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TRANSCRIPT OF PROCEEDINGS

O/N H-1287167

FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA REGISTRY

McKERRACHER J
O'CALLAGHAN J
COLVIN J

No. NSD 994 of 2020

VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) and OTHERS

and

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

PERTH

9.03 AM, TUESDAY, 22 SEPTEMBER 2020

MR J.T. GLEESON SC appears with MS K. LINDEMAN for the appellants
DR C. WARD SC appears with MR P. SANTUCCI for the respondents

THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

McKERRACHER J: Just before I ask for appearances, can I just indicate there may be a slight problem with Justice Colvin's camera. There's been a slight delay because of that. Yes, thank you. Mr Gleeson.

MR J. GLEESON SC: May it please the court, I appear with MS K. LINDEMAN for the appellants.

McKERRACHER J: Thank you, Dr Ward.

DR C. WARD SC: May it please the court, I appear with my learned friend MR P SANTUCCI for the respondents.

McKERRACHER J: Yes, thank you. I need to make an administrative announcement first; for any members of the public or the media who are observing this hearing remotely I draw your attention to the standard orders made yesterday in these proceedings to facilitate the efficient management of the hearing remotely during the COVID pandemic, which is a standard practice. Consistently with the principles of open justice and section 17 of the Federal Court of Australia Act, any person is permitted to observe these proceedings using a telephone or by video, or by contacting my associate. As is the case for hearings conducted in a physical courtroom, public observers of the court proceedings are not permitted to make any audio or video recording or photograph of the hearing or any part of it and must not participate in or interrupt the hearing. These prohibitions do not prevent a person from making his or her own notes or record of the proceeding or publishing a fair report of the proceeding. Any contravention of these orders may constitute a contempt of court. Mr Gleeson.

MR GLEESON: Yes. Thank you, your Honours. Could I say first that the appellants, and I think all the parties are grateful to the court for giving us the extreme degree of expedition that you have for this appeal. In terms of the materials that we rely upon, the court should have everything. There are three matters I need to seek leave to rely upon, if I could that first. The first is that we have provided this morning some reply submissions. And I seek leave to rely upon those.

McKERRACHER J: Yes, leave will be granted.

MR GLEESON: Thank you, your Honours. Secondly, we indicated at paragraph 40 of our written submissions in chief that we would seek to lead fresh evidence. That evidence consists of two affidavits of Mr Salvatore Algeri. The first is sworn 18 September, and the second is sworn 21 September. I seek leave to file – read those affidavits and rely upon them in due course.

McKERRACHER J: Yes, leave will be granted. Thank you.

MR GLEESON: Thank you, your Honours. Your Honours, in terms of the order of my submissions I propose to follow as closely as I can our written submissions. And then to elaborate on the key materials including by reference to the authorities. Most of our case will involve a close analysis of the convention and the protocol. I will deal briefly with the factual matters which we submit will not control the ultimate question of construction. But I will do that near the end, if I might. Your Honours, in our written submissions at paragraph 1 to 2, we seek to identify what we say are the two competing constructions in respect to article 11, paragraph 2 of the protocol to the Cape Town Convention.

In terms of his Honour's ruling which we've briefly summarised in paragraph 1. Could I emphasise these aspects of that construction of the article; the first is that the giving of possession extends beyond a transfer or relinquishment of possessory title to the aircraft object and includes a positive obligation to effect a physical delivery of that object to the creditor or lessor. Pausing there your Honours, I say creditor or lessor in the present case we're dealing with the lessor. But the correct construction needs to take into account that the creditor may be a charge as oppose to a lessor. So that's the first aspect of his Honour's ruling. The second aspect is that that physical redelivery is to occur at the place, in the manner, and in the condition deemed suitable by the - - -

McKERRACHER J: Mr Gleeson, I'm speaking for myself, I'm sorry your image and voice have frozen at the moment.

DR WARD: We've lost him as well, your Honour.

O'CALLAGHAN J: He's frozen for me too.

McKERRACHER J: Mr Gleeson, it might be necessary for you to go out of the meeting and into it again so to speak. That has sometimes cured this problem.

DR WARD: Your Honours, we might see if we can communicate privately with Mr Gleeson and let him know of the problem. And could I also just indicate just as a courtesy, we're muting our video feed at this end when we're not speaking.

McKERRACHER J: All right. Thank you very much.

MR GLEESON: Is that any better, your Honours.

DR WARD: Yes. We can hear you, but his Honour Justice McKerracher is on mute.

McKERRACHER J: Yes, Mr Gleeson. We have your picture and voice, thank you.

MR GLEESON: Okay.

McKERRACHER J: Mr Gleeson, I think you're on mute now.

MR GLEESON: Thank you, your Honour.

McKERRACHER J: Yes, we have you now clearly. Thank you.

MR GLEESON: Thank you, your Honour. Our second proposition was that on his Honour's construction, the physical redelivery is to occur in the manner, the condition, and the place suitable to the lessor. The third proposition is that the provisions governing physical return in the existing lease agreement are to be respected. The fourth proposition is that the physical redelivery may include a transfer of the objects out of the jurisdiction to the place where the lessor could have demanded redelivery had the lease agreement come to an end and if no regard were had to the domestic insolvency regime or the convention. The next proposition is, if your Honours still have me, that the court takes on a role of fashioning and ultimately ordering a highly .....

McKERRACHER J: Mr Gleeson, we are having a little trouble with audio again regrettably. This is very frustrating. Can I ask that anyone else who is not speaking ensure that they are muted. Perhaps we should just start again I think, Mr Gleeson, we're up to the fifth proposition.

MR GLEESON: Thank you, your Honour. The proposition was that the court takes on a highly specific role of fashioning a prescriptive regime by which that physical delivery is to be affected travelling beyond the language of the contract. The next proposition is the regime involves the imposition of substantial positive obligations of a regulatory and technical kind upon the insolvency administrator including inspections, creation of end of lease records, creation of serviceability tags and so on. The second last proposition is that these steps of physical redelivery and positive obligations may and usually will involve substantial expense which is borne by the administration in the present case it's in the millions of dollars and involves substantial technical and regulatory burden.

And the final proposition is that that expense ranks at the head of the claims in the administration in priority to other secured or unsecured creditors. Your Honours, that is what we say about paragraph 1 of our submissions. As to paragraph 2, the alternative we contend for is simply expressed this way; that the giving of possession involves the insolvency administrator providing the lessor with the opportunity to assume the possessory title otherwise held by the insolvency administrator. And once that is done, the obligation is discharged. Your Honours, in terms of the background, which is our paragraphs 3 through to 6 I did wish to take you to the contractual provisions to illustrate that they reflect the fundamental distinction we urge between a possessory remedy and a redelivery remedy. Your Honours will need part C, if I could suggest you go to that, at page 31.

MCKERRACHER J: Mr Gleeson, I think you're muted again, I'm sorry. Unless – you're unmuted now.

MR GLEESON: Thank you. I'm sorry, your Honour. I was drawing attention to article 3 which is that delivery on the commencement of the lease is at the Willis Facility in Florida. And equally, upon termination of the lease, there is a redelivery obligation to Willis in Florida. Article 4 identifies the equipment, including the engines, the QEC Kit for records, and so on, and article 13 confirms that:

> *On the expiry of the lease, the lessee must return the equipment in accordance with section 18 of the GTA.*

So undoubtedly in the contract, there is an obligation of redelivery on the expiry of the lease to Willis in Florida, in accordance with section 18 of the GTA. Your Honours, at page 54 there is an engine support agreement, which I will pass over for the moment, and come if I might to the GTA which commences at page 65. And relevant provisions which replicate some of what we've seen in the primary contract include clause 2A, which identifies the leased property. Clause 3 governs delivery at the commencement of the lease. Clause 3C(ix) requires registration of the international interest under the convention. Clause 3C(xi) introduces Virgin Australia as the guarantor. I will simply draw attention to clauses 4, 6 and 7, which governs records.

And in 7, you will see in paragraph C, the obligations upon redelivery to return the equipment with certain records, including those that have to be generated on their physical redelivery. Then clause 15 is title; which is that the lessee does not acquire a title to the equipment. And then if I could come to clauses 18 and 19, which are critical. In clause 18.3F, you will see:

> *The primary obligation upon the expiry of the lease term or the termination of the lease to return the equipment, free of all liens other than lessor's liens, to the location in Florida, or otherwise as nominated or agreed.*

And in this following paragraph G there's the important obligation for the lessee to affix, in accordance with the FAA or EASA requirements, in short, the serviceability tag. Now, that obligation as a matter of contract, involves a very expensive inspection being undertaken in the United States; the cost of which is in the order of half a million dollars. And then your Honours would see in paragraph 8, there's a prescriptive regime for how the shipment is to occur. So putting 18.3F, G and H together, that is the contractual regime for redelivery on lease expiry, which includes substantive positive obligations. If your Honours then go to clause 19, which are the events of default, a number of events in default were clearly made out here, by reason of the insolvency in the failure to pay rent.

I can pass over that aspect and come directly to the remedy which is on page 99. I'm sorry, on page 102. Your Honours will see near the bottom, paragraph B which is clause 19B. So:

Upon the occurrence of the event of default, the lessor at its discretion, may elect between one or more of the following remedies, to the extent permitted by the applicable law.

So it's a comprehensive set of alternative and cumulative remedies; I will just draw attention to some of them. The first remedy under (i) is for the lessor to step in and act on the lessee's account to cure the default and then recover the cost of doing so. So that's a direct remediation type remedy. (ii), the next remedy is to go to a court and seek specific performance, or damages for breach. Then when we come to (iii), it contains a series of, again, alternative but cumulative remedies, only two of which touch possession. The first remedy under 3A is a remedy by written notice to cancel the lessee's rights of possession. Then, if I come to B, there's a remedy of terminating the lessor's obligations under the lease. And then if I come to C it has within it, two alternative remedies. The first remedy is what we would describe as the redelivery remedy, which is:

A right to demand that the lessee and the lessee shall upon such demand, return the equipment to the lessor, free of claims of the lessee, in the manner required by, and otherwise in accordance with section 18, as if it were being returned at the end of the lease term.

So that remedy, which I will call for short, the redelivery remedy, says that if the appropriate demand is made, the lessee must do all of the things that we saw back in paragraph 18.2F, G and H on page 98. Redelivery to Florida, serviceable tag, shipment, etcetera. Now, returning to page 183, we then see within paragraph C:

The alternative remedy or the lessor made its option enter upon the premises where the equipment is, take possession, remove it, free of claims, without liability of the lessee.

So this is the remedy to take possession. And then it goes on to say:

…and the lessee shall be responsible for any costs associated with restoring the equipment to the condition required by section 18.

So we see there the fundamental distinction in the redelivery remedy, the lessee must do all the things in clause 18.2F 2H, and must incur the costs. Whereas in the possessory remedy, the lessor enters and takes possession and then may, to the extent it occurred, incurs any costs in restoring the equipment to the section 18 condition, and recover those costs. And then you will see in the following paragraphs, further remedies such as D, powers to hold, keep idle, sell or lease the equipment. And B, exercise rights and remedies under the convention. Your Honours, the reason I've been to that document is that it recognises a fundamental distinction in law between a possessory remedy and a delivery and return remedy. And that distinction, we submit, runs through not only the contract, but it runs through domestic insolvency regimes, such as the Corporations Act which I will come to.

And it is recognised in the convention, we would submit. Your Honours, next by reference to paragraph 6 of our outline, we have identified some of the key paragraphs in his Honour's judgment where the core reasoning is contained. And if I could ask your Honours to go to the judgment which is in part (a). First to paragraph 8, his Honour's summary conclusion –

> *...for reasons to be developed, is the protocol requires delivery up effectively in accordance with the contractual regime for lease agreement for redelivery to applicants in the United States.*

So by reference to provisions I've taken you to, his Honour has applied to protocol as requiring the administrator to deliver up the equipment to Willis in the United States in accordance with the regime in clause 18.2F to H, as subsequently referred to in clause 19. And in terms of the orders which his Honour ultimately made, which the court should have behind tab 6 of part (a). You will see on page 113 of part (a) –

> *order 5 is the key order to give possession by delivery up to the applicants in the manner set out in schedule 3 at the Florida address.*

And if your Honours could look at schedule - - -

McKERRACHER J: I'm sorry Mr Gleeson, I'm losing you at the moment I'm afraid. As far as the audio is concerned, that is.

DR WARD: Your Honour, we can hear some background noise of some description.

McKERRACHER J: It seems as though someone is dialling in. Dr Ward are you able to hear anything from Mr Gleeson at the moment.

DR WARD: Nothing, your Honour. And he appears frozen on our screen I'm afraid.

COLVIN J: Yes, I have the same problem.

O'CALLAGHAN J: So do I.

McKERRACHER J: Mr Gleeson, you may have to go out of the meeting and come in again.

DR WARD: Your Honour, we've had a brief text exchange. I understand they're reconnecting now, should be another minute or so.

McKERRACHER J: Thank you, Dr Ward.

MR GLEESON: I'm not sure whether your Honours have us again at the moment.

McKERRACHER J: Yes, I do.

DR WARD: And we do.

McKERRACHER J: Thank you, Mr Gleeson. I think we were dealing with paragraph 5 of the orders.

MR GLEESON: Yes, thank you. I was indicating that paragraph 5 is the core order to affect the redelivery in Florida, in accordance with schedule 3. And then, the lengthy schedule 3 which commences in page 120 contains the very detailed prescriptive mechanism by which the various steps are to be taken. Which include the disassembly, the internal transport, the inspection, the external transport, the preparation of the tags and so on at the Florida end. Now, the essence of his Honour's reasoning for that conclusion is found in paragraphs 85 to 89 of the judgment. If I could go to those please. In paragraph 85, his Honour reasons that –

> *…the primary obligation on the administrators to give possession…*

That's the 11.2 obligation –

> *…should be taken together with the corresponding remedy for the applicants in the insolvency situation. And can therefore be provided with content with either the requirement in article 9.3 that the remedy is to be exercised in a commercially reasonable manner in turn taking one to the provisions of the lease agreement.*

The essential error that we respectfully argue for, in respect to that reasoning, is that it has alighted three quite distinct matters. The first matter is the obligation upon the insolvency administrator under article 11.2 which is to give possession, by which we contend give the opportunity to the creditor to assume or take the possessory title. The second matter is the remedy which is then given to the creditor which is the ability to acquire that possessory title under article 11.2 if it chooses to do so. And then the third question is the manner of exercise of that remedy which arises at the stage of the taking of the possession. And at that third stage of the manner or mode of exercise of the remedy, the obligation of commercial reasonableness falls upon the creditor. And at that point the terms of the agreement may be relevant.

However, in understanding the content of the obligation upon the debtor or lessee, and the content of the corresponding remedy of taking possession, that content must be determined prior to the question of the mode of exercise of the remedy. So in effect, we argue that it was wrong to use article 9 to inform the content of our obligation under article 11. It arose at a subsequent stage, once the content of the obligation had been properly determined. And had his Honour put the article 9 question out of the frame, one could have approached more squarely the question, does an obligation to give possession include an obligation to affect a physical redelivery as if the lease was at an end. If it does not, then the question of commercial reasonableness never comes into play. Your Honours, at that point I was

proposing to move to paragraph 7 of our outline and draw attention to certain provisions of the convention. And after that I will come to the protocol if that is convenient.

Your Honours should have the convention in volume 1 of the authorities behind tab 2. And in the definitions in article 1 on page 52 and 53, a number are important to this case. I will just identify the ones that are important. The definition of agreement, paragraph (a); creditor, paragraph (i); debtor (j), insolvency administrator (k), insolvency proceedings (l), interested persons (m) – and over the page, international interests, international registry, leasing agreement, non-consensual right or interest, and finally registered interest. Could I just pause on one of those which is leasing agreement, paragraph (q) – it's:

> *… an agreement under which the lessor grants a right to possession or control of an object to another person, with or without a purchase option in return for rental or payment.*

So at the heart of the definition of a leasing agreement is the grant of the right to possession or control. And that provides relevant context in which to understand article 11.2 when we come to it. In the present case, applying that definition to the facts, the leasing agreement was between the respondent and VB LeaseCo. Virgin Australia Airlines was the guarantor. And VB LeaseCo was granted the right of possession and control referred to in the definition. Your Honours, at that point it's necessary to interpose the effect of the Corporations Act. Which is that upon the commencement of the voluntary administration, control of the equipment passed to the administrators as the third respondents.

