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Details of Filing

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File Title:	VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS V WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) & ANOR
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IN THE FULL FEDERAL COURT
OF AUSTRALIA
AT SYDNEY

No. NSD 994 of 2020

VB Leaseco Pty Ltd (Administrators Appointed) ACN 134 268 741 & Ors
Appellants

Wells Fargo Trust Company, National Association (as owner trustee) & Anor
Respondents

APPELLANTS' OUTLINE OF SUBMISSIONS

A. Introduction

1. This appeal raises a narrow but important question of construction: does the obligation to "*give possession*" of aircraft objects to a "*creditor*" under Art XI.2 of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (**Protocol**) require an insolvency administrator (**IA**) or debtor to redeliver those aircraft objects in accordance with provisions governing the physical return of such objects in an existing agreement between the parties, or otherwise in a manner deemed reasonable and appropriate by the Court, at the expense of the IA or debtor?

2. The primary judge answered that question in the affirmative. For the reasons elaborated below, that finding was in error. His Honour should have concluded that the obligation to "*give possession*" simply requires an IA or debtor (as applicable) 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 until that point was held by the IA or the debtor. His Honour further should have concluded that, on the facts as found, the Appellants complied with that obligation.

B. Background and primary judge's findings

3. The factual and procedural background is set out at J[19]-[49] and Annexure A to the judgment, and is uncontroversial. By way of summary, on 16 June 2020, the Third Appellants (the **Administrators**) issued a letter enclosing a notice under s 443B(3) of the *Corporations Act 2001* (Cth) in relation to certain aircraft objects leased to the First Appellant (**VB LeaseCo**) by the Second Respondent via a trustee, the First Respondent (together, **Willis**). The aircraft objects comprised four aircraft engines and associated parts and records (**Willis Property**).

4. The four leases between VB LeaseCo and Willis in respect of the Willis Property (together, the **Leases**) incorporated all terms and conditions of the General Terms Engine Lease Agreement between Willis and VB LeaseCo (the **GTA**). Clause 18.3(f) of the GTA deals with the return of equipment upon the expiry or other termination of a lease, and provides that the lessee will, in short, 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 US nominated by the lessor, or such other location as the parties may agree. The Leases designate a Florida address as the relevant delivery location for the purposes of cl 18.3(f) of the GTA.

5. Clause 19 of the GTA deals with remedies available to Willis in the context of events of default. Clause 19(a)(vi) provides that both insolvency and consent to the appointment of a receiver, controller or other officer with similar powers constitute events of default. Clause 19(a)(xvii) further provides that an "Event of Insolvency" (which includes the appointment of a controller, administrator or similar officer) constitutes an event of default. Clause 19(b) sets out, in short, the lessor's remedies upon the occurrence of any Default or Event of Default. Significantly, cl 19(b)(iii) provides that a lessor may: "*(A) By written notice, cancel Lessee's rights of possession and use under any and all Leases between Lessor and Lessee and/or any Related Lease; ... (C) Demand that the Lessee, and Lessee shall upon such demand, return any Equipment promptly to Lessor free of any claims or rights of Lessee in the manner and condition required by, and otherwise in accordance with, all the provisions of Section 18 as if such Equipment were being returned at the end of the Lease Term; or Lessor, at its option, may enter upon the premises where such Equipment is located and take immediate possession of and remove the same ...*" (emphasis added). In the context of an Event of Default, the GTA thus offers *alternative* remedies of (a) the *redelivery* of aircraft objects, which involves the lessee physically returning such objects in accordance with cl 18 of the GTA as if the objects were being returned at the end of the lease; and (b) the *taking of possession* of such objects, which involves the cancellation of the lessee's rights of possession by written notice, and entry into the lessee's premises and the physical taking of possession of the aircraft objects, and removal of the same.

6. In the Court below, Willis contended that the Appellants had not complied with their obligations under Art XI.2 of the Protocol, which was said to require the Appellants to redeliver the Willis Property to Willis in Florida, in accordance with the end of lease redelivery provisions in the Leases. The primary judge accepted Willis' contentions. His Honour found that "*the requirement under the Protocol involves the delivery up (effectively in accordance with the contractual regime under the lease agreement for redelivery) to [Willis] in the United States*": J[8]. The critical reasoning leading to this conclusion appears at J[84]-[90], where his Honour held that, in short, (a) the obligation on an IA or debtor to "*give possession*" is given content by the requirement that "*this remedy is to be exercised in a commercially reasonable manner*" (J[85]); (b) a remedy is deemed to be exercised in a "*commercially reasonable manner*" where the remedy is "*exercised in conformity with a provision of the agreement"* between the parties, "*except where such provision is manifestly unreasonable*" (J[86]) and (c) in circumstances where Willis was entitled to demand redelivery of the Willis Property to Florida on the occurrence of an insolvency event under the Leases, and where those redelivery provisions were

