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TRANSCRIPT OF PROCEEDINGS

O/N H-1263404

FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA REGISTRY

MIDDLETON J

No. NSD 714 of 2020

**WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER
TRUSTEE) and ANOTHER**

and

VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) and OTHERS

ADELAIDE

3.03 PM, MONDAY, 17 AUGUST 2020

MR WARD appears for the applicant

DR HIGGINS appears with MS GLINDEMAN for the respondent

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HIS HONOUR: I think I have to start again; I'm sorry about that. You probably didn't hear a word I said. The court orders that: section 17(1) of the Federal Court of Australia Act requires that the jurisdiction of the court be exercised in open court, but section 17(4) of the Act allows for the public to be excluded if the court is
5 satisfied that their presence would be contrary to the interests of justice. The court must balance the importance of this matter being heard and determined and open justice. Justice requires this hearing to be conducted as soon as reasonably possible and that it not be delayed indefinitely, pending the end of the current viral pandemic. The best practical arrangements in the circumstance of the pandemic have been put
10 in place to allow interested members of the public or the press to observe or listen to the hearing.

These arrangements are identified in paragraph 1 of the orders below. It would be contrary to the interests of justice for the public to have access to the hearing, other
15 than in order to the arrangement identified in paragraph 1 of the orders below, because the result of that would be to have the hearing deferred indefinitely. The court orders that:

(1) Pursuant to section 17(4) of the Act, the public be excluded from this hearing listed at 2.15 pm – that should be, sorry, 3.15 pm on 17 August 2020, other
20 than by the following arrangements:

- a. any member of the public will be able to join the hearing via Microsoft Teams platform by providing an email address to the associate to Middleton J, as stipulated in the court notice of proceedings, and
- 25 b. any member of the public is able to listen to the hearing via Microsoft Teams platform by dialling the number and ID allocated to the hearing published on the court list.

(2) Members of the public who attend the hearing via the methods in paragraph 1 of these orders, do so on the condition that they are:

- 30 a. permitted to observe or listen to the hearing, but are in no circumstances permitted to participate in the hearing,
- b. prohibited from making any recording or photographic record of the hearing, or any part thereof, by any means whatsoever, with the exception of media representatives, and
- 35 c. advised that any failure to observe the conditions in (a) and (b) may constitute a contempt of court and be punishable as such.

I will now take appearances.

MR WARD: May it please the court. Ward, I appear with my chief of the

HIS HONOUR: Thank you, Mr Ward.

DR HIGGINS: May it please the court. I appear with my learned friend MS
GLINDEMAN for the respondents.

5

HIS HONOUR: Now, Mr Ward, you were just slightly difficult to hear, so you may
just need to bring it closer or whatever you think. Have another go at - - -

MR WARD: How is that, your Honour. Is that better?

10

HIS HONOUR: Yes, yes. Dr Ward, that's much better, thank you. All right.
Summaries and papers have come in; perhaps, Mr Ward, you would bring us to
where we're up to at the moment.

15 MR WARD: Your Honour, there are a couple of very short contests remaining in
the form of the short minutes of order. I can indicate to your Honour that there are
two matters which should not trouble your Honour. The first is in relation to what I
think is order 4 in the current marked up version of the competing short minutes.

20 HIS HONOUR: Yes.

MR WARD: That, your Honour, is the proposition that a declaration is sought by
the respondents in relation to whether or not the expenses that your Honour has
ordered are properly incurred, and we don't take any issue at all with the form of
25 declaration. We thought that our version may have assisted the process by also
including the company Virgin Tech, which is involved – as we understand Mr
Dunveer's evidence, is involved in the process. We were told that that's not helpful,
and so we don't oppose the form of order that is, I think, order 5 in the amended
interlocutory process.

30

HIS HONOUR: All right. Well, that's where I was up to, so thank you for that. So
I've now got the new amended interlocutory process, I've got order 5 and I've read
an affidavit of Mr O'Geary, which raises this issue of Virgin Tech's inability. So I
was happy to not include them in the orders, so that order can be made without a
35 problem, can it?

MR WARD: It can, your Honour.

