HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S60/2021
File Title:	Wells Fargo Trust Company, National Association (as owner tı
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondents
Date filed:	25 Jun 2021

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

WILLIS 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

RESPONDENTS' 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 ultimate question is whether the obligation to "*give possession*" of aircraft objects to a "*creditor*" under Art XI(2) (Alternative A[1]) of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (**Protocol**) requires an insolvency administrator (**IA**) or debtor, as applicable,[2] to redeliver those aircraft objects in accordance with provisions governing the return of such objects in an existing agreement between the parties, at the expense of the IA (and, ultimately, the insolvent estate). This will involve the determination of two issues.
3. *First*, should the obligation to "*give possession*" in Art XI(2) be construed to require the physical redelivery of aircraft objects to creditors? (**No**: see Sections C.1 and D below.)
4. *Secondly*, do Arts XI(13) and IX(3) of the Protocol somehow give content to the obligation to "*give possession*" in Art XI(2), such that the alleged physical redelivery obligation/remedy is given content by the applicable lease return provisions? (**No**: see Section C.2 below.)
5. Unless the Court concludes that the obligation to "*give possession*" requires <u>physical redelivery</u>, whether by reference to Arts XI(13) and IX(3) of the Protocol or otherwise, the appeal (which is essentially a dispute over redelivery costs) must be dismissed.

PART III: SECTION 78B NOTICE

6. No s 78B Notice is considered necessary.

PART IV: MATERIAL FACTS

7. Two matters in the Appellants' recitation of facts in in their submissions (**AS**) at [8]-[21] require correction, and one requires elaboration. Unless otherwise stated, the Appellants' defined terms are adopted in these submissions for ease of reference.
8. *First,* it is not correct to contend that the Leases "*obliged*" the lessee to "*redeliver leased equipment free of all liens (other than the lessor's liens)*" (cf AS[13]). In fact, cl 19(b) of the Leases granted the lessor the right to elect to exercise "*one or more*" of a series of remedies on a "*Default or Event of Default*" (including an *"Event of Insolvency*": cl 19(a)(xvii)). These included but were not limited to a demand that the lessee promptly

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[1] All references to Art XI in these submissions are references to Alternative A, unless otherwise stated.
[2] The term "*IA*" will be used as a convenient shorthand to refer to the "*IA or debtor, as applicable*".

return the leased equipment. As such, an obligation to redeliver would only arise upon the lessor electing to pursue that remedy: see cl 19(b); Appellants' Book of Further Materials (**AFM**) 40-41. Importantly, as an alternative to demanding the return of the leased equipment, cl 19(b)(iii)(C) permitted the lessor to "*enter upon the premises where such Equipment is located and take immediate possession of and remove the same…*" The Leases thus provided for both a redelivery remedy and a possessory remedy, with the lessor to make a choice between them at its election.

9. *Secondly*, it is also not correct to say that the Respondents "*chose not to give possession in any practical or meaningful way*" (cf AS[18]) or that the Respondents "*failed to 'give possession' of either the engines themselves or the valuable engine records*" before the Appellants approached the primary judge (cf AS[21]). The various steps taken to "*give possession*" of the aircraft objects are set out at PJ[35]-[46] (CAB 31-33) and did involve the giving of possession in a practical and meaningful way. As these paragraphs also reveal, the process of providing the Appellants with technical records did in fact commence prior to the institution of proceedings (cf AS[20]).

10. *Thirdly*, the matters set out in AS[19] require elaboration. While it is accepted that the recovery of aircraft objects by the Appellants would have required a number of physical acts, there is no evidence or basis in judicial notice for the Court to assume that completing such tasks would be in any way more difficult for aircraft lessors such as the Appellants to complete than for an IA carrying out a major restructuring of an insolvent debtor with limited or no access to funds and technical capabilities.

PART V: ARGUMENT

A. Legislative context

11. This appeal concerns the construction of an article of the Protocol, which, together with the Convention on International Interests in Mobile Equipment, done at Cape Town on 16 November 2019 (**Convention**), has the force of law in Australia by reason of s 7 of the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) (**CTC Act**).

12. The provisions of the Protocol and the Convention are dealt with in detail below. It suffices to note, for present purposes, that the Convention applies to international interests in certain categories of mobile equipment and associated rights (Arts 2-4[3]) and

[3] Articles of the Convention use Arabic numerals, whereas articles of the Protocol use Roman numerals.

the Protocol applies the Convention to "*aircraft objects*" in the terms stipulated in the Protocol (Art II(1)). The Protocol has controlling power over the Convention with respect to "*aircraft objects*" (Arts 6(2), 49(1)(b); Art II(1)).

13. The present dispute concerns Art XI of the Protocol. That Article only applies where a Contracting State has made a declaration under Art XXX(3), and to the extent stated in such declaration: Art XI(1). Australia has declared that it applies Art XI Alternative A.

14. Alternative A requires the IA, by the end of the "*waiting period*" or any earlier date on which the creditor would otherwise be entitled to possession under the applicable law, either (a) to *"give possession*" of the aircraft object to the creditor; or (b) to cure all defaults (other than a default constituted by the opening of insolvency proceedings) and to agree to perform all future obligations under agreements. Australia has defined the "*waiting period*" for the purposes of Art XI(3) to be 60 calendar days. The effect of Alternative A is to restrict the operation of the relevant domestic insolvency law by precluding any order or action which would prevent or delay the exercise of remedies after the expiry of the "*waiting period*" or would modify the obligations of the debtor without the creditor's consent: Goode[4] at [5.66].

15. The Convention and the Protocol are done in a single original in English and five other languages, with all texts being equally authentic.[5] In the urgent circumstances in which this case was heard at first instance and then on expedited appeal, the parties relied only upon the English text of the Convention and Protocol. Translations of the non-English texts were not received in evidence, and those texts were not the subject of submissions. This Court is constrained by how the case was run below, and must consider the question of construction by reference to the English text alone. While the Appellants sought to rely upon the French text in their special leave application, the French text is not referred to in the AS, and it is assumed that the point is not pressed.

