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FEDERAL COURT OF AUSTRALIA

Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (administrators appointed) [2020] FCA 1269

File number:	NSD 714 of 2020
Judgment of:	**MIDDLETON J**
Date of judgment:	3 September 2020
Catchwords:	**STATUTES** – interpretation – statute implementing treaty – *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) – *Convention on International Interests in Mobile Equipment* – *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, Art XI – *Vienna Convention on the Law of Treaties*, Arts 31, 32
	STATUTES – meaning of "give possession of the aircraft object to the creditor" in the context of Art XI of *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* – whether "give possession" requires delivery of certain aircraft objects to the applicants in the United States or whether it entails making the aircraft objects available to the applicants – proper interpretation requires delivery of the relevant aircraft objects to the applicants in the United States
	CORPORATIONS – whether the administrators failed, for the purposes of the *Corporations Act 2001* (Cth), to disclaim the applicants' property and should be personally liable for post-appointment amounts payable under relevant lease agreements pursuant to s 443B of the *Corporations Act 2001* (Cth)
	CORPORATIONS – notice under s 443B given by respondents did not discharge respondents' obligation to "give possession" – notice could not satisfy the requirements of s 443B(3) of the *Corporations Act 2001* (Cth) or have the effect of relieving administrators of their obligations under s 443B(2) of the *Corporations Act 2001* (Cth)
	CORPORATIONS – whether administrators should be relieved of certain liability – administrators acted reasonably concerning providing assistance to the applicants to recover aircraft objects –s 443B notice of no effect upon the basis that the notice did not fulfil the obligations under *Protocol to the Convention on*

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	International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment – administrators relieved of liability from the period 16 June 2020 to 20 October 2020 under s 44B(8) and s 447A of the *Corporations Act 2001* (Cth)
Legislation:	*Acts Interpretation Act 1901* (Cth), s 15AB *Corporations Act 2001* (Cth), ss 440D, 440B(2), 443B, 447A *Convention on International Interests in Mobile Equipment*, Arts 2, 5, 6, 7, 8, 10, 13, 24 *Convention on the International Recognition of Rights in Aircraft* *Declarations Lodged by Australia under the Aircraft Protocol at the Time of the Deposit of its Instrument of Accession* *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) *Personal Property Securities Act 2009* (Cth), s 12 *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, Arts I, IX, XI (Alternative A) *United States Bankruptcy Code*, s 1110 *Vienna Convention on the Law of Treaties*, Arts 31, 32
Cases cited:	*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 *Barzideh v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 417 *Commonwealth v Tasmania* (1983) 158 CLR 1 *James Buchanan & Co Ltd v Babco Forwarding & Shipping(UK) Ltd* [1978] AC 141 *In Re Republic Airways Holding Inc,* 547 BR 578 (2016) *K (A Child), Re* [2013] EWCA Civ 895 *Melhelm Pty Ltd, Re Boka Beverages Pty Ltd (In Liq) v Boka Beverages Pty Ltd (In Liq) (No 2)* [2019] FCA 1809 *Nardell Coal Corp (in liq) v Hunter Valley Coal Processing Pty Ltd* (2003) 46 ACSR 467 *Pilkington (Australia) Ltd v Minister for Justice and Customs* (2002) 127 FCR 92 *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 *Shipping Corporation of India v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 *Silvia & Anor v Brodyn Pty Limited* [2007] NSWCA 55 *Strawbridge, in the matter of Virgin Australia Holdings Ltd*

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(administrators appointed) [2020] FCA 571
Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2) [2020] FCA 717
Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 3) [2020] FCA 726
Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4) [2020] FCA 927
Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 5) [2020] FCA 986
Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 6) [2020] FCA 1172
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Donald Gray, Dean Gerber and Jeffrey Wool, 'The Cape Town Convention and aircraft protocol's substantive insolvency regime: A case study of Alternative A' (2016) 5(1) *Cape Town Convention Journal* 115
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Michael White, *Australian Maritime Law* (Federation Press, 3rd ed, 2014)
Professor John F Wilson, *Carriage of Goods by Sea* (Pearson, 7th ed, 2010)
Professor Sir Roy Goode CBE, QC, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* (4th ed, May 2019)
Professor Stephen Girvin, *Carriage of Goods By Sea* (Oxford University Press, 2nd ed, 2007)

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency

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Number of paragraphs:	194
Date of last submissions:	25 August 2020
Date of hearing:	17 August 2020
Counsel for the Applicants:	Dr C Ward SC with Mr P Santucci
Solicitor for the Applicants:	Norton Rose Fulbright
Counsel for the Respondents:	Dr R C A Higgins SC with Mr R Yezerski and Ms K Lindeman
Solicitor for the Respondents:	Clayton Utz

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ORDERS

NSD 714 of 2020

BETWEEN:	**WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE)** First Applicant
	WILLIS LEASE FINANCE CORPORATION Second Applicant
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 & RICHARD JOHN HUGHES (IN THEIR CAPACITY AS VOLUNTARY ADMINISTRATORS OF THE FIRST AND SECOND RESPONDENTS) (and another named in the Schedule) Third Respondent

ORDER MADE BY: **MIDDLETON J**

DATE OF ORDER: **3 SEPTEMBER 2020**

THE COURT DECLARES THAT:

1. The First Applicant holds (for the benefit of the Second Applicant) an “international interest” in the “aircraft objects” identified in Schedule 2 of these Orders pursuant to Articles 2 and 7 of the Convention on International Interests in Mobile Equipment done at Cape Town on 16 November 2001 (the ‘**Cape Town Convention**’).

2. The Notice dated 16 June 2020 given by the Third Respondent to the Second Applicant did not discharge the First or Third Respondent’s obligation, under Art XI of the Protocol to the Cape Town Convention on matters specific to Aircraft Equipment, to “give possession” of the “aircraft objects” identified in Schedule 2 of these Orders.

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3. The Notice dated 16 June 2020 given by the Third Respondent to the Second Applicant did not satisfy the requirements of section 443B(3) of the *Corporations Act 2001* (Cth) (the '**Corporations Act**'), and did not (pursuant to section 443B(4)) have the effect of relieving the Third Respondent of their obligations under section 443B(2) of the Corporations Act in respect of the property identified in Schedule 2 of these Orders.

4. Any expenses incurred by the Respondents or Virgin Tech Pty Limited (Administrators Appointed) ('**Virgin Tech**') in complying with Orders 5 to 8 of these Orders are:

   (a) expenses properly incurred by the Third Respondent in carrying on the businesses of the First, Second and Fourth Respondents and Virgin Tech within the meaning of section 556(1)(a) of the Corporations Act;

   (b) debts or liabilities for which section 443D(aa) entitles the Third Respondent to be indemnified within the meaning of section 556(1)(c) of the Corporations Act from the assets of the First, Second and Fourth Respondents and Virgin Tech; and

   (c) debts or liabilities for which s 443D(aa) entitles the Third Respondent to be similarly indemnified within the meaning of s 556(1)(c) of the Corporations Act.

THE COURT ORDERS THAT:

5. The Respondents or any of them "give possession" of the "aircraft objects" identified in Schedule 2 of these Orders, by delivering up, or causing to be delivered up, the "aircraft objects" to the Applicants in the manner set out in Schedule 3 of these Orders, at 4700 Lyons Technology Parkway, Coconut Creek, Florida, 33073, United States of America.

6. Subject to any further order, the time by which the Respondents are to carry out the steps required by Order 5 of these Orders to deliver up the "aircraft objects" is, using their best endeavours, as soon as possible but on or before 15 October 2020. The Applicants will provide such assistance as is reasonably necessary in relation to the Respondents' obligations under these Orders, including taking any step that is reasonably required to give effect to those obligations of the Respondents.

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7. Unless and until the Respondents, or any of them, "give possession" in accordance with Order 5, or until further order of the Court, the Respondents are to preserve the aircraft objects in Schedule 2 of these Orders by:

   (a) maintaining the Engines identified in Schedule 2 of these Orders;

   (b) maintaining insurance cover over the aircraft objects identified in Schedule 2 of these Orders;

   to the same or greater extent as was maintained at the date of appointment of the Third Respondent as administrators.

8. The Third Respondent do all such things as are necessary and within its power, using best endeavours, to cause the First, Second, and Fourth Respondent to carry out the Orders of this Court in respect of the completion and transmittal of the records described at Schedule 2, paragraph 7 of these Orders.

9. Pursuant to section 443B(8) and section 447A(1) of the Corporations Act, the Third Respondent be excused and relieved of personal liability to pay rent or other amounts payable under any agreement in respect of the Applicants' aircraft objects that would otherwise have been payable by the Third Respondent pursuant to section 443B(2) from the period commencing 16 June 2020 up to and including the date in Order 6 of these Orders.

10. To the extent that the Applicants require leave of the Court pursuant to section 440D or section 440B(2) of the Corporations Act to begin and proceed with the Originating Application filed on 30 June 2020 against the First and Second Respondents and as amended by the Amended Originating Process on 28 July 2020 against the Fourth Respondent, leave is granted *nunc pro tunc* from those dates.

11. Liberty to the parties to apply to Justice Middleton in respect of these Orders, including but not limited to liberty to make an application for extensions of time, alteration to the manner and extent of delivery up as required by Order 5 of these Orders, and for any other variation amendment or addition to these Orders that may be required before, during or after the process of delivery up.

12. The First, Second and Fourth Respondents to pay the Applicants' costs as agreed or assessed as costs in the administrations of the First, Second and Fourth Respondents.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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Schedule 2

NOTE: In this Schedule 2, Appendix A and Appendix B are references to Appendix A in the Court Book at pages 15 to 39 (inclusive) and to Appendix B in the Court Book at pages 40 to 99 (inclusive).

Schedule of "aircraft objects"

Engines

(1) CFM International Engine, Model CFM56-7B24 with engine serial number 888473.

(2) CFM International Engine, Model CFM56-7B24 with engine serial number 897193.

(3) CFM International Engine, Model CFM56-7B24 with engine serial number 896999.

(4) CFM International Engine, Model CFM56-7B24 with engine serial number 894902.

Accessories, parts, and equipment

(5) Engine stands:

(a) (for Engine 888473) with serial numbers:

(i) Cradle: P/N D71CRA00005G02, S/N MCC150728-1-3;

(ii) Base: P/N D71TRO00005G03, S/N MCC150728-1-3;

(b) (for Engine 897193) with serial numbers:

(i) Cradle: P/N D71CRA00005G02, S/N MCC150728-1-4;

(ii) Base: P/N D71TRO00005G03, S/N MCC150728-1-4;

(c) (for Engine 896999) with serial numbers:

(i) Cradle: P/N D71CRA00005G02, S/N MCC170335-1-1;

(ii) Base: P/N D71TRO00005G03, S/N MCC170335-1-1; and

(d) (for Engine 894902) with serial numbers:

(i) Cradle: P/N AM-2811-4800, S/N 769;

(ii) Base: P/N AM2563-200, S/N 1216.

(6) Quick engine change (**QEC**) units and accessories:

(a) (for Engine 888473) – as specified in Appendix A;

(b) (for Engine 897193) – as specified in Appendix A;

(c) (for Engine 896999) – as specified in Appendix A; and

(d) (for Engine 894902) – as specified in Appendix A.

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Data, manuals, and records

(7) The following records in respect of each of the Engines:

(a) Historical Operator Records:

(i) Authorized Release Certificates and Installation Work Orders for any engine parts which are replaced on or before the date that the Engines are removed and prepared for transportation by road in accordance with paragraph 4 of Schedule 3 (in the form required under clause 18.3(g) of the General Terms of Agreement applicable to any Engine Lease (**GTA**)); and

(ii) Any records created, made or otherwise arising from the ferry flights or engine removal contemplated in Schedule 3 of these Orders (of the kind and in the form required under clause 7 of the GTA);

(b) End of Lease Operator Records/Status Statements:

(i) History Statement for each of the Engines in the form specified in Appendix B;

(ii) Non-Incident Statement for each of the Engines in the form specified in Appendix B;

(iii) In respect any ferry flight referred to in Schedule 3:

(A) Non Incident Statement exclusive to that ferry flight that identifies the engine Time and Cycles at removal in the form required under Exhibit E of the GTA;

(B) Aircraft journey logs that identify flight hours and cycles accumulated for that ferry flight in accordance with item F in Exhibit F of the GTA or in a form similar to Exhibit D of the GTA and amended to reflect the ferry flight;

(iv) Combination Statement for each of the Engines in the form specified in Appendix B;

(v) Life Limited Parts Status Statement for each of the Engines in the form specified in Appendix B;

(vi) Airworthiness Directive Status Statement for each of the Engines in the form specified in Appendix B;

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(vii) Approved Maintenance Organization (AMO) Statement for each Engine in the form specified in Appendix B;

(viii) Commercial Traceability Statement to be completed by head lessee in the form specified in Appendix B;

(ix) Documentation pertaining to any engine removal carried out in accordance with Schedule 3 including but not limited to:

(A) Engine removal work Order in a form similar to item 9 of Exhibit D of the GTA; and

(B) Long term preservation work order and tag in accordance with items P and Q in Exhibit F of the GTA.

(c) Lease Inspection Records:

(i) OEM EHM redelivery report as referred to in clause 6(b)(i) of the GTA;

(ii) Borescope Report as referred to in clauses 18.1(c) and 18.2(c) of the GTA;

(iii) Borescope Video as referred to in clauses 18.1(c) and 18.2(c) of the GTA;

(iv) C Check / MPD Tasks sign off as referred to in clauses 18.1(c) and 18.2(c) of the GTA;

(v) Preservation tag as referred to in Exhibit F, clause q of the GTA;

(vi) Dual Release Certificate being a United States Federal Aviation Administration (**FAA**) Form 337 and one of:

(A) a completed FAA Form 8130-3 (marked approved for Return to Service in accordance with part 43.9 of Title 14 of the US Code of Federal Regulations (**CFR**) and Release to Service in accordance with European Union Aviation Safety Agency (**EASA**) regulation Part 145.A.50); or

(B) an EASA Form One (marked approved for Release to Service in accordance with EASA Part 145.A.50 and Return to Service in accordance with 14 CFR 43.9).

Definition of Engine Lease

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(8) In this Schedule 2, a reference to an Engine Lease is a reference to any or all of, as the case may be, the lease agreements between the First Applicant and the First Respondent, the engine lease support agreement between the Second Applicant and the First Respondent, and the sub-lease agreements between the First Respondent and the Second Respondent described in paragraph 5 of Schedule 3 of these Orders.

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Schedule 3

(1) Unless the parties otherwise agree in writing, consistent with the applicable engine manufacturer's procedures for removal and the terms of the Engine Leases, the Respondents and where required, using Virgin Tech, to cause the Engines, Engine Stands and QECs to be transported to the Applicants according to the following steps as soon as possible using best endeavours but on or before 15 October 2020:

Ferry flight of Engine 894902 from Adelaide to Melbourne

(a) the Respondents to obtain from CASA the necessary regulatory approvals to carry out the terms of these Orders, including an extension of the Virgin Tech CASA approval to permit removal of the Engines at the facility operated by Delta Air Lines, Inc. (**Delta**) at Hartsfield-Jackson Atlanta International Airport at Atlanta, Georgia, United States (**Delta Facility**);

(b) the Respondents to cause aircraft VH-VUT to which is attached Engine 894902 to be transported from Adelaide to the Respondents' and Virgin Tech's Melbourne airport facility;

(c) the Respondents to cause to be created the End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)(iii) and to transmit them to the Applicants via email or via online data room;

Ferry Flight of Engine 894902 and Engine 896999 from Melbourne to Atlanta, USA

(d) at the Respondents' and Virgin Tech's Melbourne airport facility, the Respondents to cause Engine 896999 currently attached to VH-VOT to be removed and placed on VH-VUT;

(e) the Respondents to cause to be created the End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)(ix) in respect of Engine 896999 and to transmit them to the Applicants via email or via online data room; and

(f) the Respondents to cause VH-VUT to be flown (with Engine 894902 and Engine 896999 installed) to the Delta Facility;

(g) in the alternative to (d), (e) and (f) the Respondents to:

(i) at the Respondents' and Virgin Tech's Melbourne airport facility:

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(A) cause Engine 896999 currently attached to aircraft with registration VH-VOT to be removed and placed on the Engine Stand specified at paragraph 5(c) of Schedule 2;

(B) cause Engine 894902 currently attached to aircraft with registration VH-VUT to be removed and placed on the Engine Stand specified at paragraph 5(d) of Schedule 2;

(C) cause to be created the End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)(ix) in respect of Engine 896999 and Engine 894902 to transmit them to the Applicants via email or via online data room;

(ii) cause Engine 896999 and Engine 894902 to be prepared for air freight transportation in accordance with paragraph 4 of this Schedule;

(iii) consistent with the applicable engine manufacturer's procedures for air freight transportation and the terms of the Engine Leases, transport by air freight Engine 896999 and Engine 894902 to the Delta Facility.

