# NOTICE OF FILING

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## Details of Filing

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


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## Important Information

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

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**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

**TIGER AIRWAYS AUSTRALIA PTY LIMITED (ADMINISTRATORS APPOINTED) ACN 124 369 008**
Fourth Respondent

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## FIRST AND SECOND APPLICANTS' SUBMISSIONS IN REPLY

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## A. INTRODUCTION

1. The dispute is now a narrow one. Prayer 1 of the Amended Originating Process is conceded, accordingly the Applicants ask the Court to make the declaration in respect of their 'international interest'. The facts are largely agreed, save for some dispute as to the records sought by the Applicants.

2. In short, the Respondents' (cf "Defendants") arguments in favour of its interpretation of the Convention and Protocol are unpersuasive. For the reasons addressed in Part B the Respondents' arguments either assume, or subvert, the very thing being defined – the obligation to *"give possession… to the creditor*".

3. The words "*give possession"* could mean nothing less than *"transfer possession"*. But even if (contrary to the Applicants' submissions) the Court accepts the Respondents' "*make available"* interpretation that would import significantly greater obligations than was insisted upon before, and was said to support, the issue of the 16 June 2020 Notice.

4. On the interpretation of Article XI.2 advanced by the Respondents it now seems that they have abandoned any suggestion that mere disclaimer on an 'as is, where is' basis would be

sufficient. The Respondents' rely on their post-16 June 2020 conduct[1] (and indeed their conduct after the commencement of these proceedings) to demonstrate that they have complied with their obligations under the Cape Town Aircraft Protocol. For that reason, the declaration in prayer 2 ought to be made even if delivery up is not ultimately ordered in the precise manner sought in prayer 3.

5. Even on the Respondents' own *"make available"* construction, leaving the engines on the wing of various aircraft (one of which is in Adelaide where it cannot be removed), without the necessary Operator Records falls well short of any obligation to *"make available"* the aircraft objects.

6. On the facts of the present case, even if (contrary to the Applicants' submissions) the Court accepted the *"make available"* interpretation put by the Respondents, that obligation would not be discharged until the Respondents remove each of the Engines from the wing of different aircraft (owned by third parties). As a practical matter that is likely to require the Administrators to relocate Engine 894902 to Melbourne for removal. Even on the "*make available"* interpretation it would require the Engines to be placed on stands (being two of the Applicants' Engine Stands, and two stands supplied by the Respondents for temporary use at no cost), with all Operator Records provided (see prayer 4A of the relief sought), and an undertaking to return the Applicants' correct Engine Stands.

7. For the reasons outlined in Part C, the Administrators ought not be excused from payment of rent – they had ample opportunity to locate the Applicants' property during an extended rent free period. Part D rejects any attempt to impose a lien on the aircraft objects which would be entirely inconsistent with the Cape Town Convention and Protocol as enacted (see section 8 of the CTC Act).

## B. INSOLVENCY REMEDIES IN THE CAPE TOWN AIRCRAFT PROTOCOL

**The Respondents' interpretation of Article XI is unpersuasive.**

8. At RS[33]-[55] the Respondents' advance six *"reasons"* in support of their construction. Additionally, and in overlap, RS[56]-[76] joins issue with the Applicants' construction. Those points are addressed jointly as follow.

9. As to the textual arguments.

[1] See Respondents Submissions (**RS**) [5] "*steps taken …to date"*, [14] *"subsequent steps*", [80]-[82] *"together with further steps outlined*" between 18 June and 10 July.

10. The "*first"* argument (RS[34]-[36]) has a number of parts. Interpreting Article XI.2 to mean *"make the aircraft object available to the creditor*" is described as "*common-sense*", but not otherwise explained. It is asserted the Respondents' interpretation achieves "*uniformity and predictability*" (see Art 5 of the Convention) but *how* it achieves predictability and/or with *what* it is uniform is left unsaid. In any event, RS [34] takes no account of the context of Article XI in the strong form Alternative A insolvency regime declared by Australia (see AS in chief [57]-[60]) providing decidedly unique remedies in the context of aviation insolvencies.

11. The Respondents attempt to neutralise the word "give" at RS[35]-[36], which culminates in the conclusion that "give" in light of the word "possession" must mean "*provide the opportunity to exercise dominion*". That stark conclusion does not explain how or why the word 'give' or 'possession' requires an <u>additional</u> noun - *"opportunity"* - to be interposed into Article XI.2.

