



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
 SYDNEY REGISTRY

S60 OF 2021

BETWEEN: **WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION**  
**(AS OWNER TRUSTEE) & ANOR**  
 First Appellant

and

10 **VB LEASECO PTY LTD (ADMINISTRATORS APPTD) ACN 134 268 741 & ORS**  
 First Respondent

### **RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS**

#### **Part I: Certification**

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

#### **Part II: Outline of Propositions**

2. **Ultimate issue:** Whether the obligation to “give possession” of aircraft objects to a “creditor” under Protocol Art XI(2) (Alternative A) required the Respondents to redeliver aircraft engines to the Appellants in Florida, as if the leases were at an end: RS[2]-[5].  
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3. **“Possession”:** Possession has the same meaning across Convention Arts 1(q), 8, 10, 13(1)(b) and Protocol Arts XI, XVI: a broad Convention sense, wide enough to cover both common law and civil law conceptions; distinct from mere custody; being a relationship to the object manifesting a sufficient degree of physical control (personally or through an agent) and an intention to hold it as one’s own: Goode [2.30(3)]; FFC [97]-[100]; RS[25].
4. **Convention remedy of “taking possession”:** The default remedies in Arts 8 and 10 of “taking possession” involve the creditor taking an active step to assume the relationship to the object which constitutes a title to the object which is good as against the whole world save someone who can assert a better title (such as a priority lienee): Art 39.
- 30 5. **Redelivery under the Convention:** A claim by the creditor for specific performance of an obligation by the debtor to redeliver the object to the creditor at the place and in the manner required by the creditor is fundamentally different from the creditor “taking possession” of

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the object. It cannot arise under Arts 8 and 10. It can only arise, if at all, as an additional remedy permitted by the applicable law under Art 12: RS [19].

6. **Convention and insolvency:** Art 30(3)(b) preserves rules of procedure like s 440B of the *Corporations Act 2001* (Cth) such that, where Australia is the forum state and the debtor is under administration, the creditor cannot exercise its remedy of “taking possession” under Arts 8 or 10, or of requiring redelivery under Art 12, without the consent of the IA or leave of the court: Goode at [4.220], [4.222]; FC[86]-[87]; RS [53].
7. **Relationship of the Protocol to the Convention:** The Protocol applies the Convention to aircraft objects in the terms it stipulates. The capitalised term “Convention” means the Convention, not including the Protocol. In the process of application, remedies sourced in the Convention remain Convention remedies but may be modified or enhanced: RS[18].
8. **Additional remedies:** The Protocol contains only two additional remedies, those of deregistration or export and physical transfer under Art IX(1): RS [49]. Those remedies would be unnecessary from the creditor’s perspective if the “taking of possession” under Arts 8 and 10 and the “giving of possession” under Art XI already included within them an obligation on the debtor to effect physical redelivery of the object upon default. They would also be deficient from the debtor’s perspective, and the protections in them circumvented, if the debtor could already be required to effect redelivery: RS[30], [32].
9. **Commercial reasonableness:** Art IX(3) extends the commercial reasonableness constraint of Art 8(3) to the exercise by the creditor of all Convention remedies, including, relevantly, to the “taking of possession” under Arts 8 and 10. It governs the mode of exercise of the remedy but does not alter its anterior content. It would preclude, for example, a violent repossession or one where the creditor fails to take proper steps to safeguard the object from loss. In its “pro-debtor” character, it cannot be excluded by the parties: Art IV(3). The primary judge erred in finding otherwise: PJ[85], [86]; RS[39].
10. **Article XI as a whole:** For an insolvent debtor, Art XI governs the mode of exercise of the Convention remedies, and the two additional remedies of Art IX(1). It effects a substantial improvement in the position of the individual creditor in the insolvency over the Convention position (and under domestic law), while also respecting the position of the debtor, the IA and the other creditors of the estate. Under Alternative A, it gives the IA or debtor the choice of how much of the waiting period it will use to seek to cure defaults and be able to promise future performance (Art XI(7)), at the cost of preserving and maintaining the object in the meantime (Art XI(5)). If at the expiry of the waiting period default cannot

be cured, an obligation is imposed on the IA or debtor to “give possession” to the creditor, that is to take all steps, negative or affirmative, as are necessary for the creditor to be able to “take possession” under Convention Arts 8 or 10 if it is so minded (Art XI(2)). From that date the domestic court cannot prevent or delay the creditor taking possession (Art XI(9)). Within a further 5 days the administrative authorities of the state must co-operate if the creditor is pursuing the additional Art IX(1) remedies (Art XI(8)): RS[45], [53].

**11. Art XI(2) does not include an obligation to redeliver as if the lease were at an end:**

- 10 (a) Art XI(2) does not create any new remedy; rather it imposes an obligation on the IA to allow the creditor to exercise its Art 8 or 10 remedy of “taking possession” if so minded. That which is to be “given” under Art XI(2) is the same as that which may be “taken” under Arts 8 or 10 (or retained under Art XI(7)), in no case requiring redelivery by the debtor;
- (b) Possession is something which can be “given” on the expiry of the waiting period; whereas for the IA or debtor to carry out the complex steps involved in a redelivery obligation within the strict waiting period may be unfeasible because of lack of regulatory consent, financial and technical resources (noting the limitations on the IA’s capacity under Art XI(4)) or may deny the IA/the debtor the realistic opportunity to cure defaults under Art XI(7);
- 20 (c) Such difficulties are exacerbated where there are multiple creditors with claims over the same objects or a priority lienee under Art 39 and Art XI(12);
- (d) Our construction produces certain, predictable and uniform outcomes for all parties, consistent with the purpose of the Protocol and its relationship to the Convention;
- (e) Our construction coheres with Alternative B and the US position: RS [33], [54].

**12. Any remaining arguments of the Appellants should be rejected.**

13. **Relief:** (a) Relief to be considered in light of updated factual position; (b) if the Respondents succeed, the orders set out at RS[57] should be made; (c) if the Appellants succeed, the orders set out at RS[59] should be made; (d) no remitter is required.

Dated: 4 November 2021

*Justin Gleeson*

**Justin Gleeson SC**