefully, I think, from my point of view, off your task which was to talk about construction issues. So I will let you go back to do that, Dr Higgins.

DR HIGGINS: Thank you, your Honour. I had taken your Honour – if your Honour takes up again our learned friend's reply submission at paragraph 11, what I was submitting to your Honour is that the notion of giving an opportunity to do something is not an impostor in the text of article 11. It is in fact present in article 11(5), which states the correlative of paragraph 2, and in terms mentions paragraph 2. And I was submitting to your Honour that the construction advanced in-chief by our learned friends, which, to remind your Honour, was that "give possession" means redelivering aircraft objects to the creditor in accordance with the underlying agreement – we say that requires your Honour to read text into the protocol, and so too does the construction. And the different construction now purported in reply that "give possession" means "transfer possession" – that too alters the language, and it too still requires our learned friends to import into article 11(2) the terms of an underlying agreement.

Can I come, then, your Honour, to the second of the matters of construction that we identify in our written submissions? And that is the context in which the text appears. And can your Honour have open article 11(2) of the protocol? Your Honour sees article 11(2) speaks of giving possession. Article 11(2)(B) refers to the date on which the creditor would be entitled to possession if this article did not apply. And we submit that a legal entitlement to be in possession is a state of affairs achieved through the person being given the opportunity to take possession, but that that does not require or direct or even imply the delivery of the property in question to that person.

If your Honour then turns to article 11(7), that provides that the insolvency administrator may retain possession of the aircraft object where it has cured all defaults, et cetera. And we submit that that is an indication that the ..... of "give" is "retain." And that means, "to give possession" means to make it available to a creditor. And the key position we rely upon in article 11 for context, your Honour, is 11(5) in the chapeau, which is:

Unless and until the creditor is given the opportunity to take possession under paragraph 2.

Now, our learned friends have submitted that these are sequential concepts, and I will come to that. But they have never grappled with the fact that the chapeau expressly says:

Given the opportunity to take possession under paragraph 2 –

That is the clearest indicator to your Honour as to what "give possession" means in that context. Now, we have addressed in our written submissions at paragraph 40 the fact that in order to get around this language, the plaintiffs have to interpose a false temporal distinction. They have to say that "give" precedes "take", and that is a distinction that our learned friends hold onto, your Honour, in their reply submissions at paragraph 15.

And if your Honour could take up paragraph 15 of our learned friend's reply submissions, this temporal distinction is one they hold onto. They say the fact that one party is required to give possession before the other take possession is consistent with the ordinary meaning of the word "give." Now, this temporal distinction is important to our learned friend, because it's the only way they distance themselves from the otherwise clear textual indication that article 5 gives. And we say this temporal distinction is wrong, and apt to lead into error.

In the ordinary course, I cannot give you something until you accept it from me. And can I give your Honour a mundane example of this? I attempt to give a present to one of my colleagues. He declines it. He says he has no use for a second-hand pogo stick. I have not given it to him and he has not taken it from me. And we say that is all the more so when one is discussing giving possession of complex international mobile assets.

Critically, your Honour, the act of giving and taking possession are correlatives that temporarily coincide, and we say that conceptually correct statement is reflected in the language of this article, and our learned friends can't interpose between giving and taking. And once that is accepted, your Honour sees in article 5 a clear indication of what "give" means, and it does not mean "delivery up."

Can I then, your Honour, turn to paragraphs 19 and 20 of our learned friend's reply submissions, which are perhaps the key paragraphs of their reply? Because what is of interest is here is a new distinction not present in the submissions-in-chief that the applicant's interpretation of "give" –

HIS HONOUR: Sorry, Dr Higgins.

DR HIGGINS: Sorry, your Honour.

HIS HONOUR: What paragraph is this of the reply?

DR HIGGINS: It's paragraphs 19 and 20 of our learned friend's reply, your Honour.

HIS HONOUR: Thank you.

DR HIGGINS: Our learned friends say at 19 it's not correct to say that the applicant's interpretation of "give" in article 11(2) attempts to import the words in accordance with the contractual regime for delivery. The applicant's case does not recall words of that breadth. "Give" alone they say has that meaning. What they then say is, the applicants seek relief in the nature of redelivery. That is the reasonable exercise of the article 2 remedy demands, on the facts of the case, that the respondents transfer possession by redelivery.

Now, can I remind your Honour in this context of the submission I made earlier that there's a logical distinction between the nature of a remedy and the manner of its exercise? And the primary question for your Honour is: what remedy do our learned friends have? Now, this submission is quite a shift from the submissions-in-chief which said that the text of the protocol requires delivery up. Our learned friends now seem to accept that it doesn't require that, but they seek relief in those terms because they say it's commercially reasonable relief.

But, your Honour, your Honour still needs a word on which to turn the nature of the remedy conferred upon our learned friends. And we say "give" means what we say it means, but we also submit that "transfer", even if that were accepted, does not connote redelivery. Our learned friends seem to accept now, at paragraph 13 of their reply, that possession does involve the exercise of dominion. And it is trite, we submit, your Honour, to observe that dominion may be transferred without an object being delivered, or there being any movement of an object at all. The transfer of possession may well simply involve, and frequently does, an object being made available on an as-is, where-is basis. So critically, your Honour, even if your Honour accepted the new construction of "transfer possession", it's not at all obvious how that bridges to redelivery of the object.

Can I turn, then, your Honour, to the fourth matter we had relied upon in-chief? And that is that the directive in article 5(1) of the Cape Town Convention to adopt the construction that promotes uniformity and predictability supports our construction. Now, there's no dispute between the parties that that is a legitimate matter to be borne in account by your Honour. We have set out our submissions in this respect at paragraphs 42 and 43 of our submissions, and I won't repeat them, your Honour. But can I come to what the plaintiffs say in their reply submissions at paragraphs 21 to 25?

And before I come to the detail of those paragraphs, your Honour, can I stress one matter: the preamble to the Convention and our submissions about it direct attention to the twin concepts of predictability and uniformity. When your Honour comes to paragraphs 21 to 25 of our learned friend's submissions in reply, what your Honour reads about is predictability. Your Honour sees the word "uniformity" once. And

that is not surprising, because to tie compliance with the duty imposed by a Convention to the terms of underlying inter-parties contracts is an intrinsically heterogenous approach, and we submit is an approach that is hostile to uniformity and therefore, not supported by article 5(1) of the Convention.

If your Honour then looks at paragraph 22 of the reply submissions, there's a submission that – the premise of that submission appears to be that uniformity and predictability would be undermined by deference to the parties' contractual obligation, because it necessarily demands a different approach, and your Honour sees what is said there. The two hypotheticals our learned friends then advanced we say don't assist, your Honour. Our learned friends contend that no issue would arise in a circumstance where a lease doesn't provide for re-delivery, because there "give" will bear its ordinary meaning and oddly say something like "transfer possession". It will be left to the parties to negotiate the means to return on the facts of the case.

Now, that is a telling submission, your Honour, because if your Honour withdraws the importation of the terms of the contract, that's where our learned friends are left – that "give" means something like "transfer of possession" if there are no underlying contractual terms. The plaintiffs, your Honour, then contend that the scenario where a lessor refuses to accept re-delivery in accordance with the terms of the agreement is commercially fanciful, and would fall afoul of the lessor's obligation to exercise rights in a commercially reasonable matter.

Now, we submit that your Honour wouldn't accept this assertion. It's entirely plausible in a ..... environment, where there is a limited commercial demand for aircraft objects in light of the ..... pandemic, a creditor's preference would be not to receive delivery of an aircraft object, notwithstanding the terms ..... underlining this agreement. That is the very premise of the aircraft ..... about which Mr Algeri gives evidence, and which has been accepted by 70 of the 73 lessors with whom the Virgin entities are dealing.

So it's not at all the case that the term is commercially reasonable in the current commercial circumstances, your Honour, and the refusal to accept re-delivery is an entirely plausible scenario, and one that would place an insolvency administrator in an invidious position if they were said to be under an obligation under the convention to re-deliver the object in accordance with the underlying agreement. Can I ask your Honour then to look at paragraph 25 of the reply? Our learned friends submit there that retrieving aircraft objects from numerous jurisdictions is the antithesis of predictability.

MR WARD: I'm sorry, your Honour, we've just lost connection. I'm sorry, your Honour, we lost connection. Could that just be repeated; about the last 15 seconds?

DR HIGGINS: Of course. I was referring ..... to paragraph 25 of the reply submissions, and I was drawing attention to the portion of that that refers to retrieving aircraft objects from numerous jurisdictions being the antithesis of predictability. There we see that's just an assertion, and it's a wrong one. The

provision of an opportunity to retrieve aircraft objects that are made available by insolvent administrators is a predictable and, critically, a uniform outcome. The fact that this may result in prejudice, retrieving aircraft objects from multiple jurisdictions, does not make the position unpredictable, and in any event, if our learned friends' construction is correct, it simply becomes unpredictable for the lessee, who has to return the parts to numerous jurisdictions across the world.

We say, compellingly, and ignored by our learned friends, is the requirement for uniformity. Your Honour, can I turn to the fourth of the six matters on which we relied ..... of construction, and that is the directive in article V; one of the conventions to have regard to the general principles upon which article XI is based. The plaintiffs addressed this matter, your Honour, in reply at paragraphs 26 to 33, and they submit that the protocol is directed to preserving creditors' contractual expectations in insolvency. Now, again, we say that begs the question of the true content of the remedy conferred upon them by the protocol, and whether that is, in fact, tied to the contract.

In our written submissions at paragraph 57, your Honour, we accepted that it's correct to identify the protection of creditor interests as opposed to creditors' contractual expectations, as one object of the convention of protocol. And again it's important, your Honour, to notice the shifts that occur in what our learned friends say. What is protected is creditors' interests, not their contractual expectations. And what we also say, and your Honour appreciates this from our written submissions, is that the improvement in protection of creditor interests that is enshrined in the convention of protocol is not a protection at the cost of the lessor – of the lessee, rather – it is an improvement on the position that existed ..... beforehand, which was the rules of international laws .....

