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Details of Filing

Document Lodged:	Outline of 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

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NSD 714 of 2020

Federal Court of Australia

District Registry: New South Wales

Division: Commercial and Corporations List

IN THE MATTER OF VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS

WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) AND ANOTHER NAMED IN SCHEDULE 1

Applicants

VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 AND OTHERS NAMED IN SCHEDULE 2

Respondents

RESPONDENTS' SUBMISSIONS FOR THE HEARING ON 10 NOVEMBER 2020

A. SUMMARY

1. These submissions address:

   (a) (at paragraphs 5–12) the commercial and factual dimensions of the dispute;

   (b) (at paragraphs 13–41) the interlocutory relief Willis seeks;

   (c) (at paragraphs 42–62) the stay Willis seeks;

   (d) (at paragraphs 63–89) the remitter; and

   (e) (at paragraphs 90–144) prayer 6A in Willis' Further Amended Interlocutory Application.

2. There is little between the parties as to the facts. In particular, it is now common ground between the parties that:

   (a) nothing further is required to be done with the engines the subject of these proceedings (**Engines**) to prepare them for delivery to Florida (or any other location);[1]

[1] Applicants' Submissions (**AS**) [22].

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(b) all end of lease operator records have been provided;[2]

(c) the Respondents have given possession (within the meaning of the Full Court's Reasons) of all of the aircraft objects;[3]

(d) Willis should promptly obtain custody of the Engines[4] (albeit there is a dispute about which party ought pay for this if it involves transport to Florida);[5] and

(e) there will be no prejudice to the Applicants' (together, for ease of reference, **Willis**) application to the High Court in their now *taking* possession of the Engines.[6]

3. In those circumstances, Willis should simply exercise their self-help remedy to *take possession* of the Engines while they pursue their application to the High Court. However, Willis continues to attempt to force the Respondents to finance full redelivery of the Engines to Florida or else to keep the Engines in limbo for an indefinite period while they do nothing more than depreciate in value and uselessly soak up costs in storage and maintenance instead of generating income for Willis.[7] This position not only flies in the face of the Full Court's judgment but is also commercially illogical in circumstances where the costs of redelivery to Florida (estimated at being between US$228,000 and US$400,000) comprise a tiny fraction of the value of the Engines (which have an agreed contractual price of US$10m per unit).

4. Willis has rejected a number of proposals from the Respondents to reach a commercially pragmatic solution in relation to the Engines.[8] This is a matter of some urgency given that the Engines are located at the Virgin Tech Maintenance Hangar at Melbourne Airport (**Maintenance Hangar**),[9] and there is insufficient space in the Maintenance Hangar for the Engines to remain in situ.[10] The Engines must therefore shortly be transported, either to appropriate third-party storage[11] in an alternative location, or to Willis in Florida.

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[2] Affidavit of Orfhlaith Maria McCoy affirmed 3 November 2020 (**McCoy**) pages 59 and 87 to 96.

[3] AS[104].

[4] AS[22].

[5] McCoy page 101 (para 4(b)).

[6] Affidavit of Darren William Dunbier affirmed 30 October 2020 (**Dunbier October Affidavit**) [6] to [14].

[7] Affidavit of Salvatore Algeri sworn 31 October 2020 (**Algeri October Affidavit**) at 14.

[8] McCoy page 100.

[9] Dunbier October Affidavit [5].

[10] Darren Dunbier affidavit 30 October 2020 at [10], [12] and [13].

[11] AS[22]

A2. The commercial dimensions of the dispute

5. It is common ground that the Respondents have now given possession (within the meaning of the Full Court's Reasons) of all of the aircraft objects.[12]

6. The only dispute is the date at which possession was given. For reasons given in section C below the Respondents say that date is 18 or 22 June 2020. Willis says it is 13 October 2020[13] , ostensibly on the basis that they had not been given access to all End of Lease Operator records (that is, those created after 22 June 2020) by means of an electronic portal until that date.

7. In that context Willis contends that the most convenient commercial course is that the Engines be now transported to Florida and that that be financed by the Deed Administrators.[14] In doing so Willis, rightly, acknowledge that there can be no prejudice to their application to the High Court in their now *taking* possession.[15]

8. The Respondents, on the other hand, contend that the correct legal outcome, having regard to the findings of the Full Court, and the most convenient commercial course, is that Willis now take possession of the Engines.

9. Whether Willis then elect to have the Engines stored in Melbourne or elsewhere in Australia or ship them to Florida is a matter for Willis.

10. The result is that the substantive commercial dispute has narrowed to:

    (a) whether Willis should have any interlocutory relief while continuing to refuse to take up the possession which has been given to them; and

    (b) the allocation of ultimate liability for costs of transport and/or long-term storage and maintenance of the Engines and costs of the proceedings.

A3. Factual findings in the primary judgment

11. There was no appeal or cross appeal against any of the factual findings in the primary judgment and it follows that the Court will proceed in accordance with those findings.

12. Findings which are relevant to issues now before the Court are:

    (a) the Administrators attempted to reach an agreement with Willis (as it had with 70 other lessors) whereby Willis would agree not to enforce its rights for a period to be agreed by the

[12] AS[104].

[13] AS[98]

[14] McCoy page 98 [10].

[15] McCoy page 98 [11].

parties (termed as a "standstill agreement" by Willis) and Willis rejected the proposal at PJ [29] to [31];

(b) the demand by Willis on 10 and 16 June 2020 that the Administrators effect redelivery of the Engines at PJ [33] and [34];

(c) the correspondence from the Administrators to Willis on 16 and 18 June 2020 serving the s 443B(3) Notice and identifying the location of the Engines and stands, at PJ [35] and [40];

(d) that on 22 June 2020 the Respondents had made clear that records, QEC units and engine stands were all property that was directly associated with the Engines and necessary to operate, store and transport them and had set out their understanding [vindicated by the Full Court] as to the effect of the Convention (PJ [43] and [44]);

(e) that on and from 8 July 2020 the Applicants had access to the vast majority of the historical operator records via a secure dataroom established by the Respondents for that purpose (PJ [46]);

(f) by 25 August 2020 all existing documents, including those obtained by the Respondents from third party providers, had been uploaded by the Respondents to the secure dataroom to which Willis had access (PJ [49]);

(g) that the Administrators acted reasonably and were always willing to provide practical assistance to Willis to assist in the recovery of its aircraft objects (PJ [179]);

(h) that the approach taken by the Administrators to that task was based upon their understanding of the legal position as set out in their letter dated 9 June 2020 (PJ [179]). That understanding of the legal position was, of course, correct.

B. WILLIS' INTERLOCUTORY APPLICATION

B1. Is there power?

13. Willis submits that the orders that it seeks in its interlocutory application may be made pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth).

14. That is not self-evidently correct.

15. The starting point is to focus on that which the Court is currently doing, which is conducting a further hearing of the proceeding pursuant to order 3 of the Full Court:

> *"The proceeding, including any application by the appellants for declaratory relief, be remitted to the primary Judge for further hearing in accordance with these reasons."*

16. There does not appear to be a decision of the Court which identifies whether the jurisdiction exercised pursuant to such an order is original or appellate.

17. It is trite that the power to make orders under s 23 is only available in exercise of original jurisdiction[16] . The Respondents proceed on the basis that that is what is being done.

18. That does not expand the scope of the Court's power to hear the proceeding – which is limited by the terms of the remitter. Section 23 cannot operate to expand the scope of the remitter or to authorise the making of orders other than on the remitter.

B2. What relief is pressed?

19. Willis' submissions (**AS**) are of no assistance in identifying the scope of interlocutory relief now sought.

20. In their interlocutory application (**Willis IA**) Willis seeks orders:

    (a) for the preservation of the Engines and the maintenance of insurance cover "until further order" (prayer 2);

    (b) requiring the Engines be prepared for shipment (prayer 3); and

    (c) an order otherwise staying the proceeding (prayer 4).

21. By their submissions at AS[22] Willis must be taken to concede that prayer 3 has been overtaken by events and that no order in response to that prayer should be made.

22. While the position is opaque, the Respondents proceed on the basis that the interim relief now sought is that identified in prayers 2 and 4 of the Willis IA.

B3. Preserve, store and insure

23. Willis makes no submission in support of the relief which it seeks in prayer 2.

24. The relief sought is beyond the terms of the remitter. It cannot be in support of any final relief sought on the remitter. It is therefore beyond the power of the Court.

25. Lest it be suggested that that relief is directed at maintaining the status quo, the evidence shows that such a suggestion would be quite wrong. The making of the order will require the Respondents to alter the status quo to their detriment.

