NOTICE OF FILING

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Details of Filing

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

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Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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

Federal Court of Australia Proceeding No. NSD 714 of 2020

RESPONDENTS' OUTLINE OF SUBMISSIONS ON APPLICANTS' INTERLOCUTORY APPLICATION DATED 22 OCTOBER 2020 AND RESPONDENTS' INTERLOCUTORY PROCESS DATED 26 OCTOBER 2020

A. INTRODUCTION

1. On 7 October 2020, the Full Court of the Federal Court of Australia handed down judgment in proceedings NSD994 of 2020, in favour of the appellants (the Respondents).[1] At [111]-[112] and [114], the Court remitted the questions of declaratory relief in relation to when possession was given, the quantification of the Respondents' restitution claim and the costs of the first instance proceedings (**Remitter**).

2. On and from 8 October 2020, the Respondents have been endeavouring to have the Applicants take possession of the engines and aircraft objects (**Willis Property**), the subject of these proceedings.

3. That series of events has thrown up a paradox in the Applicants' approach. Despite the stated urgency with which these proceedings were commenced, and the clear opportunity to take possession of the Willis Property presented to the Applicants by the Respondents, the Applicants now *decline to take possession* of the Willis Property.

4. Instead, by their Interlocutory Application of 22 October 2020 (**Applicants' IA**), the Applicants seek to stay the remitter ordered by the Full Court, amend the Originating Application filed to commence these proceedings, and compel the Respondents to maintain and preserve the Willis Property indefinitely, pending the resolution of a foreshadowed special leave application that has not yet, to the Respondents' understanding, been filed. And all this, in circumstances where the administration of the Virgin companies will shortly end.

5. Principles of law, finality in litigation, and case management urge strongly against this course.

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[1] *VB Leaseco Pty Ltd (administrators apptd) v Wells Fargo Trust Company, National Association (trustee)* [2020] FCAFC 168

B. APPLICANTS' FAILURE TO TAKE POSSESSION

6. The Respondents invited the Applicants to take possession of the Willis Property by way of an email sent on 8 October 2020 by Andrew Symons, Leader, Technical Assets, at the Second Respondent, to Derych Warner of the Second Applicant as described in paragraph [19] of the affidavit of Salvatore Algeri sworn 26 October 2020 (**Fifth Algeri Affidavit**).

7. On 11 October 2020, the solicitors for the Respondents sent a letter to the solicitors for the Applicants in relation to (among other things) Mr Symons' 8 October 2020 email, the steps taken by the Respondents to give possession of the Applicants' property and the Respondents' failure to take possession of that property (Fifth Algeri Affidavit at [20]).

8. On 26 October 2020, the solicitors for the Respondents sent a letter to the solicitors for the Applicants proposing, *inter alia*, that the Applicants:

    (a) collect the Willis Property from Melbourne Airport by no later than 6 November 2020; or

    (b) pre-pay, by no later than 30 October 2020, for the Respondents to freight the Willis Property to the Delta facility or to the Applicants' address in Florida, as directed by the Applicants; or

    (c) arrange for long-term storage of the Willis Property at Melbourne Airport (the Respondents having obtained a quote from DB Schenker for storage in their warehouse of $1,000 per week for four engines (plus fees of $1,500 for acceptance and discharge of the engines) and offered to assist the Applicants with suggestions of suitable storage services to be entered into between the Applicants and the storage provider directly (Fifth Algeri Affidavit at [22(a)]).

9. On 26 October 2020, the solicitors for the Respondents sent a further email to the solicitors for the Applicants, offering yet a further resolution of the impasse, namely, the appointment by the Court of a receiver pursuant to division 14.3 of the *Federal Court Rules 2011* (Cth) to the Willis Property who could arrange for the Willis Property to be maintained by an appropriate storage provider pending the outcome of the Applicants' foreshadowed application for special leave to appeal to the High Court of Australia (Fifth Algeri Affidavit at [22(c)]).

C. APPLICANTS' IA AND PROPOSED AMENDED OA

10. None of these alternatives has been accepted by the Applicants, who instead press for what they describe as the preservation of the 'status quo' via a "stay" or, effectively, a mandatory injunction compelling the Respondents to preserve and maintain the Willis Property for an indefinite period, at the Respondents' cost, pending further order of the Court while the Applicants pursue an application for special leave to appeal to the High Court ((Fifth Algeri Affidavit at [21] and at [22(c)]). The Applicants have also foreshadowed an application for leave to further amend their Originating Application filed on 30 June 2020 (**Proposed Amended OA**).

11. While the Applicants have foreshadowed an application for special leave to appeal to the High Court, crucially, some 3 weeks after the Full Federal Court decision was handed down that application has not yet been filed or served.

D. ISSUE FOR DETERMINATION: TIMETABLING

12. In circumstances where the parties have been unable to reach agreement, it falls to the Court to set a timetable for the determination of the parties' respective applications.