B. Uncontentious matters

16. The Respondents understand that the following matters are uncontentious. *First*, the principles relevant to the construction of an Australian statute that wholly incorporates a treaty, such as the CTC Act, are as set out in the Full Court's decision (**FC**) at [56] CAB 127-128, and the cases there cited (see AS[25]-[26]).

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[4] Sir Roy Goode's Official Commentary to the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Objects (4th ed) (**Goode**).
[5] See the notation at the end of each of the Convention and Protocol; Goode at [4.384]; Art 33 of the United Nations Convention on the Law of Treaties, Signed at Vienna 23 May 1969, Entry into Force: 27 January 1980.

17. *Secondly*, there is a fundamental dichotomy between self-help and court-authorised remedies in Convention and Protocol. For example, Arts 8(1) and 10(a) of the Convention provide for self-help remedies, whereas Arts 8(2), 10(b) and 13 provide for court-authorised remedies.[6] Similarly, Art IX(1) of the Protocol provides for self-help remedies, whereas Art XI(5) Alternative B provides for a court-authorised remedy.

18. *Thirdly*, remedies made available under the Convention continue to exist in the world governed by the Protocol, albeit subject to modification in certain respects (see, for example, Protocol Art IX(3)). Specifically, the "*Default remedies*" in Ch III of the Convention, including the self-help remedies of "*tak[ing] possession*" of objects under Arts 8 and 10, are available in respect of "*aircraft objects*" (see Art IX(1)). It is not the case that the Protocol provides the immediate and direct source for the full range of remedies which may be available to a "*creditor*" in respect of "*aircraft objects*". The Full Court understood this position correctly: FC[86]-[92] CAB 139-140.

19. *Fourthly*, creditors do not have a right to redelivery of "*aircraft objects*" under Art 8 or Art 10 of the Convention (as applicable). Leaving aside the Protocol, any such right would only arise (if at all) under Art 12 of the Convention, which provides that additional remedies may be exercised, "*including any remedies agreed upon by the parties*", to the extent that such remedies are (relevantly) "*permitted by the applicable law*". In the present case the redelivery remedy in the Leases is not permitted by the applicable law; the ability to enforce such a remedy is stayed pursuant to s 440B of the *Corporations Act 2001* (Cth). As such, the Appellants do not claim under Art 12 in this case.

20. *Fifthly*, while Art XI(2) imposes a mandatory obligation on the IA to "*give possession*" of aircraft objects within a specified time (subject to Art XI(7)), the creditor is not bound to take possession; it may do so if it wishes (see, for example, Goode at [5.65]; see also *In the matter of AirAsia X Berhad v BOC Aviation Limited* (WA-24NCC-467-10/2020) (High Court of Malaysia) at [290]).

C. The Appellants' construction of Art XI(2) should be rejected

21. The Appellants' case may be reduced to three propositions (see AS[91]). *First*, the obligation in Art XI(2) to "*give possession*" requires the physical transfer of custody of aircraft objects; that is, redelivery (AS[78]). *Secondly*, a lessor is "*constrained by*

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[6] The exercise of Convention self-help remedies in a Contracting State may be controlled by the State via a declaration under Art 54(2). Australia has not so acted: see Australia's Declaration under Art 52(2) that all self-help remedies under the Convention "*may be exercised without leave of the court*". See also Art XXX(1) of the Protocol.

commercial reasonableness in enforcing its right to be given possession", by reason of Arts XI(13) and IX(3) (AS[90]). *Thirdly*, because the Appellants in the present case "*sought to be given possession in accordance with the terms of the Leases*", this apparent "*exercise*" of the "*remedy*" of "*be[ing] given possession*" falls within the 'commercially reasonable' safe-harbour in Art IX(3) (AS[91]).

22. For the reasons that follow, the first contention should be rejected, the second proceeds on a flawed premise and is therefore misconceived, and the third does not arise.[7]

C.1 "Give possession" does not require redelivery

23. The Appellants need to demonstrate that the obligation to "*give possession*" in Art XI(2) requires nothing less than the physical transfer of custody of aircraft objects to a "*creditor*" in order to succeed. Two key arguments are put forward in support of this conclusion at AS[78]-[79]: first, physical possession "*is the genesis of a commercial bargain between a lessor and lessee*"; and secondly, the "*ordinary meaning*" of an obligation to "*give possession*" requires the physical transfer of custody.

24. ***Leasehold Interest:*** The argument based on a leasehold interest can be dealt with succinctly. As the Appellants acknowledge at AS[35], Art XI "*confers the remedies equally on all 'creditors' (see definition of 'creditor' in Art 1(i) of the Convention)*". Thus the benefit of the obligation to "*give possession*" extends beyond lessors to chargees and conditional sellers. Yet physical possession is not the "*genesis of a commercial bargain*" between chargor and chargee – to the contrary, chargees often have no entitlement to physical possession of the secured object at all. This is recognised in Art 8 of the Convention, which provides that the remedy of "*taking possession*" is only conferred on chargees "*to the extent that the chargor has at any time so agreed*" (cf the position in respect of lessors and conditional sellers in Art 10). In those circumstances, even if physical possession is central to many leasing agreements, that does not support the conclusion that the obligation on IAs to "*give possession*" to a "*creditor*" in Art XI should be construed as requiring the physical transfer of custody of an aircraft object.