26. The only aspect of the "status quo" which would be maintained by the making of an order in terms of prayer 2 is that notwithstanding that it is common ground that the Respondents have given possession to Willis, custody of the Engines remains with the Respondents, and the making of orders in terms of prayer 2 would provide sufficient economic assurance to Willis that it could continue to refuse to *take possession* thereby forcing the Respondents to continue to assume

[16] *Trade Practices Commission v Manfal Pty Ltd* (1990) 27 FCR 284 at 287.4

responsibility, risk and maintenance costs for very high-value and sensitive property, as an unwilling bailee, against the Respondents' wishes.

27. The order would force the Respondents to *alter* the status quo.

28. The Engines are preserved and bagged in accordance with the manufacturer's requirements and ready to travel. As Mr Dunbier explains at [12]-[14] of his affidavit affirmed 30 October 2020 (**Dunbier October Affidavit**), the Respondents do not have sufficient space to continue safely to store the Willis Engines in the Maintenance Hangar (which is being used to carry out maintenance and service works on a large part of the Virgin fleet following a reduction in aviation restrictions flowing from the COVID-19 pandemic and to store certain of the Virgin Companies' own operational engines at select safe locations in the maintenance hangars, to enable ready access to those engines).[17]

29. No matter what happens the Engines must therefore be moved in the near future.

30. Arranging for the long-term storage of the Engines with a third party would come at a continued cost to the creditors of the Corporate Respondents, since those funds would need to be met from the assets of the companies.[18] Willis identifies no juridical basis for the Court to impose those costs upon the Respondents in circumstances where they were wholly successful in the Full Court and prima facie entitled to the fruits of their success.

31. As significantly, requiring the Respondents to arrange long-term storage for the Engines would give rise to legal complexities in circumstances where, as Mr Algeri explains in his affidavit sworn 31 October 2020 (**Algeri October Affidavit**) at [10], during the course of November 2020, the Deed Administrators will cease to be statutory officeholders of the Corporate Respondents. Specifically, there is a real question as to the capacity of the Deed Administrators to enter into any contract for long-term storage in circumstances where their departure from office is imminent, and on any view there is, at least, a risk that entry into a long-term storage contract would expose the Deed Administrators to ongoing liabilities following the completion of the DOCA as the parties ultimately responsible for the bailment of the Engines to the storage facility and a material question as to their capacity to give instructions with respect to that property following their cessation of office. This is a significant prejudice to be imposed by the order sought in Prayer 2.

32. There is also a risk that forcing the Respondents to retain possession (which is the combined effect of the order in prayer 2 and the stay) will inflate the amount of Willis' Proofs of Debt against the Corporate Respondents, exposing the Respondents to further prejudice. As Mr Algeri explains at [12]-[14] of the Algeri October Affidavit, Willis has lodged proofs of debt as a secured creditor of the First Respondent in the amount of US$17,067,060.09 and as an unsecured creditor of the Second

[17] Dunbier October Affidavit at [9], [10] and [13].

[18] Dunbier October Affidavit at [16]–[17].

Respondent in the amount of US$17,067,060.09. The most significant component of Willis' Proofs is the claim for rent for the remaining period of its leases of the aircraft objects. The grant of a stay would likely lead to a scenario where the Engines will not be able to be re-leased but rather will sit idle for an extended period. The effect may be to inflate the amount of Willis' proofs of debt against the Trust Fund (as they would not have taken the opportunity to mitigate their losses, as lessors are required to do), thereby diluting the returns to other unsecured creditors of the Corporate Respondents.

33. Willis is wrong to submit that both parties wish the Engines to be sent to Florida.[19] The Respondents by prayer 3 of their remitter interlocutory process (**Virgin IP**) seek that which they have sought all along: that Willis *take possession* of its Engines. It is of no concern (putting aside any questions of mitigation of damages) to the Respondents whether Willis having taken possession takes the Engines back to Florida, stores them in Melbourne, or elsewhere or takes any other course in dealing with them.

34. The Respondents seek an order to the effect that they would be justified in redelivering the Engines to Florida and that Willis should pay the reasonable costs of that redelivery but only in the event that notwithstanding the admitted giving of possession, Willis continues to refuse to take possession.

35. In response to the Respondents' earlier stay application heard by the Court on 8 September 2020, Willis submitted that they would be prejudiced by a delay in obtaining possession of their engines. On that occasion, senior counsel for Willis stated:

> *"The question, your Honour, is quite start. <u>There is prejudice, on our side, in that we have been shut out from the use and possibility of releasing these engines since April this year.</u> And that delay continues. That prejudice can be overcome if, as your Honour has indicated, no stay is ordered and the process of redelivery continues unabated."*[20]

36. Willis adduces no evidence and makes no submission which resiles from that position.

37. That being so, there is no reason why the Court would give any weight to the consideration that by making an order as sought in prayer 2, custody of the Engines would be left with the Respondents.

38. There can be no other reason to make that Order (and none is suggested by Willis) and in every other respect it forces an alteration of the status quo.

39. Further, any interim regime ordered by the Court must be at Willis' cost. The Respondents have the benefit of the Full Court's orders, which must be presumed to be correct unless and until they are

[19] AS[23] and [24].

[20] Transcript, 8 September 2020 at T15.20.

set aside.[21] In those circumstances, it would be contrary to authority for the Court to impose any regime on the Respondents that requires the Respondents to bear any costs in respect of Willis' aircraft objects going forward. To put the point another way, such a regime would not be to preserve the status quo; rather it would be to impose a burden on the Respondents contrary to the status quo, given that the Respondents have the benefit of the Full Court judgment.

40. The order in prayer 2 should therefore not be made.

41. In the alternative, if it is to be made, it should be on condition that Willis undertakes to take possession of the Engines within a short period to be specified, with the Order in Prayer 2 expiring on the earlier of that date and the taking of possession.

B4. The stay

B4(a) No complexity

42. The sole reason put by Willis for the stay is the complexity of the issues to be resolved, with the possibility that they will be revisited.

43. There is no such complexity.

44. There is a very short point in dispute, developed below in section C, namely whether the date for giving possession of the aircraft objects was not 13 October, but rather 18 or 22 June 2020. It involves the legal characterisation of a small number of facts, all of which have been found in the primary judgment.

B4(b) Principles

45. The principles governing the application to stay the proceeding pending the determination of an application for special leave are well known. They were succinctly stated by Logan J in *Unit Trend Services Pty Ltd ACN 010 382 242 v Commissioner of Taxation* [2013] FCA 333 in the following terms at [10]:

> *"Is there a substantial prospect that special leave to app[e]al will be granted? Will the grant of a stay cause loss to the respondent to the special leave application? Where does the balance of convenience lie? All that has to be decided in the knowledge that staying the operation of an order of the Full Court is an exceptional jurisdiction. In other words, it is for the applicant, in this case the Commissioner, to make out a case by reference to those criteria as to why a successful litigant, in this case UTS, should not have the fruits of its judgment."*

[21] See, for example, *State of Queensland (Department of Agriculture and Fisheries) v Humane Society International (Australia) Inc* [2019] FCA 534; 164 ALD 400 at [7].

46. Logan J's observations are consistent with those of Gageler J in *Obeid v R* [2016] HCA 9; 239 ALR 372 at [14]:

> *"Since Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [(1986) 161 CLR 681 at 684] judicial exposition of the conditions under which a stay will be granted in the context of an application for special leave to appeal has uniformly emphasised the need for the existence of 'exceptional circumstances'. The standard exposition has gone on to emphasise the relevance, even where the Court or a Justice is satisfied that a stay is required to preserve the subject matter of litigation, of consideration of whether there is a substantial prospect that special leave to appeal will be granted, of whether the grant of a stay would occasion prejudice to a respondent, and of where the balance of convenience might lie in the circumstances of the case. Those factors, however, do not always arise for consideration and collectively they do not exhaust the considerations that may be relevant in every case."*

47. *Alexander v Cambridge Credit Corporation Ltd (Receivers Appointed)* (1985) 2 NSWLR 685 (see AS[8]), upon which Willis relies, is not applicable to the present circumstances, given that Willis seeks a stay in the context of an application for special leave to appeal, as opposed to a stay pending the determination of an appeal to an intermediate appellate court. In particular, the Court of Appeal's observations in *Alexander* eschewing the need for exceptional circumstances to be demonstrated before the grant of a stay (see at 694) are inapplicable to the present context. Instead, this Court should apply Gageler J's statement of principle in Obeid v R (extracted above). Exceptional circumstances must be demonstrated.

48. Further, the authorities recognise that a stay pending an appeal is to be equated with or treated as equivalent to an application for an injunction: see *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* (1986) 161 CLR 681 at 685; *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75 at [32]-[33]; *Minister for Local Government v South Sydney City Council (No 3)* [2002] NSWCA 327 at [10]-[14]. It follows that if, where "*a stay is granted, the respondent will or may incur financial loss*", an undertaking should be given as the price of the stay: see Brennan J in *Jennings Construction Ltd* at 685.

B4(c) Stay should be refused

49. The stay application should be refused, as on no view has Willis demonstrated that the requirements for the grant of a stay are made out. This is so for the following reasons.

