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TRANSCRIPT OF PROCEEDINGS

O/N H-1279204

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

MIDDLETON J

No. NSD 714 of 2020

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

and

**VB LEASECO PTY LTD (ADMINISTRATORS
APPOINTED) and OTHERS**

MELBOURNE

TUESDAY, 8 SEPTEMBER 2020

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

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HIS HONOUR: Yes. Dr Ward.

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DR C. WARD SC: Yes, your Honour. I appear with my learned friend, MR SANTUCCI.

HIS HONOUR: And Dr Higgins.

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DR R. HIGGINS SC: May it please the court, I appear with my learned friend, MR LINDEMAN, for the respondents.

HIS HONOUR: Thank you. All right. Well, I've read the submissions and I've seen an order that's been sent up, I think, by you, Dr Ward.

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DR WARD: Yes, your Honour. There – it's, I think, a marked up order, or, at least, the version that I'm looking at is.

HIS HONOUR: Yes.

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DR WARD: There is some minor dispute, still, about dates. But the

HIS HONOUR: I haven't seen – sorry, Dr Ward. I haven't seen that particular order. I was just seeing the one – is this dealing with the – is this dealing with the actual appeal itself?

25

DR WARD: And the ex – the expedition of the appeal, your Honour.

HIS HONOUR: All right. Well, I haven't seen that, I must say. Could you get someone from your organisation to send that through so my Associate and I get it up on my screen.

30

DR WARD: We will certainly do that now – right now.

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HIS HONOUR: All right. Whilst that's being done, I take it the day you're seeking is 22 September still; is that right?

DR WARD: That's the day upon which both I and my learned junior are free, your Honour, yes.

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HIS HONOUR: And Dr Higgins, you're free that day?

DR HIGGINS: That's suitable to the respondents, your Honour.

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HIS HONOUR: All right. Well, I haven't got confirmation that's the day yet, but I have put out feelers to see whether we can get that day for you.

DR HIGGINS: Thank you.

5

HIS HONOUR: We're all – we will see how that goes. We can come back to the directions for that in a moment. Let's deal with the easy thing. Order 4. I apologise for that. I misunderstood. I thought, despite the affidavit of Mr O'Geary not wanting that particular order affecting Virgin Tech, I thought that was agreed. So if everyone is happy to deal with that variation of order 4 on the slip rule, that's clearly what it was. But I didn't worry about it in my reasons, as you can see. And it's clearly inappropriate to make an order dealing with that company where they're not a party and where I thought I was under the misapprehension, Dr Higgins, that you are happy with that even though they weren't a party, because I thought you were representing them, as well. So is everyone happy to make that order by consent.

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DR WARD: Yes.

DR HIGGINS: We're content with that, your Honour.

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HIS HONOUR: It just takes

DR WARD: And so are we, your Honour, yes.

HIS HONOUR: Thank you. It just takes one matter away from the – the Appeal Court has to consider that unnecessary diversion. So I will make that order. Does anyone object to my making an order, just out of the abundance of caution. So, again, we don't need to worry the Appeal Court with leave to appeal to the extent necessary to be granted, in respect of orders 5, 6, 8 and 12 of the orders made on 3 September by Justice Middleton.

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DR WARD: We – we wouldn't oppose leave and we don't oppose that order, your Honour.

HIS HONOUR: What about you, Dr Higgins? You're probably the one that would be interested in opposing it.

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DR HIGGINS: Yes, your Honour. We would not oppose it and we think it's a course for your Honour to grant that leave.

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HIS HONOUR: All right. Well, I will grant that leave and then the Full Court doesn't have to worry about that. So the substantive issue is the question of a stay.

DR HIGGINS: Yes, your Honour.

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HIS HONOUR: All right. So – well, I've read the submissions. Do you want to reply to anything that Mr – Dr Ward said?

DR HIGGINS: Yes, your Honour. Could I take the opportunity to do that.

HIS HONOUR: Yes.

5 DR HIGGINS: I don't propose to address any of the matters that we've addressed
in writing, further. But there are, in a sense, three key contentions that our learned
friends make. The first is that there is, in effect, a purported failure to comply, or
unwillingness to comply with the orders on the parts of our clients. The second is
10 that the applicants will suffer prejudice. And the third is that the appeal is weak.
Can I briefly identify each of those, your Honour, by reference to our learned
friend's written submissions.

HIS HONOUR: Yes.