DR HIGGINS: Yes, your Honour.

40

HIS HONOUR: All right. Well, that's gone off the list. Thank you.

MR WARD: Your Honour, also off - - -

45 HIS HONOUR: Dr Ward?

MR WARD: Your Honour, also off the list, your Honour will be pleased to hear, is in relation to our form of schedule 3, which is the more detailed redelivery proposals. The dates that we had originally included in the schedule 3 have – the internal dates have dropped away, such that we’re now essentially satisfied that, if everything is
5 done by 15 October 2020, we will obviously work with and be assisting, to the extent we have to, the respondents to meet that date, but we think that there’s not much future in having a debate about the internal timing of steps within that process.

10 HIS HONOUR: All right. Thank you.

MR WARD: So that, I think, your Honour, leaves just a few issues still for debate this afternoon. The first is, in our submission, it remains inappropriate that your Honour make orders that are in the level of detail in our proposed schedule 3 rather than the incorporation by remnants of a paragraph or two of Mr Dunveer’s redelivery
15 proposal in the affidavit evidence. So there would be that question of detail against generality. The second issue is a question which I will turn to in relation to the position of historical operator records as we now understand it to be, that is, simply some – well, we think it’s a relatively minor question in relation to historical operator records following the redelivery that is now going to occur, which involves further
20 operation of the engines. So there’s just a small issue there.

Then a more substantial issue, as we see it, in relation to the suggestion by my learned friends that the excuse from liability – or release from liability, extend beyond a release from liability in relation to rent, which was what was argued before
25 your Honour on the first occasion, to extend to apparently all liability, and we wish to be heard about that proposition. And finally, the question of costs.

HIS HONOUR: All right. Now, before I – when I got these orders, I must say, I tried to go through the schedules to – and you helpfully gave me, Mr Ward, I think it
30 was in your submissions, could have been Dr Higgins, a schedule of what the differences were of detail between the schedule and what Mr Dunveer had said and where up. Now, I must say, I have not had the opportunity of ticking those off and looking at them in any detail. I don’t know if we should spend the time in the court going through that. What I propose to do is that, unless you wanted to say anything
35 further about it, is just to go away and work it out myself as to what needs to be put in that schedule, but I can say, Dr Higgins, that my preference is to be more specific and not just incorporate by reference Mr Dunveer’s affidavit, but to be guided by his affidavit as what needs to be done and what maybe best endeavours and what time it can be done and matters like that.

40 So it just seemed to me, picking up the point that Dr Ward has been mentioning, is that it’s probably better to have a prescriptive way as much as we possibly can, but with a carve out to the extent to which Mr Dunveer says it’s either not necessary or cannot be done or we don’t have the – or whatever. So

45

DR HIGGINS: I understand that indication, your Honour, and in light of that, can I make only one submission in respect of the terms of schedule 3, and can you take up the applicant's version of schedule 3.

5 HIS HONOUR: Yes.

DR HIGGINS: And we propose, your Honour, one amendment to that, which concerns order 2: the applicant's participation.

10 HIS HONOUR: just have a look at that.

DR HIGGINS: At the – paragraph 2 should begin, your Honour, the steps to be taken by the respondents. Do you see that?

15 HIS HONOUR: Is this in the schedule itself, sorry?

DR HIGGINS: Yes, it's schedule 3 at paragraph 2.

HIS HONOUR: Sorry.

20

DR HIGGINS: Which your Honour finds on page 5 of the document.

HIS HONOUR: Schedule – sorry, rep. I've got so many different forms of orders
- - -

25

DR HIGGINS: The says schedule 3 at the top in the middle.

HIS HONOUR: It does. And then I've got a version which has page 10, which is a
– I've got a version which now has the mark ups which it had – in red and in blue,
30 and the schedule 3 I've got completely marked out. So that's the one I'm using, but
assuming it's not marked out, you wanted me to go to - - -

DR HIGGINS: I do, your Honour, yes. If your Honour takes the – it should be page
14 of your - - -

35

HIS HONOUR: “The steps have been taken”?

DR HIGGINS: Yes.