So we say there's a deep confusion in the submission our learned friends make here, but in any event we see that the improved protections for creditors under Alternative A are achieved by ensuring, as far as possible, that within a specified and binding time limit, the creditor either secures recovery of the object or obtains the curing of past defaults and a commitment to perform their future obligations. And that, your Honour, is expressly what paragraph XI(2) says. And, your Honour, at paragraph 30 of our learned friends' submissions, a point is made that I've already effectively addressed, which is an enumeration of all of the occasions in article XI where reference is made to the terms of an agreement. And we say: precisely. And what your Honour does not find there is a reference to article XI(2), because article XI(2) is not hinged to the terms of an underlying agreement and, for obvious reasons, related to predictability and uniformity.

Can I come then, your Honour, to the fifth matter, and that is the assistance provided by antecedent municipal law of other nations. We referred, your Honour, in chief to United States Bankruptcy Law section 1110 of the code, which we say straightforwardly is material to which your Honour would have regard. Our learned friends made no mention of that ..... In reply, they say it's either not relevant or it helps them. Now, we submit their silence about it in chief rather belies the fact that

it doesn't assist them. We have identified in our written submissions of paragraph 45 why this is relevant, and no issue is taken with that by our learned friends in respect of those points. What our learned friends instead do is submit that US case law is not relevant, on the basis that Alternative A enhances the position of creditors compared to section 1110 of the US bankruptcy code.

Now, your Honour, that is not an answer to the points we made. We say it's wrong, in any event. Our learned friends deconstruct an academic article to try to make it that point. That's an article that has been cited and on which we rely. So we say, straightforwardly, United States law can assist, your Honour, and we say that it does assist us. In our written submissions at paragraphs 4 to 6 and 47, your Honour, we set out extensive extracts from In re Republic, which is a 2016 piece in respect to the relevant provision. Has your Honour been provided with the bundle of authorities or does your Honour have access to them electronically?

HIS HONOUR: I have access to them electronically.

DR HIGGINS: I indicate – I don't need to take your Honour to the detail of this, but can I indicate in respect of In re Republic Airways Holdings, the version of the document that your Honour has been provided, which is tab 38 of the authorities bundle.

HIS HONOUR: Yes.

DR HIGGINS: The relevant discussion appears at pages 5 to 8 of the copy your Honour has. So those are the page references that will assist your Honour, as opposed to the ones in our written submissions.

HIS HONOUR: Thank you.

DR HIGGINS: Now, as your Honour appreciates, we say that the reasoning that supports the conclusion under section 1110 applies with equal force to article XI(2), and we say it strikingly, as the court explains in re Republic Airway Holdings Inc, notwithstanding the different language of section 1110, which more naturally suggests delivery of. The court there stated, and your Honour sees this in the extract at paragraph 46, that compliance with the underlying agreement is precisely what section 1110 does not provide. And that is relevant, as your Honour understands, because our learned friends seek to get so much out of the terms of the underlying agreement.

Now, your Honour, our learned friends, in their reply submissions at paragraph 42 to 49, identify a series of other United States authorities. They describe those at paragraph 42 as doctrinal developments in US case law. Now, that is an odd description. Each of the cases that our learned friends cite pre-date the authorities we cited by at least a decade, so they're not developments and they're all cases dealt with in the authority we cited. Your Honour, if it would assist, I can briefly identify in respect to the authorities upon which our learned friends rely, why they do not

assist our learned friends, why they assist us, and why your Honour would not follow the propositions our learned friends state forth for them. Could I briefly go through that exercise to assist your Honour?

HIS HONOUR: Yes.

DR HIGGINS: Can I begin, your Honour, with In re Atlas, which our learned friends refer to in their reply submissions at 43 to 44, and which your Honour finds at tab 32 of the authorities. Does your Honour have that?

HIS HONOUR: Yes.

DR HIGGINS: If your Honour turns through to what is page 14, at the bottom of the page of that document – it's the bottom centre of page – page 14.

MR WARD: I'm sorry, your Honour, we've lost Dr Higgins on the phone.

HIS HONOUR: All right. Well, we've been directed to page 14 of that court decision, is where we're up to, I think.

MR WARD: Thank you, your Honour.

HIS HONOUR: Yes, Dr Higgins.

DR HIGGINS: Yes, your Honour. Your Honour, this is the portion upon which our learned friends rely, the portion at the foot of page 14, going over to page 15. And your Honour sees there, section 1110 is unambiguous – a debtor must immediately surrender and return. And if your Honour reads over to the top of page 15 - - -

HIS HONOUR: Yes.

DR HIGGINS: And the court ..... at that point, ten years before the position upon which we rely ..... So what your Honour will then see, if your Honour turns to page 17, and if your Honour .....

HIS HONOUR: Yes.

DR HIGGINS: Your Honour will see order 2.

HIS HONOUR: Yes.

DR HIGGINS: All further return obligation .....

MR WARD: .....

DR HIGGINS: .....

HIS HONOUR: Sorry, I didn't hear that last comment, Dr Higgins.

DR HIGGINS: I had asked my learned friends – thank you, my learned friends were not on mute and I was asking them to go on mute because I was hearing them speak. Thank you, your Honour. So your Honour sees order 2, that was stood over to another hearing. Now, the interaction – I withdraw that. The later decision of Northwest Airlines, your Honour, which I will come to, the court rejected an argument that the debtors must comply with all the return provisions of a given lease or security agreement, and the court emphasised that that conclusion was not inconsistent with In re Atlas because this decision does not fully or finally determine the scope of the return obligations, and plainly so, in terms. And your Honour sees the interaction of those various cases and the main authority on which we rely in re Republic Airways Holdings, and that, your Honour, is at tab 38.

HIS HONOUR: Yes, I have that.

DR HIGGINS: And if your Honour turns to what is page 6 of the print, and that's six in the bottom right-hand corner.

HIS HONOUR: Yes.

DR HIGGINS: And, starting in the first column on the left-hand side, first full paragraph:

> *Other courts have similarly rejected attempts to put conditions on surrendering return obligations under section 1110, as the court in Northwest Airlines observed.*

If I can ask your Honour then to read the extract from Northwest, and following that there is a discussion of the court, and it's quite significant, your Honour, in the context of this dispute. Northwest rejected the argument that the debtors must comply with all the return provisions, noting that that is precisely what section 1110 does not provide, and then, parenthetically, noting that Congress did not require surrender and return to comply with the security agreement or lease ..... that recognising the costs and burdens this would place on the debtors, the estate, and other creditors.

Now, we obviously embrace all of that. But what your Honour then sees at the top of the second column is footnote 7, which accompanies the text I just read, your Honour, and can I ask your Honour to read that, because it explains the interaction of In re Atlas upon which our friends rely, Northwest, and this case.

HIS HONOUR: Yes.

DR HIGGINS: So the short point is the courts in Northwest and In re Republic did not believe that they were acting inconsistently with the court in re Atlas, in saying that 1110 simply does not require re-delivery in accordance with the terms of an

underlying contract. Your Honour, the next authority upon which our learned friends rely, and this is in their reply at paragraphs 45 to 46, is re FLYi. Your Honour finds this at tab 37 of the bundle. Does your Honour have that?

HIS HONOUR: Yes.

DR HIGGINS: If your Honour turns through to paragraph 5, which is on page 3 of the document at the bottom of the page, in the middle, can I ask what your Honour notices when you read paragraph 5? And this is true of all the authorities our friends cite when they are read fairly and in the whole, is that it does not support their case, except with respect to the return and surrender of documents relating to excess aircraft and corresponding engines. 1110C does not require the debtors to comply with the return conditions of the lease, and/or other operative documents. A reasonableness test applies and what is then required is only the return of the documents, for reasons evident from the discussion in re Republic, that anything else imposes a quite striking burden on the creditors and the estate in circumstances of insolvency.

Can I then refer to In re ATA Holdings, your Honour, which our learned friends refer to in reply at 47, and your Honour finds this at tab 33. What our learned friends have provided and cited as a set of orders; in truth, little can be discerned from them. It's unclear to us whether they were accompanied by reasons, but our learned friends have not provided them if so. The plaintiffs are correct to note that the court required the equipment to be returned to a single location, but it's not at all clear whether that was in accordance with the terms of a lease or was otherwise agreed to by the parties, and your Honour has seen on numerous occasions in the United States authority the notion of reasonableness and negotiation between the parties. We say this rather slight set of orders that ..... could not be relied upon to defeat the detailed reasoning of a case that occurred a decade later. Can I then come finally to the Northwest case, your Honour. This is in the authorities at tab 34, and if your Honour lets me know when you have that - - -

HIS HONOUR: I do.

DR HIGGINS: This is – this is the transcript, your Honour, and our learned friends principally rely upon pages 71 to 72, and your Honour finds those numbering in the middle of the page at the top, or at the top on the right-hand side. The page numbering is the same in each.

HIS HONOUR: I do.

DR HIGGINS: And, your Honour, the text our learned friends principally rely upon commences at line 19 on page 71. Can I ask your Honour to read that text over to line 6 on page 72. Now, we say, your Honour, fairly read, that does not assist the plaintiffs and if anything assists us. It seems expressly to contemplate the possibility of property being surrendered and returned for the purposes of 1110C on an as-is,

where-is basis. And what our learned friends do not draw attention to is the text commencing at page 72 at line 10:

> *It will be difficult to convince this court that a lender has acted reasonably if it tarries in accepting surrender and return or taking possession of its property.*

Again, we say the focus here really is on reasonableness and speed, but this discussion is wholly consistent with an as-is, where-is surrender. And if your Honour then drops down – sorry, if your Honour goes back in the text to page 70, commencing at line 22 on page 70, your Honour.

HIS HONOUR: Yes.

DR HIGGINS: And can I ask your Honour to read line 22 on page 70, over to line 7 on page 71.

HIS HONOUR: Yes.

DR HIGGINS: In fact, onto line 12 your Honour. And this portion I've just taken your Honour to, down to line 12, is what was referred to in re Republic, which I took your Honour to earlier, and it's directly contrary to the plaintiff's contention that a debtor can require the re-delivery of an aircraft in accordance with the party's agreement. Now, why I've taken your Honour in some detail to this is because the question of construction here is an important one.

