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Details of Filing

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Important Information

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

WELLS FARGO TRUST COMPANY &
WILLIS LEASE FINANCE CORPORATION
Applicants

VB LEASECO PTY LTD & ORS
Respondents

FIRST AND SECOND APPLICANTS' SUBMISSIONS SEEKING STAY OF REMITTER PROCEEDINGS PENDING AN APPLICATION FOR SPECIAL LEAVE TO APPEAL

A. INTRODUCTION

1. By interlocutory process dated 21 October 2020 the Applicants seek to stay the remitter proceedings pending the result of an appeal (assuming special leave is granted) to the High Court of Australia.

2. The overriding consideration that weighs in favour of granting a stay of the remitter proceedings is that the further factual and legal contest may prove unnecessary if the Applicants are granted special leave, and are ultimately successful on appeal to the High Court. Alternatively, even if the Applicants are unsuccessful on the appeal, the High Court may construe Article XI(2) differently, such that any remitter would be conducted on a different basis to that presently stated by the Full Court.

3. To have a hearing of a remitter at this point may prove a waste of the Court's resources, and a waste of the parties' time and legal costs. It may further complicate the factual and practical positions of the parties and thereby not contribute to the just and efficient resolution of the dispute.

4. The Applicants accept that the same considerations apply to the Applicants' Article 12 case for specific performance, such that it too can be stayed to avoid duplication of costs. That is because if the Applicants are ultimately successful on their appeal to the High Court, there will be no need to seek specific performance of the leases pursuant to Article 12 of the Convention.

5. In the event that the Court concludes (contrary to the Applicants' primary position) that the remitter proceeding should proceed, then the Applicants press for their case for specific performance of lease obligations in accordance with Article 12 to be heard concurrently with the remitter.

6. It appears that the parties are jointly desirous of the aircraft objects being sent to Florida. The Respondents' Interlocutory Application (para 3) seeks relief to that effect. In those circumstances, there are no discretionary hurdles, and the Court would grant specific performance if it is otherwise satisfied of the Applicants' case under Article 12.

B. STAY OF REMITTER

7. The Applicants seek a stay pursuant to section 23 of the Federal Court Act, as an incident of the Court's general power to control its proceedings.[1]

8. The present application is not seeking to stay the orders of the Full Court per se, which requires the exercise of the appellate jurisdiction of the Court.[2] Nevertheless, the principles applicable in those analogous circumstances are instructive. The applicable principles from *Alexander v Cambridge Credit Corp Ltd (Receivers Appointed)* (1985) 2 NSWLR 685 at 694-5, are well known, and were helpfully summarised by the Respondents in their submissions in favour of stay after judgment dated 7 September 2020. The Court would look to the arguable case on appeal as well as the balance of convenience.

9. The Applicants have now filed their application for special leave dated 3 November 2020 and have served the same on the Respondents.

10. In respect of the arguable case on appeal, the Court would have regard to the criteria in s35A of the *Judiciary Act 1903* (Cth) governing the grant of special leave to appeal and would note that the present point is one of great public importance and wider (indeed international) application. The interpretation of the Cape Town Convention and Protocol is of particular significance at a time of disruption to airlines worldwide arising from a pandemic.

11. The Applicants have good prospects of obtaining special leave, and success on the ultimate appeal. The case is one of finely balanced interpretation of an international document. It has given rise to conflicting interpretations between the primary judge and the Full Court. The Full Court appears to have decided the case on a misunderstanding of both the Applicants' case and the primary judges' reasons (see FFC [101]), while failing to refer at all to the text or effect of Article XI(13) in providing content to the manner in which the Article XI(2) remedy is invoked.

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[1] See *Groves v Commissioner of Taxation* [2011] FCA 222, [22].
[2] Section 25(2)(d) of the Federal Court Act.

12. The balance of convenience favours granting a stay. If the Applicants are successful on the appeal, the remitter will have been unnecessary. Even if the Applicants are unsuccessful on their appeal there is a real possibility the Court could require a different test to be applied in the remitter proceedings – meaning it would be necessary to undertake the remitter for a second time.

13. In the further alternative, if the Applicants are unsuccessful in even obtaining special leave then the delay in the remitter proceedings will not be material.

