HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No S60/2021

BETWEEN: **WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE)**

First Appellant

WILLIS LEASE FINANCE CORPORATION

Second Appellant

and

VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741

First Respondent

VIRGIN AUSTRALIA AIRLINES PTY LTD (ADMINISTRATORS APPOINTED) ACN 090 670 965

Second Respondent

VAUGHAN NEIL STRAWBRIDGE, JOHN LETHBRIDGE GREIG, SALVATORE ALGERI AND RICHARD JOHN HUGHES (IN THEIR CAPACITY AS VOLUNTARY ADMINISTRATORS OF THE FIRST AND SECOND RESPONDENTS)

Third Respondent

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

Fourth Respondent

FIRST AND SECOND APPELLANTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES ON THE APPEAL

2. The Appeal raises an issue of construction of a treaty incorporated into the laws of the Commonwealth: what is the content of the obligation to "*give possession of the aircraft object to the creditor*" in Art XI(2) of the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (**Protocol**).[1] Two competing interpretations were accepted in the decisions below that frame the issues for this Court.

10 3. Do the words "*give possession of the aircraft object"* in Art XI(2) of the Protocol mean give possession physically, as the primary judge considered they must (PJ [92]-[93] CAB 45-46)? And, was the primary judge correct to conclude that Articles XI(13) and IX(3) of the Protocol apply to Art XI(2), such that the content of the obligation to give possession may be understood in light of the "*commercially reasonable*" exercise of the remedy in accordance with the redelivery obligations in the parties' agreement (PJ [110] CAB 50)?

4. Or, does, as the Full Court accepted, *"give possession"* require a debtor or insolvency administrator to do no more than that which is necessary to enable the creditor to exercise a self-help remedy to take possession of the aircraft objects (FFC

20 [106] CAB 144)?

5. The Notice of Contention puts the case more starkly. It waters down even the Full Court's interpretation of the obligation, to contend that an insolvency administrator can "*give possession*" by merely "*disclaiming control over the aircraft object, thereby yielding title to the object to the creditor*" (see FFC [57] CAB 128 cited in Ground 1 of the Notice of Contention CAB 175), consistently with the manner in which the Respondents had issued a notice under section 443B(3) of the *Corporations Act 2001* (Cth) (**Corporations Act**) declining to exercise rights in relation to the aircraft objects.

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[1] *Protocol to the Convention on International Interests in Mobile Equipment Matters Specific to Aircraft Equipment*, signed at Cape Town on 16 November 2001, assented to by Australia on 26 May 2015 (subject to the matters set out in the Declarations made by Australia at the time of the deposit of its instrument of accession). Australia's declaration indicated it had opted for Alterntive A of Art XI: FFC [48] CAB123.

PART III: SECTION 78B NOTICE

6. The first and second appellants (**Wells Fargo** and **Willis**, respectively) consider that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: CITATION OF RELEVANT DECISIONS BELOW

7. Citations: *Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (administrators appointed)* [2020] FCA 1269 (**PJ**); *VB Leaseco Pty Ltd (administrators appointed) v Wells Fargo Trust Company, National Association (trustee)* [2020] FCAFC 168; 384 ALR 378 (**FFC**).

PART V: RELEVANT FACTS

8. By enacting the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) (the **CTC Act**) the Commonwealth gave domestic effect to the Cape Town Convention[2] and Protocol. The Convention and the Protocol are both given force of law by section 7 of the CTC Act, and by section 8 of the CTC Act they prevail over any other domestic law to the extent of any inconsistency.

9. The interpretation of the Convention and Protocol arises in the factual context set out in the Full Court's reasons at FFC [8]-[27] CAB 112-115. As the Full Court observed at FFC [14] CAB 113, "*the question of construction to be resolved does not turn on any controversial fact*."

10. Wells Fargo and Willis are the respective legal and beneficial owners of four aircraft engines (along with associated parts and records) leased to the First Respondent, and sub-leased to the Second and Fourth Respondents. Wells Fargo's rights as lessor (held beneficially for Willis) are an "*international interest*"[3] afforded certain rights, privileges, and immunities by the Convention, and Protocol.

11. The Third Respondents were appointed as the administrators of the other Respondents on 20 April 2020: FFC [8] CAB 112.

12. The Appellants have a number of aircraft engine lease agreements in respect of the four engines (**Leases**) (FFC [19]-[27] CAB 113-115, see example at ABFM 66). Each particular Lease incorporates the terms of a General Terms Engine Lease Agreement dated 24 May 2019 (the **GTA**) (FFC [19] CAB 113 ABFM 5).

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[2] *Convention on International Interests in Mobile Equipment*, signed at Cape Town on 16 November 2001 (**Convention**). Assented to by Australia on 1 May 2015 (subject to the matters set out in the Declarations made by Australia at the time of the deposit of its instrument of accession see FFC [43] CAB 120).
[3] Article 2(2)(c) of the Convention.

