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Details of Filing

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

Sia Lagos

Dated: 15/08/2020 12:08:07 PM AEST Registrar

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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 713 of 2020

RESPONDENTS' OUTLINE OF FURTHER SUBMISSIONS ON ORIGINATING PROCESS OF 30 JUNE 2020 AND PROPOSED AMENDED INTERLOCUTORY PROCESS OF 5 AUGUST 2020

A. INTRODUCTION

1. On 31 July 2020, the Court adjourned the hearing of the Applicants' Originating Application filed 30 June 2020 part heard, so as to permit the parties to put forward orders giving effect to the Court's indication as to the determination of the key issues in dispute.[1]

2. Since 31 July, the parties have exchanged various sets of orders, and three issues appear to remain in dispute:[2]

   (a) whether the Court should declare that the Respondents must "give possession" in the manner set out in Sch 3 of the Applicants' proposed Short Minutes of Order, or in the manner set out in paragraph 5 of the affidavit of Darren William Dunbier affirmed on 5 August 2020 (**Second Dunbier Affidavit**);

   (b) whether the Administrators' relief from liability under s 443B(8) of the *Corporations Act 2001* (Cth) (**Corporations Act**) should extend to all liability in respect of the aircraft objects, or whether such relief should be limited to relieving the Administrators of any liability to pay rent in respect of the aircraft objects, further whether such relief from liability should commence on 16 June 2020 or on some later date (the conclusion of the period being agreed);

   (c) the appropriate order as to costs.

3. The effect of these issues remaining in dispute is that Orders 4, 5, 7, 8, 10 and 11 of the parties' competing short minutes are contested.

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[1] Transcript 31 July 2020, T73.26-33 (Middleton J).

[2] In saying this, we do not mean to indicate that the Respondents otherwise consent to the relief sought. We address this in paragraph 7 of these submissions.

4. Further, the Respondents seek leave to file a Proposed Amended Interlocutory Process (**Amended IP**), served on 5 August, which includes an additional prayer for relief: prayer 5. It is not presently clear whether the Plaintiffs oppose that relief and, therefore, whether the matter is in issue between the parties. Nonetheless, we set out below the basis upon which that relief is sought.

5. The Respondents rely upon the following further evidence in respect of the matters set out above, in addition to the evidence read on 31 July 2020:

   (a) the Second Dunbier Affidavit;

   (b) affidavit of Darren William Dunbier affirmed on 14 August 2020 (the **Third Dunbier Affidavit**); and

   (c) the affidavit of Salvatore Algeri sworn 5 August 2020 (the **Second Algeri Affidavit**).

6. To the extent that the Court considers that the Respondents have closed their case, leave is formally sought to re-open so as to rely upon the further evidence set out above. In this context, it should be noted that the Court contemplated that the Respondents may rely on such further evidence at the hearing on 11 August 2020.[3]

7. There is one further preliminary matter. The Respondents maintain their position that the requirement to "give possession" of the aircraft objects under Art XI.2 of the Cape Town Protocol does not require the Administrators to do any more than give the Applicants the opportunity to take possession of the aircraft objects. The orders put forward by the Respondents, setting out a regime for redelivery of the engines to the Applicants in Florida, are proffered only in response to the Court's request on 31 July 2020.[4] It should be stressed that the Respondents maintain that such orders should not be made, including because, *first*, they are premised on what the Respondents say is an incorrect construction of "give possession" within Art XI of the Protocol, and, *secondly*, they proceed on an incorrect premise about the relief available under that Article, which provides a lessor with a self-help remedy, and not detailed curial intervention. It follows that, by proffering orders in response to the Court's request, the Respondents do not waive any right to appeal from such orders, once made.

[3] Transcript 11 August 2020 at T31.16 (Middleton J).
[4] Transcript 31 July 2020 at T73.26-33.

B. The regime for redelivery: Orders 4, 5, 7 and 10

B.1 Order 4

8. The first issue between the parties is the regime by which redelivery of the aircraft objects should occur. The parties' disagreement on this issue is reflected in the parties' competing proposed wording of Order 4 in their respective proposed short minutes of order.

9. The Applicants' proposed regime for redelivery of the aircraft objects appears in Schedules 2 and 3 to draft orders served on 11 August 2020 at 12.24pm (the **Applicants' Redelivery Proposal**). The Respondents' proposed regime is set out in paragraph 5 of the Second Dunbier Affidavit (the **Respondents' Redelivery Proposal**).