25. ***Ordinary meaning:*** Contrary to AS[78]-[79], the "*ordinary meaning*" of the phase "*give possession*" does not entail a physical transfer of the object in question. As to the word "*give*", while the word may be active in the sense described by the primary judge (to "*deliver, hand over*") in certain contexts, as his Honour went on to observe, the term also

[7] The Appellants' present case departs markedly from the construction urged before, and adopted by, the Primary Judge: see PJ[84]-[87], [110]; CAB 43-44, 50.

may have a passive meaning ("*[t]o present, to hold out to be taken*") in other contexts: PJ[92] CAB 45; cf AS[52]. It follows that limited assistance can be gained from the term "*give*" considered in isolation. As to "*possession*", nowhere do the Appellants grapple with the Full Court's reasoning at FC[97]-[100] CAB 141-142, where it is observed that the concept of "*possession*", at common law and in civil law analogues, recognises that possession requires physical control together with an intent to exercise control. The Full Court's observations are consistent with Goode at [2.30(3)], where Goode observes that the word "*possession*" in the Convention and Protocol:

> "*must here be given a broad meaning. In civil law systems, for example, the concept of possession requires 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. But both have rights that can be asserted against third parties other than those with a better right. The word 'possession' is therefore to be construed as covering both possession in the common law sense and détention in the civil law sense...*"

26. It follows that there is nothing about the ordinary meaning of the phrase "*give possession*" that requires a physical transfer of custody. It is consistent with both common law and civil law conceptions of "*possession*" that it is possible to "*give possession*" (in the sense of "*holding out possession to be taken*") without a physical transfer of custody. For example, "*possession*" may be "*given*" by disclaiming any intention to exercise control over an object in favour of another, such that possessory title is being ceded to that person, that other may choose to take up the possessory title.

27. ***Immediate context:*** Next, the immediate context of Art XI(2) does not support the Appellants' contention that the obligation to "*give possession*" requires redelivery. Specifically, Art XI(4) provides that references to the IA in Art XI "*shall be to that person in its official, not its personal, capacity.*" Thus the content of the obligation imposed on an IA under Art XI(2) must be such that the obligation that can, in fact, be performed by an IA in its official capacity. This is a strong textual indication that the obligation to "*give possession*" in Art XI(2) does not entail an obligation to redeliver aircraft objects, as: (a) the costs associated with redelivering aircraft objects are self-evidently likely to be significant in many contexts; (b) there is no reason to assume that the insolvent estate will have the requisite funds, regulatory approvals and technical resources to process redelivery of high value aircraft objects (in fact the converse is more likely to be true; the redelivery of the Appellants' aircraft objects presented significant

financial and other difficulties for an airline of the scale of the corporate Respondents[8]); (c) if the debtor has no or insufficient assets, then the burden of redelivery would presumably fall on the IA personally, which could be in direct tension with Art XI(4).

28. The Appellants' response to this contention is to offer up a new construction of Art XI(4) to the effect that the article, in some vague and unexplained way, limits an IA's personal liability to the assets of the estate: AS[41]-[42]. Leaving aside the absence of textual basis for this contention, how this construction would operate in practice is unclear. The suggested implication is that, where the estate is insufficient to cover the costs of redelivery, an IA is relieved of their obligation to redeliver. This raises a host of difficult questions to which the text of Art XI(4) supplies no answer, such as "*at what point in time is the value of the estate to be assessed*" (if it be at the end of the waiting period, in the present case there would have been no obligation on the Respondents to redeliver the Appellants' aircraft objects given the absence of funds to do so), and "*does the obligation override priority claims, such as employee entitlements?*" If the IA is not relieved of their obligation to redeliver in such circumstances, who is to fund the shortfall? The better view is that Art XI(2) does not require redelivery, as the content of the obligation then becomes one that can be performed by the IA in their official capacity, and the tension with Art XI(4) is avoided.

29. The text of Art XI(5) also cannot sustain the Appellants' construction. That provision relevantly requires an IA to preserve and maintain the aircraft object, "*unless and until the creditor is given the opportunity to take possession under paragraph 2*". The indication of the time at which preservation and maintenance obligations cease would be wholly redundant on the Appellants' construction of Art XI(2), as plainly an IA could not continue to maintain and preserve aircraft objects that have been redelivered to a creditor.

30. Art XI(8) also weighs against the Appellants' construction. That provision, together with Art IX(1)), entitles creditors to, relevantly, "*procure the export and physical transfer of the aircraft object from the territory in which it is situated*" (Art IX(1)). This sits uncomfortably with the contention that an IA is responsible for the "*export and physical transfer*" of aircraft objects (as part of the redelivery process), rather than the creditor. It is clear from the terms of Art XI(8) that the process of export and physical transfer of aircraft objects may involve regulatory hurdles. It is those hurdles that the remedies

[8] See paragraphs [21]-[23] of the Affidavit of Salvatore Algeri sworn 5 August 2020, Tab 26A, pages 366-1 to 366-25 of Part C of the FC Appeal Book; Respondents' Book of Further Material (**RFM**) 11.

conferred by Art XI(8) are intended to overcome. By conferring these remedies on creditors but not equivalent powers on IAs (see Art IX(1)), Art XI(8) indicates the absence of any intention to impose an obligation on an IA in Art XI(2) that would see the IA, rather than the creditor, being responsible for export and physical transfer (as is the case on the Appellants' construction). Indeed, the Appellants' construction renders Art XI(8) obsolete, as, at least in an insolvency context, a creditor would not need to exercise the remedies under Art IX(1), as the task of physical transfer and export would be subsumed within the IA's obligation to "*give possession*". This Court would not adopt a construction that has the effect of rendering a provision redundant when an alternative construction is available.

31. Finally, Art XI(10) does not assist the Appellants. Its practical effect is to prevent a lessor cramdown through municipal insolvency processes. The imposition of an obligation on an IA to give over something less than physical custody in Art XI(2) in no way alters a debtor's obligations under the underlying agreement; breach of those obligations will support a claim against the insolvent estate: see Goode at [2.236].

32. ***Wider Context:*** The Appellants' construction is also in tension with wider provisions of the Protocol. Comment has already been made on Art IX(1) above at [30]. It should further be noted that a creditor's exercise of the remedies in Art IX(1) is subject to conditions set out in Arts IX(2) and (6). The Appellants' construction of Art XI(2) would entitle a creditor to the redelivery of their aircraft objects in a foreign jurisdiction, without the conditions in Art IX(2) or (6) being satisfied (there being no obligation imposed by those paragraphs on an IA). It is most unlikely that Art XI(2) was intended to provide creditors with a means of circumventing the conditions in Arts IX(2) and (6) in an insolvency context absent any express indication, particularly given the significant adverse results this may pose for "*interested persons*".