15 DR HIGGINS: Our learned friends suggest, in their submissions, at paragraph 2,
that the respondents, and I quote "Would simply not comply with the orders and/or
seek to vary them." It bears emphasis, of course, that the respondents are officers of
the court. Our learned friend then make the wrong suggestion that we are advocating
20 for a form of redelivery contrary to that previously put. I will come to that shortly,
your Honour. There is then the regrettable suggestion, in paragraph 8, that the
respondents are not honouring their obligations as litigants, to ensure the just,
efficient and inexpensive resolution of this dispute. And there's then, finally, the odd
suggestion that we misunderstand the immediately binding nature of the court's
orders.

25 That, of course, is in any event, we expressly recognise it in our written
submissions at paragraph 18. As I indicated, your Honour, I will come, briefly, to a
bit of the detail of this. But can I begin by stressing that this series of submissions
put by our learned friends is, essentially, misdirected. We do not seek to dispute the
30 court's orders and suggest that that is the basis for granting a stay. Rather, in the
interests of candour, we disclose to the court that the position in respect of redelivery
has changed. Now, that is not a matter that needs to be dealt with in respect of the
stay, at all. We state that in our written submissions at paragraph 26. The matters
that do bear upon the stay are those identified by Mr O'Geary in his written
35 submissions at paragraph 9 – in his affidavit at paragraph 9, rather.

The short point, your Honour, is, in circumstances where we had identified to the
court, before judgment being delivered, that the redelivery proposer would no longer
be able to be carried out as anticipated. We considered it appropriate to put on
40 evidence as to that matter. We have put on that evidence through Mr O'Geary. This,
contrary to the suggestion of the applicants is not a new matter. We foreshadowed
this in an email of 24 August 2020, which is referred to by Mr O'Geary at paragraph
10 of his affidavit and annexed as annexure B. Likewise, there can be no suggestion
that the fluid state of the underlying circumstances affecting delivery has not been
45 the subject of repeated evidence in this proceeding.

And can I just give your Honour references in that respect. Mr Dunbier's affidavit of 5 August at paragraphs 8 to 11. Mr Dunbier's affidavit of 14 August at paragraph 22, and Mr O'Geary's most recent affidavit at paragraphs 11 to 17. Likewise, your Honour, at all times, Mr Dunbier and Mr O'Geary have indicated that the redelivery proposal was contingent on the third party corporation, and subject to the pressures imposed on the insolvent companies, including arising, now, from the restructure. None of this was contested by Willis at any earlier time. Willis has historically contested the timing of redelivery and the costs of redelivery. Can your Honour then turn to paragraphs 11(8)(e) of our learned friend's submissions.

HIS HONOUR: Yes.

DR HIGGINS: This, we say, again, is misdirected. In his affidavit at paragraph 16, Mr O'Geary sets out the position with respect to the redelivery proposal. But as I submit, that is not a matter relied on in support of the stay. The matters Mr O'Geary refers to at paragraph 16 are not indications that there would be deliberate non-compliance with orders by the respondents. They are instead, the identification of certain events which create a supervening impossibility of compliance. If your Honour looks, specifically, at subparagraphs (c) of paragraph 11 of our written friends' submissions, it is necessary to address the suggestion that Mr O'Geary has deposed to material in his affidavit that was the subject of without prejudice privilege. That submission is not correct and it should be withdrawn.

Mr O'Geary did not refer to the circumstance in which any agreement with the applicants was reached. The applicants have done that. The fact that checks have now occurred is a fact in the world that is not privileged in any way. So, too, and as we informed your Honour two weeks ago, the respondents cannot sensibly be compelled to fly an engine from Adelaide to Melbourne that is already in Melbourne. All Mr O'Geary is doing is identifying facts which have now materially changed.

Can your Honour then turn to paragraph 11(f), which is on page 4 of our learned friend's submissions. This concerns the complications for repayment of delivery costs if the appeal is successful. Again, it's necessary to deal with this in a little detail, your Honour. But I will try to be brief. It's apparent that your Honour accepted Mr Dunbier's evidence concerning the redelivery process, over that of Mr Failler, given that Mr Dunbier's proposal was accepted. It follows that Mr Dunbier's evidence as to the cost of redelivery, approximately \$1 million, a sum in his first affidavit, at paragraph 16, has been accepted.

And we do not need to call new evidence as to costs. In any event, even if the costs of redelivery were lower, Willis suggests its approximately \$300,000. That, of course, does not alleviate our concerns regarding the recovery of those costs which remain substantial. It should also be noted that the figure in 11(f) is wrongly presented. The \$1 million estimate given by Mr Dunbier and reiterated by Mr O'Geary, represents the full cost of redelivery, including engine removal, inspection, certification and engine buying and/or transport. The \$52,000 US per engine figure and the cumulative \$300,000 US figure are for nothing but air freight and

transport. So they are, in this respect, your Honour, just apples and oranges, in any event.