10. The Applicants' Redelivery Proposal and the Respondents' Redelivery Proposal adopt the same process for redelivering the engines to the Applicants in Florida. That involves attaching two of Willis' engines to a particular airframe, which will then be flown to a Delta Facility in Georgia, where the engines will be certified and then removed from the airframe. The airframe will then return to Australia (having had different Virgin or short term lease engines installed while the airframe is at the Delta Facility in Georgia), after which flight the process will be repeated with Willis' remaining two engines.

11. There are two key differences between the parties' proposals; *first*, the Applicants' Redelivery Proposal makes express provision for the return of certain Historical and End of Lease Operator Records by 14 August 2020, whereas the Respondents' Redelivery Proposal proceeds on the basis that all Historical records have been provided (Third Dunbier Affidavit at [9]) and only contemplates the provision of the End of Lease Operator records when those records come into existence, and *secondly*, the Applicants' Redelivery Proposal specifies interim dates by which particular steps in the redelivery process are to be taken, whereas the Respondents' Redelivery Proposal only includes a date by which the process is required to be completed.

12. As Mr Dunbier explains at [6]-[8] of the Second Dunbier Affidavit, the Respondents' Redelivery Proposal represents the most cost-effective and expeditious option for the redelivery of the engines to the Applicants, and has express regard to the timeframes, costs and complexities which arise from airfreight during the COVID-19 pandemic. The Court would accept this evidence. Indeed, the Applicants themselves accept the substance of the Respondents' Redelivery Proposal, and only contest matters relating to the records, and the

question of whether or not time limits should be placed on individual steps within the proposal (as opposed to a time limit being placed on the proposal as a whole).

13. Mr Dunbier explains why the Respondents' Redelivery Proposal should be preferred to the Applicants' Redelivery Proposal in the Third Dunbier Affidavit. In particular, as Mr Dunbier explains:

    (a) (at [9]) copies of all Historical Operator Records have already been provided to the Respondents, such that the requirement in the Applicants' Redelivery Proposal to provide them is otiose;

    (b) (at [10]–[15], [19]) the End of Lease Operator Records/Status Statements, Lease Inspection Records and Serviceable Tags should be required to be provided after the flight of the engines to the USA in accordance with the Respondents' Redelivery Proposal rather than before that flight (as would be required for End of Lease Operator Records/Status Statements by the Applicants' Redelivery Proposal), because:

        i. the End of Lease Operator Records/Status Statements will be rendered obsolete by the fact of a further flight; and

        ii. the End of Lease Inspection Records and Serviceable Tags cannot be provided before the end-of-lease inspections of the engines have been performed in the USA;

    (c) (at [16]–[17]) an FAA Form 337 is a form required in the case of a major repair or major alteration of aircraft property, but the Applicants' Redelivery Proposal would require it to be provided even if no major repair or major alteration was required or performed on the engines; and

    (d) (at [21]–[23]) the series of specific timeframes for steps in the Applicants' Redelivery Proposal is not feasible or necessary, in circumstances where:

        i. the times within which individual redelivery steps can be completed are inherently uncertain and difficult to estimate;

        ii. most individual redelivery steps depend partly or entirely on COVID-19-affected third-party service providers, whose cooperation and resources the Respondents cannot predict or control;

iii. any of the redelivery steps can be delayed by unforeseeable events, and any delays can have a consequential effect on the following step; and

iv. the enormous practical complexities and challenges which Virgin is presently facing as a result of the decision by the purchaser of the business (Bain Capital) to restructure the operations to operate only one type of aircraft.

14. As the Court will recall, Mr Dunbier gave oral evidence on 31 July 2020 and was an impressive witness. The Court would rely on his expertise in accepting that the Respondents' Redelivery Proposal should be adopted rather than that put forward by the Applicants for the reasons set out above at [13].

15. It follows that the Court should make Order 4 in the terms set out in the Respondents' proposed short minutes.

B.2 Order 5

16. Proposed Order 5 in the parties' competing short minutes requires the Respondents to carry out the steps required by Order 4, using their best endeavours, by 15 October 2020. That is not in dispute. The only issue between the parties is the appropriate wording of a requirement that the Applicants assist the Respondents in carrying out the Redelivery Proposal contemplated by Order 4.

17. The Applicants propose the following wording: "The applicants will provide assistance that is reasonably necessary in relation to the respondent's obligations under these orders." The Respondents' proposed wording is as follows: "The Applicants are to act reasonably in assisting the Respondents to effect delivery up of the 'aircraft objects' by that date, including taking any step that is reasonably required to give effect to the Redelivery Proposal." The Respondents' wording should be adopted, as that wording provides greater specificity to the obligation imposed on the Applicants and thereby reduces the prospect of future disputation.