14. The Respondents' response to the special leave application will be due on 24 November 2020. The Applicants' Reply submissions on the special leave will be due by 1 December 2020. It is likely a grant or dismissal of special leave on the papers would be known by the end of the year, and if dismissed the remitter could be heard early in the new Court term.

15. Finally, the outcome of the remitter and the Article 12 Convention case may themselves give rise to an appeal which would prove unnecessary if the Applicants ultimately succeed in the High Court.

C. STATUS OF AIRCRAFT OBJECTS AND INTERIM RELIEF

16. The Applicants have attempted in correspondence to reach agreement with the Respondents as to an interim regime to maintain the status quo of the Engines.

17. The reason for the Applicants' concern arose from the Respondents' suggestion in paragraph 15 of the letter dated 11 October 2020 from Clayton Utz that the Respondents would: "*proceed to deal with your clients' aircraft objects according to domestic law, on the basis that your clients have elected not to exercise their self-help remedy to take possession under the Protocol"* (page 683 of Exhibit DP-3).

18. By email dated 12 October 2020 (at page 760 of Exhibit DP-3), the Applicants sought clarification of what was meant by *'deal with'* the aircraft objects, and asked for an undertaking from the Respondents not to deal with the engines.

19. By email from Clayton Utz dated 14 October 2020, an undertaking was offered until Friday, 16 October 2020 (page 758, DP-3).

20. The Applicants sought further clarification in two emails on 16 October 2020 (pages 757, 756 DP-3). A telephone call on Monday 19 October 2020 was unsuccessful in resolving the present situation. The Applicants then prepared the present Interlocutory Process dated 20 October 2020 (formally filed the following day 21 October 2020).

21. From the evidence filed by Mr Dunbier affirmed 30 October 2020 at paragraph [6] he confirmed that:

> all of Willis' QEC kits and other Willis' accessories have been reinstalled on the Engines, the Engines have been repositioned on their titled engine stands and cradles, and the Engines have been preserved in a manner consistent with the applicable engine manufacturer's procedures for removal and the terms of the Engine Leases.

22. It is clear that nothing further is required to be done with the Engines and they are otherwise ready for delivery to Florida. Any interim maintenance orders will only be required until the aircraft objects are delivered to Florida.

23. It now seems that both parties wish the Engines to be sent to Florida.

24. By Interlocutory Process dated 27 October 2020, the Respondents wish to transport the Engines to Florida and seek the cost of that transportation by way of reimbursement from the Applicants.

25. By letter dated 31 October 2020 the Applicants' solicitors wrote to Respondents' solicitor proposing a regime by which the Respondents would deliver the aircraft to Florida and the reimbursement argument would wait to abide the outcome of the application for special leave to appeal.

26. In the 31 October 2020 letter the Applicants noted that the delivery of the Engines to Florida would obviate the need for the Applicants' Article 12 Convention claim.

27. By letter dated 3 November 2020, the Respondents have rejected that proposal and have made a counter proposal in terms which provide, in effect, that the Applicants abandon their application and concede the Respondents' application. In what appears to be a tacit recognition of the potential complications of proceeding with the Remitter in the face of the Applicants' special leave application, the Respondents have offered not to oppose an application for special leave of any Remitter questions. There is no way of knowing if the High Court would grant special leave to appeal from this application in the absence having appealed to the Full Court, even more so where on the Respondents' proposal the orders would be made by consent..

28. Given that the Respondents are themselves seeking orders to deliver the Engines to Florida, there appears to be no basis for resisting specific performance on discretionary grounds.

D. ARTICLE 12 OF THE CAPE TOWN CONVENTION

Terms of the lease and nature of the orders sought

29. In the Further Amended Originating Application, the Applicants seek orders compelling performance by the Respondents of their obligations under cl 18 of the Leases (see FFC[19]-[27] for the relevant provisions). The Respondents appear to resist the proposition that those obligations still bind.

30. Clause 19(b)(iii)(C) of the General Terms Lease Agreement (**GTA**) provides upon the occurrence of an Event of Default, the Lessor may demand and the Lessee shall "*return any Equipment promptly to lessor*" in accordance with section 18 the GTA as incorporated into each engine lease as if such Equipment were being returned at the end of the Lease Term.

31. Clause 18.3(f) of the GTA provides:

> Upon expiration of the Lease Term or other termination of a Lease, Lessee will return the leased Equipment free of all Liens other than Lessor's Liens to the delivery location described in the applicable Lease or to such a location in the continental U.S. nominated by Lessor or to such other location as the parties may mutually agree.