13. The Leases imposed on the lessees detailed return obligations in respect of the engines, associated equipment and records. The lessee is obliged to redeliver the leased equipment free of all liens (other than the lessor's liens) to the delivery location described in the applicable lease, or such other location in the continental United States nominated by the lessor, or such other location as the parties may agree (see cll 18.3(f) and 19(b)(iii)(C) reproduced at FFC [24],[27] CAB 115-116). The Leases designate a Florida address as the relevant delivery location (FFC [20] CAB 114). Clause 7(c) of the GTA required redelivery of all engine records generated by the lessees, and other redelivery documentation (FFC [22] CAB 115).

14. The appointment of the Third Respondents as administrators was an "*Event of Insolvency*" under the Leases (engaging the contractual right to redelivery), and also an "*insolvency event*" within the meaning of Art XI(2) of the Protocol (FFC [13] CAB 113).

15. The Leases expressly contemplated that the Convention and Protocol would apply. Clause 19(a) of the GTA provided that "*The occurrence of an Event of Default under this GTA shall constitute a 'default' for the purposes of the Cape Town Convention*" (which was defined to include the Convention and the Protocol). Article 11 of the Convention provided that the parties may agree on events that constitute a default.

16. It was open to the parties to exclude the operation of Art XI Remedies on Insolvency, if they had so chosen (see Art IV(3) "*Sphere of application*"). But the parties did not opt out of Art XI of the Protocol.

17. On 16 June 2020 the Appellants wrote to the Third Respondent seeking compliance with the Respondents' obligations under Art XI(2) to *"give possession"*. On the same day the Third Respondent issued a notice said to be under s443B(3) of the Corporations Act in respect of the leased property (PJ [34]-[35] CAB31-32).

18. That is, the Respondents chose not to give possession in any practical or meaningful way. Instead, they elected to issue a notice purporting to be under s443B(3) of the Corporations Act notifying the Appellants that they would not exercise rights in respect of the engines still attached to four different aircraft operated by the lessees (and owned by third parties) leaving the Appellants to their own devices to repossess them. (Notably, the primary judge ultimately held the notice to be ineffective for that purpose, which finding was not appealed by the Respondents: PJ [174] CAB67).

19. Recovery of the aircraft objects by the Appellants would have required many physical acts, including finding crew to operate ferry flights of at least one of the aircraft to a different location and undertaking significant engineering tasks to remove the engines from the four different aircraft on which they were mounted, along with the negotiation of those arrangements with the owners of those aircraft – who may have an interest in the engines remaining mounted on their aircraft in the absence of ready replacement by the airline (PJ[125] CAB 54).

20. The provision of the essential technical records (included in the definition of aircraft object: see Art I(2)(c) PJ [26] CAB 30), was not addressed by the Respondents until after the commencement of the proceedings below (PJ [45] CAB 33, PJ [176] CAB 67).

21. The Respondents having failed to "*give possession*" of either the engines themselves or the valuable engine records, the Appellants approached the primary judge to seek that relief by way of curial intervention. Issue was joined as to the content of the obligation in Art XI(2): FFC [16] CAB 113.

PART VI: ARGUMENT

A. THE CONVENTION AND PROTOCOL

A1. Summary of Arguments

22. These submissions address the argument in the following order:

(a) A2 The Court's interpretive task

(b) A3 The Convention and Protocol

(c) A4 Comparison between Protocol Art XI and domestic insolvency law

(d) B1 Decision of the Primary Judge

(e) B2 Decision of the Full Court

(f) C1 The ordinary meaning of "*give possession*" in Art XI(2)

(g) C2 The effect of Article XI(13) and IX(3)

(h) C3 Application to the present facts

(i) D The Notice of Contention

A2. The Court's interpretative task

23. At issue in this appeal is whether the words in Art XI(2) "*give possession of the aircraft object"* mean the giving of physical possession in accordance with the

parties' contractual bargain, and whether that interpretation secures the additional protections for lessors that promotes the objects of the Protocol in encouraging cheaper finance to flow to the airline industry (see the commentary cited by the PJ [117] CAB 52).

24. The Commonwealth Parliament enacted the Protocol and Convention in an attempt to improve the flow of finance to the aviation industry in Australia by providing a means for recognition of international interests in aircraft objects. The Parliamentary Second Reading Speech explains the preferential finance arrangements expected to flow to Australian airlines (including, expressly, the Virgin group) (see PJ [115] CAB 51).

25. There was no dispute about the principles relevant to the interpretation of an Australian statute that wholly incorporates an international law treaty (PJ [64] CAB 38; FFC [56] CAB 127). As the primary judge noted; "*the word 'possession' must be given a meaning not necessarily constrained by English or Australian legal precedent*" (PJ [65] CAB 38).

26. Guidance on the interpretation of the Convention and Protocol is provided in the text of the Convention itself in two relevant respects. Article 5(1) of the Convention directs attention to the purposes as set forth in the preamble including the *"need to promote uniformity and predictability"*. Article 6(1) provides the Convention and Protocol shall be read and interpreted together, but Art 6(2) provides that the Protocol prevails to the extent of any inconsistency. Article II of the Protocol provides the Convention shall apply in relation to aircraft objects *"as provided by the terms of this Protocol"*.

A3. The text of the Convention and Protocol

The Convention

27. The preamble to the Convention makes clear that its principal focus is to "*facilitate*" secured transactions "*by establishing clear rules to govern them*"; and that such rules *must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary to those transactions"*.