And that occurred under the provisions which you have behind tab 6, in particular sections 437(a), (b) and (d). So the effect of the Corporations Act sitting together with the definition of leasing agreement is that while the possession remained in VB LeaseCo Pty Limited as the lessee, full control over that possession passed to the administrators and they acted as agent for a company in their exercise of that control. I emphasise that because the person who was directly subject to the obligation in article 11 of the protocol, when we come to it, were the administrators. They were the person who had the control over the possession, and they were the persons who was agent for VB LeaseCo, have the ability to yield that possessory title to Willis. Your Honours, that is supported by the official commentary which you will find in volume 2 of the materials, at page – or section 3.127.

COLVIN J: Sorry, where are you going to Mr Gleeson?

MR GLEESON: I'm going to – I apologise your Honours; I had no control over that. I'm grateful to your Honours bearing with us. Your Honours, I was - - -

McKERRACHER J: As you know ..... but hopefully we will settle in after a period of time. What tab .....

MR GLEESON: Yes, tab 16 of volume 2, your Honour. I was asking you to go to page 274, or paragraph 3.127 of the official commentary. Where Professor Goode notes that the obligation under article 11 we're dealing with, will fall upon the insolvency administrator or the "IA" saving three situations none of which are the present case. And this is going to be important to our argument because - - -

COLVIN J: I'm sorry Mr Gleeson, I just missed the page number, I need to –

MR GLEESON: Yes, it's page 274. And it's section 3.127 of the official commentary.

COLVIN J: I don't think the electronic – my version, the electronic numbers are not matching. That's the problem.

DR WARD: If I could assist your Honours, I think it's page 886 of the volume 2 of the court book.

MR GLEESON: That's correct, I'm sorry your Honours. Page 886.

McKERRACHER J: ..... commentary as well.

MR GLEESON: So I'm seeking to go to page 886 of the electronic court book to section 3.127 of Professor Goode. Do your Honours have that.

McKERRACHER J: Yes.

MR GLEESON: Thank you. And the point there being made is, that there are three cases in which the obligation to give possession would fall upon the debtor. None of those are the present case. And so in the present case, it is the solvency administrator who falls under this obligation to give possession to which content needs to be given. If your Honours could then return please to the – to volume 1 of the authorities, and I will continue with the convention. On page 55, we have Article 2, which creates the basic concept of the international interest. And over the page, it's Article 3 which applies the convention to VB LeaseCo; situated in Australia, a convention country. And Article 5 gives us the principles of interpretation including the concept of the applicable law, which in the present case is Australian law.

And Article 6 requires the convention of the protocol to be read together with preference to be given to the protocol. If I could then ask your Honours to go to Articles 8 to 10, which are important in understanding the scope of the primary remedies in the convention before one comes to the protocol. And the distinction that is drawn is that Article 8 deals with the remedies of the chargee, which include taking possession or control, as well as other remedies, such as sale, collecting income, and profits, and so on; that's Article 8.1. And then Article 8.2 says the chargee may alternatively apply for a court order, authorising or directing any of those acts. Just pausing there, there's a fundamental conceptual distinction that runs through the convention and the protocol, between what we describe as self-help

remedies, and Professor Goode so describes them, and remedies which require the exercise of judicial power.

If your Honours then go to Article 10, what that provides is specifically, for title reservation agreements, or leasing agreements. The remedy is either A, which is a self-help remedy: terminate the agreement and take possession and control. Or B: apply for a court order authorising or directing either of those acts. Your Honours, we would submit that the concept of taking possession or control in both Article 8 and Article 10, operates in the manner of our primary submissions. Namely, the creditor assuming the possessory title against the world, which up to that point, was held by the debtor. It does not involve the concept of requiring the debtor to effect a physical redelivery to a location suitable to the creditor, or to take positive steps to effect that redelivery in a particular manner in condition.

What that means is, your Honours, that in the case of a non-insolvency, the ordinary remedies of Article 8 and 10 operate consistently with what we would understand in a common law jurisdiction, to be a possessory remedy. The creditor can take steps to assume the possessory title previously held by the debtor, and redelivery is not a convention remedy recognised in Article 8 or Article 10. If your Honours could go over to Article 12, please, that preserves the ability for additional remedies if they are permitted by the applicable law. And if a redelivery remedy is to be permitted under the convention, it would be through an Article 12 route, where the applicable law permits that remedy. Your Honours, then referring to Article 13, that contains the ability for interim relief of particular types.

Again, paragraph (b) talks about possession, control or custody. Which is not a redelivery remedy. And finally, there are two aspects of these provisions which govern the mode of exercise of the remedy as oppose to its primary content. The first of those, if your Honours could go back to article 8.3. which is the requirement that the remedies in article 13, paragraphs (a), (b) and (c) –

> *…must be exercised in a commercially reasonably manner deemed to be so where it's in conformity with a security agreement unless manifestly unreasonable.*

Now – so that is an example of subjecting the exercise of the remedy to a constraint as to its mode. And the other place we see that is in article 14, where the exercise of the remedy must be in conformity with the procedure of the lex fori. Now, your Honours there are several aspects of Professor Goode's commentary which illuminate the provisions I've just been to. If I could ask you to go back, please to volume 2 of the court book. I will just find the correct reference if I might.

MR GLEESON: Page 682, please. In section 2.100, there is a discussion of these basic remedies in articles 8 and 10. And a discussion of why they take the different form they do. And then if the court could go over a couple of pages to section 2.107, which is page 685. Professor Goode supports what I put to you that there are then two provisions which govern the mode of exercise of the remedies as it's put. And

they are the commercial reasonableness proviso to the extent it applies, and secondly article 14. And about 10 lines down, the commentary says:

> *...so the remedy of possession of an aircraft would generally have to be exercised in conformity with the procedural law of the place where the object is located.*

So we would submit that the way in which to understand this part of the Convention in the protocol is to characterise the remedy, and to ascertain its content, and then there is a separate question as to the mode of exercise of the remedy. And how that might be controlled by the provisions of the Convention. If your Honours could go over just two pages to section 2.112, 687. This is in paragraph 2.11.2 there's an illustration of how this commercially reasonable proviso operates. And the example given which is illuminating, is:

> *...that on repossessing the object, the creditor must take proper steps to safeguard it from loss or damage –*

and it goes on to say –

> *and on a sale, must act in a commercially reasonable manner.*

So what the paragraph is illuminating, is that the remedy is one of possession or repossession and then the manner of exercise of that could involve, well how am I to deal with the object after I've got it in my possession given that I may have to account back to the debtor. And if your Honours could go to the next page 2.11.4, 688. There's a section on possession which discusses further the nature of the remedy and explains that when a creditor takes possession various further steps may then occur. There might be leasing, or the creditor may take direct control of it, or act through an agent and collect the income. As where the creditor repossesses an aircraft from a debtor and continues it in service, collecting revenues, and further examples are given.

Your Honours, that commentary is important because although you're being asked to construe an international convention brought into Australian law by domestic statute therefore the principles are those in international law and we should not take a narrow focus of common law concepts of possession. It seems tolerably clear that possession is being used and understood in a sense that we would be familiar with, where the taking of possession is regarded as a remedy quite distinct from many other remedies that may be exercised either concurrently with it or subsequent upon it. And what that means is, there is absolutely nothing in the concept of the possession remedy which connotes any necessary redelivery by the debtor to the creditor in the manner the creditor seeks.

Possession is about the title, and in whose hands that title to the object rests at any particular point in time. Your Honours if I could then return to the Convention and just conclude the Convention. The registry system if found in chapter 4, which is in

pages 61 and following the volume 1. The only relevance of that today's appeal is that there is a system of registration and priority by virtue of dated registration. And it is therefore quite possible that there could be multiple creditors in respect to an individual aircraft object at the one point in time. And priority between will be governed by the date of registration. So when one comes to a remedy such as giving possession, the remedy would be available to the creditors in the order in which they are prioritised under the registry.

Could your Honours then go please to article 30, which is found on page 68. We're still in the Convention, of course. But what article 30 demonstrates is the primary relationship of the Convention to domestic insolvency regimes. And that's achieved by virtue of a series of provisions, first that even though the debtor may have gone into insolvency the international interests will be defective in the insolvency provided it was registered prior to the insolvency. So we have a first concept there of effectiveness, the international interest remains effective. And in the present case, Willis had registered leases and so it gains the benefit of effectiveness. And paragraph 2 confirms that point. The balance however is in paragraph 3, that article 30 does not affect domestic law rules for avoidance of preferential transactions and importantly, 3(b):

> *…it does not affect the rules of procedures for enforcement of rights to property under the control or supervision of the IA.*

So what 3B says, is at least as far as the convention is concerned, the domestic law and solvency rules as to enforcement of – against property under the control or supervision of the IA, remain paramount. And that proposition really sets the context for what the protocol was seeking to do. Because the protocol is dealing with a subset of the assets dealt with in the convention. And it's providing particular rules for them and it's providing, particularly, for what is to happen where there is an insolvency in those situations. But it is so do so against a background that is recognised that the primary rule in the convention is that the domestic law procedures in the insolvency are respected by the convention.

Just before I leave the conventions, if your Honours could note on page 71, in Article 39; there's an ability for a stative's declaration to give non-consensual rights and interests priority over registered interests. That has been done in Australia in our declaration, which is found at page 106; in terms that statutory liens under the Air Services Act take priority over registered interests. That's important to the argument because it confirms that in a case where the lessee has possession and is required it give possession under Article 11.2 of the protocol; nevertheless, priority is to be given to the liens registered under the Air Services Act.

And so the IA, on our construction, would give the possession, in the sense of giving the opportunity to the creditor to take the possessory title, but that transfer of possession would always remain subject to the lien. And it would then be a matter for the creditor to discharge that lien, were it so minded. Your Honours, finally, I will draw attention to Article 54, which is on page 77. And that gives a contracting

party the ability to declare that remedies available to the creditor, which are expressed in self-help terms, in fact require court leave.

Australia has not imposed that additional court requirement on any of the self-help remedies, that's again apparent from page 106, second-last paragraph. But again, it confirms the basic distinction in the convention between self-help remedies and those which require the leave of the court. At that point, your Honours, could I ask you to go to the protocol, which commences at page 82. And in terms of the definitions in Article 1, I will simply again note the relevant ones which are aircraft, aircraft engines, aircraft objects, aircraft register, air frames, deregistration of the aircraft, guarantee contract, guarantor, insolvency related event, and primary insolvency jurisdiction, which in the present case is Australia. Article 2 contains the basic application of the convention, to aircraft objects under the protocol.

Can I next ask your Honours to go to Article 9, which bears an important role in the construction exercise. Two different things are happening within Article 9; page 87, 288. The first is, your Honours will see under paragraph 1, that in addition to the remedies specified in chapter 3 of the Convention, that is, particularly Articles 8, 10 and 13, that I went to, the creditor may, to the extent the debtor has agreed, and in the circumstances specified in that chapter, procure deregistration of the aircraft and procure the export and physical transfer of the aircraft object from the territory in which it is situated.

What this confirms is that the remedy of taking possession that we saw in Articles 8 and 10, and 13 of the Convention, is an anterior remedy to deregistration or export, and physical transfer of the aircraft object from the territory, again confirming that the concept of giving or taking possession does not involve the physical redelivery of the aircraft, or the aircraft object. Your Honours, pausing there, the deregistration provision relates to aircraft as defined on page 83; that will be, "Airframes with engines, or helicopters". So that remedy will not be directly available in our case, but it is important to the construction of Article 11 to understand that if it sits against this separate remedy.

The second remedy which is, "Procure export and physical transfer", relates to aircraft objects, and thus, could be available to aircraft engines. Your Honour, continuing in Article 9, its first set of provisions is then section 1, together with section 2, and then, if you could drop down to sections or clauses, 5 and 6. This provides a mechanism by which the creditor can get the aircraft, or the object, out of the jurisdiction, back to where it would like it to be. And it involves obligations being imposed upon the registry authority of the forum to assist the creditor to achieve the deregistration and the export.

And your Honours will note, in clauses 5 and 6, there are provisions here to respect the interests of persons who may have prior ranking claims over the aircraft or the object. And so again, we see that the logical and sequential distinction is between the giving and taking of possession, and then, if it is desired, to export the object out of the jurisdiction, that is done by a separate process where the creditor takes

responsibility for it, relies upon the authority but must observe the claims of those prior entitled. So your Honours, that's the first aspect of Article 9. The second aspect which his Honour placed reliance upon, is Article 9, section 3. And what that has done is to disapply Article 8.3 of the Convention, and then it's implied a more general rule that any remedy given by the Convention, in relation to an aircraft object, must be exercised in a commercially reasonable manner.

So in that sense, it has added to the protections of the debtors because any remedy must be exercised in this manner. And then there is the provision which might be called the safe harbour provision, as to what will be a commercially reasonable manner, namely, if it's in the agreement and it's not manifestly unreasonable provision. As we have submitted, that provision only comes into play after one has properly ascertained the content of the remedy and any obligations imposed upon the insolvency administrator. Your Honours, could I then come to Article 11 and I'm at paragraph 9 of our written submissions. The first matter that we wish to observe is how the timing operates in Article 11, alternative A paragraph 2.

So it's: when is it that this obligation to give possession cuts in? And we're told it's no later than the earlier of two dates, the end of the waiting period, which in Australia's case is 60 days; or the date upon which the creditor would be entitled to possession if the Article did not apply. In determining that date on which the creditor would be entitled to possession but for the Article, one looks not only at the contract but at the provisions of the applicable law. And in Australia that relevant provision is section 440B of the Corporations Act which you will have at page 145 to 146 of volume 1.

COLVIN J: So which tab is that, Mr Gleeson?

MR GLEESON: That's tab 6 – I'm sorry, tab 6, page 145.

COLVIN J: Thank you.

MR GLEESON: And so, section 440B sets out the restriction during the administration, and going down to the table, the relevant item is 3B. So:

> *Where there's a lease, the lessor cannot take possession of the property, or otherwise recover it while the administration is in force, subject to –*

Going back to subsection 2:

> *The administration's written consent or the leave of the court.*

Now, pausing there just on the table, this is another illustration in this case, under domestic law, of the distinction between taking possession and otherwise recovering property. The effect of this restriction, if one compares it to the GTA, is that the remedy of taking possession cannot be exercised without the administrator's consent or leave of the court. But equally, the remedy of redelivery cannot be so exercised

because it would be an example of otherwise recovering the property. Now, so your Honours, coming back to Article 11.2 on page 89, the date upon which the creditor would otherwise be entitled to possession is in the present case, no earlier than the 60 days because the administrators did not give consent, and the court did not give leave.

Therefore, the relevant obligation under 2A is to give the possession no later than 60 days from the date of the insolvency. Having been through that exercise, it can be seen that that obligation, in a timing sense, is a hard obligation, in that the giving of possession is to occur no later than 19 June 2020. And that allows us to see the primary benefit which the creditor is given by Article 11 over the position which would exist under the Convention and the ordinary law of domestic insolvency. The basic problem article 11 was concerned with was, creditors could be tied up for lengthy indeterminate periods in domestic insolvency proceedings. With no ability to get possession of their aircraft object. And an aircraft object which, as time went on, may well diminish in value depending upon whether there were resources to preserve and maintain it.

So the perceived problem was domestic insolvency regimes around the world regularly, not in every single case – see the United States, but regularly do what Australia does, which is create a stay or a moratorium upon the ability to get your asset, or get possession of your asset. And they leave those matters to either the consent of the IA or the leave of the domestic court. So what was sought to be achieved here was to create a hard rule where no later than – in our case, 60 days, the IA would come under a mandatory obligation to give possession. We emphasise that's a mandatory obligation arising from the Convention, which takes priority over domestic law and in effect trumps section 440B in our case. Come the 60 days, it is no longer open to the administrators to choose whether to give consent or not – they must give possession.