not said to be manifestly unreasonable, it followed that Willis' "*entitlement to relief, namely obtaining possession in the present case requires redelivery in accordance with the existing lease agreement terms between the parties*" (J[87]). It is clear from orders 4 and 9 made by the primary judge that his Honour intended that the costs associated with redelivery would be borne by the corporate Appellants – that is, the insolvent estate, rather than the Administrators.

C. The Convention and Protocol

7. The Convention on International Interests in Mobile Equipment (**Convention**) and the Protocol have the force of law in Australia, and prevail over any Australian law, to the extent of any inconsistency.[1] The Convention deals with mobile equipment of high value or particular economic significance.[2] Within it, Ch III sets out a creditor's remedies where a debtor is in default, including, in Art 10, remedies available to a lessor in the event of a default under a leasing agreement within the meaning of Art 11.

8. The role of the Protocol is to implement the Convention as it relates to aircraft equipment.[3] Art XI deals specifically with what is to occur where an insolvency-related event has occurred in respect to "aircraft objects", as defined in Art I.2(c). Australia has declared that it will apply Art XI, Alternative A in its entirety to all types of insolvency proceeding, and that the waiting period for the purposes of Art XI.2 shall be 60 calendar days.[4]

9. The effect of Alternative A (in the Australian context) is to give an IA or debtor (as applicable) a period of time during which the IA or debtor must either: (a) cure all defaults under the applicable agreement (other than a default constituted by the opening of insolvency proceedings) and agree to perform all future obligations under the agreement; or (b) "*give possession*" of aircraft objects to the relevant creditor (see J[81). The relevant period of time is the earlier of two specified dates, namely "*the end of the waiting period*" (that is, 60 calendar days), and "*the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply*": Art XI.2. In the present case, while Willis would have been entitled to take possession of the aircraft objects immediately upon the Virgin companies going into administration by reason of cl 19 of the GTA, this entitlement was qualified by s 440B of the *Corporations Act*, which precluded Willis from exercising its right of possession without the

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[1] *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth), ss 7 and 8.
[2] Recital 1.
[3] Recital 1.
[4] Declarations Lodged by Australia under the Protocol at the time of the Deposit of its Instrument of Accession.

written consent of the Administrators or the leave of the Court. It follows that on the facts of the present case, the earlier of the two specified dates upon which the Appellants were to "*give possession*" was the end of the 60-day waiting period, being 19 June 2020.

D. The proper construction of Art XI.2

10. The principles governing the construction of the Protocol are set out at J[56]-[64], [66]-[68] and [71]-[72] and are uncontroversial. Applying those principles, the phrase "*give possession*" is to be construed as requiring an IA or debtor (as applicable) to make an aircraft object available to a creditor, in the sense of giving the creditor the opportunity to take possession of that object. In practice, this will involve an IA or debtor disclaiming control over the aircraft object, thereby yielding title to the object to the creditor. As such, from the moment possession is "*given*" in the relevant sense, the creditor has been offered possessory title to the aircraft objects that is good against the world, save against someone who can show a better right to possession, and is therefore able to *take possession*, should they choose to do so. Importantly, the creditor obtains possessory title notwithstanding the fact that the IA or debtor may retain *custody* of the aircraft objects at the time they "*give possession*". This so for the reasons that follow.

11. As a starting point, while Art XI.2 imposes a mandatory obligation on the "*insolvency administrator or debtor*" to "*give possession*" of the aircraft objects within the specified time through the use of the word "*shall*", the article is not mandatory in the sense of requiring the creditor to *accept* a giving of possession to it. As the primary judge recognised at J[84], the creditor may take possession of the aircraft objects if it wishes to do so. It follows that *taking possession* is a *remedy* available to a creditor (which it may or may not choose to exercise), and in order to permit the creditor to exercise their remedy of *taking possession*, an IA or debtor is required to "*give possession*". Once the interaction between the mandatory obligation on the IA and debtor to "*give possession*" and the (optional) remedy of "*taking possession*" is appreciated, it can be seen that the concept of "*giving possession*" in Art XI.2 is one of *making available to the creditor the ability to take possession*, and nothing more.