28. It is the rights of creditors - in this case lessors - of aircraft objects, as reflected in the parties' agreements, that are the very subject matter of the Convention and constitute the "*international interest*".

29. Article 2(2)(c) provides that the rights *"vested in a person who is a lessor under a leasing agreement"* form the secured *"international interest"*, formalised under Art 7. Article 7 sets out formalities by which an agreement between the parties can create an international interest. The term "*leasing agreement*" is defined in Art 1(q) as an agreement in which one person *"grants a right to possession or control of an object … in return for a rental or other payment*".

30. Pausing at that point, the commercial purpose of an aircraft operating lease is that the airline will only have possessory rights to the aircraft for a portion of the economic life of these expensive assets. The consideration (or "*rent*") is set at the "*hire*" price of an operational object, not at a price intended to cover the full economic value of the asset.[4] Because of that structure, the lessor still retains the economic risks of ownership. The lessor has an interest in ensuring the objects are returned in a state as close to operational as possible which is reflected in stringent contractual redelivery obligations both as to the condition of the objects and the manner of transportation.

31. A registered international interest enjoys priority under Chapter VIII of the Convention, and the holder of the international interest enjoys the benefit of the remedies conferred by Chapter III of the Convention, and Chapter II of the Protocol – which includes the provision central to this case, Art XI Remedies on Insolvency.

32. Chapter III of the Convention deals with default remedies. Article 11 respects the autonomy of the parties to determine what will constitute a default (as happened in the present case). Article 10 supplies default remedies to a lessor. Article 12 provides the force of the Convention to any other "*additional remedies*" "*agreed upon by the parties*" – in the present case that would include the redelivery obligations. Notably however, Art 12 additional remedies must be those "*permitted by the applicable law*". Applicable law is taken to be the domestic rules of the law applicable by virtue of the rules of private international law of the forum State (Art 5(3)).

33. Article 30 of the Convention "*Effects of insolvency*" provides a default regime for insolvency if Art XI of the Protocol is excluded by the parties' agreement (see Art IV(3) of the Protocol). By contrast to Art XI of the Protocol, Art 30(3) of the Convention defers to the local law of the insolvency and ensures the Convention will not affect rules of procedure relating to the enforcement of rights to property.

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[4] *Celestial Aviation Trading v Paramount Airways Private Ltd* [2010] EWHC 185, [53]-[55].

Protocol Article XI - Remedies on Insolvency

34. For the purpose of Art XI(1), Australia was the primary insolvency jurisdiction. Australia opted for the 'strong' form Alternative A of Art XI (PJ [117] CAB 52, citing Professor Goode's Official Commentary).

35. Article XI of the Protocol sets out a scheme of "*Remedies on insolvency*", provided the jurisdictional preconditions[5] have been satisfied, and the parties have not contracted out of its application. Notably, Art XI of the Protocol confers the remedies equally on all *"creditors"* (see definition of "*creditor*" in Art 1(i) of the Convention).

36. The effect of Art XI(2) and (3) is to impose a "*waiting period*" (PJ [81]-[84] CAB 43). During the waiting period the insolvency administrator or debtor "*shall preserve the aircraft object and maintain it and its value in accordance with the agreement"* (Art XI(5)). A central issue dividing the parties (and the decisions below) is the effect of Art XI(5).

37. On the Appellants' case, Art XI(5)(a) imposes a maintenance obligation. That obligation subsists "*until the creditor is given the opportunity to take possession"* under Art XI(2). As the primary judge accepted, the creditor can only take possession *after* the lessor has given possession. But the temporal element of Art XI(5) ought not be read as further describing or qualifying Art XI(2) (PJ[93] CAB 46; cf FFC[95] CAB 141).

38. As to the "*Remedies*" (plural) on insolvency provided by Art XI they are as a follows. By a time that is "*no later than"* the end of the "*waiting period*" the administrator or debtor must either:

    (a) "*give possession of the aircraft object to the creditor"* (Art XI(2)); or

    (b) the administrator or debtor can "*retain possession"* if they have "*cured all defaults …under the agreement"* (Art XI(7)).

39. Alternatively, Art XI(8) expedites (in the event of insolvency) the self-help remedies provided by Art IX(1) of the Protocol to ensure the "*remedies*" of deregistration and

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[5] It was accepted before the primary judge (PJ [53] CAB 34) that the jurisdictional preconditions to enlivening the Convention and Protocol were satisfied by the existence of an *"international interest"* within the meaning of Art 2(2) and Art 7 of the Convention; the engines fell within the thrust required by Art I(2)(b) of the Protocol, and were therefore "*aircraft objects"* for the purpose of Art I(2)(c) of the Protocol; and that an *"insolvency-related event"* occurred within the meaning of Art I(2)(m) of the Protocol upon the appointment of the Administrators on 20 April 2020.

export of the aircraft objects are made available by the registry authority "*no later than five working days"* after the creditor gives notice.