5 As to Willis' submissions concerning our points regarding recovery, as your Honour will appreciate, we do not submit that Willis does not have the means to repay the reasonable costs of delivery. We are, instead, concerned about enforcing a right to those costs. The mere fact averted to by our friends, that the administrators of US council appointed, in different proceedings, does nothing to alleviate recovery concerns, which still involve the enforcement of a foreign judgment. The ability to
10 apply foreign lawyers is not the issue. The concern is the lack of assets in Australia and the need to undertake a number of enforcement steps. There is, in that regard, a notable absence of any evidence by Willis or Wells Fargo, as to assets that we do have in Australia, which would be a complete answer to our enforcement concerns.

15 In the absence of such evidence, we submit that the concerns that we have expressed concerning recovery, are well founded and alone support a stay. Can I also, your Honour, draw attention to the fact that contrary to the applicant's submissions, a redelivery regime is one that we have expressly submitted is not contemplated or authorised by the convention assisted in precisely because of our duty to the
20 court. It is a to which our learned friends contend. So the heightened suggestion, in our written friend's – in our learned friend's written submissions at paragraph 10, that there is wasted time entirely caused by the respondents is simply not warranted.

25 We have cooperated in a regime that was – that it was clear the court intended to direct. The key point, your Honour, in any event, is that the mechanical terms of the redelivery proposal are not important, provided that the engines are redelivered, first, within a reasonable timeframe, and secondly, generally in accordance with the lease terms. It does not, for example, ultimately, matter, whether the engines are ferried or
30 air freighted. If the appeal fails, we will redeliver the engines at the cost of the insolvent companies, and, in general, in accordance with the leases. The relevance of the redelivery proposal to the stay application is that if a detailed redelivery regime is to be ordered by the court, contrary to our position ultimately on the appeal, it should not be formulated in advance of the appeal, given the fluidity of the circumstance of the Virgin companies, caused by their insolvencies and the fleet restructure.

35 That, we say, your Honour, is all where the court has with great help to the parties, indicated an ability to hear this appeal as early as 22 September. The of the court, for which we are indebted, is also a factor that strongly militates in favour of the stay. Can I turn, then, your Honour, to the second point, which is prejudice to
40 the applicants. And this is a matter that our learned friends address in their written submissions at paragraphs 12 to 22 applicants submit that the stay would deprive them of earning revenue through their assets. Now, we expect that the applicants suffer prejudice for a reasonable delay in the return of their engines. However, that prejudice is not quantified in evidence, and in the absence of evidence, the court
45 cannot assume it is substantial.

To the contrary, given the expedition application, the delay is likely to be short and is outweighed on the balance of convenience by the matters pointing in favour of a stay. If your Honour looks at the particular terms of paragraph 12 of our learned friend's submissions, that is a submission unsupported by evidence. It would not, we
5 submit, we accepted at face value. The applicants have led no evidence to support the bare assertions that the engine remain highly sought after, and the court would not accept that submission without evidence. At most, there is an unquantified prejudice caused by what appears to be a brief delay. Indeed, we submit that the court would not even accept that the applicants are deprived of an opportunity to earn
10 income from their engines, in circumstances where there is no evidence that the applicants could, in fact, earn income from the engines in the short term.

There is, for example, no evidence that the applicants have lined up a new lessee for the engines, or you could line up such a lessee should they wish to do so. Your
15 Honour knows well the effects of COVID-19 upon aviation activities, and all of this is evidence that the Willis parties were uniquely placed to bring forward. If your Honour then looks at paragraphs 13 to 15 of our learned friend's submissions, we submit your Honour would not accept, in the face of the unchallenged evidence of Mr O'Geary, that there was a real risk the applicants will suffer detriment in respect
20 of their ability to obtain the fruits of the judgment.

The applicants would need to challenge Mr O'Geary's evidence or put on counter evidence in order to make good that submission. If your Honour then turns to
25 paragraph 16 to 18 of the submissions, the evidence currently before the court does not suggest that our obligations under a judgment could not be carried out as a result of the impending end of the administration. To the contrary, the evidence suggests that in the circumstances where we may succeed on appeal, it is preferable to preserve the status quo rather than taking additional steps now, in a brief interim, that need to be wound back after the end of the administration. If your Honour then turns
30 - - -

HIS HONOUR: Could I just ask about that.