12. This is confirmed by Art XI.5, which relevantly provides that "*[u]nless and until the creditor is given the opportunity to take possession under paragraph 2*", the IA or debtor as applicable must preserve the aircraft object and maintain it and its value "*in accordance with the agreement*" (emphasis added). By the cross-reference to paragraph 2, Art XI.5 confirms that to "*give possession*" under Art XI.2 means to "*giv[e] the opportunity to take possession*".

13. Art XI.2 is subject to Art XI.7 which permits the IA or the debtor, as applicable, to "*retain possession*" of the aircraft object where "*by the time specified in paragraph 2*" it has cured all defaults other than the default constituted by the insolvency event and has agreed to perform all future obligations under the agreement. Reading paragraphs 2, 5 and 7 together, Art XI operates as follows. The IA or debtor ordinarily has up until the expiry of 60 days to seek to cure past defaults and agree to avoid future ones. If it has not done so, it must then immediately "*give possession*" to the creditor under Art XI.2 (notwithstanding any domestic insolvency moratorium that may continue to apply, such as s 440B of the *Corporations Act* in the Australian context). This obligation is discharged by making the aircraft objects available to the creditor, so that the creditor is given the *opportunity* to take the possession which is offered to it, if it is so minded. That is, it may exercise a self-help remedy, without applying to a court, to take possession of its aircraft objects, such objects having been *made available* by the IA or debtor under Art XI.2. This is confirmed by Art XI.9, which provides that the exercise of this remedy – namely the taking of possession – may not be prevented or delayed after that date. This is a direction to courts, including the courts of the forum of the insolvent company, which are prevented from seeking to tie up the aircraft object in the insolvency, notwithstanding any domestic insolvency moratorium and even if this is for the benefit of general creditors.

14. The Appellants' construction of Art XI.2 is supported by Art XI.4, which provides that references to the IA in Art XI are to that person in their official rather than personal capacity. It follows that Art XI presumes that "*giving possession*" is an act that can in fact be performed by the IA in their official capacity. This is so where the obligation to "*give possession*" is construed as requiring an IA to give a creditor the opportunity to take possession, because such an act would not impose a substantial burden on an IA that might exceed the assets of the insolvent estate, and so is an act that can be performed by the IA in their official capacity. To anticipate what follows, the same is not true of an obligation on an IA to redeliver aircraft objects to a creditor.

15. Finally, the Appellants' construction is further supported by a comparison of Alternative A and Alternative B in Art XI. In contrast to paragraph 2 of Alternative A, paragraphs 2(b) and 5 of Alternative B use the language of "*give the creditor the opportunity to take possession*" rather than "*give possession*". At [3.136] of the Official Commentary to the Protocol, Professor Goode explains that Alternative B qualifies creditors' rights in "*three significant respects*", as compared to a creditors' rights under Alternative A. None of those matters involve the giving of possession under Alternative B requiring something materially less than the giving of

possession under Alternative A. This supports the conclusion that it was intended that "*giving possession*" in Art XI.2 imposes the same substantive obligation as the obligation to "*give the creditor the opportunity to take possession*" in paragraph 2(b) of Alternative B.

E. Errors in the primary judgment

16. It follows from the foregoing that in concluding that Art XI.2 requires an IA or debtor to deliver up aircraft objects generally in accordance with existing lease terms, the primary judge fell into error. As will be seen from the paragraphs that follow, this error flows from a fundamental confusion between the concept of *giving possession* in the legal sense of giving over possessory title through yielding control, thereby giving a creditor the opportunity to *take* possession, and the concept of *redelivery* which is concerned with the transfer of custody (or, as Edelman J puts it in *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19; 94 ALJR 569 at [206], albeit in a different context, "*factual possession*").

17. *First*, unlike the position with respect to the Appellants' construction of the phrase "*give possession*", which finds textual support in Art XI.2 itself as well as Art XI.5 as explained above, there is no textual support in Art XI for the construction preferred by the primary judge. Art XI.2 does not provide that possession is to be given in accordance with the terms of the underlying agreement. To the contrary, there is no reference to the "*agreement*" between the creditor and debtor in Art XI.2 at all. This is a glaring omission in circumstances where Art XI.5(a), XI.7, XI.10 and XI.11 all expressly refer to the underlying agreement between the creditor and debtor. It follows that where the Protocol intends for an obligation to be performed in accordance with the underlying agreement, it says so specifically. The Court would not presume a drafting omission or read a limitation into Art XI.2 by reference to the underlying agreement which is not provided for in terms, in circumstances where the Protocol has expressed such a limitation in other sub-paragraphs of the same article. This conclusion is confirmed by the *travaux preparatoires*, as is explained in [30]-[33] below.