B.3 Orders 7 and 10

18. Proposed Order 7 provides that the Administrators will do all such things as are necessary and within their power to cause the First, Second and Fourth Respondents to carry out the Orders in respect of the completion and transmittal of the records. The order is made subject to further order. This is appropriate because, in circumstances where the process of providing records not yet in existence will take place over the coming weeks, it may be that unforeseen

difficulties arise in providing the remaining records that require resolution by the Court. No aspect of Order 7 is in dispute.[5]

19. However, the Applicants take issue with proposed Order 11(b), which expressly grants liberty to apply for "such further orders as may be necessary in relation to limiting the costs that the Respondents must bear in providing the records … including where inspections reveal that substantial unanticipated costs or remedial work on the Engines is necessary in order for any such records to be provided."

20. It should be noted at the outset that, given that Order 11 is in inclusive terms ("Liberty to the parties to apply on 3 days' notice in respect of these Orders, including…"), sub-paragraph (b) is, strictly speaking, unnecessary. It has been proposed by the Respondents to identify a *possible circumstance* in which liberty to apply may be exercised so as to amend Order 7 (which is subject to further order), namely in circumstances where inspections undertaken as part of the preparation of records not presently in existence reveal that substantial unanticipated costs or remedial work must be performed on the engines before such records may be provided.

21. The Applicants' Redelivery Proposal and the Respondents' Redelivery Proposal require the Respondents to provide Serviceable Tags. As Mr Dunbier explains in the Third Dunbier Affidavit at [20], if an unanticipated event occurs prior to redelivery of the Willis Engines to the Delta Facility, or a latent defect is found when the end of lease inspections are conducted, repair and remediation of the engines would be required before a Serviceable Tag is issued. Those repairs can cost hundreds of thousands, or even millions of dollars, up to the full replacement cost of an engine.

22. The Administrators do not make any submission as to how such unanticipated costs ought be dealt with. That would be a question for the Court at a later stage, should such unanticipated costs ultimately eventuate. All that is presently sought is liberty to apply in such circumstances, this being an appropriate mechanism to deal with presently unforeseen substantial expenses, in the context of the administration of the Virgin companies. It would not be appropriate to require the Administrators to burden the insolvent estate with such unforeseen substantial costs in complying with Order 7 without further consideration by the Court, given the impact of such expenditure on other creditors. Order 11 should therefore be made in the terms proposed by the Respondents.

[5] Transcript 11 August 2020 at T26.25 (Ward SC).

C. Stay: Order 8

23. The Respondents seek a stay of orders 4, 5, and 7 until 7 days after the Court delivers its reasons for the Orders or further order of the Court. That is to permit the Respondents time to review the Court's reasons and consider any appeal. The proposed order seeks liberty to restore on 1 business day's notice to allow a further order to be sought if the Respondents elect to appeal. If the Respondents do not appeal, the stay will lapse seven days from the date of the Court's reasons.

Relief from liability: Order 9

24. Two issues arise between the parties in respect of Order 9, which deals with the Administrators' relief from liability. *First*, there is a question as to the scope of the relief to be granted, and *secondly*, as to the period for which that relief should apply.

25. As to the scope of relief, the Respondents say that relief from liability should extend to all liability in respect of the Applicants' aircraft objects, rather than being limited to their liability to pay rent.

26. The Court has power under both s 447A[6] and s 443B(8)[7] to relieve the Administrators from all personal liability in respect of the Applicants' aircraft objects, including retrospectively.[8] That is, the Court's power is not limited to relieving the Administrators from liability to pay rent. The logic behind relieving the Administrators of liability to pay rent, but not relieving them from any additional liabilities that may arise in respect of the aircraft objects, is obscure. The Applicants have not explained the basis upon which any principled distinction may be drawn between the Administrators' liability for rent and other liabilities. Nor is any such distinction available on the terms of s 443B(2) of the Corporations Act which imposes liability on an Administrator for rent "or other amounts payable by the company under an agreement <u>as is attributable to a period</u>".[9]

27. The arguments supporting a grant of relief from liability, set out in the Respondents' written submissions dated 24 July 2020 at [98]-[105] and further elaborated upon at the hearing on 31

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[6] *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at [18]-[19] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ; *Mentha, in the matter of Griffin Coal Mining Company Pty Ltd (administrators appointed)* [2010] FCA 14569; 82 ACSR 142 at [29], and the authorities there cited; recently approved in *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 472 at [36].

