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Details of Filing

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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

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IN THE FEDERAL COURT OF AUSTRALIA **NSD 714 of 2020**

WELLS FARGO TRUST COMPANY
First Applicant

WILLIS LEASE FINANCE CORPORATION
Second Applicant

VB LEASECO PTY LTD
First Respondent

VIRGIN AUSTRALIA AIRLINES PTY LIMITED
Second Respondent

VAUGHAN STRAWBRIDGE, SALVATORE ALGERI, JOHN GREIG AND RICHARD HUGHES OF DELOITTE (TOGETHER, THE 'ADMINISTRATORS')
Third Respondent

FIRST AND SECOND APPLICANTS' SUBMISSIONS ON DELIVERY UP OF CERTAIN AIRCRAFT OBJECTS UNDER THE CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL AND PAYMENT OF POST-APPOINTMENT RENT

A. INTRODUCTION

1. The First and Second Applicants (**Applicants**) are respectively the legal and beneficial owners of four aircraft jet engines. The engines (and associated stands, equipment, and records) were leased to the First Respondent (**VB**) who in turn subleased them to the Second Respondent Virgin Australia Airlines Pty Limited (**VAA**), together **Virgin**. The First Applicant's rights as lessor (held beneficially for the Second Applicant (**Willis**)) are an "*international interest*" [1] afforded certain rights, privileges, and immunities by the Cape Town Convention, and Cape Town Aircraft Protocol.[2] The Cape Town Convention and Aircraft Protocol have force of law in Australia.[3]

2. Article XI(2) of the Cape Town Aircraft Protocol provides that upon the occurrence of an "*insolvency-related event*", the insolvency administrator or the debtor "*shall … give possession of the aircraft object to the creditor*". It does not appear to be in dispute between the parties that

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[1] Article 2 paragraph 2(c), *Convention on International Interests in Mobile Equipment* (**Cape Town Convention**), signed at Cape Town on 16 November 2001. Assented to by Australia on 1 May 2015 (subject to the matters set out in the Declarations made by Australia at the time of the deposit of its instrument of accession).
[2] *Protocol to the Convention on International Interests in Mobile Equipment Matters Specific to Aircraft Equipment,* signed at Cape Town on 16 November 2001, assented to by Australia on 26 May 2015 (subject to the matters set out in the Declarations made by Australia at the time of the deposit of its instrument of accession).
[3] Taking force on 1 September 2015 upon the commencement by Proclamation of section 7 of the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) (**CTC Act**). See also the *International Interests in Mobile Equipment (Cape Town Convention) Rules 2014* (Cth) (**CTC Rules**).

an insolvency related event occurred at the time of the appointment of the Third Respondent (**Administrators**). The question for this Court is have the Administrators (or VB as the debtor) complied with their Cape Town Convention obligation to "*give possession*" of the engines?

3. To date, all that the Administrators have done is inform the Applicants that the aircraft engines remain attached to four separate Boeing 737 aircraft (such that one engine is apparently on each aircraft). Three of the aircraft are in Melbourne and one is in Adelaide.[4] The location of certain vital equipment and engine records remains unclear.[5] The information provided by the Administrators by access to the data room on 8 July 2020 provides some but not all of the information required.

4. The Administrators' position appears to be that they have done, or will only do, that which is required of them under the *Corporations Act 2001* (Cth) (**Corporations Act**), to disclaim property pursuant to section 443B and that that is sufficient to discharge their obligations for the purposes of Australian law under the Cape Town Aircraft Protocol. For the reasons given below, that contention is incorrect, and the mere act of identifying aircraft upon which the engines happen to be located is entirely insufficient.

5. The Applicants' case is that the Administrators (or VB) are required to "*give*" possession as a positive act. For the reasons developed below, that requires delivery up in accordance with the contractual regime for redelivery to the Applicants in the United States. The Administrators cannot rely upon any lesser requirement found in the Corporations Act, because the Convention and Protocol prevail to the extent of any inconsistency.[6]

6. The Court should not adopt the less stringent interpretation of the Cape Town Aircraft Protocol favoured by the Administrators. Any Court-sanctioned abandonment of leased goods would interfere with international obligations that were in the contemplation of the parties at the time of financing the engines. Those stringent international obligations formed the basis upon which Australia gave domestic effect to the Cape Town Convention and Protocol, and indeed, are essential to continued flow of finance to the industry.

7. Any watered-down version of the Cape Town Aircraft Protocol leaves a lessor in circumstances where it may have to search for and recover its assets from numerous jurisdictions. On the Administrators' interpretation, that would include circumstances

[4] Affidavit of Dean Poulakidas sworn 29 June 2020, [54] (**Poulakidas Affidavit**).
[5] Poulakidas Affidavit, [65]; Affidavit of Garry Failler affirmed 8 July 2020 [22], [24]-[29].
[6] Section 8, CTC Act.

where the equipment essential to the return and transportation of the engines appears to be far removed from the engines themselves. That is not the efficient model of security against mobile assets envisioned by the drafters of the Convention and Protocol, and the Commonwealth Parliament when wholly adopting their terms into the law of Australia.

8. The second and distinct issue raised by prayers 5 and 6 of the Originating Process, is whether the Administrators failed for the purposes of the Corporations Act to disclaim the Applicants' property by their 16 June 2020 Notice and will be personally liable for post-appointment "*rent or other amounts payable by the company under the agreement"* pursuant to section 443B of the Corporations Act.

9. On the Applicants' case the "*rent or other amounts payable"* has accrued since 16 June 2020 at a rate of US$8,000 per day for all four engines and associated equipment.