40. The balance of the sub-articles in Art XI are facilitative.

41. Article XI(4) ensures that obligations imposed on the administrators are only in their official capacity and "*not in its personal, capacity*". Given the manner in which an administrator under Australian law is liable personally for the their actions in dealing with the insolvent estate[6] - subject to a right of indemnity from the assets of the estate - the Appellants submit that Art XI(4) ought to operate under Australian law by limiting the recourse against an administrator personally.

42. That is to say, under Australian law an administrator will remain personally liable for his or her actions but where the obligation is one arising under Art XI of the Protocol, the extent of any recourse against the administrator will not exceed the scope of the administrator's indemnity from the assets of the estate. Read in that, way Art XI(4) of the Protocol would obviate the need for an administrator to seek express curial intervention to achieve that result.

43. Article XI(9) ensures that no Convention or Protocol remedy *"may be prevented or delayed"* after the 60 days; Art XI(10) ensures that "*[n]o obligations of the debtor under the agreement may be modified without the consent of the creditor*"; and Art XI(12) ensures no rights or interests shall have priority over a registered interest (save for statutory liens declared by the Commonwealth Government to be Air Services liens, which did not apply to the facts of the present case). Article XI(13) (discussed below) has the effect of ensuring the "*commercial reasonableness"* safeguard on the exercise of remedies under the Convention applies equally to the exercise of remedies under Art XI.

A4. Comparison of Protocol Art XI and domestic insolvency law

44. Under domestic law (in the absence of Art XI of the Protocol) the position would be as follows: *first*, the administration is intended to operate only for the period of about a month before the second creditor's meeting is convened under section 436A of the Corporations Act (unless extended); *second*, a moratorium is imposed on enforcement of rights in the property of the company or property used by the

[6] See Division 9 of Part 5.3A of the Corporations Act, in particular sections 443A, 443B and 443D.

company under section 440B, along with the stay of proceedings under section 440D. *Third*, the administrator has a 5 day period under section 443B (which can be extended) in which the administrator must decide whether: to issue a notice stating he or she will not exercise rights in relation to the leased property, or otherwise to pay rent in respect of a lessor's property that is used or occupied by the company.

45. Where Art XI of the Protocol applies, the position of an aircraft (or engine) lessor under an administration is, during the pendency of the 60 day waiting period, in some respects less advantageous compared to the protections under Australian law. That is because the period lasts for 60 days (not the 5 days required for the administrators to make a decision about exercising rights over leased property, or the roughly one month administration period contemplated by the Corporations Act).

46. But the trade-off for that longer waiting period is the stringent obligations imposed on the administrator or debtor, both:

(a) during the waiting period: to *"preserve the aircraft object and maintain"* its value in accordance with the agreement (Art XI(5)); and

(b) at the expiration of the *"waiting period"*:

(i) to "*give possession"* (Art XI(2)); or

(ii) to *"*retain *possession"* only where all the contractual defaults are cured, and agreement has been given to perform all future obligations *"under the agreement"* (Art XI(7)).

47. In either case, however, a clear priority has been established in favour of the lessor holding the international interest. The administrator or debtor is required to expend (in priority to other creditors) the funds of the estate on the maintenance of these technical items in the manner prescribed by the contract. By the end of the waiting period the administrator is required to cure contractual defaults to *"retain possession"*, or must *"give possession"* – and on the Appellants' case must do so consistently with the terms of the agreement if such terms are commercially reasonably.

48. The primary judge recorded (at PJ [107] CAB 49) the clear textual indications that the Protocol enhanced the creditor's position by reference to the parties' bargain.

49. The Appellants' case is that Convention and Protocol were intended to provide protection for an international interest beyond "*conventional secured transactions"* such as a chargee, so that *"the scope of the Convention's 'international interest' also*

embraces the interests of a lessor and a conditional seller of an aircraft object".[7] In insolvency Art XI, Alternative A affords uniform protection to all "*creditors"*. It acknowledges the debtor airline or administrator retains primary responsibility for the physical custody of the aircraft of objects and imposes obligations to maintain and to give possession of them if required, at the cost of the administration.

50. The administrator's failure to comply with those obligations would give rise to a priority claim against the estate. A creditor who discharges the Art XI obligations on the part of an administrator is subrogated to the administrator's indemnity over the assets of the estate. But, consistently with the Appellants' interpretation of Art XI(4) discussed above, cannot seek recourse beyond that indemnity.

B. DECISIONS OF THE COURTS BELOW

B1. Decision of the Primary Judge

51. The primary judge indicated the result at the conclusion of an expedited hearing on 31 July 2020. Following further hearings as to the form of orders, orders were made and reasons were published on 3 September 2020.

52. The primary judge considered the ordinary meaning of "*give*" in Art XI(2) was an active verb connoting positive action: PJ [92] CAB 45. His Honour contrasted that with the phrase in Art XI(5) "*given the opportunity to take possession under paragraph 2*". His Honour held that "*the opportunity to take possession*" can arise only once the administrator has *given* possession: PJ [93] CAB 46.