33. ***Surprising results****:* The Appellants' construction of Art XI(2) produces the surprising result that a creditor is entitled to redelivery of their aircraft objects when a debtor is insolvent (and, therefore, has access to fewer (if any) resources to achieve redelivery safely and expeditiously), whereas the creditor is entitled only to "*take possession*" of their aircraft objects under Arts 8 and 10 of the Convention, as applicable, where a debtor is in default but no insolvency event has occurred (see [19] above). This result is especially surprising given that the provision upon which Art XI Alternative A was based, namely §1110(c)(1) of the US Bankruptcy Code, does not require redelivery of aircraft objects: see *In re Republic Airways Holdings Inc*, 547 B.R. 578 (S.D.N.Y., 2016)

at 584-587. The effect of the Appellants' construction is to render the self-help remedies of "*taking possession*" in Arts 8 and 10 of the Convention obsolete in an insolvency scenario, notwithstanding the fact that those remedies continue to operate upon "*aircraft objects*" (see [18] above). The Appellants' construction produces the additional surprising result that a chargee who is not entitled to "*take possession*" of aircraft objects under Art 8 absent the agreement of the chargor becomes entitled not only to take possession but redelivery of the aircraft object under Art XI(2) of the Protocol in an insolvency scenario. The significant and unexplained expansion of remedies under the Protocol as compared to those available under the Convention tells against the Appellants' construction, noting that Art 6(1) requires the Convention and Protocol to be "*read and interpreted together as a single instrument*". The Appellants' construction also appears to produce the still further surprising result that IAs are at risk of becoming personally liable for costly redelivery processes, in circumstances where the insolvent estate has insufficient funds to cover redelivery (see above at [27]). On such a construction, IAs would likely be unwilling to take appointments given the associated risk of very significant personal exposure and insolvent estates would end swiftly in liquidation, contrary to the interests of all creditors.

34. ***Purpose****:* The Appellants' construction of Art XI(2) is in tension with the purpose of Art XI, and does not promote uniformity and predictability in the provision's application, contrary to Art 5(1) of the Convention. The primary purpose of Art XI is to provide creditors with "*certainty as to the time when they will either obtain possession of the relevant aircraft object or obtain the curing of all past defaults and an agreement to perform all future obligations, in an insolvency scenario*": see *In the matter of AirAsia X Berhard* at [244]; Goode at [3.1]; [4.19]-[4.22]. The Appellants' construction undermines this purpose. Requiring an IA to redeliver aircraft objects to creditors in various locations around the world, in circumstances where the IA may have no access to funds, diminished (if any) technical capabilities and uncertain regulatory status does not provide creditors with "*certainty as to the time when they will … obtain possession of the relevant aircraft object*". To the contrary, imposing complex redelivery obligations on an IA without the resources to undertake the exercise may expose creditors' assets to greater risk, and create uncertainty as to the time by which the creditor will "*obtain possession of the relevant aircraft object*", given that the time by which redelivery can be effected will necessarily vary in practice. Redelivery by the end of the "*waiting period*" (which in Australia is 60 days but in other Contracting States is shorter; for example, in Brazil the

"*waiting period*" is 30 days) will often be practically impossible; certainly the primary judge in the present case accepted that redelivery could take up to six weeks from the date of his Honour's orders (see order 6 at CAB 11), in circumstances where some steps towards redelivery had already been undertaken. A creditor who is well-resourced will likely be in a better position to repossess its aircraft objects than relying on the IA of an insolvent airline to coordinate contemporaneous redelivery of aircraft objects to a multitude of creditors around the world.

35. For the same reason, the Appellants' construction does not promote uniformity and predictability; an IA's ability to redeliver aircraft objects to creditors is in large part dependent upon the state of the insolvent debtor at the time the obligation falls to be performed, and therefore will not be uniform or predictable. Further, the content of any obligation to redeliver would be radically different in respect of each aircraft object, given the variety of locations of creditors and the steps required for each redelivery.

36. ***Effect on priorities***: As the Full Court rightly observed at FC[102]-[104] CAB 143, and the Appellants accept, the Appellants' construction has the effect of giving financial priority to certain creditors, who would "*stand first in line to secure out of the insolvent administration the costs of effecting redelivery (which may be considerable), to the necessary detriment of all other creditors.*" In answer to this, the Appellants say that it is "*'tolerably clear' that the Protocol was intended to provide priority to the claims of aircraft lessors"*: AS[66]. While the Appellants cite Arts XI(9), (10), (12) and (13) in support of this proposition at AS[67], they offer no analysis as to how those provisions assist. As to Art XI(9), the fact that no remedy 'may be prevented or delayed' after the waiting period says nothing about financial prioritisation. This would only assist the Appellants if their proposed construction of Art XI(2) is otherwise correct. The same is true of Art XI(10). There is nothing in the preservation of the agreement between the creditor and debtor that supports the contention that Art XI ought be construed as prioritising creditors with international interests. Art XI(12) simply confirms that no rights or interests in aircraft objects shall have priority over registered interests in such objects. This says nothing about the priority of creditors to the funds of an insolvent estate. Finally, Art XI(13) simply applies the Convention to Art XI remedies, as explained above. This says nothing of priorities.

37. For all these reasons, this Court would not construe Art XI(2) as requiring the IA to redeliver aircraft objects to creditors in the sense of effecting a physical transfer of them.

C.2 Arts XI(13) and IX(3) do not assist

38. If Art XI(2) does not require the IA to redeliver aircraft objects to creditors, the appeal must be dismissed. However, it is nonetheless appropriate to explain briefly why the Appellants' reliance on Arts XI(13) and IX(3) in support of their claimed entitlement to redelivery to Florida is misplaced. The Appellants' propositions on this point have two elements. The first is that the commercial reasonableness constraint from Art IX(3) applies to any and all remedies given by Art XI of the Protocol. The second is that what is contained in Art XI(2) is properly to be viewed as the conferral of a remedy to which that commercial reasonableness constraint applies. Each step should be rejected.