18. In this context, the primary judge's conclusion that the "*ordinary meaning of the word 'give'*" is "*to deliver, hand over*" (J[92]-[93]) should not be accepted. This ignores that the thing that must be given is not the tangible object itself (i.e. the aircraft object) but *possession* of it. The concept of "*possession*" connotes a particular relationship between a person and a tangible object, namely a form of title to the object that is as good as absolute title against the world,

save against someone who can show a better right to possession.[5] *Giving* possession then means to yield to another a claim to title of an object. A claim of title to an object can be yielded without "*delivering*" or "*handing over*" custody of the object (to use the primary judge's language at J[92]). Thus in the present context, giving possession involves an IA or debtor yielding its claim to title as against the creditor, such that the creditor can, if it so elects, assert or resume its absolute title to the object. The yielding of possession need not entail the physical transfer of the object, and could occur (for example) through a statement that title is yielded. In those circumstances, there is no textual foundation for construing the term "*give*", in the context of "*giving possession*", as connoting the physical redelivery of a tangible object.

19. Indeed, the primary judge's construction of the term "*give*" in Art XI.2 as connoting delivery or handing over sits most uncomfortably with Art XI.5, which contemplates an IA or debtor giving a creditor the *opportunity* to take possession, and a *creditor* then taking a positive step in order to take possession, should it choose to do so. The primary judge's reasoning on this point at J[93] incorrectly presumes that the reference in Art XI.2 to "*giv[ing] possession*" means something different to the reference to "*giv[ing] the opportunity to take possession*" in Art XI.5. The text of Art XI.5 cannot sustain the primary judge's reasoning in light of the express cross-reference to paragraph 2. While the act of *taking* possession may occur some time after the *opportunity to take possession* is given (or indeed may never occur, if the creditor is not minded to take possession), *giving* possession, and *giving the opportunity to take* possession are, on the proper construction of Art XI, one and the same thing (cf J[93]).

20. *Secondly*, the primary judge's finding that the obligation on an IA or debtor to "*give possession*" is "*provided with content*" by the requirement that "*this remedy is to be exercised in a commercially reasonable manner*" (J[85]) is, with respect, misconceived. The finding is premised on a false assumption; namely that to "*give possession*" necessarily requires the physical transfer of an object. While giving possession *may*, in certain contexts, involve a physical transfer, that is not necessarily the case. As has been explained above, possession can be "*given*" by making an object available to a creditor, in which case a physical transfer is then effected as part of the act of *taking* possession (should a creditor choose to take such a step). The potential for the physical transfer of an object to occur as part of the *taking* of possession (rather than the giving) is contemplated by the very Leases the subject of these proceedings. As

[5] See, for example, *Hocking v Director-General of National Archives* [2020] HCA 19 at [91]. The position in the civil law context is briefly referred to at J[65] but for present purposes the position at common law and civil law is relevantly the same; "possession" identifies a legal relationship between a person and an object of a particular genus.

noted above at [5], the GTA offers Willis *alternative* remedies of redelivery and the "*taking of possession*", the latter of which involves Willis entering the lessee's premises and physically taking possession of, and removing, its aircraft objects.

21. Once it is appreciated that the concept of giving possession does not, as a matter of necessity, entail redelivery, but can instead be achieved through yielding title to an object which remains in the giver's custody, it becomes clear that the act of "*giving possession*" may be separate and anterior to that of *taking possession*. In such circumstances, it would be the *latter* act that constitutes the exercise of a Convention remedy rather than the former. This follows from the fact that it is inherent within the concept of a remedy that a remedy is "*exercised*" by the party obtaining the benefit of the remedy, rather than by the person obliged to *give over* the remedy. Thus if the obligation to "*give possession*" in Art XI.2 is construed to require an IA or debtor to make an aircraft object available to a creditor, so that a creditor can then take possession of the object if it chooses to do so (as the Appellants say Art XI.2 should be construed) then the act of "*giving possession*" does not involve the exercise of a Convention remedy, and so the requirement that Convention remedies be exercised in a "*commercially reasonable manner*" has no application to the act of, and therefore provides no assistance in determining the content of the obligation to, "*giving possession*".