B. FACTUAL AND PROCEDURAL BACKGROUND

Applicants' *"international interest"* in aircraft objects

10. The First Applicant is the legal owner of certain aircraft objects, as trustee for Willis Engine Structured Trust III through its servicer, the Willis.[7]

11. The Applicants agreed to lease, and provide lease support services in respect of, the equipment to the First Respondent pursuant to lease arrangements detailed in the affidavit of Dean Poulakidas sworn 29 June 2020 (**Poulakidas Affidavit**).[8]

12. The First Respondent sub-leased the engines and equipment to the Second Respondent.[9]

13. The Administrators were appointed as voluntary administrators to the Virgin Australia airline group of companies, including the First and Second Respondents on 20 April 2020.[10]

14. The lease arrangements are detailed in paragraphs 7 to 32 of the Poulakidas Affidavit and relevantly provide for the demise and delivery of the following (defined as the **Equipment**):

[7] Poulakidas Affidavit [3] as to the relationship between the Applicants and exhibit DP-1.
[8] Poulakidas Affidavit [7]-[10], [13], [18], [23], [28] and pages of DP2 referred to therein.
[9] Poulakidas Affidavit [14], [19], [24], [29] and pages of DP2 referred to therein.
[10] Poulakidas Affidavit [24], ASIC searches at DP-2 p3, 22.

(a) four CFM International aircraft engines, model CFM-56-7B24, with engine serial numbers 888473, 897193, 896999 and 894902 (**Engines**), which have at least 24,000 pounds of thrust and are used on Boeing 737 aircraft;[11]

(b) an engine stand for each Engine (**Engine Stand**)[12] which have individual serial numbers for the cradle and the base. The Engine Stands are essential for transportation in accordance with the manufacturer's guideline when the engines are not attached to an airframe;[13]

(c) a quick engine change (**QEC**) unit for each Engine (which are components attached to the external part of an engine and are required to make the Engine operable); and

(d) Engine records relating to the use and airworthiness of the Engines (comprising historical records, records generated by the First and Second Respondents during the term of the lease, and records to be provided on return of the engine) (**Records**).

15. The agreed value of the Equipment totals US$40,000,000.[14]

16. The Equipment comes within the definition of "aircraft objects", and "aircraft engines" for the purpose of Article I.2(b) (c) of the Cape Town Aircraft Protocol, the latter of which is defined as "*aircraft engines ….together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto*".

17. As Professor Goode explains in the Official Commentary (2019, 4ed) at [3.9]: "*Data, manuals and records relating to aircraft, airframes and aircraft engines are a vitally important part of what is included in the definitions in that without complete records the operator will be unable to obtain an airworthiness certificate.*"

18. That is consistent with the evidence of the Applicants' technical specialist Garry Failler, who explains how Willis requires those records in order safely to use the engines, and in the absence of which the Engines' commercial value is greatly reduced.[15]

19. During the course of the administration of the Virgin Group the Administrators sought (and were granted) orders from this Court including orders:

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[11] Poulakidas Affidavit [13], [18], [23], [28] and pages of DP2 referred to therein.
[12] Poulakidas Affidavit [13], [18], [23], [28] and pages of DP2 referred to therein.
[13] Affidavit of Garry Failler affirmed 8 July 2020, [16].
[14] The agreed value of the Equipment under each of the 4 leases is US$10,000,000: See Schedule 1 Article V of the Aircraft Engine Lease Agreements, Poulakidas affidavit at DP-2 p139, 211, 278, 353.
[15] Affidavit of Garry Failler affirmed 8 July 2020, [24]-[31].

(a) extending the time limit imposed in section 443B(2) of the Corporations Act for the Administrators to decide whether to exercise Virgin's rights in relation to leased property (ie including the First and Second Respondent's rights in respect of the Equipment), which time ultimately expired on 16 June 2020; and

(b) relieving the Administrators from personal liability that would otherwise arise under sections 443A and 443B of the Corporations Act in respect of any property leased, used or occupied by any member of the Virgin Group up to 16 June 2020.[16]

Administrators' standstill proposal and purported disclaimer

20. Since 1 May 2020 the Administrators and Willis have been in communication in respect of the continued use and/or return of the Engines and Equipment leased by the Applicants to the First Respondent and sub-leased to the Second Respondent.

21. On 1 May 2020 the Administrators proposed that Willis agree to a "standstill" of its rights (proposed in a document styled "Aircraft Protocol" (**Standstill Agreement**) to the effect that Willis would agree not to enforce its rights for a period to be agreed by the parties.

22. On 30 May and again on 2 June 2020 Willis informed the Administrators that it would not agree to the terms of the proposed Standstill Agreement and sought expressly in writing the return of its engines.

23. On 9 June 2020 the Administrators foreshadowed that by 16 June 2020 they proposed to issue a notice pursuant to section 443B(3) of the Corporations Act, and stated that the "*issue of a section 443B(3) notice does not result in the redelivery of the engines pursuant to the redelivery provisions of the aircraft leases. After the notice is issued, you* [Willis] *will have to recover possession of the Engines at your own cost on an "as is, where is" basis…".*

24. On 10 June 2020 by email from its President Mr Hole, Willis sought the return of its engines and stated that it expected the Administrators to comply with its obligations under the Cape Town Convention and the delivery obligations prescribed by the terms of the leases.

25. On 16 June 2020 by letter from its solicitors, Norton Rose Fulbright, Willis wrote to the solicitors for the Administrators, Clayton Utz, insisting that the Administrators comply with their obligations under Article XI of the Cape Town Aircraft Protocol to *"give possession"* of the Engines and Equipment.