53. The primary judge held that Arts XI(13) and IX(3) of the Aircraft Protocol require that the remedy available to the Appellants (ie their right to be given possession) must be exercised in a manner that is "*commercially reasonable*" (PJ [86] CAB 44). It followed that the aircraft objects were required to be redelivered to Florida in accordance with the underlying Leases – there being no suggestion that that obligation was manifestly unreasonable: PJ [87] CAB 44. The primary judge summarised the interplay between the requirement on the creditor to exercise its remedy reasonably, and the text of Art XI as follows (PJ [110] CAB 50):

> 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

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[7] Charles W Mooney Jr, '*The Cape Town Convention's Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application*' (2014) 55(1) Virginia Journal of International Law 163 at 165.

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.

54. The primary judge concluded that such a construction was consistent with the objects and purpose of the Protocol (as enacted in Australian law). The primary judge concluded that the "*give possession"* obligation was "*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*": PJ [118] CAB 53.

55. The primary judge recognised that engines records are a vital part of the commercial value of the engines (see PJ [133] CAB 56 citing Gray, et al).[8] The primary judge's orders required the Respondents to provide three different categories of records that were recognised under the prescriptive terms of the Leases:

(a) "*Historical Operator Records*", being those records created by the Virgin entities while they used the objects (Order Schedule 2, para 7(a) CAB 14);

(b) "*End of Lease Operator Records*", being records to be issued by the Respondents by taking positive steps at the end of the lease, for example, to certify that the engines had not been in an incident (Order Schedule 2, para 7(b) CAB 14);

(c) "*Lease Inspection Records*", being records that could only be obtained from an FAA or EASA approved engine repair shop following inspection of the engines after their return (Order Schedule 2, para 7(c) CAB 15).

B2. Decision of the Full Court

56. An expedited hearing took place in the Full Court on 22 September 2020 and orders allowing the appeal were entered on 7 October 2020. Their Honours held that Art XI(2) requires nothing more than that the administrator "*must do that which is necessary to pass to the creditor the form of possession that the creditor could have taken in the exercise of the self-help right to possession*": FFC [106] CAB 144.

57. The Full Court held that the primary judge had erred in applying the "*commercially reasonable*" standard in Art IX(3) to determine the content of the obligation in Art XI(2): FFC [101] CAB 143. For the Full Court, the underlying contract between

[8] The definition of "*aircraft objects*" includes "*aircraft engines"* which includes "*all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto"*: Art I(2)(b). See also the Statement of Agreed Facts [38] CAB 80.

the parties was irrelevant to the obligation in Art XI(2). Their Honours held that Art XI(5) supported their interpretation of Art XI(2), construing the words "*given the opportunity to take possession*" in the former as signalling the content of the obligation imposed by the words "*give possession*" in the latter: FFC [95] CAB 141.

58. The Full Court also saw no material difference in the wording of Alternative A's obligation to *"give"* possession compared to Alternative B's obligation merely to give an "*opportunity to take"* possession: FFC [96] CAB 141.

59. The practical effect of the Full Court's decision is that Art XI(2) is indistinguishable from the creditor's existing rights to a "*self-help*" remedy to retrieve the aircraft object wherever in the world it happens to be: see FFC [106] CAB 144.

60. It followed on the Full Court's view that the "*commercial reasonableness*" constraint in Art IX(3) only: "*qualif[ies] the manner in which the self-help right to take possession and the right to enforce the agreement to the extent permitted by domestic law may be exercised"*: FFC [90] CAB 140. The Full Court did not expressly consider Arts XI(13), or XI(8) and erred in its consideration of the effect of Art IX(3).

61. The Full Court recorded the reasons of the primary judge that dealt with Art XI(13): FFC [52] CAB 124-125; and Respondent's submission on the issue: FFC [69] CAB 134. But the Full Court failed to record the Appellants' submissions in that respect.

62. Further, the Full Court reasoned that construing Art XI(2) to permit the survival of redelivery obligations on a debtor, even after entry into administration, would result in a "*reworking of generally accepted principles of insolvency law"* because it would confer priority on the lessor creditor: FFC [102] to [105] CAB 144. The Full Court did not provide any explanation of how such "*reworking*" was said to be contrary to the purposes of the Convention and Protocol. Without any explanation the Full Court concluded at FFC [107] CAB 144:

> Art XI(10) instead imposes constraints upon the enforcement of those obligations, and makes clear that if a domestic insolvency regime otherwise permitted a court to modify the agreement, it may no longer do so.

63. With respect, Art XI(10) is incapable of yielding any interpretation that would support the conclusion that it imposes constraints upon enforcement of agreed obligations upon insolvency.

64. The Full Court's reasoning does not account for why the Protocol would make expressly clear that a debtor's obligations are unmodified, but at the same time (one assumes implicitly) restricts the creditor's enforcement of such rights.

65. Instead, the Full Court's reasoning upsets the balance between the rights of lessors who hold an international interest on the one hand and airline lessees on the other.

66. Contrary to FFC [103]-[105] CAB 143-144 it was "*tolerably clear*" that the Protocol was intended to provide priority to the claims of aircraft lessors.

67. The text of Art XI(9),(10),(12),(13) indicated that aircraft creditors with an international interest were intended to obtain priority for their claims, that the contractual obligation on the debtor survived insolvency, and that a debtor who invoked Art XI(2) in a manner consistent with the contractual regime for redelivery would be deemed to be acting commercially reasonably.