The proper construction of article XI(2) has never been determined by a Cape Town Convention party – your Honour will be breaking new ground. And what your Honour does find in the United States authority, to permissible antecedent law, is a detailed consideration of just these issues; the balancing of creditors' and debtors' rights, the types of activity that will constitute giving permission. And what your Honour also knows is that that is in circumstances where section 1110C(1) uses language that assists our learned friends more than the language with which your Honour is dealing, because 1110 speaks of "surrender and return" and what our provision speaks of is only "give possession". And the clear position under the American law is that it assists the defendant's construction and it does so when there is a greater textual predicate for the plaintiff's argument than there is here.

So I want to take your Honour through them in some care, because it is the richest source of assistance your Honour gets in this application, and we say it uniformly supports the construction for which we contend. Your Honour, I notice the time. I have only one more matter, which is the sixth matter, to address on by way of construction.

HIS HONOUR: Keep going.

DR HIGGINS: Thank you, your Honour. The sixth matter, as your Honour is aware, that we relied upon in our submissions is that article VI(1) of the convention

requires that it be considered alongside the protocol. And we say that when one properly considers the protocol alongside the convention, one sees that the only remedies available to a lessor, under an event of default, under the convention, are either to terminate the agreement or to take possession or control of any object to which the agreement relates. And that, your Honour, is article X of the convention.

So your Honour sees there, on an event of default, under the convention, those are the remedies conferred and that, we say, reflects the fact that as the owner of the object, the conditional seller or lessor does not need more extensive remedies, and once the agreement is terminated is free to deal with the object as it wishes. And then article VI(1) is ..... your Honour, we submit that it would be odd, in the absence of express text, which there isn't in article XI(2), if the remedies available to a lessor went beyond those available to lessors in any other context involving an event of default, under article X of the convention. The circumstance that would produce is that things get better for the creditor in insolvency, and they get better for the creditor in insolvency in circumstances where there is no express warrant for that.

Now, we say the better view is that article XI(2) grants creditors additional protection in an insolvency context, by imposing an obligation on the debtor to make the aircraft objects available so that the creditor does not themselves need to enforce their entitlement under article X of the convention. Article XI does that for them – it doesn't radically innovate on the remedies available to them, but it efficiently ensures that it occurs. But what the plaintiffs are propounding in the construction of article XI(2) provides creditors with a wholly different remedy, in an insolvency context, than both are available under the convention, and nothing in the text of article XI(2) supports that contention or that outcome.

Your Honour, the plaintiff's respond to our submission in this respect in their reply submissions at paragraphs 50 to 52, if your Honour takes them up. They say that the fact that Alternative A requires the court to compel re-delivery, when that might not be obtained outside insolvency, is explained by the context in which those rights are exercised. And they say that in an insolvency context, positive obligations are imposed to avoid recalcitrant airlines and administrators otherwise acknowledging a breach of the terms of the lease, but remaining uncooperative knowing that the creditor had limited prospects of reclaiming those costs as a debt.

Now, we say your Honour would reject that submission. The positive scenario of a recalcitrant airline and administrator is avoided by imposing an obligation on debtors and insolvency administrators to give possession of aircraft objects to creditors, in the sense of making them available to the creditors, and that is an obligation that goes beyond that in article 10, but not by innovating the remedies available, but by ensuring that those remedies occur. And it is passing strange to think that it is in an insolvency circumstance, where there are competing creditor claims, and circumstances of exigency, that the remedies available would suddenly radically change. And your Honour has seen in the United States authority discussion of congress not requiring that kind of activity in circumstances where it would burden an insolvent estate and operate to the prejudice of other creditors. Your Honour, if

that's convenient to the court, the only other matter that I would address are matters of fact that might realise on the question your Honour has raised in any event.

HIS HONOUR: All right. Mr Ward, I would like after lunch – we will come back at 2.15 – some assistance on Article 11 of the protocol sub-article – if that's the right terminology – 13. That's the convention as modified by Article 9 of this protocol should apply to the exercise of any remedies under this article. Whether that is relevant. You may just like to - - -

MR WARD: It's not that irrelevant, your Honour. It's a complete answer to almost everything that has been put in the last half hour.

HIS HONOUR: I just wondered that. But you don't want me to fall into error on a wrong – come to your decision on a wrong basis. So - - -

MR WARD: I will explain in some detail, your Honour, how Article 9 is to be read with article - - -

HIS HONOUR: All right. On its face it seems clear – so that's the first point I would like you to inform me about. Secondly, I'm not entirely sure the extent of the dispute on records. So, Dr Higgins says to me, really, you've got everything that we can give you at the moment. There are some other things that may come into existence if we have – like, let's take the manufacturing – which I think may have been 25F, I can't remember now – so if I make an order about the records I would like you to think about exactly what is in dispute about that. If you've got things already, then we don't need to argue about them. If it's peripheral that – when I say peripheral, I'm not trying to downplay it – but if it's only a few documents or few things that need to be done – then they should be clearly identified. And I don't know if that's the case. In the orders that have been sent up to me and the – in the schedule on page 6 of the orders that you've provided me with – it talks about data manuals and records and there seem to be quite a lot of them. And I'm not sure whether they are still in dispute, that's all. So, we may just need to think that through.

MR WARD: We'll clarify that, your Honour.

HIS HONOUR: And the other thing is – assume I do not slavishly follow the terms of the lease agreement – but in the context of looking at what is encompassed within the concept of giving possession – I work out what is reasonable just by reference to what the parties have looked at, in any event. Because what the parties agree in the beginning would prima facie be something which is reasonable, unless it's an onerous – something onerous or not in good faith or all sorts of other reasons which no one seems to be arguing about – but then it has to be recognised that what one agrees to at the beginning of a lease arrangement and the circumstance that arises when there is now an administration – has to be taken into account as well. So, if you have a think about that for me.

And then – the American cases are like any foreign authorities are useful for identifying lines of thought. And lines of philosophy. And to that extent the American authorities raise all those matters, and the dichotomy between the interests of the creditors and your client not imposing an obligation on the creditors that's perhaps not necessary or proper. And I would like you to address that. And maybe one can't address it any further than stating the two propositions and then coming to a final analysis about it - - -

MR WARD: Yes. Your honour - - -

HIS HONOUR: - - - but anyhow.

MR WARD: I can just so that your Honour can stew on this over lunch – I can indicate that the starting point for the US cases is what we have put squarely and frankly from paragraph 35 to 36 of our submissions in reply. Which is that it is plain on the very face of the draft in history of this treaty that Article 11 and the convention are ..... together. Whereas .... bankruptcy .....
So, although the language started with a similarity and has that basis in history, it is no surprise at all that the protections offered by the conventions and protocol in the domestic US case is dealing with .... So that's the start of what your Honour's ..... in more detail after lunch.

HIS HONOUR: All right. And then, just moving forward to the other issues once we get over this primary issue and section 443B – if I've come to the view that the notice is not enough - - -

MR WARD: Your Honour just dropped out.

HIS HONOUR: Sorry. If I come to the view that the notice that has been given does not satisfy the Corporations Act in the circumstances – but having already come to a conclusion that more has to be done in giving possession – what does it matter what I say about the notice? If I say it's not sufficient for that purpose.

MR WARD: I'm very sorry, your Honour, I missed almost all of that ..... live throws but we're now back.

HIS HONOUR: All right. All right. So, if in the context of my looking at what's required to do – content of the giving possession – and if I come to the conclusion you've got to do more than just giving the notice - - -

MR WARD: Yes, your Honour.

HIS HONOUR: - - - then that issue just goes away, doesn't it? The notice just doesn't have any effect relevantly.

MR WARD: That would be our submission, your Honour. It may have some residual effects in relation to the rent claims, but we can deal with that by way of submission this afternoon.

DR HIGGINS: Your Honour, can I indicate it would ..... to the liability of the administrators .....

HIS HONOUR: So, it relates to the liability of the administrators.

DR HIGGINS: Yes, your Honour. And that's - - -

HIS HONOUR: Well then on that point – as an independent point – assuming Dr Higgins you lose on the primary point in one way or another – it still may be appropriate that in the circumstance in which we find ourselves I excuse the administrators from liability for a period of time up until it's reasonable to have all these things worked out. Which would get over a number of problems. One would be the signing of any documentation could be carried out – because that was one of the reasons you didn't want to sign some documents, I understand. Because you would have liability issues.

DR HIGGINS: ..... your Honour .....

HIS HONOUR: Then there's the rent issue, of course. So, if you're excused from liability, let's say, to the end of – just hypothetically – the end of August – then Mr Ward's client misses out on getting rent. That's the effect of that, is that right?

DR HIGGINS: Yes, your Honour. And the administrators are relieved from personal liability. With respect, if your Honour were against us on the primary issue we – subject to any further instructions – that seems like an attractive submission to a number of problems.

HIS HONOUR: Give me a head's up on that.

DR HIGGINS: Sorry, your Honour, I don't follow.

HIS HONOUR: What are the other – what are the problems that would arise if on the first point that you don't succeed and we have to deal with the mechanics?

DR HIGGINS: Sorry. Setting to one side – assuming we've lost, sadly, the first point, your Honour's suggestion that there would be relief to the administrators for a defined period, say to the end of August, is subject to any further instructions I receive an attractive proposition. It would, I think get around some of – if there are formal but trivial defects in the notice etcetera, it would relieve the administrators of liability. It would prevent our learned friends getting burnt for that period from the administrators at least. But we think it would be an attractive solution.

HIS HONOUR: All right. Then we have the lien point – and a new argument's been raised against you in reply, I think, Dr Higgins, because of the international flavour of this. Is that a killer point for you or you want to argue against it?

DR HIGGINS: We don't need to argue against it, your Honour. And probably don't need to argue about it at all, because it proceeds on the misconception that the relief we seek is concerned with priority. It's not. All of the points our learned friends raise concern the priority of different claims. All we seek is recognition that we have a lien and nothing about its priority ordering.

HIS HONOUR: Well, do you need the court to intervene to that extent for that purpose, then?

DR HIGGINS: We do, your Honour. Yes. We do.

HIS HONOUR: Well I will have to think of it in that context. Mr Ward, if it's not a priority issue do you care if I declared it a lien?

MR WARD: Yes, your Honour. I think we do still care. Your Honour should also be aware there is an additional matter which we have put our friends on notice of it. And that is the operation of the Personal Property Securities Act and section 73 of that Act, which in our submission has a particular effect. Which again, goes to priority. We think that it's impossible that this issue may become a dead letter, because of the priorities question. That probably doesn't mean that it leads to – that it doesn't have to be resolved.

