HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE)**
First Appellant
WILLIS LEASE FINANCE CORPORATION
Second Appellant
and
VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741
First Respondent
VIRGIN AUSTRALIA AIRLINES PTY LTD (ADMINISTRATORS APPOINTED) ACN 090 670 965
Second Respondent
VAUGHAN NEIL STRAWBRIDGE, JOHN LETHBRIDGE GREIG, SALVATORE ALGERI AND RICHARD JOHN HUGHES (IN THEIR CAPACITY AS VOLUNTARY ADMINISTRATORS OF THE FIRST AND SECOND RESPONDENTS)
Third Respondent
TIGER AIRWAYS AUSTRALIA PTY LIMITED (ADMINISTRATORS APPOINTED) ACN 124 369 008
Fourth Respondent

APPELLANTS' REPLY

PART I: CERTIFICATION

1. These reply submissions are in a form suitable for publication on the internet.

PART II: REPLY

2. On appointment of the administrators, the Appellants' four engines were on four different aircraft. Those aircraft were not owned, controlled, or in the "*possession*" of the Appellants. One engine was on an aircraft in Adelaide and had to be flown to Melbourne to be removed (PJ [125] CAB 54). Another had been subleased to the fourth respondent (Tiger Airways). That fact not being brought to the Appellants' attention until the engine was disclaimed (FFC [8] CAB 112).

3. Add to that picture that the essential engine records that are the lifeblood of the leasing industry were stored somewhere in the physical or digital archives of the many Virgin companies, but in a location unknown to the Appellants. Of how much benefit is the promise of an "*opportunity to take possession*" in those circumstances?

4. The Respondents submit that the Full Court's or the Respondents' construction of Art XI(2) "*confers a substantial benefit on creditors*", because a creditor can, at the end of the waiting period "*pierce*" or "*override*" "*any operative domestic stay to give the creditor the opportunity to 'take possession'…*"(Respondents' Submissions (**RS**) [53], [64]). That submission hinges on the misleading suggestion that in the "*context of the Virgin administration*" the waiting period ceased on 19 June 2020, but the "*statutory stay continued until 25 September 2020*" (RS [53]).

5. The statutory stay was irrelevant once the Respondents issued a s443B notice and evinced an intention to permit creditors to collect their property (see Algeri 5 August 2020 [13]-[14] RBFM 8-9; Algeri 17 July 2020 [19],[23]-[24] Appellants' Supplementary Book of Further Materials (**SBFM**) 11-14). By then the Appellants could collect their equipment by virtue of domestic law, unimproved by the Protocol.[1] Contrary to the Respondents' case if Art XI(2) only provides an "opportunity to take possession" there is no "substantial benefit": see PJ [118] CAB 53.

6. The Respondents' own evidence sworn after the primary judge indicated the result on 31 July 2020, set out the significant practical and coordinative hurdles that would have confronted the Appellants had they attempted to collect their engines. For example, for the first time on 5 August 2020 Mr Algeri deposed to the existence of a claimed lien by Adelaide airport (Algeri 5 August 2020 [11] RBFM 8). The Respondents were able to remove that lien (by means unknown to the Appellants) and use Virgin pilots and staff to fly the aircraft to Melbourne and remove the Appellants' engines.[2]

7. Confronted with that factual picture the "*practically impossible*" (RS [34]) suggestion by the Respondents, cuts against them. The coordinative responsibility that immediately before the time of appointment rests with the airline, with all its records, resources, and safety responsibility, is suddenly thrust onto a scrum of creditors with

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[1] A s443B notice ceases to have effect if the company exercises, or purports to exercise, a right in relation to the leased property: s443B(5) and (6). Further a s443B notice is good evidence of an administrator's consent to a third party exercising property rights despite the stay: see under s440B(2)(a); and *Re Oliver Brown Pty Ltd* [2012] NSWSC 1222; 17 BPR 32253 at [47] (Black J) considering an earlier version of s443B.

[2] See item 3 in email dated 24 August 2020 from Clayton Utz to the Associate to Middleton J: RBFM 55. The lien was not a "non-consensual right" contemplated by Art XI (12) and Australia's declaration.

divergent interest. In this case, the engines were in fact redelivered to Florida, and records were provided. This was a well-funded administration and there is now an "*amply capitalised*" creditors' trust to deal with claims.[3] The real question is not impossibility but to whose account does the Protocol allocate that cost of redelivery. The Appellants say Alternative A, Art XI(2) requires an administrator to give possession where that is reflected in the underlying agreement.

8. The Respondents do not offer a compelling account of the content of the "*opportunity to take possession*" of aircraft objects. Is it sufficient to offer physical collection of records from a filing cabinet in disparate foreign airport hangars? What about those records that require sign-off from the airline? In the present case the Virgin safety team admitted they would have taken positive steps to certify the engines had not been in an incident, but they were directed not to take those steps by the administrator because of the perceived risk to the administrator (PJ [157] CAB 62; T15.13-29 SBFM 36; Algeri 17 July 2020 [36] SBFM 17). It is precisely that sort of reluctance in providing the aircraft objects that Alternative A of Art XI was intended to overcome to ensure the aircraft objects will swiftly return to operation (see the definition of aircraft objects PJ [133] CAB 56). But on the Respondents' account there is no "*remedy*" available to demand the return of aircraft objects (including records) because although Art XI(2) imposes a "*mandatory obligation*" it does not supply a "*remedy*" (see RS [42]).