[7] *Eagle, in the matter of Techfront Australia Pty Limited (administrators appointed)* [2020] FCA 542, where Farrell J relieved the administrators from "*any liability with respect to the property leased, used or occupied*" within a defined period.

[8] *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2)* at [39], by reference to *Australasian Memory v Brien* at [26].

[9] *De Vries v Rapid Metal Developments (Australia) Pty Ltd* (2011) 84 ACSR 261; [2011] NSWCA 100 at [161].

July,[10] apply equally to the payment of rent and other liabilities. In circumstances where it is understood that he Court has accepted those submissions, relief should therefore extend to all liabilities, and the Applicants' submission to the contrary at the hearing of 11 August should be rejected.

28. As to the period of relief, the parties are in agreement that relief ought be granted up to 15 October 2020 inclusive. The question is the date from which relief should commence. The Applicants say that relief should only commence from 7 August 2020, being the date on which the Administrators provided the HMU certification for P/N 1853M56P14 S.N BECW0406 in respect of engine 896999. The Applicants submit that this is "in effect the earliest date on which it could be argued that the Administrators substantially complied with the obligation under section 443B(3) to identify the location of the leased property."[11]

29. This submission should be rejected. Leaving aside the fact that it seems incoherent to speak of an electronic record created by the Virgin companies at the conclusion of a lease as "leased property" in an identifiable "location" for the purposes of s 443B(3) of the Corporations Act, the submission is contrary to evidence that has not been the subject of serious challenge in this Court. Mr Dunbier gave evidence to the effect that the provision of historical records necessarily involves a staged process, requiring the participation of both the Applicants and the Respondents[12] and that End of Lease Operator Records are documents not yet in existence in the circumstances of the Respondent companies (Third Dunbier Affidavit at [15]). As has been observed above, Mr Dunbier was a compelling witness, and the Court would accept that evidence.

30. The Court would further conclude, on all the evidence including, in particular, Mr Dunbier's oral evidence, that the Administrators took all reasonable steps to work with the Applicants to deliver the records in as timely a manner as possible. As Mr Dunbier candidly stated, "we hand over copies of everything that we reasonably can. We've got no desire to retain anything. It doesn't add us any value other than continuing records cost."[13] Mr Algeri sets out in some detail the significant steps taken by the Administrators to return the records to the Applicants in as timely a manner as possible, in the form sought by the Applicants.[14]

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[10] Transcript 31 July 2020 at T65.39-T67.43 (Higgins SC).
[11] Applicants' written submissions dated 11 August 2020.
[12] Transcript 31 July 2020 at T16.35-39; T17.11-17 (Dunbier).
[13] Transcript 31 July 2020 at T16.35-39; T19.4-6 (Dunbier).
[14] See First Algeri Affidavit at [36]-[38].

31. The Applicants have directed particular focus on the provision of an HMU unit installation work order for ESN 896999.[15] As Mr Dunbier explains in the Third Dunbier Affidavit at [7]–[8], the Applicants specified that they required the Respondents to produce the HMU work order for the first time on 16 July 2020. The Respondents then took all reasonable steps to provide the work order as soon as possible, but were unavoidably delayed by a third-party service provider in Europe locating a release certificate. Virgin had, by 7 August 2020, provided electronic copies of all Historical Operator Records to the Applicants, including the HMU work order.

32. In those circumstances, the Court would not accept that the date on which the last historical record was provided is the appropriate date for relief to commence; this represents the conclusion of a process engaged in by the Administrators to return the records as expeditiously as possible. Indeed, in circumstances where the Applicants themselves agree that it is appropriate that certain records not yet in existence are to be provided some weeks into the future, the selection of the date of the provision of the HMU Record as the date upon which relief from liability should commence is wholly arbitrary.

33. The Court should instead conclude that the Administrators should be relieved from liability from 16 June 2020, being the date upon which they served the s 443B(3) Notice on the Applicants. That is so because, from that date, the Administrators acted in good faith, and took all reasonable steps to work with the Applicants to return the aircraft objects, consistent with their understanding of their obligations under the Convention.[16] The conduct of the Administrators in that regard has not seriously been called into question in these proceedings.

