HIGH COURT OF AUSTRALIA

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### Important Information

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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

# OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANTS

**Part I: Certification**

This outline of oral submissions is in a form suitable for publication on the internet.

**Part II: Outline of Propositions**

**The obligation to "give possession" in Alternative A Art XI(2) arises from two choices**

1. First, the choice by the Commonwealth to declare under Art XXX(3) of the Protocol that Alternative A of Art XI would apply at time of acceding to the Convention and Protocol (JBA 1/11/116; 1/13/123) and to enact the provisions with precedence over other laws: ss7 and 8 of the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) (JBA1/3/20-21), see also Second Reading Speech: PJ[115] CAB 51
   (a) Text of the Convention AS[27]-[33]
   (b) Text of Protocol AS[34]-[43], [71]-[90]; AR[11]-[12]
   (c) Art 11(1) of the Convention parties can agree what constitutes an event of default;
   (d) Art IV(3) of the Protocol (i) confers a choice on the parties to exclude Art XI; and (ii) prohibits contracting out of IX(2)-(4) which includes the commercial reasonableness safeguard
2. Second, the choice by the parties to the leases not to exclude Art XI of the Protocol.
   (a) AS[12]-[15]; FFC [19]-[27]
   (b) Engine Lease Agreements (**Leases**): Article I incorporates the General Terms Engine Lease Agreement (**GTA**); Art III redelivery in Florida; Art XIII Return of Equipment (ABFM 67, 70); Art XVIII representation that Lessee in a contracting state for Cape Town Convention
   (c) GTA: cl 3(c)(ix) contemplates Cape Town Convention Registration (ABFM 12); cl 15 lessee obliged not to permit liens to be imposed (ABFM 27); cl 7(c) records to be returned on redelivery (ABFM 18); cl 18.3(f) redelivery to the US; cl 18.3(h) detailed shipping requirements for engines (ABFM 36); cl 19 (xvii) events of default include events of insolvency, and will constitute default for Cape Town Convention (ABFM 39); cl 19(b)(iii)(c) on default lessor can ask for return of equipment, or may take possession (ABFM 41).

**Essential facts**

3. Statement of Agreed Facts (**SAF)** CAB 73-82; AS[8]-[21]; AR[2], [5], [6], [8].
4. Four engines attached to four different aircraft (not owned by the Appellants). Engine in Adelaide could not be removed, it had to be ferried to Melbourne: PJ [125] CAB 54.

5. Engines records are a vital part of the commercial value of the engines (see PJ [133] CAB 56 citing Gray, et al). Engine records not provided until 17 July 2020 (after commencement of proceedings): PJ[176] CAB67; AS [20], [55]; AR[8].

**The Court's interpretative take will not be assisted by supplementary means of interpretation**

6. There is no dispute that the primary judge and the Full Court applied the correct principles to the interpretation of an international treaty incorporated into domestic law: AS[25]-[26]; RS[16], Arts 31, 32 *Vienna Convention* (JBA 1/14/125).

7. But this is not a case in which the Court will be assisted by *travaux préparatoires* (PJ[151] CAB60; FFC[108] CAB 145).

8. If there were foreign judgments of other Courts considering the interpretation of Art XI(2) that would be of assistance in achieving uniformity – but there are no such cases.

9. A survey of antecedent municipal statutes and cases by their very nature cannot assist in the interpretation. See eg US statutes and cases rejected at PJ[126], [134] CAB 54, 56.

**The primary judge was correct to find that the ordinary meaning of "give possession" required physical return in accordance with the commercially reasonable terms of the agreement**

10. The primary judge held: "give" in Art XI(2) was an active verb connoting positive action: PJ [92] CAB 45. Contrasted with Art XI(5) temporal description of passing of risk. The "opportunity to take possession" arises only after possession is given: PJ [93] CAB 46.

11. The primary judge recognised the centrality of the parties' bargain in the text of the Protocol: PJ[107] CAB49. Predictability and uniformity is achieved by honouring the parties' bargain PJ[98] CAB47. Art XI(13) and IX(3) required redelivery in commercially reasonable manner, which in this case was consistent with the redelivery obligations in the contract: PJ [110] CAB 50.

12. Text and context of Art XI consistent with giving effect to parties' agreed remedies, even if it comes at the cost of other creditors: PJ[108]; CAB 50. It was consistent with the object and purpose of the Convention and Protocol that "give possession" may be more onerous than any local law or the disclaimer in s 443B of the Corporations Act: PJ [118] CAB 53.

**The outcome of the Full Court's decision is problematic**

13. The Full Court devised a test for the application of Art XI(2) that was untethered from the text and introduced 'necessity', and 'form of possession' FFC [106] CAB 144; and destroys predictability and uniformity cf PJ [98]-[99] CAB47, AS[26], [85]; AR[9]. It ignores the primacy of the parties' bargain, without addressing PJ [107] CAB49.

**The errors in the Full Court's reasoning**

14. The errors in the Full Court's reasoning AS[56]-[69]. Summarised at AS [70].

15. Full Court's central errors:

    (a) did not treat Art XI(5) as primarily directed to imposing a maintenance obligation and the describing when risk passes: AR[10]; cf FFC [95] CAB 141.

    (b) assimilated Alternative A (*"give"* possession) with Alternative B's ("*opportunity to take"* possession): AS [76], AR[15] cf FFC [96] CAB 141.

    (c) did not expressly consider Arts XI(13), or XI(8): AS[80]-[90]; AR[13];

    (d) held that Art XI(10) "imposes constraints" on enforcement: AS[63] FFC[107] CAB 144

16. Full Court's consequentialist concern for "reworking of generally accepted principles of insolvency law" (FFC [102] to [105] CAB 144) was in error.

17. First, it is not clear which principles are said to be reworked. Art XI provides for a principled and orderly process, and protects secured creditors both of which are common aims of insolvency. Second, the text of Arts IX(3),XI(5),(7),(9),(10),(12),(13) demonstrates the primacy of the contract survives the insolvency event and is given priority. Third, the fact specific concern is not a matter of principle, and in any event this was a well-resourced administration (see AR[7], and Appellants' Amended Chronology).

18. Appellants' comparison with domestic insolvency AS[44]-[54]; AR[5]-[6] demonstrates that the Respondents' construction provides little if any benefit: cf RS[53],[64].

**The Notice of Contention must fail**

19. AS[94]-[90].

20. The Respondents' construction renders Art XI(2) indistinguishable from a right to take possession AS[59], [98]; and overlooks the centrality of physical possession and physical responsibility imported by Art XI(2), (5) and (7); and overrides the contractual right to be given possession (contrary to Art XI(10)). It ignores the central problem the Protocol was trying to solve of certainty, security, and coordination of mobile assets that the airline and administrator are best placed to undertake (see PJ [125] CAB 54), it offers no comfort to a creditor trying to obtain objects in disparate locations, including records: AR[2],[8]

**Relief**

21. Notice of Appeal 6(a)-(d) CAB169; AR [17]. Consistent with Orders sought in Respondents' Amended Interlocutory Process Order 5 before the primary judge RBFM 18.

3 November 2021

**Bret Walker** Fifth Floor St James' Hall