DR HIGGINS: Yes, your Honour.
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HIS HONOUR: What – even if we let the process go ahead for a couple of weeks, where are we up to with that? What does need to be unwound? We've already done some – something up until now. So that's – that damage – if I'm wrong, that damage
40 is done to your clients and the creditors. What's the damage – what's going to be involved now in the next two weeks, that needs to be undone?

DR HIGGINS: So, your Honour, I understand your Honour's question to be directed at what steps should be taken in the next fortnight - - -

45 HIS HONOUR:

DR HIGGINS: Would have to be unravelled. Your Honour, could I seek - - -

HIS HONOUR: Yes. Yes.

DR HIGGINS: remotely, some precise instructions about that and come back to you on that.

5

HIS HONOUR:

DR HIGGINS: So that I give a very precise answer.

10 HIS HONOUR: Yes.

DR HIGGINS: I will return to that - - -

15 HIS HONOUR: What I have in mind – well, I don't have in mind, that's putting it too high at the moment, Dr Higgins, but there's a 15 October drop dead date at the moment. So it has to be done as soon as possible, but on or before 15 October. And there's a lot riding on 15 October, including the liabilities of your – of the administrators and what rent and the entitlement of the applicants to get rent. And if there is not much to be done in a physical way or a way, then that is, in
20 one way, the balance of what should happen. And then the costs – what – if the appeal is successful, will the administrators seek costs back from the applicants, will they, by some quantum meruit, or some enrichment or whatever? How does that work, by the way?

25 DR HIGGINS: Yes, your Honour. If your Honour takes up the affidavit of Orfhlaith Maria McCoy.

HIS HONOUR: Yes.

30 DR HIGGINS: Which is the affidavit of 7 September 2020. And if your Honour then turns to page 7 of that affidavit, the first annexure, your Honour sees the notice of appeal.

HIS HONOUR: Yes.

35

DR HIGGINS: And if your Honour through to the orders sought, which commences on page 9 of the affidavit.

HIS HONOUR: Yes.

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DR HIGGINS: ultimately on page 10, order 6.

HIS HONOUR: Yes. I did notice that.

45 DR HIGGINS: Yes.

HIS HONOUR: You didn't quite answer my question. I know that's what you're wanting and what is the Full Court do? It remits it to me whatever. I just have to work out the amount

5 DR HIGGINS: Yes, your Honour. Your Honour, that's a very good a question for which I perfect answer.

HIS HONOUR: All right.

10 DR HIGGINS: That is one of the means by which that might occur, your Honour, that it would be remitted to the court and the basis of the quantum of the reimbursement determined by your Honour.

HIS HONOUR: All right.

15 DR HIGGINS: That seems the most likely course, and – because that would, itself, require a separate fact finding exercise.

HIS HONOUR: Well, won't that get over the problem of Wells Fargo and whether
20 they're in the country? They will be before the court if it doesn't get over the problem with enforcement. But we sometimes deal with these issues in class actions, where you have a who is not in the jurisdiction. Now, they are two ways of dealing with that. You can get them to put money in the court or whatever, or, alternatively, if they're big enough and their reputation is such that you just say,
25 "well, it's unbelievable that they won't adhere to an order of the court and pay over the money because it will affect their reputation as a large organisation of good repute."

There's two ways of looking at that. And I don't know, other than what's said, I
30 suppose, in submissions, about the standing of Wells Fargo, other than, I suppose, my own knowledge. But upon that. anyhow, I'm getting off the point a little bit. But, if there's an unwinding – and that can be done, which, is presumably, the thing can be done, because you're asking the Full Court to order that, then the only issue is the jurisdictional basis of that. But then, the other issue is enforcement, if I do make
35 an order. But won't Wells Fargo want to be around in the litigation, anyhow? Because even if you're right, won't there be some procedural orders or some directions I will need to make about how they come and get it all, even so?

40 DR HIGGINS: can I address the various issues your Honour has raised - - -

HIS HONOUR: Yes.

DR HIGGINS: and come to that issue your Honour has just raised last.

45 HIS HONOUR: Yes.

DR HIGGINS: We say that the problem with enforcement does remain. And the problem with enforcement is one that our learned friends could have answered with evidence, and have not. And statements about good-standing and the like, don't take your Honour terribly far. We do say that the question your Honour has now raised as
5 to quantum merit and reimbursement, is a factor that weighs in favour of a stay, because to stay the matter now and pursue expedition would avoid the increased complexities of what that reimbursement or quantum merit would look like. A line would be drawn in the sand. And I will tell your Honour as soon as I can, where that line is drawn in terms of what has happened and what needs to happen. So we do say
10 that mitigating the complexities of reimbursement is a factor that weighs in favour of the stay.