[16] Poulakidas Affidavit, [34]-[36].

26. On the same day 16 June 2020 by cover of a letter from Clayton Utz to Norton Rose Fulbright, the Administrators purported to issue a notice to Willis in accordance with section 443B(3) of the Corporations Act disclaiming the engines, and stating among other things:

(a) "*the Administrators are unable to comply with all the return terms of the lease agreement that Virgin has with you* [Willis]*";*

(b) the Administrators proposed to pay for insurance *"in the interest of maintaining the existing insurance protection for the engines during the period until you have taken possession or control of the engines and in any event no later than 14 days from this notice* [ie, until 30 June 2020]*"*.

(c) Willis *"will have all risk in the engines when you have taken possession or control of the engines and in event no later than 14 days from this notice* [ie, until 30 June 2020]"; and

(d) the engines were "on the wing of" four separate aircraft, three of which were in Melbourne, and one of which was in Adelaide.

27. The 16 June 2020 Notice identified that:

(a) Engines 896999, Engine 897193, and Engine 888473 were each "on the wing" of three different Virgin aircraft at Melbourne Airport;

(b) Engine 894902 was "on the wing" of a different Virgin aircraft at Adelaide Airport.

28. The 16 June 2020 Notice identified nothing else of the Applicants' leased Equipment.

29. On 16 June 2020 Steve Chirico of Willis emailed Gordon Chan and others at Deloitte providing details of the serial numbers of the Engines, Engine Stands, and type of QEC kits provided to Virgin at the time of lease. [17]

30. On 18 June 2020, the Applicants' solicitors highlighted the deficiencies in the Notice to the solicitors for the Administrators.[18]

31. On 18 June 2020 Garry Failler of Willis followed up by email to Gordon Chan and Ian Boulton at Deloitte when no response to Mr Chirico's email was forthcoming.[19]

[17] Email from Steve Chirico of Willis to Gordon Chan of Deloitte dated 16 June 2020, at DP2 p506-507.
[18] Letter from Norton Rose to Clayton Utz dated 18 June 2020, at DP2 p496-497.
[19] Email from Garry Failler of Willis to Gordon Chan of Deloitte dated 18 June 2020, at DP2 p505.

32. Mr Boulton responded by email dated 18 June 2020 (although the email was signed "Gordon"). [20] That email stated different locations for two of the Engines, which (if correct) meant that the locations identified in the 16 June 2020 Notice were also deficient.

33. Mr Boulton's 18 June 2020 email identified fundamental differences in relation to the location of two of the Engines:

(a) Engine 897193 was in Adelaide on VH-VUT (not in Melbourne on VH-VUA as previously identified);

(b) Engine 894902 was in Melbourne on VH-VUA (not in Adelaide on VH-VUT as previously identified).

34. These errors are not merely minor errors of misdescription, they reveal at a fundamental level the difficulty with the Administrators' approach to their obligations. The Engines were in a different State to that first identified, and as later explained by the Administrators, were at an airport at which there were insufficient facilities to remove them from the aircraft.

35. Mr Boulton's 18 June 2020 email also identified (for the first time) the whereabouts of the Engine Stands. Although the email did not identify serial numbers it suggested that two of the Willis Engine Stands were in Melbourne, and two were located at "*Delta, Atlanta"*. But no mention was made of the QECs (or an inventory of components) nor the Records.

36. On 19 June 2020 Garry Failler from Willis sought clarification to determine if Willis was authorised to remove the Engines from the aircraft owned by third parties.[21]

37. On the same day, 19 June 2020, Gordon Chan of Deloitte wrote back explaining that Willis would be required to engage either Virgin technicians or other CASA approved engineers at Willis' expense to remove the Engines. Moreover, Gordon Chan stated that the *"limitations of the Adelaide facilities"* would *"require the ferrying of VH-VUT to another location"* at Willis' cost.[22]

38. From Mr Chan's email it was clear that the Respondents' were not in a position to *"give possession"* of the engine at Adelaide (even at that location) – as it had no facilities to remove the engine from the aircraft in Adelaide.

[20] Email from Ian Boulton of Deloitte to Garry Failler of Willis dated 18 June 2020, at DP2 p503-504.
[21] Email from Garry Failler of Willis to Ian Boulton of Deloitte dated 19 June 2020, at DP2 p503.
[22] Email from Gordon Chan of Deloitte to Garry Failler of Willis dated 19 June 2020, at DP2 p502.

39. On 22 June 2020 the Respondents' solicitors Clayton Utz wrote[23] to Norton Rose Fulbright, among other things, conceding that the "*records, QEC units and engine stands (collectively, Ancillary Property), is all property that is directly associated with the Engines and necessary to operate, store, and transport them."* However, the letter asserted the so-called "ancillary property" had "*no, or minimal, use or value independently of Engines"* (which assertion is rejected by the Applicants).

40. In respect of the Cape Town Convention obligations, the 22 June 2020 letter clarified the Respondents' position stating: *"Similarly, paragraphs [2] and [5] of Article XI of the CTC Protocol do not give rise to any more onerous obligation on an 'insolvency administrator' than simply giving an owner or lessor the opportunity to take possession of property.*"

41. In those circumstances the Applicants approached the Court on 30 June 2020.

42. On 3 July 2020 Gordon Chan confirmed the location of two of the Engine Stands in the possession of Delta at the "DTO", being a facility in Atlanta, Georgia in the US.[24]

43. Garry Failler explains that shortly before affirming his affidavit on 8 July 2020 (in the United States) Mr Failler's team obtained access to a data room with records.[25] On present instructions not all Records required by Willis have been provided, but the technical staff at Willis are corresponding directly with the Administrators in respect of a list of outstanding documents. The status of outstanding Records will be the subject of evidence in reply by the Applicants, given the factual picture is likely to change between the date of these submissions and the hearing.