40 HIS HONOUR: “The steps that have been taken by Ms Follens”? Yes, I have that.

DR HIGGINS: Thank you, your Honour. Thank you. But, your Honour, all we
seek is this: that at the beginning of that paragraph (b), interpose “the respondents
will use their best endeavours to procure that the steps to be taken by the respondents
involve” – and that – we require a best endeavours obligation because that step
45 involves certain Delta premises which are not controlled by the applicants. So it's
not a matter over which we have complete control.

HIS HONOUR: Yes.

DR HIGGINS: So if your Honour were merely to introduce “the respondents will use their best endeavours to procure”, and if your Honour then drops down to the
5 bottom chapeau, that would result in R2 being deleted at the beginning of the chapeau. And in the third last line, after - - -

HIS HONOUR: Sorry, Dr Higgins, where – so if I put in “the respondent will use their best endeavours to procure the steps to be taken by the respondents” – I’m
10 sorry, I’m back on – I’m still back on page – paragraph 2.

DR HIGGINS: Let me start again, your Honour.

HIS HONOUR: How do you want that to read, again?
15

DR HIGGINS: “The respondents will use their best endeavours” - - -

HIS HONOUR: Yes.

20 DR HIGGINS: - - - “to procure” - - -

HIS HONOUR: Yes.

DR HIGGINS: - - - “that the steps to be taken by the respondents under the
25 previous paragraph involving (a), (b), (c), (d)” - - -

HIS HONOUR: Yes.

DR HIGGINS: Then delete R2.
30

HIS HONOUR: Yes.

DR HIGGINS: Just syntactically. So it would be “involving, be taken in the presence of, etcetera”.
35

HIS HONOUR: Yes.

DR HIGGINS: And then your Honour sees “engine leases”, comma. Then it says, “will cause” and there we ask that “use their best endeavours” to be inserted, so it
40 would read “will use their best endeavours to cause those steps to be carried out”.

HIS HONOUR: All right.

DR HIGGINS: And that’s because of their – the Delta premises not being under our
45 full control.

HIS HONOUR: Yes. I think Mr Dunveer went through that in his affidavit.

DR HIGGINS: He did, your Honour. That's so.

HIS HONOUR: Well, then, that was what I was indicating to the parties, that where that was the case, where it was a matter which was not completely controlled, I
5 would be used to best endeavours and That's probably consistent with what I had in mind.

DR HIGGINS: Yes, your Honour.

10 HIS HONOUR: All right, you're welcome.

MR WARD: Your Honour, we don't oppose that, although it's already caught by paragraph 1 of the schedule 3 orders which say that everything needs to be done using best endeavours.

15 HIS HONOUR: All right.

MR WARD: So it's overkill. Could I just add a further proposed variation, your Honour, to order 1 in schedule 3, which I think should be uncontroversial?

20 HIS HONOUR: Yes.

MR WARD: Which is, would your Honour consider in commencing the words in paragraph 1 with "unless the parties otherwise agree in writing" just to allow us to
25 - - -

HIS HONOUR: Have confidence.

MR WARD: - - - cooperate to the extent possible.

30 DR HIGGINS: That's all for your Honour, thank you.

HIS HONOUR: All right. Well, then, in relation to that part of the order I will have to reformulate it in accordance with what I – view I take about Dr Ward's table.
35 That's a convenient way for me to look at it; wasn't it, Dr Higgins?

DR HIGGINS: Yes, your Honour. That's fine.

HIS HONOUR: All right. Well, then, let's not waste any more time on that, although obviously if it's important. So the second – the historical open records, was that the next issue?

MR WARD: It is, your Honour. It's a minor point. But if your Honour turns to the table which I think you're referring to which is in our submissions at court book page
45 115.

HIS HONOUR: Yes.

MR WARD: And we agree entirely that in terms of historical records, everything that has currently been generated through the historical operation of the aircraft has now been provided, although obviously it hadn't been previously. The question is simply whether or not what is contained in our proposed schedule should be provided
5 by way of historical record, that the completion of the ferry flights. We think that the answer to that is plainly an obvious yes, and in particular the EASA releases should be provided at the completion of the ferry flights. We're not sure why that wouldn't be the case.