HIS HONOUR: All right. Well, have a think about that. You've scared me a little by referring to that last piece of legislation, I should tell you.

MR WARD: Your Honour, I've spent so much time looking at it over the last 12 hours, I'm sure I can make it easy for you.

HIS HONOUR: I will be indebted to you. All right. Well, look, have a think about some of those matters. We will adjourn the court now to 2.15.

ADJOURNED **[12.59 pm]**

RESUMED **[2.16 pm]**

HIS HONOUR: Yes, Dr Higgins.

DR HIGGINS: Your Honour, can I – I need only be reasonably brief. I wanted to do two things before Mr Ward addresses in reply and that is to clarify my response to your Honour's question about article 11 being a code and also to come briefly to the

facts, which really are what the gist of your Honour's questioning in the morning was directed at. Can I turn to the first issue, and, as indicated, I would like to clarify my response to your Honour's question comparing article 11 being a code in case that has raised a false issue, your Honour.

MR WARD: I'm sorry, your Honour, we can't hear - - -

HIS HONOUR: I can't hear you, Dr Higgins, nor can Mr Ward, apparently.

DR HIGGINS: I think I had gone mute for some reason. I apologise.

HIS HONOUR: All right.

DR HIGGINS: So, your Honour, can I first address – did your Honour hear any of my submissions or - - -

HIS HONOUR: Yes, no, you want to address the article 11 code point and you wanted to address the facts.

DR HIGGINS: Thank you, your Honour. Can I - - -

HIS HONOUR: I should say when I – I probably raised the code point, Dr Higgins. I wasn't referring to any technical sense of code but what I took the substance of your submission to be, effectively, that's where we're looking remedies on insolvency. That's the starting point. But, anyhow, explain what you want to explain.

DR HIGGINS: I just want to ensure that there's no faults issue and that Mr Ward doesn't have to address a point that doesn't arise, your Honour. What we say is this: article 11 is a provision specifically and directly concerning insolvency. It is a detailed set of provisions that allow countries to adopt either alternative A or alternative B. It's language is carefully selected and, in the case of alternative A ..... in respect of it ..... but that does not mean, your Honour, and we do not submit that it is construed in isolation. So much is apparent from the fact that articles 5 and 6 of the convention require the convention and protocol to be construed together and so much also is clear, your Honour, from article 11(13), and that's a provision that your Honour had asked Mr Ward about and also asked me about.

And if your Honour takes up article 11(13), what we do say, and at risk of repeating myself, is that article 11(13) does not introduce their article 9(3), an ability to rely on contractual terms in circumstances where article 11(2) is engaged, and that is because article 13, like article 9, is directed at the exercise of remedies and not at the introduction of fresh remedies beyond those expressly provided for by the protocol. So what we say is that nothing about article 9(3) amplify the remedies available under article 11. Of course they must be construed together, but, in a sense, we rely upon article 11(13) in that regard because it is expressly about the exercise of remedies and not super adding remedies beyond those already found in article 11 of

the convention. So I hope that has assisted both your Honour and my learned friend as to how we put ..... those two provisions.

HIS HONOUR: Yes, thank you. And the facts.

DR HIGGINS: Briefly, your Honour, can I ask your Honour to take up the court book at tab 45, especially at page 529.

HIS HONOUR: Yes.

DR HIGGINS: And before I come to the detail of that, your Honour, can I say this: this is not a case about records. It is, to some extent, a case about the sequencing of records but to the extent that records are available to us, we have given them to the plaintiffs. And now, your Honour, is it a case of bear abandonment? My learned friend used colourful language, like hostage, in his oral submissions earlier. What Mr Dunbier's evidence will have made plain to your Honour is that the Virgin companies and the administrators have taken extremely seriously the negotiations which each of their counterparties, 70 of them have resulted in the signing of protocols, the other two have been resolved consensually. There was a dispute with this counterparty, but throughout the period of this dispute, the administrators have continued to ensure and maintain the engines in question, astute to ensure that the value of those assets is not diminished in any way.

So this is not a circumstance of a failure to engage or a bear abandonment, and where the detail of that becomes clear, your Honour, is in the email of 18 June commencing at the foot of page 529. Your Honour will see that Mr Bolton of the administrators follows up the 16 June notice, and at the top of page 530:

> *We confirm we will liaise with certain individuals to facilitate an orderly hand back of the engines.*

The following is a summary of the status of the engines. That's a status that has been updated frequently to inform the plaintiffs as to where the engines are. If your Honour then drops down to the second full paragraph under the table. There's a statement as to the nature of the notice. There is then in the second – in the third full sentence, rather, a statement that any liability ..... debt of the company of which you're entitled to submit a claim in the administration. And then, critically, your Honour – and this picks up some notions your Honour had earlier of a pragmatic and commercial solution to this difficulty – we have already offered to assist in providing the services to you in removing and delivering the engines to your specified location, but said that that would be at their cost ..... in advance to achieve that consistent with that negotiated under the protocol.

So services have been offered by the administrators in the Virgin entities to facilitate assets being returned and we remain willing to do so, and we would, of course, your Honour, remain willing to resolve all of this on the basis of the protocol that we put to our learned friend's clients and that we secured with 70 of the lessors. So there

are practical and commercial solutions and some of them have already proffered to try to facilitate the return of the engines if that is what the plaintiffs truly seek. Your Honour, your Honour also raised a question which it may be convenient for us to address now before my learned friend replies. This is a question to my learned friend, Mr Ward. Your Honour asked for a timeframe in which relief might be granted to the administrators to facilitate an orderly giving of possession, however your Honour ultimately construes that phrase. And what we would propose is that in light of the fact that leading up to the second meeting there will be numerous lease negotiations, in light of the fact that JobKeeper and other programs are currently engaged in their administration, I think a date that would make sense is a date that coincides with the end of the administration, which may be towards the end of September because there might be quite a deal to be done in the interim, your Honour.

HIS HONOUR: All right.

DR HIGGINS: Depending on the relief your Honour granted, your Honour would appreciate that it might consume significant resources on the part of the administrators.

HIS HONOUR: Well, I'm very mindful of that and it's one of the reasons that I raise the matter before lunch. I certainly don't need persuading that the parties have been trying to do the best they can as far as working out a return, but what has happened with this particular applicant is that things have stopped because of this dispute as to giving possession. So once I've assumed – and I think I've got basis to do so on what everybody has said and what the evidence is and just the evidence you've just showed me – that once that's determined and that ground rule is established, then obviously the parties will have to get together and work out a practical way of handing back, whatever phrase you want to use in practical terms, of the engines and the documents. So that's where I'm leading to, so I don't think there's any difficulty there.

Now, it does interrelate to what you've been talking about as to the exclusion of liability of the administrators because it seems to me that if I decide in favour of the applicants on the interpretation and one way or the other the implementation of that may be in accordance with the agreement, although not necessarily a strict letter of the lease agreement – and if we have to I will come to discuss that – then it may be equally appropriate in the circumstances of where we land today for me to exclude the liability of the administrators for a period of time because it's really no one's – I'm not blaming anybody for where we're at now as far as the impasse because, obviously, there was a question that needed to be determined and you've come to the place to have it determined, so – and we've done it as quickly as possible. So everybody, all the creditors and Mr Ward's client, had to understand that there needs time to do these things and I don't know, necessarily, that should be at the risk of the administrators and their liability, and that may free them up to help Mr Ward's client in the real world if they don't feel as though they're going to be liable if they sign documents warranting certain things, and I understand all that.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: So – all right. Well, thank you for what you've just indicated. Anything else you want to say at this stage?

DR HIGGINS: I don't believe so, your Honour. It may be necessary for me to say something more about the ..... I've tried to be clear that we don't assert anything about priority.

HIS HONOUR: Well, I've been thinking about that over lunch, and I will speak to Mr Ward about this, but you're the one seeking this order. I just wonder – and there's quite a lot on our plate today and there's going to be a lot on your administrator's plate – whether we need to press that. There's no – if it's not a matter of priority at the moment, you can't tell me how much you want yet. That's a matter for another stage of how much you want in relation to it. And what would be any disadvantage to anybody in not deciding that now – if you want to put it in legal terms, I won't be making a declaration unless there's some utility in it and utility has a time aspect as well as a legal consequence. So, anyhow, have a think about that while I speak to Mr Ward.

DR HIGGINS: I will, your Honour.

HIS HONOUR: All right. Mr Ward.

MR WARD: Yes, your Honour.

HIS HONOUR: So we're just dealing with the first question of construction and operation of what – where we go. Is there anything you want to say about that following up from what was said before lunch?

MR WARD: I think so, your Honour. There is a few points to make to clarify the way we say article 11, which is the primary source of dispute, operates. We're pleased that there is no dispute between the parties as we now understand it as to the fact that the protocol ..... has to be read holistically as the ..... would require. As I hope I put clearly before lunch, that involves reference to the remedy's provisions in the ..... This is a slightly long-winded answer to your Honour's question before lunch about the effect of article 11, subparagraph (13) of the protocol.

One starts with the convention itself and asks how does the convention apply in the context of remedies upon an insolvency event. Now, my learned friend took you, before lunch, to article 10 of the convention, but I took you both to article 10 and article 12, which is entitled Additional Remedies. It is, in our submission, plain that the remedies sought shadowed by the convention itself are the remedy of a possession which is referred to in article 10 and the additional remedies agreed between the parties referred to in article 12.

If we then turn to the protocol, and if I can start with article 11 and subparagraph (13), which your Honour asked about, one sees very clearly that the convention, as modified by article 9, so that's ..... to the exercise of any remedies under article 11. But the article 11 remedies, if we go back to the beginning of article 11, and article 11 held remedies upon insolvency. The convention is to apply to the article 11 remedies upon insolvency. That, in our submission, necessarily means not just the right of repossession under article 10 but the rights agreed between the parties under additional remedies under article 12 of the convention.

That position is consistent with the balance of article 11. It is clear, in our submission, when one looks at article 11 in its entirety, that the agreement between the parties has work to do. So, for example, if you look at article 11, subparagraph (10), there is the reference to the agreement, the contract between the parties, and a complete prohibition upon modification of the obligations of the debtor under the agreement without the consent of the creditor. That provision has work to do in several ways, including in relation, we say, to the proposal we have, if that were to be argued today, is that would amount to a modification of the agreement between the parties which expressly prohibits the creation of any equitable .....