50. *First*, the threshold requirement for the grant of a stay – an adequate undertaking as to damages – has not been proffered by Willis. The stay should be refused on that basis. The Respondents should not be shut out from obtaining the relief they seek in Prayer 3 of the remitter and thereby forced to bear the significant costs and risk associated with maintaining custody of Willis' aircraft objects (which extend beyond storage costs to insurance costs, preservation costs, and cost exposure arising from the risks associated with maintaining custody of complex, valuable aircraft

machinery[22]) for a potentially lengthy period until the final resolution of Willis' High Court appeal, in circumstances where the Respondents have the benefit of the Full Court judgment.

51. The Full Court found that the Respondents' obligation to "*give possession*" of Willis' aircraft objects did not extend to an obligation to redelivery the aircraft objects to Florida (FFC[110]). The Respondents cannot be required to bear the costs of redelivery of the aircraft objects to Florida pending the determination of Willis' High Court appeal.

52. The stay of prayer 3 of the Virgin IP prevents the Respondents from dispensing with custody of the Engines by redelivery to Florida at Willis' expense. Accordingly, a secured general undertaking must be proffered by Willis before this Court could entertain the stay application. As to the need for the undertaking to be secured, the Applicants are both foreign corporations, and they have not put forward any evidence of assets in the jurisdiction (other than the Engines). In those circumstances, any unsecured undertaking would not offer adequate protection to the Respondents. As to the need for the undertaking to be in general terms, as Mr Dunbier makes clear at [14]-[17] of the Dunbier October Affidavit, the costs exposure associated with continued custody of the engines extends well beyond storage costs to unforeseen costs arising from the risks of continuing to maintain physical custody of the engines. As such, nothing less than a general undertaking would provide the Respondents with adequate protection.

53. In the absence of a secured general undertaking, the stay application should be dismissed.

54. *Secondly*, even if a secured general undertaking were proffered, the stay application should nonetheless be dismissed because the balance of convenience favours the refusal of the application. While Willis accepts that in order to obtain a stay, the Court must conclude that a stay should be ordered on the balance of convenience (see AS[8]), it puts forward *no evidence at all demonstrating any prejudice they would suffer* if the Court were to proceed to determine the remitter, which would result in custody of the aircraft objects being transferred to Willis. At the same time, paradoxically, Willis' own actions in seeking the stay causes additional prejudice *to Willis* (in the form of the lost opportunity to earn rental income, which could be earned if the Engines were put to productive use). [23] It also risks causing prejudice to the creditors of the companies as a consequence of the potential for an increased claim to be made against the Creditors' Trust in light of Willis' failure to mitigate its loss and re-lease its property for that period.[24]

55. In circumstances where Willis has contended that it would be prejudiced by a delay in obtaining custody of the Engines and has not withdrawn or submitted evidence contrary to that contention,

[22] Dunbier October Affidavit at [14].

[23] Algeri October Affidavit at [14].

[24] Ibid.

the basis upon which Willis opposes this Court determining the remitter, which would result in Willis obtaining custody of the Engines (see prayer 3 in the Virgin IP), is wholly obscure.

56. In contrast to the absence of any evidence of prejudice to Willis in the Court proceeding to determine the remitter, the Respondents rely upon evidence of significant prejudice that would flow from the grant of a stay. Those matters are dealt with above at [27]-[31].

57. Against the significant prejudice faced by the Respondents, the only matter Willis points to in favour of the grant of a stay is the fact that, "*[i]f the Applicants are successful on the appeal, the remitter will have been unnecessary*" and that "*[e]ven if the Applicants are unsuccessful on their appeal there is a real possibility the Court could require a different test to be applied in the remitter proceedings – meaning it would be necessary to undertake the remitter for a second time*": AS[12]. In making this submission, Willis contends that its special leave application has good prospects of success (AS[11]). The following points should be made in response:

    (a) even if it be correct that, if Willis succeeds in the High Court, the remitter will have been "*unnecessary*", the converse is equally true. If the Respondents are successful in the High Court, it will be necessary for this Court to determine the remitter. In circumstances where both parties have filed evidence and submissions on the remitter and are ready to proceed, the possibility that the remitter will *remain* necessary even following the High Court appeal weighs heavily in favour of the Court proceeding to determine the remitter. This would mean that, if the Respondents succeed in the High Court, the matter will be finally resolved between the parties and there would be no need to return to this Court. Proceeding with the remitter would therefore result in the efficient disposal of the proceedings in a timely manner, and is, therefore, consistent with the overarching principle set out in s 37M of the *Federal Court of Australia Act*;

    (b) perhaps most significantly, as will be apparent from the mere 15 paragraphs Willis devotes to issues on the remitter in their submissions (AS[96]-[110]), and the analysis set out in Section C below, the questions for determination on the remitter are in narrow compass, are straightforward, and are likely capable of determination immediately following oral argument on 10 November. In circumstances where the parties have incurred all costs associated with proceeding with the determination of the remitter, and the Court has set aside time for the hearing of the remitter, it is appropriate to proceed to determine the remitter so as to ensure that the issues between the parties are finally resolved should the High Court either refuse special leave or dismiss the appeal. The straightforward nature of the remitter thus weighs heavily in favour of the remitter proceeding, notwithstanding the possibility that the remitter proves unnecessary following the determination of the High Court appeal.

58. Willis' submission that the remitter may itself "*give rise to an appeal*" (AS[15]) is to be assessed in light of the actual issues on the remitter – see section B1 above and C below. Further the Respondents have, in correspondence, undertaken not to oppose a grant of special leave in

respect of orders made on the remitter, if Willis' special leave application seeking to appeal from the Full Court's orders is granted.[25] No issue of duplicative appeals therefore arises by reason of the Court proceeding to hear the remitter.

59. Returning to the balance of convenience, the position is as follows. No prejudice has been asserted by Willis that would favour the grant of a stay. The only factor in favour of a stay is the *possibility* that the hearing of the remitter – a short application involving the determination of a single narrow issue, in respect of which all costs have already been incurred, and which is ready to proceed – ultimately proves unnecessary. Weighing against a stay is the significant prejudice a stay would occasion to the Respondents, and the fact that proceeding with the remitter would place the parties in a position where the matter is finally resolved if the High Court either refuses special leave or dismisses the appeal. In those circumstances, the Court should conclude that the balance of convenience significantly favours the dismissal of the stay application.

60. *Finally*, even if an adequate undertaking as to damages was given (which it has not been), and even if the balance of convenience favoured the grant of a stay (which it does not), in order to grant a stay this Court would need to be satisfied that there are "*exceptional circumstances*" warranting the grant of a stay, as is made clear in the authorities noted above. The Applicant has not attempted to identify any "*exceptional circumstances*" that would warrant the Court taking the significant step of keeping the Respondents out of the fruits of its judgment. It follows that the Applicant has not discharged its onus, and the stay must be refused.

61. Accordingly, the Court should proceed to determine the remitter.

62. For completeness, it is noted that, as has been conveyed in correspondence,[26] the Respondents would not oppose a notation by the Court that the Respondents undertake not to contest the utility of Willis' special leave application or proposed High Court appeal on the basis that Willis has taken possession of their aircraft objects (whether in accordance with any interim regime ordered by the Court, or following orders made on the remitter).

C. THE REMITTER

C1. The issues

63. The issues on the remitter are in narrow compass. The Respondents agree with Willis' summary of the issues at AS[96], which are restated for ease of reference:

    (a) By what date did the Respondents "*give possession*" of the aircraft objects in accordance with the Full Court's reasons?

[25] McCoy, Annexure E, page 103.

[26] McCoy, annexure E, page 103.

(b) Should Willis be liable to pay the Respondents $235,323.84 in respect of costs of complying with the Court's earlier orders up to 22 September 2020?

(c) Should Willis pay the costs of these proceedings up to and including 8 September 2020?

64. It is convenient to identify two of the matters that are not in issue.

65. *First*, the Respondents have in fact given possession of the aircraft objects, on the construction of the Protocol adopted by the Full Federal Court (AS [104]). Accordingly, the declarations sought in prayers 1 and 2 of the Virgin IP should be made, with the only issue between the parties being the date to be included in those declarations.

66. *Secondly*, it is not in issue that the declaration in prayer 3 of the Virgin IP should issue. As noted above, if Willis continues to refuse to *take* possession of the Engines, engine stands and QEC Kits, the Respondents accept that they will have no option but to send them to Florida – a course which Willis seeks (see AS[23]) – albeit at Willis' cost. That is, in circumstances where it is now accepted that the Respondents have "*given possession*" of the aircraft objects on the Full Court's construction of the Respondents' obligations, it follows that, if Willis does not exercise its self-help Convention remedy of *taking possession*, the Respondents are entitled to deal with the Engines in accordance with the domestic law. Redelivering the Engines, engine stands and QEC Kits to Florida at Willis' cost is consistent with the ordinary treatment of disclaimed property in an Administration; the property may be left for the owner to collect or repossess, or, if returned to its owner, returned at the owner's cost.[27] The form of relief sought would simply put beyond doubt that the Deed Administrators are justified in incurring the substantial costs involved in doing so, having regard to their duties to other creditors. Given the potentially material prejudice thereby to be caused to other creditors that relief is appropriate. Accordingly, the relief in prayer 3 should issue. Willis says nothing in its submissions against the issuing of such relief.