10 HIS HONOUR: Well, I've forgotten what Mr Dunveer has said about the – but didn't – wasn't that again a matter that may not be available? You can help me, Dr Higgins. You're on mute, Dr Higgins.

DR HIGGINS: Yes, sorry, your Honour phone. Your Honour, they are granted
15 by a European authority, and it's a matter over which we don't have control.

HIS HONOUR: All right. So can we put something in, Dr Ward? Best endeavours, again, to try and get them?

20 MR WARD: We can. Your Honour, I formally read on the application the affidavit of Mr Failler, F-a-i-l-l-e-r, affirmed on 10 August. And your Honour will see that Mr Failler says that the Delta facility is quite capable of issuing an EASA release, as well as the FAA release.

25 HIS HONOUR: All right, I did read that. But I don't want to make something which was impossible to the end to, but if everyone just kind of used their best endeavours, I've got no belief that – I've no reason to disbelieve that won't occur. So just looking at the schedule where does that how do I need to deal with that point?
30

MR WARD: Would your Honour just bear with me for one moment.

HIS HONOUR: Yes.

35 MR WARD: It's in Federal 2, your Honour.

HIS HONOUR: Yes.

MR WARD: Paragraph 7C, roman (vi) capital B.
40

HIS HONOUR: I see, yes. How does that – how does work for that one? The following – I would have to be given – so do we – how do you want that refined, Dr Higgins? Is that - - -

45 DR HIGGINS: best endeavours obligation again, and the liberty to restore would also apply. This is a matter that's addressed in Mr Dunveer's third affidavit at paragraph 18 to 20 - - -

HIS HONOUR: Yes.

5 DR HIGGINS: - - - but your Honour knows what evidence goes to that. But if it were reasonable endeavours, and an ability to relist, that would be adequate from our point of view.

10 HIS HONOUR: How do I refer to – respondents – identified – Dr Ward, it's up to you. Do you want a – are we allowed to have a best endeavours, or do your client happen to have a best endeavours wall of schedule 2?

MR WARD: I think, some of it, your Honour, isn't – I think most of schedule 2 is not something that requires best endeavours, because they're records that must relate to - - -

15 HIS HONOUR: Yes, I see.

MR WARD: - - - we just want them delivered.

20 HIS HONOUR: Yes. Well could we put in 6AB an ESA etcetera to the extent to which it can reasonably be provided?

MR WARD: I don't think I can consent to that, your Honour. It's a matter for your Honour, of course, but - - -

25 HIS HONOUR: No, no. Well, I don't want to – maybe what you could do, I don't want to create more draft orders, but maybe what you could do is between the two of you work out just in – don't give me a whole order, but just give me something you think you would be happy with in relation to this particular item by an email through your solicitors, and we can go from there.

30 MR WARD: We will do that, your Honour.

35 HIS HONOUR: I think it's just a matter of working out the wording, but I think you understand when I – I agree with Dr Higgins outside should make it best endeavours.

DR HIGGINS: We can do that, your Honour.

40 HIS HONOUR: All right. Then we deal with the rent issue, is that the next area?

MR WARD: We do, your Honour. Now, this is matter in which the parties, I think, are well apart.

45 HIS HONOUR: Yes.

MR WARD: We understood that we argued before your Honour the question of whether there should be relief, or excuse from liability for rent during the period of

possession of the aircraft objects, in this case being the engines. We sought rent pursuant to a Corporations Act argument on the basis of the invalidity of the notice which had been issued. Your Honour having indicated that the notice is invalid has then also indicated that you would nevertheless propose to excuse, in relation to rent
5 for the – presumably the period from 16 June until now 15 October. What is now proposed by the respondent is a much broader relief in relation to what appears to be all liability, or any liability in respect of the aircraft objects.