Article 13 – sorry – article 11, subparagraph (13), provides that the convention as modified by article 9 of the protocol applies to the exercise. So we now come to, well, what is the alteration to the exercise of convention rights that is affected by article 9 of the protocol. And I took your Honour to article 9, subparagraph (3), at the outset and, I think, correctly make the submission that the convention rights, being the right of repossession under article 10 or the rights agreed by the parties as additional remedies under article 12 of the convention, are to be exercised in a commercially reasonable manner, and something is commercially reasonable unless it is manifestly unreasonable.

So we think that the construction of the convention and protocol is relatively clear. It has to be read together with the convention and there is work to be done for the agreement between the parties. That's sufficient, in our submission, to dispense with the reliance upon the bankruptcy cases in the United States. There's good reason that we didn't ..... in our submissions in-chief, we are trying to construe a convention. If it had been the case that the drafters of the convention had said we are drafting this convention and protocol to give effect to US bankruptcy law, we would be in a different world, but we're not. As we made very clear in our submissions in reply when we were directed to deal with this issue by the submissions of the respondent, the protocol and convention are intended to enhance the regime that would otherwise exist under the provision of the US bankruptcy ..... and that's precisely what has occurred.

More work is given to and more emphasis is placed upon the underlying agreement of the parties. That does not, as my learned friend would ..... detract from the predictability of the convention in a global interpretative sense. In fact, it is entirely predictable for parties upon an insolvency to know what their rights and obligations are by reference to the underlying agreements which deal, as this agreement does,

expressly with rights upon insolvency. So not just does the protocol and convention deal with rights upon insolvency, the very agreement between Virgin and my clients deals with rights upon insolvency; and where we are dealing with particularly complex pieces of machinery, as your Honour has now, I think, fully appreciated, it is simply not possible for a regime on the run to be established from scratch. The predictable result is for the agreement of the parties to be the starting point unless compliance with it is manifestly unreasonable.

Now, one of the things that your Honour asked me to do was to - - -

HIS HONOUR: Just before you go off, Mr Ward, with that issue, what would the court do if there was nothing in this agreement dealing with giving possession or redelivery or handing back, the court would still be confronted with the practical problem of how this would happen. So how would I deal with that in the hypothetical that the agreement doesn't say anything about it.

MR WARD: Your Honour would have to find the reasonable or commercially reasonable manner in which ready delivery could be given and that would involve something more than a disclaimer, a take it or leave it, and probably something less than the sophisticated regime that's in place at our end. Could I lead into this point, your Honour: my learned friend refers to article 11, subsection (5), as though it is, in some way, supportive of the limited view of give possession; it's nothing of the sort. What is required under article 11, subsection (2), as we've said repeatedly in our written submissions is a quality of act of return. We say that that – because we're not dealing with a hypothetical in which there is no structured return process, we say you're guided by the agreement of the parties in that regard unless it's manifestly unreasonable. If there's nothing at all, then it would probably be in the absence of agreement of the parties. It would probably be, regrettably for your Honour, a position to ..... and decide what is reasonable ..... in the circumstances of the particular case. In our submission, your Honour is not in that position here because there is an agreement and nothing in it, in our submission, is manifestly unreasonable. But if possession was offered, that is the act of giving possession was offered - - -

HIS HONOUR: Could I just stop you there, Mr Ward.

MR WARD: Yes, your Honour.

HIS HONOUR: The question I was thinking of was I've got to work out what is commercially reasonable now, don't I, as I sit here on 31 July with all that has occurred since the agreement was first entered into, even though obviously this was anticipated in one way, but - - -

MR WARD: Yes.

HIS HONOUR: So is that the right time I should be looking at this?

MR WARD: Your Honour, in my primary submission, what I've just put is not correct. My primary submission is that your Honour will first determine whether what is agreed between the parties is, in any way, manifestly unreasonable in normal circumstances, and that question, in our submission, will be determined in the negative. There is nothing manifestly unreasonable about what is proposed.

HIS HONOUR: Well, I think you've carefully worded that as the primary position. Let's say, for instance, that I had evidence that three of the things that were required in the agreement simply could not be done for one reason or another because they – it's impossible for someone to do it or this document doesn't exist or whatever, I would have to take that into account, wouldn't I, before I said what had to be done.

MR WARD: Well, yes, your Honour, but if something physically could not be done, it would be manifestly unreasonable to insist upon it.

HIS HONOUR: Well, it would be – that takes it outside of what the contract says by definition because the contract has anticipated that it will be reasonable. So that would be a factor that I take into account in whether I said it was reasonable. That's what I'm putting to you, which I think you have to accept.

MR WARD: I think I accept that, your Honour, in the hypothetical circumstance.

HIS HONOUR: Yes.

MR WARD: Although, we're not sure that – I don't know that I agree that any such circumstances arisen here.

HIS HONOUR: Yes. All right.

MR WARD: Now, could I just return to the article 11(5) point briefly because this is the suggestion that the words until the creditor is given the opportunity to take possession under paragraph (2) or in some way effects the interpretation of article 11, subsection (2), itself, it doesn't. What is structured in article 11 is a sequential process whereby the insolvency administrator or debtor must give possession of the aircraft object in accordance with the article 11(13), which imports article 9 protocol process.

If the creditor/lessor did not take possession as a result of that giving process, the obvious consequence which is then put in article 11, subsection (5) – paragraph (5), is that the insolvency administrator from that point on does not need to continue to preserve the aircraft ..... and that's entirely logical. It says nothing at all about the manner in which possession should be given for the purposes of paragraph (2) and we've expanded upon that at some length in our written submissions both in-chief and in reply.

In our submission, your Honour, our primary submission in relation to the operation and the work that is to be done by the agreement between the parties, unless it is

manifestly unreasonable is the correct position ..... wrong about that, it nevertheless remains the case that your Honour does have to identify how reasonably to give effect to the obligations to give possession for the purposes of article 11(2). The starting point would have to be that which the parties had already agreed and to departure from those propositions only to the extent that it was commercially necessary to do so, but we do not make that our primary submission. And your Honour will see – no need to go to it now but we have put in schedule 3 to the originating process what we consider to be, by reference to the provisions we ..... the reasonable approach that should be taken to the return operation.

Now, that's all I was proposing to say on article 11, your Honour. I think it's adequately exposed between the parties. I don't want to accept your Honour's time invitation to bid against my opposition by describing some lesser commercially reasonable standard factually. If your Honour is against my primary submission then your Honour might have to identify something which is commercially reasonable, but, as we have put, that should be done to the extent that it is commercially ..... to depart from the primary position of the agreement between the parties, and that's very much against the submission that I put as the primary submission, which is the manifestly unreasonable test for departure from that agreement.

Your Honour next asked a question within relation to what records are outstanding. The short answer to that, your Honour, is the colour coded record open items answered the question but it might assist if I started the answer to the question by taking you to the affidavit of Mr Derych Warner.

HIS HONOUR: Well, I wanted to probably, without taking too much time on this, try and short circuit it because surely it can't be in dispute what you have and what you want. So that can't be a dispute, can it?

MR WARD: No, your Honour, it wouldn't be in dispute and Mr Warner explains that in his affidavit in reply.

HIS HONOUR: Yes.

MR WARD: From paragraph 12 through to 16, he identifies the nature of the records that we seek. That's at court book 109 and five.

HIS HONOUR: Thank you. Let me just get that. Yes.

MR WARD: There are really two categories of records related to these ..... your Honour. They are what is called operator records, which includes historical operator records, and then there the end of lease records. The – if your Honour goes to the next page, at 110, paragraph 18, we now have, as Mr Warner says, the vast majority of historical operator records.

HIS HONOUR: Yes.

MR WARD: And they are described as closed in the records open items list. The one that is not closed, if you are bracing for this, is the hydro-mechanical unit installation work order for engine 896999. You heard Mr Oberio this morning describe that as a significant component without which the engine certainly could not be operated – records for that which the engine could not be operated. It has been outstanding since the first negotiations around these records. It remains outstanding with no explanation whatsoever for its clarity they didn't provide us. And at least insofar as that engine is concerned, one would say that there is no explanation, not even no satisfactory explanation, there's simply no explanation for the failure to provide such a critical piece of documentation which forms part of the record – sorry – forms part of the equipment for the reasons that I described for your Honour by reference to the lease earlier this morning.

The end of lease operator records are the other records that are currently outstanding. Could I take your Honour back to Mr Oberio's affidavit and to the paragraph that my learned friend took you to, paragraph 36, which is page 84 of the court book.

HIS HONOUR: Yes, I have that.

MR WARD: Now, Mr Oberio says a number of things in this paragraph, your Honour. One is he identifies – and I think we agreed, in relation to the identification of the matters which are outstanding. You will see, your Honour, the reference to non-incident statements, history, LLPN ..... status statements. They are outstanding, your Honour, because as Mr Oberio nakedly advises the court, in the last sentence of that paragraph, he has taken a decision to direct those officers, including Mr Dunbier of Virgin, not to provide them. He has done so because he considers that there's no commensurate benefit being offered by my client to the administrators or to the company. That is, your Honour, in my respectful submission, an entirely inappropriate attitude for the administrator to have taken to records which, on any view of it, are the equipment that is owned and possessed by my client, and which directly affects the commercial value of these extraordinarily expensive pieces of equipment.

We do not have to provide a commercial benefit, your Honour, to Mr Oberio, to obtain our equipment. His obligation is to act in good faith and to provide the information required of him to us, as expeditiously as possible. And your Honour heard Mr Dunbier frankly say, there was no impediments to him providing us with this information, at all, other than his – he had been directed not to do so. Now, that, your Honour, effects the next proposition in relation to the section 443B notice. And I will turn to that, if I may, in one moment. I will just say this. The records open items list, in its coloured coded from, we think, adequately describes the documents that are either pending or open. That is, that have not been provided. We would be very happy to provide your Honour, though, with a tabulated or compendious list of the documents which we still seek. And I'm sure that could be done by agreement with the respondent's, by say, Monday afternoon or some convenient time.

HIS HONOUR: Well, I will take you up immediately on that offer, because - - -

MR WARD: Now, I'm sure my instructing solicitors will be delighted.