And the second this is, come the 60 days, it is not open to an Australian domestic court to choose to give or withhold leave to the administration of that remedy. And that direction to domestic courts your Honours see in article 11, section 9. And that is a very powerful protection which is given to the creditors. So in effect – I took to section 440B, which in our domestic context says the remedy can't be exercised without the consent of the administrator or the leave of the court. One can map against that article 11.2 trumps the consent power which the administrator would otherwise have. And article 11.9 trumps the power which our court would otherwise have. And so the essential and radical improvement which the creditor receives is that the creditor knows, come the 60 days, it must be given possession which it can then take or refuse to take as it thinks appropriate.

Now, could I just add to that, one other aspect of the value of that remedy to the creditor. Because it is a hard deadline of the 60 days, the IA and debtor know that they run the risk of losing the asset on day 60. And losing an asset such as an aircraft engine or a frame, could and in many cases would impede, the ability to engage in any successful reconstruction of the airline out of insolvency. So the threat and the

pressure which is created in favour of the creditor is that it can say to the debtor, on the 60 days you must give possession and I may take, and you may therefore lose an object which is essential to your reconstruction. And that then allows the creditor either to enforce the remedy directly, under article 11.2 or the threat of the administration of that remedy may allow the creditor to negotiate a favourable new arrangement during that term.

And they are the benefits that are given by knowing that on day 60, possession must be given and may be taken. Now, your Honours know from the facts of this case as would not be surprising, in the pandemic, we have an airline which has in excess of a hundred leases. We have administrator working to engage in a form of reconstruction, the effect of which will be that some of the engines and aircraft will be taken over by the new entity, but some will not be able to be taken over. The effect of this construction we're propounding is that the administrator was under the hard obligation that come 19 June, if not earlier, they had to expose their possessory title to the creditor being able to take it. And they had to do that for all leases. And they had to plan their reconstruction accordingly.

Your Honours, coming then to paragraph 10 of our submissions and as to what give possession means. We emphasise that it is to give possession of the object in the sense of give the creditor the opportunity to assume the possessory title to the object which the IA otherwise holds. And what that means is giving the creditor the opportunity to hold the title as against the rest of the world, to the object save against another person who can show a better title to possession. Your Honours, the High Court recently in the Hocking v Archives decision engaged in some discussion of the concept of possession under our concepts. If I could just go that, which is in volume 2 of the materials, behind tab 21, at paragraph 89 of the judgment, which is page 1256, the plurality judgment commenced the discussion of the concept of property, and in particular at paragraph 91 said:

> *The doctrine of the common law is that physical possession of a tangible or corporeal thing, in the sense of actual physical custody is not merely evidence of absolute title, it confers a title of its own sometimes called a possessory title. The title which comes from lawful possession is as good as the absolute title as against that is usually said every person except the absolute owner.*

And then the court says –

> *Leaving aside encrustations, a slightly more complete statement of it is that lawful physical possession is as good as absolute title against every person except someone who can show a better right to possession.*

And your Honours will see the references in footnote 88. That is the concept that we submit is being engaged in article 11. That what the administrator is required to give, that is offer, to the lessor or the creditor is the ability to assume lawful physical possession of the object which will then be as good as absolute title against everyone except someone who can show a better right to possession. And your Honours,

being very practical about could I take two examples which are not far removed from this case. The first is the statutory lien that I've referred to. The obligation under Article 11.2 can be complied with by offering Willis the title, which is as good as absolute title against the whole world; save someone who could show a better right to possession, namely, someone who has a lien registered under the Air Services Act.

The second practical example I would give, is what about an engine leased by lessor A to an airline which is attached to an airframe leased by lessor B. We have two physical objects intermingled. What occurs under Article 11.2 is no later than the 60 days, the creditor must give each lessor the opportunity to assume possessory title to either the engine or the airframe, as the case may be. And each lessor then decides whether to assume that possessory title; they may say yes, they may say no. If they assume the possessory title, that is, they take the possession, they are required to do so in a commercially reasonable manner, by reason of Article 9.3 and commercial reasonableness would clearly include respecting the fact that another lessor has possessory rights in a co-mingled object.

And so in that sense, the distinction between the remedy of possession on one hand, and the manner of exercise is observed, and also the distinctions are clearly observed between possession and other concepts such as redelivery. Your Honours, just before leaving Hocking, in Edelman J's judgment, at paragraphs 202 to 206, which is on page 1284 and following; there's a further discussion of this concept of possession, and particularly at paragraphs 205 to 206. We would refer you to his Honour's discussion in that the right to possession, this is the middle of 205, is the right to control physical access and it's the foundation upon which the whole superstructure of ownership rests. And in paragraph 206, his Honour speaks of a person who:

> *First has a sufficient degree of physical control, sometimes called factual possession, to the exclusion of others, and secondly, a manifested intention to exercise that control, personally, in a manner that excludes unauthorised interference.*

Now, immediately prior to 19 June, the administrators had possession in the sense referred to here by Edelman J. They had the control and they had the lawful ability to exclude unauthorised interference with that control and they had that by reason of section 437A to D of the Corporations Act. We submit that what Article 11.2 required them to do, was to give possession in the sense of, give the creditor the irrevocable opportunity to assume that relationship to the objects, which up to that point, the administrators held. And therefore, once that was offered, the next step for the creditor was whether to accept or reject that offering. I've said accept or reject, your Honours, because while this written submission we made has been criticised yesterday by the respondents, there is an important distinction between the mandatory obligation upon the administrators to give the possession, and the choice or election that is then available to the creditor as to whether to take that possession.

There could be many reasons why the creditor chooses not to take that possession. One might think particularly in a pandemic, but in many other situations. Because by taking that possession, the creditor loses the ability to continue to claim rent payments under the lease. That may be an unsecured claim in the administration, but it may be worth something. But more importantly, that creditor takes on all of the burdens and risks that then follow from being in possession. There's an article which was before his Honour and referred to in part in the judgment which is helpful on this topic. Your Honours, the reference in the judgment is at paragraph 104, on page 78 of volume A. it's the article by Dr Senam Sedover, and the passage his Honour has extracted commences with the proposition that:

> *…the disadvantages associated with repossession may mean the secured creditor will not always be ready and willing to proceed with it.*

We've given your Honours' associates it only fairly recently, so I will simply refer to it at the moment the full article. And the entirety of the section from the foot of page 184 through to page 188, we would submit is of assistance in this case. Not only does it give a detailed series of reasons why a creditor may decide not to take possession. But it goes on to explain how the possessory remedy is distinct from a range of other remedies consistent with our argument. Your Honours, next, while I've indicated that article 11.2 can be viewed as a self-help remedy. Can I make clear that we do not go so far as to say that a court could never have jurisdiction in a matter in respect to a dispute over 11.2.

What a court could do is give a declaration that an administrator had not given possession in the relevant sense. What we submit a court cannot do, is what was done in this case which was to order redelivery in accordance with a prescriptive regime of the sort I've identified. Now, your Honours, next can we come to article 11.5 which is clearly important to the construction exercise. I'm sorry, just before doing that I've passed over the very important article 11.4. 11.4 says that references to the IA are to that person in the official, no personal capacity. I will give you the cross-reference to Professor Goode without asking you to go to it at the moment. It's in the official commentary at section 5.63 where he explains that this article is stating that which must be obvious anyway.

Page 1126 just for a reference. What's important is that the obligations which are imposed upon the IA, are to be in the official not the personal capacity. And that's a very clear recognition of a fundamental commercial reality that in many insolvencies of airlines, there may be an insufficiency of assets. And there may be an insufficiency of staff who are qualified and of regulatory licenses which would be necessary to perform positive obligations. The respondents have accused us in our – in their submissions of engaging in what they call consequentialist reasoning. Rather, we would suggest that a construction of the convention and protocol that has regard to object and purpose would properly take into account that in insolvency administrations there could be a range of cases.

From the one end cases where when the airline goes into administration there is no pool of spare cash. The administrators do not have money to employ staff. They stand down or terminate staff. They do not have qualified licensed technicians. And therefore, any positive obligations incurred by the administrators may well expose them either to personal liability, because there will be no assets to be indemnified from. Or may be obligations which they simply cannot perform because they do not have the technical expertise and licensing qualifications. We submit that article 11.4 is an express recognition of that commercial reality and what it is saying is any and every obligation in this article is something you can be expected to perform in your official capacity.

But we are not seeking to impose obligations upon the IA, which could only take you into the territory of personal responsibility. Now, if one accepts that premise then one comes back to article 11.2, it's very easy to see that giving possession in the sense of giving the opportunity to take the possessory title, can be performed by the IA in the official capacity. Under Australian law, it simply means that the control given to the IA under section 437A, must be exercised in a particular manner. Namely, yielding possession to the creditor. However, if one were to construe article 11.2 as requiring the complex series of positive obligations of a regulatory and technical kind involving substantial expense it may simply be impossible for an administrator to do that in the official capacity.

And that might be to impose onerous personal obligations on the administrator, the very thing 11.4 says is not to occur. So that, your Honours, we submit is an important textual indicator of the limitations found in article 11.2. your Honours, can I then come to 11.5, which is critical. The language used to commence it is:

> *…that unless and until the creditor is given the opportunity to take possession under paragraph 2, then two things happen.*

If I could just emphasise again, he's given the opportunity to take possession under paragraph 2. We submit that that language is further describing the obligation which has been imposed under article 2. And it is telling us that the giving of possession under article 2, involves the giving of the opportunity to take possession. In other words, the short form language of article 2 is further explicated by the language of article 5. And therefore, confirming that the giving of possession is the giving of the opportunity to take the possessory title should the creditor be so minded. His Honour came to a different view on that question. He referred to this in the judgment at paragraph 93.

Where he discerned a contrast between the phrases in each case, and he discerned from that contrast an interpretation that supports giving of possession as the positive act of giving, and not merely the opportunity to take possession. We would submit that's a little difficult to reach that conclusion, once the language is, "Opportunity to take possession under paragraph 2". It seems to be telling us fairly clearly, that what is happening under paragraph 2 is the giving of that valuable opportunity. And his Honour went on in that paragraph to say near the end:

This is consistent with the ordinary meaning of the phrase give possession, and the notion of passive receipt by the taker.

We would submit that passive receipt has little to do with the construction of this clause. The creditor is being given the opportunity to administer a most valuable remedy. The creditor doesn't sit there passively, the creditor must decide, do I take it or not? If I do, I get the benefits and the burdens. If I don't, the world will then play out as it will. Your Honours, returning to Article 11.5, what it then does it two things. It firstly says until that opportunity is given, which could be any time between day one and day 60, there's a positive duty on the IA or the debtor to preserve the aircraft object and maintain it and its value in accordance with the agreement. Now, pausing there. This is one of the clear illustrations that where the protocol intends, obligations - - -

MCKERRACHER J: I'm sorry, Mr Gleeson, I have lost you, at the moment.

DR WARD: As have we, your Honour.

MR GLEESON: I'm sorry, your Honours, am I back now?

MCKERRACHER J: You are, Mr Gleeson, thank you. We lost you at the point where you were about to draw attention to the words in accordance with the agreement in 5A.

MR GLEESON: Thank you. So the submission is that where the protocol requires obligations to be performed in accordance with the underlying agreement, it uses that language quite expressly, and 11.5A is a good example of that. The clear contrast between 11.2 where that language is not used, is important, we say. The next aspect of 11.5A is that during that 60 day period, if the IA remains in possession, it has a positive duty to preserve and maintain the object of its value. It's important to understand the discretion which is given to the IA here. If, for example, the IA has an estate with no assets, or limited assets and limited technical capacities, such that the IA cannot ensure that obligation is performed, that's the very sort of case where the IA may give the opportunity to take possession almost immediately.

On the other hand, if the IA has assets, has technical capacities and sees the possibility of it being useful to retain possession, then the IA will have to take on the burden of Article 5A. This therefore does not cut across our argument on Article 11.4 because the IA is still given full autonomy under Article 11.5(a). It's not a positive duty to preserve and maintain for 60 days. It's rather a duty to preserve and maintain for so many of the 60 days as you choose to keep possession. The next aspect, your Honours, under article 11.5(b), is that during the 60 days the creditor can go to the court for interim relief under Australian law so in that period there's an ability to pursue court relief as distinct from the self-help remedy under article 11.2. But come the 60 days, the self-help remedy arises at its fullest if it has not already done so. Can I then draw attention to article 11.6 and 7. The effect of 6 is that during the 60 days - - -

COLVIN J: Mr Gleeson, just before you leave 5. If the language, given the opportunity to take possession, is what is meant in 2 – well, those words could have been used in 2 and they're not. Is the explanation perhaps that to give possession means that you must both give the opportunity and submit to the taking of the possession? That is to say, you're not to take any action or steps or court proceedings or anything that might oppose the taking of the possession. Which is something different to what the primary judge found. And that would explain the difference in the language.

MR GLEESON: Yes. Your Honour, we would submit that that's the force of those very short words, give possession. It is a very comprehensive obligation; you must give the opportunity to take and then you must do anything which impedes the ability of that taking to be effective. And both of those together comprise the giving. And so in the context of section 440B, to take a practical example, you could not if there were any court proceedings underway continue to oppose the transfer of possession after the 60th day. And your Honours, that actually sits with article 11.5(b).

Because, as I've indicated you could have interim proceedings underway during that 60 days period. But come the 60th day, because you must give the possession you must cease any step which is resisting that transfer of possession. And your Honours, I drew attention earlier to article 11.9 which is that very stern direction to the court. Which is a little confronting to our eyes, but it must be observed because this Convention has priority over domestic law. But it does mean that even if proceedings are on foot, come the 60th day, the court may not grant further relief – and putting it more practically, the IA must ensure the court is not asked to do so. And so an IA would have to withdraw its proceedings and consent to any necessary relief on that date.

COLVIN J: Yes.

MR GLEESON: Your Honours, in 11.6 I was drawing attention to part of the commercial quid pro quo or bargain that's involved here. That during the period which may be up to 60 days, I will just assume for the moment it is 60 days, although you must preserve and maintain you may use the aircraft object in a manner designed to preserve it and maintain its value. So, with an airline like Virgin, with demand for its services radically reduced but it's still attempting to fly some planes some places to earn some money. It could maintain and preserve its aircraft including in use, and to that extent enhancing the value of the estate for the benefit of all creditors including the lessor. And then that sits together with 7, that there's an ability to retain possession whereby the time specified in paragraph 2, you have cured all defaults and agreed to perform all future obligations.

So reading these all together, because paragraph 2 gives us a hard date – no later than 60 day period, if you're so minded, the IA has the full 60 days to retain possession. To seek to cure defaults, and promise to perform future obligations eg, there may be an ability to restructure the company during that 60-day period. And so on the 60th day you must then do the thing required under article 11.2. So on the one hand you

have up to 60 days to pursue the remedy of curing default. On the other hand, come the 60 days, unless you have cured default you must give the possession. And that's a critical part of the quid pro quo, that it will be on the 60 day, if not earlier that the creditor then gets told, I may take possession or I may not because I've been paid up in full for the past and the future is secured.

Your Honours, I've emphasised the number of times it's a hard deadline of the 60 days. That can be contrasted with the regime in schedule 3, and we're not criticising his Honour for giving the parties the time we sought which was in excess of 40 days to carry out the extensive redelivery obligation. Once his Honour had ruled that was the correct instruction, his Honour then crafted the orders to respect our evidence which was that it would take an extensive time. But what that tends to illustrate is that crafting a redelivery regime, particularly an export regime, is going to take a considerable period of time. And how is that to sit with the idea that on the 60 days, if not earlier, the possession is actually given.

On his Honour's construction what has in fact happened is that at least as far as the engines are concerned, the IA is still in possession today even though we're now some 10 weeks after the 60-day period. And the IA remains in possession at the point up until when redelivery is completed in Florida, which will be in several weeks' time. So that concept of the court crafting a redelivery regime which will take time, as well as cost money seems we submit inconsistent with the idea that it's a hard giving of possession on the 60 days. And the related matter we pose, and we think it's not merely theoretical is that the giving of possession is something which can happen at a distinct point in time at which, as your Honour put to me, the opportunity is given to take and there must be no steps to resist taking possession.