10 And that breadth of language is, in our submission, utterly inappropriate. It would, on the face of it, extend to liability in respect of the very matters we've been arguing about, being the costs of the redelivery proposal. It's simply – first of all it falls outside the scope of, in our submission, 443B, but more significantly it would be completely inconsistent with the Cape Town Convention, which was the very
15 argument that we had, and appear to have been successful in relation to. And finally, it appears to be a completely hypothetical argument insofar as it relates to the possibility that defects will be found in one or more of the engines following the final inspection process, and to that extent your Honour would not make an order that was intended only to catch a hypothetical which may never occur. That's a matter which, presumably, could be addressed pursuant to a liberty to apply if it became a serious
20 issue in the months ahead.

HIS HONOUR: Well, let's start with section 443(b), which is the – it's not the only provision relied upon by Dr Higgins, but it's the starting one, I think.

25 MR WARD: Yes, your Honour.

HIS HONOUR: So – and what I was interested in is 443(b)(ii) says, some of this section, the administrator is liable for so much of the rent, that covers rent. And then it says, or other amounts payable by the company under the agreement, which
30 presumably is the lease agreement. So that's the starting position. Then, you've got the subsection 8, does not apply insofar as a court by excusing from liability. So the liability I, at first blush, would say rent or other amounts payable by the company under the lease agreement.

35 MR WARD: That's right, your Honour.

HIS HONOUR: All right. So if I made an order in those terms, rent or other amounts payable under the – whatever identified the agreements. Where does that
40 lead to?

MR WARD: Well, so long as it does not affect the obligation of the respondents to be liable for the costs of the redelivery, which occurs pursuant of the Capetown convention, it's difficult to see that it adds very much to what your Honour has already ordered.
45

HIS HONOUR: Well, it may not so much, pending what you're concerned about, but it may give broader exemption to the administrators should there be some dispute

or liability under the agreement otherwise then, in relation to redelivery. May, I don't know.

5 MR WARD: Yes. Well, your Honour, in our submission, it would be incumbent upon the respondents to have litigated that question before your Honour on the basis of actual evidence, rather than a speculative grab bag in some orders proposed at the conclusion of argument. It is, with respect, from our perspective, difficult to see to what such an order could apply, and certainly the originating process upon which I moved did not seek any such payments.

10 HIS HONOUR: Yes, all right. I understand that point. And you would – as far as power is concerned, I would have power to do that under 443B, necessarily so, because I would just be using the wording of the statute.

15 MR WARD: Well, your Honour, that's right, save only for this. My learned friends relied upon an authority, *De Vries v Rapid Metal*, a decision of the New South Wales Court of Appeals, and in particular made reference to paragraph 161 of that decision. Could I just read - - -

20 HIS HONOUR: Yes.

MR WARD: It related to section 419A, which is in similar terms. And could I just read the sentence in that paragraph that is of relevance. "The language of section 419A subsection (2) is not apt to extend to a liability to make payments under a hiring agreement between an owner of goods and a corporation when the liability is not incurred or is not enforceable until the end of the period of hire". So that carve out, we think, does control your Honour's discretion under 443B subsection (8) as well. That is, to the extent that payments are not enforceable, or the liability is not incurred until the end of the period of hire, it seems to support the proposition for which we contend.

25 30 HIS HONOUR: All right. And then, there's reliance on the provision I've relied upon before to excuse some liability - - -

35 MR WARD: 447A.

HIS HONOUR: Yes.

40 MR WARD: Which is – there is little I can say, your Honour, about the potential scope of 447A, although it does, on the authority, seem to have a carve out in relation to accrued liabilities, and there's a question to the extent to which the redelivery obligations are an accrued liability. But, I don't know that we're actually talking about redelivery obligations and the cost of redelivery. I think, on the last occasion, it was suggested that the real concern was the possibility that there be some hidden liability lurking in the engines which nobody knows about at the moment. And to 45 the extent that we're dealing with that, could I suggest to your Honour that it's – whether the power exists in 447A or elsewhere, it's a hypothetical concern, and it's

one that can be covered with your Honour making the ruling you've indicated in relation to excuse from payment of rental payments, and otherwise acknowledging that there is a liberty to apply in relation to other matters that may arise that are yet unforeseen.

5

HIS HONOUR: Yes, thank you. Also, I think – I figure someone has recognised, with the order it made in relation to the costs, to leave the costs of redelivery being in the administration, that solves one problem. Anyhow.