39. ***The limits on Art IX(3)****:* Article IX(3) has three limbs. *First,* it disapplies Art 8(3) of the Convention in relation to "*aircraft objects*". *Secondly* it requires "*[a]ny remedy given by the Convention in relation to an aircraft object*" to be "*exercised in a commercially reasonable manner*" (emphasis added). *Thirdly*, the paragraph deems a remedy to have been "*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*". In practical terms, the effect of Art IX(3) is to provide that Convention remedies apply to "*aircraft objects*", but are subject to a "*commercial reasonableness*" constraint on the creditor.

40. Art XI(13) provides: "*The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article*". The initial problem with the Appellants' argument is that it over-states the work of Arts IX(3) and XI(13) when read together. The true combined effect of these two articles is no more than the following. Art IX(3) imposes the obligation of commercially reasonable exercise solely upon remedies given by the Convention and does not extend that obligation to remedies given by the Protocol. That is because the term "*Convention*" when used in the Protocol is defined to mean the "*Convention on International Interests in Mobile Equipment*" (see the Preamble to the Protocol). It is not a term used to cover both the Convention and the Protocol.

41. When one comes to Art XI(13), again it is the Convention, albeit as modified by Art IX of the Protocol, that applies to the exercise of remedies under Art XI. Therefore one needs to find a provision in the Convention itself, either directly or as modified by Art IX, which speaks to how the remedies under Art XI are exercised. An example of this is Art 24 of the Convention, regarding the evidentiary value of certificates. The practical effect of Art XI(13) is to provide that a creditor may take the benefit of Art 24 of the

Convention in applying for (for example) interim relief under Art XI(5) (being a remedy under Art XI). But what does not follow is that Art IX(3) applies of its own force to the remedies exercised under Art XI. The Appellants' contention that Art XI(13) imposes a mandatory condition upon the exercise of all remedies under Art XI, namely the requirement for "*commercial reasonableness*" set out in Art IX(3), should therefore be rejected (cf AS[82]; [84]).

42. ***No conferral of a remedy:*** Even if Art XI(13) does operate so as to apply a "*commercial reasonableness*" constraint on the "*exercise of remedies*" under Art XI, this does not assist the Appellants, because the obligation to "*give possession*" under Art XI(2) does not constitute the "*exercise of a remedy*" at all. Rather, it is a mandatory obligation imposed on an IA, following which a creditor may elect to exercise their remedy of taking possession, should they choose to do so. It is in the exercise of the remedy of taking possession of an aircraft object from an insolvent debtor that the creditor must act commercially reasonably. To contend that the IA's act of "*giving possession*" constitutes the "*exercise of a remedy*" strains the ordinary meaning of the term "*remedy*". The giving of possession under Art XI(2) is mandatory. However, there may be good commercial reasons why a creditor does not want to take possession of their aircraft objects.[9] In those circumstances, the optional act of *taking* possession is more comfortably understood as a "*remedy*", rather than the mandatory obligation to "*give possession*" which may well not be beneficial to the creditor and is not, in any relevant sense, remedial. Further, as a matter of ordinary meaning, a remedy is not "*exercised*" by the obligee. Rather, a remedy is exercised by the beneficiary of the remedy, when they elect to take it up (cf AS[89]). As much is clear from the examples of how the obligation to act "*commercially reasonably*" operates in practice in Goode at [2.112].[10] This too points against the obligation to "*give possession*" being characterised as a remedy.

43. The Appellants seek to avoid this conclusion by contending at AS[85] that "*exercising*" a remedy, in the context of Art XI(13), "*should be interpreted as 'invoking' or 'seeking' a remedy*", such that 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*". By these propositions, the Appellants seek to convert an obligation on an IA to carry out a step prior to the

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[9] See Sanam Saidova, '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 at 184-185, cited at PJ[104] CAB 48.

[10] Examples include the need for creditors to take proper steps to safeguard objects from loss or damage during repossession, and to avoid repossessing objects in a manner that is violent or constitutes a breach of the peace.

creditor's exercise of a remedy (that is, "*giving possession*") into the remedy itself. This device would not be accepted. There is no textual basis upon which exercising a remedy could be construed as invoking or seeking a remedy. As a matter of ordinary language, invoking or seeking a remedy is the anterior step to exercising the remedy. Further, the Appellants' argument is premised on the creditor "*insist[ing] on the performance of the obligation to 'give possession'*" (AS[90]). This fails to grapple with the mandatory character of the obligation to "*give possession*" in Art XI(2), the fulfilment of which does not involve any "*invocation of [the creditor's] rights under the Protocol*" at all (cf AS[90]). Once it is appreciated that the obligation to "*give possession*" arises regardless of whether the creditor "*invokes*" any rights it has under the Convention or Protocol, it becomes clear that this obligation does not involve the "*exercise*" of a remedy at all.

44. The Appellants' attempt to bundle up the obligation to give possession with the remedy of taking possession so as to bring Art IX(3) and, in particular, the safe-harbour provision, to bear on the obligation to "*give possession*" is thus misconceived. The obligation imposed on IAs under Art XI(2) is anterior to the exercise of any remedy by creditors. As such, even if it be the case that Art XI(13) applies the restriction on the exercise of remedies imposed by Art IX(3) to remedies conferred by Art XI (which is far from clear), the Full Court's reasoning in FC[101] CAB 143 is correct, and Art XI(13) is of no assistance to the Appellants.