C2. The date on which possession was given

67. In [106] of the Full Court's judgment, the Court makes pellucidly clear that the only affirmative actions required of an insolvency administrator or debtor in order to "*give possession*" of aircraft objects beyond disclaiming the property are actions "*needed to overcome any barrier to taking possession that is a consequence of the insolvent administration*". The question for the Court in determining the date/s upon which the Respondents "*gave possession*" of the aircraft objects is, therefore, a straightforward one: by what date had the Respondents disclaimed the aircraft objects, and taken any additional steps "*needed to overcome any barrier to taking possession that is a consequence of the insolvent administration*"? To put the point another way, were the steps taken by the Respondents steps that were "*needed to overcome any barrier to taking possession that is a*

[27] See for example, the usual courtesy the Administrators would extend to lessors, outlined in the affidavit of Salvatore Algeri sworn 28 July 2020 at [24].

consequence of the insolvent administration"? If not, they were not steps that were required to be taken in order to "*give possession*".

68. The relevant chronology is the subject of findings at PJ [33] to [49].

69. On 16 June 2020, the Administrators wrote to Willis, enclosing a notice issued under s 443B(3) of the Corporations Act (**443B Notice**).[28] The letter relevantly stated: (a) under the heading '*Physical collection of assets and records*',… "*it is our intention to discuss and agree an orderly hand back arrangement with you. Gordon Chan and Ian Boulton from Deloitte will work with you and the Virgin team to co-ordinate the orderly return of your engines and all their respective technical and historical records*"; (b) that the Administrators advise that the Companies "*do not intend to exercise any of their rights in respect of the property identified in the enclosed Form 509B 'Notice of Administrators' Intention Not to Exercise Property Rights'*, and (c) that "*[f]or the avoidance of doubt, your engines are available for you to take possession and arrange collection from the date of this letter*". The enclosed s 443B Notice stated that the Administrators did not propose to exercise rights in relation to the "*specified property in the attached Schedule B*". Schedule B identified the Leases between Willis and VB LeaseCo. Accordingly, on 16 June 2020, the Administrators disclaimed any possessory title to the property the subject of the Leases, being the Engines, the engine stands and the QEC kits and their associated records.

70. On 18 June 2020, Mr Ian Boulton of Deloitte sent an email to various employees of Willis.[29] In that email, Mr Boulton identified the location of Willis' Engines and engine stands, and stated that the Administrators were able to assist in removing the Engines from the airframes, and delivering them to Willis' specified location, at Willis' cost.

71. On 19 June 2020, Mr Gordon Chan of Deloitte emailed Mr Failler of Willis[30] proposing various options to facilitate Willis taking possession of its Engines, including an option whereby "*Virgin will make the necessary and appropriate arrangements with the aircraft lease company / financier [of aircrafts to which the Applicants' engines were attached] for consent and will work with you to schedule in a suitable time to make the aircraft available for removal of the engines*".

72. On 22 June 2020, Clayton Utz, on behalf of the Respondents, wrote to Norton Rose Fulbright, acting for Willis, confirming that Willis' records, QEC kits and engine stands (the **Ancillary Property**) were considered by the Administrators to be property "*directly associated with the Engines and necessary to operate, store and transport them*" and, in effect "*a component of the*

[28] Poulakidas 19 October Exhibit DP-2 at 490-495; CB at 516-521.

[29] Poulakidas 19 October Exhibit DP-2 at 503-505.

[30] Poulakidas 19 October Exhibit DP-2 at 502; CB at 528.

Engines", such that (c.f. Willis' construction) a reference to the "*Engines*" in the s 443B Notice also covered the Ancillary Property.[31]

73. It follows that, to the extent further confirmation was required, it is beyond doubt that by 22 June 2020, the Respondents had disclaimed any entitlement to possession of all of Willis' aircraft objects and associated records.

74. Returning to [106] of the Full Court decision, on the facts of the present case, the only barrier to Willis taking possession of their aircraft objects which was "*a consequence of*" the insolvent administration was the statutory stay under s 440B of the *Corporations Act 2001* (Cth). Willis did not adduce at trial and have not adduced on the remitter evidence of any other barrier to their taking possession.

75. As such, no barriers to Willis "*taking possession*" of their Engines, Engine Stands or QEC Units that arose "*as a consequence of*" the insolvent administration of the Corporate Respondents existed following 22 June 2020. As at that date, the principal barrier to taking possession – the stay under 440B of the *Corporations Act* – had been overcome by way of the correspondence set out above, which conveyed the Administrators' consent to Willis taking possession of all of their aircraft objects (see s 440B(2) of the *Corporations Act*).

76. It follows that, on a straightforward application of [106] of the Full Court's judgment, the Respondents "*gave possession*" of the Engines, stands, QEC Kits and records on, at the latest, 22 June 2020. As with all of the rest of the Willis' aircraft objects, the Respondents facilitated the Applicants' access to records: both those which were held by the Respondents in June 2020 and those which were generated or created after that date. In the case of the records, the steps taken by the Respondents (at their own cost) were to enquire as to the manner in which Willis wished to receive records[32] and, in accordance with that preference, establish a secure dataroom to which all records were uploaded. The only relevant distinction between records and the remainder of Willis' aircraft objects was that, unlike the remainder of its aircraft objects which remain in stasis pending the outcome of this litigation, Willis was prepared to take possession of the records (by downloading them).

77. Willis contends that the date for giving possession is 13 October 2020, on the basis that it was not until that date that Willis had *received* the relevant records. (AS [98]).

78. The Court found at PJ [49] that Willis had received all of the extant records by no later than 25 August 2020; and at PJ [157] that the records which had not been made available were only those which did not exist.

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[31] See also affidavit of Salvatore Algeri sworn 28 July 2020 at [28].

[32] Affidavit of Salvatore Algeri sworn 17 July 2020 Exhibit SA-2 at 45; Court Book at 546.

79. At AS[102]-[103], Willis seeks to undermine those findings by a submission: "*the Court will recall Mr Dunbier's evidence in cross-examination at the hearing on 31 July 2020 that he was being directed by the Administrators not to provide any of the End of Lease Operator Records, that he would otherwise have provided if not in insolvency. There was no way for the Applicants to exercise their right to take the records until the Administrators had provided them. That did not occur in complete form until 13 October 2020*."

80. The submission is to be rejected because it is inconsistent with the findings made, including upon the evidence now relied upon.

81. What this submission fails to note is that the End of Lease Operator Records referred to *did not exist* as at 22 June (or, indeed, as at 31 July). The End of Lease Operator Records constitute records that are ordinarily *created* at the conclusion of a lease as an aspect of redelivery obligations contained therein. As much is made clear from Willis' own evidence, namely the affidavit of Derych Warner sworn on 22 July 2020 at [20]. A creditor in the exercise of their self-help right to take possession (FC[106]) is unable to take possession of records which do not exist. That follows from the fact that they do not exist, and not from any barrier to taking possession of them.

C4. Possession given on 22 June

82. It follows from the foregoing that the Respondents gave possession of all of Willis' aircraft objects on or before 22 June 2020. This should be reflected in the declarations sought in prayers 1 and 2 of the Virgin IP.

C5. Restitution

83. By prayer 6 of the Virgin IP, the Respondents seek an order that Willis pay the Respondents the amount of $232,933.25, being the costs incurred by the Respondents in complying with the Court's 3 September 2020 orders up until those orders were stayed on 22 September. The basis for that sum is set out in the Algeri October Affidavit at [14]-[17].

84. The authorities make clear that a party is entitled to restitution for expenses incurred in complying with orders that are later set aside.[33] Willis does not contest the Respondents' entitlement to restitution or, indeed, the amount of restitution claimed. The only basis upon which Willis opposes the relief sought in Prayer 6 of the Virgin IP is that set out at AS[105]-[107], namely that in the event that the Court accepts that Willis is entitled to specific performance under Article 12 of the Convention, the costs the Respondents seek to recoup would be costs that were properly incurred by the Respondents in compliance with their obligation to give specific performance, and so restitution ought not issue.

[33] *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.

85. The Respondents have the benefit of the Full Court judgment and are presently entitled to the reimbursement in accordance with the authorities identified above. If the position differs following the High Court appeal or any later determination of prayer 6A, Willis can take steps to recoup any money to which they consider they are then entitled.