10 MR WARD: Well, does your Honour mean the costs of these proceedings, or the cost of the redelivery?

HIS HONOUR: No, no, the redelivery.

15 MR WARD: Yes.

HIS HONOUR: Yes.

20 DR HIGGINS: Your Honour, could I just on order 9, if my learned friend has finished?

HIS HONOUR: Yes, of course.

25 DR HIGGINS: With respect, your Honour, we embrace everything your Honour initially indicated to Dr Ward. Your Honour would be making an order precisely in the terms of the Act. It would be order under 443B(8) or 443A, which friend's submissions, if your Honour takes up our written submissions of 14 August 2020, if your Honour has them.

30 HIS HONOUR: Yes, yes.

DR HIGGINS: Your Honour sees submissions directed to this order commencing at paragraph 24, and going through to paragraph 36.

35 HIS HONOUR: Yes.

DR HIGGINS: We ourselves that the submissions respect grab bag.

HIS HONOUR: Yes.

40

DR HIGGINS: The reliance on evidence that we have read in the proceedings, your Honour, and your Honour has the benefit of the written submissions and has had a long day, so I will not repeat those written submissions, but we do say that those matters support the orders we seek, and they would be both orthodox and straight
45 forwardly in the language of the Act.

HIS HONOUR: All right. I will have – I’m going to reserve on this issue, have a bit more of a think about it. But, I should indicate I’m clear in my own mind, and I don’t know if – I know Dr Ward’s not consenting to this, but I’m clear in my own mind the of 16 June until 15 October, so the period of time I have – I indicate that’s what I will be making. But then the issue is the covering – how long it covers. So I will reserve on that.

MR WARD: Your Honour, could I just say one thing, which is if your Honour were minded to make any order at all of this type, in our submission, it would be limited to an order which I understand is similar to orders your Honour has made elsewhere in these proceedings, which limits the liability of the administrators to the extent that the assets of the Virgin companies are capable of satisfying the debt.

HIS HONOUR: All right. Dr Higgins, you want to say anything about that?

DR HIGGINS: Yes. It’s the first I’ve heard of it, your Honour. I’m unclear as to why that would be necessary or appropriate. That seems to result in a circumstance of personal liability for the administrators, potentially, which is contrary to the burden of the other orders that your Honour foreshadowed making.

HIS HONOUR: Perhaps you had better explain it, Dr Ward, a bit more limited in the liability assets of the – so if it’s – if the assets don’t provide for it, then the administrators are liable, is that – that can’t be right, can it.

MR WARD: The other way round. The other way round, and it’s premised upon your Honour being prepared to make orders under 447A, which were not argued at all before you on the hearing that we had.

HIS HONOUR: Yes. No, no. I understand. All right. Well, I will consider what – how that works and what I’ve done in the past, and then there was the question of costs. I thought – let’s go to the question of costs. As long as you get your costs, Dr Ward, do you have anything else to say about the question of costs?

MR WARD: No, your Honour. What we say is that your Honour should make an order that my clients receive their costs of the proceedings and presumably the administrators are indemnified in relation to the payment of those costs in the ordinary way. But that’s not a matter that should concern us. Your Honour’s order should be a straightforward order.

HIS HONOUR: Well, what do you say, Dr Higgins? In your submissions, you – in paragraphs 37 to 39, I sort of just made some observations last time; I haven’t really come to a concluded view. So the problem I suppose from Dr Ward’s client is if there’s not enough money to pay the cost, then he’s out of pocket.

DR HIGGINS: Yes, your Honour. We maintain our position at paragraph 37 to 39 of our written submissions. An alternative, your Honour, would be to make an order that by 5 pm 24 August 2020, the parties are to file and serve written submissions up

to a few pages in length on the question of costs, to be determined on the papers, which may facilitate an exchange between the parties of offers to resolve the question of costs.

5 HIS HONOUR: Another way is that your clients are liable for the costs; they get an indemnity. There's another option, isn't there.

DR HIGGINS: Yes, your Honour, that is also an option. With respect, yes.