34. Further, the s 443B(3) Notice served on 16 June was effective to put the Applicants on notice of the Administrators' intention that the Respondents would not exercise rights in relation to the aircraft objects. The effectiveness of the Notice in conveying the Administrators' intentions is clear from the fact that the Applicants confirmed their understanding in an email from Mr Chirico of the Applicants to the Administrators on 16 June 2020.[17] In those circumstances, there can be no prejudice or injustice in exercising the power under s 443B(8) to grant relief from 16 June 2020.

35. Finally, waiving liability from 16 June would not prejudice the interests of any other creditors.

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[15] Affidavit of Derych Warner sworn 22 July 2020 at [18], [26(d)].
[16] See First Algeri Affidavit at [27]-[31].
[17] Exhibit DP-2 at 506.

36. In all of those circumstances, the Court should make Order 9 in the form proposed by the Respondents.

D. Costs: Order 12

37. The Respondents seek an order that there be no order as to costs. The issue raised by the Originating Application was a previously unresolved question of public international law, which had never been considered by any Court. If a costs order is made against the Administrators, it will ultimately be borne by unsecured creditors of the Virgin companies. The appropriate order is that the parties bear their own costs.

38. The better view is that, if, contrary to the foregoing, the Court is minded to award the Plaintiffs their costs, those costs should be costs in the administration. In that regard, the Defendants embrace the Court's observations on 11 August that the issue raised by the Originating Application "needed a determination, and the issue is one of law, and it hadn't been decided before. [The Court has] taken a particular view … It's all part and parcel of dealing with the assets of a company, and just because of the nature of the assets, certain things have to be done and this litigation arose to clarify that".[18] As the Court continued, "I know it's a cost to the creditors but there's lots of matter[s] that have to be dealt with this way and it is a cost to the administration".[19]

39. The basis on which costs ordered by this Court would be other than costs in the administration is unclear. The Respondents will deal with any argument contrary argument raised by the Applicants at the hearing on 17 August 2020.

E. Prayer 5 of the Amended Interlocutory Process

40. The Respondents seek leave to amend the Interlocutory Process dated 17 July 2020 to add an additional prayer for relief: prayer 5 of the Amended IP served 5 August 2020. As noted, the Plaintiffs' position with respect to the Amended IP is unclear.

41. The relief contemplated by prayer 5 is sought for the following reasons. As Mr Dunbier explained in his affidavit affirmed 30 July 2020 (**First Dunbier Affidavit**) at [16], the costs of redelivering the Applicants' aircraft objects are substantial. This raises a real question as to where the money for the redelivery will come from.

[18] Transcript 11 August 2020 at T28.43-47 (Middleton J).
[19] Transcript 11 August 2020 at T29.8-9 (Middleton J).

42. As Mr Algeri explained at [20] of his affidavit sworn 30 July 2020 (**First Algeri Affidavit**), the First Respondent is a special purpose vehicle with no assets, and the Second and Fourth Respondents have very substantial liabilities to creditors including employees, secured creditors, trade creditors, bondholders, other aircraft lessors who hold guarantees and inter-company debts (see First Algeri Affidavit at [21]-[22]).

43. In those circumstances, the Administrators seek assurance from the Court that the expenses incurred in complying with any orders of the Court to redelivery the Applicants' aircraft objects to Florida are properly incurred in the administrations of the Respondent companies. Specifically, the Administrators seek confirmation that the expenses are either:

    (a) expenses properly incurred by the Administrators in preserving, realising or getting in the property of the company, or in carrying the company's business (that is, expenses within the meaning of s 556(1)(a) of the *Corporations Act*), or

    (b) debts or liabilities incurred in good faith and without negligence, by the administrator in the performance or exercise, or purported performance or exercise, of any of his or her functions or powers as administrator (that is, expenses within the meaning of s 556(1)(c) of the *Corporations Act*).

44. The point is of significance to the Administrators, because the characterisation of expenses as falling within either s 556(1)(a) or s 556(1)(c) of the *Corporations Act* means that they are expenses to be paid ahead of unsecured creditors, and the Administrators therefore seek the Court's approval of such a course before such expenses are incurred.

F. CONCLUSION

45. In circumstances where the Court has indicated it will reject the Respondents' construction of "give possession" in Art XI.2 of the Cape Town Protocol, and prefer a construction which requires the Administrators to redeliver the aircraft objects to the Applicants, the appropriate orders are those set out in the Respondents' proposed Short Minutes of Order.

14 August 2020

Ruth C A Higgins SC　　Robert A Yezerski　　Kate Lindeman

Counsel for the Respondents