D. The proper construction of Art XI(2): Full Court's construction is correct

45. The Full Court construed the obligation to "*give possession*" in Art XI(2) to require an IA to "*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 take possession*": FC[106] CAB 144. On this construction, Art XI(2) is a facilitative provision that better enables a creditor to exercise the self-help remedy of "*taking possession*" conferred by Arts 8 and 10 of the Convention (as applicable), should the creditor wish to do so. The effect of Art XI(2) is, therefore, to ensure that creditors are not disadvantaged by a debtor's insolvency, as even in an insolvency scenario (and notwithstanding any provision of municipal law), a creditor will be able to exercise their self-help remedy of taking possession.[11]

[11] The Full Court's conclusions were recently applied in *In the matter of Arctic Aviation Assets Designated Activity Company* [2021] IEHC 268 at [293]-[296] and [298].

46. ***The argument:*** This construction of Art XI(2) is correct, for reasons that build on Section C but can be drawn together as follows. *First*, this construction gives effect to the ordinary meaning of the phrase "*give possession*", which, as explained above at [25], does not necessitate a physical transfer of custody.

47. *Secondly*, this construction sits comfortably with the other paragraphs of Art XI. Specifically: such a construction does not impose onerous requirements on an IA, who is merely obliged to take whatever affirmative steps are "*needed to overcome any barrier to taking possession that is a consequence of the insolvent administration*" (FC[106] CAB 144), and so operates harmoniously with Art XI(4); such a construction gives work to the temporal limb of Art XI(5) as a scenario may arise on the Full Court's construction whereby an IA has given a creditor the "*opportunity to take possession*" under Art XI(2) and yet retains physical custody of the aircraft objects; and such a construction gives work to do to Art XI(8), as on the Full Court's construction the creditor, rather than the IA, would be responsible for physical transfer and export of the aircraft objects. The construction is also consistent with the predominantly facilitative operation of Art XI more generally; for example, Art XI(5)(b), which facilitates the availability of interim relief and therefore complements Art 13 of the Convention; Art XI(8) which facilitates the relief conferred by Art IX(1) of the Protocol; and Art XI(9) which facilitates a creditor's speedy access to Convention and Protocol remedies.

48. *Thirdly*, this construction also fits comfortably with the terms of the Convention. On the Full Court's construction, the obligation in Art XI(2) complements the self-help remedies conferred by Arts 8 and 10 of the Convention, providing creditors with protection to ensure that those remedies can be exercised, even in an insolvency scenario. This is consistent with the architecture of the Convention and Protocol, whereby in the world of the Protocol, the Convention remains the primary source of remedies for creditors, which are modified or supplemented to ensure their workability in respect of "*aircraft objects*".

49. *Fourthly*, the Full Court's construction, according to which Art XI(2) is facilitative of existing remedies, rather than conferring an additional remedy on creditors, is consistent with the Official Commentary. Goode repeatedly refers to the Protocol as containing only "*[t]wo additional remedies*" beyond those contained in the Convention, namely "*de-registration and export and physical delivery*": see at [2.106]; [3.30]; [4.85].

50. *Fifthly,* the Full Court's construction gives effect to the purpose of Art XI as described above at [34], namely to give creditors certainty as to the time by which they will be able to take possession of their aircraft objects, notwithstanding the operation of any

moratorium that would otherwise be imposed by domestic law. Specifically, creditors benefit from the knowledge that, unless all future defaults are cured (Art XI(7)), they will be able to "*take possession*" of their aircraft objects by the end of the "*waiting period*" because, by that time, any barriers to taking possession that are a consequence of the insolvent administration (such as a domestic law stay which endures beyond the "*waiting period*") cannot be invoked by an IA to resist repossession. The Full Court's construction also promotes uniformity and predictability (Art 5(1)) for the same reasons.

51. ***The Appellants' criticisms:*** The Appellants' various criticisms of the Full Court's construction are without merit. *First,* the submission that the construction results in the obligation to "*give possession*" being rendered obsolete in light of the fact that Art XI(8) "*already afforded a means to 'take' possession*" (AS[86]) is misconceived. Once it is appreciated that possession may be given without the physical transfer of an aircraft object, it becomes clear that a creditor may still need to physically transfer and export its aircraft object after it "*takes possession*" of that object. It is in recognition of this fact that the Protocol (in Arts IX(1) and XI(8)) confers an additional remedy on creditors, being the procurement of physical transfer and export. It is on the Appellants' construction that these additional benefits are rendered obsolete, as explained above at [30].

52. *Secondly*, it is not correct to contend that the Full Court's construction results in Art XI containing "*only one true 'remedy'*", being the "*remedy of deregistration and export*": cf AS[86]. This submission ignores the express language of Art IX(2), which makes plain that "*de-registration*" and "*export and physical transfer*" constitute two remedies. As such, on any view the Full Court's construction results in at least two separate remedies being conferred by Art XI (namely those conferred by Art XI(8), which is to be read together with Art IX(1), as the Appellants accept at AS[86]). No tension therefore arises between the Full Court's construction and the references to "*remedies*" (plural) in the title to Art XI and in Art XI(13). In any event, Art XI confers a further remedy still in Art XI(5)(b), such that the submission that the article confers only one remedy on the Full Court's construction must be rejected.

53. *Thirdly*, the contention that the Full Court's construction does not secure additional benefits for lessors is incorrect: cf AS[23]; AS[59]. Absent Art XI(2), a creditor is subject to rules of procedure relating to the enforcement of their rights to property under the control or supervision of an IA: Art 30(3)(b). It follows that, absent Art XI(2), a creditor's right to exercise a possessory remedy under Arts 8, 10 and/or 12 would be subject to the rules of procedure including any stay under domestic insolvency law, as

well as the limited rights afforded to, for example, other contractual creditors such as lessors. By imposing a mandatory obligation on an IA, with which domestic insolvency courts cannot interfere, to give the creditor the unfettered ability to exercise their self-help remedy of taking possession of their aircraft objects following the "*waiting period*", the Full Court's construction of Art XI(2) confers a substantial additional benefit on creditors, who are thereby able to pierce a domestic stay in order to take possession of (and therefore re-lease or otherwise monetise) their aircraft objects thus mitigating their financial exposure. This benefit is afforded in priority to other lessors without an "*international interest*" under the Convention, including other secured creditors, who remain bound by a domestic stay. In the context of the Virgin administration, while the "*waiting period"* ceased on 19 June 2020 (FC[50] CAB 123), the statutory stay continued until 25 September 2020.[12] Indeed, a creditor's position is considerably improved beyond the position under the Convention, because benefits conferred by the Full Court's construction of Art XI(2) are supplemented by Arts XI(8) and (9).