And at that time the lessor or the creditor has an election whether to take. What is to happen in the present case if after the 42 days, when the engines are about to arrive in Florida, Willis says we've changed our mind we now have no use for aircraft engines, we wish to simply pursue our rights in the administration. Now, it's possible that problem could be solved on the facts by some notion of election. Possible, we would submit, but far more likely that article 11.2 is not contemplating prolonged redelivery obligations. It's looking at obligations which can be performed at a point in time on the 60 days. Your Honours, next could I go to Article 11.8, and this is important because this is cross-referring to the remedies back in Article 9.1, which was that when I emphasised deregistration and physical transfer and export.

So what it does, is it takes the 9.1 remedy, which is a general remedy whether in solvency or not, and then it indicates particularly how it is to be applied in the insolvency context. And it first gives a direction to the administrative authorities of Australia or so on, to make available deregistration, export and physical transfer, not more than five dates after the creditor notifies the authority it has an entitlement to procure those remedies, in accordance with the Convention. And then there's a positive duty on the authorities to cooperate with the creditor in the exercise of the remedies, conformity with the law. So in the simple case where we were looking at the aircraft frame and engine, what would occur, is that the matter would proceed

sequentially. Under 11.2 the IA would give possession no later than the 60 days. The creditor would then decide whether to take that possession.

If it did not take the possession, the aircraft would simply remain with the IA. The IA would be relieved of the duty under 11.5, to preserve and maintain. What would happen instead, is its duties would revert to those under domestic insolvency law. But if the creditor decides to take the possession, then, sequentially, if it was seeking to procure an export and physical transfer, and if all other conditions were met, it would then notify the authority and ask for its assistance. And in doing so, by reference back to Article 9, .5 and .6, it would have to have properly respected the claims of any person with a higher interest in the object. And so if a lien remained undischarged, which is given priority under Australia's declaration, then the export remedy would not become available until the lien had been appropriately met by the lessor.

So it's important to the article 9 remedy that is arises sequentially after the taking of possession, and that it involves the creditor doing the job in this manner. Which seems completely inconsistent with saying that the obligation to give possession under 2, has required us to get the aircraft to Florida in the first place. Your Honours, I've mentioned 11.9 and then come into 11.10 – the respondent's submissions yesterday criticise us for ignoring this provision. They seem to suggest that our argument involves some form of modification of the obligations to the debtor, which it does not. The obligation to the debtor under the agreement remain unmodified, what the Convention does, and the domestic law does is impose constraints upon the enforcement or exercise of those obligations.

So the importance of 11.10 is that if a domestic insolvency regime actually allowed the court to modify the contract, that ability is taken away by the Convention. But that is not occurring in this case. Your Honours, 11.11 is interesting – that preserves the authority, if any, of the IA under the applicable law to terminate the agreement. So if there's an ability under domestic law, to bring the obligations under the agreement to an end, whether with or without creating a repudiation. That is an ability which is preserved by the Convention. And so when one looks at this concept of the agreement. We can see that the agreement has been referred to in 11.5(a), it has been referred to in 11.7 and it is being referred to in 11.11 – giving a clear indication that where the protocol intends the matter to be governed by the agreement it says so. Now, your Honours, 11.12 is again part of the powerful remedy which is obtained by the creditor.

Because, what that says is apart from the non-consensual rights covered by the declaration which are the Air Services Act liens, no other rights can have priority in insolvency over registered interests. So every other priority provision which we might expect under domestic law including for employees, payment of essential expenses of the administration. The Convention says that they cannot trump the registered interests. And so what happens is the ability to get the possession under 11.2 trumps all of those other provisions which might exist under domestic law. Your Honours, finally here 11.13 says the Convention as modified by 9, shall apply

to the exercise of any remedies under this article. And the appellants in their submissions yesterday criticise us for collapsing the remedy down to simply the remedy of deregistration and export. That is not our argument.

Our argument is that there are a range of valuable remedies given to the creditor. To itemise them there's the remedy of possession under 11.2. There's the remedy of deregistration, export and physical transfer which arises by reason of 11.8 and article 9. There are the remedies of interim relief by reason of 11.5(b). And what 11.13 is telling us is that whatever the remedy be, all of them are subject to the duty to exercise them in a commercially manner. And I've given you an example of how that duty would apply to the cause of the giving of possession under 11.2. Now, your Honours, could I address at this point one of the themes of the respondents submissions from yesterday which is that unless they are correct then lessors will be placed in a terrible position of having to fight their way around recalcitrant insolvency administrators and the vagaries of domestic law insolvency regimes.

And instead what the protocol is doing is respecting the contract which in turn provides security and predictability of interpretation. Now, I've put in that a number of themes but that is at the heart of what is put against us. Our first answer to that is, that I've sought to show that the construction we place upon this provision has given creditors a most substantial improvement over the position they are likely to face in most domestic insolvency regimes. And the ability to get the possession no later than the 60 days, is an extraordinarily powerful remedy, both directly and through the threat of the remedy. And that is the essential improvement that the creditors have been given. The next thing we would say is that the Convention did not simply say that the contract must always prevail. It says in fact the exact opposite. It says:

> *…the domestic law insolvency regime is to be respected –*

That's article 30 of the protocol:

> *subject to these extra rights we are giving you under article 11 of the protocol. And when we give those extra rights, where they are intended to be exercised in accordance with the agreement, we say so.*

Your Honours, the next thing we would say in response is that one needs to focus on the range of interest which are being protected by the Convention and the protocol. We're not simply dealing with lessors, one or many. Creditors could come in a whole variety of shapes and forms, secured or unsecured. Many creditors may not have redelivery obligations in their agreements. Such obligations would not be typical for finance agreements. What's intended by article 11.2, is to state a remedy which is capable of straightforward and equal application across all of the creditors who might be in play. And the giving of possession, in respect to a lessee, ought to have the same meaning as the giving of possession to a finance creditor.

That is what certainty and predictability requires, that it have the same meaning in both cases. However, the respondent's construction seems to say that the meaning

may vary depending upon whether there is a redelivery obligation or not. Or depending upon its content and scope. Your Honours, the theme of his Honour's judgment, we would perhaps say the supplementary reasoning, is to be found at paragraphs 108 and following of the judgment. If I could go to that. His Honour discerns that:

> *…it's consistent with text and context to give effect to remedies in accordance with the agreements even if that comes at the cost of other creditors.*

Now, unpacking that, its tolerably clear that many of the remedies in the party's agreement are not picked up as convention remedies, even on the respondent's view. I took you this morning to some of the other aspects of clause 18, including the ability to seek specific performance of obligations. On any view that is not picked up as a remedy. So it's not a across the board proposition that we are picking up all terms of the parties agreements. We are looking at a much narrower exercise of what is meant in the giving of possession. But the next aspect I wanted emphasise in 108 is his Honour says:

> *…even if that comes at the cost of other creditors.*

Now, that has an assumption built into it that there will be assets in the estate which can be used to meet the onerous obligations under the redelivery head. There may not be any such assets, monetary or technical. In which event it will not simply be at the cost of other creditors, it will be imposing on the IA an obligation which simply is impossible to meet except from his or her private pocket, which is not the intention. Your Honours, in a similar vein, if your Honours could go back to paragraph 106. His Honour discerns the position of creditors is improved vis-à-vis the debtor, and other creditors who hold something less than an international interest. And the obligation is more onerous than under domestic law.

At a level of generality, that is true on either side's construction. And I've indicated the substantial obligation imposed on the IA, which doesn't exist under domestic law. But even if one is looking at the creditors, who hold international interests. The construction propounded, as I've put earlier, does not treat them in a position of equality. Because what the construction actually does is it says for those creditors who have redelivery obligation in their contract, they can insist upon the IA performing it at the IA's cost which is thereby to the detriment of every other creditor including other creditors with international interests who do not have redelivery obligations in their contracts. So it doesn't treat all creditors the same.

It opens up an ability for those creditors who have redelivery obligations to throw the cost of redelivery on the estate, including on their fellow creditors who do not have such terms in their contracts. And that is always assuming their assets there to meet it. Now that, we submit, is a position which is not only imperilling the insolvency, but it is imperilling equality even between creditors with international interests. Your Honours, could I then go to alternative (b), which is on page 90. This is the

soft alternative. And it hinges off a request by the creditor. No request, then no further remedy. But if there is a request, then:

> *…the IA gives notice within the time whether it will cure the defaults or B, give the creditor the opportunity to take possession of the object in accordance with the applicable law.*

Now, there we see again that language, give the creditor the opportunity to take in accordance with the applicable law. The same language we saw in 11.5. The different with alternative (b) is then particularly clear under (b)(5) which is that if the IA either does not give the notice or fails to give the opportunity to take possession, the court may permit the creditor to take possession upon terms. This in fact comes back, in my respectful submission, to the question your Honour Justice Colvin asked me about the difference between the two. Because the giving of possession under alternative (a) involves the making available the opportunity to take, and then doing nothing to prevent the taking in a self-help way.

And the only role of the court, as I've indicated, is to declare whether those steps have been taken. And potentially to injunct or prevent the debtor from interfering with the taking. However, under alternative (b), again we start with the idea of giving the opportunity to take. But the actual taking occurs not by self-help, but under the courts control. So we've got the two stages of the giving of the opportunity to take, and then the taking. The first is regulated entirely by self-help with the court having a declaratory role, the second gives the court the critical role to determine whether that possession is to be taken.

And that's why alternative (a) is regarded as a far more powerful remedy than alternative (b), because under (b) you're back in the hands of the court whether it's appropriate to allow that taking of possession. Your Honours, in the official commentary at paragraph 3.135 which is on page 889, Professor Goode identifies the three differences between alternative (a) and (b). He does not identify as a difference that alternative (a) includes redelivery obligations whereas alternative (b) does not. And we submit that's quite understandable.

O'CALLAGHAN J: Have you placed any store on the words, may require the taking of any additional step.

MR GLEESON: Yes, your Honour, the commentary suggests – I will find you the reference, that what that's particularly concerned with is the protection of the debtor ..... in the sense that the claim under alternative (b) may often be made before there has been a complete ability to determine whether the international interest exists or has priority. And so, the court remedies could include interim type remedies and the court can fashion any remedies to meet the justice of the case. Now, the example I've just given is where the justice of the case requires additional steps or additional guarantees to protect the debtor estate. It is possible that given those words, particularly where they're found at the conclusion of article 11.5, that the court can

fashion the way in which the possession is actually taken requiring additional steps at that point.

But all of that is to say, it has been left in the hands of the court to fashion the appropriate terms of the remedy of the taking of possession. Whereas, it is still a remedy of taking possession that is being administered now by the court. What we would submit is common to alternative (a) and (b), it is the remedy being administered is the giving of possession whether self-help or court administered, as opposed to a remedy of redelivery by the debtor. Your Honours, in the submissions I've put, I've covered a large amount of what we have put as our primary construction argument. The additional matters are these. In the judgment at paragraph 109, his Honour, with respect, correctly averts to the possibly that the terms of the agreement may not cover the case. And he then says:

> *Well, perhaps it will be governed by an implied term. And if there's no implied term, which may arise on a case by case basis, you will fall back on commercial reasonableness in accordance with the Conventions general principles.*

Now, two observations there. The first is this again has assumed that the article 9.3 commercial reasonableness constraint on the mode of exercise is somehow the source of the content of the obligation. Which we submit is the elision. But secondly, it's very difficult to see that this is promoting certainty and predictability in the application of the Convention, when the matter could vary in all of these ways that have been indicated. And your Honours will see in 110, and this is really central to the judgment, that his Honour has deduced the content of the obligation by saying the remedy must be exercised from all parties' point of view in a commercially reasonable manner, that's the essential error that we respectfully urge. Your Honours, on this question of the purpose of the provision, I've made a number of submissions already, can I add this.

It is no doubt said that one of the benefits of alternative (a) is that it may reduce the cost of Lease Finance, because lessors know they have better protection than they would have under many domestic law regimes. And more particularly, the source of the alternative (a) we're told, is the US Code Provision. And in effect, the US provision, subject to drafting, has been extended across the world. The construction that we proffer provides the certainty which matches that object. Lessors know if they are to finance engines in Australia or other countries who adopt alternative (a), should they be hit by insolvency, on the 60 days, they will be able to secure their position back with such benefits and burdens as may flow from that taking of possession.

Your Honours, the final textural matter is that his Honour's construction creates quite a tension between Article 11 of the protocol and Articles 8 and 10 of the Convention. I took you earlier to Articles 8 and 10 and indeed 13, which speak of the taking of possession, a remedy which does not involve redelivery and yet somehow, in the insolvency situation, the creditor is given a remedy beyond that in Article 10. Your

Honours, at paragraph 29 and following, we refer to the extrinsic materials. Could I ask your Honours to go to volume 1 of the authorities, to tab 10, to show your Honours that they, within the Vienna Convention, confirm our construction. Using the numbering at the bottom of the document tab 10, page 205, is the origin of Article 11.2, and on page 206, paragraph 3(b), at that stage spoke of:

> *An obligation to return and deliver, in accordance with and in the condition specified in the agreement.*

That was the proposal as of the 1997 ..... group. Then, at what should be tab 10A, you have the early version of the document and at page 227-16 to 17 you have that same early provision. I go to that because it's numbered article 19. This is the document that we've inserted to plug the gap which the respondents proposed yesterday, respondents proposed that the drafting note I'm going to come to, which refers to an Article 19, is a stray document. That's the Article 19 in the force it was in. then at tab 11, it's the 1998 ..... document. At page 294 and 295 there's the next version, and at 295(3)(b) the language now being proposed is, "Give possession", so that's when give possession first entered the ring. Then critically, in square brackets "in accordance with the agreement".

So that concept of the agreement has now been square bracketed, clearly for further consideration. Page 307, note 4, it says, "The references are for the document I just previously took you to." And 308, next to Roman 19, that's the critical note but the words are in square brackets, "as they could involve substantial expenditure to the detriment of the general body of creditors." That's not what is intended. It should be confined, "Will need redrafting". That's the point at which, in the workings, that we've identified that express use of the language, in accordance with the agreement, could create onerous and impossible obligations. Then at tab 12, the first joint session dealt with the document, it's page 390, it's still in the same form.

The second joint session at tab 13, from pages 419, the plenary session was considering the work of the insolvency working group, which report is at 455, and the critical provision is at 457, paragraph 2.6.6, where it was said, "that the words return" which were in some of the earliest draft, should be replaced by "giving possession as in some cases the obligee would never previously have had possession". So it's quite clear the group is thinking of possession in the sense of the possessory title and it's concern to ensure that that title can pass from the debtor to the creditor on the 60 days, and it's not concerned with physical delivery, and not concerned with return. And that's what becomes the ultimate form of the article. So after the final draft, and which is at tab 14, page 541, paragraph 199, the rapporteur put the matter fairly succinctly. Alternative A was simply concerned with the ability to acquire possession. And that's the final form at page 606. Your Honour, is - - -

O'CALLAGHAN J: Does the primary judge – sorry, Mr Gleeson. Did the primary judge deal with this history?

MR GLEESON: His Honour dealt with it and said it was of no assistance. His conclusion is at paragraph 151, but the ..... is summarised between 146 and 149. And you will see, in particular in 148 to 149 the argument I put about the ability to acquire possession, and we submit it's a fairly powerful indicator that what happened was, any reference to the agreement was removed, any reference to return was removed, and the concept was "give possession". But possession was being understood in the common law sense that we would understand it, that it's all about the title. And there was a concern that any other view would impose substantial obligations on the estate. That's the sort of the material which, we submit, confirms the construction.

McKERRACHER J: Can I just ask you about one small aspect of that on the way through, in the new document at item 11. Item 19, you emphasise the fact that the last part of paragraph 3 there had been put in brackets because, "It could involve a substantial expenditure to the detriment of the general body of creditors." And it was understood from ..... And it goes on, "and that the thing that will return in proper condition is meant to be a confined to cases where ..... part of a secure obligation." What's the significance of that original path, if any?

MR GLEESON: None for us because it seems to be contemplating the case of a finance agreement and the security could in some way extend to that obligation. And what seems to have happened is that, when it says, "we will need some redrafting" it proved too difficult to pursue that thought – such as it was going – and so, instead, they took the more straightforward approach of saying the whole of what's in the brackets goes, because it contemplates this substantial expenditure. And so the agreement is gone for this reason, and we're back to "giving possession".