HIS HONOUR: - - - it seems to me that the declaration relating to that, when it relates to certain records, would only relate to those pending or open. And it could easily be agreed. So let's work on that basis.

MR WARD: Yes. We will certainly attend to that and could we – could I ask your Honour for Tuesday afternoon, just to make sure it can be done. But if it can be done by Monday .....

HIS HONOUR: Yes. You will be briefed, again, I think, Mr Ward, for asking for that extra time.

MR WARD: Yes. Thank you, your Honour. Now, if I could then - - -

HIS HONOUR: Keep going.

MR WARD: I was then going to turn to the 443B notice issue. The starting point is, in our submission, it is claimed, beyond all doubt, that the notice was ineffective according to its terms on the date it was on 16 June, and it therefore falls away and is of no effect, at all. It can't be saved. It can't be strapped up by some later amendment. It's either valid or it's invalid. It did not identify, for the reasons that we have given in the ..... it did not identify the equipment, it did not identify the engine stands, even in passing, and even today we see that the – well, let me be precise about it, the majority of the records which form part of the equipment were not provided, at all, until 8 July, and some on 17 July, and then some not even to date. So, in our submission, the notice is invalid. It was a valiant attempt by Mr Oberio to sustain his understanding of what was required on a take it or leave it basis, but it was wrong and it must therefore fall away.

The question is what flows from that. My clients, as your Honour is aware, seek rent. They seek rent in relation to the engines up to the date upon which proper notice of the location of all of the defined equipment, including records, was provided. And that means that in relation to the one engine with the HMU problem, that obligation continues to the present day. The suggestion is then that either falling from your Honour or gratefully embraced by my learned friends, that there should be some exclusion from liability under 443B(8). I just need to take your Honour to the history of how this issue developed, so that your Honour could identify whether it was appropriate to exercise that discretion, particularly, your Honour might think, in relation to the engine with the HMU issue, as to which there is no explanation whatsoever for the failure to provide the required critical significance documents. Could I take your Honour to page 495 of the court book, please.

HIS HONOUR: Just before we do, Mr Ward, I think we're on the same page with this, but just make sure I'm right in my thinking process on this issue of the notice. So the notice is relevant for two aspects of what's between the parties. One is whether it's the effective way to give possession. And if you win on your first

analysis which we've been debating this morning, then clearly it couldn't be. In itself, the notice couldn't be giving possession.

MR WARD: Yes.

HIS HONOUR: So, as far as that's concerned, the notice has no effect on that issue. So then we're only talking about, now, the exemption from liability, as far as the administrators are concerned, aren't we? So that – am I right in this is the way we are looking at this?

MR WARD: That's exactly right, your Honour.

HIS HONOUR: All right.

MR WARD: It had the two ..... operations. The first – if we're right about giving possession, the first must fall away, because a disclaimer could not, on our submissions, amount to a give possession under the convention. The second issue is whether, consistently with the convention of protocol, the notice could either, if it were invalid for the first purpose, nevertheless be a valid disclaimer of the rent liability. In our submission, it couldn't be, because if it's invalid for the first purpose, it would also be invalid for the second. It would then lead to the question, which is now what I'm addressing, which is whether or not your Honour should nevertheless exercise a fresh discretion to extend time on a belated application to relieve liability for rent. Now, as to that - - -

HIS HONOUR: And just to make sure, I've relieved, haven't I, up to 16 June? Is that right?

MR WARD: That's my understanding, your Honour, yes.

HIS HONOUR: Yes. Yes. All right. Thank you.

MR WARD: Now, that's probably a convenient point to start, because that means, of course, your Honour, that my clients have been out of the money from the very first day, until 16 June. And although they did not enter into – and quite legitimately did not enter into one of the aircraft agreements put forward by the administrators, nor did they elect to take advantage of your Honour's permission in the extension of time orders which allow interested parties to approach the court for a variation. The effect of that is that the administrators have, since the date of the first order extending time, had every ability and every generous extension of time from the court within which to conduct themselves properly. It is not my client's fault that a period of some 50 or 60 days has expired without them taking the most basic steps towards compliance, as we see it, with their obligations. And, again, your Honour will have regard to Mr Oberio's paragraph 6, where it's plain that ..... insofar as the rental is concerned, that's a deliberate decision of an accidental decision. Now, I was going to take your Honour to page 495 of the court book - - -

HIS HONOUR: The only thing I would say about that, Mr Ward, it was clearly a deliberate decision and, on your argument, and one the court may accept, a decision that was misinformed by an understanding of the correct position. But I don't think it could be said it was untenable or frivolous or, on a frolic, completely unsustainable, having regard to what we hear now. That's all. I need to take that into account, don't I?

MR WARD: Your Honour could take that into account. But your Honour would also ask why it is the case that the steps that have now been taken were not taken well into July and why it is that in relation to one engine, the value of which your Honour has evidence of, the – a very significant document is still not provided, despite consistent attempts by my client to obtain it. If your Honour looks at the document at 495, which is the email from 2 June 2020, your Honour will see the 2.32 am timestamp, which suggests that my clients reside somewhere other than Australia, this is the notification by Willis to the administrators that they do not agree to sign what's described as the protocol. That is the aircraft protocol prepared by the administrators.

And in the plainest terms, reiterate that we wish to have our engines back immediately. Over the page, at page 496, there was an earlier email on 30 May, a couple of days earlier, which requested that the engines could be returned, that the aircraft protocol was unacceptable and the engines could be returned, or should be returned as provided under the leases. So from, at least, 30 May or 2 June, the administrators were on clear notice as to the basis upon which it was asserted that these engines needed to be returned. That is, in accordance with the lease terms. At page 501, there is an email of 10 June. This email, your Honour, is relevant for two reasons. The first is that it correctly, in our submission, identifies the risks to Australian aircraft operators if the administrator's position was sustainable.

That is, the financing of expensive aircraft objects, all of which are manufactured overseas, requires some predictability and certainty. We've directed your Honour to the second reading speech of the Cape Town Convention Act. My learned friend suggests that you shouldn't have reference to it, but I don't know why. Legislation which incorporates into a domestic law treaty is legislation. Your Honour should have regards to the terms of the legislation and the second reading speech surrounding it, to the extent there is ambiguity, just as any other piece of domestic legislation. The second reading speech makes it plain that the prospect of more beneficial financing to the Australian industry – aviation industry, is the driving force behind the application of the convention of protocol, and, indeed, this airline was singled out as one of the potential beneficiaries of the convention process.

That leads me to take your Honour to the second paragraph of this email, which clearly and expressly identifies the Cape Town Convention as a relevant or the relevant source of obligation, so far as my clients were concerned. So from 10 June, there was no doubt – let me restart that. From 30 May, there was no doubt that we required the return of our engines and we're not prepared to negotiate on the aircraft protocols that they put forward, anymore. From 10 June, it was clear that the Cape

Town Convention process was going to be required. And the response to that was 16 June notice, which, in the barest possible terms, disclaimed or purported to disclaim the obligations of return. If your Honour turns to page 516, which is the covering letter to the 16 June notice, your Honour will see the covering letter does three things.

In the first paragraph, last sentence, it suggests that the engines are available from 16 June to be repossessed at locations specified in the notice. Well, we've now teased apart that bold assertion and shown it to be almost impossible that could ever have been a correct statement. The second paragraph starts with a suggestion that the administrators have, at all times, been in compliance with the provisions of the Cape Town Convention, including in relation to the preservations of engines and the time periods ..... return of the engines are required. Now, that's a reference, your Honour, to a 60-day waiting period under the Cape Town Convention.

That would be relevant, in our submission, to the suggestion that your Honour should further extent time. And the Cape Town Convention provides for a 60-day waiting period and provides that no extension of that time is permissible. Now, that's a problem, in our submission, if your Honour were planning to further extend time by which the obligation to return could be made good by the administrator, without paying it for the assets that they retain. And that's not the problem that's of our making. It's an administrator's error. Now, your Honour might say it's not a frivolous error or their position wasn't untenable, but nevertheless, it's not our error.

We very plainly dealt with this issue. So 16 June 2020, Clayton Utz letter, suggests that the Cape Town Convention is being complied with and puts forward the apprehension of an obligation under paragraph 5 ..... article 11, and the take possession issue. And so I just, without taking your Honour to it, say that ..... 18 June – and your Honour finds it at page 522, in the most emphatic and details terms, my instructing solicitors wrote a very detailed letter which identified the deficiencies in the notice and the deficiencies in the Cape Town process. Now, in our submission, your Honour would not exercise the discretion in relation to rent release. Whether or not your Honour felt that it was a tenable or arguable position taken by the administrators in circumstances where, first, presumably there's still a right of indemnity against assets.

Secondly, in any event, it appears, in our submission, as though the delay beyond 60 days is entirely at the hands of the administrator and that there is, at least, insofar as we're talking about engine records, there has been no impediment to the provision of those records, well before the time they had been provided, well before the ones that have not been provided could have been provided, save only for the ones that can't be provided until the engine is actually taken off the ..... and we then – I do direct your Honour, regrettably, to the provision of article 11, paragraph 9, which is the date problem to which I have referred. Now, your Honour, I don't want to say anything else if we're not dealing with the lien point this afternoon, but I say to your Honour this about the lien – claimed lien.

HIS HONOUR: ..... I hadn't decided definitely not to deal with it. But what's the – is there an urgency about the lien point?

MR WARD: Not from our point of view, your Honour, because submissions that we primarily make about are, first, it can't exist, because of some provisions of the Cape Town Convention. If we're right about that, well, we're right. But, secondly, two reasons. There could be no priority in relation to any claim ..... our rights. First, because of the article 11, paragraph 10 problem, which is that ..... amount to a modification of our rights under the agreement without our consent, and secondly, it would be a security interest for the purposes of the Personal Property Securities Act and it would be caught by section 73, and, again, would lose priority. And if we're right about those two points it goes nowhere anyway, and your Honour won't probably exercise the discretion to order a lien that was futile. We don't see any need to deal with that afternoon if your Honour doesn't.

HIS HONOUR: All right. Dr Higgins, there's at least one new point there that I haven't become, until this morning when Mr Ward told me about it in the Securities Act. Are you pressing for this relief today? do you need it today or next – in the new future?

