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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD994/2020
File Title:	VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS V WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 22/09/2020 8:18:31 AM AEST Registrar

Important Information

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IN THE FULL FEDERAL COURT
OF AUSTRALIA
AT SYDNEY

No. NSD 994 of 2020

VB Leaseco Pty Ltd (Administrators Appointed) ACN 134 268 741 & Ors
Appellants

Wells Fargo Trust Company, National Association (as owner trustee) & Anor
Respondents

APPELLANTS' REPLY SUBMISSIONS

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1. The Respondents' submissions, filed 21 September 2020 (**RS**), include a number of contentions based on flawed allegations of fact, which are contrary to the findings of the primary judge and are wholly misconceived. It is convenient to respond to those matters in brief terms in writing. The substantive issues raised by the Respondents will be dealt with orally.

2. *First*, factual focus of the Respondents' submissions (cf RS[3]) is fundamentally misplaced, because the factual position of the parties does not illuminate the proper construction of the Convention and is, therefore, of limited relevance to the issues in dispute on appeal.

3. *Secondly*, and in any event, many of the factual contentions made by the Respondents are incorrect. For example:

   (a) Mr Dunbier did not concede in cross-examination that "*the records required by Willis were essential to the engines being redeployed for another airline*" (cf RS[7]), a contention that is made without any citation. The high point of Mr Dunbier's evidence in that regard was that the provision of documents sought by Willis was "*one method*" by which an engine could be placed into service, and that "*[r]ecertification is another.*"[1]

   (b) Similarly, there was no concession that certain records required Virgin "*to take active steps*" (cf RS[7]); Mr Dunbier's evidence was that, in an end of lease context, giving over the certain records would ordinarily involve Virgin staff carrying out certain certifications. There is no evidence that such records could not be obtained through other means, or that Virgin was even qualified to provide certain records described by the Respondents as "essential".[2]

   (c) Further, it is not the case that "*the reason the End of Lease Operator Records had not been provided by the time of trial*" was "*because [Mr Dunbier] was being expressly directed by the Administrators not to provide them*" (cf RS[8]). To the contrary, Mr Dunbier's evidence was to the effect that the Appellants could not issue certain of the End of Lease Operator Records because Virgin do not "*have the ability, legally, to issue [the FAA or EASA serviceable tags], and the Australian equivalent, the Civil Aviation Safety Authority here, inhibit us from – from issuing one, because we don't have the ability to prove serviceability on the wing. We don't have an engine approval. We're an*

[1] Transcript 31 July 2020 T13.33-37: Part C, p 404.
[2] Ibid at T15.35-4-: Part C, p 406.

operator, not an engine shop. So I can't physically, legally issue one, regardless of what people's interpretations of the rules in the FAA are."[3]

(d) The Respondents' repeated complaint that the Administrators directed Virgin not to deliver the certified statements (see RS[8], [10], [13] and [19]) is unsupported by the evidence and is simply incorrect. The Administrators were content to provide the certified statements, provided an appropriate release of any personal liability was given.[4] As noted by the primary judge, no such confirmation was forthcoming from the Respondents.[5]

(e) The Respondents' observation at RS[19] that Mr Algeri "*appears to have assumed that Willis wanted one of the Administrators personally to sign off on the critical records*" is similarly incorrect. In his affidavit sworn 17 July 2020, Mr Algeri states at [36], "*The Administrators are not prepared to cause or permit the Virgin companies to issue signed Status Statements without an appropriate disclaimer or limitation of liability from the Plaintiffs that reflects the external administration of the Virgin Companies and the inability of the Administrators to provide warranties in relation to facts and circumstances which are not within our direct area of control or expertise*" (emphasis added). Mr Algeri plainly recognised that the records sought by Willis would be signed by the Virgin companies. The legal context of Mr Algeri's statement is s 198G of the *Corporations Act*, which provides that while a company is under external administration, an officer of the company "*must not perform or exercise a function or power*" of their office without (relevantly) the "*written approval of the external administrator of the company or the Court*". The effect of s 198G is that responsibility for functions or powers exercised by officers of a company under administration ultimately lies with the administrators. Accordingly, the Administrators would be liable for the Virgin companies' certification of records for Willis, regardless of who ultimately signs the documents in question. The Respondents' criticisms in RS[19] are therefore misplaced. Importantly, as is noted below, the primary judge accepted that the conduct of the Administrators in this context was reasonable: see J[157].

(f) The statements at RS[18](c) and [22] concerning the fact that the Historical Operator Record for the HMU was outstanding at the date of the hearing before the primary judge are apt to mislead. The "trial" in this matter was not concluded until 3 September when

[3] Ibid at T15.35-4-: Part C, p 406.
[4] Affidavit of Salvatore Algeri sworn 17 July 2020 at [36]: Part C, p 345.
[5] J[157].