12. That expanded definition does violence to the simple (mandatory) command that the administrator or debtor *"shall", …give possession of the aircraft objects to the creditor".*

13. To the extent "*possession"* bears on the meaning of *"give*" (see RS[35]) it simply means "*transfer possession"*. Or, in the language adopted by the Respondent at RS[36],*"transfer dominion"*. The text does not permit the *"give"* or *"transfer*" of possession to be weakened to a mere *"opportunity to exercise*".

14. The *"second"* reason at RS[37]-[42] assumes wrongly that the words in Article XI.2 and Article XI.5 were intended to be read interchangeably. While Article XI.5 refers to paragraph 2, it is not purporting to further describe, or qualify the obligation in XI.2. Rather, consistently with the Applicants' approach (see AS in chief at [52]) "*give"* and *"take"* in Articles XI.2 and XI.5 are sequential concepts; the latter follows the former. The work being done by the introductory words of Article XI.5 '*unless and until*' is to specify the duration of the maintenance obligation.

15. The fact that one party is required to "*give"* possession before the other "*takes"* possession is consistent with the ordinary meaning of the words "*give".*

16. Contrary to RS[74], the Applicants refer to Barrett J's judgment in *The Leasing Centre v Rollpress Proplate* [2010] NSWSC 282 not in a bid to rely (impermissibly) on "*technical rules"* or binding "*precedent*". Rather, it is an example of a common law judge grappling with a similar question.

17. His Honour's reasoning is, of course, not binding on this Court in construing the Cape Town Aircraft Protocol, but it is instructive of the ordinary meaning of 'give' and 'take' possession in the context of leased goods. As contemplated by *James Buchanan & Co Ltd v Babco Forwarding & Shipping Ltd* [1978] AC 141 at 152, Barrett J's reasoning is based on *"broad principles"* of what is involved in giving and 'taking' possession in commercial transactions (AS in chief at [55], [56]).

18. Contrary to RS[41] Article XI.7 is, in fact, confirmatory of the Applicants' position. The Applicants agree that "*give possession"* in Article XI.2 is the opposite of "*retain"* possession in Article XI.7. But contrary to the final sentence of RS[41] *"give"* cannot be equated with *"not retain"*. That would fly in the face of the drafter's choice of the active "*give possession… to the creditor"*.

19. Further, at RS[42] it is not correct to say that the Applicants' interpretation of *"give"* in Article XI.2 attempts to import the words "in accordance with the contractual regime for redelivery". The Applicants' case does not require words of that breadth to be read as part of the interpretation of Article XI.2 – *"give*" alone, on its ordinary meaning is sufficient.

20. Nevertheless, the Applicants quite clearly seek relief in nature of redelivery. That is, the reasonable exercise of the Article XI.2 remedy demands, on the facts of this case, the Respondents to "*give"* (ie *"transfer"*) possession by redelivery in a manner consistent with the (undisputed) terms of the parties' contract. Article IX.3 of the Aircraft Protocol *"deems"* the exercise of the Applicants' remedy in that manner to be "*commercially reasonable"*.

21. That leads, importantly, to the flaw with the *'third'* reason at RS[43] based on "*uniformity and predictability*".

22. The premise of that submission appears to be that uniformity and predictability would be undermined by deference to the parties' contractual obligations because that *"necessarily demands a different approach to be taken in each case in which the obligation in Article XI(2) applies…*" (RS[43]).

23. That is said to be so, based on two hypotheticals. As to the first (unlikely) hypothetical in RS[43] where a lease does not provide for redelivery – that is answered above in respect of the Respondents conflating the Applicants' interpretation of the contract, with the manner in which it seeks to exercise its rights. In such a case, the word *"give"* will bear its ordinary meaning (something like *"transfer"* possession) and in the absence of a contractual term defining how *possession* should be *given* the lessor will not have the protection of a deeming

regime for the *"commercially reasonable"* exercise of its rights. It would be left to the parties to negotiate the means of return on the facts of that case. But it demonstrates why a lessor is always incentivised to determine return obligations in advance to ensure predictability of its remedies. It also explains why the hypothetical is so unlikely to arise in light of the well-known Cape Town Aircraft Protocol provisions.

24. As to the second hypothetical in RS[43] where it is suggested a lessor may refuse to accept redelivery in accordance with the terms of the agreement. That commercially fanciful scenario would immediately fall foul of the lessor's obligation to exercise rights in a "*commercial reasonable manner"* in Article IX.3.