C6. Costs of the proceedings

86. At [114], the Full Court vacated the costs order made at first instance and remitted the question of costs to this Court.

87. It is clear that the Respondents have been wholly successful in the proceedings. Their arguments on appeal were upheld and, if this Court concludes that possession of Willis' aircraft objects was "*given*" on or before 22 June or, indeed, any date prior to 3 September 2020, when orders were made at first instance, it would follow that the Respondents ought to have been wholly successful at first instance, in which case costs should follow the event.

88. In response, Willis emphasises at AS[109] that the Court held that the 443B Notice was not sufficient to effect the Respondents' obligation to "*give possession*" under Art XI.2 of the Protocol. That plainly ignores the matters at paragraphs [66] to [71] above. It is also not to the point, in circumstances where the Respondents complied with their obligations prior to the determination of the first instance proceedings, such that the relief with respect to "giving possession" ought not have issued. The Respondents ought to have been wholly successful at first instance in opposing the substantive relief sought by Willis.

89. Accordingly, costs should follow the event, and the Court should so order. It would not be appropriate to delay the determination of the question of costs, as in accordance with the overarching principle, the Court should endeavour to bring the proceedings to finality as expeditiously as possible, and if the Respondents are successful in the High Court, then there would be no need to return to this Court on the question of costs in the future.

D. THE FURTHER AMENDED ORIGINATING APPLICATION

90. The Prayer 6A claim is wholly without merit. It will not even arise if either prayer 3 in the Virgin IP is granted, or, consistent with the course urged by the Respondents, the Court requires Willis to pick up the Engines as the price of obtaining a stay pending the High Court special leave application and any appeal. It is addressed below against the possibility that the Court is not minded to take that course.

91. Willis has submitted that the Prayer 6A claim is made "pursuant to Article 12 of the Cape Town Convention" (see AS[14]) and it continues to describe it as a claim "under Article 12" (AS at [92]), but these are misdescriptions. Article 12 is not a source of power.

92. The Prayer 6A claim is merely a claim in the Court's equitable jurisdiction for an order compelling VB Leaseco to perform its asserted obligation under cl 19(b)(iii)(C) of the GTA to deliver the

Engines to Florida in accordance with cl 18 of the GTA. It is *not* affected by the Cape Town Convention because of Article 12.

93. It does not matter whether the Prayer 6A claim is treated as specific performance or a type of mandatory injunction (cf AS at [34]-[35]) as the applicable principles will be substantially the same.

94. In short, as developed below, if it even arises, the Prayer 6A claim should be dismissed because:

    (a) the arguments made in support of it are contrary to authority on the proper construction of s 444D of the Act (including intermediate appellate authority) and involve a construction of the Primary DOCA that the Court will immediately perceive, given its oversight of the administration, to be at odds with both its language and fundamental commercial rationale;

    (b) it is also brought out of time, with the consequence both that the Court has no power to make it, and even if it did have such power, Willis would be estopped from seeking it; and

    (c) it is also not available applying ordinary equitable principles.

95. The second of those matters raises a question of power, and so we deal with that question first.

D1. No power and estoppel

96. The order sought in prayer 6A of the Further Amended Originating Application is in the following terms:

> *"An order that the Respondents return the aircraft objects identified in Schedule 2 in the manner set out in Schedule 3 at Coconut Creek Florida United States of America as soon as possible, and by no later than a date to be determined by the Court."*

97. That order is in substance and effect wholly indistinguishable from the order sought in prayer 3 being:

> *"An order that the Respondents or any of them "give possession" of the "aircraft objects" identified in Schedule 2, by delivering up, or causing to be delivered up the "aircraft objects" to the Applicants in the manner set out in Schedule 3 at Coconut Creek Florida United States of America by no later than 31 July 2020."*

98. Following a trial on the Amended Originating Application the Court, in the exercise of its original jurisdiction, made orders 5 and 6 of 3 September 2020 as final orders:

> *"5. The Respondents or any of them "give possession" of the "aircraft objects" identified in Schedule 2 of these orders, by delivering up, or causing to be delivered up, the "aircraft objects" to the Applicants in a manner set out in Schedule 3 of these orders, at 4700 Lyons Technology Park, Coconut Creek Florida 3307 United States of America.*

6. *Subject to any further order the time by which the Respondents are to carry out the steps required by order 5 of these orders to deliver up the "aircraft objects" is, using their best endeavours as soon as possible but on or before 15 October 2020."*

99. The Respondents appealed against those orders. In the exercise of the Court's appellate jurisdiction the Full Court, by order 2 of 7 October 2020, set aside orders 5 and 6 of the orders made on 3 September 2020.

100. By order 3 of 7 October 2020 the Full Court remitted the proceedings to the primary Judge "for further hearing in accordance with" the Full Court's Reasons.

101. Those Reasons identified at [110] and [111] the scope of the remitter which is limited to:

(a) the factual issues as to what may be required in order to give possession in light of the Full Court's reasons;

(b) any issues which may arise as to the approach to be adopted in dealing with third party interests in the Engines; and

(c) the entitlement of the Respondents to restitution and as to the amount of restitution.

102. The remitter does not extend to hearing or determining the application by prayer 6A which is in substance and effect to reinstate orders 5 and 6 which have been set aside by the Full Court.

103. The Applicants have applied for special leave to appeal against orders 1 to 4 of the Full Court.[34]

104. Upon the entry of the orders on 3 September 2020 this Court's exercise of original jurisdiction in the proceeding was completed and those orders were beyond recall by the Court,[35] other than in the exercise of the appellate jurisdiction.

105. Likewise, when the Full Court's orders were entered on 7 October 2020 the exercise by this Court of jurisdiction in the proceeding (whether appellate or original), was exhausted except to the extent of the remitter.[36]

[34] McCoy page 106 [4] and [5].

[35] Per Barwick CJ in *Bailey v Marinoff* (1971) 125 CLR 529 at 530 quoted with approval by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *DJL v Central Authority* (2000) 2001 CLR 226 at 245 [38].

[36] The relevant conferral of original and appellate jurisdiction on this Court is not to be distinguished from that on the Family Court of Australia considered in *DJL v Central Authority* (2000) 201 CLR 226 at 242 [30] and 248 [49].

106. For this Court to hear or determine the application in prayer 6A it is necessary to identify specific statutory authority by which it might reopen the proceeding. So much follows from the reasoning in Achurch v R:[37]

> *"14. Absent specific statutory authority, the power of Courts to reopen their proceedings and to vary their orders is constrained by the principle of finality …*
>
> *15. … The principle protects parties to litigation from attempts to reagitate what has been decided and serves as "**the sharpest spur to all participants in the judicial process, Judges, parties and lawyers alike, to get it right the first time**."*
>
> *16. The principle of finality forms part of the common law background against which any statutory provision conferring power upon a Court to reopen concluded proceedings is to be considered. It is a principle which may inform the construction of the provision. … **A statute conferring original jurisdiction is not likely to be construed as undermining [the distinction between original and appellate jurisdiction]**." [emphasis added]*

107. There is no provision in the *Federal Court of Australia Act* 1976 which authorises this Court to reopen the orders made at trial or on appeal. The relief sought by prayer 6A is beyond the terms of the remitter and it follows that this Court does not have the power to hear or determine it. If Willis were to bring its claim it needed to *get it right the first time*.[38]

108. It is no response to this argument for Willis to say that it was not able to bring the Prayer 6A claim before the DOCA was executed on 25 September 2020 and the moratorium under s 440B of the Act was lifted (AS at [94]). That is so for several reasons:

(a) Willis first demanded that VB Leaseco deliver the Engines to Florida in performance of VB Leaseco's asserted contractual obligations on 30 May 2020.[39] From that date on, on the case Willis now seeks to advance, VB Leaseco's contractual obligation under cl 19(b)(iii)(C) of the GTA to deliver the Engines to Florida in accordance with cl 18 of the GTA was enlivened. The Prayer 6A claim does not depend on the DOCAs. So far as Willis' ability to bring the Prayer 6A claim is concerned, the present situation is indistinguishable to that which has existed since 30 May 2020:

(i) Prior to the DOCAs being executed, Willis could have brought the Prayer 6A claim at any time. It would simply have required leave to proceed against the Respondents under s 440B of the Corporations Act, the same leave which was granted to it on 31

[37] Per French CJ, Crennan, Kiefel and Bell JJ (2014) 253 CLR 141 at 152 - 153 [14] - [16].

[38] Ibid.

[39] Poulakidas 19 October Exhibit DP-2 at 480; CB at 496.

July 2020 to commence these proceedings. While no application for leave under s 444E of the Act (the "stay" provision relevant in deed administration) has been formally sought by Willis, in its submissions Willis accepts that, as at today, it still requires leave under s 444E (AS [92]).