32. Clause 18.3(h) sets out a detailed and prescriptive regime for how a shipment of the engines is to be effected in accordance with the manufacturers requirements.

33. In substance, what the Applicants seek is an order requiring the Respondents to redeliver the Engines and aircraft objects in the manner and condition provided by cl 18.

34. In terms of the proper juridical characterisation of such an order, it can either be classed as an order for specific performance of the Leases or an "enforcing mandatory injunction" (see Heydon, Leeming & Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (8th ed, 2014) at [21-445] ordering the Respondents to do that which they have promised to do. "The matter is one of substance not of form": *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576 at 578. The learned authors of *Meagher, Gummow & Lehane* say this on the distinction (at [21.445]):

> The truth of the matter is, first, that "specific performance" is a term usually reserved for an order enforcing the whole of an agreement, while an order compelling performance of a single positive contractual obligation is called a mandatory injunction; and, secondly, that in the realm of contract all forms of injunction, mandatory or prohibitory, approximate in some degree to decrees of specific performance.

35. With that approach in mind, the Applicants have styled the relief in the Amended Originating Application as specific performance. Although in substance the only contractual right sought to be vindicated by the Applicants is that of redelivery, the means and requirements of redelivery prescribed by the contract are not without complexity, and are potentially affected by multiple clauses of the Leases. Hence, it is submitted that an order requiring the Respondents to specifically perform the Leases is appropriate.

36. Approaching the matter in this way, the Applicants submit that an order for specific performance is available and appropriate. In *Bristol Airport Plc v Powdrill* [1990] Ch 744 at 759, Sir Nicolas Browne-Wilkinson V-C (with whom Woolf and Staughton LJJ agreed) said, in the insolvency context where the insolvent airline held aircraft subject to chattel leases: "*I have no doubt that a court would order specific performance of a contract to lease an aircraft, since each aircraft has unique features peculiar to itself.*"

37. The proposition applies squarely here and it ought to be followed.

38. The Applicants submit that (a) they are entitled to redelivery under the Leases of the aircraft objects, and (b) the Court would grant relief in the nature of specific performance giving effect to that right.

39. In light of the fact the Respondents themselves are seeking to return the aircraft objects to Florida, there is no reason for the Court to refuse relief as a matter of discretion. The Respondents have suggested that damages will be an adequate remedy, but they have not clarified how they propose to treat the debt the Administrators will incur by their failure to perform the return obligations in the course of managing the Respondents' business.

40. The relief is sought pursuant to Article 12 of the Cape Town Convention, which states:

> Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised to the extent that they are not inconsistent with the mandatory provisions of this Chapter as set out in Article 15.

41. The question then arises are the Applicants "*permitted by the applicable law*" to exercise the remedies "*agreed upon*"?

42. On 20 April 2020, upon the appointment of an administrator on the Lessee, an Event of Insolvency within the meaning of cl 19 of the Leases occurred.

43. On 4 September 2020, at a meeting of creditors of the First Respondent convened in accordance with section 439A of the *Corporations Act 2001* (Cth) (**Corporations Act**):

(a) the Applicants voted against a resolution that the First Respondent execute a deed of company arrangement (**DOCA**)[3]; and

(b) a majority of creditors resolved to execute the DOCA.

44. On 25 September 2020, the Second Respondent executed the DOCA on behalf of the First Respondent. Accordingly, under section 435C of the Corporations Act, the administration of the First Respondent ended on that day and the moratorium under section 440B of the Corporations Act came to an end.

45. The Full Court in *obiter* stated that the reference in Article 12 to the applicable law will include the local insolvency law: FFC[87]. The Applicants reserve their right to challenge that conclusion on appeal if necessary as it did not appear to account for the text of Article XI of the Protocol.

46. Nevertheless, for present purposes the Applicants accept that having established the "*agreed*" right to redelivery, the Court's consideration of whether that right is *"permitted"* by the Applicable law will require the Court to determine whether the DOCA has compromised the Applicants' claim.

The DOCA does not purport to compromise the Applicants' claim

47. The Respondents argue that the DOCA has compromised the Applicants' right to specific performance of the redelivery obligations.