As to Wells Fargo wanting to be around and stay in the proceedings because of procedural rulings, that may depend, your Honour, on (a) success in the appeal, and
15 (b) the terms of success in the appeal. Because if it were determined, ultimately, that what is required under the Cape Town Convention, is that the appellants, as we would then be, make the aircraft objects available to the respondents, which involves giving the respondents the opportunity to take possession. That may be a matter that the parties resolve, consensually, without the need for curial intervention. Because
20 they are available on a stand at Melbourne or Adelaide Airport. So it's not necessarily the case that at that point, depending on the terms of the Full Court's resolution, the court would, again, have to be involved.

HIS HONOUR: Yes

DR HIGGINS: I would hope I have answered the various questions your Honour asked.

HIS HONOUR: Yes. No. No. You've done very well, considering I just threw
30 them out there without any logic. Thank you.

DR HIGGINS: Your Honour, returning then – I would just ask your Honour to direct your attention to paragraphs 16 to 18 of our learned friend's submissions. And I would say that it was preferable to preserve the status quo rather than to now,
35 that need to be wound back. And it that your Honour asked about the steps. And I will come back to your Honour on that shortly. Can I ask your Honour, then, to turn to paragraph 19. The applicants there say no explanation has been given to what we propose to do if a stay has been granted, that the reasonable obligations have not been completed by the end of October. The answer to that is that we would
40 exercise our liberty to apply in the circumstances.

We would caution your Honour against determining the stay application, by reference to pure hypotheticals. But if that were to occur, it would be necessary for us to exercise our liberty to apply. And it bears emphasis, your Honour, in light of
45 your Honour's stress upon the October dates. But the evidence that Mr Dunbier has given in this proceeding, is that, at best, it would take 48 days from the inception of the process fully to return the assets. So it may be that that date in October is no

longer achievable, in any event. And it may, indeed, be that the respondents would need to exercise liberty in any event, to come back before your Honour. Because that is the state of Mr Dunbier's evidence and the question of in truth to be completed. Can I ask your Honour, then, to look at paragraph 20 of our friend's
5 submissions.

HIS HONOUR: Yes.

DR HIGGINS: And can I be clear that we do not cavil with the fact that if we are
10 unsuccessful in the appeal, we would remain, as we are now, bound by the court's orders. And can I address, also, the question effectively asked at paragraph 22, and confirm that the respondents do not raise such a defence. So that concern does not arise. So, your Honour, those are the submissions we wish to make about the applicant's prejudice.

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HIS HONOUR: Yes.

DR HIGGINS: Can I come, then, deferring, again, answering your Honour's
20 question until I get instructions. Can I come to the third points pressed by the applicants, which is the suggestion that the appeal is weak. The notice of appeal has now been served on our learned friends. And your Honour has that at page 7 and following, of Ms McCoy's affidavit. Our learned friends appreciate the points that we will agitate. The central question, as your Honour well appreciates, is one of construction, essentially uncomplicated by factual matters. And as a question of
25 construction, it's quintessentially ones – a question, rather, on which reasonable minds might differ. The court would not accept that the appeal is a weak one.

As we highlight in our written submissions, at paragraph 19, the question involved a
30 real degree of complexity and cogent arguments are available that the conclusions identified in the ground of appeal – in the grounds of appeal, are infected by error. We submit that your Honour would accept that the appeal has, at least, reasonable prospects, and certainly would not include that the prospects are so poor as to justify the refusal of a stay, which would otherwise be ordered on the balance of convenience. And, indeed, the considered and lengthy judgment that your Honour
35 delivered, we say, reveals the complexity and novelty of the matter, and the questions at issue. There were travel preparatoire and other complex international materials that had to be taken into account. And one would not conclude that we did not have reasonable prospect. Can I ask your Honour, then, to turn to paragraph 26 of our learned friend's written submissions, where a distinct point is made.