Inspection, removal and road transportation of Engine 894902 and Engine 896999 from Atlanta, USA to Florida, USA

(h) the Respondents to cause, while Engine 894902 and Engine 896999 remain installed on airframe with registration VH-VUT, the inspections, checks and other steps necessary to enable the Respondents or Delta, as the case may be, to create, prepare or complete:

(i) End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)

(ii) Lease Inspection Records described in Schedule 2, paragraph 7(c);

(i) the Respondents to cause:

(i) Engine 894902 and Engine 896999 to be removed from airframe with registration VH-VUT by Delta at the Delta Facility;

(ii) Engine 894902 and Engine 896999 to be placed into Engine Stands specified in paragraphs 5(a) and (b) of Schedule 2 currently located at the Delta Facility;

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(iii) the QECs described at Schedule 2, paragraphs 6(c) and (d) of these Orders to be removed from Engine 894902 and Engine 896999 respectively;

(iv) Engine 894902 and Engine 896999 to be prepared in readiness for transportation in accordance with paragraph 4 of this Schedule 3;

(v) all End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b) and Lease Inspection Records described in Schedule 2, paragraph 7(c) in respect of Engine 894902 and Engine 896999 to be transmitted the Applicants via email or via online data room; and

(vi) Engine 894902 and Engine 896999 and the QECs described at Schedule 2, paragraphs 6(c) and (d) of these Orders to be transported by road using trucks equipped with air ride or air cushion tractors and trailers to the Applicants to their at facility at 4700 Lyons Technology Parkway, Coconut Creek, Florida, 33073, United States of America (**Coconut Creek Facility**).

Ferry Flight of Engine 888473 and Engine 897193 from Melbourne to Atlanta, USA

(j) using the Respondents' and Virgin Tech's Melbourne airport facility, the Respondents to cause Engine 888473 (currently installed on airframe with registration VH-VOY) and Engine 897193 (currently installed on airframe with registration VH-VUA) to be removed from airframes on which they are respectively installed and installed on airframe with registration VH-VUT;

(k) the Respondents to cause to be created the End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)(ix) in respect of Engine 888473 and Engine 897193 and to transmit them to the Applicants via email or via online data room;

(l) the Respondents to cause VH-VUT to be flown (with Engine 888473 and Engine 897193 installed) to the Delta Facility;

(m) in the alternative to (j), (k) and (l) the Respondents to:

(i) at the Respondents' and Virgin Tech's Melbourne airport facility:

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(A) cause Engine 888473 currently attached to aircraft with registration VH-VOY to be removed and placed on an Engine Stand of the same make, model, condition and quality of the Initial Stands and which otherwise comply with the applicable engine manufacturer's procedures for storage and transport of the Engines (Temporary Transportation Engine Stand);

(B) cause Engine 897193 currently attached to aircraft with registration VH-VUA to be removed and placed on a Temporary Transportation Engine Stand;

(C) cause to be created the End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)(ix) in respect of Engine 888473 and Engine 897193 to transmit them to the Applicants via email or via online data room;

(ii) cause Engine 888473 and Engine 897193 to be prepared for air freight transportation in accordance with paragraph 4 of this Schedule;

(iii) consistent with the applicable engine manufacturer's procedures for air freight transportation and the terms of the Engine Leases, transport by air freight Engine 888473 and Engine 897193 to the Delta Facility.

Inspection, removal and road transportation of Engine 888473 and Engine 897193 from Atlanta, USA to Florida, USA

(n) the Respondents to cause, while Engine 888473 and Engine 897193 remain installed on airframe with registration VH-VUT, the inspections, checks and other steps necessary to enable the Respondents or Delta, as the case may be, to create, prepare or complete:

(i) End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)

(ii) Lease Inspection Records described in Schedule 2, paragraph 7(c);

(o) the Respondents to cause:

(i) Engine 888473 and Engine 897193 to be removed from airframe with registration VH-VUT by Delta at the Delta Facility;

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(ii) Engine 888473 and Engine 897193 to be placed into Engine Stands specified in paragraphs 5(c) and (d) of Schedule 2 currently located at the Virgin Tech's Melbourne airport facility or alternatively:

(A) in lieu of using the Engine stands specified at paragraphs 5(c) and (d) of Schedule 2 (**Initial Stands**), the Respondents may substitute those stands with equivalent engine stands approved by the Applicants (acting reasonably) (**Replacement Stands**) after which time ownership and title to the Initial Stands will pass to Virgin and the Replacement Stands will pass to the Applicants;

(B) in respect of the preceding paragraph (A), the Applicants agree that they will not unreasonably withhold consent to the use substitute stands provided that those stands are of the same make, model, condition and quality of the Initial Stands and which otherwise comply with the applicable engine manufacturer's procedures for storage and transport of the Engines.

(iii) the QECs described at Schedule 2, paragraphs 6(a) and (b) of these Orders to be removed from Engine 888473 and Engine 897193 respectively;

(iv) Engine 888473 and Engine 897193 to be prepared in readiness for transportation in accordance with paragraph 4 of this Schedule 3;

(v) all End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b) and Lease Inspection Records described in Schedule 2, paragraph 7(c) in respect of Engine 888473 and Engine 897193 are to be transmitted to the Applicants via email or via online data room; and

(vi) Engine 888473 and Engine 897193 and the QECs described at Schedule 2, paragraphs 6(a) and (b) to be transported by road using trucks equipped with air ride or air cushion tractors and trailers to the Applicants to their Coconut Creek Facility.

Applicants' participation

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(2) The steps to be taken by the Respondents under the previous paragraph involving:

(a) removal of Engines or QECs;

(b) placing of Engines on Engine Stands;

(c) inspections, checks or other steps necessary to produce End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b) and Lease Inspection Records described in Schedule 2, paragraph 7(c); or

(d) preparation of Engines or QECs in readiness for road transport

are to be taken in the presence of the Applicants' nominated representative and, so far as reasonable and consistent with the applicable engine manufacturer's procedures for removal and the terms of the Engine Leases, will use their best endeavours to cause those steps to be carried out in accordance with the directions of the Applicants' nominated representative.

(3) At the time of removal of Engines or QECs, the Respondents' will give the Applicants' nominated representative sufficient access to the Engines and components in order to undertake an inventory of the parts belonging to the Applicants.

Preparation of Engines in readiness for road transportation

(4) Where it is specified in these Orders that the Respondents shall cause the Engines prepared in readiness for transportation, they shall cause to occur, for each Engine, consistent with the applicable engine manufacturer's procedures for removal and the terms of the Engine Leases:

(a) capping and plugging all openings of the Engine;

(b) preserving the Engine for long-term preservation and storage for a minimum of 365 days in accordance with the applicable manufacturer's procedures for the Engine;

(c) completely sealing the Engine in a Moisture Vapour Proof (**MVP**) Bag provided by the Applicants or with heavy gauge vinyl plastic if the Applicants do not provide an MVP Bag;

(d) otherwise preparing the Engine for shipment and, if applicable, the shipment of the Engine, in accordance with the manufacturer's specifications and recommendations.

Definition of Engine Lease

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(5) In this Schedule 3, a reference to an Engine Lease is a reference to any or all of, as the case may be, the lease agreements between the First Applicant and the First Respondent, the engine lease support agreement between the Second Applicant and the First Respondent, and the sub-lease agreements between the First Respondent and the Second Respondent as follows:

(a) Engine Lease Support Agreement dated 24 May 2019 between the Second Applicant and the First Respondent;

(b) General Terms Engine Lease Agreement dated 24 May 2019 between the First Applicant and the First Respondent;

(c) Aircraft Engine Lease Agreement in respect of Engine 897193 dated 24 May 2019 between the First Applicant and the First Respondent;

(d) Engine Sublease Agreement in respect of Engine 897193 dated 24 May 2019 between the First Respondent and the Second Respondent;

(e) Aircraft Engine Lease Agreement in respect of Engine 896999 dated 14 June 2019 between the First Applicant and the First Respondent;

(f) Engine Sublease Agreement in respect of Engine 896999 dated 14 June 2019 between the First Respondent and the Second Respondent;

(g) Aircraft Engine Lease Agreement in respect of Engine 888473 dated 28 August 2019 between the First Applicant and the First Respondent;

(h) Engine Sublease Agreement in respect of Engine 888473 dated 28 August 2019 between the First Respondent and the Second Respondent; and

(i) Aircraft Engine Lease Agreement in respect of Engine 894902 dated 13 September 2019 between the First Applicant and the First Respondent; and

(j) Engine Sublease Agreement in respect of Engine 894902 dated 13 September 2019 between the First Respondent and the Second Respondent.

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REASONS FOR JUDGMENT

MIDDLETON J:

INTRODUCTION

Background

1 The First and Second Applicants (the '**Applicants**') are respectively the legal and beneficial owners of four aircraft jet engines. The aircraft engines (and associated stands, equipment, and records) were leased to the First Respondent ('**VB**') who in turn subleased them to the Second Respondent, Virgin Australia Airlines Pty Limited ('**VAA**'), together referred to as '**Virgin**' in these reasons.

2 The First Applicant ('**Wells Fargo**') as lessor (holding its interest beneficially for the Second Applicant ('**Willis**')) holds an "international interest" (by reference to Art 2(2)(c)) of the *Convention on International Interests in Mobile Equipment* (the '**Convention**'). Wells Fargo is afforded certain rights, privileges, and immunities by the Convention, and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (the '**Aircraft Protocol**'). The Convention and Aircraft Protocol have the force of law as part of the law of the Commonwealth, so far as they relate to Australia, effective on 1 September 2015 upon the commencement of the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) (the '**CTC Act**').

3 Both the Convention and Aircraft Protocol prevail over any law of the Commonwealth and over any law of a State or Territory, to the extent of any inconsistency (CTC Act, s 8).

4 Australia has declared that it will apply Art XI, Alternative A of the Aircraft Protocol in its entirety to all types of insolvency proceedings, and that the waiting period for the purposes of Art XI(2) shall be 60 calendar days: see *Declarations Lodged by Australia under the Aircraft Protocol at the Time of the Deposit of its Instrument of Accession*.

5 Article XI(2) of the Aircraft Protocol provides that upon the occurrence of an "insolvency-related event", the insolvency administrator or the debtor "shall … give possession of the aircraft object to the creditor". This is subject to Art XI(7) (to which I will come).

6 It is not in dispute between the parties that an insolvency-related event occurred at the time of the appointment of the Third Respondent (the '**Administrators**') to the Virgin Australia airline group of companies, including VB and VAA. The primary question for this Court is

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whether the Administrators (or VB as the debtor) have complied with their obligation to "give possession" to the Applicants (ie Wells Fargo and Willis) of the engines and associated stands, equipment and records (collectively, the '**aircraft objects**').

7 The Applicants' case is that the Administrators (or VB) are required to give possession as a positive act of delivery in the United States in accordance with certain lease agreements, and not simply giving the Applicants the opportunity to take possession of the aircraft objects in Australia.

Summary of conclusion reached

8 I have reached the conclusion, for the reasons developed below, that the requirement under the Aircraft Protocol involves the delivery up (effectively in accordance with the contractual regime under the lease agreement for redelivery) to the Applicants in the United States. The Administrators cannot rely upon any lesser requirement found in the *Corporations Act 2001* (Cth) (the '**Corporations Act**'), if for no other reason than because the Convention and Aircraft Protocol prevail over the Corporations Act to the extent of any inconsistency.

9 The Court has adopted a construction of the Convention and the Aircraft Protocol that is in accordance with the relevant text, and the object and purpose of the Convention and Aircraft Protocol. In my view, to interpret the relevant words, namely "shall … give possession of the aircraft object to the creditor", as requiring redelivery in the manner ordered in these proceedings, which is effectively in accordance with the terms of the lease agreements, is consistent with the ordinary meaning of the phrase, the contractual bargain reached between the parties, the context in which the phrase is found in the Convention and Aircraft Protocol, and their object and purpose.

10 The construction adopted by the Court provides an efficient model for the return of the aircraft objects, and affords security (in the event of an insolvency-related event) against mobile assets, which are purposes envisioned by the Convention and Aircraft Protocol, and the Commonwealth Parliament when the Parliament wholly adopted their terms into the domestic law of Australia. The advantages of the Convention and Aircraft Protocol are predictability and enforceability, as well as reducing the risks for creditors (and consequently the borrowing costs of debtors) through the resulting improved legal certainty. By their nature, aircraft engines have no fixed location, and different legal systems have different approaches to such matters like securities and repossession remedies. The Convention and

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Aircraft Protocol were intended to ensure that interests (in, for example, aircraft engines) were "recognised and protected universally", as indicated in the preamble to the Convention.

11 The second and separate issue raised in the Amended Originating Application (to which document I will come) is whether the Administrators failed, for the purposes of the Corporations Act, to disclaim the Applicants' property by their 16 June 2020 s 443B(3) Notice and should be personally liable for post-appointment rent or other amounts payable by Virgin under the relevant lease agreements pursuant to s 443B of the Corporations Act.

THE AMENDED ORIGINATING APPLICATION OF THE APPLICANTS

12 The Applicants' Amended Originating Application dated 26 July 2020 (**Amended Originating Application**) sought the following substantive relief, which it is convenient to set out here (omitting the inclusion of Schedule 2 and Schedule 3 and Annexures referred to therein):

> … [T]he Applicants claim:
>
> **Declaration of international interest**
>
> 1 A declaration that the First Applicant holds (for the benefit of the Second Applicant) an "international interest" in the "aircraft objects" identified in Schedule 2 [of the Amended Originating Application] pursuant to Article[s] 2 and 7 of the [Aircraft Protocol].
>
> **Declaration of failure to comply with Article XI of the Cape Town Aircraft Protocol**
>
> 2 A declaration that the Notice dated 16 June 2020 given by the Third Respondent to the Second Applicant did not discharge the First or Third Respondent's obligation under Article XI of the [Aircraft Protocol] to "give possession" of the "aircraft objects" identified in Schedule 2.
>
> **Delivery up of aircraft objects**
>
> 3 An order that the Respondents or any of them "give possession" of the "aircraft objects" identified in Schedule 2, by delivering up, or causing to be delivered up the "aircraft objects" to the Applicants in the manner set out in Schedule 3 at Coconut Creek, Florida, United States of America by no later than 31 July 2020.
>
> 4 An order that unless and until the Respondents, or any of them "give possession" in accordance with prayer 3, or until further order of the Court, the Respondents are to preserve the aircraft objects in Schedule 2 by:
>
> (a) maintaining the Engines identified in Schedule 2 in accordance with paragraph 1 of Schedule 3;
>
> (b) maintaining insurance cover over the aircraft objects identified in Schedule 2 to the same or greater extent as was maintained at the date of appointment of the Third Respondent as administrators.

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4A An order that the First, Second, and Fourth Respondents take all steps necessary to cause to be completed, and 'give possession' of, all records and information set out in Schedule 2, paragraph 7 of this Amended Originating Process.

4B An order that the Third Respondent do all such things as are necessary and within its power to cause the First, Second, and Fourth Respondents to carry out the Orders of this Court in respect of the completion and transmittal of the records described at Schedule 2, paragraph 7 of this Amended Originating Process.

Rent or other amounts payable under section 443B of the Corporations Act

5 A declaration that the Notice dated 16 June 2020 given by the Third Respondent to the Second Applicant did not satisfy the requirements of section 443B(3) of the [Corporations Act], and did not (pursuant to section 443B(4)) have the effect of relieving the Third Respondent of their obligations under section 443B(2) of the Corporations Act in respect of the property identified in Schedule 2.

6 An order that the Third Respondent pay rent or other amounts payable pursuant to section 443B(2) of the Corporations Act in respect of the property identified in Schedule 2 from 16 June 2020 until the date of this order.