48. That argument ought to be rejected:

(a) First, as a matter of construction the DOCA expressly preserves claims under a Security Interest or Lease that are much broader than the statutory carve out(see cl 6.3(b));

(b) Second, the carve outs in cl 7 and 9 that mirror s444D(2) and (3) do not compromise the Applicants right to seek specific performance.

49. On the latter point, the Applicants submit that (contrary to the Respondent's submissions) there is no authority that determines the question precisely on point in these proceedings.[4]

[3] Second Affidavit of Dean Poulakidas sworn 19 October 2020 [7(c)].
[4] A number of decisions considering similar, but importantly distinct issues, were surveyed by Vaughan J in *Smith and Others v Sandalwood Properties Ltd* 2019) 334 FLR 278 (WASC)

Clause 6.3(b) preserves the right to enforce the lease (which is also a PPS lease)

50. Clause 6.3(b) of the DOCA preserves rights on broader basis than simply the statutory carve outs in s444D(2) and (3).

51. Clause 6.1 of the DOCA relevantly provides that it binds "in accordance with section 444D of the Corporations Act, all Creditors".

52. This directs attention to the definition of "Creditor" in cl 1.1, which is "a person who has a Claim". Clause 1.1 defines "Claim" as (relevantly):

> a debt payable by, and all claims against, a Deed Company (present or future, certain or contingent, ascertained or sounding only in damages), being a debt or claim that would be admissible to proof against a Deed Company in accordance with Division 6 of Part 5.6 of the Corporations Act, if the Deed Company had been wound up and the winding up is taken to have commenced on the Appointment Date ….

53. Claim is defined to expressly "include" a "Claim of a Secured Creditor".

54. Clause 6.3(b) provides a very broad savings provision. The "Moratorium" on claims in clause 6.3(a) is expressly, "*subject to clause 6.3(b)".*

55. Importantly, clause 6.3(b) states:

> Despite anything to the contrary in this Deed, nothing in this Deed affects the rights of any Secured Creditor or Owner in respect of a leasing, hire purchase or financing transaction relating to any aircraft, aircraft engine or airframe (or any associated technical records and parts) to enforce, realise or otherwise deal with any Security Interest or Leased Property and retain the proceeds from the enforcement or realisation of, or other dealing with, any Security Interest or Leased Property.

56. Notably, the wording of clause 6.3(b) does not make immediate sense in respect of Leased Property. The phrase "to enforce" in the infinitive, cannot be read with the words "Leased Property" without implying words to give that phrase meaning.

57. The Applicants suggest the obvious words to be included to give the clause a business like operation is "*to enforce the terms of any agreement in respect of*…"

58. In the words of Leeming JA in *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation)* (2019) 99 NSWLR 317; [2019] NSWCA 11 at [5], this is an instance where "*it is clear on the face of a written contract that something has gone wrong with the language.*" In such cases, quite apart from any order for rectification in equity, at common law the mistake may be corrected as a matter of construction. As Leeming JA said in *Seymour Whyte* at [7], "*[t]he language of a contract is not read like a computer program, such that any slip is fatal.*"

59. There are two preconditions to an error being corrected in this manner: "*(a) that the literal meaning of the contractual words is an absurdity and (b) that it is self-evident what the objective intention is to be taken to have been*": *Seymour Whyte* at [8] (citations omitted).

60. As to the first requirement, it is clear that the words enforce, realise or otherwise deal with, were intended to refer to both the Security Interest and the Leased Property. The objective intention was that cl 6.3(b) was trying to ensure secured creditors and lessors contractual rights remained untrammelled to entice them to vote in favour of the DOCA.

61. In those circumstances it becomes clear that the Applicants are entitled to enforce the terms of the Leases, by which they are entitled to call for redelivery of the leased goods in accordance with the redelivery conditions.

62. Alternatively, clause 6.3(b) has expressly preserved the Applicants right to "*enforce*" its security interest.

63. It was not in dispute before the primary judge that the he leases give rise to a security interest in the form of a PPS leases and were registered under the PPSR (see the primary judgment of Middleton J 3 September 2020 (**PJ**) [27]).

64. As explained below the right to "*enforce"* that security interest ought to extend to a right to require redelivery.

Clauses 7 and 9 preserve the rights of enforcement

65. Further and in the alternative, clauses 7 and 9 preserve the Applicants' rights to redelivery.

66. Clause 6.4 is a critical provision, providing that "*[s]ubject to clause 6.6, each Creditor agrees that on Completion, its Claims are extinguished and released.*" That provision must be read subject to other clauses, particularly clauses 6.3(b), 7 and 9.