68. It was consistent with the purposes of the Protocol to impose an obligation of returning physical possession on the administrator or the airline, especially when it is remembered that the circumstances of an airline administration involve:

(a) highly technical equipment that can only be maintained, operated, and removed by approved technicians which usually include the airline's own technical team lest there be safety risks to other equipment in the fleet;

(b) the need for detailed records to be provided at the end of lease, including delivery of documents already in existence as well as certifying the status, usage and condition of the aircraft objects – matters which are known only to the debtor airline (see PJ's Orders, Schedule 2, paragraph 7 CAB 14-15);

(c) the need to relocate aircraft or engines where the airline is the entity with existing regulatory clearances to undertake ferry flights of aircraft or engines to different locations (as was required in this case (PJ [125] CAB 54)); and

(d) a coordinative exercise in disentangling the aircraft objects from both the airline's or third party's equipment and airframes.

69. It made sense for the Protocol to "*rework"* (see FFC [105] CAB 144) or in effect recalibrate the relationship between the creditors and insolvency administrators in respect of aircraft objects. That change reflects the purpose of the Convention and Protocol. The Protocol assimilates the remedies and priorities available to all creditors, and ensures they benefit from the positive obligations to give possession. It ensures the costs and coordination of the redelivery exercise fall upon a single

administrator in control of the debtor and not an array of creditors with divergent interests. And, in light of those assurances, the Protocol aimed to reduce risks on insolvency for financiers and deliver cheaper aircraft financing to airlines.

Summary of Full Court's errors

70. To summarise the errors of the Full Court. *First*, it misconstrued the statutory wording to require something less than physical delivery: FFC [101] CAB 143. *Second*, it devised a test for the application of Art XI(2) that was untethered from any statutory foundation and instead deployed terms not found in the text (e.g. *"necessary" "form of possession"* and "*self-help right to take possession*"): FFC [106] CAB 144. *Third*, it ignored the distinction in wording between the Alternative A and Alternative B, and misconstrued Art XI(5) as confirming the content of Art XI(2): FFC [95]-[96] CAB 141. *Fourth*, it ignored Art XI(13) and found that the application of Art IX(3) was subject to "*domestic insolvency law"*: FFC [90] CAB 140. *Fifth*, it concluded, without explanation that Art XI(10) imposed *"constraints on enforcement". Sixth*, the consequentialist reasoning as to the effect on insolvency administrators ignored the clear words and obvious intent of the Convention and Protocol that those with an international interest were to take priority over other claims: FFC: [103]-[105] CAB 143-144.

C. ARGUMENTS ON APPEAL

C1. Ordinary meaning of "*give possession*" under Art XI(2) Alternative A

71. Article XI(2) imposes a limitation on the rights of creditors who hold an "*international interest*" by imposing a moratorium on enforcement for "*the waiting period*": Art XI(3).

72. Upon the expiration of the waiting period (declared by Australia to be 60 days), the debtor/lessee and the insolvency administration are required by mandatory language ("*shall"*) to "*give possession of the aircraft object to the creditor*".

73. As to the *"give"*, the Full Court at FFC [101] CAB 143 had read into Art XI(2) words that were not apparent to reduce it to an obligation to "*give the opportunity to take possession"*.

74. The Full Court fell into error in construing the relationship between Arts XI(2) and XI(5). At FFC [95] CAB 141 their Honours reasoned that the words in Art XI(5) "[u]*nless and until the creditor is given the opportunity to take possession under paragraph 2*" confirms that the content of Art XI(2) is merely to confer a self-help

remedy on the part of the creditor to retrieve its aircraft object from wherever it happens to be. That is not so.

75. Those words in Art XI(5) are in no way inconsistent with the Appellants' contentions. Article XI(5) does no more than signify the giving of possession as the precursor to the creditor taking it. Article XI(5) does not diminish or otherwise qualify the content of the primary obligation found in Art XI(2). Instead Art XI(5) is concerned with the debtor's obligation to maintain the objects while they remain in *physical* possession. As the primary judge concluded at PJ [93] CAB 46:

> 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.

76. The Full Court erred by assimilating the command to '*give'* possession, with the opportunity to take it. The same error lay at the heart of its (erroneous) assimilation of the quite different obligations required of administrators or airlines in the Alternative A & Alternative B of the Protocol: FFC [96] CAB 141.

77. As to "*possession*". This Court has endorsed the proposition that the meaning of "*possession*" must depend upon the context.[9] In the present case, the immediate statutory context is telling: "*possession"* is surrounded by *"give",* the active verb discussed above, and *"aircraft object"* which is defined to include physical objects.

78. The obligation to "*give possession*" cannot be narrowed from its ordinary meaning by supposing that "*possession*" in the context of the Convention and Protocol is something short of physical possession. It is the *physical* possession of an aircraft object (for use by an airline) that is the genesis of a commercial bargain between a lessor and lessee. Articles 2 and 7 of the Convention establish an *"international interest"* that vests in a lessor of a "*leasing agreement*"- being an agreement by which a lessor "*grants a right to possession or control of an object*": Art 1(q).