MR GLEESON: Your Honours, I'm conscious I've gone a little longer than our time. The remaining matters we have in-chief we can rely upon in writing though, firstly that, on the assumption that the court is unable to give a decision today, which we would expect would be the normal course, we are seeking a stay of the further orders. The reason appears from the affidavits which is that further expenses of in excess of half million dollars need to be committed to tomorrow. Willis has identified no reason why there cannot be a stay or a short extension of the 15 October delivery date. They do not put on any evidence to suggest they've got any other use for the engine, and that's unsurprising. So that's one aspect we seek to put on the table.

And the second is in terms of the orders, if we were successful. We've indicated in our submissions why it would be appropriate to make the orders that we do, and the – all the affidavits we have filed put beyond doubt that, if our construction is correct on the facts put to the court, we have given possession of everything. And the only things which are not in existence are records which cannot be created and would only be created on a return of an engine to Florida. And if they're not required to return them to Florida, we can't be required to create and give records today. So I've dealt with those two matters very summarily but if there's any dispute about those from the respondents, I might in reply pursue those two topics. If your Honours please.

McKERRACHER J: Yes, thank you Mr Gleeson. Dr Ward we are proposing to adjourn for an hour and a half, resuming at 1 pm your time until 3 pm if necessary. Will that be sufficient time for you?

DR WARD: Yes, your Honour. I think it's 3 pm our time until 6 pm our time – 5 pm our time.

McKERRACHER J: I'm sorry, 3 until 5 your time. Yes, correct.

DR WARD: Yes. That's adequate, your Honour. And hour and a half should be adequate for us to do what we need to do.

McKERRACHER J: All right, thank you. Well, we will resume at 3 pm Eastern Standard Time. Please adjourn the court.

ADJOURNED **[11.32 am]**

RESUMED **[1.01 pm]**

MCKERRACHER J: Yes, thank you, Dr Ward?

DR WARD: May it please the court. With respect to my learned friend, the solution to the central issue of construction is, in our submission, relatively straightforward. It flows from the text of the treaty and the protocol to the treaty. It does not necessarily require recourse to be had to the travaux préparatoires, because for the reasons that I hope I will give in the next half an hour or so, the language of the Convention and the associated protocol is in fact entirely clear. That said, we will take your Honours to the travaux préparatoires. You've been taken to an interesting footnote, which demonstrates that there was once a provision which made express reference to the underlying agreement of the parties as governing in all cases.

The obligations to positively return to wherever the agreement required return to take place. That express provision, that express language was removed, and you've been taken to the amendment to that section. What your Honours have not been taken to is the amendments to other provisions, which make clear that there was a consequential alteration to the language of the Convention and the protocol, to give rise to the commercial unreasonability tests, which now provide the so-called safe harbour provisions throughout. That is, the agreement remains fundamental to obligation, for reasons that I hope I will be able to explain. But there is now a commercial unreasonableness limitation on the parties' agreement. And the two changes in drafting occurred simultaneously and must be read together.

In our submission, the test is precisely that, as identified be the primary judge, that is, that the convention and protocol require, read holistically, upon the occurrence of an

insolvency event involving a registered aircraft object. The agreement of the parties to govern the obligations of giving possession, subject only to the fact that the remedy must be exercised a commercially reasonable manner. On no view of it, in our submission, on no view of it, could giving possession be affected by disclaimer; that is, by the administrator merely throwing up their hands and disclaiming legal possession to the object. That may be how domestic law operates, but it is not, for the reasons that I will explain, how the Convention and protocol operate, and of course they prevail over any Australian law, by reasons of section 7 and section 8 of the implementing legislation.

What I propose to do, is to work through the provisions of the protocol, and the Convention and then take your Honours to the preparatory material that my learned friend put before the court, but in a slightly different way. The question of interpretation, is not one to be conducted according to common law principles. We are not seeking to construe, despite the superficial attraction of Hocking v National Archives, we're not seeking to construe a common law conception of possession. We are seeking to give meaning to an international Convention, and to do so in accordance with the rules of interpretation provided by Article 31(1) of the Vienna Convention on the Law of Treaties. And that is so for the reasons given by the primary Judge, at paragraphs 58 to 61, with which we do not think there is any debate.

One has to interpret the Treaty according to Article 31(1) of the Vienna Convention holistically, in light of the object context and purpose of the provisions, and they must be read as a whole, not separately. That's the starting point, and that's where I propose to start. We adopt, with respect, the discussion of the primacy of the agreement of the parties of the primary Judge, given at paragraphs 107 and 108 of the judgment. We note that alternative (a) in the protocol, deals with practical matters of possession, not the illegal hypothetical constructs of possession urged upon you by our learned friend.

Could we turn to Article 11 itself, which appears in my copy of the bundle of authorities, behind tab 3, at page 89. And can I start by making this point. There are two alternatives; Alternative (a) and alternative (b). State parties were free to adopt either one. Australia chose to adopt alternative (a) and there is no dispute between us, I think, that alternative (a) is the more rigorous of the two. Would you turn, briefly, to alternative (b) and at page 91, you will see paragraph 2(b) of alternative (b) uses the words in alternative (b) that the debtor, or in our case, lessor must:

> *...give the creditor the opportunity to take possession of the aircraft object in accordance with the applicable law.*

That language is entirely different – entirely different – from what on our submission, and what the primary judge's construction is consistent with, is the much more onerous obligation in alternative A, to positively give possession. That distinction in language is not of no effect. There is a difference between the right to take possession and the obligation to give possession. My learned friend's

submissions, with respect, draw no distinction whatsoever between the two. The same may be said for the alternative remedies provided in article 19 – I'm sorry, in clause 19 – of the terms of the contract – the GTA, general terms of agreement, in this case.

Clause 19 provides for a number of different remedies, but there is certainly amongst them an obligation to redeliver, sitting alongside the possibility that my client could choose to take possession. That is consistent with both logic and the agreement of the parties, and the practical operation of the protocol. There is a difference, both in quality and nature, and in practical implementation, between the ability of a party to take possession, using if necessary the processes of deregistration and export that are provided for expressly by the convention, and the obligation – the positive obligation – to give possession, which exists only in the more onerous – option, alternative A.

It is clear, in our submission, that Australia modified its domestic insolvency regime by enacting the convention as part of domestic law by providing expressly that the convention would override any inconsistent provisions of domestic law and by selecting Alternative (a). We draw to your Honour's attention the fact that in Article 11, subsection 2 of Alternative (a), the language is mandatory, that is, it is the word shall. It is not something as to which there is any discretion. Could I say, at this point, that the position urged upon your Honours by our learned friends is unpalatable in the extreme. They would urge upon you this construction: that the administrators, in the event of an insolvency event, may retain physical possession and legal possession of an aircraft object up to and including one minute to midnight on the 60th day.

On the administrator's construction, through all of that time, there need be no communication with the creditor or lessor as to the intentions of the administrator. The administrator, on that construction, is required to maintain and preserve the aircraft or aircraft object for all of those 60 days up to one minute to midnight on the 60th day. But then, at midnight, by a simple act of disclaimer, it is said that the construction permits the administrator to disclaim ownership and thereby permit the taking of possession of the aircraft or aircraft object, wherever it is in the world. Without having cured any defects or defaults, leaving the valuable and fragile asset unmaintained, not, necessarily, in a place readily accessible, not even, necessarily, in a place or on an airframe that is owned or controlled by the lessor, as in fact was the case in one of the engine objects in this case.

The evidence in this case is that three of the engines were on Virgin airplanes, not VB LeaseCo, and one of them was on an aircraft pursuant to a further sublease to Tigerair. On the 60th day, following a disclaimer of technical legal possession, on my learned friend's construction, a creditor or lessor in the position of my client is expected to absorb or be on risk for the aircraft or aircraft object from that moment – from midnight on the 60th day – without necessarily having any practical means of accessing the object, and is expected to deal with all of the restrictions that may exist to ready access, including – as, again, was the case in this circumstance – the possibility of asserted liens from third parties, in this case, an asserted lien from

Adelaide Airport over one of the airplanes, which was not an Air Services lien, but another lien.

Now, this, your Honours, is entirely inconsistent with the proper construction of a convention and protocol that on any view of it are designed to enhance the rights of creditors and lessors. What that construction does not pay any service to is the obligation of the administrator during the 60 day grace period to have both determined whether or not they intend to utilise the object and to take such steps as are necessary to ensure that they can give possession by the 60th day. That is what the 60-day period is for; it's not to allow an administrator to sit on their hands for 60 days and then disclaim at the last minute. It is to permit an orderly return of the goods if they are not to be used, and to otherwise permit the administrator to reach the position that they intend to use the goods. Now, Article 11(7), which you find at page 90, provides a layout - - -

COLVIN J: Doctor Ward, how does that fit in with the requirement of clause 7, then, that possession can be retained during a period in which there might be steps taken to cure defaults? And the argument you've just also articulated suggests that the position advanced against you is that the administrator can foist the object on the lessor, when the way the argument was put that was it's an opportunity to take possession; it's not as if the lessor can be forced to take possession.

DR WARD: Well, your Honour, there's two questions and two answers. The first is that during the period of the 60 days, the debtor or insolvency administrator is expressly permitted to retain possession, but by the 60th day it must have cured all defaults. Now, during that period, it is possession – physical possession – in the sense described by Edelman J in Hocking. I don't, for a moment, equate the two, but in the same position as a thief who has physical possession, the administrator who has physical possession over the object is in a position, and is solely in the position, under Article 7, to decide whether or not they intend to keep the aircraft beyond the 60 day period – or the aircraft object – and is fully entitled to retain it up to that point, so long as defects and defaults are cured by that point in time.

The obligation to maintain, which exists in Article 5, is part of that obligation. The obligation to maintain – and this is, I think, the answer to your Honour's underlying question – the obligation to maintain is part and parcel of the permission to retain, and exits up to and only up to the 60th day, or until physical possession is given. So it might be an earlier point in time. The proposition that a return might be rejected can be dealt with in two ways. One is, if a creditor has not demanded the return, there is an answer to the question. The facts of this case are – and I can take your Honours to them if need be, but I think it's probably not necessary – there were repeated, unequivocal and clear demands for the return of the aircraft objects to the location in Florida. So the hypothetical simply doesn't arise.

It doesn't arise, in our submission, on the question of construction, either, because, as we put forward, the construction – everything in the parties' agreement is tempered by the obligation to act in a commercially reasonable manner. If it was the case that

physical return was offered but rejected, the party rejecting the return would not be acting in a commercially reasonable manner. But, again, that's not a matter that arises in the circumstances of this case in any way. Now, in our submission, it makes no sense at all for the concept of retaining possession, as referred to in subparagraph 7, to be a reference to just legal custody without physical custody, nor physical custody without legal custody.

It must be that retaining is the opposite of giving, and the retaining must be the retention of physical possession, because that is associated with the Article 5 obligation to maintain. And the obligation to maintain, of course, can only take place in the presence of physical possession. What we do draw attention to, your Honour, though, in Article 11(5), is the centrality of the agreement. The obligation in Article 5 to maintain is an obligation to maintain the object and its value in accordance with the agreement. The obligation in Article 7 is to cure defaults, again, defaults under the agreement. We place significance upon Article 11, subparagraph 10. My learned friend sort of sought to bat this away as being of no moment; it's of central moment:

> *No obligations of the debtor under the agreement may be modified without the consent of the creditor.*

In our submission, the plain intention is that the obligations of the debtor under the agreement are to be maintained throughout the insolvency process unless – for reasons that I will come to, the proposition that they be maintained is commercially unreasonable. There must be – there is necessarily, a modification of the rights of the creditor and the corresponding of the debtor if any of the obligations of return are the subject of variation by operation of the Convention or protocol. That is, not only not the intention of the Contention and protocol, it is expressly rejected by article 11.10. The maintenance of those obligations is central to an understanding of what is required by giving possession.

And I will make that good when I come back to the Convention itself, and another provision of the Convention, which again, was given scant attention by our learned friends. The references, your Honours, to other remedies in subparagraph 8 of article 11 go nowhere. It is common ground that the remedies on insolvency in article 11 are severable. That is, there are numerous remedies upon insolvency given by article 11. They are in no particular order. They are in no particular priority. The remedy of deregistration and redelivery is a default remedy. It arises where there has been a default by the debtor or lessee in relation to their – what is otherwise, their return obligations. It is a measure of last resort, your Honours, to deregister an aircraft and return it to the place of origin as a deregistered aircraft.

The concept behind it is straightforward. The civil aviation authorities of the state in which the aircraft happens to be located are required to assist the process. They are required to permit the deregistration from the register of that country and allow its export back to its place of origin. But that says nothing at all about the obligations of the debtor or lessee to comply with their primary obligation – or the insolvency administrators who stand in their shoes, at the time of the insolvency itself.

Certainly, it's a powerful tool. It provides a limited measure of comfort to those in the position of my client. That if all else fails they can take the drastic step of deregistration. Although, as my learned friend points out it would not have assisted in relation to the engines because they are not caught by the provision.

But it is a default provision, it's an alternative provision, and it is most certainly not something that can shed light on the other meaning – the meaning of the other provisions including article 11, subparagraph 2. By article – paragraph 11.13 we see that the Convention is as modified by article 9 of the protocol applied to the exercise of any remedies under the article itself. Now, I will come to the Convention, because we have to read the Convention and protocol holistically. Before I do so, could I just make one final point about article 11 which is in relation to the timing of the waiting period. It has been said – and this arises in article 11, subparagraph 3, it has been said against us that there is a strong or powerful benefit to lessors or creditors by reason of the 60-day mandatory waiting period cut-off.

Well, I don't know whether that's right or wrong in relation to some countries. But it's certainly not the case in relation to this country. The 60-day period in this country, when applied to the position of a lessor such as my client, represents a substantial detraction from what would otherwise be the law of the Commonwealth in the Corporations Act. My learned friend took your Honours to section 440B, which is a moratorium period on lessor's rights. But section 440B must be read with section 443B. and section 443B, has the effect that within 5 business days of an insolvency event and an administrator being appointed, the lessor must either be paid rent or alternatively be provided with a section 443B notice and be entitled to recover property the subject of the notice.

Failing which the administrators are personally liable for the rent. So in fact, the 60 day waiting period provides a moratorium for the purposes of the convention. That is 55 days worse off than my client would have been under the Corporations Act. And the Convention of course does not say anything about personal liability of administrators. Which again is another powerful difference between the law of the Commonwealth and the Convention rights. So it's simply inaccurate to have suggested that article 11 in some way represents a powerful benefit to creditors and lessors on their construction. I might also, while I'm just dealing with small points, your Honours, deal with this. My learned friend on, I think, two occasions referred to article 30 of the Convention.

I'm shortly to turn to the Convention, but the submission was made that article 30 of the Convention preserves Australia's domestic laws as the lex fori. And that that was in some way, of some relevance to the construction question. The submission is wrong. Article 30 of the Convention which I will turn to in a moment, preserves the procedural laws of the Commonwealth but not the substantive laws. We're dealing with procedural laws today, by having this hearing. This is an example of a hearing conducted under the procedural laws of the Commonwealth. But article 30 of the Convention does nothing to preserve the substantive domestic laws of the Commonwealth. In fact, there are other reasons that article 30 would have no effect

and that is that the protocol prevails over the Convention to the extent of any inconsistency between the protocol and the convention.

That flows from article 6 of the Convention itself. And article 11, subsection 9 makes clear that no exercise of the remedies permitted by the Convention or the protocol may be prevented or delayed after the date specified in paragraph 2. So we see through the operation of those three provisions, article 6 and 30 of the Convention and article 11, subparagraph 9 of the protocol that Australian substantive law has no work to do beyond the 60 day period. Now, if I could stay with the protocol for a moment, your Honours. Article 11, subparagraph 13 as I said provides that the Convention as modified by article 9 of the protocol applies to the exercise of any remedies under article. We then turn to article 9, which appears at page 87.