C. REMEDIES ON INSOLVENCY UNDER CAPE TOWN AIRCRAFT PROTOCOL

The Applicants' source of rights and the Court's interpretative task

44. Prayers 1 to 4 of the Originating Process seek relief under the Cape Town Convention. The Applicants' cause of action arises under the CTC Act as the source of law,[26] but where the statute has wholly enacted the terms of the Cape Town Convention and Protocol it is necessary to interpret the words of the Convention and the Protocol themselves in

[23] Letter from Clayton Utz dated 22 June 2020 at DP2 p508-510.
[24] Affidavit of Garry Failler affirmed 8 July 2020, [22].
[25] Affidavit of Garry Failler affirmed 8 July 2020, [28].
[26] *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, [12] (Gleeson CJ, Gummow, Hayne and Heydon JJ), [59] (McHugh J).

accordance with the principles of international law that govern the interpretation of treaties.[27]

45. The starting point for the interpretation is the text of the Cape Town Convention and Protocol themselves. The applicants submit that the language of Article XI of the Cape Town Aircraft Protocol is tolerably clear that it requires the administrators to *give* possession.

46. The relevant interpretative principles are set out in the *Vienna Convention on the Law of Treaties* [1974] ATS 2 (***Vienna Convention***). Article 31(1) entitled "General Rule of Interpretation" provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose. Article 32 of the *Vienna Convention* entitled "Supplementary Means of interpretation" permits recourse to the supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion as an aid to construction (ie the *"travaux preparatoires"*).

47. Nothing in the Applicants' submissions is intended to derogate from that primarily textual and contextual approach to interpretation of the Cape Town Convention and Protocol. To interpret *"give"* possession as requiring redelivery is consistent with both the ordinary meaning of the word and the objects and purpose of the Convention and Protocol.

48. However, given the dearth of curial consideration of the Cape Town Convention and Aircraft Protocol and its international significance for the aircraft financing industry, the Applicants refer the Court to a number of other sources, including the travaux preparatoire and Professor Goode's Official Commentary (2019, 4 ed) written after the time of the adoption of the Convention and its enactment in Australian law.

Text of Article XI of the Cape Town Aircraft Protocol

49. The jurisdictional preconditions to enlivening the Convention and Protocol are satisfied in the present case because:

[27] *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, [24]-[25] (Gleeson CJ, Gummow, Hayne and Heydon JJ), and section 15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth). To similar effect *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-231 (Brennan J), at 251-252 (McHugh J); *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd* [2020] HCA 2, 94 ALJR 182 [35].

(a) the "*international interest*" in Article 2.2(c) and 7 of the Convention is established by each engine lease (incorporating the terms of the GTA), which establishes Wells Fargo as the lessor of various "aircraft engines" as referred to in Article 2.3(a);

(b) the aircraft Engines are of the thrust required[28] by Article I.2(b) of the Aircraft Protocol, and are defined to include the "*modules and modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto"*;

(c) the Engines and Equipment are therefore each "aircraft objects" for the purpose of Article I.2(c) of the Cape Town Aircraft Protocol;

(d) the priority search certificates in evidence[29] are prima facie proof of the interests in favour of Wells Fargo in each engine (see Article 24 of the Convention);

(e) an "*insolvency-related event"* occurred within the meaning of Article 1.2(m) of the Cape Town Aircraft Protocol, by reason of the commencement of "*insolvency proceedings"* (defined in Article 1(l) of the Convention) when the Administrators were appointed to the Virgin entities on 20 April 2020.

50. Article XI of the Cape Town Aircraft Protocol (to the extent acceded to by Australia) is in the following form:

> Article XI — Remedies on insolvency
>
> 1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3).
>
> *Alternative A*
>
> 2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:
>
> (a) the end of the waiting period; and
>
> (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.
>
> 3. For the purposes of this Article, the "waiting period" shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.
>
> 4. References in this Article to the "insolvency administrator" shall be to that person in its official, not in its personal, capacity.

[28] Affidavit of Garry Failler affirmed 8 July 2020, [10].
[29] Poulakidas affidavit, [33] and DP-2, p 409.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.

7. The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

8. …

9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

…

51. Turning first to the text itself. The ordinary natural meaning of the word "*give*" connotes positive action by the debtor and receipt by the creditor. It is an active verb. If the intention had been to permit the creditor simply to abandon the aircraft object on an "as is, where is" basis, a verb like "relinquish" would have been more appropriate, and the words "to the creditor" would not have been included.

52. The words "*give possession … to the creditor*" impose a positive obligation upon the debtor or insolvency administrator to return the aircraft. To hold that the obligation is satisfied where the debtor or insolvency administrator merely abandoned or relinquished possession would be to transform that positive obligation into a licence to abandon the creditor's property wherever it happens to be and in whatever condition. That is all the more so where the property in question is highly moveable property in the form of an aeroplane, capable of being relocated in the ordinary course of the aircraft's work to almost any location.

53. Any construction of Article XI that reduced the obligation in Article XI.2 to *"give possession"* to an obligation only to give an *"opportunity to take possession"* to the creditor as described in Article XI.5 ought to be rejected.