25. Predictability is best achieved by applying the Aircraft Protocol rights in a manner consistent with the terms of the parties' underlying agreement. Contrary, to RS[73] retrieving aircraft objects from numerous jurisdictions is the antithesis of predictability. From the point of view of the parties (at the time of contracting, right through to insolvency), the Aircraft Protocol can be applied with both uniformity and predictability by upholding the terms of the underlying lease agreement in insolvency. The lessor is entitled to insist on the predictable result that, regardless of where the debtor has flown the assets, they will be redelivered to the contractually determined location with complete operator records being provided. The facts of the present case demonstrate the hurdles created for lessors if the Respondents' interpretation is adopted – where records are perceived to be of minimal value to an administrator, and a lessor is left chasing those essential details.

26. The *"fourth"* reason at RS[44] touches on a thematic difference central to the parties' opposing positions. The Applicants contend that the preservation of the creditors' contractual expectations in insolvency is the foundation for the provision of cheaper capital to the airline industry, that underpins the objectives of the Airline Protocol.[2]

27. Contrary to RS[60] and RS[62], the greater protections given to creditors by the Cape Town Protocol is precisely in respect of their contractual rights in the event of insolvency. The position of creditors <u>is</u> improved under the Cape Town Aircraft Protocol <u>vis a vis the debtor company</u> and <u>other creditors</u> (who hold something less than an international interest).

[2] See AS in chief [64]-[67].

28. The Respondents appear to have overlooked the primacy given to the parties' agreement in the Aircraft Protocol specifically in the context of insolvency (cf RS[57]-[65]).

29. That is what makes the Cape Town Aircraft Protocol decidedly at odds with ordinary insolvency rules around the world. The Court would reject the assertion by the Respondents that "*there no basis on which to assume that the obligation imposed on an insolvency administrator under Art XI.2 is necessarily more onerous than would be required "under any local law"*: RS[65].

30. The creditor's enhanced position under the Cape Town Aircraft Protocol is obvious from the text of document, and its heavy reliance on the parties' contractual bargain:

(a) Article IX.3 provides a safe-harbour to ensure that a creditor who exercises its remedies *"in conformity with a provision of the agreement"* will be deemed to be acting in a *"commercially reasonable manner"*, and imposes an onus on the debtor to demonstrate why any provision is *"manifestly unreasonable*".

(b) Article XI.5 imposes an obligation on an administrator to "*preserve*" the aircraft object and *"maintain it and its value in accordance with the agreement"*. As Professor Goode explained that may require expenditure out of the insolvent estate,[3] an obligation well beyond the administrator's right of disclaimer in section 443B of the Corporations Act;

(c) Article XI.7 imposes upon an administrator or debtor as a condition of retaining the aircraft object, the obligation to cure "*all defaults"* and agree *"to perform all future obligations under the agreement"* (which may otherwise have been stayed or compromised by a domestic insolvency regime);

(d) Article XI.9 makes clear that the creditors' exercise of remedies may not be *"prevented or delayed"* after the waiting period;

(e) Article XI.10 preserves intact the contractual obligations by stating *"No obligation of the debtor under the agreement may be modified without the consent of the creditor*";

(f) Article XI.12 ensures that the creditor's international interest has primacy over all other interests, *"No other right or interest… shall have priority in insolvency proceedings over registered interests"* save for specific non-consensual liens imposed;

[3] Official Commentary (2019, 4ed) [5.70], Illustration 71, "…In the meantime, obligations under the security agreement may not be modified and the aircraft engine must be preserved, and Airline 2 will be required to maintain the aircraft engine and its value in accordance with the terms of the security agreement, even if that requires expenditure from general assets of the estate. [emphasis added]"

31. By contrast the only real right of debtors secured by the Cape Town Aircraft Protocol is the right to quiet enjoyment (see Article XVI – Debtor Provisions). That does not improve the rights of debtors beyond what would be an ordinary incident of possession of leased goods. In any event, the limits of the debtor's Cape Town Aircraft Protocol rights are still determined by the parties' bargain: ie "*in accordance with the agreement"* (Article XVI.1).

32. It is wholly consistent with the text and context of Article XI of the Aircraft Protocol for the Applicants to ask this Court to give effect to remedies that are in accordance with the terms of the parties' agreements. That is why redelivery to Florida (while geographically distant on the facts of the present case) is of no great normative significance – it is simply holding a party to their bargain, even if that comes at the cost of other creditors.

33. That interpretation is supported by the travaux preparatoire (as was explained in AS in chief [68]-[78]). The Applicants agree with the principles stated at RS[67] that recourse may only be had to that material if the words are ambiguous or obscure, or leads to a manifestly unreasonable result. As was made clear (AS in chief [47]) the Applicants' case is put primarily on the basis of the ordinary meaning of *"give*". But as the parties both state that their competing interpretations are obvious, and unambiguous, the Court should find that the requisite ambiguity exists to warrant recourse to the travaux preparatoire.