10 HIS HONOUR: All right. Well, Dr Ward, I'm going to reserve on these matters, so I won't be making orders today. I would like to have made orders today, but until I finalise that schedule, it's a waste of time really, because - - -

15 MR WARD: I apologise for that, your Honour, but we've done what we can to make it simple.

HIS HONOUR: No, no. Already, probably served on the – what's happening today.

20 MR WARD: Your Honour, we of course – we would not oppose, in any way, the proposition that there be an indemnity, to the extent assets are available, in relation to the costs of these proceedings that would ordinarily follow.

25 HIS HONOUR: How about I take Dr Higgins suggestion that if the two of you could put in a short submission about – after talking to each other, about what you propose. If there's a conflict, I will deal with it on the papers. If there's not a conflict, then we can deal with otherwise.

30 MR WARD: Your Honour, I can indicate – I think I've said everything I intend to say - - -

HIS HONOUR: All right.

35 MR WARD: That is your Honour – your Honour, in our submissions, your Honour – assuming that your Honour's reasons are consistent with that which you've indicated, there is no reason at all the costs would not follow the event. There is no - - -

40 HIS HONOUR: Yes. I think you should work on the basis that you're the winning party, so costs should follow the event. It's just how those costs are facilitated by – in an administration. That's the only issue, so – you've said everything you want to say, thank you. Dr Higgins, I will give you the opportunity of putting in a short submission as to the mechanics of that, but - - -

45 DR HIGGINS: Yes,, your Honour.

HIS HONOUR: I think if – from what I have indicated what I am going to be doing, the successful party has been your opponent, so they will be entitled their costs, so work on that basis.

5 DR HIGGINS: Yes, your Honour.

HIS HONOUR: It's just facilitating how – Dr Ward - - -

MR WARD: Your Honour, could I - - -

10

HIS HONOUR: - - - if you do get some submissions from Dr Higgins that indicates a matter which your client needs to respond to because that particular form of payment of your costs has risks, then I will let you – give you leave to put in a short submission of – within, you know, 24 hours, so I can know that if I don't hear from

15

MR WARD: Thank you, your Honour, you took the words out of my mouth. Thank you.

20 DR HIGGINS: Your Honour, there's one more matter upon which I should address your Honour, and I'm not sure what our learned friend's position is in this respect. If your Honour looks at order 8 - - -

HIS HONOUR: Yes.

25

DR HIGGINS: - - - which is marked up in the short minutes.

HIS HONOUR: Yes. You just want a – is this the stay?

30 DR HIGGINS: Yes, it is, your Honour.

HIS HONOUR: Yes. but I – I see. So this fits into a – well, I'm quite happy to obviously stay until you get the opportunity to look at my reasons.

35 DR HIGGINS: Yes, your Honour can - - -

HIS HONOUR: The only trouble is this is going to delay the process if I don't get my reasons out quickly.

40 DR HIGGINS: Well we didn't want to increase the pressure on your Honour, but there is a real possibility that we will seek to appeal - - -

HIS HONOUR: Yes.

45 DR HIGGINS: - - - and we wanted to preserve the position by reason of a short stay.

HIS HONOUR: I understand. Well just tell me, what are the time pressures everybody is under, which will – everybody in the real world. So where are we – has anything happened with the actual delivery of the objects, and preparing for delivery?

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DR HIGGINS: certain respects of the documents, your Honour. And I can per my instructions otherwise.

MR WARD: We wouldn't mind knowing, your Honour, whether the ferry flight has happened, and whether the that Mr O'Geary refers to over the aeroplane in Adelaide has been dealt with.

DR HIGGINS: Your Honour, I need to seek instruction on those matters,

15 HIS HONOUR: All right, well what date are we today? We're the 17th, aren't we? And – maybe you could report to me, Dr Higgins, and obviously the other side, when you put in your submission on costs as to where – what the timetable is.

DR HIGGINS: Yes, your Honour, we're content to do that we will give your Honour as much detail as possible at that point.

20 HIS HONOUR: All right, you can do that. I don't want to hold up the process, if it turns – let's say I'm – just trying to work this out – let's say I'm wrong, and an appeal court says that no, it's not to be done by giving possession the way in which I have envisage - - -

DR HIGGINS: Yes, your Honour.