(ii) Prior to the DOCAs being executed, VB Leaseco would have resisted specific performance on the basis that a DOCA was proposed which, on its effectuation, would extinguish the contractual claims, leaving only the proprietary rights of secured creditors and lessors preserved by s 444D(2) and (3). VB Leaseco makes the same argument today: as submitted further below, the Prayer 6A claim has not yet been extinguished (but is subject to a moratorium) but will be extinguished once the Primary DOCA is effectuated.

(b) Willis cannot point to the moratorium in s 440B of the Act as a reason why it did not bring the Prayer 6A claim in a timely manner in circumstances where: (i) the Respondents did not oppose leave under s 440B of the Act in respect of its other claims and the Court therefore indicated at the hearing on 31 July 2020 that it would grant leave on 31 July 2020; (ii) it did not apply for or otherwise attempt to obtain leave under s 440B in respect of the Prayer 6A claim; (iii) it still requires leave to bring that claim (albeit under a different provision – s 444E) today.

(c) Although it should not matter, Willis was fully apprised of the terms of the DOCA that was being propounded long before the hearing of the Full Court appeal on 22 September 2020. By that stage:

(i) it had known since at the latest 25 August 2020, that Bain proposed a DOCA the effect of which was to “release all debts and claims that would be admissible to proof against a company in the Primary DOCA if that company had been wound up on the date of appointment of the Voluntary Administrators” including “[t]he claims of secured creditors (without limiting the rights of secured creditors under section 444D(2) of the Act)” and “[t]he claims of lessors (without limiting the rights of lessors under section 444D(3) of the Act)” (Poulakidas 19 October [7(a)]; Report to Creditors dated 25 August 2020 at [9.3.1]);

(ii) it had been provided on 3 September 2020 with the terms of the Bain DOCAs (Administrators’ circular to creditors attaching copies of draft DOCAs dated 3 September 2020); and

(iii) it had participated in the Second Meetings of Creditors held on 4 September 2020, by actively voting against the DOCAs (Poulakidas 19 October [7(b) and (c)]).

(d) Even so, there was no Notice of Contention on the hearing of the appeal and no application to adduce further evidence by Willis.

109. The same facts also mean that, even if the Court had power to hear and determine the Prayer 6A claim, Willis would be estopped from bringing it. Willis seeks the same relief as it sought in Prayer 3 and it relies on an argument that it could, and should reasonably, have put in the first action. The specific performance claim in Prayer 6A is "so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it" and it is therefore barred by the form of estoppel recognised in *Port of Melbourne Authority v Anshun Pty Limited* (1981) 147 CLR 489 at 602.

110. The equities are particularly strongly in favour of the estoppel in the present case because of the administration context. The Deed Administrators will cease to hold any statutory office upon the impending effectuation of the DOCAs. They will become Trustees of the Project Volar Creditors' Trust. VB Leaseco and VAA will be released from all pre-administration liabilities and will become wholly owned by an entity controlled by Bain Capital. Arrangements will need to be made between the Deed Administrators and Bain Capital for the continued conduct of this litigation, and those arrangements will ultimately be at the expense of creditors. The need for finality in litigation is even greater than is usual.

D2. Construction of s 444D of the Act

111. Prayer 6A is particularised on the basis that Willis' contractual rights for delivery of the Engines to Florida will survive the effectuation of the Primary DOCA because they are preserved by ss 444D(2) and (3) of the Act. Similar (but somewhat more convoluted) submissions are made in AS [65]-[90]. Subsections 444D(2) and (3) contain a "carve out" to s 444D(1), which makes a valid DOCA binding on "all creditors of the company" in respect of "*claims arising on or before the day specified in the deed*…". That date is, in respect of the Respondents, 20 April 2020. All three subsections fall to be considered.

112. Willis refers in AS at [80] to the recent decision of *Vaughan J in Smith (as Trustee of the Smith Investment Trust) v Sandalwood Property Ltd* (2019) 344 FLR 278. It does not submit that any aspect of that decision was wrong. Paragraphs 73ff of *Smith v Sandalwood Property* contain a useful restatement of the by now well-established case on the proper construction of s 444D, including the following propositions:

    (a) a DOCA "binds 'all creditors' but only "so far as concerns claims arising on or before the day" specified for the purpose of s 444A(4)(i) (s 444D(1)). To the extent that a DOCA purports to address claims beyond those covered by s 444D(1) the DOCA is ineffective to bind creditors: *Smith v Sandalwood Property* at [73];

    (b) accordingly, the terms "creditor" and "claim" are critical in determining the extent to which a DOCA may release a company from a debt. And the extent to which a DOCA may release a company from a debt is, in turn, critical to maximising the chances of the company continuing in existence. Financial rehabilitation will often be dependent on extinguishing existing debts and claims. Part 5.3A assumes that this is the case: *Smith v Sandalwood Property* at [73];

(c) the object of Pt 5.3A has thus proven important in ascribing meaning to the terms "creditor" and "claim" in s 444D(1) (and more generally in Pt 5.3A). It is necessary to identify who will be bound by the deed (as creditors) and in what respect those creditors will be bound: *Smith v Sandalwood Property* at [74];

(d) it is well established that the term "creditors" in s 444D(1) includes all creditors of the company for the time being rather than just those creditors with debts or claims for amounts becoming due and payable prior to the administration: *Smith v Sandalwood Property* at [76], citing *Brash Holdings Ltd (administrator appointed) v Katile Pty Ltd* [1996] 1 VR 24 at 33;

(e) the "creditors" for the purposes of Pt 5.3A are those who would have been the creditors of the company had the company gone into liquidation and the relevant date for the purposes of s 553(1) of the Act been the day specified in the DOCA (usually, and as here, the date of appointment of the administrators). Thus the "claims" arising as referred to in s 444D(1) are those debts or claims which would be provable against the company in a winding-up. Put alternatively, the claims that fall within s 444D(1) are coextensive with those that could fall under s 553(1): *Smith v Sandalwood Property* at [76], citing *Brash Holdings Ltd v Katile Pty Ltd* [1996] 1 VR 24 at 34, 36; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [42]; *City of Swan v Lehman Brothers Australia Ltd* (2009) 179 FCR 243 at [135]; *Lehman Bros Holdings Inc v City of Swan* (2010) 240 CLR 509 at [38]; *Central Queensland Development Corporation Pty Ltd and Another v Sunstruct Pty Ltd and Others* (2015) 231 FCR 17 at [63]; *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* (2015) 297 FLR 1 at [68]-[69];

(f) the words of s 553 indicate an intention to define provable claims widely. That is consistent with one of the basic aims of insolvency laws - being to deal comprehensively with all claims against a company so that its affairs can be fully wound up or so that it can resume trading: *Smith v Sandalwood Property* at [79], citing *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* (2015) 297 FLR 1 at [211];

(g) to better facilitate a fresh start for an insolvent company which pursues external administration through Pt 5.3A it is necessary that the terms "creditor" and "claim" be understood as being broad in their ambit. That conclusion is consonant with the legislative ancestry of the language employed in s 444D(1): *Smith v Sandalwood Property* at [81], citing, amongst other authorities, *Re Thiess Infraco (Swanston) Pty Ltd and Smith* (2004) 209 ALR 694 at [7], [9], [16];

(h) a "fresh start" or "clean slate" object is also readily identifiable as a purpose of a deed of company arrangement pursuant to Pt 5.3A. That purpose is implicit in the statutory scheme of Pt 5.3A: *Smith v Sandalwood Property* at [82], citing *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* (2015) 297 FLR 1 at [218]-[221], [238]; see also *Brash Holdings*

Ltd (administrator appointed) v Katile Pty Ltd [1996] 1 VR 24 at 28; *Blacktown City Council v Macarthur Telecommunications Pty Ltd* (2003) 47 ACSR 391 at [19];

(i) s 444D(1)'s formulation of "claims arising on or before the day specified in the deed" comprehends future or contingent debts or claims. That is a result of the terms of s 553(1) and the acceptance that claims within s 444D(1) can extend to any debt or claim that would be provable in a winding-up. It follows that future and contingent creditors may be bound by a DOCA as concerns such future or contingent claims: *Smith v Sandalwood Property* at [83], citing *Lehman Bros Holdings Inc v City of Swan* (2010) 240 CLR 509 at [38];

(j) it is unremarkable that, on its proper construction, the "claims arising on or before" the day specified in a DOCA may include future and contingent claims. The object of Part 5.3A, and the purpose of a DOCA, would be frustrated if this were not so. To restore an insolvent company to financial health, and maximise its chances of continuing in existence, it is necessary that the company may be relieved from existing obligations which may mature into monetary liabilities post-DOCA: *Smith v Sandalwood Property* at [85].

