

NOTICE OF FILING

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Details of Filing

Document Lodged:	Submissions
File Number:	NSD714/2020
File Title:	WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) & ANOR v VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 14/08/2020 4:27:30 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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IN THE FEDERAL COURT OF AUSTRALIA

NSD 714 of 2020

WELLS FARGO TRUST COMPANY

First Applicant

WILLIS LEASE FINANCE CORPORATION

Second Applicant

VB LEASECO PTY LTD

First Respondent

VIRGIN AUSTRALIA AIRLINES PTY LIMITED

Second Respondent

**VAUGHAN STRAWBRIDGE, SALVATORE ALGERI, JOHN GREIG AND
RICHARD HUGHES OF DELOITTE (TOGETHER, THE 'ADMINISTRATORS')**

Third Respondent

TIGER AIRWAYS AUSTRALIA PTY LIMITED (ADMINISTRATORS APPOINTED)

ACN 124 369 008

Fourth Respondent

**FIRST AND SECOND APPLICANTS' SUBMISSIONS
ON FORM OF FINAL ORDERS**

Introduction

1. The Applicants rely on their earlier written and oral submissions in this matter at the 31 July 2020 hearing, as well as the written submissions prepared on 11 August 2020.
2. In summary the Applicants' position is that they do not contest the manner in which redelivery will be effected, nor do they contest the date by which it will be effected. To that end the Applicants' form of orders simply capture in more precise detail Mr Dunbier's "Redelivery Proposal".
3. The second affidavit of Mr Gary Failler affirmed 10 August 2020 is read on the basis that the Applicants do not accept that the redelivery proposal is either the fastest, or cheapest means of redelivery. The Applicants do not consider it is necessary for the Court to make findings in that regard. However, Mr Failler's evidence demonstrates that, despite other options being available to the Respondents, the Applicants are acting reasonably by largely accepting the plan advanced by the Respondents.

4. The matters in dispute in respect of the Orders can be summarised as follows:
 - (a) the Applicants seek Orders in the form of the detailed regime they have drafted in Schedules 2 and 3 to the short minutes. Those Schedules document Mr Dunbier's Redelivery Proposal, with certain modifications, in order to clarify the parties' expectations at the outset. Each of the detailed provisions of the Schedules is addressed by way of a table at the end of these submissions.
 - (b) The Applicants submit that the Court should only excuse the Respondents from the statutory rent (Order 9), with liberty to apply for any extension in respect of rent (Order 11), and should not grant a wider release of liability.

Relief from rent

5. In respect of the dates the Court proposes to excuse the Respondents from rent, the Applicants rely on their written and oral submissions at the substantive hearing, and the further written submissions on 11 August 2020, which were largely based on interpreting the transcript from the 31 July 2020 hearing. The short point of the Applicants' submissions in respect of the date of excusal from rent, is that the Third Respondent (**Administrators**) had been given long enough (by reason of the earlier extensions) to comply with the notice requirements in s443B(3) in order to avoid liability, and the attempt to exercise a lien over the property in the Interlocutory Process dated 17 July 2020 was inconsistent with that disclaimer (see s443B(5) of the Corporations Act), such that the Court would not further excuse the Third Respondent. If, against those submissions, the Court was minded to excuse rent from 16 June 2020, the period should end no later than 15 October 2020 – being the date for redelivery contemplated by Order 6.
6. Section 443B(8) only gives the Court power to excuse the Administrators from paying rent. The Court's discretion to excuse rent in section 443B(8) complements the statutory imposition of rent on an administrator for use of leased goods or property pursuant to section 443B(2) of the Corporations Act. Section 443B(8) has no wider application.
7. Nothing was advanced at the hearing of the matter on 31 July 2020 to suggest such broader relief was being sought by the Administrators to excuse them from the costs of redelivery. To the extent that such relief had been sought it would have been opposed as being inconsistent with the obligation to "*give possession*" imposed on the Administrator (in addition to the debtor companies) by reason of Article XI.2 of the Cape Town Protocol.