13 I should indicate that, as these proceedings progressed, and once the Court indicated it was proposing to make the declarations and orders sought by the Applicants and had adopted their construction of the Aircraft Protocol, alterations were made to Schedule 2 and 3 of the proposed orders through a process of discussion between the parties as to the most effective and least costly method of giving possession of the aircraft objects.

THE AMENDED INTERLOCUTORY PROCESS OF THE RESPONDENTS

14 The Amended Interlocutory Process of the Respondents dated 5 August 2020 sought the remaining following substantive relief, which it is convenient to set out here:

1. An order pursuant to section 443B(8) or section 447A(1) of the Corporations Act that the Third [Respondent] be excused from liability in respect of the property identified in Schedule 2 to the [Applicants'] Originating Process.

2. …

3. …

4. …

5. A declaration, or alternatively, a direction pursuant to section 90-15 of the [Insolvency Practices Schedule (Corporations) (**IPSC**)], that, to the extent that any of the First [Respondent], Second [Respondent] and Fourth [Respondent] are ordered to:

   a. "give possession" of the "aircraft objects" in the manner sought in paragraph 3 of Amended Originating Application filed by the [Applicants] on 28 July 2020 **([Applicants'] Originating**

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Application) or such other manner as the Court determines;

b. maintain the "aircraft objects" in the manner sought in paragraph 4 of the [Applicants'] Originating Application or such other manner as the Court determines;

c. take all steps necessary to cause to be completed, and "give possession" of, records and information in the manner sought in paragraph 4A of the [Applicants'] Originating Application or such other manner as the Court determines;

the expenses of complying with those orders are:

d. expenses properly incurred by the Third Respondent in carrying on the company's business within the meaning of s 556(1)(a) of the Corporations Act; or, alternatively,

e. debts or liabilities for which s 443D(aa) entitles the Third Respondent to be indemnified within the meaning of s 556(1)(c) of the Corporations Act. (Bold text in the original.)

THE POSITION OF THE RESPONDENTS

15 Contrary to the conclusion reached by the Court, the Respondents took the following overall position.

16 The Respondents submitted that the phrase "give possession of the aircraft object to the creditor" in Art XI(2) of the Aircraft Protocol should be construed to mean "make available the aircraft object to the creditor". The Respondents submitted that what is involved in making aircraft objects available to a creditor/lessor will depend on the circumstances, and that the Court need not reach any generalised conclusion as to what is required of an insolvency administrator or debtor in order to satisfy their obligation to "give possession" under Art XI(2) of the Aircraft Protocol. The Respondents submitted that all that need be determined was whether the obligation—which the Respondents say consists of an obligation to make aircraft objects available to a creditor/lessor—has been satisfied on the facts before the Court.

17 The Respondents submitted that, in relation to prayers for relief 2 to 4 and 4A and 4B in the Amended Originating Application, the Applicants' proposed construction of Art XI(2) of the Aircraft Protocol should be rejected. The Respondents submitted that the Court should conclude that the Respondents have complied with their obligation to "give possession" by reason of the steps they contend need to be taken to make the aircraft objects available to the Applicants.

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18 As to prayers 5 and 6, the Respondents submitted that the Court should find that the s 443B(3) Notice dated 16 June 2020 satisfied the requirements of s 443B(3) of the Corporations Act, and therefore precluded any personal liability for rent or other amounts under s 443B(2) of the Corporations Act from arising with respect to the aircraft objects. It was then submitted that if the Court found that the s 443B(3) Notice was defective, it should nonetheless order that the Administrators be excused from any liability in respect of the aircraft objects from 16 June 2020 by way of an order pursuant to s 443B(8) or s 447A(1) of the Corporations Act.

FACTUAL AND PROCEDURAL BACKGROUND

19 It is useful to set out in more detail the factual and procedural background to the dispute, which is not in contention. The parties also provided a Statement of Agreed Facts dated 30 July 2020 (**Statement of Agreed Facts**), which is Annexure A to these reasons.

The Applicants' "international interest" in aircraft objects

20 Wells Fargo is the legal owner of certain aircraft objects, as trustee for a trust described as the "Willis Engine Structured Trust III".

21 The Applicants agreed to lease to VB certain engines and equipment pursuant to lease arrangements detailed in the affidavit of Mr Dean Poulakidas sworn 29 June 2020 (**Poulakidas Affidavit**) filed on behalf of the Applicants. The Applicants also agreed to provide to VB lease support services in respect of these arrangements.

22 VB sub-leased these engines and equipment to VAA.

23 The Administrators were appointed as voluntary administrators to the Virgin Australia airline group of companies, including VB and VAA, on 20 April 2020.

24 The lease arrangements are detailed in the Poulakidas Affidavit and relevantly provide for the demise and delivery of the following (defined as the '**Equipment**'):

(1) four CFM International aircraft engines, model CFM-56-7B24, with engine serial numbers 888473, 897193, 896999 and 894902 (each an '**Engine**' or, collectively, '**Engines**'), which have at least 24,000 pounds of thrust and are used on Boeing 737 aircraft;

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(2) an engine stand for each Engine ('**Engine Stand**'). The Engine Stands are essential for transportation in accordance with the manufacturer's guideline when the engines are not attached to an airframe;

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

(4) Engine records relating to the use and airworthiness of the Engines (comprising historical records, records generated by VB and VAA during the term of the lease, and records to be provided on return of the engine) ('**Records**').

25 The agreed value of the Equipment totals US$40,000,000.

26 The Equipment comes within the definition of "aircraft objects" and "aircraft engines" for the purposes of Art I paragraphs 2(b) and (c) of the Aircraft Protocol. Article I(2)(c) defines "aircraft engines" as including "all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto".

Security Interests over Engines

27 Wells Fargo has a security interest as that term is defined in s 12 of the *Personal Property Securities Act 2009* (Cth) over each of the Engines pursuant to the following lease documents (registered on the Personal Property Securities Register ('**PPSR**') with the PPSR registration numbers listed below):

(1) Engine 897193 Lease (registered on the PPSR with PPSR numbers: 201905290067617, 201905290067629 and 201905290067638);

(2) Engine 896999 Lease (registered on the PPSR with PPSR numbers: 201906260103349, 201906260103401, 201906260103673, 201906260103591, 201906260103768 and 201906260103845);

(3) Engine 888473 Lease (registered on the PPSR with PPSR numbers: 201909120024204, 201909120024215 and 201909120024227); and

(4) Engine 894902 Lease (registered on the PPSR with PPSR numbers: 201910160000574, 201910160000588 and 201910160000590).

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

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

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

Administrators' standstill proposal and disclaimer

29 Since 1 May 2020, the Administrators and Willis have been in communication in respect of the continued use and return of the Engines and Equipment leased by the Applicants to VB (and sub-leased to VAA by VB).

30 On 1 May 2020, the Administrators proposed that Willis agree to a "standstill" of its rights (this was proposed in a document styled "Aircraft Protocol", which is separate from the defined term Aircraft Protocol used in this judgment). This standstill agreement was to the effect that Willis would agree not to enforce its rights for a period to be agreed by the parties ('**Standstill Agreement**').

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

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

33 On 10 June 2020, Willis sought the return of its Engines and stated that it expected the Administrators to comply with its obligations under the Convention and the delivery obligations prescribed by the terms of the leases.

34 On 16 June 2020, by letter from its solicitors, Willis wrote to the solicitors for the Administrators, insisting that the Administrators comply with their obligations under Art XI of the Aircraft Protocol to "give possession" of the Engines and Equipment.

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35 On the same day the Administrators issued a notice to Willis purportedly in accordance with s 443B(3) of the Corporations Act disclaiming the Engines, and stating among other things:

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

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

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

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

36 This 16 June 2020 s 443B(3) Notice identified that:

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

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

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

37 On 16 June 2020, Willis provided the Administrators with details of the serial numbers of the Engines, Engine Stands, and the type of QEC kits provided to Virgin at the time of lease.

38 On 18 June 2020, Ian Boulton of the Administrators' firm sent an email to Garry Failler and Steve Chirico of the Applicants identifying the locations of the Engine Stands.

39 The email identified differences in relation to the location of two of the Engines:

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

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

40 This 18 June 2020 email identified for the first time the whereabouts of the Engine Stands. Although the email did not identify serial numbers, it suggested that two of the Willis Engine

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Stands were in Melbourne, and two were located at "Delta, Atlanta". No mention was made of the QECs (or an inventory of components), nor the Records.

41 On 19 June 2020, Willis sought clarification to determine if Willis was authorised to remove the Engines from the aircraft owned by third parties.

42 On 19 June 2020, the Administrators advised that Willis would be required to engage either Virgin technicians or other Civil Aviation Safety Authority (**CASA**) approved engineers at Willis's expense to remove the Engines. It was stated that the "limitations of the Adelaide facilities" would "require the ferrying of VH-VUT to another location" at Willis's cost.

43 By letter dated 22 June 2020, the Respondents informed Willis (through their respective solicitors) that the "records, QEC units and engine stands (collectively, Ancillary Property), is all property that is directly associated with the Engines and necessary to operate, store, and transport them", but indicated that this "Ancillary Property" had "no, or minimal, use or value independently of Engines".

44 In respect of the Convention and Aircraft Protocol obligations, the 22 June 2020 letter clarified the Respondents' position. It stated that the Aircraft Protocol does not give rise to any more onerous obligation on an "insolvency administrator" than simply giving an owner or lessor the opportunity to take possession of the relevant property.

45 On 8 July 2020, the Respondents provided the Applicants with access to an online "data room" containing "Operator Records".

46 On and from 8 July 2020, the vast majority of the "Historical Operator Records" were provided by the Respondents to the Applicants.

47 Those records that have been provided are described as "Closed" in the "Records Open Items List" (referred to as the '**ROIL**') for the Engines, which is a document that identifies the status of records provided by the Respondents as at 17 July 2020 in respect of the Engines, but was updated as these proceedings progressed.

48 At the time of the preparation of the Statement of Agreed Facts, the Respondents had not provided to the Applicants any of the "End of Lease Operator Records". At the time of the preparation of the Statement of Agreed Facts, the Respondents had also not provided any of the "Lease Inspection Records from Engine Shop".

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49 By the time of the receipt of the final submissions to this Court, existing documents were provided by the Respondents to the Applicants and alternative arrangements may have become necessary for the removal of the aircraft engines, although, as Schedule 3 of the Orders indicate, further documentation needs to be delivered by the Respondents to the Applicants.

JURIDICTION OF THE COURT

50 Hence a dispute has arisen between the parties, and applications have been made to this Court for declarations and orders as identified above.

51 The Amended Originating Application in part seeks relief under the Convention and Aircraft Protocol. However, the Applicants' cause of action arises under the CTC Act as the source of law: see *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 ('***Povey***'), at [12] (Gleeson CJ, Gummow, Hayne and Heydon JJ) and [59] (McHugh J).

52 These is no dispute as to the jurisdiction of this Court to consider and determine the relief sought by the parties.

53 There is also no dispute that the jurisdictional preconditions to enlivening the Convention and Aircraft Protocol are satisfied in the present proceedings because:

(1) the "international interest" in Art 2(2)(c) and Art 7 of the Convention is established by each engine lease (incorporating the terms of the "General Terms of Agreement applicable to any Engine Lease" (**GTA**)), which establishes Wells Fargo as the lessor of various "aircraft engines" as referred to in Art 2(3)(a);

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

(3) the Engines and Equipment are therefore each "aircraft objects" for the purpose of Art I(2)(c) of the Aircraft Protocol;

(4) the priority search certificates in evidence are *prima facie* proof of the interests in favour of Wells Fargo in each Engine: see Art 24 of the Convention;

(5) an "insolvency-related event" occurred within the meaning of Art I(2)(m) of the Aircraft Protocol, by reason of the commencement of "insolvency proceedings" (the

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latter term is defined in Art 1(l) of the Convention), when the Administrators were appointed to Virgin, on 20 April 2020.

THE CONVENTION AND AIRCRAFT PROTOCOL

Introduction

54 Whereas here Commonwealth legislation has wholly enacted the terms of the Convention and Aircraft Protocol it is necessary to interpret the words of the Convention and the Aircraft Protocol themselves in accordance with the principles of international law that govern the interpretation of treaties.

55 Given that the central issue relates to the proper construction of the Convention and Aircraft Protocol, it is convenient to set out in brief terms the principles governing the construction of the Convention and Aircraft Protocol.

56 Article 5(1) of the Convention provides that, in construing the Convention, regard is to be had to "its purposes as set forth in the preamble, to its international character and the need to promote uniformity and predictability in its application." Article 5(2) provides that questions concerning matters governed by the Convention which are not expressly settled in the Convention itself are to be settled "in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law". Article 6 further provides that, while the Convention and Aircraft Protocol "shall be read and interpreted together as a single instrument" (Convention, Art 6(1)), to the "extent of any inconsistency between [the] Convention and the Protocol, the Protocol shall prevail" (Convention, Art 6(2)).

57 The proper construction of the Convention and Aircraft Protocol is also governed by Arts 31 and 32 of the *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969 (the '**Vienna Convention**'). As McHugh J observed in *Povey* at [60] (when his Honour was considering Art 17 of the '**Warsaw Convention**', being the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*), "an Australian court should apply the rules of interpretation of international treaties that the Vienna Convention on the Law of Treaties has codified" (citations omitted).

58 Article 31(1) of the Vienna Convention requires that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". As McHugh J also observed in *Applicant A v Minister*

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for Immigration and Ethnic Affairs (1997) 190 CLR 225 (‘***Applicant A***’) at 252-253 (footnotes omitted), Art 31(1):

> contains three separate but related principles. First, an interpretation must be in good faith, which flows directly from the rule *pacta sunt servanda*. Second, the ordinary meaning of the words of the treaty are presumed to be the authentic representation of the parties’ intentions. This principle has been described as the ‘very essence’ of a textual approach to treaty interpretation. Third, the ordinary meaning of the words are not to be determined in a vacuum removed from the context of the treaty or its object or purpose.

59 His Honour, after considering the authorities, stated, at 254, that “[p]rimacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered”.

60 Chief Justice Brennan agreed with McHugh J’s explanation of the operation of Art 31 and commented as follows (at 230-1):

> If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.
>
> In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules. The political processes by which a treaty is negotiated to a conclusion preclude such an approach. Rather, for the reasons given by McHugh J, it is necessary to adopt an holistic but ordered approach. The holistic approach to interpretation may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning. Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text. (Citations omitted.)

61 Justice Dawson (at 240) provided an interpretation of Art 31 that was consistent with that of Brennan CJ and McHugh J, and Gummow J (at 277) agreed with McHugh J’s view of the operation of Art 31.

62 In *Pilkington (Australia) Ltd v Minister for Justice and Customs* (2002) 127 FCR 92 (‘***Pilkington***’), at [25]–[28], the Full Court of the Federal Court (Mansfield, Conti and Allsop JJ as Allsop J then was) set out the applicable principles of statutory construction in the context of a legislative scheme that gave effect to an international agreement and the rationale for the approach adopted. The Full Court said:

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> … To the extent that the Parliament has passed … legislation dealing with the subject matter of [an international] [a]greement, that legislation will be interpreted and applied, as far as its language permits, so that it is in conformity, and not in conflict, with Australia's international obligations. Where a statute is ambiguous (the conception of ambiguity not being viewed narrowly) the court should favour a construction consistent with the international instrument and the obligations which it imposes over another construction …
>
> The ascertainment of the meaning of, and obligations within, an international instrument … is to be ascertained by giving primacy to the text of the international instrument, but also by considering the context, objects and purposes of the instrument … The manner of interpreting the international instrument is one which is more liberal than that ordinarily adopted by a court construing exclusively domestic legislation; it is undertaken in a manner unconstrained by technical local rules or precedent, but on broad principles of general acceptation … The reasons for this approach were described by Lord Diplock in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 281–2, as follows:
>
> > The language of that Convention that has been adopted at the international conference to express the common intention of the majority of the states represented there is meant to be understood in the same sense by the courts of all those states which ratify or accede to the Convention. Their national styles of legislative draftsmanship will vary considerably as between one another. So will the approach of their judiciaries to the interpretation of written laws and to the extent to which recourse may be had to *travaux préparatoires*, doctrine and jurisprudence as extraneous aids to the interpretation of the legislative text.
> >
> > The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it, in *James Buchanan & Co Ltd v Babco Forwarding & Shipping(UK) Ltd* [1978] AC 141 at 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation'.
>
> The need for a broad or liberal construction is reinforced by the matters which can be taken into account under Art 31 of the *Vienna Convention on the Law of Treaties* … in accordance with which Australian courts interpret treaties. (Citations omitted.)