54. *Fourthly*, the difference in language between Art XI(2) in Alternative A and Art XI(2)(b) in Alternative B does not detract from the Full Court's construction (cf AS[70]). While the obligations in those articles have certain similarities, they arise in fundamentally different contexts, and so a comparison between the language of the two Alternatives does not assist the construction exercise. Specifically, while Art XI(2) of Alternative A imposes a mandatory obligation on an IA to perform a specific act (namely, to "*give possession*"), Art XI(2) of Alternative B does not impose any automatic obligation on an IA. That provision simply requires an IA "*upon the request of the creditor*" to "*give notice*" as to whether it proposes to cure all defaults (Art XI(2)(a)) or to "*give the creditor the opportunity to take possession*" (Art XI(2)(b)). If the IA does not give notice as required by Art XI(2) or, if it has said that it will "*give the creditor the opportunity to take possession*" but does not follow through with this stated intention, then a court may (but is not required to) permit the creditor to "*take possession*" of the aircraft objects, which permission may be granted on terms. In this way Alternative B does not impose an obligation on an IA to "*give possession*" of aircraft objects at all, but rather provides for a court-ordered possessory remedy which may be on terms (and so is less beneficial than the "*self-help*" remedies available under Arts 8 and 10 of the Convention). As much is

[12] See paragraphs [21] and [22] of the Affidavit of Orfhlaith Maria McCoy, affirmed 7 September 2020, Tab 32, pages 479 to 527 of Part C of the FC Appeal Book; RFM 35.

confirmed by Goode at [3.136]. In circumstances where Alternatives A and B impose wholly different obligations on IAs and confer wholly different benefits on creditors, there is little to be drawn from similarities or differences in the language adopted in the two Alternatives from the perspective of the construction exercise before the Court.[13] However, even if these differences in context are to be ignored, Alternative B nonetheless supports the Full Court's construction. This is because we see within Art XI(5) Alternative A the very same language that appears in Art XI(2)(b) Alternative B. Given that Art XI(5) Alternative A links back to Art XI(2) ("*given the opportunity to take possession under paragraph 2*"), an available reconciliation of Alternative A and Alternative B is that the obligation to "*give possession*" in Art XI(2) Alternative A requires the giving of an opportunity to take possession as per Art XI(5) Alternative A and Art XI(2)(b) Alternative B. This observation also supports the construction proposed on the Notice of Contention dealt with below.

55. *Fifthly*, the Full Court did not ignore Art XI(13); that provision simply had no relevance to the construction exercise, as explained above. Further, the Full Court's observation that the application of Art IX(3) was subject to "*domestic insolvency law*" at FC[90] CAB 140 was correct (cf AS[70]); this reflects the fact that Art IX(3) modifies Convention remedies, and under the Convention Art 30(3)(b), rules of procedure relating to the enforcement of rights to property under the control or supervision of the IA are preserved.

56. *Finally*, there was no error in the Full Court's observation that Art XI(10) imposed "*constraints upon enforcement*" (cf AS[63]). While the express effect of Art XI(10) is to provide that a court may not modify a debtor's obligations under an agreement absent the creditor's consent, Art XI as a whole (including Art XI(10)) operates to prevent the enforcement of obligations under such an agreement, at least within the "*waiting period*". The distinction between the preservation of a debtor's obligations and limitations on a creditor's enforcement of those obligations is fundamental to both municipal insolvency regimes and that enacted by Art XI. No error has been identified.

E. Conclusion on the Appeal

57. For the reasons set out above, contrary to AS[70], no error has been identified in the Full Court's decision. It follows that the appeal must be dismissed. Indeed, even if the Court

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[13] This conclusion is fortified by McHugh J's observation in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255-256 that "*international treaties often fail to exhibit the precision of domestic legislation. … The lack of precision in treaties confirms the need to adopt interpretive principles … which are founded on the view that treaties 'cannot be expected to be applied with taut logical precision'.*"

adopted a different construction of Art XI(2) from that reached by the Full Court the appeal still must be dismissed, unless that alternative construction imposed an obligation on the Respondents to redeliver the Appellants' aircraft objects to Florida. The appropriate orders are that: (i) "*the amount of $500,352.99, paid into the Federal Court of Australia by the Appellants pursuant to orders of the Federal Court of Australia made on 10 November 2020 be released to the Respondents*", this sum representing the amount expended by the Respondents in redelivering the Appellants' aircraft objects: see Order 2(a) at AFM 93, 97-98; (ii) "*order 3 of the Full Federal Court be set aside*" (no remitter being necessary in the event that the Respondents are successful in this Court); (iii) the appeal otherwise be dismissed with costs; and (iv) the costs of the primary proceedings be awarded in favour of the Respondents, as agreed or assessed.

58. If, contrary to the foregoing, the appeal is to be allowed, it would not be appropriate to make the declaration proposed by the Appellants at [6](a), or the order proposed at [6](c) of CAB 169. While the Appellants make oblique references at AS[42] and [50] to some entitlement to recourse against the Administrators for breach of Art XI, and the possibility of subrogation to the Administrators' indemnity over assets of the estate, the basis upon which a monetary claim is available against an IA for breach of an obligation to "*give possession*" under Art XI is unexplained, and should not be assumed to exist. In those circumstances, the declaration sought in [6](a) should not be made, even if the Appellants' construction of Art XI is accepted. It also follows that there should not be any order for remitter as proposed in [6](c), as no arguable basis upon which the Respondents could be liable for the "*costs of giving possession*" has been articulated. If the Appellants wish to make a claim in respect of such costs, their recourse is to submit a claim to the Trustees of the Creditors' Trust together with substantiating material.