54. The opportunity to "take" arises only after the debtor has "given" possession. That is consistent with the common law interpretation of the phrase *"give possession"*.

55. In *The Leasing Centre (Aust) Pty Ltd v Rollpress Proplate Group Pty Ltd* [2010] NSWSC 282, Barrett J considered a contract of hire which imposed no obligation (in express terms), but contained a recital stating that the party "has agreed" to "rent" a forklift. His Honour held that this implied an obligation to "give possession" of the forklift, which obligation was never fulfilled, even though the lessee made rental payments. Barrett J explained:

> [108] When one person makes delivery, another **takes** or accepts delivery by **acquiescing in the process set in train by the person making delivery**. Accepting or **taking delivery involves some relevant form of co-operation complementing the steps taken to make delivery**. In the simplest case, the person making delivery of a chattel holds it in his or her hand, extends that hand towards the person to whom delivery is to be made and puts it into his or her hand.
> [109] Obtaining delivery, in terms, involves more than taking or accepting delivery. Taking and accepting may be quite passive, in the sense just described. Obtaining, by contrast, connotes some active step to complete or implement a process by which delivery is intended to be made. The active step required will, of course, depend on circumstances.
> [110] The clause 1(a) "obligation of the Renter to obtain delivery of the Equipment" must thus be an obligation to take whatever active step is necessary on the Renter's part to bring about delivery the effectuation of which ultimately lies within the power of someone else. This is an important point. One cannot obtain delivery without some form of co-operation by the person capable of giving delivery. The obligation to obtain delivery therefore can only be regarded as an obligation to do everything necessary to ensure that a person able and to make delivery actually does so. It cannot be an obligation the due discharge of which will always and inevitably result in the taking of delivery.
>
> …
>
> [112] Someone can diligently do everything that it is necessary and possible for him or her to do in order to obtain delivery without thereby bringing about the result that some other person obliged to give possession actually does so. **Non-performance of an obligation to give possession is not somehow excused by the mere existence of a counter obligation to obtain delivery; nor is the obligation to give possession inconsistent with and, as it were, cancelled out by the counter obligation to obtain delivery**. [emphasis added]

56. Barrett J stressed that "take" in the context of transfers of possession does not ordinarily connote active steps by the receiver (cf the stronger obligation to "*obtain*" goods described at [109], and applied at [112])). As his Honour suggests the words "give" and "take", when used together (as in Art XI.2 and 5), will ordinarily impose positive obligations on the giver and passive receipt by the taker.

57. The context of the phrase "*give possession"* only supports the interpretation and ordinary meaning advanced by the Applicants. Article XI.2 appears in the "*Alternative A"* insolvency

regime, provided for by Australia's Declaration under Article XXX(3) at the time of its accession to the Cape Town Aircraft Protocol.

58. Professor Goode in his Official Commentary (2019, 4ed) describes Alternative A as the "hard", or "rule-based" alternative within Art XI: at [3.126].

59. Professor Goode described called Art XI "*the single most significant provision economically*": at [5.60]. In Professor Goode's "Review of Protocol" he says at [3.117]:

> Article XI introduces special rules in relation to aircraft objects **designed to strengthen the creditor's position** vis-à-vis the insolvency administrator or the debtor on the occurrence of an insolvency-related event. (emphasis added)

60. The words "shall" "give possession" "to the creditor" must be interpreted in that creditor favoured context.

61. Moreover, in "Illustration 71", at [5.70] of the Official Commentary, Professor Goode gives a set of hypothetical facts and analyses the application of Art XI to them and concludes that the effect of Alternative A is that "*[t]he financed aircraft engine* ***must be returned*** *at the end of the 60-day period*" (emphasis added). While the Illustration 71 example is not addressing the precise issue in terms, the language is consistent with the applicants' approach – that the object must be delivered to the lessor. Moreover, it expressly acknowledges that it may require funds to be expended "*from the general assets of the estate*".

62. In those circumstances the use of the phrase "*give possession*" imposes an obligation to redeliver. It must certainly require something more than a drip feed of information on the location and whereabouts of the Cape Town Convention creditor's assets. The text of the Cape Town Convention is entirely inconsistent with the approach taken by the administrators in their 16 June 2020 Notice. That must especially be so when the Administrators acknowledged that the engine located on an aircraft (owned by a third party) in Adelaide could not be removed from the aircraft at that location but must be first flown on a ferry flight to some other location (DP2 p502) – presumably requiring (on the Administrators' approach) Willis to find a crew, request permission to operate the aircraft, pay for the expenses of the flight and then arrange to dismantle the aircraft at the destination. Nothing in that approach amounts to *"giving"* possession on any reading of the words.

63. The text of Article XI.2 of the Cape Town Aircraft Protocol requires no more or less than what the Applicants seek in prayer 2 of their Originating Process, namely, delivery up in a manner consistent with the agreement.

Object and purpose of the Cape Town Convention and Aircraft Protocol

64. The textual basis for the obligation on the debtor or administrator to positively *give* possession of the aircraft object is only confirmed by the objects and purpose of the Convention.