40

Our learned friends there, submit, that it should be clear from the court's orders that any stay will not have the effect of delaying the obligation to redeliver by 13 October. That ignores, as I've already submitted, the grant of liberty to apply, which we may, in any event, be required to exercise, and is, in any event, inconsistent with
45 the balance of the applicant's other submissions. If your Honour stayed the orders made, we would be under no obligation to commence progressing redelivery. In those circumstances, complying with the 15 October deadline would likely be

impossible if it is not already so, and, on its face, we would have good prospects of varying that order. The applicant's opposition to the stay is entirely premised on that assumption, if it were to be assumed that we needed to comply with the deadline, notwithstanding the stay. So, your Honour, those are the main issues that I wish to raise about - - -

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HIS HONOUR: Let me throw this one out to you, Dr Higgins and Dr Ward. If we can secure the date of 22 September, which is two weeks away, the next proposition, the issue before the Full Court is a matter of construction, not dealing with all the other matters I think I had to deal with, which is the formal delivery and nuts and bolts, it would really be a question of law, looking at a number of aspects. So won't it involve day hearing at the most, I would have thought. It won't involve an appeal which would necessarily require the court to go through facts and make evaluations.

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So the next proposition is, it could be a case where the Full Court could, through judges, come to a view, one way or the other, it would, relatively quickly, impact on the day, possibly, even though they may not be able to give reasons. So that court, then, would be in a good position as to what to do for the future. Because if they come to the view clearly that I'm right, that's the end of any stay or any argument. If they come to the view that I'm wrong, then they could either refer it back – order the stay themselves, order it back to me with obvious changes. Because you've got to have the comeback. You seem to be indicating to me you've got to come back to me anyhow, because things aren't looking too good for the redelivery of a stand.

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DR HIGGINS: Yes, your Honour. That is sought, your Honour. And can I indicate that, with respect, we embrace everything your Honour has said. That court so constituted, would be well placed on that date, to address this question and remit it to your Honour or deal with it. And, as I've indicated, the evidence before the court does suggest – and they are my instructions that 15 October is likely to be impossible, in any event.

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HIS HONOUR: Well, I don't think I should use that in favour of – I'm actually suggesting this isn't to why I won't grant a stay, Dr Higgins, just to put where I'm leading to. Because 15 October won't have been reached by 22nd, assuming that's the date. So the drop dead date that I've so far made, doesn't arise, irrespective of any application. You've just got to do – what does it say, "As soon as possible do these things" which involves the preparation. Which gets back to the question that I asked at the beginning, what's there to be done in the next two weeks? Do we know an answer to that yet?

45
DR HIGGINS: Yes, your Honour. The answer I've been given is the following, that the respondents are still in the process of working through various third party consents. And that process, itself, is likely to take two weeks. That process will, of course, include expending costs of the insolvent companies. But I understand that those third party consent processes will be the principal things occurring over the next fortnight.

HIS HONOUR: Well, don't they have to be done in – whoever has paid for them, don't they have to be done in any event? By the way, has anyone thought of splitting the difference here? Anyhow, depending on how much money is at stake, which, obviously, there is a dispute about, certain things just have to be done, whatever the right side of interpretation is, certain – rent will have to be paid or dealt with.
5 Anyhow, that's not my role. You can think about

DR HIGGINS: I'm not sure, your Honour, that identical third party consents would be required, for example, if the ultimate circumstance were one in which our learned friend's clients had to take up the opportunity to take possession by recovering the engines from airports in Australia. I'm not sure that all the same third party consents are necessary for the transfer process required, but some might be. I'm just not sure, at all, your Honour, that they would be the same ones.
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HIS HONOUR: Well, the flavour I'm getting, Dr Higgins, rightly or wrongly, is that we've already spent the money, we've already done certain things, following my orders, were something to be done in relation to third party in the next two weeks, I'm not sure too sure. My inclination is I don't think that's too burdensome. And by the time we get to 22 September, having regard to the nature of the appeal – and I can't bind the Full Court, obviously, but I have been involved in some of these cases the mechanism I'm suggesting has been implemented, and everybody will know where they stand, at least, at this level of the juror's prudence and the Federal Court, once that decision is made.
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So I'm inclined to hold off with any stay, make the various orders for directions which I've now had a look at for the Full Court. We will deal with the other orders we've mentioned. If you have to come back before me, I've deliberately made that liberty to apply as wide it could deal with everything, other than the appeal itself. So we could go from there, I think. That's my inclination at the moment, Dr Higgins.
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30 Do you want to say anything further? Are you getting instructions about – the next two weeks is going to be the most expensive time. It's the only things that probably would persuade me differently.

DR HIGGINS: I do have the instructions, your Honour.
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HIS HONOUR:

DR HIGGINS: your Honour's indications, I don't have any further submissions to make.
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HIS HONOUR: All right. Dr Ward.

DR WARD: Your Honour, I think I need to say, I don't think I'm going to do better than no stay, which is, with respect, in our submission, the principal incorrect outcome. May I just respond to a couple of things that were said?
45

HIS HONOUR: Yes.