His Honour gave judgment. While his Honour had given an earlier indication of the shape of his proposed orders, he continued to receive evidence and submissions up until judgment. While the original circumstances in which the HMU records came to be requested and delivered when they were may be the subject of debate[6], the undoubted fact as noted in footnote 7 of the Respondents' submissions is they were provided by 7 August, that is a month before judgment. The primary judge made a finding in the Appellants' favour on the provision of records at J[157] which confirms he took into account all evidence and submissions filed up until judgment and that he did not regard the "trial" as closed on 31 July 2020. Accordingly the ultimate submission of the Respondents on the HMU topic at RS[22] first sentence should be rejected.

4. *Thirdly,* Art XI of the Protocol operates with regard to insolvent debtors and insolvency administrators. In that context it is important to appreciate the complexity of the administration of the Virgin companies in considering the factual matters raised by the Respondents. Virgin's fleet contains 117 leased aircraft and engines[7] leased by some 73 lessors and financiers.[8] Aircraft Protocol Agreements, which are consistent with the Appellants' construction of their obligations under Art XI.2 of the Protocol,[9] were entered into with 70 of the 73 lessors and financiers.[10] Each of those lessors and financiers is, therefore, required to collect their property from the Virgin companies, at their own cost. The Administrators' significant attempts to provide practical assistance to Willis in taking possession of its aircraft objects should be seen in that context.

5. *Fourthly*, as to the Respondents' submissions at RS[20]-[21], it was entirely appropriate for the Administrators to ensure that they acted in accordance with their obligations under the *Corporations Act 2001* (Cth) at all times, in addition to complying with their obligations under the Convention. This included acting so as to maximise the chances of the Virgin companies continuing in existence through reducing unnecessary liabilities to the companies[11], including through avoiding costs they considered they had no obligation to incur. Prior to the delivery of the primary judgment, there was no available precedent as to how the question of the proper construction of the obligation to "*give possession*" in Art XI.2 should be resolved, and in those

[6] Transcript, 31 July 2020 at T65.20-37: Part C, p456.
[7] Affidavit of Vaughan Neil Strawbridge sworn 11 May 2020 at [87]: Part C, p 266.
[8] Affidavit of Salvatore Algeri sworn 18 September 2020 at [25].
[9] Ibid at [26].
[10] Ibid at [25].
[11] Section 435A of the *Corporations Act 2001* (Cth).

circumstances, it was not only open to the Administrators to refuse to take steps that were inconsistent with the Appellants' view of the proper construction of Art XI.2, such a course was entirely appropriate in the context of the Administrators' obligations under the *Corporations Act*. This does *not* amount to treating "*the provision of records as a bargaining chip*", and does *not* mean that the Administrators took the view that they were not obliged to provide records "*until there is some commercial benefit in it for them*". Such contentions are in any event inconsistent with (a) Mr Dunbier's sworn evidence in cross-examination that the Virgin companies "*will give you absolutely everything that we've got. Every record that we have … We've got no hesitation at all not [sic] to provide something that we have as a record*"[12] and later "*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]; and (b) Mr Algeri's sworn evidence that the issue preventing the provision of the certified statements was the absence of a release from liability.[14] They should not be accepted.

6. *Fifthly,* and most fundamentally, the primary judge squarely held at J[178], "*I do not draw the inference that the Administrators have not invested the time and effort required to locate all the Applicants' aircraft objects*", in the context of what "*has been a complex Administration*". His Honour further held at J[179]:

> "*[t]he approach taken by the Administrators was based upon their understanding of the legal position set out in their letter dated 9 June 2020. 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.*"

7. The primary judge also held, at [157], that "*the Respondents have taken reasonable steps (in the circumstances confronting them and the nature of the Administrator) to locate the documents identified by the Applicants*".

8. Those findings are not challenged in the appeal, and there is no Notice of Contention. In those circumstances, allegations of the kind made at RS[19]-[21] should not be made. In particular, personal attacks on the Administrators of the kind set out in RS[19]-[21] are wholly irrelevant

[12] Transcript 31 July 2020 at T15.4-11: Part C, p 406.
[13] Ibid at T19.3-6: Part C, p 410.
[14] Affidavit of Salvatore Algeri sworn 17 July 2020 at [36]: Part C, p 345.

to the issues in dispute on the appeal, and in light of the findings at J[178]-[179] they should not be entertained by the Court.

22 September 2020

Justin Gleeson SC
Banco Chambers

Kate Lindeman
Banco Chambers