We see that article 9 is a modification of the default remedies provisions. It modifies remedies but subject to article 9.3. Article 9.3 in turn, provides that article 8, subparagraph 3 of the Convention does not apply to aircraft objects which includes the engines that we're dealing with. It's an extraordinarily convoluted way of drafting. But what then happens is the last words in article 9.3 of the protocol read:

> *…any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner. 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 the provision is manifestly unreasonable.*

Two things flow from that. The first is, it is utterly wrong for my learned friend's submission to suggest that the agreement has no work to do. Article 9 makes abundantly clear that the agreement between the parties remains the foundation of remedies for the purposes of protocol. The agreement is to be given work unless it is commercially unreasonable – that is it must be exercised in a commercially reasonable manner. And it is deemed to be commercially reasonable except to the extent that it is manifestly unreasonable.

Now my learned friends could have run a case, at any point at trial, that anything that was suggested was manifestly unreasonable. That case was not put; it's still not put, and now it's far too late to put it. What we propose is, of course, for reasons on the evidence commercially reasonable, but it is clear, in our submission, beyond any debate that what is proposed by Article 9, subparagraph (3) dealing with the default remedies provisions of the protocol, is that the agreement between the parties still has work to do, and it is the starting point. Far from being irrelevant, it's the foundation.

COLVIN J: But it - - -

DR WARD: My learned friend – sorry.

COLVIN J: But Dr Ward, it's not the last sentence that's significant, it's the second sentence, isn't it, that:

> *Any remedy given by the Convention –*

Not any remedy given by – and unless the Convention is to be reduced to nothing more than a party is entitled to enforce its agreement, we need to plumb the depths of what the remedies are that are given by the Convention first and foremost.

DR WARD: And your Honour, I will take your Honour to that provision in about one minute's time. Could I answer the question now though, so that your Honour is not left in suspense. The answer is given by Article 12 of the Convention, which picks up the agreement and remedies agreed upon by the parties. So it does precisely that in relation to remedies. It doesn't pick up all the agreement of the parties, it picks up the agreement of the parties as to remedies in Article 12 of the Convention, described as additional remedies. That is the answer to your Honour's foray. Just to give a level of comfort about this, your Honours, before I turn to the Convention and then to the preparatory works.

My learned friend took you this morning to the article by Dr Senam Sedover, a portion of which was extracted in the judgment. Do your Honours have that article before you? I think it was sent by email this morning by our learned friends, and if so, could you turn to page 185, and at the foot of page 185, Dr Sedover is dealing with the remedies of a secured creditor and is identifying the remedies of repossession as being one of the remedies and is articulating the proposition with which we agree that all remedies, including the remedy of repossession, which is something that we say is subtly different to the obligation to give possession, but that it should be exercised in a commercially reasonable manner.

Dr Sedover is then discussing how to determine what is commercially reasonable or unreasonable, and at the foot of the page, says the following, first – I'm sorry, a convention should be – he extracts the provision:

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

Dr Sedover identifies that a security agreement, however detailed, cannot be expected to cover all possible aspects of repossession. If a particular aspect of repossession is not dealt with in the security agreement, questions of compliance with commercial reasonableness shall have to be examined under the convention. I don't need to say anything more about it, it is clear that Dr Sedover starts from the correct proposition as we would have it, which is that the security agreement is the starting point. It is not only of no relevance, it is of fundamental relevance, which is what the primary judge was doing at 108 and 109 and 109 to 110.

Now, could I take your Honours to the Convention itself. Can I start at Article – in fact, I might start at Article 6 if I may or Article 5. You will find that at page 57 of the book of authorities, behind tab 2. As I opened, the question of construction is to be governed by Article 31 of the Vienna Convention on the Law of Treaties. I should make clear to your Honours, lest there be any doubt about it, that Article 31 is the rule of interpretation. Article 32 provides that in certain circumstances, recourse can be had to the travaux préparatoires, but only in certain circumstances. In our submission, your Honours will not need to have regard to the travaux because of the clarity of what we are putting in relation to the holistic reading of the Convention itself.

But I will go through the travaux and make the submission that in fact, far from being inconsistent with the propositions we put, it's entirely consistent. Could I turn though, to Article 5, which is the interpretation and applicable law provision, and make the point that in Article 5 and subparagraph (1):

> *Regard has to be had in the interpretation of the Convention to the purposes of the Convention as set forth in the preamble, as well as its international character and the need to promote uniformity and predictability in its application.*

But I first make the submission as to uniformity and predictability. That there is nothing that would provide more uniformity and predictability than the proposition that parties who have entered into express agreements, dealing with defaults following insolvency, would ordinarily be expected to comply with those provisions. Every party in the world would understand that that is the starting point, unless the provision was manifestly unreasonable in the circumstances that arose. My learned friend says, "Well, some creditors might not have return provisions in their agreements".

Well, your Honours, that is precisely the point. Parties – the starting point is the parties are held to the bargain that they have struck. If you strike a good bargain, you have a good bargain. If you strike a less good bargain, you have a less good bargain. But that doesn't promote instability or uncertainty. The proposition of certainty is the starting point of the parties' bargain. Could I then take your Honours to the preamble, which we find at page 52. In typical international language, the state parties to the Convention are aware of some things and recognise things, and are mindful of somethings, but they then believe that such rules much reflect the principles underlying asset-based financing and leasing, and promotes the autonomy of the parties, necessary in these transactions.

So the autonomy of the parties is front and centre, and your Honours are directed, with respect, to have regard to it, as part of the object and purpose of the treaty, which is expressly part of the Article 31 interpretation exercise. Could I then go to Article 8. Article 8, your Honours, is the interesting provision, which is excised, in part, by article 9.3 of the protocol. And this is where the complexity arises. Nothing eventually turns on it, save for some complex drafting. Article 8 provides for

remedies of the chargee. Now, a chargee is not a lessor. So these are remedies of a chargee. A chargee – what's that. Yes. A chargee, your Honour, is not a lessor, your Honours, and article 8 provides for remedies in relation to chargees.

It provides, in article 8 subparagraph 3, that any remedy set out in subparagraph 1, or in article 13, must be exercised in a commercially reasonable manner. And then you see the same language that is – appears in article 9. What occurs is that the language of article 8(3) is essentially extended by article 9(3) of the protocol to lessors of aircraft objects. That's the effect of what occurs. It's a complex way of doing it, but that's the effect – what was the page number of the – just pardon me one moment, your Honour. In the bundle of authorities, your Honour, at page 682, your Honours might just perhaps take a note rather than going to it now – your Honours will find Professor Goode, at paragraph 2.100, identifies the problem and the distinction between the rules governing the remedies of a chargee and the rules governing those of a conditional seller or lessor, under the convention.

And it's to that, that article 9, subparagraph 3 seems to be primarily directed. Now, articles 9, 10 and 11 of the convention – back at pages 58 and 59 – provide for a variety of remedies. Article 10 deals with the remedies of a conditional seller or lessor. That article 10 provides for the taking of possession, in article 10(a) as a remedy. It permits the seeking of a care order in certain circumstances, but then, as I put to your Honour, Colvin J, article 12 provides plainly for additional remedies. And the additional remedies are those permitted by the applicable law. Now the applicable law is both the contract and the law of the lex fori Australia, including any remedies agreed upon by the parties.

Now your Honours have been taken conveniently by my learned friend to the remedies that have been agreed upon by the parties in this case. They exist in clauses 18 and 19 of the general terms of agreement. There is no doubt that they are remedies agreed upon by the parties, and article 12 of the convention expressly provides that

They may be exercised subject only to one carve out, to the extent that they are not inconsistent with the mandatory provisions of this chapter as set out in article 15. And so article - - -

COLVIN J: I'm sorry, I didn't mean to interrupt. Those opening words then, you read, "permitted by the applicable law" as excluding the insolvency law of the applicable law?

DR WARD: I do, your Honour, and we must do that because the insolvency law of the Commonwealth has been expressly overridden by the other provisions of this agreement, of the protocol and convention. It's not circular although it may sound circular. There is an express grant of remedy in article 12 which gives effect to the parties' agreement and there is nothing inconsistent in Australian law which would not permit full effect to be given to that clause. And that is particularly so, your Honour, because of article 11.9 of the protocol which prevails over the convention in

any question of inconsistency. So to the extent that your Honour were minded not to accept my first point, the second one nevertheless saves it. Which is that article 11.9 of the protocol would be inconsistent with the restricted view of article 12.

So in our submission, your Honours, the - - -

COLVIN J: Sorry, just following that through, why then does article 30, sub-provision 2 have this notion of impairment of the effectiveness of an international interest, where that interest is effective under the applicable law? So article 33B deals with the procedural point to which you've already adverted, but what are we to make of article 30.2?

DR WARD: Your Honour, an international interest in the insolvency proceedings where the interest is effective under the applicable law, if the interest is effective under the applicable law, then the convention neither adds nor derogates from it. And I think that's the effective article 30.2. The international interest – article 30.1 is the operative provision. The international interest is effective if, prior to the commencement of any insolvency proceedings, the interest was registered in conformity with the convention. That is the operative provision so it is simply giving effect to the processes of registration but it's providing that, if the domestic law had provided for an enforceably registered interest or an effective interest, nothing in article 30.1 should be taken to derogate from that domestic effectiveness.

And I think that is the answer to your Honour's question. It's the – my learned junior correctly prompts me as to a point that I was going to come to shortly which is it is essentially what we would describe as the PPSA point. Which is referred to in judgment paragraph 27. At judgment paragraph 27, his Honour identifies that my clients have a secured interest for the purposes of the PPSA Act. That is a secured interest which would be effective under domestic law, and it is not of no effect, because we also have convention rights as an international aircraft objects, registered under the convention.

COLVIN J: So these rights – as conferred by the convention, before we go to the protocol – you say, are unconstrained at all by domestic insolvency law?

DR WARD: Yes, your Honour.

COLVIN J: And then, plainly the protocol does something about insolvency law, but notwithstanding all of those provisions, you say you get to the end point where that continues to be the case – that is, the rights under the agreement continue to apply, irrespective of the domestic insolvency law.

DR WARD: Exactly, your Honour. Yes. In our submission that is clear, with respect, beyond almost doubt.

COLVIN J: Well, seems to be a lot of language to do no more than say that your agreement rights will prevail over any domestic insolvency law.

DR WARD: Not quite, your Honour, with respect – your Honours, part of the difficulty with this case is that we are dealing with a particular set of circumstances, in this case, and that's both a blessing and a disguise. The blessing is that there is a complex, well drafted and we say enforceable contract at the heart of this dispute. Not every creditor will be in that position, and to the extent that a party – as perhaps I indicated a few moments ago – to the extent that a party may not have the benefit of a well-constructed, commercially complex agreement, the article 11 remedies on insolvency, and the convention remedies on insolvency will have a lot more work to do. That's the - - -

COLVIN J: So you say this is to super add to the rights under the agreement, rights which these parties don't have, by operation agreement – to confer upon them, in spite of domestic insolvency law, additional rights to be exercised according to the convention.

DR WARD: That's exactly right, if they have an international aircraft instrument, or interest.

COLVIN J: But if they have them in their agreement, then they can be confident in the knowledge that it doesn't matter what any contracting party to this convention says: insolvency law means nothing.

DR WARD: Well, domestic insolvency law means nothing, your Honour, yes. And that's – that's made even clearer by the terms of the influencing legislation in this country, which provide expressly that the convention and protocol prevail to the extent of inconsistency with domestic law. It is not necessarily the case that the contract will apply in all its terms, all of the time, because of the caveat and the carve-outs of manifest unreasonableness and commercial reasonableness. But domestic insolvency law in our submission, it is clear, has no work to do. Now, your Honours – your Honours will appreciate that the construction that both the primary judge adopted and that we urge upon your Honours as being, in our submission, clear from the holistic reading of those paragraphs, emerges because of the centrality of the parties' agreement – tempered by, as I just said, the commercial unreasonableness provisions.

That is also, in our submission, what flows from the – a more detailed review of the preparatory work of the conferences leading to the treaty. Could we start – I will take your Honours to the travaux now – and I do so against my submission, which is that article 31 – sorry, article 32 of the Vienna Convention Process is not triggered. That is, the meaning of the give possession provision is not so manifestly ambiguous or uncertain as to require recourse to the travaux, but in response to my learned friend's submissions, we will nevertheless do the exercise. Could I turn, your Honours, to tab 11 of the bundle of authorities, and to – I think – page 308.

COLVIN J: Sorry, you just broke up when you gave the page numbers.

DR WARD: I'm sorry. Page 308, your Honour.

COLVIN J: Thank you.

DR WARD: Now, this is the footnote, or the note upon which my learned friends place a great deal of emphasis. It is a reference to the language which used to appear in an article 19, which made express reference to the agreement of the parties. We accept that the language once made express reference to the agreement of the parties, and that that language was modified. The modification, or the explanation for modification that appears from the written record of the travaux goes no further than what appears at this page – that is, Mr Wool says:

> *This is not what was intended. The duty to return in proper condition is meant to be confined to cases where that duty is part of a secured obligation.*

Now, two things flow from that. The first is – the parties' agreement is central to it. It is clear beyond any doubt, in our submission, that that note is highlighting the nature of the obligation struck between the parties. There is either a secured obligation or there isn't. In our case, of course, we have a secured obligation. We have a PPSA security, and we also have a convention security, so they're secured twice. What doesn't come from the drafting changes that follow is – any reference to abandonment of the principle of giving possession, nor any insertion of the disclaimer proposition my learned friends contend for.

Instead, what we have is the realigning of obligation, such that redelivery will occur when it is required by a secured obligation, or secured contract, subject to the commercially reasonable constraints. And I need to take your Honours to the insertion of the commercially reasonable constraints because they did not appear, prior to this drafting change. In other words, it was not the cause that the drafting change was simply the deletion of an express reference to the agreement of the parties. What occurred was the modification of language in article 11 of the protocol throughout, and the insertion of language dealing with commercial unreasonableness – being the provisions that I have taken your Honours to a moment ago.

Can I take your Honours to page 294 and 295, a few pages earlier – which is in what is there, numbered article 12. Your Honours will see that, although this is numbered article 12, it's the language of what becomes article 11 of the protocol. And your Honours will see, in clause 3(b), the words which have been described in the note as now being in square brackets. That's at page 295. So if the obligation is to give possession of the aircraft object to the obligee, and then in square brackets, in accordance with and in the condition specified in the agreement and related transaction documents. Those words are in square brackets, and your Honours are aware that they don't end up in the final version, in that form, of what becomes article 11.

What your Honours will also see is that there is no reference in that draft of article – what is then article 12 but becomes article 11 of the protocol – there is no reference to what becomes subparagraph 13, being the commercially reasonable obligation. So there are two drafting changes, at least, each of which happen in lockstep, ultimately

in the final draft of what becomes article 11. One is the removal of the express reference to agreement of the parties, as being the – in all cases, the defined basis of obligation. And what we're left with instead is the process which I've articulated to your Honours of Article 12 of the Convention remedies – additional remedies – flowing through into the consistent references to the agreement of the parties as being the source of obligation. The obligation of giving possession and the insertion of the commercially reasonable test in Article 11 (13).

If your Honours' go to tab 13 – if your Honours go to tab 13 at page 501, where we see the language inserted in a different – again, in a slightly different form. But the gist of it is now appearing for the first time. We have at page 501, in what is then now Article 9, so the numbering keeps changing – it's now defined to be Article 9, but again, it becomes Article 11. We see – I'm sorry. This is Article 9, which stays Article 9. We see for the first time, the insertion of language that Article 8.2 of the Convention shall not apply to aircraft objects, that's the deletion of, or the excision of what becomes Article 8.3. And we see the insertion of the words, "an agreement between an obligor and an obligee as to what is commercially reasonable, shall, subject to paragraph three, be conclusive".

So we start to see this language being introduced, and it flows through, and as I have said, your Honours, I think your Honours can probably, without going through each of the following steps, see that it concludes in the version which becomes Article 11. Just pardon me for one moment. If your Honours would then turn to page 606, behind tab 14. And this is now very close to what becomes Article 11. Your Honours see that at paragraph two, we now have the final language: "Shall, subject to paragraph seven, give possession of the aircraft object to the creditor". We have the insertion of subparagraphs (13), the Convention as modified by Article 9 of the protocol, shall apply to the exercise of remedies under the Article. So in the previous draft, Article 9 was modified to insert the commercially reasonable test, and that is then picked up in the spinal draft of Article 11 in Article 13. Pardon me for one moment, your Honour.