13. For the reasons which follow, the Respondents' Interlocutory Application dated 26 October 2020 filed in these proceedings seeking orders in respect of the Remitter (**Respondents' IA**) should be listed for hearing as soon as possible on a date convenient to the Court.

14. The Applicants' IA should not be timetabled for hearing at this stage, as the application is wholly premature and is, in event doomed to fail. The application should only be timetabled for hearing when a special leave application has been filed, and when an adequate undertaking has been proffered, as until such a time, there is no utility in having the application heard. Alternatively, the Applicants' IA should be timetabled to be heard on the same day as the Respondents' IA.

E. URGENCY OF THE RESPONDENTS' IA

15. As this Court is aware, the Deed Administrators are statutory officers appointed to the Corporate Respondents for a specific purpose and for a period of limited duration. On 25 September 2020, each of the Virgin Companies, including the Corporate Respondents, executed a deed of company arrangement (**DOCAs**). The DOCAs are due to be effectuated following the making of an order pursuant to section 444GA of the *Corporations Act 2001* (Cth),

transferring the shares of Virgin Australia Holdings Limited ACN 100 686 226 to Bain Capital or its nominee. That application is listed for hearing on 10 November 2020, before this Court.

16. Upon effectuation of the DOCAs, the Deed Administrators will retire from office and the Corporate Respondents will cease to be subject to any form of external administration. The restructure of the Corporate Respondents will have been effectuated, the claims of creditors arising on or before the date of the Administrators' appointment, i.e. 20 April 2020, will be "extinguished and released",[2] and creditors' claims converted to a right to claim as a beneficiary of the Creditors' Trust Deed.[3]

17. The leases entered into between the Corporate Respondents and the Applicants were entered into prior to the date of the Administrators' appointment and, pursuant to sections 444D(1) and 553 of the Corporations Act, any claims arising in respect of or under those leases, are extinguished and released by the DOCAs.[4] Pursuant to section 444D(3) of the Corporations Act, the Applicants' right to possession of (or proprietary interest in) the Willis Property is not affected by the DOCAs.[5]

18. Upon the DOCAs being effectuated, control of the Corporate Respondents passes to their directors and new owners, Bain Capital, and the Corporate Respondents are cleansed of all debts and claims, the circumstances giving rise to which occurred on or before the date of the Administrators' appointment on 20 April 2020. On and from effectuation of the DOCAs, the Deed Administrators will cease to hold office and will have no further power or authority to direct or instruct the Corporate Respondents, or their new owners, in any way, including to deal with the Willis Property.

19. It is at least arguable that the Corporate Respondents will likewise have no ongoing legal authority or power to deal with the Willis Property in circumstances where (a) the Applicants' leases were repudiated prior to the DOCAs being executed, (b) that repudiation gave rise to a claim against the Corporate Respondents and (c) such claim is compromised by the DOCAs.

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[2] See section 9.5.1 of the Report to Creditors at page 99 of the exhibit DP-2 to the Exhibit to the affidavit of Dean Poulakidas sworn 19 October 2020; clause 1.6 (*Bar to Claims*) of the DOCA at page 319 of the Exhibit to Mr Poulakidas' affidavit and clause 6.4 (*Release upon completion*) of the DOCA at page 323 of the Exhibit to Mr Poulakidas' affidavit.

[3] Clause 6.6 (*Conversion of Claims*) of the DOCA at page 324 of the Exhibit to Mr Poulakidas' affidavit.

[4] See, for example, *Lam Soon Australia Pty Ltd (Administrator Appointed) v Molit (No 55) Pty Ltd* (1996) 70 FCR 34; Brash Holdings Ltd v Katile Pty Ltd [1996] 1 VR 24 at 33:

[5] Section 444D(3) is confined to preserving a right "*in relation to*" leased property, such as a right to take possession, and does not preserve any of a lessor's rights under a lease (see, for example, *Henaford Pty Ltd v Strathfield Group Ltd* (2009) 72 ACSR 240 and *Re Bluenergy Group Ltd (Subject to a Deed of Company Arrangement) (Admin Apptd)* (2015) 107 ACSR 373).

The Applicants' entitlements, as creditors of the Corporate Respondents are to exercise their right to recover the Willis Property (pursuant to section 444D of the Corporations Act) and/or to make a claim as a beneficiary of the Creditors' Trust Deed (pursuant to clause 6.6 of the DOCA).

20. On any view, there is a real question as to whether the Corporate Respondents can (in the absence of Court orders) deal with the Willis Property in any way following the completion of the DOCAs, including to take steps to preserve, maintain, insure and/or redeliver them. In those circumstances, given that the Applicants have refused to take possession of the Willis Property, declaratory relief is urgently required so as to permit the Respondents to remove the Willis Property from the Corporate Respondents' possession ahead of the completion of the DOCAs.

21. For those reasons, the Respondents' submit that their Interlocutory Application should be heard as soon as possible and prior to completion of the DOCAs.