34. As to the "*fifth"* reason and the reference to US bankruptcy law. The reference is misconceived. First, (and in further answer to the *"fourth"* reason) the Cape Town Aircraft Protocol was intended to *"enhance*" the position of creditors compared to section 1110 of the US Bankruptcy Code. Second, even if the Court were to consider the US domestic law cases on the US statute (as contended for by the Respondent at RS[47]) the doctrinal position is, if not neutral to both parties' contentions, slightly in favour of the Applicants' case. The US caselaw certainly confirms the importance of records.

35. The academic article cited by the Respondents[4] ("**Gray, Gerber and Wool"**) clearly explains that Alternative A 'enhanced' the position of creditors, and was intended to achieve predictability. Gray, Gerber and Wool (at 117) confirm that Alternative A is modelled on s 1110 of the United States Federal Bankruptcy Code (11 USCA § 1110), but then continue at 124:

[4] See RS[21] and footnote 10. Citing Donald Gray, Dean Gerber and Jeffrey Wool, "The Cape Town Convention and aircraft protocol's substantive insolvency regime: A case study of Alternative A" (2017) 5 *Cape Town Convention* 115. Mr Gray was the Chair of the Unidroit Drafting Group Insolvency Sub-group that prepared Alternatives A & B as ultimately adopted in the Convention. Mr Wool was the chair of the Advisory Board to the International Registry Aircraft Protocol.

> Alternative A was specifically drafted with view to preserving all of the best parts of Section 1110, while simplifying it and amending the problematic provisions, particularly Section 1110's debtor restriction (i.e., limited to air carriers). The intent was to develop an efficient and **enhanced version of Section 1110**. [emphasis added]

36. Gray, Gerber and Wool confirm that the policy behind Alternative A was to protect financiers/lessors and their investments, at p 119:

> Given the large amount of money involved, and an industry susceptibility to bankruptcy, financiers have long demanded special protection for their investment. Without this protection, financial institutions or aircraft manufacturers would be unwilling to provide financing for aircraft to new or troubled airlines, leasing companies, or other users, or would do so only under terms far less favourable to the borrower.

37. They continue, at 138-9:

> The US experience under Section 1110, while not directly relevant, may provide significant guidance to practitioners and courts interpreting Alternative A. What is apparent from the 1110 experience in the US is the immense value that this provision provides for the benefit of airlines and their creditors, alike. This was the driving principle in the development of Alternative A. The value of alternative A, similar to that of Section 1110, is **that it creates a commercially predictable transaction which enables a creditor to maximise its earning potential in respect of an aircraft object, even during a default**. … As such, practitioners and courts should interpret Alternative A with an aim to providing the predictability to aircraft financing transactions intended by the contracting states to the Convention and Protocol.

38. The overall objectives of predictability would be undermined by an interpretation which simply allowed debtors to leave aircraft objects on an "as is, where is" basis. That is the antithesis of predictability. It puts an engine lessor in a position where it has no way of knowing where in the world its equipment will be, or in what condition; nor will it know whether it will have access to an aircraft (owned by another third party creditor), or whether facilities will be available to remove an engine. Given the inherent mobility of the asset, each of those variables is likely to be something of a lottery. No reasonable financier would be expected to provide better terms of finance on the basis of a such an unpredictable set of circumstances on insolvency.

39. Gray, Gerber and Wool identify (at pp 125-130) each of what they consider to be the substantial differences between s 1110 and Art XI (Alternative A). There is no suggestion that the obligation to "give possession" is any different. Indeed, at p 125, they confirm that:

> Alternative A and Section 1110 are similar in their most important respects in that they each ensure that … the debtor/lessee would be required … **to return** the aircraft equipment to the financier/lessor. [emphasis added]

40. Importantly, in respect of records Grey, Gerber and Wool explain the enhanced protection for creditors in Alternative A. After explaining that the Convention and Protocol were directed at securing the aircraft objects including "*all data, manuals and records relating thereto*", Grey, Gerber and Wool explain the centrality of records in Alternative A (at 126):

> [Alternative A] does not delineate those records which are and are not required to be returned in the context of the exercise of remedies pursuant to the underlying financing documents, **but rather simply requires that all data, manuals, and records be returned**. This is a significant distinction, since manuals and records play such a vital role in the remarketing process. T**he ability to obtain a fulsome set of records** following repossession of any aircraft equipment (without having to negotiate which records may or may not be covered by the underlying documentation) **materially enhances a creditor's ability to recover the value of its collateral**. [emphasis added]

41. Those propositions align entirely with the Applicants' evidence[5] and the relief sought in the Amended Originating Process including paragraph 4A and 4B.