So your Honours will see that in our submission, the drafting did not change just in relation to the removal of the express reference to the party's agreement. That removal, or that alteration, took place in the context of other references to the party's agreement. It cannot be said that the removal of the language rendered the party's commercial agreement of no effect and of no relevance. To the contrary, it was a steppingstone on the pathway to the final form of the agreement, but in the protocol and the Convention read together, which provide collectively for the commercial reasonableness of the agreement deemed to be commercially reasonable unless manifest to be unreasonable. And that, your Honours, gives meaning, and all the meaning that we need to the obligation of give possession. What is required to give possession, is at a starting point, what is agreed between the parties to do so.

In some circumstances, that may mean nothing more than the default provisions provided for in the Convention and protocol itself. As my learned friend would have it, in some circumstances that may mean nothing more than the default deregistration

and export provisions. Where the parties have agreed expressly to give possession in a particular way upon an insolvency event, and where that obligation is secured, as ours is – as the PPSA and Convention's security, the starting point for article 11 is that is the source of obligation unless it is manifestly unreasonable to comply with. That is also consistent, your Honours, in our submission, with the object and purpose of the Convention. It is consistent – entirely consistent with the object and purpose of the domestic implementing legislation.

His Honour, the primary judge, made reference to the second reading speech, at paragraph 115 of the judgment. Could I draw your Honours' attention – I think – I won't take your Honours to it now in the interest of time, but would your Honours have regard to tab 1B, in which is the second reading speech, and pages 4215 to 4216 of the Hansard, which identify the need that was at the heart of this legislation – to provide preferential financing of international aircraft objects – engines and other aircraft, for Australian airlines, including specifically-identified Virgin. And, may I say, your Honours – the second – I said a moment ago, there were two reasons that the facts of this case tended to distract. The second of those reasons is this: it may well be the case that the obligations in this case come with a certain expense.

Your Honours should be aware, although I won't belabour the point, that there is a dispute between the parties as to the cost of redelivery – a substantial dispute. My learned friend's proposal was, during the course of the first instance proceedings, that it was necessary to fly the airplanes – fly the engines on the wings of the airplanes on which they were located – individually, one at a time to Florida, take an engine off in Florida, fly the aircraft back by putting another engine on it, mount another engine on it in Australia, fly it over again, and that was undoubtedly an expensive and convoluted pathway. My clients did not accept that it was the most efficient way, nor the most cost-efficient way, of doing it.

Being reasonable, we agreed to it – only to discover about two weeks ago that it was now no longer proposed to be the most efficient way of proceeding, and in fact – the most efficient way of proceeding was now said to be that the engines should be removed, and that a Emirates Boeing 777 should be chartered for the special purpose of freighting each of the engines to the United States. And again, we do not accept that that is the most cost-efficient way of doing it, and there is a great difference between us as to price. My point, though, is this, your Honours: the interpretation of the Convention must take place absent the peculiarities of the facts in this case, which are that the engine lessor is located in the United States, and the engines have ended up in Australia.

It could as easily be between a lessor located in Australia, seeking redelivery between Melbourne and Adelaide. It could as easily be between a financier in London seeking redelivery of an object from France. The costs are not relevant to the question of interpretation, and much of my learned friend's submission touched upon what was described repeatedly as the onerous obligations on administrators. Well, there are two answers to it: one is that the onerous obligations on the administrator arise here to the extent that they are onerous because of the peculiarity

that the airline chose to obtain engines under lease arrangements from a location in the United States.

That is not something for which my client should bear the risk – when my client believed, and continues to believe, that it has the substantial protection of the Convention and protocol rights. That is the basis upon which finance or engines are provided on preferential reduced bases to that which prevailed prior to the Convention and protocol being given the force of law in Australia. And it matters not to the question of interpretation that by chance – by happenchance in this particular fact situation, we are dealing with a dispute between an American lessor and an Australian administrator. And that, your Honours, is a point made by Gray, Gerber and Wool in the articles extracted at judgment, paragraphs 128 to 133.

Now, your Honours, to the extent that reference has been made to the United States Bankruptcy Code being the genesis of what now appears in article 11, may we just say this: there, I think, is no dispute that substantial similarity existed between the United States Bankruptcy Code and what became article 11, but the Capetown Convention was to enhance section 1110 of the Federal Bankruptcy Code. It was – Alternative (a) was modelled upon it, but was expressly said to enhance it, and your Honours will find that in judgment paragraph 129, and for that reason, his Honour was correct – the primary judge was correct to find that the United States' cases were of little assistance. Now, your Honours, we spent some time discussing the facts of this particular dispute, and those facts are relevant, because they explain the very dilemma and the very vice that the Capetown Convention is directed towards.

And in our submission, the Court will be very reluctant to adopt an uncommercial, and, in our submission, a quite prejudicial construction of a provision in the face of what we say is a clear indication that the primacy of the parties' agreement is to be at the heart of the construction question. The construction that my learned friend urges upon the Court imperils the ability of a lessor to identify its property, to locate it, to access the physical aircraft objects, to identify the records and the data which is an essential and integral part of the aircraft object, and then imperils the ability to actually take possession of the aircraft objects. Now, my learned friend's answer to that will be to say – well, there's a default provision there that can be relied upon, which is the deregistration and export provision, but that's no answer.

The existence of a default provision, which is on any view of it – draconian, and which requires expense and effort, is no answer to the proposition that it is an uncommercial and not commercially sensible approach that is urged upon the Court. In this case, your Honours, there is – a declaration was sought – I'm sorry, I withdraw that. On the appeal, your Honours, a declaration is sought that the appellants have complied with their obligation to give possession. That declaration is sought without any identification of the date upon which it is now asserted the possession was given. It might be suggested that 18 June 2020 was a date upon which it said that possession was offered in the technical sense that my learned friend would have you believe possession can be offered, but that is simply not consistent with the facts as the primary judge has found them.

Your Honours will see at judgment paragraph 32, that the consistent position of the administrators was that the aircraft objects – that is the physical engines, could be possessed on an as-is, where-is basis by my clients in some way physically accessing the airplanes, and at their own cost, and perhaps even using their own mechanics, removing the engines from the wing of an aircraft. Now, can I say two things about that, your Honours. The first is, it is not obvious to any of us that our clients would have a legal entitlement to access the tarmac of an Australian to remove an engine. It is also not always going to be the case that the aircraft operator is the same entity as the lessee of the engines. And, in fact, that was not the case here. Putting to one side the distinction between VB LeaseCo and Virgin, one of these engines had been further subleased to Tigerair, which was an entirely different operator, operating under an entirely different operator certificate.

And it is not clear at all that our clients would have had any entitlement to access a Tiger aircraft to arrive one day with a fleet of mechanics and seek to dismantle a Boeing 737 and put an engine in a crate and send it back to America. Not only that, your Honours, but we were not even aware that our engine was on a Tiger aircraft, which demonstrates the point at a very fundamental level: it is the obligation of the lessee to inform, through the provision of records, which are an integral part of the aircraft objects, as to all matters relevant to the engine. Now, not only was the administrator, in this case, not in a position to do that for many, many weeks after 18 June, the engine stands, which are associated with each engine, were also defined to be aircraft objects. We had to write to the administrators reminding them of the serial numbers of the engine stands and the associated quick engine change kits.

We were notified of the location of the engine stands for the first time on 18 June. We were told that they were in Atlanta, in the United States. They were required to move the engines. It turned out that Virgin was unable to procure replacement engine stands in this country to enable the removal of the engines, and our engine stands have to be flown, apparently, from the United States to Australia for the purpose of removing the engines from the aircraft located in Australia. On 19 June – again, referred to a judgment paragraph 42, so this is after the 60-day period – my client was told that it needed to engage Civil Aviation Safety Authority approved staff to remove the engines itself.

It was told that because there was no facilities in Adelaide, the engine that was located in Adelaide had to be flown on the aircraft located in Adelaide to Melbourne to enable the removal of the engine. We were then told, very belatedly, that a lien was asserted over the aircraft located in Adelaide, and, apparently, as recently as 5 August, negotiations were continuing between the administrator and the third party who asserted that lien to obtain access to the aircraft. It was not until 8 July 2020 – and your Honours find this at judgment paragraphs 45 to 46 – that a data room was provided with the vast majority of what we call the historical operator records. In no sense was there the giving of possession of the aircraft objects, including the essential records, on 18 June 2020.

There are two types of operator records; they are historical operator records and end of lease operator records. Each of them are essential. The historical operator records, which your Honours will find referred to in the affidavit of Mr Derych Warner – that's D-e-r-y-c-h for the transcript – which is behind part C tab 19, your Honours will find that the historical operator records were mostly provided by 8 July, but not completely. There were historical records for something called a hydro mechanical unit that were not provided even by the date of the trial on 31 July 2020, and your Honours find that at paragraphs 16 to 18 of Mr Warner's affidavit.

Your Honours should be aware that without these documents, the engine assets have limited – very limited – value. It seems to be common ground that in the absence of historical operator records, the engines would not be capable of being fitted to another aircraft without substantial recertification work at significant expense. The historical operator records, your Honours, in part, were not provided because Mr Algeri, for reasons described in the judgment, deliberately instructed the Virgin technical staff not to provide them because there was no commercial benefit to the administrators in their provision.

And your Honours will see the references to those in our written submissions. That is, first, something that is unfortunate. Secondly, flies in the face of the proposition that possession was given in any meaningful sense at any point in time. And, thirdly, describes the very reason that the convention and protocol protections should be interpreted in a manner which is expansive and consistent with the underlying concept of protecting the interests of a creditor. My clients were not provided with the historical operator records for many, many weeks after the 60-day period expired. Whatever might be said about common law construction of the term possession in a strict legal sense, the failure to provide access to the historical operator records amounted to a failure to provide possession of those items.

The end of lease operator records, which your Honours will find it Mr Warner's affidavit at paragraph 19, are equally significant. It is the case that they cannot be provided until the end of a lease. That is because they, at least in part, must be provided at the point in time when the item is actually returned. Only the operator can provide them. Only the operator has access to the records to provide them. My clients will never be in a position to know whether, for example, an engine has suffered an engine fire during the course of its operation with the airline. My clients will never know, in the absence of the end of lease operator records, whether the engines are safe to be reinstalled.

There is a subset of the end of lease operator records described as the serviceability tags. They are the result of what's called a part 145 inspection; that refers to part 145 of the United States Aviation Regulations. A part 145 inspection, your Honour heard my learned friend from the bar table today make the rather startling – to us – submission that it would cost half a million dollars to conduct a part 145 inspection. Our evidence of Mr Warner is at paragraph 36 that the cost would be in the order of US$45,000 per engine, a substantial reduction on the quote that seems to have been estimated by my learned friend. And we're told, in recent affidavit evidence from

Mr Algeri, that one of the most substantial parts of inspection – being what's called a borescope inspection, of the internals of the engine has been conducted and no issues have been found.

The part 145 inspection can't be done, obviously, until the engines have reached a part 145 workshop. There are some accredited facilities in Australia, there are others in the United States. There is no obvious impediment to that inspection being done. May I say this, your Honours, about the facts: the proposition that disclaimer is enough – which is at the heart of my learned friend's submissions – is simply wrong. It is commercially insensible and it is completely inconsistent with the coherent construction of the protocol and Convention, together. It is commercially nonsensical because it would place a person in my client's position in a practically impossible position. It would allow the administrators to retain physical possession of an aircraft object for the full 60 days, to take no steps towards redelivery until the 60th day, then to abandon the object wherever it happens to be in the world. And it need not be in Australia, your Honours are dealing here with a particular set of facts, which involved a domestic Australian airline.

We could just as easily, your Honours, have been dealing with an airline that flew to more remote countries in the world where access would be perhaps difficult but not impossible. You may well be dealing with places in the world where aviation access agreements are impossible to come by, other than for the licenced operator that had the particular flight approvals to that country. The practical impossibility of what is proposed, the coherent approach to the protocol and Convention, and the fact that the commentaries, and particularly, Dr Sedover's commentary, make clear that there is still some substantial work to be done for the agreement, throughout the protocol and Convention, in our submission, make clear that his Honour's approach is correct.

And that the obligation to give possession means much more than the disclaimer which Mr Algeri assumed, as an experienced Australian domestic insolvency practitioner, was all that was required of him by Australian insolvency law, and therefore by the Convention and protocol. On the facts, your Honours, even on the facts of this case, an administrator's lien was sought as recently, and right through to the end of the proceedings of first instance, and it may well still be sought today. Only up to 31 July. But the existence of a claimed administrator's lien just demonstrates the force of the proposition, that give delivery means the taking of a positive act on the part of an insolvency administrator, and much more than a disclaimer. Unless there's anything else I can assist with, those are our submissions, your Honours.

COLVIN J: Dr Ward, do you maintain that if the appellant's construction is accepted, that as at today, there has not been the giving of possession?

DR WARD: Yes, your Honours. Because the end of lease operator records have not been provided.

COLVIN J: So you say that even if possession is given by the – providing you with the opportunity to take possession and taking no steps on the part of the administrator to assert possession, so that you're entitled to possession of the aircraft objects, that there is – there remains some document that needs to be provided, in order to give possession.

DR WARD: Your Honour, there are two propositions wrapped up in that. The first is, your Honour, I think, after question of my learned friend about whether Article 11.2 of the protocol carried with it an implication that there be no impediment to the taking of possession, and perhaps that was what Article 11.2 meant in its proper construction. And I will answer your Honour's current question in this way, Article 11.9 is a complete answer to that proposition. So the taking of possession, or the proposition that making available the goods to be taken, is enough, is inconsistent with the express reference in Article 11.9, to the prevention of the exercise of remedies. It's dealing with it expressly, so no implication is required in subparagraph (2).

The second point is, your Honour, at a factual level, on our construction, if delivery – on my client's construction, if delivery was positively given in the sense of a physical transfer, everything would have been given if it was delivered to Florida, save for the part 145 inspection records and other end of lease operator records. I think your Honour then asked if the administrator's construction was accepted, do we accept that possession has been given and the answer is no.

COLVIN J: Because?

DR WARD: Well, first because we would need an opportunity to take possession that is meaningful and secondly, because all of the operator records, being the end of lease records, would still not have been provided. But that assumes that your Honour is not accepting the force of the submissions that we make about the nature of the obligation to give possession.

COLVIN J: Well, yes. What I'm interested to know is whether there is a factual issue that still needs to be determined as between the parties, in order to determine whether possession has occurred or not and whether the parties would, in the event that the appellant's construction was accepted, be fighting over the consequences of delaying giving possession. I know the appellant's saying there hasn't been delay, or whether there is still a substantive issue about whether possession has been given even if the appellant's argument is accepted.

DR WARD: But there would be an issue, your Honour, in relation to whether possession had been given even on those terms. There would, in any event, if your Honour was not minded to accept our submissions, there would, I think have to be a remitter on a number of issues, including the question of what costs have reasonably been incurred to date given the competing evidence about those costs.

COLVIN J: Well, do I take it from that submission that, if we were to deal with the construction question, your position would be that there would otherwise need to be a remitter?

DR WARD: If your Honours accept our construction question, then the orders that require delivery of the goods by 15 October should be complied with.

COLVIN J: Yes.

DR WARD: It's only in the alternative that there would need to be a remitter.

COLVIN J: Yes, thank you.

DR WARD: Your Honours, I at this stage, I think I will say nothing more about the proposition that there be a stay, save for this. There is a dispute as to the – as your Honours have heard, a dispute between the parties as to the path by which we have arrived at this much delayed date. In our submission, if proper steps had been taken to efficiently move these objects to the United States as they should have many weeks ago, we would not now be facing first of all a delay. Secondly, time pressure in relation to the 15 October date and thirdly, the proposition that it is necessary to charter an entire aeroplane to fly the four engines to the United States. There are alternative quotes. Your Honour will find Mr Algeri filed an affidavit dated 18 September 2020, which I think is not in the appeal books because it was so late. At paragraph 14 of that affidavit, there is a proposal for the Emirates 777 freighter aircraft and there is also a reference at paragraph 16 and exhibit SA1 to our alternative proposition for about half the price using Qantas. Those quotes are related to delivery by 15 October, which is a date which we remain of the view is achievable. Otherwise, in relation to the stay, can I simply say this. Any stay should be given on terms and the terms should be as to an undertaking as to damages which has not been offered.