65. The Second Reading Speech of the Bill that became the Cape Town Convention Act explained that the CTC Act was intended to ensure creditors had access to greater rights in the event of default or insolvency (prevailing over any inconsistent local law) in return for which local Australian airlines would have access to cheaper finance. In the Second Reading Speech Virgin is identified as one of the airlines who may benefit:

> The Cape Town convention is an international legal system that protects secured lenders of aircraft objects such as aircraft, airframes, engines and helicopters and reduces the risk and cost associated with financing these objects.
> The Cape Town convention creates an international registry for lenders to register their interest in an object so that, in the event a borrower is unable to repay a loan, the lenders' claim has priority over any other claim registered thereafter.
> It also outlines internationally-consistent remedies available to the lender in the event of default or insolvency. They include the right to take possession of the aircraft without needing to seek approval of the courts.
> This reduces the time it takes for a lender to be recompensed in the event of a default….
>
> In Australia, for example, by making certain declarations, our airlines will be eligible for a discount of up to 10 per cent on their export finance arrangements for the purchase of an aircraft or aircraft object. Actual savings will vary depending on the credit rating of the borrower and the purchase price of the aircraft, but it is estimated the airlines could save in the order of $2.5 million on the purchase of a new Airbus A380 or $330,000 on the purchase of a new ATR72 aircraft (similar to that which currently operates by Virgin Australia from Sydney to Canberra)….
> As industry has noted, these discounts will ultimately enable airlines to accelerate the upgrade to safer, more fuel-efficient fleets….
> This will include any declarations that we make under the convention or the protocol. To ensure that Australia qualifies for the export financing discount, the Cape Town convention will have precedence over other Australian law, to the extent that any inconsistency applies.

66. Professor Goode's Official Commentary at [3.1] explained the background to the Cape Town Convention in similar terms. Professor Goode identified that the strong Alternative A regime would permit access to better finance:

> In addition, ratification of the Cape Town Convention and Aircraft Protocol with select declarations, including Article XI, Alternative A, of the Aircraft Protocol, will help airlines access the capital markets, for example, through the issue of enhanced equipment trust certificates, and thus tap a source of finance hitherto almost entirely confined to U.S. airlines because of the lack in other jurisdictions of any parallel of

section 1110 of the U.S. Bankruptcy Code, which provided the model for Alternative A.

67. It is entirely consistent with the objects and purpose of the Cape Town Convention and Aircraft Protocol that the obligations being assumed by debtor airlines (and their insolvency administrators) required them to redeliver the aircraft objects in the event of insolvency. That obligation is intended to be more onerous than would be required under any local law (like an 'as is where is' disclaimer by an administrator under section 440B), and the quid pro quo for those more onerous obligations is that airlines generally, and Virgin specifically, had access to cheaper finance.

Travaux preparatoire and secondary materials

68. The drafting history and travaux preparatoire support the Applicants' interpretation of "*give possession"* as requiring redelivery in accordance with the parties' agreement .

69. In an earlier draft of what became Art XI, an earlier draft form of the Cape Town Aircraft Protocol in 1997 contained Article XIV 3(b) in the following form with the chapeau "the obligor shall:[30]

> "(b) return and deliver the aircraft object to the obligee in accordance with, and in the condition specified in, the agreement and related transaction documents."

70. From the earliest form the provision reflected an intention to require the return and delivery of aircraft objects in accordance with the contractual terms between the parties.

71. Subsequently by 1998 the provision was numbered Art XII(3)(b), [31] and embodied the eventual phase "*give possession"* stating that the obligor shall:

> "(b) give possession of the aircraft object to the obligee [in accordance with, and in the condition specified in the agreement and related transaction documents]."

72. The parenthetical words appear in the original, and capture precisely the scope of the obligation advocated for by the Applicants. Notably the square brackets appear to have been added by the Chair of the Meeting Professor Goode, who explained that it applied to minor amendments not affecting substance.[32]

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[30] UNIDROIT 1997, Study LLXXII, Document 36 add 3.

[31] UNIDROIT 1998, Study LLXXII, Document 41 produced by the Steering and Revision Committee, Appendix III pp8-9.

[32] UNIDROIT 1998, Study LLXXII, Document 41 produced by the Steering and Revision Committee, Item 8 Business of the Meeting: Chairman and Mr Wool's introduction, p5-6 "With a view to facilitating the work of the Committee he had revised the text of the preliminary draft Convention and that of the preliminary draft Protocol considered by the Governing Council at its 77th session. In this task he had derived considerable assistance from Mr Wool, in relation to aircraft equipment in general and as regards the preliminary draft Protocol in particular. **He had also introduced certain minor amendments which, while not affecting the substance, had appeared to him to be necessary or which might be considered to be necessary (these last had been submitted for**

73. The parenthetical words were not included in the final text of the Protocol. However, in the subsequent drafts of the Protocol there is nothing to suggest a deliberate departure from the substantive redelivery obligations envisioned by the original drafting.

74. If the approach to the drafting of the Protocol was being radically modified to provide for mere abandonment of aircraft equipment on an "as is, where is" basis one would have expected that wording to appear in the text, and certainly for that to have been explained in the working papers. The Applicants have found no such indication.

75. Instead the wording was retained in the draft provided with the First Joint Session Report of February 1999 (see p 82).[33] It was also retained for the Second Joint Session Report of September 1999[34] (see p 103).

76. However, the wording changed to the present form in the Third (and final) Joint Session Report[35] (see p 90). The report discusses that change at paragraph [202] stating:

> "It was decided that the Drafting Committee should improve the wording of Article XI, taking into consideration the proposals referred to in § 193, supra, and the discussion that had taken place."

77. The document referred to at § 193 is a "Comment"[36] submitted by Germany. That comment related to the obligation of maintenance of aircraft components in relation to aircraft that may be the subject of security interests and therefore not form part of the available asset pool following an insolvency event. The substance of the comment became Article XI.5, which itself refers back to the underlying obligation to *"give possession"* in Article XI.2.