42. To the extent that it is permissible to have recourse to the doctrinal developments in US caselaw in respect of section 1110, the Court ought to be referred to further cases as follows.

43. In *re Atlas Worldwide Holdings, Inc.*, Case No. 04-10792 (Bankr. S.D. Fla. 2004) (***In re Atlas***), a case from the Southern District of Florida, the debtors proposed rejection procedures that authorised lessors to "*take possession of aircraft equipment*" while the debtors would cooperate with the lessors in connection with the repossession. The debtors had, in the Court's view, effectively said "*here it is, come and get it.*" The Court rejected that approach stating that "*[c]ertainly, return means at least actual delivery of the planes and engines.*" The following passages are instructive, and it is convenient to set them out in full (at 14-16, emphasis added):

> The Court finds the Debtors' position illogical and manifestly at odds with the rights afforded aircraft lessors in s 1110. **Section 1110(c)(1) is unambiguous: A debtor must "immediately surrender and return" leased aircraft equipment** if it does not cure and assume within 60 days or enter into a s 1110(b) stipulation to extend the 60 days. Why should a rejection order provide a lessor with more limited rights? Debtors' position relies on the illogical assumption that Congress believed the benefits to a debtor of using the equipment for 60 days (as opposed to some shorter postpetiton period prior to rejection) were so significant that on the 60th day, the debtor must

[5] See in particular the Affidavit of Garry Failler affirmed 8 July 2020 [24], [25(d)]. Affidavit of Derych Warner sworn 22 July 2020 [14], [20(d)], [27(b)(d)], [32]-[34].

> return the equipment, but on any day earlier in which rejection is authorized, all a debtor has to do is say, here it is; come and get it. The Court acknowledges that it has found no cases on point, but logically, and in light of the policy evident in s 1110, this makes no sense.
>
> Section 1110(c)(2) says that once a party is entitled to take possession under s 1110 (a)(1), the lease is deemed rejected. By this Order, this Court concludes that the converse is also true: Upon rejection of a lease under s 365, a lessor is entitled to possession under s 1110(a)(1) and to immediate surrender and return under s 1110(c)(1).
>
> …
>
> The primary legal issue is the scope of the "return" obligation under (c)(1). Certainly, "return" means at least **actual delivery of the planes and engines**. [emphasis added]

44. In *re Atlas* a further hearing was required to determine the precise scope of the return obligations (see Part C of the reasons). However, the position put by the debtors in *In re Atlas* echoes the position taken by the Respondents in this case, who asserted in their 9 June 2020 correspondence that "*[Willis] will have to recover possession of the Engines at [its] own cost on an "as is, where is" basis*…". The debtors' position in *In re Atlas* was forcefully rejected by the Court.

45. In *re FLYi*, Case No. 05-20011 (MFW) (Bankr. D. Del. 2005) (***FLYi***), a Delaware case, the debtors sought to place the burden of retrieving equipment on lessors, asking the Court to require lessors to take possession of their equipment within five days of entry of an order rejecting the lease. The Bankruptcy Court rejected this approach, finding that the debtors had to comply with the "*surrender and return*" obligations under section 1110(c). The Court noted that the return obligation was subject to a reasonableness test, but that the return of records and documents was governed by the "Operative Documents" ie the agreement.

46. The bankruptcy court then gave the debtors two options: (i) make the aircraft available for pickup at the debtors' maintenance hangar, with the original engines installed and the aircraft in flyable condition (i.e., a special flight permit to conduct a "*ferry flight*"), or (ii) fly the aircraft in flyable conditions with original engines to the location listed in the lease or another location designated by the lessor. In addition, the Court allowed lessors more time to inspect their equipment before taking possession. In any case, either of the two alternatives in *FLYi* required more than mere disclaimer.

47. In *In re ATA Holdings Corp.*, Case No. 04-19866 (Bankr. S.D. Ind. Jan. 3, 2005) (***ATA***), the Bankruptcy Court for the Southern District of Indiana imposed specific requirements on the debtors to satisfy section 1110. First, the Court required the debtors to return the airframe with engines properly attached, and to the extent the original engines had been removed or installed in another aircraft, such engines had to be reinstalled into the aircraft prior to returning the aircraft. The bankruptcy court also required the debtor to (i) return

the equipment, including all engines, records and documents, to a single location as specified by the bankruptcy court, (ii) (at para [6]) "*make the records and documents relating to the Rejected Aircraft Equipment available to the Lessor as promptly as practicable, but in no event later than five (5) business days following the entry of this Order,*" and (iii) provide the lessor with a lease termination document to be filed with the FAA.