8. Notably, since the substantive hearing on 31 July 2020, the Respondents have filed a further Amended Interlocutory Process dated 5 August 2020, paragraph 5 of which seeks confirmation that any expenses incurred are properly incurred in the course of carrying on the business of the Respondents and are debts which entitle the Administrators to an indemnity from the assets of the Respondents.
9. The Applicants have consented to orders being made in accordance with paragraph 5 of the Amended Interlocutory Process dated 5 August 2020 and have provided for that by Order 5 of the Applicants' proposed short minutes. That provides sufficient protection to the Administrators.
10. In light of those orders the Court would prefer Orders 9 and 11 of the Applicants' proposed short minutes.
11. The Applicants have included Order 11 so that either party can relist the matter as is necessary. Order 11 also provides the ability for the Administrators to seek further reprieve from rent if they have taken reasonable steps but have not been able to achieve redelivery by 15 October 2020.

Form of orders and details in the schedules

12. The Applicants' submission in respect of the detail in the Schedules is contained in the table at the foot of these submissions for convenience.
13. The Applicants Schedules 2 and 3 include certain clarifications (or additions) as set out in the table. For example, in the second affidavit of Mr Failler affirmed on 10 August 2020 at paragraph 4, Mr Failler explains that Delta is appropriately qualified to produce the EASA release in addition to the FAA release. No mention is made of the EASA release in the affidavit of Mr Dunbier sworn 5 August 2020.
14. Accordingly, the Applicants' short minutes provide for the EASA serviceability tags in Schedule 2, paragraph 7(c)(vi)(B).
15. Outside of any issues of substance, the Applicants object to the style of the Respondents' short minutes which lack precision and are drafted by incorporating parts of Mr Dunbier's 5 August 2020 affidavit (by reference and without detail).
16. Order 4 of the Respondents' draft short minutes refers to paragraph 5 of Mr Dunbier's affidavit sworn 5 August 2020. However, when one turns to paragraph 5 it is a long paragraph that addresses many topics with sub paragraphs (a)-(h).

17. Even where the Respondents' draft short minutes provide a specific cross-reference (see Schedule 2, paragraph 7(b)(iii)) referring to Mr Dunbier at paragraph 5(a) – that paragraph of Mr Dunbier's evidence itself describes a number of activities in general terms.
18. Even if the Court were satisfied with the style of making orders that required constant cross-referral to evidence of Mr Dunbier in the proceedings, it would not be satisfied that paragraph 5 was sufficiently clear and precise to provide a useful framework for the parties.
19. The Applicants' short minutes provide the detail necessary to attempt to clarify expectations at the outset, in the hope of avoiding any further dispute at a later date.
20. The detail in the Schedules is set out below in table form to assist the Court to understand the nature of the dispute between the parties:

Item no.	Applicants' Short Minute of Orders	Respondents' Short Minute of Orders	Applicants' submissions
1	<p>Engine Stands.</p> <p>Schedule 2, paragraphs 5(c) and (d) identifies the Engine Stands.</p> <p>Schedule 3, paragraph 1(m)(ii) includes a mechanism for exchange of the Engine Stands at</p>	<p>Respondents have deleted:</p> <p>-Schedule 2, paragraph (5)(c) and (d)</p> <p>-Schedule 3, paragraph 1(m)(ii) has been deleted.</p>	<p>The Applicants submit:</p> <ol style="list-style-type: none"> 1. it remains necessary to identify their Aircraft Objects in Schedule 2; and 2. the exchange of Engine Stands is dealt with more comprehensively in Schedule 3 to accommodate paragraph 5(f) of the Second Affidavit of Darren William Dunbier affirmed on 5 August 2020 (Dunbier Affidavit).
2	<p>Outstanding Historical Operator Records at date of redelivery</p> <p>Schedule 2, paragraph 7(a) provides an obligation to provide any further Historical Operator Records that are created as a result of the ferry flights and removal of engines contemplated by Schedule 3.</p>	<p>The Respondents have deleted Schedule 2, paragraph 7(a).</p>	<p>The status of the additional records is not addressed paragraph 5(d)(i) of the Dunbier Affidavit.</p>
3	<p>End of Lease Operator Records</p> <p>Schedule 2, paragraph 7(b) addresses all End of Lease Records,</p> <p>Paragraph 7(b)(iii) specifically identifies all such records that may arise from <u>all</u> ferry flights referred to in Schedule 3 (not simply the Adelaide to Melbourne ferry flight).</p> <p>Paragraph 7(c)(vi)(B) specifically includes reference to the EASA serviceability tags</p>	<p>The Respondents have altered the wording paragraph 7(b)(iii) to refer only to the Adelaide to Melbourne ferry flight discussed in Dunbier Affidavit paragraph 5(a).</p>	<p>The Applicants' orders now address all End of Lease Operator Records for all ferry flights. This is not addressed in the Dunbier Affidavit at paragraph 5(a).</p> <p>The Dunbier affidavit refers to schedule 7 of the Originating Process, but the affidavit at paragraph 5(c) refers only to FAA release and does <u>not</u> refer to providing a EASA release.</p> <p>The Second Affidavit of Garry Failler sworn 10 August 2020 [4] explains that Delta is capable of providing EASA release.</p>

Item no.	Applicants' Short Minute of Orders	Respondents' Short Minute of Orders	Applicants' submissions
4	Schedule 2, paragraph 7(ix) cross references Schedule 3.	Schedule 2, paragraph 7(ix) the cross reference to Schedule 3 is deleted.	The Applicants' submit it is necessary to detail the requirement of orders in the same document rather than cross referencing the Dunbier Affidavit.
5	Schedule 3, paragraph 1(a) includes a requirement that the Respondents obtain from CASA the necessary regulatory approvals to carry out the terms of the Orders.	Schedule 3, paragraph 1(a) has been deleted.	Whilst the necessity of obtaining CASA approvals is mentioned in paragraph 5(g) of the Dunbier Affidavit, the Applicants' submit that it is necessary for an Order expressly requiring that the Respondents obtain those approvals.
6	Schedule 3, paragraph 1(b) outlines the requirement for CH-CUT to be transported from Adelaide to Melbourne.	Schedule 3, paragraph 1(b) has been deleted.	This is essentially the same requirement contained in paragraph 5(a) of the Dunbier Affidavit. The Applicants' submit it is necessary to detail the requirement of orders in the same document rather than cross referencing the Dunbier Affidavit.
7	Schedule 3, paragraph 1(c) outlines the requirement for End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)(iii) of these Orders to be created and provided to the Applicants.	Schedule 3, paragraph 1(c) has been deleted.	The Applicants submit that this is necessary as the Dunbier Affidavit is unclear as to the requirement for the Respondents to provide records.
8	Schedule 3, paragraph 1(d) outlines the requirement for the Respondents to cause Engine 895999 to be removed and placed on VH-VUT.	Schedule 3, paragraph 1(d) has been deleted.	This requirement is essentially the same as set out in paragraph 5(a) of the Dunbier Affidavit although the Applicants have specified the engine number of the engine that needs to be removed and replaced. The Applicants submit it is necessary to detail the requirement of orders in the same document rather than cross referencing the Dunbier Affidavit.
9	Schedule 3, paragraph 1(e) outlines the requirement for End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)(ix) in respect of Engine 896999 to be created and provided to the Applicants.	Schedule 3, paragraph 1(e) has been deleted.	The Applicants submit that this is necessary as the Dunbier Affidavit is unclear as to the requirement for the Respondents to provide records.
10	Schedule 3, paragraph 1(f) outlines the requirement for CH-VUT to be flown (with Engine 894902 and Engine 896999 installed) to the Delta Facility.	Schedule 3, paragraph 1(f) has been deleted.	This requirement is essentially the same as set out in paragraph 5(b) of the Dunbier Affidavit. The Applicants submit it is necessary to detail the requirement of orders in the same document rather than cross referencing the Dunbier Affidavit.