113. The same considerations that have favoured a wide construction of "claims" and "creditors" in s 444D(1) also favour a narrow construction of the "carve outs" for secured creditors and lessors in ss 444D(2) and (3). In short, if those carve outs are interpreted too widely so as to put beyond the reach of any DOCA onerous personal obligations (for instance, contractual obligations) an important object of Part 5.3A, being to enable the creditors of a company by majority vote to give it a "clean slate" so that it can be rehabilitated, would be impeded.

114. That is confirmed when one considers how Part 5.3A deals with the personal and proprietary rights of secured creditors and lessors. Section 440D(1) imposes a moratorium "[d]uring the administration" on beginning or proceeding with any proceeding against the company without leave or the consent of the administrator. Section 440B(1) imposes a special moratorium on the exercise of third party property rights against the company subject to leave or the consent of the administrator. Secured creditors and lessors of property in the possession of, or used, or occupied by the company, are prohibited from "enforcing the security interest" or taking possession or otherwise recovering the property (amongst other things). The s 440B moratorium is clearly directed to preventing, during the administration, the taking of *extra curial* action by secured creditors and lessors which might be anticipated to interfere with an orderly administration.

115. If the company executes a DOCA, its ability to compromise or extinguish the rights of secured creditors is limited by s 444D(2) and (3). However that is subject to s 444F, pursuant to which the Court may make orders limiting the rights of a secured creditor, by ordering it "not to realise or otherwise deal with the security interest, except as permitted by the order" (s 444F(1)-(2)). The Court may only make such an order if satisfied that, amongst other things, "for the creditor to realise or otherwise deal with the security interest would have a material adverse effect on achieving the purposes of the deed."

116. In *Lam Soon Australia Pty Ltd v Molit* (No 55) Pty Ltd (1996) 70 FCR 34, the Full Court of the Federal Court (von Doussa, O'Loughlin and Lehane JJ) observed upon the manner in which Part 5.3A deals with the rights of secured creditors and lessees and then stated the following general principle (at 41, underlining added):

> "Section 444F then provides, in a way that assimilates the positions of secured creditors, owners and lessors, that the Court may, if satisfied as to certain matters, make orders limiting the rights which they might otherwise exercise under s 444D. There is nothing surprising in that. There are obvious practical and commercial similarities between the situation of a mortgagee of property of a company and that of the owner or lessor of property of which the company has possession or which it uses. … clearly, so far as s 444D(2) and (3) and s 444F are concerned, no distinction is to be drawn between an owner or lessor of goods and a lessor of land. In *J & B Records Ltd v Brashs Pty Ltd* (1995) 36 NSWLR 172 at 179-182, Hodgson J treated the provisions as operating in the same way as regards both mortgagees and lessors: his Honour concluded (at 181, 182) that the "preferable view" was that the provisions were intended to "set up something of a code relating to court proceedings in relation to matters concerning claims arising on or before the day specified in the deed" so that, where secured creditors or lessors had claims of that kind, s 444E prohibited their enforcement, except with the leave of the court, by proceedings in court, including proceedings in which the assistance of the court is sought in the enforcement of a mortgagee's or lessor's rights over mortgaged or leased property: the field thus left for the operation of s 444D(2) and (3) and s 444F was that of the extra curial or "self-help" rights and remedies of a mortgagee, owner or lessor: see also *Hamilton v National Australia Bank Ltd* (1996) 66 FCR 12 at 30-31."

117. The conclusion in *Lam Soon* that ss 444D(2) and (3) operate to preserve *only* an owner's or lessor's right to take *extra curial* action in relation to their property, such as by re-entering possession for non-payment of rent, is also consistent with the language used in s 444D(2) and (3). Sub-s (2) preserves the secured creditor's right to "realise" or "otherwise deal with" its property. Sub-(3) is in terms wider, because it uses the elastic phrase "in relation to", but the Full Court held that it was to be assimilated or read harmoniously with sub-s (2), and so should be read as being restricted to the exercise of *extra curial* rights such as taking possession or re-entering.

118. *Lam Soon* has been applied in several subsequent first instance decisions as authority that ss 444D(2) and (3) operate to preserve only an owner's or lessor's right to take *extra curial* action in relation to their property, such as by re-entering possession of real property for non-payment of rent: *Henaford Pty Ltd v Strathfield Group* (2009) 72 ACSR 240 at [19] (White J); *Re Bluenergy Group Ltd (Subject to a Deed of Company Arrangement) (Admin Apptd)* (2015) 107 ACSR 373 at [43]-[35] (Black J); *In the matter of Baseline Constructions Pty Ltd (subject to deed of company arrangement)* [2017] NSWSC 1018 at [51]-[52] (White J); *Rosecell Pty Ltd & Ors v JP Haines Plumbing Pty Ltd & Ors* [2015] NSWSC 1238 at [80] (White J).

119. It is not to the point that the facts in *Lam Soon* were not concerned with a redelivery obligation. The reasoning quoted above was part of the Court's reasons for deciding the case as it did. That reasoning formed part of the *ratio* of the case. If that is not right, the reasoning is seriously considered dicta and is to be followed unless plainly wrong. It follows that there is binding appellate authority, directly on point, that means the Prayer 6A claim, so far as it rests on the assertion that Willis' contractual right to have the Engines delivered to Florida in accordance with the special regime under cl 18 of the GTA is preserved by ss 444D(2) and (3) must fail. All those provisions do is preserve Willis' right, as a property owner, to come and take possession of its property (ie, the physical aircraft objects). Willis is free, of course, to take possession of the physical aircraft objects (including the Engines) at any time – the Respondents urge Willis to do so, including in these submissions.

120. Willis' submission that there is no binding authority on point (AS at [78]-[79]) must be rejected. Willis also submits that this case concerns a contractual obligation to "insist on the return of possession and physical custody of goods" whereas *Lam Soon* and the cases applying it were concerned with other contractual obligations that were "more distantly" associated with property, such as payment of rent (AS at [79]). But *Lam Soon* expressly holds that s 444D(2) and (3) preserve only the taking of *extra curial* action and provides careful reasons in support of that conclusion. The attempt to distinguish it goes nowhere. The claim for redelivery of the Engines to Florida in accordance with cl 18 of the GTA (which involves, amongst other things, arranging for third party regulated Maintenance Repair Operator engineering certifications to be issued, including FAA or EASA forms which are not issued in Australia) may be a claim for performance of a contractual obligation associated with the property in question, but it is not the exercise of a right to take *extra curial* action in relation to the Engines, such as by re-taking possession.

121. A further reason why s 444D(3) does not apply is that s 444D(3A) states that it has no application "in relation to an owner or lessor of PPSA retention of title property of the company". Section 51F of the Act defines "PPSA retention of title property" in such a way as to include the Engines, in that the Engines are personal property in VB Leaseco's possession but VB Leaseco does not have title to them and VB Leaseco has granted a "PPSA security interest" that has attached to the Engines (namely a "PPS Lease" as defined in s 13 of the *Personal Property Securities Act* 2009 (Cth)).

D3. Construction of the Primary DOCA

122. In its written submissions Willis places reliance on the terms of the DOCA. It contends that "as a matter of construction the DOCA expressly preserves claims under a Security Interest or Lease that are much broader than the statutory carve out" (AS at [48(a)]). Willis is driven to make that submission because the Act does not assist them (see above). The DOCAs were plainly intended to give the Virgin Companies, in the hands of Willis, a "clean slate" or "fresh start".

123. As the Court is well aware, on their effectuation the DOCAs, which have received the overwhelming support of the Virgin Companies' creditors, will convert personal claims against the

Virgin Companies, save for those specifically excluded, into rights to participate in a Creditors' Trust.

124. Bain Capital is required to make a cash contribution to the Creditors Trust of between $447.2 million and $572.2 million. In exchange Bain Capital will take over the Virgin Companies' business as a going concern by acquiring all shares in VAH and becoming the ultimate parent of the Virgin Companies.

125. A key element of the DOCAs that the Virgin Companies (now owned by Bain) will be free from all pre-administration personal liabilities except for those specifically excluded. That is effected by cl 6.4 of the Primary DOCA (which is the relevant DOCA for present purposes) which states that "each Creditor agrees that on Completion, its Claims are extinguished and released".[40] "Claim" is defined to include all claims against … a Deed Company (present of future, certain or contingent, ascertained or sounding only in damages) … that would be admissible to proof against a Deed Company in accordance with Division 6 of Part 5.6 of the Corporations Act, if the Deed Company had been wound up and the winding up is taken to have commenced on the Appointment Date" and specifically includes "a Claim of a Secured Creditor".

126. The excluded liabilities are also identified with particular care in the Primary DOCA, through the definitions of "Excluded Claim" and "Excluded Contract" (being the contracts listed in Schedule 7 of the Primary DOCA). They include, amongst other things, employee entitlements, travel credit liabilities, and liability for a loan owing to Velocity Rewards Pty Ltd.