9. The Respondents never engage with the primary judge's finding that predictability and uniformity is achieved by honouring the parties' bargain (PJ[98] CAB 47). Instead the Respondents' case is concerned with certainty, uniformity and predictability for the insolvency administrators (RS[34]-[35], [50], [62], [66]). The administrator can ignore the carefully calibrated contractual redelivery obligations (and the choice not to opt out of Art XI - see Art IV(3)) and instead permit rival creditors to fight it out. Certainty for financiers, the basis of preferential aircraft financing, would fall by the wayside.

10. The Respondents' construction sits uncomfortably with the Art XI(5) maintenance obligations on the party with physical possession. The suggestion at RS [29] that Art XI(5) would be redundant misses the point. Art XI(5) is directed primarily at imposing positive maintenance obligations on a debtor/administrator during the waiting period, and secondarily, describes the point at which risk for the maintenance obligation passes to a creditor. That risk allocation incentivises compliance with the obligation in

[3] Letter from Clayton Utz to Norton Rose Fulbright dated 3 November 2020 [4(b)], SBFM 43.

Art XI(2). Risk will not pass until the administrator has given possession at which point the lessor has the opportunity to take possession.[4] Similarly, Art XI(8) is not obsolete (cf RS [30]) but reflects the available choice of remedies common in leases to collect or insist on redelivery. Such was the lease in the present case: RS [8].

11. No mention is made of Art IV(3) by the Respondents. It has two important functions that appear to be overlooked. First, it entrenches respect for party autonomy by providing the parties freedom to opt out of Art XI in writing if they wish to. Conversely, where Art XI applies in an insolvency it is the primary source of remedies for a creditor and picks up and applies parts of the Convention as needed (cf RS [48]).

12. Second, Art IV(3) provides that parties *can* derogate from any of the provisions of the Protocol except Art IX(2)-(4). The effect is that party autonomy is respected, but the "*commercial reasonableness*" safeguard in Art IX(3) remains one of the unalterable pillars of the Protocol: see also Goode [4.5].

13. Viewed in that light, it is clear that Art XI(13) is directed at ensuring that the commercial reasonableness safeguard in Art IX(3) applies to "*the exercise of any remedies under* [Art XI]". The subject matter of Art XI(13) is the manner of exercise of remedies under Art XI specifically – not the imposition of commercial reasonableness on the Convention remedies as applied to the Protocol generally (cf RS [40]). The Respondents' position would lead to a result where parties cannot contract out of Art IX(3) (see Art IV(3)) – but the commercial reasonableness standard does not apply to Art XI remedies on the occurrence of an "*insolvency-related event*".

14. The Respondents propose a "*fundamental dichotomy between self-help and court-authorised remedies*": RS [17]. That should be treated with caution. It is true that the Convention and Protocol recognise some rights and remedies arise extra-curially (derived from the parties' bargain or property rights). But that proposition ought not be used to narrow Art XI(2) to a remedy of re-possession. Moreover, it should not be thought that extra-curial rights and remedies require express words to be enforced and recognised by a Court if there is a failure to comply.

15. It is true Alternatives A and B are different (see RS [54]). Alternative A is hard or rules based, while Alternative B is discretion-based: Goode [3.126], [3.134]. If the parties

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[4] In *The Leasing Centre (Aust) Pty Ltd v Rollpress Proplate Group Pty Ltd* [2010] NSWSC 282, [108]-[112] Barrett J discussed a slightly different process of giving possesion and obtaining delivery saying: "[n]*on-performance of an obligation to give possession is not somehow excused by the mere existence of a counter obligation to obtain delivery*" (at [112]).

have agreed to the debtor "*giving possession*" in their bargain, that must be honoured. The removal of discretionary fetters streamlines the availability of the remedy. In domestic law similar relief in the case of detained goods would be discretionary.[5]

16. The parties' bargain in the present case provides the possibility to repossess, or to insist on redelivery. Alternative A Art XI(2) ensures that any such contractual remedy is picked up and applied in the event of insolvency without modification (see Art XI(10)). On an application to a Court by either a creditor seeking to enforce the Alternative A Art XI(2) remedy, or by a debtor seeking to contest the reasonableness of the demand – the only question to be determined is whether the remedy sought is "*commercially reasonable*", and if provided for by the terms of the agreement, whether such a term is "*manifestly*" unreasonable (Art XI(13), and IX(3)).

17. **Relief.** The declaration in 6(a) CAB 169 is appropriate (cf RS [58]). It is consistent with Art XI(4); the basis upon which the case has been conducted and correspondence between the parties.[6] The declaration resolves the point of principle. What flows from that declaration can be determined either on remitter (see proposed Order 6(c) CAB 169) consistently with the remitter ordered by the Full Court; or by the parties' subsequent agreement (including in respect of what is to be determined by a claim made to the trustees of the creditors' trust).

Dated: 15 July 2021

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[5] *Re Gillie & Ors: Ex parte Cornell* (1996) 70 FCR 254 at 258 (Finn J), explains the development of the relief for delivery up of chattels first in equity, and by s 78 the Common Law Procedure Act 1854 (UK).
[6] See PJ Order 4 CAB 85; Letter from Clayton Utz dated 3 November 2020 [4(b)], SBFM 43.