63 The decisions of domestic courts with respect to the interpretation of the Convention and the Aircraft Protocol may have some relevance to the proper construction of those instruments: see Anthea Roberts, 'Comparative International Law? The role of national courts in creating and enforcing international law' (2011) 6(1) *International Comparative Law Quarterly* 57, 58-61 (eg "[a]cademics, practitioners and international and national courts frequently identify and interpret international law by engaging in a comparative analysis of how domestic courts have approached the issue"). However, a court should be careful in having any regard to a domestic decision when construing the Convention and Aircraft Protocol. The observation of Lord Wilberforce in *James Buchanan & Co Ltd v Babco Forwarding & Shipping(UK) Ltd*

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[1978] AC 141 at 152, referred to by the Full Court in *Pilkington* and set out above, has been approved by the High Court of Australia: see *Shipping Corporation of India v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142, 159 (Mason and Wilson JJ); *Povey* at 202 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Applicant A* at 240 (Dawson J); see also the decision of Hill J in *Barzideh v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 417, 425.

64 The need to disregard domestic legal precedent in construing a treaty reflects the fact that the construction of a treaty "must be uniform throughout the courts of the Member States. It cannot be dominated by a domestic law approach in cases brought under the domestic jurisdiction, whether it be statutory or inherent": *K (A Child), Re* [2013] EWCA Civ 895 at [19] (Thorpe LJ; Tomlinson and Brigss LJJ agreeing).

65 For instance, at various points, the Convention and Aircraft Protocol refer to the debtor's holding of an object as "possession". The word "possession" must be given a meaning not necessarily constrained by English or Australian legal precedent. In civil law systems, the concept of possession seems to require a combination of factual possession of an object and an intention to hold it as owner, so that an equipment lessee is not a possessor but a "detainer" (*détenteur*) whose rights are in essence contractual rather than proprietary. The word "possession" will need to be construed as covering both possession in the common law sense and *détention* in the civil law sense. No issue in these proceedings was raised by the parties as to the interpretation of the word "possession".

66 Returning then to the Vienna Convention, Art 31(2) sets out what constitutes "context" for the purpose of the interpretation of a treaty; namely, in addition to "the text, including its preamble and annexes", any "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". No agreement or instrument of a kind described in Art 31(2) has been identified by the parties as being relevant to the construction exercise before the Court.

67 Article 31(3) requires that certain further matters shall be "taken into account, together with the context", namely any "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its

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interpretation", and "any relevant rules of international law applicable in the relations between the parties". No agreement, practice or rules have been identified that would be required to be taken into account by this Court in construing Art XI(2) of the Aircraft Protocol, by reason of Art 31(3) of the Vienna Convention.

68 Article 32 addresses the extent to which recourse may be had to "supplementary means of interpretation" in construing a treaty. Two aspects of this Article should be noted. First, unlike Art 31, Art 32 is in permissive terms: "[r]ecourse may be had to supplementary means of interpretation". Secondly, Art 32 is conditional; recourse may only be had to supplementary means of interpretation in certain circumstances, namely (a) "in order to confirm the meaning resulting from the application of article 31"; or (b) in circumstances where the interpretation according to Art 31 "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable". A court must be satisfied of either (a) or (b) before having regard to "supplementary means of interpretation". Thus, Art 32 grants conditional permission to consider materials beyond the primary materials required to be considered under Art 31 when construing a treaty.

69 I should just mention that ambiguity (and obscurity) may arise because the intention of the rule maker is doubtful for any number of reasons, not just because of some grammatical or lexical ambiguity. Whilst some focus in these proceedings has been on the words "give possession", any ambiguity that may arise from the use of the verb "give" is dispelled when that verb is considered in the context in which it appears, and more significantly once it is realised that the giving of possession is to be in accordance with the requirements of the lease agreements. As the parties recognised, the Court's task is to determine the content of the obligation under Art XI(2) of the Aircraft Protocol, which involves more than an interpretation of the phrase "gives possession" in isolation divorced from its context.

70 I do not need to dwell on the extent to which I can have reference to supplementary materials, or supplementary means of interpretation, even if I did so only for the purpose of background information. Whilst I have been referred to a number of supplementary means of interpreting the Convention and Aircraft Protocol (to which I will return) — including reference to domestic case law and the *travaux préparatoires* — I consider these materials are of no real assistance in the task the Court needs to undertake. In my view, the text provides the complete answer to the correct interpretation of the relevant Articles of the Aircraft Protocol as to be applied to the facts before the Court. This is not to say that the meaning of the phrase

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"shall … give possession of the aircraft object to the creditor" is to be determined without regard to the context of the Convention and Aircraft Protocol, and their objects or purpose.

71 The approach taken to the use of supplementary materials as a means of interpretation in *Commonwealth v Tasmania* (1983) 158 CLR 1 (ie the Tasmanian Dam case) is instructive, although arising in a different context. One of the issues in that case was whether the World Heritage Convention, to which Australia was a party, imposed legal obligations on Australia to protect the Western Tasmania Wilderness National Parks from damage. Although the Vienna Convention, to which Australia was also a party, was not in force when the World Heritage Convention entered into force in 1972, both Gibbs CJ (at 93) and Brennan J (as his Honour then was) (at 222) considered that its interpretation was governed by the principles set out in Arts 31 and 32 of the Vienna Convention (which did "no more than indorse or confirm the existing practice" (Gibbs CJ at 93) and "codif[ied] existing customary law and furnish[ed] presumptive evidence of emergent rules of general international law", ensuring it was "appropriate to refer to the Vienna Convention though it had not entered into force" at the relevant time (Brennan J at 222)).

72 On this basis, reference was made to the *travaux préparatoires* of the World Heritage Convention. Chief Justice Gibbs concluded (at 96) that the *travaux préparatoires* "confirm the meaning which the words of the Convention themselves reveal". Justice Wilson reached a similar conclusion (at 191–2), while Dawson J merely referred (at 307–8) to some of the *travaux préparatoires* as background. Justice Mason (as he then was) did not find the *travaux préparatoires* "to be of assistance" (at 134) (noting that it did not "contain anything that [was] sufficiently definite to displace the natural construction of the language of the Convention"), while Brennan J (as he then was) refused to refer to them, stating (at 223):

> We were invited to refer to travaux preparatoires of the Convention in order to perceive the attenuation of obligatory language from the first draft of the Convention to its final text. In my view that invitation should be rejected. It accords with the Vienna Convention and with the consistent practice of the International Court of Justice and, earlier, of the Permanent Court of International Justice, generally to decline reference to travaux preparatoires, for 'there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself' (citing *Conditions of Admission of a State to Membership in the United Nations* [1948] ICJR 56 at 63).

73 I find myself in a similar position to these Justices of the High Court referred to above in so far as there is a need to consider and take into account the supplementary materials referred to by the parties: those supplementary materials either confirm the ordinary meaning of the text,

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or in any event, are materials that I could refuse to resort to as not being of assistance, or because the text of the Convention and the Aircraft Protocol is sufficiently clear.

74 Nevertheless, I will refer to the supplementary materials later, but will now concentrate upon the text of the Aircraft Protocol.

Text of the Aircraft Protocol and the Convention

75 At the outset it is important to note that the Aircraft Protocol is just one of a number of protocols introduced, including others dealing with railway and space objects, although these are not in force. Each protocol (and the Aircraft Protocol) provide remedies tailored to the specific types of mobile equipment and are exercisable by all creditors to the case of the debtor's default or insolvency.

76 Then it is important to note that the Convention in Chapter III deals generally with "Default remedies", the meaning of default defined in Art 11 of the Convention. These are general remedies, not relating to insolvency. In the context of these remedies, it is clear that an available remedy is to "take possession or control" of any object (see eg Arts 8 and 10 of the Convention).

77 Then the Aircraft Protocol sets out specific Articles dealing with aircraft objects in Chapter II, including a specific Article (Art XI) dealing with remedies on insolvency. It is necessary not to conflate the requirements and the nature and content of the remedies available generally and these available in the context of insolvency.

78 It is to be observed that the remedies provided to a chargee (Art 8 of the Convention) and in relation to relief pending final determination (Art 13 of the Convention) (namely the remedies of the secured creditor) are to be exercised in a commercially reasonable manner (see Art 8(3) of the Convention). However, in relation to the Aircraft Protocol, all remedies given by the Convention and Aircraft Protocol should be exercised in accordance with this requirement, which is deemed to be in conformity with the underlying agreement unless a relevant provision is manifestly unreasonable (see Art IX(3) of the Aircraft Protocol). This provision is mandatory and cannot be derogated from by the parties (see Art IV(3) of the Aircraft Protocol).

79 Article IX – titled "Modification of default remedies provisions" – of the Aircraft Protocol (found in Chapter II headed "Default remedies, priorities and assignments") provides in paragraph 3:

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> Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

80 Article XI – titled "Remedies on insolvency" – of the Aircraft Protocol (to the extent acceded to by Australia in adopting "Alternative A") is (as far as relevant) in the following form:

> Article XI — Remedies on insolvency
>
> 1. This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3).
>
> *Alternative A*
>
> 2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:
>
> (a) the end of the waiting period; and
>
> (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.
>
> 3. For the purposes of this Article, the "waiting period" shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.
>
> 4. References in this Article to the "insolvency administrator" shall be to that person in its official, not in its personal, capacity.
>
> 5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:
>
> (a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and
>
> (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.
>
> 6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.
>
> 7. The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.
>
> 8. …
>
> 9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.
>
> 10. No obligations of the debtor under the agreement may be modified without the

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> consent of the creditor.
>
> 11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.
>
> 12. …
>
> 13. The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article. (Italicised text in the original.)

81 The effect of Alternative A is to give insolvency administrators a prescribed "waiting period" (namely, 60 days) during which the insolvency administrators must either:

(1) cure all defaults under the applicable agreement (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement; or

(2) "give possession" of the relevant aircraft object to the applicable creditor/lessor.

82 The concept of a stay limitation, or "waiting period", in respect of an aircraft as appears in Alternative A, is drawn from s 1110 of the United States Bankruptcy Code: see Professor Sir Roy Goode CBE, QC, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* (4th ed, May 2019) ('**Official Commentary**') at [3.1]. I will return to this provision later in these reasons but will set it now for convenience.

83 Section 1110(c)(1) relevantly provides:

> In any case under this chapter, the trustee shall immediately surrender and return to a secured party, lessor, or conditional vendor, described in subsection (a)(1), equipment described in subsection (a)(3), if at any time after the date of the order for relief under this chapter such secured party, lessor, or conditional vendor is entitled pursuant to subsection (a)(1) to take possession of such equipment and makes a written demand for such possession to the trustee.

84 The scheme prescribed by Alternative A is relatively straightforward. The primary obligation upon an insolvency administrator, arising on the occurrence of an insolvency-related event, is to "give possession" of the aircraft object to the creditor no later than the specified date. Then "unless" (which equates to 'if') and "until" (which relates to time) the creditor is given the opportunity to "take" the possession given to the creditor pursuant to the primary obligation on the administrators, the administrator shall preserve and maintain the aircraft object. However, if the administrator cures the relevant default and agrees to perform future obligations by the specified date whereby possession is to be given, the administrator "may

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retain" possession of the aircraft object pursuant to Art XI(7). Obviously, at this stage, possession would not have "been given" nor the opportunity to take possession availed of: the administrator would still be in possession of the aircraft objects as the administrator is to "retain possession", being the possession granted under the lease agreements. Further, it must be recalled that the lessor (for one reason or another) may not be ready and willing to "take" possession of the aircraft objects. So Art XI(5) will operate to relieve the insolvency administrator from still preserving the aircraft objects after giving the opportunity to the lessor to take possession. Until the lessor takes possession, the lessor could still apply for other forms of interim relief available under the applicable law.

85 Then, significantly, the primary obligation on the Administrators to give possession (and, here, the corresponding remedy for the Applicants in the insolvency situation as provided for in Art XI) is provided with content by the requirement that this remedy is to be exercised in a commercially reasonable manner. In this case the remedy is to be exercised in conformity with the relevant redelivery provisions of the lease agreements.

86 This obligation on the Administrators arises because Art XI(13) and IX(3) of the Aircraft Protocol require that the remedy available to the Applicants (ie their right to be in possession) must be exercised in a manner that is "commercially reasonable". Article IX(3) operates so that the manner of giving of possession will be "deemed" commercially reasonable if "it is exercised in conformity with a provision of the agreement except where such provision is manifestly unreasonable".

87 Therefore, the Applicants' entitlement to relief, namely obtaining possession in the present case requires redelivery in accordance with the existing lease agreement terms between the parties in clause 18.3 of the GTA. The location in Florida is expressly stated in Art III of the Aircraft Engine Lease Agreements for each Engine. There has been no suggestion that the provision is manifestly unreasonable.

88 On this point, the Respondents argued that the lease agreements were irrelevant to the operation of Art XI. Senior Counsel for the Respondents put it this way:

> Can I turn, then, your Honour, to the protocol and the point that my learned friend raised about article 9? And if your Honour has that, your Honour sees that article 9 falls within chapter 2, which is Default Remedies, Priorities and Assignments. And article 9 is then the modification of the default remedies provisions, and it's important, your Honour, to have regard to the architecture of the protocol and the different circumstances in which it is affording remedies. Article 9 modifies the default remedy provisions. My learned friend went to article 9(3). Your Honour and

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> my learned friend discussed the opening sentence concerning article 8(3). It then states:
>
> > Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner.
>
> Now that, plainly enough, is an obligation imposed on the lessor and not the lessee. There was then a deeming provision in effect that commercial reasonableness will be engaged where a remedy is exercised in accordance with the provision of an agreement, unless that provision itself is manifestly unreasonable. Now, so much is apparent and so much, we submit, is irrelevant. Because the critical question is the anterior question of: are the terms of an underlying agreement in any way relevant to the remedy sought in this application, which is a remedy under article 11(2) of the protocol? So it's really about an anterior question of: is an underlying agreement relevant to this at all that must be answered? And with that, can your Honour turn to article 11?

89 The difficulty with this approach is to ignore the fact that Art IX(3) refers to any remedies given by (relevantly) the Aircraft Protocol, which will include the Applicant's right to and remedy of obtaining possession of the aircraft objects. This remedy available to the lessor (specific to insolvency and aircraft objects) must then be exercised, as an obligation on the lessor, in a commercially reasonable manner, which will be in accordance with the lease agreements. This view of the operation of Art XI is reinforced when one keeps in mind Art XI(10) (where no obligation of the debtor may be modified without the consent of the creditor).

90 Whilst obviously not directly applicable, provisions for redelivery are not unknown in the context of commercial arrangements. For instance, such provisions are usually included in a charterparty and are subject to principles of maritime law. Here, redelivery usually includes the requirement to keep the vessel in good order until it is delivered by the charterer at a specified place and time. Obviously, the requirements and form of redelivery will be in accordance with the bargain entered into between the parties, and are of fundamental importance: see generally Professor Stephen Girvin, *Carriage of Goods By Sea* (Oxford University Press, 2nd ed, 2007) at 683-685; Professor John F Wilson, *Carriage of Goods by Sea* (Pearson, 7th ed, 2010) at 88 and 111-112 and Michael White, *Australian Maritime Law* (Federation Press, 3rd ed, 2014) at 151-152.

91 I now turn to a further analysis of the text of Art XI itself to cover the relevant submissions of the parties.

92 The ordinary natural meaning of the word "give" connotes positive action. It is an active verb primarily meaning, in the context we are dealing with, "to deliver, hand over", "to deliver or

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hand (something) to a person; to put (food and drink) before a person": see *Oxford English Dictionary Online* (Oxford University Press, June 2020). The use of the verb "give" in combination with the word "possession" means to deliver or hand over, and in context means to give back, in the sense of restoring a thing to the lessor. Another meaning of the word "give" is "to present, to hold out to be taken" (*The Shorter Oxford English Dictionary* (Clarendon Press, 3rd ed, 1972)) or "[t]o present or expose to the action of a person or thing; to hold out (one's hand) to be taken" (*Oxford English Dictionary Online* (Oxford University Press, June 2020)). However, that meaning is simply not apposite to the giving possession of the aircraft objects and the context and structure of the Aircraft Protocol. It is again important to remember that we are concerned with complex machinery and moveable property, capable of being relocated in the ordinary course of the aircraft's work to almost any location. To hold that the obligation to "giv[e] possession" is satisfied where the debtor or insolvency administrator merely abandoned or relinquished possession would be to transform that positive obligation into an ability to abandon the creditor's property wherever it happens to be and in whatever condition.