22. Accordingly, the fact that Convention remedies must be exercised in a "*commercially reasonable manner*" does not assist in giving content to the obligation to "*give possession*" unless one presumes, as one's starting point, that the primary judge's construction is correct, and that giving possession requires a physical transfer, such that the giving and taking of possession are a bundled-up act, together forming a Convention "remedy". Once it is recognised that the concept of giving possession does not conceptually *require* a physical transfer, and that the concept of giving possession therefore may be disentangled from that of taking possession, it becomes clear that "*giving possession*" does not necessarily involve the exercise of a Convention remedy. If the Appellants' construction is accepted, which it should be for the reasons given in Section D, the reasoning at J[85]-[89] is in error. But on any view, the reasoning in J[85]-[89] cannot support the primary judge's construction, as, with respect, that reasoning presumes the very construction it is directed towards supporting.

23. *Thirdly*, as explained above at [11], creditors do not have a mandatory duty to accept the possession which may be given by the IA or debtor under Art XI.2, yet on the primary judge's construction redelivery is required to "*give possession*". This quickly leads to absurdities. For

example, on the primary judge's construction, the Administrators may be forced to incur very substantial expenses in redelivering property to a remote location specified in a lease (such as Florida), only to be told by the creditor that it chooses not to take possession, rendering the cost and time expended in the exercise entirely futile. It is also unclear what is to be done once a creditor declines to take possession in those circumstances. The Court would not conclude that Art XI was intended to achieve this extraordinary result in an insolvency context, where funds are limited, absent clear textual indication.

24. *Fourthly*, the significant commercial burden the primary judge's construction imposes on debtors and IAs further tells against his Honour's construction, in circumstances where, as explained above at [14], Art XI.4 provides that references to an IA in Art XI are to that person in its official, not personal capacity. The costs and practical challenges associated with redelivering aircraft objects are self-evidently significant.[6] There is no reason to assume that there will always be a sufficient pool of free assets for the insolvent estate to bear the costs of redelivery of aircraft objects (cf J[123]), as well as the resources (in the form of employees and regulatory, technical and engineering capability) to comply with return obligations under a lease. Notably, Art XI applies without discrimination to all types of insolvency proceeding, including liquidation in which a debtor may have no continuing employees or resources. If the debtor has no or insufficient assets, then the burden of redelivery would presumably fall on the IA personally, as Art XI.2 imposes an obligation on an IA in terms, and it is unclear where else the funding is to come from. This is directly in tension with Art XI.4, which points strongly against the primary judge's construction. Indeed, it is not too far a stretch to see that insolvency administrations for airlines, the continuing value of which Article XI recognises, would be put at risk by a construction that would threaten the willingness of IAs to take on administrations with liabilities that might exceed all assets of the estate. Further, an essential purpose of many domestic insolvency regimes is to preserve and maximise the assets of the company for the benefit of all the creditors, while giving due regard to secured claims. This purpose would be wholly undermined by imposing an unquantifiable and effectively uncapped burden on insolvent estates via Art XI.2.

25. While it is undoubtedly open to parties to agree to onerous redelivery obligations as a matter of contract, there is no indication in the text of Art XI, or in the drafting history or available

[6] See, eg, the Affidavit of Darren Dunbier affirmed 17 July 2020 at [16]. Clearly, where an airline enters administration, it may be obliged to "*give possession*" of a sizeable number of aircraft objects. As outlined in the Affidavit of Vaughan Neil Strawbridge sworn 11 May 2020, Virgin's fleet contains 117 leased aircraft and engines.

extrinsic materials cited by the primary judge, to support the conclusion that Art XI, which appears in a Protocol designed to deal specifically with insolvency, was intending to impose that burden on the IA or the debtor, in tension with orthodox principles governing the administration of insolvent companies. The focus of Art XI is in reality more confined; it is intended to override any domestic insolvency moratorium so that the creditor should be *given the opportunity*, should it be so minded, to take possession of its aircraft objects. If the taking of possession in turn requires the creditor to accept the burden of disassembly, repair, transport (internal or external), paying off liens, deregistration costs, import/export duties etc, then those are 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.

26. *Fifthly*, the primary judge's construction does not promote "*uniformity and predictability in [the Convention's] application*", as is required by Art 5(1) of the Convention (cf J[98]-[99]). An obligation to "*give possession*" in the sense of making aircraft objects available by giving a creditor an opportunity to take possession is able to be applied predictably and uniformly across various factual scenarios. By contrast, an obligation to *redeliver* aircraft objects necessarily demands a different approach be taken in each circumstance in which the obligation in Art XI.2 applies. The content of the obligation will necessarily differ, depending on the terms of the parties' underlying agreement and, as noted above, in many circumstances will simply be impossible for an insolvent debtor or IA to perform. Further, as the primary judge recognises at J[109], it will not necessarily be the case that an underlying agreement between the parties provides for redelivery at all. The primary judge's answer to this difficulty – to imply redelivery terms "*on a case by case basis*", or otherwise to determine an IA's or debtor's obligations by reference to "*commercial reasonableness*"– itself reveals the lack of uniformity produced by his Honour's construction. Art 5(1) of the Convention thus points against this construction.