DR HIGGINS: Your Honour, we are content to stand that over. In a sense, because the ..... PPSA issue and including because we would need to furnish some evidence of quantum. It's not entirely right for determination, and we take the force of what your Honour says in that respect. We believe it's a matter that probably could be raised, in any event, in the Virgin proceedings. The separate Virgin proceedings as opposed to these proceedings.

HIS HONOUR: Yes.

DR HIGGINS: And we're quite – subject to any concern your Honour has about that course, we are content for that matter not to be addressed today and to be ventilated in the Virgin proceedings when it's right for determination.

HIS HONOUR: All right. All right. Well, I think that's the appropriate thing to do, quite frankly. I – as my ..... was that it wasn't – of no utility or it's premature to deal with it now. So, Mr Ward, if it's raised in separate proceedings, which we will call the Virgin proceedings, which is the proceeding that comes back before me when various relief is required, you would have the opportunity, obviously, of intervening in those proceedings, to protect your client's interest, along the lines of resisting the lien. So you're content with that?

MR WARD: I think I have to accept that that's a sufficient avenue for us to ventilate .....

HIS HONOUR: Yes. And I must say – yes.

MR WARD: They're may - - -

HIS HONOUR: I must say it does seem to me I've been assisted by, obviously, submissions in writing in advance of my having to think about it, which the parties will need – if this does come back before me, to work out a timetable for that. But also, as Dr Higgins says, it may involve some evidence that I need to know about. So I will leave that to you, Dr Higgins, and Mr Ward, to deal out – to work out what steps need to be done, and I can make any procedural matters and we can hear that whenever we need to, further down the track. But – so in relation to that relief, I will simply assume, for the moment, it is not pressed, Dr Higgins.

DR HIGGINS: Yes, your Honour. I'm content for your Honour to proceed in that course.

HIS HONOUR: All right. All right. All right.

MR WARD: Those are our submissions, ... your Honour.

HIS HONOUR: All right. Do you wish to say anything further, Dr Higgins?

DR HIGGINS: Yes, your Honour. There are a couple of issues that my learned friend addressed for the first time, in those submissions, which I ..... address. Can I first address the HMU record, which is ..... which my learned friend cross-examined Mr Dunbier this morning. And, in a sense, it's a useful microcosm of the status of this document and of the fact that it is a collaborative process that requires the participation of a number of parties. My instructions in respect of the HW – HMU, rather, is that it is available to be loaded up to the documentary system. There was a hold up because the certificate ..... from a ..... provider. And, in addition, your Honour would have ..... in the submissions, thus far.

This was added to the request of 10 July. It was not in the original request – sorry, 16 July. So there has been ..... process in respect of HMU, and I understand it is now ready to be loaded to the system. So, really, the documentary process is a collaborative and dynamic one and the most useful document for your Honour will be that which is jointly produced on Monday or Tuesday of next week, which lets your Honour know what is outstanding. Mr Dunbier was played and your Honour would believe ..... that the Virgin entities want to give over whatever they have and can give. Can I direct your Honour, then, to the question of an extension. And that is an extension of the liability – really from liability under section 443B(8).

Can I address that immediately before addressing the questions of the validity of the notice. There is a very basic point which undermines the submissions my learned friend made, and it is this. The 60-day waiting period under article 11(2)(a) of the protocol has no relationship whatsoever with relief your Honour would give, leaving administrators of personal ..... under the Australian Corporations Act. It does not effect the time limit of the remedy being exercised. What it would do, is in the exercise of your Honour's discretion, protect the administrators as officers for personal liability, from 16 June until a date that your Honour specified. So there is no trenching on the time period in article 11(2). There is no inconsistency. There is

no relationship, whatsoever, between article 11(2) and personal liability of personal administrators. And, your Honour, can I briefly also go to one factual issue?

HIS HONOUR: What do you say, though, Dr Higgins is – someone has to bear the burden, financially, of the period of time from 16 June until possession is given to Mr Ward's client. So he – Mr Ward says, "Well, look, we haven't done anything wrong. We told you what our position is" and you've, not doggedly, but you have taken a different view. You have got to take the consequences of your view. And it wasn't as if you didn't know the alternative view, and, obviously, took the risk. So someone has to bear the burden, so why shouldn't the administrators. What's the answer to that?

DR HIGGINS: Can I give you the answer, your Honour. And it is that the natural – if your Honour determined against the argument we have put, the natural solution would be that it is the insolvent company that bears that debt. And that is the position that was expressed on 18 June, in Mr Bolton's email, that I took your Honour to, which your Honour finds at 530 of the court book.

HIS HONOUR: Yes.

DR HIGGINS: Your Honour will recall page 530 - - -

HIS HONOUR: Yes. Yes.

DR HIGGINS: - - - around the middle:

Any liability remains a debt to the company for which you are entitled to submit a claim in the administration. Your Honour would not visit the liability upon the administrators, in circumstances where what the evidence read fairly disclosing is an extensive and most collaborative negotiation to try to resolve the position in respect of this. Now, I do need to take your Honour to one document that my learned friend skipped over. But it simply could not be suggested that the administrators did not take all reasonable endeavours ..... learned friends on 16 June, in accordance with their construction of the law.

And, in fact, your Honour, they did notify them of the keys facts under 443B, because a discussion was then held between the parties about all of those facts. It cannot be suggested that our learned friends were not, from 16 June, on notice of the integers in 443B(a) and (b). It simply cannot be suggested, because that is the whole premise of the discussion occurring, that there were different views is manifest and, as your Honour said, being resolved before your Honour today. But can I take your Honour in this respect, your Honour was taken by my learned friend to page 495 .....

HIS HONOUR: 495?

DR HIGGINS: Yes, your Honour. The email of 2 June from ..... Mr Ward directed you to the sentence:

Otherwise, we will take all necessary action and look forward to your cooperation, etcetera.

And he then took your Honour to page 501 and the email of 10 June, which in fairness to the author of it, notes that there might be a risk over statement in some of the statements made within it. Though what my learned friend jumped over, is tab 37, which is a latter of 9 June from Mr Algeri to Mr Hall, the president of .....

HIS HONOUR: What page is that - - -

DR HIGGINS: It's 498, your Honour.

HIS HONOUR: 498?

DR HIGGINS: Yes.

HIS HONOUR: Yes.

DR HIGGINS: And I encourage your Honour to ..... this letter at some point. But what Mr Algeri does is at paragraph 1, recite the correspondence that has preceded it. And paragraph 2 express disappointment at the fact that in the preceding communication, a different position has been taken. And your Honour sees the totality of that. So the short point is, your Honour, there can be no real credible suggestion that after 16 June, the plaintiffs were not on notice of the administrator's intention that Leaseco and Virgin would not exercise rights in relation to the property, the subject of the relevant airline leases that is the premise of every discussion that follows. They had notice, in fact, from that date. there can be no prejudice or injustice, we say, in exercising the power under section 443B(8), to grant relief from that date by reason of that fact.

It would visit an injustice on the administrators to make them liable for that ..... in circumstances where there is clearly a bona fide discussion ..... throughout the relevant period. And the natural solution, were your Honour against us, would be for the insolvent estate to bear that cost, as Mr Botham indicated on 18 June. And that would be realised by submitting a claim in the administration. And there are many factors that would bear upon the exercise of your Honour's discretion in that respect. Mr Algeri was negotiating an aircraft protocol with multiple lessors, all over the world, 73 of them had successfully brokered an agreement with ..... trying to resolve the rump of the dispute that existed with my learned friend's clients, in the best way available to him. And there was nothing, we say, on these materials, that would weigh against the exercise of your Honour's discretion, in favour of the administrators.

HIS HONOUR: Yes. Dr Higgins, that is what you want to say at the moment?

DR HIGGINS: Yes. Unless your Honour had any - - -

HIS HONOUR: No.

DR HIGGINS: - - - further questions, those are our submissions.

HIS HONOUR: Well, as the parties ..... have the opportunity of considering all the written submissions before the hearing today – and I've been assisted in the elaboration given by counsel in relation to the submissions on the interpretation of the protocol and the convention, I propose now to indicate what orders I will make, although I will not formally make them, because I think they need some assistance from the parties as to, firstly, identification of various records which I – is going to be determined and worked out between yourselves by Tuesday, so I get a notification of it. But I think it is beneficial, having regard to the view that I have come to, to inform the parties as to what I propose to order in general terms.

As I say, I am not making these orders now, but – so you know what I will be making. And if you have a look the applicant's proposed short minutes of order, as marked up, agreed or disputed, that was probably the most convenient way in which to analyse what I am going to do. So if you look at the first order, which is the first applicant holds, for the benefit of the second applicant, an international interest in the aircraft objects identified in schedule 2, pursuant to article 2 and 7 of the convention, on international interests in mobile equipment, on matters specific to aircraft equipment done at Cape Town on 16 November 2001, that is a declaration that I take it to be agreed, and on the material, I am satisfied it should be made.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: Then declaration 2 is the notice dated 16 June 2020 given by the third respondent to the second applicant, did not discharge the first or third respondent's obligation under article 11 of the Cape Town aircraft protocol, to give possession of the aircraft's objections identified in schedule 2 of his orders. That declaration I will make, although I appreciate it is disputed. Then 3 is a declaration that the notice dated 16 June, given by the third respondent to the second applicant, did not satisfy the requirements of section 443B(3) of the Corporations Act 2001 and did not, pursuant to section 443B(4), have the effect of relieving the third respondent of her obligations under section 443B(2) of the Corporations Act, in respect of the property identified in schedule 2 of these orders. And that is disputed, but that is a declaration I will make.

Then the court has been asked to order that the respondents ..... give possession of the aircraft objects identified in schedule 2 by delivering up or causing to be delivered up, after the aircraft objects to the applicants in a manner set out in schedule 3 to these orders at Coconut Creek, Florida, United Stated of America, within 30 days of the date of these orders, is an order I will not make in those terms. And what I would be asking the parties to do is to work on this basis. That I take the view, "shall given possession" just means that, that it should be actual delivery of the aircraft objects. The manner in which that is done is to be prime facie done in

accordance with the lease agreement, but it will depend upon the practicalities of that now occurring, based upon the evidence before the court.