79. Article XI(2) does not require merely that a lessee relinquish its "*right to possession"*. But rather by mandatory language requires that it "*give possession*" to the creditor.

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[9] *Federal Commissioner of Taxation v ANZ Banking Group* (1979) 143 CLR 499, 504 (Stephen J).

C2. The effect of Article XI(13) and IX(3)

80. The Full Court wrongly concluded that for the Appellants to prevail, it would be necessary to read into Art XI(2) the words: "*in accordance with the agreement between the parties*": FFC [94] CAB 141. That error arose from the Full Court's failure to consider Art XI(13).

81. Article XI(13) imposes a mandatory condition upon the exercise of all remedies under the Alternative A Art XI: *"[t]he Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article*".

82. Article XI(13) requires close attention; it is in two parts. The text after the words "*shall apply"* clearly describes a condition or constraint upon the exercise of "*any remedies*" under Art XI. The earlier words in Art XI(13) describe the nature of the constraint. By reference to Art IX of the Protocol that constraint is the requirement for "*commercial reasonableness*".

83. Article IX(3) does three separate things. First, it disapplies the distinction between secured creditors and lessors derived from Art 8(3) of the Convention. Second, it imposes a requirement that any remedy shall be exercised in a commercially reasonable manner. Third, the final sentence of Art IX(3) establishes a safe harbour provision by, providing that "*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*." (There was no suggestion in this case that the redelivery obligations in the Leases were manifestly unreasonable.)

84. Expressed more simply Art XI(13) when read with Art IX(3), in effect, says: "*insofar as Article IX(3) of the Protocol modified the Convention by imposing a commercial reasonableness constraint on the exercise of remedies, so too will that constraint apply to any remedy in Article XI of the Protocol"*.

85. In the context of Art XI(13) "*exercising"* a remedy should be interpreted as "*invoking*" or "*seeking*" a remedy. The effect of Art XI(13) is that a creditor was not at liberty to demand any unreasonable form of transfer of possession, in any location. The parties have certainty and predictability (in accordance with the objects of the Convention) as to the limits of the obligation because a request for redelivery "*in conformity with a provision of the agreement"* will be deemed to be commercially reasonable: Art IX(3).

86. As a matter of construction, it ought to be remembered that Art XI is entitled "*Remedies on insolvency*" (plural). Article XI(13) is directed to the "*exercise of any remedies under this Article*" (plural). The Respondents' construction led to the incongruous result that Art XI contains only one true "*remedy*" which must be "*exercised*" pursuant to the "*commercially reasonable*" constraint, being the remedy of deregistration and export: Arts XI(8) (and IX(1)). It also raises the question what was the need for the Art XI(2) obligation to "*give possession*" if Art XI(8) already afforded a means to "*take*" possession?

87. Moreover, attention must be paid to the manner in which both the Convention and Protocol refer to "*remedies"* and their exercise:

(a) Article 8 of the Convention uses the phrase *"exercise any one or more of the following remedies"* to refer to the "*rights*" to take possession, sell the object, or collect income from it;

(b) Article 10 of the Convention uses the term "*Remedies of conditional seller or lessor*" in the title, but makes no further express reference to the exercise of such a remedy;

(c) Article 11 of the Convention refers to the *"rights and remedies specified in Articles 8 to 10 and 13"*;

(d) Article 12 of the Convention describes as "*additional remedies"* any *"remedies agreed upon by the parties"*; but provides they *"may be exercised to the extent that they are not inconsistent"* with the mandatory provisions of the Chapter. That is to say, in the present case, Art 12 would treat the agreed contractual right to insist on redelivery as a "*remedy"*;

(e) Article 54(2) of the Convention entitled "*Declarations regarding remedies*" expressly contemplates that "*any remedy available to the creditor under any provision of the Convention*" may be exercisable without need for an application to a Court. Article 54(2) provides scope for Contracting States to declare limitations on the exercise of remedies so that they can be "*exercised*" only with leave of the Court;

(f) Article IX(1) of the Protocol explains that it applies "*in addition to the remedies*" in the Convention; Art IX(2) refers to *"exercise the remedies"* of

procuring de-registration and export; while Art IX(3) insists that such remedies must be exercised in a commercially reasonable manner;

(g) Article XI(6) refers to the "*remedies*" in Art IX(1), and Art XI(6)(a) says that the "*creditor is entitled to procure those remedies"*; while Art XI(6)(b) requires the authorities to "*co-operate with and assist the creditor in the exercise of such remedies"* (see also Art XIII(4)).

88. Two observations can be made about the use of the term "*remedies*" in the text of the Convention and Protocol. First, it applies to both rights granted to a creditor by the Convention and Protocol itself, as well as to rights – here described as remedies – conferred by the parties' agreement.

89. Second, the "*exercise"* of those remedies contemplates the performance of obligations by the party with a correlative obligation, be it the debtor, or the "*authority*" who must assist.

90. In that statutory context, it is consistent with the usage of the term to understand the exercise of remedies as applying to the invocation of rights under the Protocol, and to reading Art XI(13) as imposing a limitation on the manner in which a creditor can insist on the performance of the obligation to "*give possession"*.