67. The Applicants submit that cl 6.4 does not have the effect of extinguishing its claims, because they are within the carve out of claims preserved by cll 6.3(b), 7 and 9.

68. Starting with cl 9, which provides:

> Nothing in this Deed will restrict a right that an Owner has in relation to the property of that Owner under section 444D(3) of the Corporations Act.

69. "Owner" is defined in cl 1.1 to mean "any person who is the legal or beneficial owner or holder of a leasehold interest (including any lessor) of property in the possession of a Deed Company as at the Appointment Date." The Applicants are squarely within this definition.

70. Accordingly, the Applicants' rights under sub-s 444D(3) are unrestricted by the DOCA. That provision provides that the binding effect of the DOCA prescribed by sub-s 444D(1)

"does not affect a right that an owner or lessor of property has in relation to that property", except insofar as **both** (i) the DOCA so provides; **and** (ii) the owner or lessor voted in favour of the resolution adopting the DOCA.

71. First, the Applicants voted **against** the DOCA. That alone is enough to ensure the DOCA "*does not affect"* a right in relation to property.

72. Second, whether, as a matter of construction, the DOCA "*so provides*" for the compromise of any of the Applicants' rights - must be answered by reference to the terms of the DOCA.

73. Clause 6.1 of the DOCA binds all Creditors (that includes the present Applicants), but that is subject to cl 6.3(b) (discussed above) and cl 9.

74. Clause 9 exhibits an intention to exclude lessors' property rights from the terms of the DOCA. Clause 9 preserves all of the Applicants' rights "*in relation to the property*". Those rights of the Applicants are broad enough to encompass redelivery of the aircraft objects.

75. As to the scope of the rights "*in relation to property*" the relational term "*in relation to*" in cl 9 is of broad import.

76. In *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620; [1961] HCA 41, Taylor J described the words "relating to" as "extremely wide but … also vague and indefinite" and observed that "all that a court can do is to endeavour to seek some precision in the context in which the expression is used."

77. In *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510; [2010] HCA 33, in dealing with the phrase "in relation to", French CJ and Hayne J stated at [25] that it was "a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ". Their Honours also "*accepted that 'the subject matter of the inquiry, the legislative history, and the facts of the case', are all matters that will bear upon the judgment of what relationship must be shown*".

78. Adopting that approach, the Applicants submit that all of its incidental rights associated with its right to redelivery are preserved by cl 9. The purpose of cl 9 is to ensure that the Owner or Lessor is not deprived of its property. The use of the words "*rights … in relation to the property*", it is submitted, is a manifestation of a statutory intention to ensure that the Owner or Lessor is not deprived of those rights which are incidental to ownership and which give utility to ownership.

79. True it is that Courts have construed the rights *in relation to* property as excluding payments of rent in relation to the property (see *Henaford Pty Ltd v Strathfield Group Ltd* (2009) 72 ACSR 240). But claims for rent are more distantly "related" to the property than the right to insist on the return of possession and physical custody of goods in a specified condition.

80. So too have Courts looked to section 444F(5) as providing relevant context for construing the minimum content of rights in relation to property being preserved.[5] But the Applicants submit that there is no authority squarely addressing the present issue, namely: is a right to redelivery of property a right *"in relation to"* property?

81. In the present case, the Applicants' rights in relation to the leased property would be enormously diminished if the lessee were not held to its contractual promises to return the aircraft objects, physically, and in an airworthy condition.

82. This includes, for example, redelivery of the data, manuals and records which are required to ensure the continuing airworthiness of the Engines. Put simply, there is no reason to read the broad words in cl 9 or section 444D(3) as not extending to these rights, which are integral to the Applicants' ownership interests.

83. The same applies for the carve-out in cl 7 for rights to realise security, which provides:

> Nothing in this Deed will restrict the right of a Secured Creditor to realise or otherwise deal with its security to the extent permitted by section 444D(2) of the Corporations Act.

84. "Secured Creditor" is defined in cl 1.1 to mean "any Creditor with the benefit of a Security Interest at the Appointment Date over all or any property of a Deed Company securing all or any part of the Creditor's Claim."