DR WARD: Because it's important for your Honour's understanding of the future of the matter. We are quite seriously concerned by what has occurred. The redelivery orders that your Honour made were, although based upon the – what I will call the Dunbier proposal, were, as you know, affected by our essential consent to
5 that proposal, on a pragmatic and practical basis. But fleshing out the detail of that proposal, it is quite incorrect to suggest that the Dunbier proposal was accepted by your Honour as a sort of competition with that proposed by Mr Failler of the more direct redelivery airfreight proposal. So that's not, with respect to my learned friend, what occurred during the hearing, as your Honour would recall.

10 The propositions that are now being put to your Honour, including that there will be need – will be a need under all circumstances, to avail – to take advantage of the liberty to apply. Because the redelivery proposal that was proposed by the respondents is now no longer capable of being complied with, is quite staggering to
15 us. And there is no evidence, none at all, as to what has changed to render the Dunbier proposal now inappropriate and cause yet further delay. And we, of course, will raise, on the appeal, quite predictably, the fact that it appears that if third party consents are still in play, it would have been entirely impossible for us to just simply collect our engines on a take it or leave basis. But that's not a question for the stay.

20 The question, your Honour, is quite stark. There is prejudice, on our side, in that we have been shut out from the use and possibility of releasing these engines since April this year. And that delay continues. That prejudice can be overcome if, as your Honour has indicated, no stay is ordered and the process of redelivery continues
25 unabated. There will be an issue that will clearly arise if the Full Court is unable to indicate a decision relatively promptly, following the determination of the appeal or the conclusion of the hearing of the appeal. But that is something that, perhaps, we will have to address at the hearing of the appeal, in light of what your Honour has indicated as the way forward.

30 HIS HONOUR: I can't bind or direct or even suggest to independent appeal judges, but there's lots of things – they may actually make an order straightaway and give their reasons later on. Or, without making an order, they may be able to have a greater feel for the weakness of my decision. And even if they're not – that would
35 have a big impact upon the stay, whether they order a stay or whether I order a stay at that time. So there's lots of scenarios that could work out - - -

DR WARD: Yes.

40 HIS HONOUR: - - - when the authoritative view is taken of the construction issue.

DR WARD:

45 HIS HONOUR: So suggesting, but we will have to see what happens, and you will have to work on some advocacy, Dr Ward, to persuade the Full Court the way to go with this.

DR WARD: And, your Honour, the only other point of substance to raise is that of enforcement. In our submission, as we said, I think, fairly clear in our written submissions, the process of redelivery should not only not be stayed, but it should continue with full expedition towards the actual redelivery of these engines. The
5 prejudice that my learned friends point to is the possibility of difficulty of enforcement of a judgment of this court, which would be a judgment, essentially, on a remitter, back to this court, to determine what the appropriate cost of redelivery was or should have been, and that then being a judgment sum enforceable against my clients in the event that the appeal was lost.

10 That's all perfectly capable of being dealt with. It's a weak prejudice to point to, with respect, and doesn't, in our submission, outweigh the prejudice that my clients can suffer and continue to suffer in the lack of ability to access their engines. That said, your Honour, I think, I won't look a gift horse in the mouth when it is what I've
15 been asking for and no stay is the correct outcome.

HIS HONOUR: Yes. All right. Well, so let's through – yes, Dr Higgins, you want to stay something?

20 DR HIGGINS: At risk of responding in an unnecessary way to that which is already unnecessary, your Honour, but can I indicate this. It is unsatisfactory to suggest that the respondents have been dilatory in any way. We can only start the redelivery process once the orders have been made. And it is for that reason that the process has not been started. And the evidence before this court, and available to our learned
25 friends, and Mr Dunbier's affidavit on 5 August at paragraphs 7 to 9, has always stated that it will take 48 days and that we will need multiple third party consents and payments, because the insolvent companies have multiple creditors.

DR WARD: Your Honour, I will just chime in and reply if I may, very quickly, in
30 response to that. That's premised upon the Dunbier redelivery proposal, which involved ferry flights.

HIS HONOUR: Yes.

35 DR WARD: The 48 days says nothing, at all, about airfreight.

HIS HONOUR: All right. Well, that may be a debate for another day, if the matter comes back before me under the liberty to apply. Can I just go then to deal with the orders. Dr Ward, it's your team I would ask to formulate these and send to my
40 chambers, please.

DR WARD: I thought that had been done, your Honour. Have the short minutes
.....

45 HIS HONOUR: formulate it now. So I've got short minutes of order dealing with the appeal being expedited. I've got that before me now.