93 The phrase "give possession … to the creditor" can be contrasted with the phrase "given the opportunity to take possession under paragraph 2" used in Art XI(5). This contrast in context supports the interpretation that "give possession" is the positive act of giving, and not merely giving an opportunity to take possession. The opportunity to "take" arises only after the debtor has "given" possession. That is consistent with the ordinary meaning of the phrase "give possession" and the notion of passive receipt by the taker.

94 Then, in my view, Art XI(7), in referring to "retain possession", does not detract from the meaning to be ascribed to "give possession" in Art XI(2) but supports the operation of Art XI. The phrase "retain possession" in Art XI(7) is being used in a different context to the phrase "give possession" in Art XI(2), and, as I have alluded to, arises where the relevant default has been cured and there is an agreement to perform all future obligations under the relevant lease.

95 I should mention one specific argument put by the Respondents in support of their argument that any compliance with the underlying agreement is precisely what Art XI does not provide for, similarly to the position said to pertain in the United States in relation to the operation of s 1110 of the Bankruptcy Code (see *In Re Republic Airways Holding Inc,* (2016) 547 B.R. 578).

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96 It was argued that under Alternative A, an insolvency administrator and debtor are given two options: either "give possession of the aircraft object to the creditor" or "perform all the obligations under the agreement" (see Arts XI (2) and (7)) so it was contended that it was clear that Art XI(2) contemplates "giving possession" as something other than complying with the agreement, such a course being an alternative to such compliance.

97 Whilst I agree that there are the two options, there is no reason to suppose that where the insolvency administrator does not agree to perform <u>all future</u> obligations under the lease agreement, this precludes the specific contractual obligations of redelivery as being deemed those necessary to be exercised by the lessor in a commercially reasonable manner in being given possession of the aircraft objects.

98 Predictability is achieved by applying the Aircraft Protocol rights in a manner consistent with the terms of the parties' underlying agreement. Imposing an obligation on a creditor of retrieving aircraft objects from numerous jurisdictions does not create predictability. From the point of view of the parties, 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 a predictable result to the effect 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 which would be created for lessors if the Respondents' interpretation was adopted – in circumstances where, for example, records are perceived to be of minimal value to an administrator, and a creditor/lessor is left chasing those essential details.

99 The overall objective of predictability would be undermined by an interpretation which simply allowed debtors to leave aircraft objects on an "as is, where is" basis. Whilst I accept an engine lessor could ascertain where in the world its equipment may be, it puts an engine lessor in a position where it has no way of knowing the equipment's condition, whether it will have access to an aircraft (perhaps owned by another third party creditor), or whether facilities will be available to remove the relevant engine.

100 The Respondents submitted that the object of the Convention is, relevantly, to improve the position of creditors, as compared to their prior position. The prior position was regulated by the *Convention on the International Recognition of Rights in Aircraft*, done in Geneva, on 19 June 1948 (the '**Geneva Aircraft Convention**'). The Geneva Aircraft Convention offered no unified notion of a security right that is eligible for international protection. It served

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instead as a choice of law treaty, "aiming only to deflect automatic application of the law of the location of the aircraft (the *lex situs*) and imposed a choice of law on the court of the *situs*": Brian F Havel and Gabriel S Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge University Press, 2014), 348. It has for this reason been described as a "conflict of laws treaty that deals with recognition of rights, not a substantive treaty that creates rights" (ibid).

101 A further difficulty presented by the Geneva Aircraft Convention is that it involved an open-ended determination of which state's laws apply in the event of an insolvency. A creditor or lessor's position is improved *vis-à-vis* the prior state of the law by the Convention through a number of means, including through the introduction of an international registration system and the clarification on laws applicable in the event of insolvency.

102 On this basis, it was then contended by the Respondents that there is nothing in the preamble of the Convention that would support the conclusion that the Convention (or the Aircraft Protocol) is intended to improve the position of creditors at the expense of the position of debtors.

103 I should say that whether this be correct or not at a general level, in my view the issues to be determined in these proceedings cannot simply be determined by reference to the relative position of creditors and debtors generally. It is important to look at the relevant operative provisions and context of the Aircraft Protocol in the way it provides a remedy to a lessor in the event of an insolvency.

104 The Respondents then argued that the benefits of this regime have recently been identified by Dr Sanam Saidova in a manner supportive of the Respondents' construction generally. Dr Saidova has stated the following in her article 'The Cape Town Convention: Repossession and Sale of Charged Aircraft Objects in a Commercially Reasonable Manner' (2013) *Lloyd's Maritime and Commercial Law Quarterly* 180, 185:

> The disadvantages associated with aircraft repossession may mean that the secured creditor will not always be ready and willing to proceed with it. But if moving the object to a different jurisdiction may help the secured creditor to avoid lengthy insolvency stays and delayed court proceedings, and to increase the likelihood of better sale proceeds, the secured creditor may decide to repossess. Another reason why the secured creditor may repossess the aircraft is to manage the object where the debtor has ceased trading or to keep it in operation so that profit from its use may still be earned. By taking possession, the secured creditor may also intercept any rental payments which may be due under the leases provided that they do not terminate once the security interest is enforced. Most importantly, the secured creditor may

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> need to repossess the aircraft object in order to sell it. Taking possession is a powerful remedy because the debtor loses control of its most valuable asset. The loss or unavailability of even one aircraft may cause serious disruption to the debtor's flight schedule and, in some cases, a mere threat of repossession may induce the debtor to cure the default. Since the Convention permits self-help repossession, the secured creditor may be able to seize the object without applying for a court order saving time and cost. Such availability of the remedy of repossession may serve to reassure the secured creditor that, if the debtor defaults, it can take the object and realise it to obtain repayment of the debt. This may reduce the risk of non-repayment and give the debtor access to credit at lower cost.

105 Whilst the above passage is supportive of the Respondents' construction at a very general level, it is not at all focusing on the issue before the Court, nor the circumstances of the terms of lease agreements themselves, nor dealing with the specific scope of Art XI (dealing with insolvency not just repossession following a default other than insolvency). Upon reading the whole article, its focus is on the scope of the requirement to act in a commercially reasonable manner, and then in the context of the remedies of repossession and sale of aircraft objects.

106 In my view, it is apparent that some greater protections are given to creditors by the Aircraft Protocol in the insolvency context. The position of creditors is improved under the Aircraft Protocol *vis-à-vis* the debtor company and other creditors (who hold something less than an "international interest"). The obligation imposed on an insolvency administrator under Art XI(2) is necessarily more onerous than would be required under any domestic law.

107 As pointed out by the Applicants, the creditor's enhanced position under the Aircraft Protocol is obvious from the text of document, and its heavy reliance on the parties' contractual bargain. By way of example:

(1) 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". As a result, it imposes an onus on the debtor to demonstrate why any provision is "manifestly unreasonable".

(2) 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 has explained, that may require expenditure out of the insolvent estate (see Official Commentary, [5.70], "Illustration 71"): "… [i]n the meantime, obligations under the security agreement may not be modified and the aircraft engine must be preserved, and [a hypothetical airline] will be required to maintain the aircraft engine and its value in accordance with the terms of the security agreement, even if that

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requires expenditure from general assets of the estate". That is an obligation beyond the administrator's right of disclaimer in section 443B of the Corporations Act.

(3) 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).

(4) Article XI(9) makes clear that the creditors' exercise of remedies may not be "prevented or delayed" after the "waiting period" referred to in Art XI(2).

(5) Article XI(10) preserves intact the contractual obligations by stating that "[n]o obligations of the debtor under the agreement may be modified without the consent of the creditor".

(6) Article XI(12) ensures that the creditor's international interest has primacy over all other interests: "[n]o rights or interests … shall have priority in insolvency proceedings over registered interests", save for specific non-consensual liens imposed.

108 It is consistent with the text and context of Art 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, even if that comes at the cost of other creditors.

109 I should interpolate that, if any terms of the relevant agreement between the parties do not specifically cover the eventualities that may occur on the obligation arising to give possession, then normal principles of contract may apply to fill in the gaps – either by the implication of terms (eg by custom) or overriding responsibilities of acting in good faith, according to the law governing the agreement (see Art 5 of the Convention). If there are simply no terms of the agreement dealing with the obligation to give possession, then they may need to be implied on a case by case basis, presumably by reference to custom. Otherwise, the meaning of the concept of commercial reasonableness will need to be determined in accordance with the Convention's general principles. This is not a matter that needs to be further elaborated in these proceedings.

110 As I have alluded to already, and as both parties recognised, the content of the obligation of either of the parties' competing constructions needs to be determined. The remedy must be exercised from all parties point of view in a "commercially reasonable manner". On one analysis, if the giving of possession is to be done in accordance with the lease agreements

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between the parties, then the debate as to the ordinary meaning of the phrase "shall … give" is, in isolation, arid. It is the content of the requirement which will be informed by the lease agreement redelivery terms. Therefore, when it is concluded that the requirement is to give possession in accordance with the lease agreement, this is not adding any words to the phrase in contention: it is merely explaining what is meant by that phrase in circumstances before the Court in these proceedings. In other words, the Respondents are to be given possession (by redelivery) in a manner consistent with the bargain between the parties. The remedy is exercised under Art XI by the Applicants requiring delivery in a commercially reasonable manner, which is the only requirement they can insist upon in exercising their remedy.

Object and purpose of the Convention and Aircraft Protocol

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

112 There should be "broad and mutual economic benefits for all interested parties", as the preamble to the Convention states. I should mention that if an insolvency administrator or debtor must incur significant costs in complying with Art XI(2) (and, on any interpretation given, there will be costs to be incurred by an insolvency administrator or debtor) this is just part and parcel of the whole "mutual economic benefits" to be considered and provided to each party to the bargain.

113 I have already mentioned that creditors were to have greater rights in the event of insolvency, which would prevail over Australian domestic law. The adoption of the Convention and Aircraft Protocol was to assist local Australian airlines to have access to cheaper finance. This is the broad economic benefit for all the interested parties reflected in the terms of the Aircraft Protocol, at least viewed as an overall purpose of the Aircraft Protocol.

114 The greater protection given to creditors by the Aircraft Protocol is related to their contractual rights in the event of insolvency. The position of the creditors is improved in respect of the debtor company and the other creditors, who hold something less than an "international interest".

115 The Second Reading Speech of the Bill that became the CTC Act explained that the CTC Act was intended to ensure creditors had access to greater rights in the event of default or insolvency (prevailing over any inconsistent local law). In return, local Australian airlines

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would have access to cheaper finance. In the Second Reading Speech, Virgin is identified as one of the airlines who may benefit:

> The [Convention] is an international legal system that protects secured lenders of aircraft objects such as aircraft, airframes, engines and helicopters and reduces the risk and cost associated with financing these objects.
>
> The [Convention] creates an international registry for lenders to register their interest in an object so that, in the event a borrower is unable to repay a loan, the lenders' claim has priority over any other claim registered thereafter.
>
> It also outlines internationally-consistent remedies available to the lender in the event of default or insolvency.
>
> They include the right to take possession of the aircraft without needing to seek approval of the courts.
>
> This reduces the time it takes for a lender to be recompensed in the event of a default.
>
> …
>
> In Australia, for example, by making certain declarations, our airlines will be eligible for a discount of up to 10 per cent on their export finance arrangements for the purchase of an aircraft or aircraft object.
>
> Actual savings will vary depending on the credit rating of the borrower and the purchase price of the aircraft, but it is estimated the airlines could save in the order of $2.5 million on the purchase of a new Airbus A380 or $330,000 on the purchase of a new ATR72 aircraft (similar to that which currently operates by Virgin Australia from Sydney to Canberra).
>
> …
>
> As industry has noted, these discounts will ultimately enable airlines to accelerate the upgrade to safer, more fuel-efficient fleets.
>
> …
>
> This bill is required in order to make the benefits of the [Convention] a reality.
>
> Its primary function is to give the [Convention] force of law in Australia.
>
> This will include any declarations that we make under the convention or the protocol.
>
> To ensure that Australia qualifies for the export financing discount, the [Convention] will have precedence over other Australian law, to the extent that any inconsistency applies. (Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2013, 4215-4216 (Mr Anthony Albanese, Leader of the House, Minister for Infrastructure and Transport and Minister for Regional Development and Local Government)).

116 I interpolate that, whether or not s 15AB of the *Acts Interpretation Act 1901* (Cth) or the common law enables reliance on the Second Reading Speech, and putting aside the reference to the facts surrounding Virgin, the other information extracted above is otherwise uncontroversial and can be discerned from the Convention and Aircraft Protocol themselves.

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117 In this respect, Professor Goode's Official Commentary at [3.1] explained the background to the Convention. Professor Goode identified that the strong Alternative A regime would permit access to better finance:

> In addition, ratification of the Cape Town Convention and Aircraft Protocol with select declarations, including Article XI, Alternative A, of the Aircraft Protocol, will help airlines access the capital markets, for example, through the issue of enhanced equipment trust certificates, and thus tap a source of finance hitherto almost entirely confined to U.S. airlines because of the lack in other jurisdictions of any parallel of section 1110 of the U.S. Bankruptcy Code, which provided the model for Alternative A.

118 It is consistent with the objects and purpose of the Convention and Aircraft Protocol that the obligations being assumed by debtor airlines (and their insolvency administrators) required them to redeliver the aircraft objects in the event of insolvency. That obligation is intended to be more onerous than would be required under any local law (such as an "as is where is" disclaimer by an administrator under s 443B), and the *quid pro quo* for those more onerous obligations is that airlines had access to cheaper finance.

119 However, as referred to already, the Respondents contended that, considering the Aircraft Protocol together with the Convention, as is required by Art 6(1) of the Convention, it can be appreciated that the only remedies available to a lessor under the Convention on an event of default are: (a) to terminate the agreement; and (b) to "take possession or control" of any object to which the agreement relates: Art 10. It was then submitted by the Respondents that it would be surprising if the remedies available to a lessor in an insolvency context under Art XI(2) of the Aircraft Protocol extended beyond those available to lessors in any other context involving an event of default under Art 10 of the Convention, absent any textual indication to support such an extension.

120 It was submitted by the Respondents that when Art XI(2) of the Aircraft Protocol is read together with Art 10 of the Convention, the better view is that Art XI(2) grants creditors additional protection in an insolvency context by imposing an obligation on the debtor or insolvency administrator to make aircraft objects available to a creditor, so that the creditor does not themselves need to enforce their entitlement under Art 10 of the Convention to "take possession or control" of its aircraft objects. In that way, Art XI(2) of the Aircraft Protocol provides assistance to a creditor in obtaining the substantive benefit of the remedy conferred by Art 10 of the Convention (namely, the taking of possession of its aircraft objects) in an insolvency context.

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121 The Respondents contended that the Applicants' construction of Art XI(2) would result in Art XI(2) providing creditors with a wholly different remedy in an insolvency context than those which are available under the Convention. The Respondents contended that there is no textual foundation for construing Art XI(2) as offering a substantively different remedy to creditors beyond those offered under the Convention. To the contrary it was argued by the Respondents, the Aircraft Protocol uses the same terminology as that appearing in Art 10 of the Convention (that is, the taking of "possession or control"). The need to construe the Convention and Aircraft Protocol together as a single instrument under Art 6(1) of the Convention, and the inconsistency between the two that flows from the Applicants' construction of Art XI(2), thus further tells against the acceptance of that construction.

122 It will already be apparent that I do not accept the Respondents' approach. In my view, the Aircraft Protocol is there to meet the particular requirements of aircraft finance, as stated in the preamble. Then (as I have indicated already) particular attention must be given to the "[r]emedies on insolvency" in Art XI and its specific provisions.

123 In this respect, Alternative A specifically relates to an insolvency regime declared by Australia which provides a special remedy in the context of aviation insolvencies. It should be read in that context. Article XI does introduce special rules in relation to aircraft objects which are there to assist the creditor on the occurrence of an insolvency–related event. The clear obligation is to return or redeliver in accordance with the agreement between the parties, which may involve funds to be expended from the pool otherwise available to other creditors.