85. The Applicants have a Security Interest by virtue of their PPSA registered leases: PJ[27].

86. The commercial purpose of an aircraft operating lease is that the consideration is set at the true "hire" price of an operational object, not a price intended to cover the full economic value of the engine (cf a hire-purchase).[6]

87. The quid pro quo - and the essential interest that that lessors tried to protect or secure by the institution of the Cape Town Convention and Protocol – is that the aircraft object is returned to the creditor (physically) in operational condition at the end of the lease, so that it can re-deployed to another lessee.

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[5] *Smith and Others v Sandalwood Properties Ltd* 2019) 334 FLR 278, [102]-[109].

[6] See *Celestial Aviation Trading v Paramount Airways Private Ltd* [2010] EWHC 185, [55].

88. In that way airlines have access to newer, more efficient fleets, without requiring the capital to fund an acquisition. But the availability of ready to hire operational objects (at a cost less than the economic value of the asset) depends on their return in operational condition.

89. Viewed in that light the rights to require redelivery in a prescribed condition is central to the aircraft operating lease transaction. It is a right which was vitally important to "secure" by registering the PPS lease, and ought to be protected an upheld.

90. The Court would readily conclude that the DOCA has not prohibited the Applicants ability to "enforce" that security (under cl 6.3(b), or "realise" that security under cl 7 of the DOCA. There is no basis for concluding the DOCA has compromised the Applicants right to seek specific performance of the redelivery obligations in the lease as a means of enforcing its security.

Leave to proceed and Anshun estoppel

91. Article 12 is expressly subject to the applicable law. The Full Court held that (at [87]):

> under the Convention, the creditor must conform to the requirements of the domestic law as to the procedures by which it may enforce its rights to the property. The Convention thus does not provide for the enforcement of contractual rights to take possession of an "*international interest*" in the territory of a participating State where such enforcement would be contrary to the procedures required by domestic insolvency law (such as where leave of a court is required to exercise such rights).

92. The Applicants accept (based on the Full Court's decision) that leave is required under section 444E to bring a claim under Article 12 of the Cape Town Convention and such leave is sought by the Applicants.

93. In granting leave, the Court would have regard to the fact that the remedies which the Applicants now seek to enforce are expressly preserved under the DOCA and the granting of leave is consistent with the DOCA. If the Court is otherwise satisfied the Applicants rights are preserved it will suffer prejudice if it is not now permitted to pursue its claim.

94. As to Anshun estoppel, on the Full Court's interpretation any claim under Article 12 could not have been brought until after the lifting of the domestic law moratorium on enforcement (under s440B). That moratorium was lifted on 25 September 2020 upon the entry into the DOCA on 25 September 2020, which had the effect of terminating the administration (see section 435C). The Article 12 claim is available based upon the terms of the DOCA that have expressly preserved the rights of secured creditors and lessors.

95. Accordingly, there was nothing unreasonable about bringing the Article 12 claim after the DOCA had been entered into and expressly preserved those claims.

E. SUBMISSIONS ON RESPONDENTS' REMITTER (IF NOT STAYED)

96. If the remitter proceeds to be heard substantively (contrary to the Applicant's primary position) then the following further questions remain:

(a) By what date did the Respondents "give possession" of the aircraft objects in accordance with the Full Court's reasons, to give rise to the declaratory relief sought in paragraphs 1 and 2 of the Respondents' Interlocutory Process?;

(b) Should the Applicants be liable to pay the Respondents $235,323.84 in respect of costs of complying with the Court's earlier orders up to 22 September 2020 (as sought in paragraph 5)?

(c) Should the Applicants pay the costs of these proceedings up to an including 8 September 2020 (as sought in paragraph 6)?

Date of "giving possession"

97. The Applicants case on the remitter is simple. Possession of the aircraft objects was not given until the date on which all Operator Records (as explained by Derych Warner in his affidavit dated 22 July 2020) were given to Willis.

98. An email dated 16 October 2020 showing a long chain of correspondence between the parties confirms that the Applicants did not receive the relevant records until 13 October 2020. Mr Warner states:

> I was able to download and review the suite of records provided on 13 Oct. Please see the updated ROIL attached. The LLP Statuses are now closed for all engines in return. Many Thanks!!