48. In *In re Northwest Airlines Corp.*, Case No. 05-17930 (Bankr. S.D.N.Y. Oct. 18, 2005) (***Northwest***), the Bankruptcy Court for the Southern District of New York declined to offer specific guidance on what specific return conditions must be satisfied in order to meet the "*surrender and return*" requirements of Section 1110. Instead, the court determined to address this issue on a "*case-by-case basis"* and stated that "*[t]he hallmark as in any case is reasonableness*", the other "*hallmark of Section 1110 is speed"* (see p71 line 21– p72 line 8).

49. The obligation to "*surrender and return*" as contemplated by *Atlas*, *FLYi, ATA, Northwest* is consistent with the type of relief sought by the Applicants, under the 'enhanced' Cape Town Aircraft Protocol rights. What remains clear from the decisions is that the return of records remains part of the minimum return conditions with respect to aircraft that the Court imposes, along with ensuring that aircraft will be in an operable and airworthy condition at a specific location. That is entirely consistent with the Applicants' demands for the return of Records in the present case.

50. In light of the above consideration of the exceptional position created by Alternative A the *"sixth"* reason (RS[52]-[54]) can be dealt with shortly. The fact that Alternative A requires the Court to compel redelivery when that might not be obtained outside of an insolvency context under Article 10 of the Convention is explained by context in which those right are exercised.

51. In the context of a default by an airline in the ordinary course of business the creditor will have the opportunity to seek compliance with contractual redelivery obligations, or to *"take possession"* and sue for damages for the default and any loss arising from a failure to redeliver.

52. In the case of insolvency however, the Cape Town Aircraft Protocol was intended to impose a positive obligation to give possession of engines (and associated records) so that creditors can require the debtor companies or administrators to return the lessor's property. That was intended precisely to avoid recalcitrant airlines and administrators otherwise acknowledging a breach of the terms of the lease but remaining uncooperative

knowing that the creditor had limited prospects of reclaiming those costs as a debt. Compelling an administrator of insolvent airline to *'give possession*' is the right of greatest utility left to the creditor in an insolvency context. Where, if the airline was still operating, a creditor could otherwise expect to recover damages.

**Prayers 3, 4A, and 4B of the Amended Originating Process**

53. It follows from the above that insistence on the contractual obligation of redelivery in respect of the Engines, Engine Stands and QEC is a natural consequence of the Applicants' construction, and is commercially reasonable. Orders in respect of prayer 3 should be made.

54. From the Applicants' evidence[6] it clear that the Records are essential to the use and value of the Engines. For the reasons outlined above the Records clearly fall within the obligation to return the aircraft objects. The Respondents will not have discharged their obligations to give possession of the aircraft objects until the Records have been provided.

55. For that reason the Court would make orders in accordance with prayers 4A and 4B of the Amended Originating Process.

**Relief should be given in the form of Prayer 2**

56. Even if the Court were to accept the Respondents' "*make available*" (RS[2]) interpretation of the Article XI, that phrase itself has greater substantive force than a mere disclaimer on an 'as is, where is' basis pursuant to the 16 June 2020 Notice.[7]

57. Even the Respondent's "*make available"* interpretation imports greater obligation than was insisted upon before the issue of the 16 June 2020 Notice.

58. On the interpretation of Article XI.2 advanced by the Respondents it now seems the they have abandoned any suggestion that mere disclaimer on an 'as is, where is' basis would be sufficient. The Respondents' rely on their post-16 June 2020 conduct[8] (and indeed their conduct after the commencement of these proceedings) to demonstrate that they have complied with their obligations under the Cape Town Aircraft Protocol. For that reason,

[6] See in particular the Affidavit of Garry Failler affirmed 8 July 2020 [24], [25(d)]. Affidavit of Derych Warner sworn 22 July 2020 [14], [20(d)], [27(b)(d)], [32]-[34].
[7] Cf the Respondents' approach in the letter dated 9 June 2020 from Deloitte: Exhibit DP-2 pp482-484.
[8] RS[5] "*steps taken …to date"*, [14] *"subsequent steps*", [80]-[82] *"together with further steps outlined*" between 18 June and 10 July.

the declaration in prayer 2 ought to be made even if delivery up is not ultimately ordered in the precise manner sought in prayer 3.

59. Even on the Respondents' own construction, leaving the engines on the wing of various aircraft, one of which is in Adelaide where it cannot be removed, and without the necessary Operator Records falls well short of any obligation to *"make available"* the aircraft objects.