124 Professor Goode describes Alternative A as the "hard", or "rule-based" alternative within Art XI: Official Commentary at [3.126]. Professor Goode referred to Art XI as "the single most significant provision economically": Official Commentary at [5.60]. Professor Goode stated that "Article XI introduces special rules in relation to aircraft objects *designed to strengthen the creditor's position* vis-à-vis the insolvency administrator or the debtor on the occurrence of an insolvency-related event": Official Commentary at [3.117]; emphasis added.

125 The text of the Convention is also inconsistent with the approach taken by the Administrators in their s 443B(3) Notice. As an example, the Administrators acknowledged that the engine located on an aircraft (owned by a third party) in Adelaide could not be removed from the aircraft at that location but must be first flown on a ferry flight to some other location. As the Applicants point out, this would presumably require Willis to find a crew, request permission

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to operate the aircraft, pay for the expenses of the flight and then arrange to dismantle the aircraft at the destination. That approach is far removed from any obligation of giving possession in accordance with the contractual regime under the lease agreements.

Section 1110 of the US Bankruptcy Code

126 I have already made mention of s 1110 of the US Bankruptcy Code. I do not consider it assists.

127 As I have indicated above, Alternative A in the Aircraft Protocol derives from s 1110 of the US Bankruptcy Code. However, the relevant wording of s 1110 (being "surrender and return") is different to Art XI. The context of the Convention and Aircraft Protocol is also different to that of s 1110 of the US Bankruptcy Code.

128 It may be that the Aircraft Protocol was in this regard intended to enhance the position of creditors compared to section 1110 of the US Bankruptcy Code. In recent commentary, namely Donald Gray, Dean Gerber and Jeffrey Wool, 'The Cape Town Convention and aircraft protocol's substantive insolvency regime: A case study of Alternative A' (2016) 5(1) *Cape Town Convention Journal* 115 ('**Gray, Gerber and Wool**'), some references are made to the purpose of Alternative A. (Mr Gray was the Chair of the UNIDROIT Drafting Group Insolvency Sub-group that prepared Alternatives A and B as ultimately adopted in the Convention. Mr Wool was the chair of the Advisory Board to the International Registry Aircraft Protocol.)

129 Gray, Gerber and Wool (at 117) confirm that Alternative A is modelled on s 1110 of the United States Federal Bankruptcy Code, and state (at 124) the following:

> 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.)

130 Gray, Gerber and Wool confirm that the policy behind Alternative A was to protect financiers/lessors and their investments. The authors state the following (at 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.

131 They continue, at 138-9:

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> 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 [section] 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* … [P]ractitioners 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 [Aircraft] Protocol. (Emphasis added.)

132 Gray, Gerber and Wool identify (at 125-130) each of what they consider to be the substantial differences between s 1110 and Art XI (Alternative A). At 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 either to cure all defaults within a specified limited time … or *to return* the aircraft equipment to the financier/lessor" (emphasis added).

133 In respect of records, Grey, Gerber and Wool explain the enhanced protection for creditors in Alternative A. After explaining that the Convention and Aircraft 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) as follows:

> [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. *The 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.)

134 I should also mention that the Applicants referred the Court to a number of US cases. However, in my view, these must be read in their own statutory setting: see *re Atlas Worldwide Holdings, Inc.*, Case No. 04-10792 (Bankr. S.D. Fla. 2004); *re FLYi*, Case No. 05-20011 (MFW) (Bankr. D. Del. 2005); *re ATA Holdings Corp.*, Case No. 04-19866 (Bankr. S.D. Ind. Jan. 3, 2005) and *re Northwest Airlines Corp.*, Case No. 05-17930 (Bankr. S.D.N.Y. Oct. 18, 2005). I do not consider that they assist in interpreting Art XI(2), nor do they give any guidance as to a doctrinal basis of US law which could be relied upon by this Court in the task of interpreting the Convention and Aircraft Protocol. At most, they emphasise the importance of the Records in any redelivery (whether it occurs in the context of "giving possession" or allowing the taking of possession on an "as is, where is" basis).

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Travaux préparatoires **and supplementary materials**

135 I have already indicated my views as to the use that can be usefully made of the *travaux préparatoires* and other supplementary materials. However, I address some of the submissions on this topic of the parties for completeness.

136 It was submitted by the Applicants that the drafting history and *travaux préparatoires* support the Applicants' interpretation of "give possession" – that is, as requiring redelivery in accordance with the parties' agreement.

137 In an earlier draft of what became Art XI, an earlier draft form of the Aircraft Protocol in 1997 contained an Art XIV(3)(b) in the following form:

> [The obligor shall] return and deliver the aircraft object to the obligee in accordance with, and in the condition specified in, the agreement and related transaction documents. (See UNIDROIT 1997, Study LLXXII, Document 36 add 3.)

138 It was submitted that from the earliest form the provision reflected an intention to require the return and delivery of aircraft objects in accordance with the contractual terms between the parties.

139 Subsequently, by 1998, the provision was numbered Art XII(3)(b) (see UNIDROIT 1998, Study LLXXII, Document 41 produced by the Steering and Revision Committee, Appendix III 8-9), and embodied the eventual phase "give possession", stating that the obligor shall:

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

140 This led the Applicants to argue that the parenthetical words appear in the original (ie "[in accordance with, and in the condition specified in the agreement and related transaction documents]"), and capture precisely the scope of the obligation advocated by the Applicants. Notably, the square brackets appear to have been added by the Chair of the Meeting, Professor Goode, who explained that it applied to minor amendments not affecting substance (UNIDROIT 1998, Study LLXXII, Document 41, Steering and Revision Committee, Item 8 "Business of the Meeting: Chairman and Mr Wool's introductions", 5-6). In that document, the following was stated:

> In introducing the business of the meeting, the Chairman recalled that the Committee's role was further to refine the texts laid before the Governing Council, albeit without interfering with the substance, and that, in doing so, the Committee should take account of the views expressed by Council members at the 77th session of that body … In carrying out the task given to it by the Council, namely the

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> alignment of the preliminary draft Protocol, as to both style and terminology, with the preliminary draft Convention, it would be appropriate for the Committee to iron out any inconsistencies between the two texts. It would be for the Committee to consider whether there were provisions in the preliminary draft Protocol that could be made of general application and brought into the body of the preliminary draft Convention.
>
> With a view to facilitating the work of the Committee [the Chairman] had revised the text of the preliminary draft Convention and that of the preliminary draft Protocol considered by the Governing Council at its 77th session. In this task he had derived considerable assistance from Mr Wool, in relation to aircraft equipment in general and as regards the preliminary draft Protocol in particular. He had also introduced certain minor amendments which, while not affecting the substance, had appeared to him to be necessary or which might be considered to be necessary (these last had been submitted for consideration in square brackets). He had appended notes both to the preliminary draft Convention and the preliminary draft Protocol in order to explain the thinking behind the changes he had made. In line with the Council's instructions, he had provisionally moved a number of provisions, which he had judged to be potentially capable of general application, from the preliminary draft Protocol into the body of the preliminary draft Convention for the Committee's consideration. Where he had done so, he had signalled the fact by presenting the relevant provision inside square brackets, a technique only previously used in the preliminary draft Convention to signal points judged by the Study Group to be beyond its terms of reference and to that extent to raise policy questions for Governments (for example, Arts 20 and 42).

141 It was submitted that the parenthetical words were not included in the final text of the Aircraft Protocol. However, in the subsequent drafts of the Aircraft Protocol there is nothing to suggest a deliberate departure from the substantive redelivery obligations envisioned by the original drafting. It was submitted that if the approach to the drafting of the Aircraft Protocol was being radically modified to provide for mere abandonment of aircraft equipment on an "as is, where is" basis one would have expected that wording to appear in the text, and certainly for that to have been explained in the working papers.

142 Instead the wording was retained in the draft provided with the First Joint Session Report of February 1999 (see UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, First Joint Session, 1 – 12 February 1999 at 82). It was also retained for the Second Joint Session Report of September 1999 (see UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, Second Joint Session, 24 August – 3 September1999, Attachment F, F38).

143 However, the wording changed to the present form in the Third (and final) Joint Session Report (see UNIDROIT Committee of governmental experts for the preparation of a draft

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Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, Third Joint Session, 20 – 31 March 2000, Appendix II, ix). The report discusses that change at paragraph [202] stating:

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

144 The document referred to at § 193 is a "Comment" (see UNIDROIT CGE/Int.Int/3-WP/13; ICAO Ref. LSC/ME/3-WP/13, Comments submitted by Government of the Federal Republic of Germany). That comment related to the obligation of maintenance of aircraft components in relation to aircraft that may be the subject of security interests and therefore not form part of the available asset pool following an insolvency event. The substance of the comment became Art XI(5), which itself refers back to the underlying obligation to "give possession" in Art XI(2).

145 It was submitted by the Applicants that, by the draftsman's own suggestion, he was only trying to "improve the wording" and that is an entirely inadequate explanation to support an argument that the text was being radically altered to become a limited "as is, where is" obligation.

146 The Respondents submitted that the Court may not have regard to supplementary materials unless those materials either confirm the construction of Art XI(2) that emerges from an application of the principles of construction set out in Art 31 of the Vienna Convention, or unless the Court is satisfied that the interpretation that follows from an application of Art 31 is ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. It was submitted that the Court could not be satisfied of either matter, and so the *travaux préparatoires* are unavailable as a source of construction material in the present case. It was submitted that the *travaux préparatoires* do not confirm the construction which emerges based on an application of Art 31 of the Vienna Convention (being the construction put forward by the Respondents), and that construction is not ambiguous or obscure, and does not lead to a result which is manifestly absurd or unreasonable. In those circumstances, it was said that Art 32 of the Vienna Convention prohibits regard being had to materials of the kind put forward by the Applicants.

147 The Respondents then submitted that, in any event, even if regard is to be had to the draft materials, they do not assist the Applicants. The Respondents submitted that, while the

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drafting appearing in the UNIDROIT 1997, Study LXXI Doc 36, add 3 might support the Applicants' construction, it should be apparent that that early iteration of what later became Art XI(2) is in markedly different terms to the final version. In those circumstances, the Respondents submitted that that there is nothing to be drawn from that early draft, which was several years away from being agreed to by the contracting States and was ultimately substantially re-written.

148 The Respondents noted that the drafting in the version that appeared in the 1998 draft moved away from the language of "return and deliver" and instead adopted the ultimate language of "give possession". The Respondents noted that the Applicants seek to emphasise a drafting note which stated "[in accordance with, and in the condition specified in the agreement and related transaction documents]", and which remained in the drafts circulated in both February and September 1999. However, the Respondents submitted that the purpose of the drafting note is far from clear, and does not fully disclose the purpose of the notation, given that multiple types of notation are identified in that passage. The Respondents said that, in circumstances where the purpose and meaning of the drafting note is unclear and, more fundamentally, the note was not included in the final text of Art XI(2), the Court should not rely on that drafting note to reach a conclusion as to the construction of Art XI(2) which is contrary to the text itself.

149 Then the Respondents referred to the Third Joint Session Report, and noted that at [199] the Report states: "The *Rapporteur* stated that the Convention applied except to the extent that it was modified by the Protocol. Article XI, Alternative A, was simply concerned with the ability to acquire possession, the power of sale would apply by virtue of the Protocol and not of the Convention, and then Article 8 of the Convention would come into play." The Respondents submitted that a concern to confer the "ability to acquire possession" on creditors is consistent with the Respondents' construction of the phrase "give possession" as meaning "make available to the creditor", and does not reveal any intention to impose an obligation on debtors and insolvency administrators to deliver up aircraft objects to creditors. The Respondents said that it was trite to observe that creditors may have the ability to acquire possession of aircraft objects without in fact having been delivered the objects. It was submitted that this passage supports the Respondents' construction, rather than that of the Applicants.

Retrieved from AustLII on 04 September 2020 at 07:22:01

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150 However, in conclusion, the Respondents submitted that the *travaux préparatoires* are at best ambivalent as to the proper construction of Art XI(2) in its final form. The earliest draft of what became Art XI was in a form so different to the final version that it must be put to one side. The later materials are of limited assistance, as they do not clearly point in favour of the Applicants' construction or that of the Respondents – and observations in favour of both constructions can be identified.

151 If not already anticipated by the reader, I should say that I agree that the supplementary materials (even if taken into account) do contain observations that may lean (to varying degrees) one way or the other in favour of each competing construction. However, no observation is focussed on the issues directly to be determined by the Court in these proceedings, and the supplementary materials to the extent relied upon are of no assistance.

THE CONTENT OF THE OBLIGATION TO 'GIVE POSSESSION' AND THE SECTION 443B(3) NOTICE

152 The Respondents did not contend that the process of giving the 16 June 2020 Notice under s 443B(3) of the Corporations Act in some way limited the Administrators' obligation under Art XI(2) of the Aircraft Protocol. Rather, on the particular facts of this case, the Respondents submitted that the step taken in giving notice under s 443B(3) on 16 June 2020, together with further steps taken to implement the orderly hand back arrangement, were sufficient to "give possession" to the Applicants for the purposes of Art XI(2) of the Aircraft Protocol. It was submitted that there was no need for the Court to go so far as to determine that a notice pursuant to s 443B(3) will always be effective, in and of itself, to satisfy an Administrator's obligations under Art XI(2).

153 The Administrators submitted that they have complied with their obligation under Art IX(2) (properly construed) to "give possession of the aircraft object[s]" to the Applicants. It is submitted that they have done so by making those objects available to the Applicants in the manner set out in the evidence before the Court and by service of the s 443B(3) Notice.

154 As mentioned already, on 16 June 2020, the Administrators sent the s 443B(3) Notice to the Applicants, under cover of a letter from the Administrators stating "[f]or the avoidance of doubt, your engines are available for you to take possession and arrange collection from the date of this letter". The Administrators further explained that they did "not intend to exercise any of their rights in respect of the property identified in the enclosed Form 509B 'Notice of Administrators' Intention Not to Exercise Property Rights'", and noted it was the

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Administrators' "intention to discuss and agree an orderly hand back arrangement … Gordon Chan and Ian Boulton from Deloitte will work with you and the Virgin team to co-ordinate the orderly return of your engines and all their respective technical and historical records."

155 On 18 June 2020, pursuant to the "orderly hand back arrangement" proposed in the letter dated 16 June 2020, Mr Boulton of the Administrators emailed the Applicants confirming that the Administrators would liaise with the Second Applicant's staff to facilitate an orderly handback of the engines, summarised the status and location of the engines and engine stands, offered to assist in providing services to the Second Applicant in removing and delivering the engines (at the Second Applicant's cost), and confirmed that the Administrators continued to insure and store the engines.

156 So it was contended by the Respondents that it follows that, from at least 18 June 2020, the engines and the engine stands identified at paragraphs 1 to 5 of Schedule 2 to the Amended Originating Application were made available to the Applicants. The same is true of the QEC Units, which were attached to the engines. By 18 June 2020, the Administrators had identified the location of those aircraft objects, and stated in terms that the Administrators, VB and VAA did not intend to exercise any of their rights in respect of those objects and that they were available for collection by the Applicants.

157 Between 18 June and 10 July 2020, the Administrators and the Applicants corresponded in respect of the Applicants' requests for engine records. On the evidence before me, I accept the Respondents have taken reasonable steps (in the circumstances confronting them and the nature of the Administrator) to locate the documents identified by the Applicants, and have now made the engine records available via a data room to which the Applicants have access, other than a FAA Form 8130-3 or EASA Form 1. In the absence of confirmation from the Applicants (which has not been forthcoming) that the Applicants will release the Administrators from any personal liability arising from causing an appropriately qualified representative of the First and Second Respondents to sign the "Status Statements", or "End of Lease Operator Records" (as defined in the Affidavit of Derych Warner sworn 22 July 2020), the Respondents did not complete and sign those documents.

158 By reaching the above conclusions on the interpretation of the Aircraft Protocol, I have already determined that the s 443B(3) Notice did not serve the purpose for which it was purportedly given, and on this basis was ineffective according to its terms as at 16 June 2020. It was of no effect to discharge the obligations on the Respondents under Art XI of the

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Aircraft Protocol. By its very nature, the Notice could not satisfy the requirements of s 443B(3), nor have the effect of relieving the Administrators of their obligations under s 443B(2) of the Corporations Act. The remaining issue then relates to other relief sought by the Administrators under s 443B(8) or s 447A(1) of the Corporations Act, to which I will come.