F. RELIEF SOUGHT BY APPLICANTS SHOULD NOT BE GRANTED

22. The relief sought in the Applicants' IA represents an extraordinary reversal of the position put to this Court on 8 September 2020 at the hearing of the Respondents' stay application. At that hearing, the Applicants submitted at TR15.20:

> 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 unabated.

23. Notwithstanding the alleged prejudice in the Applicants being delayed in taking possession of their engines, multiple opportunities to take possession of the Willis Property have been rebuffed in favour of a position whereby the Respondents maintain and preserve, and bear the continuing risk and responsibility for, the Willis Property, as sought in the Applicants' IA.

24. The Applicants' IA is wholly premature and is, with respect, doomed to fail. This is so for the following reasons.

25. *First,* the sole basis upon which the stay application is brought is the prospect of potential High Court proceedings which may render the Respondents' Interlocutory Application inutile.

Some three weeks after the Full Court's decision, no special leave application has been filed. In those circumstances the stay application cannot succeed; it is on any view premature. It ought not be listed for hearing until a special leave application has been filed, and this Court can assess the merits of the application, this being relevant to the question of whether a stay should be granted.

26. *Secondly*, no adequate undertaking as to damages has been offered. While Willis has offered an undertaking to "reimburse any reasonable storage costs that the Respondents incur", that undertaking is unsecured and so is entirely inadequate in circumstances where Willis is a foreign entity with no identified assets in this jurisdiction and a clear predilection to litigate. A further defect of the undertaking proffered is that it is limited to "reasonable storage costs". Not only does the undertaking not extend to other costs that would be incurred by the Virgin Companies in preserving and maintaining the engines in accordance with the orders Willis seeks (such as the costs of insurance, maintenance, regulatory compliance), it also overlooks the present entitlement of the Respondents to seek costs of both the Full Court proceedings and to seek an order for their costs of the primary proceedings and payment of their restitution claim. It must be appreciated that, if the Applicants do file a special leave application and are granted special leave, the orders the Applicants propose in the Applicants' IA contemplate the Respondents preserving and maintaining the Willis Property for an indefinite period which may well extend to 12 months or more. An undertaking in respect of "reasonable storage costs" is, therefore, wholly deficient.

27. In the absence of an adequate undertaking, the stay application cannot succeed. It is clear that, while the Applicants say that they want to maintain the status quo, in fact they require the Respondents to assume all the risk associated with the Willis Property, and decline to make any attempt to re-lease or redeploy the Willis Property so as to mitigate their loss pending the determination of their foreshadowed High Court appeal. In order to seek a stay, the Applicants must do equity, and protect the Respondents by providing security for any losses which the Respondents might suffer, given that the Applicants seek to put the Respondents in a position where they retain custody of the Willis Property notwithstanding the fact that the Respondents have the benefit of the Full Court's judgment. The Applicants have not done equity, as their proposed undertaking is grossly inadequate, and their stay application will fail on that basis.

28. *Thirdly*, the Applicants have not identified any prejudice in having the Respondents' IA dealt with expeditiously and so they cannot succeed in demonstrating that the balance of

convenience favours a stay. Indeed, as noted above, the Applicants previously argued that they would be *prejudiced* by a delay in having its engines returned. The Court therefore would not entertain an argument that the Applicants are prejudiced by having the Respondents' IA determined, and the Willis Property returned expeditiously.

29. *Finally*, the Applicants are prohibited by s444E(3) from bringing proceedings against the Corporate Respondents in the absence of leave of the Court. For the reasons stated above, leave should be refused.

30. In those circumstances, the Applicants' IA should not be timetabled for hearing, as it is, at least, premature, and in its present form, doomed to fail. Alternatively, the Applicants' IA should be timetabled to be heard on the same date as the Respondents' IA.

31. Should the Applicants now not wish to retrieve the Willis Property — notwithstanding the aim of the entire proceedings being to retrieve that Property expeditiously — the obvious solution would be to seek the appointment of a Court appointed receiver to preserve and maintain the Willis Property pending the determination of the Applicants' foreshadowed but as yet unfiled High Court appeal, as proposed in the email from Clayton Utz to the Applicants' solicitors dated 26 October 2020, the costs of which should be borne by the Applicants. It is not appropriate for the Respondents to continue to be burdened by the Willis Property in circumstances where they have the benefit of the Full Court judgment, and where the DOCAs are due to be effectuated in the coming days.

G. CONCLUSION

32. In circumstances where the stay application is wholly premature and, in its present form (that is, absent an adequate undertaking and the identification of prejudice) doomed to fail, the Court would not shut the Respondents out of their entitlement to the relief they seek in their Interlocutory Application, which follows from the decision of the Full Court of the Federal Court. The Respondents' IA should be heard as expeditiously as possible, and, preferably, prior to 10 November to avoid complexities arising from the completion of the DOCA.

33. The appropriate orders are those set out in the Respondents' proposed Short Minutes of Order.

27 October 2020

Ruth C A Higgins Kate Lindeman

Counsel for the Respondents