99. The test devised by the Full Court to explain the content of the obligation was set out in the Full Court's reasons at [106]:

> With due respect to the considered views of the primary judge, formed with urgency in the course of managing a complex insolvency, Art XI(2), properly construed, provides that notwithstanding the domestic insolvency law, the insolvency administrator must do that which is necessary to pass to the creditor the form of possession that the creditor could have taken in the exercise of the self-help right to take possession. To do so may require the taking of affirmative steps by the insolvency administrator beyond simply disclaiming the property. Merely submitting to the claim by the creditor may not be enough. However, the extent of those affirmative obligations is confined by what is needed to overcome any barrier to taking possession that is a consequence of the insolvent administration, and does not extend to affording to the creditor any form of possession of the relevant aircraft objects that the creditor would be unable to take in the exercise of the remedy conferred by the Convention (and applied to aircraft objects by the opening words of Art IX of the Protocol) in circumstances where there was no insolvent administration. To the extent that the existence of the insolvent administration means that the creditor cannot exercise that self-help remedy, the insolvency administrator must give possession. It is an obligation that arises in circumstances where the creditor wishes to take up the opportunity

to take possession. It is for that reason that Art XI imposes obligations upon the insolvency administrator that are expressed to apply unless and until "the creditor is given the opportunity to take possession" under Art XI(5). Once that opportunity is afforded those obligations come to an end, unless the creditor seeks to take up the opportunity, in which case they continue until the obligation to give possession (which is of the character already described) must be performed by the insolvency administrator.

100. A number of propositions are clear. The obligation on the insolvency administrator bites where "*the existence of the insolvent administration means that the creditor cannot exercise that self-help remedy"*. Second, the obligation may "*require the taking of affirmative steps"*. Both of those considerations apply to the obligation to 'give possession' of the Records that formed part of the 'aircraft object'.

101. The Court will recall prior to the commencement of the proceedings the Administrators had not furnished any records (not even Historical Operator Records) to the Applicants.

102. The Historical Operators Records were provided in large part by way of an online portal on 8 July 2020. However, the Court will recall Mr Dunbier's evidence in cross-examination at the hearing on 31 July 2020 that he was being directed by the Administrators not to provide any of the End of Lease Operator Records, that he would otherwise have provided if not in insolvency.[7]

103. There was no other way for the Applicants to exercise their right to take the records until the Administrators had provided them. That did not occur in complete form until 13 October 2020.

104. Accordingly, in the present case the obligation to give possession was not complied with until 13 October 2020 and the relevant date the Court would find in paragraphs 1 and 2 of the Respondents Interlocutory Process is 13 October 2020.

Liability for costs of the redelivery

105. If this Court accepts that the Applicants are entitled to their relief for specific performance under Article 12 of the Convention, then there is no basis to award the costs of compliance with the Court's orders to date.

106. Those steps for redelivery would always have been incurred by the Respondents by the time they complied with their contractual obligation to redeliver.

107. In those circumstances if the Court accepts the Applicants case in respect of Article 12 the Court would decline the relief sought in paragraph 5 of the Respondents' Interlocutory Process.

[7] Transcript 31 July 2020 T15.15-24

Costs of the proceedings

108. The costs of the proceedings to date cannot be usefully argued until the Court determines the present application. That is because there are a number of clear bases upon which the Respondents have failed in their defence of these proceedings.

109. For example:

(a) The Respondents' was that its s443B notices on 16 June 2020 were sufficient to comply with its obligation to give possession (see the correspondence dated 9 June 2020 quoted at PJ [32]) – which position made it necessary for the Applicants to commence these proceedings on 30 June 2020);

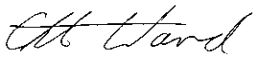
(b) The Respondents' s443B notices were held to be defective (PJ Order 3);

(c) The Respondents now press for 18 June 2020 which is an equally unsustainable date as they had provided none of the essential records by that date;

(d) The Respondents ignored their obligation to provide records to the Applicants under the Cape Town Protocol. No steps were taken to comply with that obligation until 8 July 2020 after the commencement of the proceedings (PJ[45]). On that basis alone these proceedings were rightly commenced on 30 June 2020.

110. However the full scope of the Respondents' failed defences cannot be assessed until the outcome of the present application is known. For that reason the Court would wait determination of all questions of costs until the balance of the orders in the proceedings have been made.

4 November 2020



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