To that end, I will be directing the parties to put before the court, a proposal based upon the lease agreement but based upon the practicalities of delivering the – and giving possession of the aircraft objects to the court, as soon as possible. And I will come back to what that means when we deal with where we go with this particular action. The fifth order which is sought is unless and until the respondents ..... possession in accordance with the order of the court or until further order of the court, the respondents are to preserve the aircraft objects in order – in schedule 2 of these orders by (a) maintaining the engines identified in schedule 2, in accordance with paragraph 1 of schedule 3 of the orders, (b) maintaining insurance cover over the aircraft objects identified in schedule 2 of these orders, to the same or greater extent as was maintained at the date of appointment of the third respondent's administrators. That is an order which I will make it.

It will be, obviously, tailored depending upon the order relating to giving possession. I took it that that particular order, in its terms, was not disputed. In relation to 6, the first and second and fourth respondents take all steps necessary to cause to be completed or give possession of all records and information set out in schedule 2 to paragraph 7 of these orders. That was disputed. But I will make an order in the appropriate terms, identifying what are the records that are outstanding. It may be, when you look at the documents, or the schedule you're going to provide to me, there may be two categories. there may be a category – it seems to me on the evidence there will be two categories – there may be a category whereby there is a document which is simply available to be given, and that can be done pretty much straightaway.

It may be another category of document which needs to be premised with a basis of all reasonable steps and in good faith, producing it. Because it may depend on the manufacturer or someone, I think, to give some evidence about that. I then – I will make an order, in effect, to be in those terms. The parties can confer about the exact terms. The other order is that the third respondent do all such things as are necessary, within its power, to cause the first, second and third – fourth respondent to carry out the orders of this court in respect of the completion and transmittal of the records described in schedule 2, paragraph 7 of these orders. That's a dispute order, but it is an order which I will make, in, effectively, those terms or use all best endeavours.

Anyhow, effectively, that would be the germane meaning of the order. In relation to rent and the interlocutory application made by the administrators in relation to the exclusion of liability pursuant to section 443B(8), I will be making an order excusing the administrators for a period of time, which I will want to hear the parties further on, which will, in my view – and I will give reasons for this, obviously, is appropriate, particularly having regard to some of the steps that the administrators may have to take in the foreseeable future. I will come back to the time of that in one moment. But I will make an order to that effect. I will not make an order in

relation to excusing non-compliance with the notice that I have held to be effectively not satisfying the requirements of the Corporations Act.

I don't think that really matters in the circumstances. Having decided that the notice doesn't comply in the shall giving possession, it's not relevant to that anymore and, having regard to what I propose to do in relation to excusing the administrators from liability, it – from a certain period of time, it's not relevant to that either. But, in any event, I don't think it's appropriate to accede to the application by the administrators. I would then make the order to the extent the applicant's require leave of the court pursuant to section 440D or 440B(2) of the Corporations Act, to begin and proceed with the originating application filed on 30 June against the first second respondent, and as amended by the originating – amended originating process on 28 July, against the fourth respondent, leave is granted nunc pro tunc from those dates.

That is an order I will make, and I understand that is not disputed. In relation to costs, I will reserve the question of costs pending submissions of the parties. And the only thing I need, then, to discuss, is this time issue in relation to excusing the administrator from liability. Now, what I need to know a little bit more – and I will hear you, Dr Higgins, first, is – I'm going to give, effectively, time to carry out the requirements that are now necessary for your client to do to give possession. So there's two aspects to that. There's the engines and then there's the records. So the – do you have any instructions about when all this could happen on the basis of the engines, effectively when they're going to be out of your possession?

DR HIGGINS: The answer to that, really, at the moment, is no, your Honour. If your Honour gave, perhaps, a short adjournment, I may be able to seek those instructions in respect of specific questions. It may be a matter that we could also put evidence on if .....

HIS HONOUR: I think – what ..... if you can't give me an answer now – and I also would like to know, effectively, what the position is with the documents, to the extent they're not immediately available to be handed over and you may have to do some other matters, I was thinking maybe the best way to deal with this is to adjourn to Wednesday. How is everybody placed next Wednesday, Mr Ward and Dr Higgins?

MR WARD: That's fine, your Honour, from our perspective.

HIS HONOUR: All right. Well, if we adjourn to – that's 5 August, I think.

DR HIGGINS: Your Honour, I currently have a difficulty with that day. I'm currently in the Crown inquiry that's being conducted in Sydney next Wednesday.

HIS HONOUR: Yes. I see.

DR HIGGINS: I apologise for that, your Honour.

HIS HONOUR: Is that all day?

DR HIGGINS: It appears to be in my diary all day, your Honour. Yes.

HIS HONOUR: All right. Could your – I just wonder if one of your juniors could take over this particular task. I'm really wanted – the purpose of adjourning it is to get the information I've just now requested, on the basis of giving me some reasonable amount of information so I can excuse the liability for what I think is an appropriate time, but not too excessive. And that really will be a factual inquiry, based upon what evidence you provide to me.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: I would have thought, also, it is something you would need to discuss with your opponent, because it takes two to finalise this, as you have – both of you have indicated. So probably in the next few days, you can talk about what are the practical implications now that I have decided, effectively, as far as the parties are concerned, now, at least, what is the correct interpretation of the protocol, and what is to be expected.

DR HIGGINS: Yes.

HIS HONOUR: So on the basis that that's the case ..... moving forward, and the other thing - - -

DR HIGGINS: Could I request - - -

HIS HONOUR: - - - we're going to be talking about is the form of order which, in most cases, is pretty obvious, but in some cases may need a little bit of tweaking.

DR HIGGINS: Your Honour, could I – would it inconvenience the court if it was a 2.15 sitting next Wednesday? That that - - -

HIS HONOUR: No. No. That doesn't inconvenience me. Mr Ward, can you do 21.5? Yes. So let's - - -

DR HIGGINS: We will make some arrangement in respect of that then, your Honour.

HIS HONOUR: Excellent. I'm sorry, Dr Higgins. I would like to accommodate, but I think we should keep the thing moving. I mean, everyone wants to know what needs to be done.

DR HIGGINS: Absolutely, your Honour.

HIS HONOUR: And, unfortunately, this is Full Court period in the Federal Court and I've got other commitments that I – the Chief Justice gets angry if I don't keep to

them. All right. Well, I don't – as I say, I'm making no orders today other than I will adjourn the hearing of the proceeding over to 10.15 on 5 August.

DR HIGGINS: Your Honour, could I raise one issue that arises from your Honour's proposed order 4.

HIS HONOUR: Yes.

DR HIGGINS: And it's ..... parties that your Honour has contemplated. Your Honour has said that there will be a requirement that we give possession of the aircraft objects, etcetera, but not in the manner set out in schedule 3. Does your Honour have in mind that one of the issues to be discussed between the parties, in that regard, is the distribution of the costs of that exercise?

HIS HONOUR: What I have in mind is – I have acceded to – we will give reasons for all of this, of course, but I have acceded to the argument that we start from the position of the agreement – and so that's where we start. But it's not the end of the inquiry. If it turns out that there's something which is not, in my view, able to be done or now reasonable or appropriate. So that's why I'm careful not to make the order or propose the order directly in the terms of order 4 as proposed, because it may be when one goes to the schedule, we need to tweak that so that it actually does work. Having said that, so I make it quite clear, for instance, the serviceability tags I would – on the basis of the evidence, irrespective of the agreement, I would require them to be provided, for instance.

DR HIGGINS: Yes, your Honour.

HIS HONOUR: Would that add – so the basic requirements are there, once you identify the data and manuals, and the engine themselves need to be identified. And there's substantial evidence, which I have accepted, as to the care and how these have to be transported. So that would all have to be factored. So no one has attacked anyone's evidence as to the mechanical way and the difficulties and what needs to be done, and you should take it that I have accepted that evidence as to what needs to be done. So I hope – I know you haven't got my reasons, and I will try to produce reasons as soon as possible. But I hope I've made myself clear as to the starting point and what needs to be done. I'm happy to answer any questions from counsel if I haven't made myself clear, at least, for the purposes of the next few days before you come back on Wednesday.

MR WARD: Your Honour, could I – we understand from that that the starting point, and, we think, the finishing point, is not whether or not delivery should be made to Florida, but how that delivery should be made to Florida.

HIS HONOUR: Yes.

MR WARD: Yes. Thank you, your Honour.

HIS HONOUR: Yes. And that may be subject to negotiation of how it gets there.

MR WARD: Yes. Thank you, your Honour.

HIS HONOUR: Yes.

DR HIGGINS: And, your Honour, the question I would ask but your Honour may have answered is, does your Honour have in mind that as an aspect of the feasibility, commercial reasonableness, etcetera, questions of the distribution of cost for that exercise that is accepted would also arise?

HIS HONOUR: No, I don't. I haven't looked at the questions as far as what the agreement says, but I assume the costs will be at the cost of the company. Is that right? Hence we're not – hence we're here.

MR WARD: Yes, your Honour, from our side.

HIS HONOUR: Otherwise we wouldn't be bothering with the argument before me, I don't think. So what I'm thinking about is more the practical aspects of moving machinery and how to do that. And that may impact, Dr Higgins, on costs. If there is some way of doing it which is less expensive and Mr Ward's client agrees, I'm not going to stand in the way of that. Obviously, what has to happen in the normal course of events, which has happened with other cases of – in its administration, is the parties have agreed to protocols and there we go.

So I would assume that now we've worked out this basic issue, an agreement could still be reached between the parties, along the lines of a protocol, other than, obviously, any argument now about who is to bear the responsibility cost wise. That's what I'm anticipating. If it doesn't work, as Mr Ward reminded me, then it will be my task to work out the nuts and bolts of it. But, hopefully, we don't have to get to that. It would be a very dangerous think to rely upon a judicial officer to impose those things on commercial operators of the type, I'm sure, we are dealing with. But, anyhow, if that's the task give to me, I will carry it out. All right.

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

HIS HONOUR: Anything else?

DR HIGGINS: No.

MR WARD: No, your Honour. Thank you.

HIS HONOUR: All right. Well, I thank you very much for your assistance. We will now adjourn the court on this particular case, to 10.15 – sorry, 2.15 on 5 August.

MATTER ADJOURNED at 3.35 pm UNTIL WEDNESDAY, 5 AUGUST 2020

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