159 Then there was a separate attack by the Applicants on the s 443B(3) Notice. The Applicants contended that the s 443B(3) Notice was deficient for three reasons, and was therefore ineffective. The primary two reasons relate to the identification of the location of certain of the Applicants' engines and engine stands. As to the engines, the Applicants assume, based on discrepancies between the s 443B(3) Notice and Mr Boulton's email dated 18 June 2020, that the s 443B(3) Notice incorrectly stated the locations of two of the engines. As to the engine stands, the Applicants rely on the fact that the s 443B(3) Notice did not identify their whereabouts. Their location was confirmed two days later on 18 June 2020. The third reason given for invalidity is that "access to any records was not given to Willis until 8 July 2020 at which time access to a data room was provided".

160 On this attack, the Respondents' primary submission was that the s 443B(3) Notice was effective, as none of the purported deficiencies identified by the Applicants invalidate the Notice. The Respondents pointed out that the purported deficiencies identified by the Applicants would be of a kind that would appropriately attract an order under s 443B(8) (or s 447A(1)) of the Corporations Act), excusing the Administrators from liability in respect of the aircraft objects from 16 June 2020.

161 In response to the three criticisms of the Applicants, the Respondents also contended as follows. First, as to the Engines, the s 443B(3) Notice was said to correctly state the location of each of the Engines, and so there was no deficiency in the Notice in that regard. Mr Boulton's email contained the error, which was of no practical consequence given that it simply reversed the locations of the two Engines (of the same make and model), such that one Engine in Adelaide was said to be in Melbourne and one Engine in Melbourne was said to be in Adelaide. The important facts (that there are four Engines, three of which are in Melbourne and one of which is in Adelaide) were correct.

162 Secondly, as to the Engine Stands, it was contended that the principal purposes of a notice under s 443B(3) is to put owners and lessors on notice that an administrator does not intend to use or occupy property of the company and to permit the administrator to avoid the

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personal liability that would otherwise arise under s 443B(2). To fulfil that purpose, the critical requirements are those prescribed by s 443B(3)(a) and (b). Consistently with that proposition, the requirement in s 443B(3)(c) to identify the location of the property is conditional and informed by considerations of reasonableness. The administrator is only required to identify the location of the property if, and to the extent, known or knowable by reasonable diligence. It was submitted that it follows that a notice under s 443B may be valid in certain cases even where the location of the relevant property is unspecified.

163 It was then submitted that the s 443B Notice was sufficient to discharge the requirements in ss 443B(3)(a) and (b). It was said that the property was identified with specificity (by reference to the underlying lease agreements) and the Administrators' intention not to exercise any rights in respect of the property was stated expressly.

164 Further, it was contended that it was sufficient for the purposes of s 443B(3) in the present circumstances to identify the location of the principal property leased pursuant to those leases, namely the Engines. That sufficed to put the Applicants on notice that the Administrators were not intending to exercise any rights in respect of the property the subject of the leases. The failure to identify the location of the engine stands in the s 443B(3) Notice itself ought not be regarded as invalidating the Notice or rendering it ineffective. That is because the Notice was sufficient to discharge its statutory purpose.

165 It was submitted that the case might be different where a s 443B notice is so deficient in its identification of the property or its location as to frustrate attempts by the owner or lessor to retake possession. Where, however, a notice is sufficient and effective to put the relevant owner or lessor on notice of the matters in ss 443B(3)(a) and (b), minor and inconsequential errors as to description or location will not deny the notice its effect under s 443B(4).

166 Finally, in relation to the engine records, it was submitted that the provision of access to those records via an online data room following consultation with the Applicants was an appropriate mechanism by which to ensure all records were provided to the Applicants in a convenient manner. No sub-section of s 443B(3) has been identified by the Applicants that would ground a finding of invalidity by reason of the Administrators adopting such a pragmatic and efficient course.

167 Then it was submitted by the Respondents that, even if the deficiencies identified by the Applicants were to result in the invalidity of the s 443B(3) Notice, the deficiencies are of a

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kind that would justify the Court granting relief under s 443B(8) or s 447A(1) of the Corporations Act, consistent with prayer 1 of their Amended Interlocutory Process.

168 This is the way I intend to proceed, and to make orders accordingly.

169 The discretion in s 443B(8) is wide, albeit not absolute and unfettered and it must be exercised judicially: *Nardell Coal Corp (in liq) v Hunter Valley Coal Processing Pty Ltd* (2003) 46 ACSR 467 at [63]-[65] and [102] (construing the analogous discretion in s 419A(7)). Obviously, it is a discretion that must be exercised having regard to the impact on creditors.

170 In *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* [2020] FCA 571 at [44]-[46] I set out the principles that relevantly apply:

> [44] The principles governing the Court's power to extend time under section 443B of the Corporations Act were usefully summarised by Markovic J in *Strawbridge (Administrator), in the matter of CBCH Group Pty Ltd (Administrators Appointed) (No 2)* [2020] FCA 472, where her Honour said this at [39]:
>
> > Section 447A(1) of the Act also gives the Court ample power to alter the operation of s 443B(2) and (3) of the Act: see In the matter of *Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263 at [6]. Alternatively, s 443B(8) gives the Court an additional power to alter the operation of s 443B(2) and (3): see *Silvia v FEA Carbon Pty Ltd* (2010) 185 FCR 301 (***Silvia v FEA***) at [13]. The usual rationale behind the extension of the five business day period in s 443B(2) and (3) or the exercise of the power in s 443B(8) is because the administrator has had insufficient time to conduct the necessary investigations to decide whether he or she thinks it best to retain or give up possession of leased property: see *Silvia v FEA* at [12]-[13]. Further it seems that s 443B(8) allows the Court to excuse the administrator from liability to pay rent even after the five business day period has passed (see *Silvia v FEA* at [13]-[14]) or that s 447A enables a court to amend the operation of Pt 5.3A of the Act retrospectively (see Australasian Memory v Brien at [26]). (*Emphasis in original*)
>
> [45] In that decision, her Honour went on to note, at [52] and [57], that when considering an extension of this type, it is important to balance the interests of different creditors (particularly in the circumstances of a complex administration).
>
> [46] In *In the matter of Mothercare Australia Limited (administrators appointed)* [2013] NSWSC 263, Black J canvassed the rationale for granting an extension of time for administrators to decide whether to give notice to landlords limiting their personal liability, and made the following pertinent comments, at [2]-[4]:
>
> > The first issue which arises is the application for an extension of time in order to give any notice to lessors under s 443B(3) of the Corporations Act. That section broadly deals with the circumstances in which an administrator becomes subject to personal liability for rental or other amounts payable by a

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> company under a lease. In broad terms, the section provides that the administrator is liable for rent payable by a company under administration for the period which begins more than five days after the administration begins, but may avoid that liability by giving notice that specifies the property and states that the company does not propose to exercise its rights in relation to the property. That section will operate in a relatively straightforward manner in circumstances that, for example, a company occupies a single or a small number of properties, and assumes that the administrator will be in a position, by the exercise of appropriate diligence, to form a view as to whether the company should continue to occupy the premises and whether or not to assume personal liability in respect of the premises within that period.
>
> However, a situation may arise where there are obstacles to the administrator forming that view within that period. Such a situation was considered in *Silvia v Fea Carbon Pty Ltd (ACN 009 505 195) (admins apptd) (recs and mgrs apptd)* [2010] FCA 515; (2010) 185 FCR 301, where Finkelstein J noted the policy behind the section and that the section was intended to allow the administrator the opportunity to avoid personal liability for rental payable by giving notice within the five day period, but also recognised the possibility that that period may be too short in a particular case. His Honour noted that the Court can either excuse such liability under s 443B(8) of the Corporations Act or extend the time for investigation under s 447A of the Corporations Act.
>
> The Administrators here seek orders under s 443B(8) of the Corporations Act or alternatively under s 447A which, in effect, extend the time for the giving of notice of an intention not to exercise rights in respect of the relevant properties to 5 March 2013, a month from today. A number of factors relevant to making such an order were identified in *Silvia v Fea Carbon*, including that there may be a large amount of paperwork to review; factual uncertainty in relation to the leases; or the administrators' inability to form a view within the five business days allowed by the section as to whether it was necessary or desirable to exercise rights over the relevant property for the purpose of maximising the chances that some or all of the members of the companies can continue in existence or maximising the return to creditors.

171 It was submitted by the Administrators that relief should be granted to the Administrators for the following reasons.

(1) The s 443B(3) Notice was effective to put the Applicants on notice of the Administrators' intention that VB and VAA would not exercise rights in relation to the property the subject of the relevant airline leases. In circumstances where the Applicants had such notice in fact from 16 June 2020, there can be no prejudice or injustice in exercising the power under s 443B(8) to grant relief from 16 June 2020, being the date of the s 443B Notice.

(2) If there was a deficiency in the s 443B(3) Notice, it was inadvertent and arose in circumstances where the Administrators were otherwise seeking to comply with s 443B(3).

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(3) The correspondence between the Administrators and the Applicants demonstrates that the Administrators have engaged in good faith efforts to locate and make available all of the aircraft objects to the Applicants.

(4) The Administrators have not caused the company to in fact use or exercise rights in respect of any of the property.

(5) Waiving liability under s 443B(8) would not prejudice the interests of any other creditors.

(6) The purported deficiencies identified by the Applicants in the s 443B(3) Notice are of a trivial kind, were corrected in correspondence two days later, and had no practical implications for the Applicants, as no steps were taken to recover the aircraft objects between service of the s 443B(3) Notice and the correction of the deficiencies.

172 I consider, in light of my decision on the central issue before the court on the construction of the Convention and Aircraft Protocol, I can deal with these issues in short compass.

173 As I have indicated, the Respondents do not just rely on the 16 June 2020 s 443B(3) Notice, but relied on their post-16 June 2020 conduct (and their conduct after the commencement of these proceedings) to demonstrate that they have complied with their obligations under the Aircraft Protocol. By reasons of my interpretation of the obligation on the Respondents to give possession of the aircraft objects, the Respondents have failed to comply with Art XI.

174 In my view, the s 443B(3) Notice was invalid for the reasons advanced by the Applicants, and I do not regard the defects as minor or of a trivial kind in view of the nature of each of the aircraft objects (including the Records).

175 The remaining issue is whether the Administrators should be relieved of liability, assuming the s 443B(3) Notice is invalid.

176 I appreciate that the Court has granted the Administrators time well beyond the first five business days afforded to them under s 443B(2) to precisely identify the property and its location, and excused the Administrators for any rent in respect of that same period. I also appreciate that the balance of the historical Records were not provided to the Applicants until on or about 17 July 2020, so there is still the question of the liability for the rent for three Engines up to that date (being 30 days' rent), and the rent for Engine 896999 in respect of which the HMU documents have (or had) not been provided.

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177 I also appreciate that the Administrators have failed to both disclaim the aircraft objects, and have failed to fulfil the obligation to give possession on the Court's interpretation of the Aircraft Protocol.

178 Nevertheless, I do not draw the inference that the Administrators have not invested the time and effort required to locate all the Applicants' aircraft objects. This has been a complex Administration. The background and nature of the Administrators' activities and the circumstances in which the Administration is being conducted is set out in various decisions relating to that administration: see *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed)* [2020] FCA 571; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 2)* [2020] FCA 717; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 3)* [2020] FCA 726; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 4)* [2020] FCA 927; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 5)* [2020] FCA 986; *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 6)* [2020] FCA 1172 and *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 7)* [2020] FCA 1182.

179 The approach taken by the Administrators was based upon their understanding of the legal position set out in their letter dated 9 June 2020. The Administrators have acted reasonably and were always willing to provide practical assistance to the Applicants to assist in the recovery of the aircraft objects. Whilst the s 443B(3) Notice was of no effect, this was upon the basis that the Notice (and for that matter the subsequent conduct of the Administrators) did not fulfil the obligations under Art XI(2), and any deficiencies in the s 443B(3) Notice were inadvertent, although still in my view of sufficient significance to invalidate the s 443B(3) Notice.

180 I consider on the basis of the principles that apply to granting relief under s 44B(8) and s 447A, the Court should grant relief from the period 16 June 2020 to 20 October 2020 (the period of time allowed to arrange and give possession of the aircraft objects).

181 The relief is specifically framed by reference to the obligations under the general rule set out in s 443B(2) and no further.

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OTHER MATTERS

182 In addition to the above issues, a number of other matters were raised by the parties through the course of the proceedings.

183 First, there was no opposition to the Applicants to be given leave to begin and proceed with the proceeding pursuant to s 440D or s 440B(2) of the Corporations Act. I will grant such leave as it is appropriate to do so.

184 Secondly, I have included an order giving extensive liberty to apply, covering eventualities that may occur in the process of delivery up by the Respondents. It is not appropriate, nor is it the Court's function, to supervise the process of delivery. However, I envisage that certain details may need to be determined by the Court as delivery progresses, in the absence of any agreement between the relevant parties. I have deliberately made the order in the widest possible terms to at least allow a party to approach the Court.

185 Thirdly, there was a debate between the parties as to the form of Order 5, and the manner of delivery up. The debate concerned whether the manner should be prescribed in the form set out in Schedule 3, or by reference to the evidence of Mr Darren Dunbier, called on behalf of the Respondents. I accept the evidence of Mr Dunbier, but consider it preferable to set out as clearly and as precisely as possible the exact manner of delivery.

186 I have considered the evidence of Mr Dunbier and the Applicants' redelivery proposal, and in particular, I have considered paragraph 20 of the "First and Second Applicants' Submissions on Form of Final Order" dated 14 August 2020. I have accepted the Applicants' approach detailed therein. In the main there are no substantive differences in the content of the requirements. To the extent that difficulties arise concerning timing, or in carrying out the prescriptive requirements, a party can seek agreement for any variation or can approach the Court. If, for instance, by the time the Orders are to be implemented, certain historical records have already been provided (as seems to be either the case or in train), then the Orders may require no future action by the Respondents. In addition, there may also of course be Records not yet in existence, but which will need to be provided over the coming weeks.

COSTS

187 There is no doubt that the Applicants are entitled to their costs.

188 An order awarding costs against the corporate Respondents is orthodox in circumstances such as the present, where an administrator (or liquidator) has acted reasonably in defending

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litigation: see *Melhelm Pty Ltd, Re Boka Beverages Pty Ltd (In Liq) v Boka Beverages Pty Ltd (In Liq) (No 2)* [2019] FCA 1809 at [7] per Gleeson J citing *Silvia & Anor v Brodyn Pty Limited* [2007] NSWCA 55; (2007) 25 ACLC 385 at [52] (Hodgson JA, Ipp JA and Basten JA agreeing).

189 No costs order should be made that exposes the Administrators ultimately to personal liability for the Applicants' costs. The Administrators acted reasonably in defending the Applicants' claims, and the issue was one that required a court determination and involved a question of construction not otherwise considered by a court. There is no occasion to depart from the usual position that a costs order should not impose personal liability on the Administrators in circumstances where they acted reasonably in defending these proceedings.

190 The fact that a claim is made by reference to the Convention and Aircraft Protocol does not alter the orthodox position. Art XI(4) of the Aircraft Protocol provides that "[r]eferences in this Article to the 'insolvency administrator' shall be to that person in its official, not in its personal, capacity". This is an indication that generally obligations imposed on insolvency administrators under Art XI of the Aircraft Protocol are not imposed on such persons in their personal capacity.

191 I appreciate that the Applicants have consented to an order that any expense incurred in carrying out the redelivery obligations are expenses properly incurred in the administration. In these circumstances, the Respondents contend that the preferred form of the cost orders should be an order for costs against the Administrators with such liability being limited to the extent of the available indemnity.

192 It was submitted by the Applicants that the best way to reflect that provision of the Aircraft Protocol in an order for costs in an insolvency context is to provide a limit on personal liability to the extent of any indemnity. This is said to be consistent with the nature of Australian insolvency law obligations in which an administrator is personally liable but is entitled to an indemnity to cover such liability. Where, as here, much of the debate has centred on the obligations of the Administrators under the Aircraft Protocol (and not simply on the obligations of the Respondent companies) it was submitted that it was appropriate that orders be made against the Administrators with a limit on such liability to the extent of assets (which would include funding) available to the Administrators.

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193 Whilst I see logic in the approach suggested by the Applicants, I nevertheless consider that the orthodox approach is appropriate here. This is in view of the position and conduct of the Administrators, and the nature of the Administration. The circumstances in which the Administration is being conducted is detailed in my earlier decisions dealing with the Administration as referred to above, and needs no rehearsing here. In addition, it should be noted that the motivation of the Administrators in resisting the approach of the Applicants was to act in the interests of the other creditors.