59. The only relief that should follow if the Appellants succeed are the orders proposed in [5], [6](b), which would be available in the highly specific fact circumstances of the proceedings below, reflected in the primary judge's orders of 10 November 2020 (AFM 92), [6](d), [6](e) and [7] of CAB 169.

PART VI: NOTICE OF CONTENTION

A. Alternative construction: giving the opportunity to take possession

60. While the Respondents defend the reasons of the Full Court as set out above, in the alternative, the Respondents say that the Full Court's orders ought be upheld on the basis that the obligation to "*give possession*" simply requires an IA to make aircraft objects

available to a creditor, in the sense of giving such a creditor the opportunity to "*take possession*" of their aircraft objects, and thereby assume as against the whole world the possessory title which up to that point was held by the IA.

61. The distinction between this construction and that of the Full Court is a slight one. Each produces the same result on the present facts. The alternative construction requires an IA to take whatever steps are necessary to make aircraft objects available to a creditor, which steps are not necessarily limited to those necessary to overcome "*barrier[s] to taking possession that [are] a consequence of the insolvent administration*" (cf FC[106] CAB 144). What is required by Art XI(2) is that a creditor be given an opportunity to exercise their self-help possessory remedy under Arts 8 and 10. Importantly, possession may be "*given*" in the relevant sense despite the fact that the IA may retain custody of the aircraft objects. In short, the Respondents press the submission recorded at FC[62] CAB 130.

B. The alternative construction is consistent with the text, context and purpose

62. The alternative construction gives effect to the ordinary meaning of the phrase "*give possession*" which, as explained above at [26], does not necessitate a physical transfer of custody in the context of Art XI(2) (cf AS[95]). The alternative construction also sits comfortably with the remaining sub-paragraphs of Art XI for the reasons set out above at [47], and complements the provisions of the Convention for the reasons set out above at [48]. The Appellants' reference to Art XI(7) at AS[95] does not change the position. Contrary to AS[95], nothing in Art XI(7) requires a lessee to retain custody of an aircraft object in order to "*retain possession*" in the sense there described; indeed, in the present case, the lessee – VB LeaseCo – has sub-leased the Appellants' aircraft objects to other Virgin entities (FC[8] CAB 112), such that it may be presumed that, if VB LeaseCo had sought to retain possession of the Appellants' aircraft objects under Art XI(7), VB LeaseCo would not have retained physical custody of the aircraft objects. Finally, the alternative construction gives effect to the purpose of Art XI, as described above at [34], and promotes predictability and uniformity for the reasons set out above at [50].

63. Importantly, this construction does not "*overrid[e] the contractual right to be given possession"* (cf AS[98]). A creditor's contractual rights are preserved under Art XI, and if a debtor breaches their obligation under an agreement, this may sound in a damages claim provable in the administration of the debtor. The fact that a creditor who elects to "*take possession*" of their aircraft objects will, on both the Full Court's and the alternative construction of Art XI(2), be required to accept the burden of disassembly, repair,

transport, discharging liens, deregistration costs, import or export duties, and so on, does not amount to any alteration to the creditors' contractual rights. Those are simply burdens which have been allocated to the creditor as part of the quid pro quo for being able to free its asset from a domestic law insolvency regime no later than the 60-day deadline, which burdens may be provable as debts against the debtor if they would otherwise have fallen to be paid by the debtor by agreement with the creditor.

64. It is also not correct to say that this construction "*amounts to saying no more than – 'at the end of the waiting period the lessor can exercise a right to take possession' which is an ordinary incident of their proprietary rights*" (cf AS[98]). As explained above at [53], a creditor's right to take possession will often be stayed by the applicable domestic insolvency regime such that it is not available to be exercised at the end of the waiting period. It follows that Art XI(2), on the alternative construction, gives creditors a substantial benefit by overriding any operative domestic stay to give a creditor the opportunity to "*take possession*" of their aircraft objects at the end of the waiting period, should they wish to do so.

65. As to the submission that the alternative construction "*overlooks the centrality of physical possession and physical responsibility imported by Art XI(2), (5) and (7)*", as explained above, the Appellants have not identified any basis upon which "*physical possession*" could be said to be "*central*" to Art XI. The additional criticisms levelled in AS[98] are also unsound. The bare assertion as to the introduction of "*undue complexity*" is similarly unexplained and would not be accepted. An obligation to make an aircraft object available to a creditor is significantly less complex than imposing on IAs an obligation, within a fixed period, to redeliver aircraft objects to numerous creditors around the world in a variety of different circumstances.

66. Finally, as to AS[99], the alternative construction promotes certainty and security over mobile aircraft objects by ensuring a creditor is able to access those objects no later than a fixed point in time, and is not reliant on the IA of an insolvent debtor to redeliver their aircraft objects, a task which would be complex, time consuming and fraught with risk given the insolvent state of the debtor.

67. For those reasons, the alternative construction is consistent with the text, context and purpose of Art XI(2), and ought be accepted. It follows that the appeal must be dismissed.

PART VII: TIME ESTIMATE

68. The Respondents estimate that they require 2 ¼ hours to present their oral argument.

Dated : 25 June 2021

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ANNEXURE

Legislation (as in force at 20 April 2020)

1. *Corporations Act 2001* (Cth), s 440B.
2. *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth), s 7.
3. *Convention on International Interests in Mobile Equipment*, done at Cape Town on 16 November 2001, Arts 1(i), 5, 6, 8, 10, 12, 13, 24, 30(3)(b), 49(1)(b), 54(2).
4. *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, done at Cape Town on 16 November 2001, Arts II(1), IX, XI Alternative A and Alternative B, XXX, and the Declarations lodged by Australia under the Protocol at the time of the deposit of its instrument of succession.
5. *United Nations Convention on the Law of Treaties*, done at Vienna on 23 May 1969, Art 33.