60. On the facts of the present case, even if (contrary to the Applicants' case) the Court accepted the *"make available"* interpretation the Respondents will not have discharged that obligation until each engine is removed and placed on stands (being two of the Applicants' Engine Stands, on two stands supplied by the Respondents), with all Operator Records complete, and an undertaking to return the Applicants' correct Engine Stands.

## C. CLAIM FOR POST-APPOINTMENT RENT

**The Applicants are entitled to rent – prayers 5 and 6 of the Amended Originating Process**

61. The Respondents couch their defence to the claim for rent primarily on the basis of seeking the discretionary dispensation from rent (RS[88]).

62. The highest the substantive defence of the deficiencies appears to rise is that the 16 June Notice *"was sufficient to discharge its statutory purpose*" even if it did not locate the Engine Stands (RS[92]) (but not there addressing the failure to provide records).

63. That appeal to 'statutory purpose' flies in the face of the express statutory requirement to locate assets where the administrator is capable of doing so. Given that the administrator was capable of locating those assets on 18 June 2020 (but the location not finally confirmed until 3 July 2020) it is not surprising that that the Administrator's raise no argument that it was unreasonable for them to have to identify the location.

64. The Applicants respectfully agree with the Respondents' submission that the administrator is "*required to identify the location of the property if, and to the extent, known or knowable by reasonable diligence*" (RS[90]). The steps taken by the administrators *after* issuing the 16 June Notice demonstrate that the location of the property was knowable by reasonable diligence. It is apparent that reasonable diligence was not undertaken prior to issuing the 16 June Notice, notwithstanding: first, the Court had provided the administrators with two extensions of the period specified in section 443B(3) to 16 June 2020[9] (three days short of the 60 day

[9] See *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* [2020] FCA 571 and *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 3)* [2020] FCA 726

waiting period under the Convention); and second, Willis notified the Respondents on 30 May and again on 2 June 2020 that it would not agree to the terms of the proposed Standstill Agreement and sought expressly in writing the return of its equipment.

65. The Applicants' reject the the Respondents' suggestion that defects in the notices were "*minor and inconsequential*" (RS[93]), or "*trivial*" (RS[104]).

66. The Records are central to the value of the Applicants' engines and their ability to use them.[10] The terms of the Engine Leases, Article IV expressly includes the Records among the leased Equipment - including those to be generated during the term of the lease.[11] Clause 7(b) of the GTA provides expressly that: "*All such records will be deemed as part of the Equipment as of the time generated*".[12] The records ought to have been located and identified in any notice under s443B and the data room ought to have been made available in advance of 16 June 2020, and not, as here by 8 July 2020.

67. The Operator Records are vital for the orderly return of the engines. As in the present case they have led to a number of further enquiries so that the lessor can be made aware of the present state of its engines including any components installed on them. For that reason, even if the Applicants had attended Adelaide and Melbourne airports to attempt to deal with their Engines on 16 June, they would have been hamstrung in their ability to identify which components belonged to them (for example the thrust plugs) and which components had been replaced.

68. Notably, even of the Operator Records that are strictly historical, it is important to note that the Respondents have still not provided the important records in respect of the installation of the HMU unit.[13]

69. For that reason, even if the Court was satisfied that the balance of the historical Operator Records were provided to the Applicants on 17 July 2020,[14] the Court would order that;

    (a) the rent for three Engines up to that date (being 30 days' rent); and

[10] See in particular the Affidavit of Garry Failler affirmed 8 July 2020 [24], [25(d)]. Affidavit of Derych Warner sworn 22 July 2020 [14], [20(d)], [27(b)(d)], [32]-[34].
[11] See Exhibit DP-2 to the affidavit of Dean Poulakidas, pp 125, 197, 266, 340,
[12] Exhibit DP-2 to the affidavit of Dean Poulakidas, p77.
[13] Affidavit of Derych Warner sworn 22 July 2020, [18], [26(d)].
[14] See the affidavit of Sal Algeri sworn 17 July 2020 [36]: "as at the date of this affidavit the Administrators' staff have made all documents identified at paragraphs 24 and 25 of the Failler Affidavit available to Willis".

(b) the rent for Engine 896999 in respect of which the HMU documents have not been provided continue up until those documents are provide (being 44 days by the date of the trial).

**No reason to exercise discretion under s443B(8) – Respondents' Interlocutory Process**

70. The essential factual background which shapes the exercise of the Court's discretion is as follows. First, the Court afforded the Administrators some 51 days (35 business days) beyond the first 5 business days afforded to them under section 443B(2) to precisely identify the property and its location. Second, the Court has already excused the Administrators for any rent in respect of that same period.