27. *Sixthly,* the primary judge's construction is in tension with Art XI.8, which refers to the creditor's additional remedies under Art IX.1, namely the creditor's right, to the extent that the debtor has at any time so agreed and in the circumstances specified in Chapter III of the Convention, to procure, relevantly for present purposes, the export and physical transfer of the aircraft object from the territory in which it is situated.[7] These remedies are exercised by a creditor notifying the relevant authorities that it is entitled to procure those remedies in accordance with the Convention. The process to be followed by the authorities in making such

[7] Article XI.8 does not actually say that the creditor is entitled to those remedies but "*It is implicit in this provision that the creditor is in fact entitled to exercise the remedies in question"* (Official Commentary at [5.64]).

remedies available to a creditor "*is purely documentary, dispensing with the need for the authority to investigate external facts*": Official Commentary at [3.46]. The additional remedies in Art IX.1(b) would not be necessary if the creditor had a right, under Art XI.2, to require the IA to redeliver the aircraft object to the creditor in accordance with a contractual regime. The fact that these remedies are effected by the creditor without the assistance of the debtor further confirms that the Protocol contemplates that the physical transfer of aircraft objects will be effected by a *creditor* as an aspect of taking possession, rather than being effected by a debtor or IA through "*giving possession*".[8]

28. *Seventhly*, the primary judge's construction gives Art XI.2 a dramatically different operation to Art 10 of the Convention, absent any textual support. Art XI.2 must be read together with Art 10 of the Convention[9] (cf J[122]), which permits a creditor to "*take possession or control*" of its aircraft objects upon an event of default.[10] There is no reason why, in an insolvency context where a debtor has either very limited or no assets, a debtor would have to go so far as to *redeliver* aircraft objects, whereas in other (solvent) default contexts no such redelivery obligation arises. The better view is that Art XI.2 grants creditors *additional protection* in an insolvency context by imposing an *obligation* on the debtor or IA to make aircraft objects available to creditors, at a time when a creditor's entitlement under Art 10 of the Convention to "*take possession or control*" of their aircraft objects may otherwise be restricted by local law. As such, on the Appellants' construction, Art XI.2 operates harmoniously with Art 10 of the Convention by assisting a creditor in obtaining the substantive benefit of the remedy conferred by Art 10. The disconnect between Art 10 and Art XI.2 on the primary judge's construction tells against that construction being accepted.

29. *Eighthly*, the extrinsic materials cited by the primary judge J[126]-[151] are not merely of no assistance (cf J[151]). Those materials, as made relevant by the *Acts Interpretation Act 1901* (Cth) or the Vienna Convention, positively favour the construction set out in Section D above. Specifically, as to the US authorities, Art XI takes its origins from s 1110 of the US Bankruptcy Code. US authorities on that Code make it tolerably clear that s 1110 is intended to operate in the manner described in Section D above,[11] supporting the Appellants' construction. The

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[8] The point applies equally where the relevant aircraft object is an aircraft, in which case both Art IX.1(a) and (b) apply.
[9] Art 6(1) of the Convention.
[10] It should be noted that additional remedies which may be available in non-insolvency contexts via Article 12 of the Convention are not preserved or recognised in the Protocol.
[11] See, most recently, *In re Republic Airways Holdings Inc*, 547 B.R. 578 (S.D.N.Y, 2016) at 584-587 which makes clear that it is sufficient, under Section 1110 of the US Bankruptcy Code, for a debtor to make aircraft objects available to a lessor in order to give over possession, without being required to deliver up the aircraft objects.

primary judge's disregard for the conclusion reached in the US authorities at J[128]-[134], on the basis that "*[i]t may be that the Protocol was … intended to enhance the position of creditors compared to section 1110 of the US Bankruptcy Code*" (at J[128]) is unfounded. The materials cited by his Honour do not point to any relevant enhancement with respect to the obligation to "*give possession*". As such, if regard is to be had to extrinsic materials, the US case law straightforwardly supports the Appellants' construction.