MCKERRACHER J: All right. We might come back to that question, Dr Ward. When you say you don't want to say anything more at this stage on a stay, subject to a certain undertaking and what might be said about that, I think we ought to be inclined to grant a stay, but with liberty to apply to ventilate such matters which haven't been adequately ventilated at this stage, if that's your contention. Is there anything more you want to say in relation to that, Dr Ward?

DR WARD: I would press, your Honour, the proposition that there should be an undertaking as to damages. On any stay, my clients are shut out from their goods and have been for some time.

MCKERRACHER J: Yes, thank you.

DR WARD: Thank you.

MCKERRACHER J: Mr Gleeson, perhaps you could deal with that stay proposition first.

MR GLEESON: Yes, if your Honour would pardon me for one moment.

MCKERRACHER J: Certainly.

MR GLEESON: Right, your Honours, the factual position is that Mr Ward's clients have never identified any prejudice they suffer in the event they win if there a short delay or extension to the 15 October date. They have not identified they have any customer for the leases, so at the moment, on the balance of convenience, there is no prejudice they have identified if there is a short stay. In terms of an undertaking, I am not instructed to give an undertaking as to damages so we press for the stay on the limited basis without the support of an undertaking.

MCKERRACHER J: To be specific, sorry if I'm interrupting, the stay inclusive of orders 5, 6, 8 and 12 of Middleton J's orders, I think, save the same as I saw a short time ago.

MR GLEESON: Yes, that's correct, your Honour.

MCKERRACHER J: Well, it may be that a stay could be granted, but there would be liberty to apply within two days to deal with the question of other matters which may be sought to be raised. It seems that – speaking for myself, I think I would be inclined to grant a stay until determination of the appeal but with liberty to apply to any party to revisit the question of the stay.

MR GLEESON: We submit that's an appropriate course, your Honour.

MCKERRACHER J: All right. Well, I will give my colleagues the opportunity to express their views.

DR WARD: Your Honour, there would be a difficulty in relation to the 15 October date in the judgment, that's all. And we press strongly for the maintenance of that date.

MCKERRACHER J: Yes. Well, I think I might confer on that issue after we have heard from you give a reply, Mr Gleeson on the other substantive points.

MR GLEESON: Thank you, your Honour. Could I deal in reverse order with Colvin J's question about on the assumption we were successful whether a remitter is needed. There are two aspects to a possible remitter. One is the question of the quantification of the reimbursement in respect to the expenses incurred to date under the orders. The respondents do not submit that in principle we would not be entitled to restitution and we have given you the authorities to support the basis of restitution. As to quantification, it would be appropriate to frame that order as agreed and if not,

as remitted, to the primary judge. So we accept a remitter on the question of reimbursement.

In respect to the question of giving of possession, we submit that this court is able to reach the decision we seek, that possession has been given on the facts as proven. The only matter that Dr Ward has referred to is the question of the creation of the end of lease records. However, if we are correct we gave possession in the sense of the opportunity to take up the engines back in late June. That opportunity has been there for that period, and it's never been taken up by the respondent through their own choice. The records that we have to make available under our possessory obligation include all records which were in existence – or which with due care, should have been in existence at the date the possession is offered in respect to the tangible equipment. The end of lease record by definition do not meet that test. They only come into existence if the respondents are correct, that they were entitled to require us to engage in the positive redelivery obligations that they assert.

Your Honours, could I then just return to the main issues and only deal with a couple of discrete points if I might. The first is that there appears to be a new argument based on article 12 of the Convention. Which is a notice contention point because you won't see any reference to it in the judgment. And you won't see any reference to it in Dr Ward's written submissions. As it was advanced this afternoon, if your Honours have article 12 which is on page 60 – this is in the Convention. Dr Ward's argument is that any additional remedies, that is beyond the remedies of article 8 and 10 – are including those in the contract, are permitted even within a domestic insolvency situation. And he agreed with your Honour Justice Colvin that that was a fair summary of his argument.

If that argument were correct, your Honours don't need to open the protocol. What that is saying is that any remedy in the contract of any nature is made available by the Convention, subject only to the constraint it be exercised commercially reasonably. Middleton J made no reference to any such argument. We would as your Honours respectfully to reject the argument. It fails to take account of the words, permitted by the applicable law. And the applicable law must include the domestic insolvency regime. And so one is thrown back to section 440B of the Corporations Act, to see what remedies are available within an insolvency. Your Honour Justice Colvin asked about article 30, in particular paragraph 2.

Dr Ward's answer to that question is probably correct, that was article 2 is doing is extending the concept of effectiveness beyond paragraph 1 which is registration under the Convention to the case where the applicable law, if it does, generates additional grounds for effectiveness. However, the problem for his argument remains under section 3(b). Which is, the rules of procedure relating to the enforcement of rights to property under the control or supervision of the insolvency administrator pick up, in our case, section 440B. And to that extent, the domestic insolvency regime is recognised by the Convention in priority to the mere contractual remedies. Your Honours, to conclude that topic, in a number of places and it may not be just a rhetorical flourish.

Dr Ward said that the essence of the Convention is that whatever the parties have agreed, will be a remedy to deal with default is available is the foundation – is the starting point, he said, subject only to commercial reasonableness. What that has done is completely write out of the equation the fact that article 11 of the protocol is carrying through into insolvency only a particular remedy, the one described as giving possession. And we would submit that the core question for the court comes back to the content of the obligation to give possession under article 11.2. And you have our arguments on that. And the essential issue before is whether the respondents have provided a satisfactory basis for reading, give possession to include by way of the debtor, effective a physical return of the object to the creditor in the manner desired by the creditor.

If they cannot plug that gap, then they do not have the remedy that they seek. And then when one comes back to article 9 of the Convention, they do not yet have the necessary remedy which can then be exercised commercially reasonably. Your Honours, the next point is a number of submissions were made that our concept of possession was either technical or theoretical or too common law based, and not reflective of broader international principles. And that Hocking in the High Court, you can really cast aside as a mere domestic idiosyncrasy. Our submission on that topic is that the paragraphs of the commentary that I've taken you to consistently with the language, show that possession is being used in this Convention in the manner we have identified.

And this is an area where the common law concept of possession has been taken up. It's a very practical workable concept of the common law. It has been built over centuries. And that concept of possession, as explained in Hocking, is what underpins this Convention. Your Honours, there was a submission made on the Corporations Act that in fact under domestic law after five days they can get their engine back. And therefore, the Convention on our construction is not giving the benefits that I put this morning in chief. What was confused in that submission was section 443B, which concerns the administrators being liable for rent or not. Where they need to act promptly to avoid personal liability, with section 440B which is the provision which prevents the taking of possession. And it's 440B which is what prevented possession under domestic law at all times up until the 60-day waiting period and beyond.

And the final provision to be looked at in that package is of course section 447 – 447A, which is the provision his Honour used in order to extend the relief from personal liability for the administrators beyond the five-day period. Your Honours, in respect to the travaux, the argument that was put was that you don't need to worry that the express reference to the agreement dropped out because it was a quid pro quo for the inclusion of what became article 9. Which brought the agreement back in under the commercial reasonableness guise. The first answer to that is of course that article 9 only applies to the mode of exercise of the remedy and does not assist in understanding the underlying remedy. And so it's not simply a case of taking away with one and giving with the other. The second answer, your Honours, is that the

drafting history is in fact not what Dr Ward put to you. If I could ask you to go to volume 1 at page 388 to 389.

COLVIN J: So which tab are we at, Mr Gleeson.

MR GLEESON: That's tab 12.

COLVIN J: Thank you.

MR GLEESON: The first joint session in February 1999. What's apparent in the draft at pages 388 to 389, is that in article 9 the concept of the commercial reasonableness constraint and the reference, in turn, to the agreement is already there in the draft, at a time when, if one looks at page 390, Article 11 is still in the square brackets and the problem of whether to pick those words has not yet been resolved. So commercial reasonableness has come into the drafting ahead of the critical decision which was made to delete the reference to the agreement. The only other submission I wish to make in reply on the travaux was that if your Honours go back, please, to tab 11, page 308. The respondent – and you might recall in the written submissions you received at lunch time yesterday, you were told that Article 19 was a red herring. It's today accepted by the respondent that the reference to Article 19 is a reference to the relevant provision, so that issue is now resolved.

The new addition you heard this afternoon was the assertion that the rights of a lessee should be regarded as a secured obligation within this note, and that was said to arise because either of the PPSA or because the Convention treats the lessee as a secured obligation. We would ask your Honours to reject that proposition. The PPSA is not to the point; the Convention does not treat it as a secured obligation, and in any event, whatever thought was here contemplated about secured obligations, it was not taken up in the language of the Convention thereafter. Your Honour Justice O'Callaghan asked me this morning about some language in Article – in alternative (b) which concerned the ability of the court to require additional steps.

Could I complete the answer I gave by saying that the reference to the official commentary that I referred to is at page 890 of volume 2, paragraph 3.135, which seems to contemplate the additional steps would be imposed upon the creditor rather than upon the debtor. Your Honours, you've heard a submission at a fairly high level, which had a number of adjectives in it, that our construction was unpalatable, that it was uncommercial and so on – I won't repeat the adjectives – and that there was something obnoxious to good commercial sense that on the 60th day, the creditor would have the answer to its question: could it take possession or would it be told ..... it has its defaults secured and the contract will be performed for the future.

Your Honours, there is nothing in any way commercially unpalatable or unworkable about the way our construction of Article 11 fits together. It is clearly, in that 60 day period, assuming that time is available, creating a balance of rights and obligations and interests, and on the one hand, the insolvency administrator is being given the full 60 days and may well need the full 60 days to find out if it can cure the defaults

and agree to perform future obligations, and of course, if it's attempting a restructure, 60 days is not a long period and it may need every day of it to see whether it is able to act under Article 11(7). But, as I said this morning, if it takes up that opportunity, that is the IA, the cost is Article 11(5), that it must preserve the aircraft and maintain its value, even though it may turn out, after the 60 days, it has to surrender the aircraft and so it gets no continuing benefit from those expenditures.

All of that happens within the 60 days, and one would expect the IA, as the present IA's did, contrary to any aspersions cast on them by Dr Ward, to behave with both expedition and reasonableness to see what they can achieve for the benefit of the whole estate, which includes this particular creditor. On the other hand, once the 60 days has passed, time has run out for the IA, and what it must then do is perform its obligation to give the possession under 11.2. And obviously, it must give a meaningful opportunity to take possession. Dr Ward is casting the idea of fanciful possibilities where the lessor is told "your aircraft is in .....". What must be given is possession. It's a real, practical, meaningful opportunity to take the possessory title to the aircraft. What that will involve will depend upon the circumstances of the case.

In the present case it involved, as the IA's did, saying "here is where your engines are, and here is where they may reasonably be collected". And from that moment, the choice reverts to the creditor whether to take up that opportunity and thereby to free the asset from the domestic regime, or to leave it with the domestic regime. Dr Ward suggested that if the lessor did not take up the asset immediately, it would then be under some peril. What would happen to its asset at that point, is that it would fall back to the applicable law for such duties as the IA has in respect to the aircraft. And that's pointed out by Professor Goode at paragraph 5.65. So when one looks at this as a package, that balance of rights and obligations matches the language, and achieves, we would suggest, the fundamental purpose of the Convention.

Your Honours, in respect of the facts we have given you our short written submission in reply, which will answer the attacks which Dr Ward has made upon the administrators. I observe that there is no notice of contention, seeking any adverse findings against them, and I also observe that his Honour made a finding that the administrators acted reasonably at all times. That finding is at paragraph 178 and 179. So that even upon his Honour's construction of their obligation, which was greater than we would contend for, his Honour found the administrators have acted reasonably, and were always willing to provide practical assistance to the applicants to assist in the recovery of the aircraft objects. For that reason, he has relieved them from any personal liability, even on his construction of the Convention. And for that reason, as well as the detailed answers we have given, we would ask your Honours to reject the personal attack upon the administrators, and we would also ask you to not be distracted by the particular facts of the case in the important construction question that lies before you.

Your Honours, I think I'm down to the last two matters, if I may just deal with them briefly. The first is, a reference was made to the second reading speech, and we

would make two replies. Firstly, there was a concern to adopt Article alternative A, in order to assist in obtaining preferential financing in the export markets, thereby making quite clear, the common assumption that the lessors and the financiers would in many cases be based in North America or Europe. So the notion that it is, perhaps just happen stance, that the redelivery provisions are in favour of a North American or European operation, is quite contrary to the whole basis upon which Australia adopted alternative A.

Secondly, there's not a word in the secondary speech that Australia took on alternative A on the basis that giving possession means what the respondents say it means. And, if that was what Australia was doing in the Parliament, imposing that potentially onerous obligation on the administrator and the estate, one might have expected clearer attention to it in the secondary speech. Your Honours, the final matter was, in terms of the US material Dr Ward supported his Honour's approach that it's relevant background, but really of no greater assistance than that. Could I just indicate in the materials where you will find the best case on the US position. The terms of the US section are found in volume 1, tab 7, page 161. That's the general stay provision under section 362 of the Bankruptcy Statute.

And then at tab 8, that's the particular provision section 1110 and particularly paragraph (c) at the foot of the page. And then the critical authority is found in volume 2 at tab 22, which is the decision in re Republic Airways Holdings Inc, 547 B.R. 578 (S.D.N.Y, 2016) that we've cited in our written submissions, where the court squarely rejected the argument being made by the respondent in the present case and squarely said that, "The United States provision does not require compliance with contractual requirement for return of the object." So far from the proposition being put that our construction is highly unpalatable and contrary to commercial common sense, our construction is supported by the clearest authority on the domestic world regime which was the model for the convention. And so - - -

O'CALLAGHAN J: Is there a particular paragraph in that judgment, or an opinion that you take us to?

MR GLEESON: Yes. Yes, your Honour. Page 1312, in the second column, the middle paragraph, the court says, "Applying the principles, the court rejects the majority of Citibank's objections, the court declines the ..... suggestion that you must return the aircraft with matching engines." There's then some ..... and over on the page in the first column, halfway down, "Other courts have rejected attempts put conditions on the surrender and return obligations." And then in the second column on page 1313 halfway down, just after the number 586, "The court may clear that section 1110 meant that you get the equipment immediately and you get it as it is, where it is, finding it counterintuitive to require immediate return of the equipment while also imposing conditions on its return."

Now, that really is one of the things I've advanced, you get it immediately. You get it on 19 June, you get it as it is, where it is. And for the court to be imposing

conditions is contrary to the provisions. Unless your Honours have questions, they are our submissions in reply, and thank you for the time you've afforded us today.

McKERRACHER J: Thank you, Mr Gleeson. We will just adjourn briefly to confer in relation to the ..... question. We should be able to resume within a few minutes.

ADJOURNED [2.59 pm]

RESUMED [3.11 pm]

MCKERRACHER J: Yes, thank you. We've had the opportunity to confer on the issue of the stay. The court is inclined ..... to grant a stay until determination of the appeal, but it will be accompanied by a further order that there be liberty to apply on short notice, and we would wish to make it clear, as I think the arguments have, that it's not the intention of the court that the grounds on which there might be an application or the evidence in support of that application, should be limited in any way. But on the basis of the evidence, as it stands at the moment, in the absence of any evidence of prejudice, we would grant a stay without the need, at this stage, for any undertaking of damages. So the orders of the court will be that orders 5, 6, 8 and 12 made by the primary Judge on 3 September 2020 be stayed until determination of the appeal, filed on 7 September 2020, and that each party have liberty to apply on short notice.

MR GLEESON: May it please the court.

MCKERRACHER J: Were there any other matters that needed to be attended to before we reserved our decision?

DR WARD: Your Honour, if I could just raise one matter, by way of reply to the reply as a factual matter. The proposition was put that there was a new submission about Article 12; it was put squarely to the primary Judge and it appears at transcript page 414 of part C.

MCKERRACHER J: All right, thank you. Mr Gleeson, anything for you?

MR GLEESON: No.

MCKERRACHER J: We thank you all for your very helpful submissions, we will reserve our decision and deliver it as soon as possible.

MATTER ADJOURNED at 3.13 pm INDEFINITELY