71. Third, the Applicants were in extensive correspondence with the Administrators in respect of the return of their property. So much so that on 9 June 2020, the Administrators clearly flagged an intention to issue a section 443B notice on 16 June.[15]

72. The inference to be drawn is that despite the 51 days (being a 35 business day extension of the time ordinarily provided), and the intention formed 7 days in advance of issuing the Notice, the Administrator's had simply not invested the time and effort required to locate the Applicants' property.

73. Insofar as the Court upholds the Applicants' interpretation requiring the Respondents to "*give possession*" beyond "as is, where is" disclaimer, that should be a factor weighing against the exercise of the Court's discretion. The Administrators should not be excused from post-appointment liability where they would have failed to both disclaim the property, and failed to fulfill the more burdensome obligation to give possession.

74. In those circumstances there is no reason to <u>further</u> relieve the Administrators from liability. It is hard to envisage circumstances in which the Administrators would have had more time to locate and identify the Applicants' property and prepare a section 443B(3) notice.

75. Paragraph 1 of the Respondents' interlocutory process dated 17 July 2020 ought to be dismissed.

[15] Exhibit DP-2 to the affidavit of Dean Poulakidas, pp482-484.

## D. ADMINISTRATORS' CLAIMED LIEN

76. In the "*Legal Principles"* identified in support of the Administrators' claimed lien RS[109], no reference is made to the text of Article XI.10 and 12 that would clearly prohibit the Court from imposing such a lien.

77. The relevant parts of Article XI of the Aircraft Protocol are:

(a) Article XI.10 states: *"No obligation of the debtor under the agreement may be modified without the consent of the creditor*";

(b) Article XI.12 states that creditor's international interest has primacy over all other interests, *"No other right or interest, except for non-consensual rights or interest of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests"*.

78. It is clear, that Article XI preserves both the creditor's contractual rights (unmodified) and ensures its international interest has primacy. More importantly, the Article XI.12 has made express reference to the only type of "non-consensual" right (ie a lien) which may arise. It is only those as declared by a contracting state.

79. The Administrators did not refer the Court to the fact that Australia has made a declaration under Article 39(1) which provides that:

> the following categories of non-consensual right or interest have priority under its law over an interest in an object equivalent to that of the holder of a registered international interest and shall have priority over a subsequently registered international interest, whether in or outside insolvency proceedings: statutory liens registered in accordance with the Air Services Act 1995 (Cth).

80. Accordingly, the only type of lien this Court would be empowered to uphold (let alone judicially impose or declare) in priority to the Applicants' international interest is a statutory lien under the Air Services Act. The Administrators' claimed lien is clearly not one contemplated by Article XI of the Protocol.

81. The Applicants contend it would be an error of law for the Court to impose such a lien in light of the terms of Article XI. Or, in the alternative it is a factor that would weigh heavily against the exercise of the Court's discretion to grant a lien in favour of the Administrators.

82. Assuming (which is denied) the power of the Court to grant such a lien, the magnitude of the leap in principle the Respondents ask the Court to make from (i) a lien arising in respect of realisation of the company's assets; to (ii) a lien being imposed over a lessor's property

because of the costs of return, is not adequately accounted for in the authorities cited in the footnotes that support the proposition (see RS[111]), nor the facts led in aid of it.

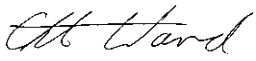
83. Moreover, even on the Respondents' own case the steps taken by the Administrators were both a requirement of the obligations under Article XI.2 and XI.5 of the Cape Town Aircraft Protocol in respect of any leased aircraft objects in their control (see RS[113(b)]), and necessary for the Administrator to properly disclaim property under section 443B of the Corporation Act (see RS[112] *"work done in identifying… the Aircraft Objects*").

84. No evidence has been called of the *"incurred expenses and rendered services"* (RS [113(b)) by the Administrators to date. That is a matter that weighs against the discretion to grant a lien. The Applicants ought to be able to test that evidence at the time at which the Court is asked to exercise its discretion to impose a lien over the Applicants' property. Similarly, there is no evidence to suggest that the Administrators would not be able to have such expenses met out of the assets of the companies in administration, or otherwise paid for.

85. Further it appears to run contrary to both the purported disclaimer under section 443B(3), or the discretionary relief sought under section 443B(8), for the Administrators to now seek to exercise proprietary rights by way of lien over the Applicants' property.

86. The Court would dismiss the Respondents' interlocutory process dated 17 July 2020.

28 July 2020



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