DR WARD: And the debate, your Honour, is – the only debate, I think, your Honour, is that in relation to a couple of dates. We propose, in order 1A, a date of the 11th – I’m sorry, 11 September, and my learned friend had proposed the 14th. Essentially, the – we take the view that we were being given, on the unmarked draft
5 – we were being given three days to respond to submissions that my learned friend’s team would have had between, now, seven and 10 days, depending on when they started, assuming they had already started, which seems a little unfair. So we’ve adjusted the dates to equalise the timing a little bit.

10 HIS HONOUR: All right. Well, that’s – Dr Higgins, do you want to say anything further about that?

DR HIGGINS: Your Honour, we had sought, in order 1A, 14 September, and order 1B, also, the 14th, and order C, the 15th. And then the 18th, we would be content to
15 keep. We have some difficulty with counsel availability to meet dates of 11 September. Can I just be straightforward and candid about that. That is the constraint we face. So, contrary to my learned friend’s concern, it is that we will be finding and refining them before that. We have difficulties before that date. So if there’s some way we could meet the difference we would be indebted.

20 HIS HONOUR: So you want 14 September. Is that what you’re

DR HIGGINS: Yes.

25 DR WARD: Well, in that case, your Honour, the obvious solution is to move the date for the respondents’ submissions to the Monday, rather than the Friday, the 18th. So that should be Monday, I think, the 21st.

30 HIS HONOUR: Yes. I’m just feeling sorry for the appeal judges. But I don’t know why I should.

DR WARD: I will be brief, your Honour.

35 HIS HONOUR: Well, I assume you’re just going to adopt my judgment, Dr Ward.

DR WARD: That might your Honour.

40 HIS HONOUR: All right. I think that’s the way out of it, Dr Ward. We will do the dates you’ve just suggested and what – it’s 4 pm on the day before the appeal, though, isn’t it?

DR HIGGINS: Could I suggest, your Honour, possibly midday for those submissions.

45 HIS HONOUR: Yes. Yes.

DR WARD: That’s fine, your Honour.

HIS HONOUR: I think make it midday. At least give them a chance to - - -

DR HIGGINS:

5 HIS HONOUR: They will have the judgment beforehand, anyhow, which sets out, hopefully most of the arguments. All right.

DR WARD: And, your Honour, there should be, I think, perhaps, an adjustment to the reply submissions in 1E. Perhaps that could be 4 pm or something like that.

10

HIS HONOUR: Yes. Something to that effect. All right. If you could deal with those dates, Dr Ward, and, in the appeal, be listed concede to the relevant party, that subject to further order, the appeal be listed for 22 September. But I just haven't had that confirmed yet.

15

DR WARD: We will – between us, your Honour, we will refine the short minutes of order and send them to your Honour's Associate

HIS HONOUR: Make that - - -

20

DR WARD: perhaps later today or first thing tomorrow.

HIS HONOUR: Yes. Yes. So if you make that a separate order, deal with those issues as a separate order and I can make those orders. And then there will be an order in relation to the stay application, which will be that the order 4, by consent, be varied, you have suggested, leave to appeal in the way in which I formulated, to the extent in respect of orders 5, to the extent necessary, 5, 6, 8 and 12 of the orders made on 1 September by Justice Middleton. Liberty to apply and I think I should just dismiss the application for a stay, shouldn't I, at this stage? Another application can be made.

25

30

DR HIGGINS: Yes, your Honour. I think that's the correct course.

HIS HONOUR: All right.

35

DR WARD: We seek our costs of today, your Honour.

HIS HONOUR: Yes. Well, I will dismiss the application for a stay with costs.

40

DR WARD: Thank you, your Honour.

HIS HONOUR: All right. Any other orders, or anything that can be done now?

DR HIGGINS: I don't think so, your Honour.

45

HIS HONOUR: All right. Well, I thank you for your assistance. I wasn't proposing to provide any reasons other than through the course of the transcript. Does anyone require reasons, at this stage, other than having the transcript?

5 DR WARD: We don't, your Honour, no.

HIS HONOUR: Dr Higgins?

10 DR HIGGINS: No, your Honour. We don't require them either.

HIS HONOUR: All right. I think it has been made clear, the position, in transcript, if the Full Court wants to know what the process was.

15 DR HIGGINS: Yes, your Honour.

HIS HONOUR: All right. Well, I'm indebted to that in the circumstances. Thank you. I will adjourn the court.

20 DR HIGGINS: May it please the court.

MATTER ADJOURNED INDEFINITELY