30. As to the *travaux preparatoires*, the better view is that the *travaux preparatoires* support the Appellants' construction of Art XI. While an early 1997 draft of what would eventually become Art XI required the "*obligor*" to "*return and deliver the aircraft object to the oblige in accordance with and in the condition specified in, the agreement and related transaction documents*"[12], by 1998 the draft article had been modified to require the obligor to "*give possession of the aircraft object to the obligee [in accordance with, and in the condition specified in the agreement and related transaction documents]"*.[13] A note in an annexure at the end of the document explained the use of square brackets for this text as follows (see note XIX): "*Last part of paragraph 3(b) put in brackets, as it could involve substantial expenditure to detriment of general body of creditors. It is understood from Mr J. Wool that this is not what was intended, and that the duty to return in proper condition is meant to be confined to cases where that duty is part of a secured obligation. Will need some redrafting."*

31. The next iteration of the draft article relevantly provided that the IA "*or the obligor, as applicable, shall, subject to paragraph 6, return the aircraft object to the obligee…*"[14] While this draft used the term "*return*", the Insolvency Working Group agreed that this term should be replaced by references to "*giving possession*", because in the case of some transactions the obligee would never previously have had possession.[15] Notably, the reference to complying with the underlying agreement was deleted in this iteration of the article. While the available materials do not expressly state the reason for this deletion, it followed a concern being raised that such a requirement could involve substantial expenditure to the detriment of the general body of creditors, and this is "*not what was intended*", as noted above.

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[12] UNIDROIT 1997, Study LXXII, Doc 36 Add. 3, Art XIV.3(b).
[13] UNIDROIT 1998, Study LXXII, Document 41, Art XII.3(b).
[14] UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, *Second Joint Session*, 1999 at E-6.
[15] Ibid at E-3, para. 2.6.6.

32. The final formulation of Art XI.2 was presented in the Report of the Third Joint Session in 1999.[16] This iteration thus replaced the reference to "*return[ing]*" aircraft objects with a requirement to "*give possession*" of those objects. During that session, the *Rapporteur* stated that Art XI, Alternative A was "*simply concerned with the ability to acquire possession*".[17]

33. In sum, these materials indicate that: (a) a conscious decision was taken *not to* require an IA or debtor to comply with provisions in the underlying agreement in giving possession under Art XI.2, probably because of the significant burden this would place on the insolvent estate; (b) the language of "*give possession*" was preferred to that of "*return*"; and (c) the objective of Art XI.2 is simply to permit a creditor to "*acquire possession*". Taken as a whole, these materials indicate that a decision was taken *not* to impose an obligation to require the IA or debtor to "*give possession*" in accordance with any contractual regime (certainly not one of redelivery), but simply to ensure that the IA or debtor gave the creditor the opportunity to take possession of its aircraft objects. As such, if regard is to be had to the *travaux preparatoires*, those materials support the Appellants' construction and tell against that adopted by the primary judge.

34. *Finally*, the primary judge's analysis of the objects and purpose of the Convention and Protocol at J[111]-[118] and [122] does not support his Honour's conclusion. It may be accepted that a central purpose of the Convention and Protocol is to give greater protection to creditors in insolvency contexts, including so as to assist airlines obtain access to cheaper finance. However, the construction outlined in Section D already provides a uniform and certain self-help remedy which significantly enhances the position of creditors in an insolvency, in the manner explained in the Official Commentary at [3.129]-[3.136]. Reference to objects and purpose does not require the further step taken by his Honour.

F. Conclusions that ought to have been reached

35. It follows that the primary judge ought to have found that the obligation to "*give possession*" in Art XI.2 required the Appellants to make the Willis Property available to Willis, thereby giving Willis the opportunity to take possession of its aircraft objects, and nothing more. In order to ensure the dispute between the parties is finally resolved, this Court should, in addition to setting aside the primary judge's orders requiring redelivery of the Aircraft Objects, declare,

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[16] UNIDROIT Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, *Third Joint Session*, 1999.
[17] Ibid.

on the facts as found by the primary judge, that the Appellants have complied with their obligation to "*give possession*".

36. Such a declaration is appropriate as the Appellants have "*given possession*" of the Willis Property. Specifically, by their letter and the s 443B notice dated 16 June 2020, the Appellants expressly conveyed to Willis that they no longer sought to exercise control over the Willis Property, and provided details as to the location of each of the engines. By email dated 18 June 2020 (the day before the end of the 'waiting period'), the Appellants gave more fulsome details as to the status of the Willis Property, including the locations of the QEC units (which are attached to the engines) and the engine stands (J[35]-[38]). That was sufficient to give Willis an "*opportunity to take possession*" of its aircraft objects.