127. The Primary DOCA is therefore drafted to take advantage of the important purpose of Part 5.3A identified above – namely, the ability for a company to be given a "fresh start" or "clean slate", save for liabilities or obligations expressly reserved.

128. The above provisions, and commercial context, make it inherently illogical that, as Willis contends, the Primary DOCA in fact operates to leave behind ongoing contractual liabilities, not specifically identified, to be assumed by Bain as the new owner of the Virgin Companies. Quite apart from the fact that the Primary DOCA specified the scope and specific identity of excluded liabilities with particular care through the definitions of "Excluded Claim" and "Excluded Contract" (being the contracts listed in Schedule 7 of the Primary DOCA), such a construction defies commercial logic and would lead to absurd results.

[40] Pending Completion (upon which the Primary DOCA terminates – see cl 18.1), the moratorium in cl 6.3(a) of the Primary DOCA applies. It also precludes the Prayer 6A claim, save that it is subject to an exception in cl 6.3(b) which is similarly expressed (although if anything, narrower) to the exceptions in ss 444D(2) and (3) (addressed below). In any event, until the Primary DOCA effectuates or terminates, Willis, as a person bound by the DOCA, prevented from beginning or proceeding with a proceeding "against the company or in relation to any of its property" except with the leave of the Court (s 444E(3) of the Act). It would plainly be subversive to the purpose of Part 5.3A if the Court were to grant leave so as to permit, while a DOCA was on foot and on course to effectuate, a claim to be brought and enforced against a company that stood to be released by the DOCA on its effectuation.

129. Willis first contends that cl 6.3(b) of the Primary DOCA has that effect (AS at [50]-[64]) but the submission does not withstand scrutiny. There is no problem with the language of cl 6.3(b).[41] The limiting factor is the words "enforce, realise or otherwise deal with any Security Interest or Leased Property". The words "enforce", "realise" and "otherwise deal with" are variously found in ss 444B, 444E and 444F of the Act. What they pick up is the taking of *extra curial* action by creditors and lessors (whose positions are assimilated by Part 5.3A). Further, if it matters, the clause has a perfectly clear and sensible operation when construed distributively.

130. There is no mystery to cl 6.3(b). The evident (indeed obvious) purpose of the provision is to put in express terms in the DOCA the same carve out as is found in ss 444D(2) and (3) of the Act but not make its operation dependent on the secured creditor or lessor voting against the DOCA at the second meeting of creditors. It means that secured creditors and lessors who favour a DOCA but are concerned about losing their rights under s 444D(2) and (3) of the Act can vote in favour of the DOCA (to avoid the alternative consequence of liquidation) without compromising their position.

131. Accordingly, and unsurprisingly, given the commercial rationale for the Bain transaction, cl 6.3(b) of the DOCA does not create an exception in favour of secured creditors and lessors that is any wider than that already provided for in the Act.

132. If the construction now sought to be placed by Willis on the DOCA reflected its true understanding of cl. 6.3(b) of the DOCA, one would have expected Willis to vote "in favour of" rather than against the DOCA, as it did.

133. In any event, in seeking specific performance by Prayer 6A Willis is clearly not "enforcing", "realising" or "otherwise dealing with" the Engines as Secured Creditor or Owner. It is seeking an order to compel *another person* (VB Leaseco) to transport the Engines to a contractually identified place and carry out other asserted contractual obligations (such as the engineering certifications and issuance of FAA or EASA serviceable tags). Prayer 6A does not involve Willis, as Secured Creditor or Owner, taking *any action at all*.

134. Willis next refer to clauses 7 and 9 of the DOCA (Willis submissions at [65]-[90]), but it is perfectly clear from the language of each of those clauses (particularly the words "to the extent permitted by section 444D(2)/(3) of the Act") that they adopt, and do not depart from, the terms of the Act. Clauses 7 and 9 are a form of drafting commonly seen in DOCAs. On one view of things they are unnecessary, but they have the salutary effect of directing the reader's attention to the relevant provisions of the Act, so that the operation of the DOCA can be understood by a person who does not have pre-existing familiarity with ss 444D(2) and (3).

[41] The clause deals with leases and security interests together, but in that respect it is no different to s 444F of the Act (which, as the Full Court noted in Lam Soon, is drafted differently in that respect to s 444D(2) and (3)). The "or" in "enforce, realise or otherwise deal with" need only be read distributively for the provision to make grammatical sense: see Lewinson and Hughes on Contractual Interpretation at [7.1.4].

135. Willis tries to make use of the words “in relation to that property” in s 444D(3) (picked up by cl 9 of the DOCA) but, as submitted above, there is binding authority that those words, read in context, only carve out a lessor’s entitlement to take *extra curial* action, such as going back into possession (see above). As the authorities point out, interpreting those words widely, so as put beyond the reach of Part 5.3A contractual obligations or liabilities associated with leased property, would put lessors in a very different position to other secured creditors (contrary to the statutory scheme) and frustrate the “fresh start” or “clean slate” objective of Part 5.3A.

136. Finally, as submitted above, a further reason Willis cannot take advantage of the words “in relation to that property” in s 444D(3) (as picked up by cl 9 of the DOCA) is that s 444D(3) has no application in the case of the Engines because they are “PPSA retention of title property” within s 51F of the Act and so s 444D(3) is excluded by s 444D(3A).

D4. Prayer 6A claim should be refused on general equitable principles

137. Whether treated as a claim for specific performance or a mandatory injunction, the Prayer 6A claim is subject to ordinary equitable principles. The Prayer 6A claim fails because it is an attempt to enforce a positive contractual obligation and damages have not been shown to be an inadequate remedy (as to which, see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 at 11) and because Willis has made a contrary binding election.

138. Willis refers, without explaining any context, to a general statement of Lord Browne-Wilkinson in *Bristol Airport Plc v Powdrill* [1990] Ch 744 to the effect that specific performance of an obligation to lease an aircraft will generally be specifically performable and is “available and appropriate” (AS at [36]).

139. *Bristol Airport* was a case where two creditors of a charter airline that was in administration and had leased certain aircraft, sought to take two aircraft as security by detaining them, but were preventing from doing so on the basis that, having taken the benefit of the administration (in the form of payments made to the creditors during the administration), the creditors could not act inconsistently with it. It was the opposite of the circumstance of this case. Lord Brown-Wilkinson’s remarks at 759 concerned whether specific performance could be sought *by* the company in administration. The case says nothing about whether specific performance is “*available and appropriate*” when sought *against* a company in administration and is not concerned with getting possession of, or title to, unique property, but merely requiring that it be transported to a particular location in a particular manner.

140. In this case, Willis is able to come and pick up the Engines at any time. This is not a case about whether a person should have the benefit of a contractual entitlement to acquire title to, or take possession of, unique property. The dispute between the parties is as to who should transport the property to a particular location in a particular manner. Damages are an adequate remedy for the non-performance of that obligation. This is just a dispute about who bears the expense of transportation, not who should have possession of, and title to, the Engines.

141. That is underscored by the fact that Willis has submitted a proof of debt in which it asserts, amongst other things, an entitlement to damages for breach by VB Leaseco of its obligation to redeliver the Engines: Algeri October Affidavit [13].

142. The only matter that Willis points to as making damages an inadequate remedy is that it will not receive a 100% return on its claim for breach of the contractual obligation to effect delivery to Florida, because it will be proving along with other creditors in the Creditors' Trust. That is so, but where specific performance is sought (on a final basis), the insolvency of a defendant does not render inadequate an award of damages that would otherwise be adequate. Indeed, in such a case, the prejudice that specific performance would cause to other creditors of the defendant company, by giving one creditor effective priority over others, is a reason to refuse it. *Spry's Equitable Remedies* (9th ed, 2014) at p 57, fn 20) states that "specific performance should not be granted in such circumstances as to give rise to a preference or unfair advantage over other creditors of the insolvent party", citing *In re Wait* [1927] 1 Ch 606 at 616-618. For further applications of the principle, see G*ilgandra Marketing Co-Operative Limited v Australian Commodity & Merchandise Pty Ltd & Ors [administrator appointed] [No. 2]* [2011] NSWSC 16 at [112] and *Anders Utkilens Rederi A/S v 0/Y Lovisa Stevedoring Co. A/B* [1985] 2 All ER 669 at 674.

143. Finally, and additionally, by lodging a proof of debt claiming damages for non-performance of the contractual obligation to transport the Engines to Florida, Willis has accepted the repudiation of the Engine Leases and elected to take damages as its remedy. Two things follow. First, having accepted damages as its remedy, it therefore cannot now seek specific performance of that same obligation. Second, the consequence of acceptance of the repudiation is that the contract has terminated. Specific performance should also be refused on that basis.

144. The Prayer 6A claim is therefore also to be refused on the basis of general equitable principles.

E. Conclusion

145. For the foregoing reasons, the Willis IA should be dismissed with costs, and the relief sought in the Virgin IP should be granted.

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