194 The Court will make an Order so that the costs incurred by the Applicants are recoverable as costs in the administrations of the First, Second and Fourth Respondents.

I certify that the preceding one hundred and ninety-four (194) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Middleton.

Associate:

Dated: 3 September 2020

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SCHEDULE OF PARTIES

NSD 714 of 2020

Respondents

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

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ANNEXURE 'A'

Statement of Agreed Facts

No. NSD714 of 2020

Federal Court of Australia

District Registry: NSW

Division: General

Wells Fargo Trust Company, National Association (as owner trustee) and others named in schedule 1

Applicants

VB LeaseCo Pty Ltd (Administrators Appointed) ACN 134 268 741 and others named in schedule 1

Respondents

For the purpose of the proceeding only, the Applicants and the Respondents agree the following facts:

1. The Second Applicant is authorised to bring this proceeding on behalf of the First Applicant.

General terms of lease agreements

2. On or about 24 May 2019, Willis Lease Finance Corporation (**Willis**) and VB LeaseCo Pty Ltd (Administrators Appointed) ACN 134 268 741 (**VB LeaseCo**) entered into an Engine Lease Support Agreement. [A copy of that document is at page 117 of the Court Book.]

3. On or about 24 May 2019, Wells Fargo, as lessor (**Lessor**), for the benefit of Willis entered into a General Terms Engine Lease Agreement (**GTA**) with VB LeaseCo, as lessee. [A copy of the GTA is at page 128 of the Court Book.]

4. On or about 24 May 2019, pursuant to a deed of guarantee and indemnity (**Guarantee**), Virgin Australia Airlines Pty Ltd (Administrators Appointed) ACN 090 670 965 (**Virgin Australia**) provided the Lessor with a guarantee and indemnity of VB LeaseCo's obligations in connection with the GTA, each aircraft engine lease

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agreement and each transaction document entered into or to be entered into pursuant to the GTA or a lease.

Engine 897193

5. On or about 24 May 2019, the Lessor, for the benefit of the Beneficiary, entered into an Aircraft Engine Lease Agreement with VB LeaseCo in respect of the equipment, including CFM International Engine Model CFM56-7B24/3 (currently configured as 7B26/3), with engine serial number 897193 (**Engine 897193**) and engine stand (**Engine Stand 897193**) with serial numbers:

   (a) Cradle: P/N D71CRA00005G02, S/N MCC150728-1-4;

   (b) Base: P/N D71TRO00005G03, S/N MCC150728-1-4,

   (**Engine 897193 Lease**). [A copy of Engine 897193 Lease is at page 188 of the Court Book.]

6. VB LeaseCo sub-leased Engine 897193 to Virgin Australia by an Engine Sublease Agreement dated 24 May 2019 (**Engine 897193 Sublease**). [At page 214 of the Court Book is a copy of Engine 897193 Sublease.]

7. By a Deed of Security Assignment dated 24 May 2019, VB LeaseCo, as assignor, assigned all of its rights in and to Engine 897193 Sublease to Wells Fargo as assignee. [A copy of that document is at page 243 of the Court Book.]

8. On or about 24 May 2019, Virgin Australia provided a Guarantee Confirmation (as defined in the Guarantee) to the Lessor and the Beneficiary in respect of Engine 897193. [At page 257 of the Court Book is a copy of the Guarantee Confirmation in respect of Engine 897193 Lease.]

9. On or about 24 May 2019, Willis delivered the following equipment to VB LeaseCo:

   (a) Engine 897193;

   (b) Engine Stand 897193;

   (c) a QEC unit comprised of components set forth in Appendix A to Engine 897193 Lease;

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(d) engine records, including a copy of the life-limited parts profile attached as Appendix B to Engine 897193 Lease.

[A copy of the delivery receipt dated 24 May 2019 is at page 258 of the Court Book].

Engine 896999

10. On or about 14 June 2019, the Lessor, for the benefit of the Beneficiary, entered into an Aircraft Engine Lease Agreement with VB LeaseCo in respect of the equipment, including CFM International Engine Model CFM56-7B26/3, with engine serial number 896999 (**Engine 896999**) and engine stand (**Engine Stand 896999**) with serial numbers:

(a) Cradle: P/N D71CRA00005G02, S/N MCC170335-1-1;

(b) Base: P/N D71TRO00005G03, S/N MCC170335-1-1,

(**Engine 896999 Lease**). [A copy of Engine 896999 Lease is at page 259 of the Court Book.]

11. VB LeaseCo sub-leased Engine 896999 to Virgin Australia by an Engine Sublease Agreement dated 14 June 2019 (**Engine 896999 Sublease**). [At page 283 of the Court Book is a copy of Engine 896999 Sublease.]

12. By a Deed of Security Assignment dated 14 June 2019, VB LeaseCo, as assignor, assigned all of its rights in and to Engine 896999 Sublease to Wells Fargo as assignee [A copy of that document is at page 312 of the Court Book]

13. On or about 14 June 2019, Virgin Australia provided a Guarantee Confirmation (as defined in the Guarantee) to the Lessor and the Beneficiary in respect of Engine 896999. [At page 326 of the Court Book is a copy of the Guarantee Confirmation in respect of Engine 896999 Lease.]

14. On or about 14 June 2019, Willis delivered the following equipment to VB LeaseCo:

(a) Engine 896999;

(b) Engine Stand 896999;

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(c) a QEC unit comprised of the components set forth in Appendix A to Engine 896999 Lease;

(d) engine records, including a copy of the life-limited parts profile attached as Appendix B to Engine 896999 Lease.

[A copy of the delivery receipt dated 14 June 2019 is at page 327 of the Court Book].

Engine 888473

15. On or about 28 August 2019, the Lessor, for the benefit of the Beneficiary entered into an Aircraft Engine Lease Agreement with VB LeaseCo in respect of the equipment, including CFM International Engine Model CFM56-7B24 (currently configured as 7B26/3), with engine serial number 888473 (**Engine 888473**) and engine stand (**Engine Stand 888473**) with serial numbers:

(a) Cradle: P/N D71CRA00005G02, S/N MCC150728-1-3;

(b) Base: P/N D71TRO00005G03, S/N MCC150728-1-3,

(**Engine 888473 Lease**). [A copy of Engine 888473 Lease is at page 328 of the Court Book.]

16. VB LeaseCo sub-leased Engine 888473 to Virgin Australia by an Engine Sublease Agreement dated 28 August 2019 (**Engine 888473 Sublease**). [At page 357 of the Court Book is a copy of Engine 888473 Sublease.]

17. By a Deed of Security Assignment dated 28 August 2019, VB LeaseCo, as assignor, assigned all of its rights in and to Engine 888473 Sublease to Wells Fargo as assignee. [A copy of that document is at page 386 of the Court Book.]

18. On or about 28 August 2019, Virgin Australia provided a Guarantee Confirmation (as defined in the Guarantee) to the Lessor and the Beneficiary in respect of Engine 888473. [At page 400 of the Court Book is a copy of the Guarantee Confirmation in respect of Engine 888473 Lease.]

19. On or about 28 August 2019, Willis delivered the following equipment to VB LeaseCo:

(a) Engine 888473;

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(b) Engine Stand 888473;

(c) a QEC unit comprised of the components set forth in Appendix A to Engine 888473 Lease;

(d) engine records, including a copy of the life-limited parts profile attached as Appendix B to Engine 888473 Lease.

[A copy of the delivery receipt dated 28 August 2019 is at page 401 of the Court Book].

Engine 894902

20. On or about 13 September 2019, the Lessor, for the benefit of the Beneficiary entered into an Aircraft Engine Lease Agreement with VB LeaseCo in respect of the equipment, including CFM International Engine Model CFM56-7B26/3, with engine serial number 894902 (**Engine 894902**) and engine stand (**Engine Stand 894902**) with serial numbers:

(a) Cradle: P/N AM-2811-4800, S/N 769;

(b) Base: P/N AM2563-200, S/N 1216,

(**Engine 894902 Lease**). [A copy of Engine 894902 Lease is at page 402 of the Court Book.]

21. VB LeaseCo sub-leased Engine 894902 to Virgin Australia by an Engine Sublease Agreement dated 13 September 2019 (**Engine 894902 Sublease**). [At page 427 of the Court Book is a copy of Engine 894902 Sublease.]

22. By a Deed of Security Assignment dated 13 September 2019, VB LeaseCo, as assignor, assigned all of its rights in and to Engine 894902 Sublease to Wells Fargo as assignee. [A copy of that document is at page 456 of the Court Book.]

23. On or about 13 September 2019, Virgin Australia provided a Guarantee Confirmation (as defined in the Guarantee) to the Lessor and the Beneficiary in respect of Engine 894902. [At page 470 of the Court Book is a copy of the Guarantee Confirmation in respect of Engine 894902 Lease.]

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24. On or about 13 September 2019, Willis delivered the following equipment to VB LeaseCo:

(a) Engine 894902;

(b) Engine Stand 894902;

(c) a QEC unit comprised of the components set forth in Appendix A to Engine 894902 Lease;

(d) engine records, including a copy of the life-limited parts profile attached as Appendix B to Engine 894902 Lease.

[A copy of the delivery receipt dated 13 September 2019 is at page 471 of the Court Book].

Security Interests over Engines

25. The First Applicant has a security interest as that term is defined in section 12 of the *Personal Property Securities Act 2009* (Cth) over each of the Engines pursuant to the following lease documents (registered on the Personal Property Securities Register (**PPSR**) with the PPSR registration numbers listed below):

(a) Engine 897193 Lease (registered on the PPSR with PPSR numbers: 201905290067617, 201905290067629 and 201905290067638);

(b) Engine 896999 Lease (registered on the PPSR with PPSR numbers: 201906260103349, 201906260103401, 201906260103673, 201906260103591, 201906260103768 and 201906260103845);

(c) Engine 888473 Lease (registered on the PPSR with PPSR numbers: 201909120024204, 201909120024215 and2 01909120024227); and

(d) Engine 894902 Lease (registered on the PPSR with PPSR numbers: 201910160000574, 201910160000588 and 201910160000590).

Engines

26. Each of Engine 897193, Engine 896999, Engine 888473, Engine 894902, together with all parts and attachments thereto (collectively, **Engines**) is a CFM56-7B model

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aircraft engine, which is used on Boeing 737-800 and 737-900 aircraft and has a jet propulsion with at least 24,200 pounds of thrust.

27. Engine 897193 is currently configured to operate as CFM56-7B26/3 engine.

28. Engine 896999 is currently configured to operate as a CFM56-7B26/3 engine.

29. Engine 888473 is currently configured to operate as a CFM56-7B26 engine.

30. Engine 894902 is currently configured to operate as a CFM56-7B26/3 engine.

Location of the Engines at 17 July 2020

31. As at 17 July 2020 the Engines are attached to four separate airframes in the following locations [appearing at page 521 of the Court Book]:

(a) Engine 896999 is attached to airframe with registration VH-VOT at Melbourne Airport;

(b) Engine 897193 is attached to airframe with registration VH-VUA at Melbourne Airport;

(c) Engine 888473 is attached to airframe with registration VH-VOY in Melbourne Airport;

(d) Engine 894902 is attached to airframe with registration VH-VUT in Adelaide Airport.

QECs

32. The QECs constitute certain components that are attached to the external part of the Engines to make them operable and comprise the components described in Appendix A of each of the Aircraft Engine Lease Agreements.

33. The QECs were delivered to VB LeaseCo in the "neutral" configuration.

Engine Stands

34. Each Engine Stand is a static metal structure used to secure the Engines for transportation.

35. Transportation of the Engines on the Engines Stands is in accordance with the Engine manufacturer's requirements for transportation.

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36. Aircraft engine stands which are of the make, model described in the manufacturer's specifications for transporting the Engines can also be used for transportation of the Engines in place of the Engine Stands. The manufacturer's specifications set out other such stands at pages 733 to 803 of the Court Book.

37. If an Engine is not transported according to the manufacturer's requirements, it is necessary to conduct an inspection of the bearings as these can be jarred in transportation (causing what is known as "Brinelling") and potentially fail and in turn cause the Engines to fail.

38. The records required to be provided under the leases to Willis upon redelivery of the Engines are required to assess each Engine's airworthiness.

Engine Records

39. Willis has created a ROIL for the Engines. The ROIL identifies the status of records provided by the Respondents as at 17 July 2020 in respect of the Engines. A copy of the ROIL is at pages 624 to 627 of the Court book.

Rental

40. The GTA and Engine 897193 Lease, Engine 896999 Lease, Engine 888473 Lease and Engine 894902 Lease provide for monthly and daily rental for the Engines at the rates specified in the following table:

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Equipment (including Engines, Engine Stands, QEC units, Records)	Monthly Rent	Daily Rent
Engine No 1 [897193] + Engine Stand: Cradle: P/N D71CRA00005G02 S/N MCC150728-1-4; Base: P/N D71TRO00005G03 S/N MCC150728-1-4	US$64,000 per month when Engine is operated as CFM56-7B26 (current configuration).	US$2,098.36
Engine No 2 [896999] + Engine Stand: Cradle: P/N D71CRA00005G02 S/N MCC170335-1-1; Base: P/N D71TRO00005G03 S/N MCC170335-1-1	US$64,000 per month when Engine is operated as CFM56-7B26 (current configuration).	US$2,098.36
Engine No 3 [888473] + Engine Stand: Cradle: P/N D71CRA00005G02 S/N MCC150728-1-3; Base: P/N D71TRO00005G03 S/N MCC150728-1-3	US$64,000 per month when Engine is operated as CFM56-7B26 (current configuration).	US$2,098.36
Engine No 4 [894902] + Engine Stand: Cradle: P/N AM-2811-4800 S/N 769; Base: P/N AM2563-200, S/N 1216	US$64,000 per month when Engine is operated as CFM56-7B26 (current configuration).	US$2,098.36

Administration

41. On 20 April 2020, Vaughan Strawbridge, Salvatore Algeri, John Greig and Richard Hughes of Deloitte (**Administrators**) were appointed as voluntary administrators to VB LeaseCo, Virgin Australia and certain of their related entities, by resolution of the directors of each of those companies pursuant to section 436A of the *Corporations Act 2001* (Cth) (**Corporations Act**).

42. On 23 April 2020, the Administrators filed an application (**First Application**) in the Federal Court of Australia.

43. On 24 April 2020 Court made orders in the First Application. [[2020] FCA 571].

44. On 12 May 2020, the Administrators filed an application (**Second Application**) in the Federal Court of Australia.

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45. On 13, 15 and 20 May 2020 the Court made orders in the Second Application. [[2020] FCA 717]

46. On 25 May 2020, the Court made orders that, among other things, provided that the time within which the Administrators could issue a notice under section 443B(3) of the Corporations Act be extended to 16 June 2020 in respect of aircraft leased property. [[2020] FCA 726]

Information given to Applicants

47. The Administrators issued a notice pursuant to section 443B(3) of the Corporations Act (**443B(3) Notice**) to the Applicants on 16 June 2020 stating that the Administrators did not propose to exercise rights in relation to in relation to "the specified property in Schedule B" to the notice. A table listing each of the Engine 897193 Lease, the Engine 896999 Lease, the Engine 888473 Lease and the Engine 894902 Lease (together, the **Engine Leases**) is set out in Schedule B to the 443B(3) Notice. The table specified that Engine 896999, Engine 897193 and Engine 888473 were located at Melbourne Airport and that Engine 894902 was located at Adelaide Airport [Page 521 of the Court Book].

48. On 18 June 2020, Ian Boulton of the Administrators' firm sent an email to Garry Failler and Steve Chirico of the Applicants identifying the locations of the Engine Stands. That email also summarised the locations of the Engines, but inadvertently transposed the locations of Engine 894902 and Engine 897193 specified in the table scheduled to the 443B(3) Notice [Pages 529 to 531 of the Court Book].

49. On 8 July 2020 the Respondents provided the Applicants with access to an online "data room" containing Operator Records.

50. On and from 8 July 2020, the vast majority of the Historical Operator Records were provided by the Respondents to the Applicants.

51. Those records that have been provided are described as "Closed" in the ROIL.

52. The Respondents have not provided any of the End of Lease Operator Records to the Applicants.

53. The Respondents have not provided any of the "Lease Inspection Records from Engine Shop."

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