37. Importantly, the fact that Willis' engines may have been (a) attached to an airframe owned by a third party; and/or (b) the subject of liens, does not mean that the Appellants had not "*given possession*" as at 18 June. One can meaningfully speak of a lessee "*giving possession*" of engines to a lessor, in the sense of offering the lessor the opportunity to resume its title to the engine which is good against the world (save for anyone who can show a better right to possession), notwithstanding the fact that an engine is attached to an airframe. The transfer of possession, if accepted, might occur, for example, through a documentary transfer. The lessor may be left with the practical problem of arranging for disassembly, but that is not to deny that the transfer of possession has been effective in law. And where a third party holds a lawful lien over the engine under domestic law which is given priority under the Convention and Protocol[18], the lessee may "*give*" possession of the engine to the lessor without the discharge of that lien; the lien simply continues as an encumbrance on the title resumed by the lessor. In short, nothing in the concept of the transfer of possessory title within Art 10 of the Convention or Art XI of the Protocol is inconsistent with the continued existence, before or after the transfer, of legal relationships between other persons and the object in question.

38. As to records, the Appellants have made all records in existence available to Willis: J[157]. Certain additional records sought by Willis are not presently in existence, and cannot be created until certain inspections are completed (at considerable expense) by an authorised maintenance and repair organisation (**MRO**). The intractable difficulty posed by the non-existent records is a symptom of the erroneous construction given to the phrase "*give possession*" by the primary judge. The problem is particularly acute in respect to the serviceable tags, as the primary judge's

[18] Articles 29, 30 and 39 of the Convention; Article XI.12 of the Protocol, and paragraph 1 of Australia's Declaration.

construction imposes on the Appellants the duty and the expense of transporting the engines to an MRO (such as Delta Air Lines, Inc.) that can carry out the relevant certifications.[19] On the Appellants' construction that difficulty does not arise. At the end of the 'waiting period' (or prior), the Appellants were required to "*give possession*" of all aircraft objects in their possession, including all records then in existence. It is nonsensical to speak of an obligation to "*give possession*" by a particular date of an object not in existence as at that date. Accordingly, as the remaining records sought by Willis were not in existence at the moment the obligation under Art XI.2 crystallised, there could be no obligation to "*give possession*" of those records.

39. Finally, it follows from the proper construction of Art XI that the Court has no role in directing an IA or debtor to make an *actual transfer* of an aircraft object to a creditor, let alone making orders as to the regime by which that transfer is to occur. The Convention and Protocol draw a clear distinction between remedies which are exercised *directly* by the creditor and those which are exercised *pursuant to a court order*. Art XI is designed to recognise and regulate a direct or self-help remedy of the creditor. Accordingly, the only role of a court in respect of Art XI is a strictly declaratory one, namely to determine whether the IA or debtor has complied with the mandatory obligation imposed by that article in the circumstances. Ordering a regime for redelivery is also inconsistent with the text and purpose of Art XI.2, as such a regime presupposes a delay between the date upon which the obligation to give possession arises and the date for its performance, in circumstances where Art XI is structured to create a "hard" deadline for the giving of possession. This is a distinction which would not arise if the words "*give possession*" in Art XI.2 are read to require, only, the facilitation of a creditor taking possession rather than mandatory redelivery (irrespective of a creditor's wishes). It therefore follows that the Court did not have power under the Protocol to make orders in the form of orders 5 to 8 inclusive. For that reason too those orders must be set aside.

40. In the event the appeal is successful, the orders will need to include restitution for the expenses incurred in complying with the orders to date.[20] Given a stay of the orders was refused, the Appellants have commenced down the path of compliance. These matters are unfolding and an affidavit will be filed by way of fresh evidence updating the Court on the position close to the hearing. Given the extremely short timeframe any further application for a stay will be reserved until the hearing.

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[19] See the Affidavit of Darren Dunbier affirmed 5 August 2020 at [5].
[20] *Heydon v NRMA Pty Ltd (No 2)* [2001] NSWCA 445; 53 NSWLR 600 at [12]-[14]; *Food Channel Network Pty Ltd v Television Food Network GP (No 3)* [2010] FCA 1112 at [8]-[9], and the cases there cited.

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Justin Gleeson SC
Banco Chambers

Kate Lindeman
Banco Chambers
02 8239 0247
kate.lindeman@banco.net.au