C3. Application to the present facts

91. In light of the above interpretation, the Appellants' case is summarised by these propositions: (1) the Art XI(2) obligation to give possession is an obligation to give possession of physical objects; (2) a lessor is constrained by commercial reasonableness in enforcing its right to be given possession: Art XI(13) and IX(3); and (3) the Appellants sought to be given possession in accordance with the terms of the Leases that fell within the "*commercially reasonable*" safe-harbour, and no attempt was made to demonstrate that the terms were manifestly unreasonable.

92. The effect of the above is that the parties' bargain, as recorded in the Leases, still had operation following an event of insolvency in a number of ways. Article XI(2), (9), (10) and (13) ensure that the redelivery provisions are preserved in an insolvency.

93. As a consequence, it may be necessary for the insolvency administrator to expend funds of the airline lessee in undertaking redelivery. The Appellants' case is that that is the very priority provided by the Convention and Protocol that reduces risks to those financing the airline industry. As the primary judge found at PJ [108] CAB 50,

an approach which respects and preserves the underlying contractual rights and obligations of the parties "*is consistent with the text and context of Art XI … even if it comes at the cost of other creditors*".

D. THE NOTICE OF CONTENTION

94. The Appellants will respond in full after submissions have been received on the Notice of Contention. In short, however, the Notice of Contention overlooks the centrality of physical possession and physical responsibility imported by Art XI(2), (5) and (7).

95. On the Respondents' case the giving of possession in Art XI(2) requires the Court to read into the words of Art XI(2) an (otherwise undisclosed) separation between legal possession and physical custody. That interpretation seems unlikely when it cannot be applied equally to Art XI(7) where both context and the ordinary meaning suggest Art XI(7) means "*retain"* both legal possession and physical custody in a unified sense.

96. It remains entirely unclear what it is the Respondents envisage that they would have conveyed by mere disclaimer of the aircraft objects? Or how that resembles the "*giving*" of possession?

97. In truth the Respondent's case involves no "*giving*" at all, but merely a concession of a right to possess. It appears the Respondent suggests that by disclaiming or yielding possessory title the Appellants then stood in sufficient "*relationship"*[10] to their chattels to be considered as holding a form of constructive or legal possession divorced from physical custody – that is, the Appellants acquired a right to possess separated from physical possession.[11] That appears to be premised on the assumption that at the point of the disclaimer, the Appellants could then exercise their self-help rights to take physical custody and achieve actual completion.

98. That argument has several flaws. First, it introduces undue complexity that is not apparent from the clear words. Second, it has the effect of overriding the contractual right to be given possession (contrary to insulation of those terms from modification provided by Art XI(10)). Third, it is not apparent why the elaborate mechanism of Alternative A XI(2) is necessary at all, as it amounts to saying no more than – "*at the*

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[10] See the submission recorded at FFC [58] CAB 128, by reference to *Hocking v Director-General National Archives of Australia* (2020) 94 ALJR 569, 591 [89]

[11] Pollock and Wright, *An Essay on Possession in the Common Law*, 1888, p 27.

end of the waiting period the lessor can exercise a right to take possession" which is an ordinary incident of their proprietary rights.

99. Fourth, and most importantly, it ignores the central problem the Protocol was trying to solve, which was to ensure certainty and security over mobile aircraft objects that can end up anywhere in the world and require a degree of coordination on the part of the airline and administrator to retrieve. It is this coordination that the airline and administrator are best placed to undertake (see PJ [125] CAB 54).

PART VII: ORDERS SOUGHT BY THE APPELLANTS

100. The Appellants seek the orders set out in the Notice of Appeal at CAB 166.

10 101. The relief contemplated by Order 6(d) of the orders sought in the notice of appeal is intended to ensure all of the costs (not just those spent *"in complying with Orders 5 to 8"* which were eventually set aside) are treated as costs of the administration.

102. That relief ought to be uncontroversial. It will ensure that to the extent either party has expended any such costs, they can be paid in priority as costs of the administration under the terms of the Creditors' Trustee Deed, arising out of the deed of company arrangement.

PART VIII: TIME REQUIRED FOR PRESENTATION OF ORAL ARGUMENT

103. The Appellants estimate they will require 2 hours for oral submissions in chief plus a reply of not greater than half an hour.

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Dated 29 May 2021

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ANNEXURE

Legislation (as in force at 20 April 2020)

1. *Corporations Act 2001* (Cth) ss 436A, 440B, 440D, 443A, 443B, 443D.
2. *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) ss 7 and 8.
3. *Convention on International Interests in Mobile Equipment*, signed at Cape Town on 16 November 2001, Arts 1(i), 1(q), 2, 5(1), 5(3), 6(1), 6(2), 7, 8, 10, 11, 12, 30, 54(2).
4. *Protocol to the Convention on International Interests in Mobile Equipment Matters Specific to Aircraft Equipment*, signed at Cape Town on 16 November 2001, Arts I(2)(c), II, IV(2), IV(3), IX, XI Alternative A and Alternative B, XIII(4), and Declarations lodged by Australia under the Aircraft Protocol at the time of the deposit of its instrument of accession.