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consideration in square brackets). He had appended notes both to the preliminary draft Convention and the preliminary draft Protocol in order to explain the thinking behind the changes he had made. In line with the Council's instructions, he had provisionally moved a number of provisions, which he had judged to be potentially capable of general application, from the preliminary draft Protocol into the body of the preliminary draft Convention for the Committee's consideration. Where he had done so, he had signalled the fact by presenting the relevant provision inside square brackets, a technique only previously used in the preliminary draft Convention to signal points judged by the Study Group to be beyond its terms of reference and to that extent to raise policy questions for Governments (for example, Articles 20 and 42). [emphasis added]

[33] UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, *First Joint Session*, 1999 at p 82.

[34] UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, *Second Joint Session*, 1999 at p 103.

[35] UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, *Third Joint Session,* 2000 at p 90.

[36] UNIDROIT CGE/Int.Int/3-WP/13 Comments submitted by Government of the Federal Republic of Germany.

78. The draftsman's own suggestion he was only trying to "*improve the wording*" is an entirely inadequate explanation to support an argument that the text was being radically altered to become a limited "as is, where is" obligation.

The Applicants are exercising their rights in a *"commercially reasonable manner"*

79. Article XI.13 and IX.3 of the Aircraft Protocol require that the creditor must exercise its remedy in a *"commercially reasonable manner"*. That term is not otherwise defined in the Cape Town Convention or Aircraft Protocol.

80. In explaining its use elsewhere in the Convention Professor Goode states that the phrase is intended to take on an "autonomous Convention interpretation" and gives an example of conduct that falls short of the standard a breach of the peace on repossession (see: [2.112]).

> Commercial reasonableness is based on an autonomous Convention interpretation, not on the concept of commercial reasonableness in any particular national legal system, so that in a Contracting State the exercise of a remedy which meets the Convention test of reasonableness cannot be struck down because of a more stringent test under national law. It is the manner of exercise of the remedy that is required to be reasonable, not the outcome from the viewpoint of the debtor, and the creditor is entitled to have regard to its own interests, for example, as to the time and method of disposal, in exercising the remedy of sale. However, the test is an objective one - whether the manner of exercise would be considered reasonable by the neutral observer familiar with the usages of the market - not whether it is considered reasonable in the mind of the creditor. Repossession of an object in a manner that is violent or otherwise constitutes a breach of the peace would not constitute enforcement in a commercially reasonable manner (see paragraph 2.107)

81. In the present case, however, it will be unnecessary for the Court to explore in any detail what the limits of commercially reasonable conduct may be. That is because Article IX.3 operates as a safe harbour type provision for creditors, whose conduct in exercising a remedy will be "*deemed"* commercially reasonable if "*it is exercised in conformity with a provision of the agreement except where such provision is manifestly unreasonable"*.

82. Notably the Applicants' relief in the present case (as set out in Schedule 3 to the Originating Process) requires redelivery only in accordance with the existing lease terms between the parties in clause 18.3 of the GTA (see DP2 p 94 and following). The location in Florida is expressly stated in Article III of the Aircraft Engine Lease Agreements for each engine (see for example DP2 p 125)

83. The only exception is if the Respondents are able to discharge an onus to demonstrate the "*provision is manifestly unreasonable*". Any argument to that effect will be responded to in reply

submissions. But it remains difficult to see how those terms could be manifestly unreasonably at the time they were entered into.

D CLAIMS FOR RENT OR OTHER AMOUNTS PAYABLE

The 16 June 2020 Notice did not identify the Applicants' property

84. Prayers 5 and 6 of the Originating Process argue that the Administrators have not done enough to disclaim the Applicants' property by issuing their notice on 16 June 2020 purporting to be pursuant to section 443B of the Corporations Act.

85. Section 443B(2) makes the Administrators liable for rent of the Equipment so long as the First and Second Respondents continue to use or be in possession of the equipment. By orders of the Court on 25 May 2020, the date from which the administrators would be liable to pay rent was extended to 16 June 2020.

86. On 16 June 2020 the Administrators purported to issue a notice[37] under section 443B(3) of the Corporations Act disclaiming property.

87. Section 443B(3) required the Administrators to "*specify the location of the property"* owned by the Applicants if the Administrator *"knows"* or "*could, by the exercise of reasonable diligence, know the location of the property"* (s443B(3)(c)(i) and (ii)).

88. The 16 June 2020 Notice identified that:

    (a) Engines 896999, Engine 897193, and Engine 888473 were each "on the wing" of three different Virgin aircraft at Melbourne Airport;

    (b) Engine 894902 was "on the wing" of a different Virgin aircraft at Adelaide Airport.

89. Nothing else was said about the Applicants' leased Equipment

90. The Notice was deficient for the following reasons:

    (a) the location of two of the engines was incorrect and not clarified until 18 June 2020 (see DP2, p504);

    (b) the Notice did not identify the whereabouts of the Engine Stands (confirmation of their whereabouts was not provided until 3 July 2020[38]);

[37] Exhibit DP2, p493, and Schedule B to the Notice describing the property (DB2, p495).
[38] Affidavit of Garry Failler affirmed 8 July 2020, [22].

(c) access to any records was not given to Willis until 8 July 2020 at which time access to a data room was provided. Willis contends it does not have all the Records required by the various lease terms. However, the parties remain in direct communication about a list of outstanding documents. It is hoped that the status of any outstanding documents can be the subject of agreed facts by the time of the trial (even if the obligation to provide such documents is disputed).