Item no.	Applicants' Short Minute of Orders	Respondents' Short Minute of Orders	Applicants' submissions
11	Schedule 3, paragraph 1(g) outlines the requirement for the Respondents to complete the inspections, checks and other steps necessary to create, prepare or complete the records required for Engine 894902 and 896999 in Schedule 2, paragraphs 7(b) and (c).	Schedule 3, paragraph 1(g) has been deleted.	The Applicants submit that this is necessary as the fact that Delta will attend to these matters is referred to in paragraph 5(c) of the Dunbier Affidavit but there is no express obligations on the Respondents to ensure that this occurs.
12	Schedule 3, paragraph 1(h) outlines the Respondents obligations in respect of removal and transportation in respect of Engines 894902 and 896999.	Schedule 3, paragraph 1(h) has been deleted.	This is covered in paragraph 5(d) of the Dunbier Affidavit but does not include the level of specificity as the Applicants' proposed orders. In particular, we note the specificity included in terms of the engine and stand numbers and the additional requirements in respect of removal of the QECs and provision of records. The Dunbier Affidavit does not address these issues.
13	Schedule 3, paragraph 1(i) outlines the requirement for Engine 888473 and Engine 897193 to be removed from the airframes they are installed on and installed on airframe VH-VUT.	Schedule 3, paragraph 1(i) has been deleted.	This is essentially the same requirement contained in paragraphs 5(e) of the Dunbier Affidavit.
14	Schedule 3, paragraph 1(j) outlines the requirement for End of Lease Operator Records/Status Statements described in Schedule 2, paragraph 7(b)(ix) in respect of Engines 888473 and 897193 to be created and provided to the Applicants.	Schedule 3, paragraph 1(j) has been deleted.	The Applicants submit that this is necessary as the Dunbier Affidavit is unclear as to the requirement for the Respondents to provide records.
15	Schedule 3, paragraph 1(k) outlines the requirement for the Respondents to cause VH-VUT to be flown (with Engines 888473 and 897193) to the Delta Facility.	Schedule 3, paragraph 1(k) has been deleted.	This step is mentioned in paragraph 5(f) of the Dunbier Affidavit but the Applicants' proposed Orders include this as a specific step that is required to be included.
16	Schedule 3, paragraph 1(l) outlines the requirement for the Respondents to complete the inspections, checks and other steps necessary to create, prepare or complete the records required for Engines 888473 and 897193 in Schedule 2, paragraphs 7(b) and (c).	Schedule 3, paragraph 1(l) has been deleted.	The Applicants submit that this is necessary as the fact that Delta will attend to these matters is referred to in paragraphs 5(c) and (f) of the Dunbier Affidavit but there is no express obligations on the Respondents to ensure that this occurs.
17	Schedule 3, paragraph 1(m)	Schedule 3, paragraph 1(m) has been deleted.	See also comment in items 1 and 12 above.
18	Schedule 3, paragraph 2 outlines the requirement for the various steps to be carried out in the presence of, and the direction of, the Applicants' nominated representative.	Schedule 3, paragraph 2 has been deleted.	This is covered in paragraph 5(h) of the Dunbier Affidavit but the Applicants' proposed orders makes this explicit.

Item no.	Applicants' Short Minute of Orders	Respondents' Short Minute of Orders	Applicants' submissions
19	Schedule 3, paragraph 3 outlines the requirement for the Applicants' nominated representative to be provided with sufficient access to undertake an inventory.	Schedule 3, paragraph 3 has been deleted.	The Dunbier Affidavit is silent on the Applicants ability to conduct an inventory of their parts.
20	Schedule 3, paragraph 4 outlines the specifications required to be complied with in preparing the engines for road transportation.	Schedule 3, paragraph 4 has been deleted.	This is referred to briefly in paragraph 5(d) of the Dunbier Affidavit. This is dealt with in more detail in the Applicants' short minutes to ensure there is no subsequent dispute.

14 August 2020

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