HIS HONOUR: - - - there still has to be redelivery, doesn't there?

30

DR HIGGINS: No, your Honour. We would say that if our construction of get possession is correct, the assets are made available and our learned friends come to collect them, in effect. So it changes quite dramatically.

35 HIS HONOUR: Yes, I was trying to – I used the word 'redelivery' in a wrong way, they - - -

DR HIGGINS: Sorry, your Honour.

40 HIS HONOUR: - - - still have to be moved from one place to another.

DR HIGGINS: Only, your Honour, if our learned friends take up the opportunity to take possession of the object.

45 HIS HONOUR: I see. It would - - -

MR WARD: It would be very difficult, your Honour, for us to take possession of an object at Adelaide airport that's the subject of a

5 HIS HONOUR: Yes, I see. All right, well I will do the best I can. But if you can give me a timetable, we will go from there.

DR HIGGINS: We will do that, your Honour.

10 HIS HONOUR: All right.

MR WARD: Your Honour - - -

HIS HONOUR: Anything else you need – yes.

15 MR WARD: Just in relation to the stay, your Honour. We don't formally consent to the stay, although we think it's an irresistible proposition that your Honour should give reasons in the circumstances, redo our we have a great about the 15 October date being

20 HIS HONOUR: That – yes. Well, at the moment I haven't made any orders, so no time runs.

MR WARD: Yes.

25 HIS HONOUR: It's when I make the orders, but it seems to me – if I give you the reasons at the same time I make the orders, that's probably the better way to deal with it, isn't it?

30 DR HIGGINS: Yes, your Honour.

MR WARD: Yes, your Honour.

35 HIS HONOUR: And then, you can just go off in a normal time limit and you expedited the hearing, that's where you want it.

DR HIGGINS: Yes, your Honour, and also we would seek an expedited hearing, given circumstances.

40 HIS HONOUR: All right. Well then, I think that's the way in which I will aim to do my job, is to give you the orders and the reasons at the one time. You're all – you've had the indication already as to what I'm proposing to do on the matters, I think I've made that quite clear, other than the ones I've reserved on such as costs. And I say reserved – informally reserved on, and the issue of the rent. And I will deal with those in my reasons and orders. All right. We can go from there, I think.
45

DR HIGGINS: Your Honour, could I raise one final matter, and it's a procedural one. I've not yet formally read the additional evidence that we have put before your Honour.

5 HIS HONOUR: All right, yes

DR HIGGINS: that, and read the affidavit of Darren William Dunveer, of 5 August 2020.

10 HIS HONOUR: Yes.

DR HIGGINS: And, I believe, your Honour, on the last occasion, that was not formally read. We also read the affidavit of Darren William Dunveer, affirmed on 14 August 2020.

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HIS HONOUR: Yes.

DR HIGGINS: And the affidavit of Salvatore Algeri, sworn on 5 August 2020.

20 HIS HONOUR: Yes. And have you included the affidavit today?

DR HIGGINS: I believe we don't now need to read that, your Honour.

HIS HONOUR: All right.

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MR WARD: There's no objections to that, your Honour.

HIS HONOUR: And no objection. I think, probably – I think it should be in the court record, Dr Higgins, so - - -

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DR HIGGINS: That was my suggestion.

HIS HONOUR: - - - if you don't want to read it, I suppose it's not for me to tell you you have to.

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DR HIGGINS: I don't believe we will require it, your Honour, so I ought not to read it.

HIS HONOUR: All right.

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DR HIGGINS: And there's also the issue, your Honour, of the amended interlocutory process, which I seek leave to file.

HIS HONOUR: And I will give you leave to file that, and there is no objection to that, as I understood it.

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MR WARD: No objection.

DR HIGGINS: May it please the court.

HIS HONOUR: All right. So does that have the court record complete, then, from your point of view, Dr Ward, as well?

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MR WARD: It does, your Honour, yes.

HIS HONOUR: All right. Well, I will – thank you for your assistance, I will reserve my decision, and now adjourn the court.

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MATTER ADJOURNED at 3.41 pm ACCORDINGLY