91. The location of each of those items was something either known, or self-evidently (after the Administrators exercised their "*reasonable diligence*") could have been known by the Administrators at 16 June 2020, but was not provided.

92. In those circumstances the Court would conclude that the Notice did not satisfy section 443B(3) of the Corporations Act, and did not have the effect provided for in section 443B(4). In those circumstances the Applicants seek the rent of the Equipment at the Contractual rate until the date the location of each item of Equipment is provided.

93. **Annexure A** to these submissions sets out the Applicants' calculation of rent for the Equipment since 16 June 2020 (including each Engine, which vary depending on their configuration) at a rate of $8,000 per day across all four Engines.

E. LEAVE TO PROCEED

94. The Applicants' primary position is that leave to proceed pursuant to section 440D, or 440B(2) of the Corporations Act against the First and Second Respondents is not required. That is because the proceedings are brought under the Cape Town Convention and Aircraft Protocol as enacted by the CTC Act.

95. Article XI.9 of the Cape Town Aircraft Protocol provides that "*no exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2*". In the present case the "paragraph 2 date" was 19 June 2020 being 60 calendar days[39] after the commencement of the administration on 20 April 2020.

96. Section 8 of the CTC Act states that the provisions of the Cape Town Convention and the Cape Town Aircraft Protocol "*prevail*" over any law of the Commonwealth "*to the extent of any inconsistency*".

[39] Being the number of days declared by Australia in its Declarations made at the time of the deposit of its instrument of accession. See Article XI.3 of the Aircraft Protocol.

97. The requirement for leave to proceed against the First and Second Respondents in section 440D(1) of the Corporations Act has the effect of preventing or delaying the exercise of the Applicants' remedy under the Cape Town Aircraft Protocol. It is inconsistent with the Aircraft Protocol as enacted by section 7 of the CTC Act.

98. Additionally, the "*restrictions*" on the exercise of property rights set out in section 440B(1) (Item 3 (b) of the Table) of the Corporations Act are inconsistent with the CTC Act. The entire purpose of the CTC Act is to ensure (contrary to Item 3(b)) that the creditor can obtain possession of the aircraft object.

99. As Professor Goode's Official Commentary makes clear at [3.132] that was certainly the intention of the Cape Town Convention:

> Moreover, in order to conform to Alternative A a Contracting State that has made a declaration selecting that alternative must ensure that any provisions of its domestic law imposing an automatic stay, or conferring on its courts the power to impose a stay, are disapplied where they would be inconsistent with paragraph 9.

100. Alternatively, if the Court is persuaded that leave is required, such leave is sought pursuant to the Interlocutory Process filed on 14 July 2020, under both section 440B and section 440D. Leave ought to be granted because the Applicants' claim is a serious dispute with a *"solid foundation*",[40] and if not granted will cause the Applicants' prejudice[41] by preventing the Applicants from bringing their claim for possession under the Cape Town Convention.

17 July 2020

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[40] *Vagrand Pty Ltd (in Liq) v Fielding* (1993) 41 FCR 550, 556 (Wilcox, Burchett and Beazley JJ).
[41] See also the summary of relevant factors in *Attard v James Legal Pty Ltd* (2010) 80 ACSR 585, 614 [146], [147] (Tobias JA, Beazley and Giles JJA agreeing on this point).

Annexure A

Rent calculations

Equipment (including Engines, Engine Stands, QEC units, Records)	**Monthly Rent**	**Daily Rent**	**Outstanding Rent from 16 June 2020 to 17 July 2020**
Engine No 1 [897193] + Engine Stand: Cradle: P/N D71CRA00005G02 S/N MCC150728-1-4; Base: P/N D71TRO00005G03 S/N MCC150728-1-4	US$58,000[42]	US$1,901.64[43]	US$58,950.84[44]
Engine No 2 [896999] + Engine Stand: Cradle: P/N D71CRA00005G02 S/N MCC170335-1-1; Base: P/N D71TRO00005G03 S/N MCC170335-1-1	US$64,000[45]	US$2,098.36[46]	US$65,049.16[47]
Engine No 3 [888473] + Engine Stand: Cradle: P/N D71CRA00005G02 S/N MCC150728-1-3; Base: P/N D71TRO00005G03 S/N MCC150728-1-3	US$58,000[48]	US$1,901.64[49]	US$58,950.84[50]
Engine No 4 [894902] + Engine Stand: Cradle: P/N AM-2811-4800 S/N 769; Base: P/N AM2563-200, S/N 1216	US$64,000[51]	US$2,098.36[52]	US$65,049.16[53]
Totals	US$244,000.00	US$8,000.00	US$248,000

[42] Exhibit DP-2 to the affidavit of Dean Poulakidas sworn 29 June 2020 (**Exhibit DP-2**) at 139
[43] US$58,000x12 = $696,000/year; $696,000/366 = $1,901.64/day
[44] US$1,901.64/day x 31 = $58,950.84
[45] Exhibit DP-2 at 197 and 211
[46] US$64,000x12 = $768,000/year; $768,000/366 = $2,098.36/day
[47] US$2,098.36/day x 31 = $65,049.16
[48] Exhibit DP-2 at 266 and 278
[49] US$58,000x12 = $696,000/year; $696,000/366 = $1,901.64/day
[50] US$1,901.64/day x 31 = $58,950.84
[51] Exhibit DP-2 at 340 and 353
[52] US$64,000x12 = $768,000/year; $768,000/366 = $2,098.36/day
[53] US$2,098.36/day x 31 = $65,049.16