

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, EDELMAN AND STEWARD JJ

WELLS FARGO TRUST COMPANY, NATIONAL
ASSOCIATION (AS OWNER TRUSTEE) & ANOR APPELLANTS

AND

VB LEASECO PTY LTD (ADMINISTRATORS
APPOINTED) & ORS RESPONDENTS

*Wells Fargo Trust Company, National Association (as owner trustee) v
VB Leaseco Pty Ltd (administrators appointed)*

[2022] HCA 8

Date of Hearing: 4 November 2021

Date of Judgment: 16 March 2022

S60/2021

ORDER

- 1. Order 3 of the orders of the Full Court of the Federal Court of Australia made on 7 October 2020 be set aside and, in its place, it be ordered that: "the respondents pay the appellants' costs of the proceedings before the primary judge as agreed or assessed".*
- 2. Appeal otherwise dismissed.*
- 3. The appellants pay the respondents' costs of the appeal.*
- 4. The amount of \$500,352.99, paid into the Federal Court of Australia by the appellants pursuant to the orders of the Federal Court of Australia made on 10 November 2020, be released to the respondents.*

On appeal from the Federal Court of Australia

Representation

B W Walker SC with P F Santucci for the appellants (instructed by Norton Rose Fulbright Australia)

J T Gleeson SC with K I H Lindeman for the respondents (instructed by Clayton Utz)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Wells Fargo Trust Company, National Association (as owner trustee) v VB Leaseco Pty Ltd (administrators appointed)

Aviation – Aircraft leasing – Where first appellant leased aircraft engines to lessee company – Where administrators appointed to lessee company – Where lease agreements specified obligations for redelivery of aircraft engines – Where Protocol to Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment ("Protocol") required administrators to "give possession" of aircraft engines upon insolvency-related event – Where specific redelivery obligations under lease agreements preserved by Convention on International Interests in Mobile Equipment but constrained by s 440B of *Corporations Act 2001* (Cth) – Whether obligation to give possession under Art XI(2) of Protocol fulfilled by administrators providing opportunity to take possession of aircraft engines in Australia – Meaning of "give possession" in Art XI(2) of Protocol.

Words and phrases – "aircraft engines", "aircraft objects", "give possession", "insolvency-related event", "lease agreements", "obligation to give possession", "opportunity to take control", "provide an opportunity for the exercise of the right to take possession", "right to take possession", "rules of insolvency procedure".

Corporations Act 2001 (Cth), s 440B.

International Interests in Mobile Equipment (Cape Town Convention) Act 2013 (Cth).

1 KIEFEL CJ, GAGELER, KEANE, EDELMAN AND STEWARD JJ. The *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) ("the Act") enacts that the Convention on International Interests in Mobile Equipment¹ ("the Convention") and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment² ("the Protocol"), so far as they relate to Australia, have the force of law as part of the law of the Commonwealth³. The Convention and the Protocol as so in force must be construed according to the principles applicable to the interpretation of treaties in international law⁴.

2 The Act goes on to enact that the Convention and the Protocol as so in force prevail to the extent of any inconsistency over any law of a State or Territory and any other law of the Commonwealth⁵, including relevantly the *Corporations Act 2001* (Cth). The Act confers jurisdiction on the Federal Court of Australia and the Supreme Courts of the States and Territories in matters arising under the Act⁶.

3 This appeal, from a decision of the Full Court of the Federal Court of Australia⁷ in a matter arising under the Act, turns on the content of the obligation imposed by Art XI(2) of the Protocol on VB Leaseco Pty Ltd ("Leaseco") and its administrators ("the Administrators") to "give possession" of certain aircraft engines to Wells Fargo Trust Company ("Wells Fargo") within 60 days of the occurrence of an "insolvency-related event" constituted by the appointment of the Administrators under Pt 5.3A of the *Corporations Act*. Was the obligation to redeliver the aircraft engines to Wells Fargo in the United States? Or was the

1 Convention on International Interests in Mobile Equipment (2001) as amended and in force for Australia from time to time.

2 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (2001) as amended and in force for Australia from time to time.

3 Section 7 of the Act.

4 *Addy v Federal Commissioner of Taxation* (2021) 95 ALJR 911 at 917-918 [23]; 394 ALR 214 at 221-222.

5 Section 8 of the Act.

6 Section 9 of the Act.

7 *VB Leaseco Pty Ltd v Wells Fargo Trust Company* (2020) 279 FCR 518.

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obligation no more than to provide Wells Fargo with an opportunity to take control of the aircraft engines in Australia?

4 For reasons to be explained, the obligation of Leaseco and the Administrators was no more than to provide Wells Fargo with an opportunity to take control of the aircraft engines in Australia. The Full Court was correct to so conclude.

Facts and procedural history

5 Leaseco, part of the Virgin Australia group, leased the aircraft engines from Wells Fargo, their legal owner. The beneficial owner of the aircraft engines was Willis Lease Finance Corporation ("Willis"). Each agreement for lease provided for the leased aircraft engine to be redelivered by Leaseco to Wells Fargo at a location in Florida to be specified by Wells Fargo upon the expiration or other termination of the lease. Each agreement incorporated terms and conditions set out in a General Terms Engine Lease Agreement ("GTA").

6 The GTA set out terms which provided for the redelivery of the aircraft engines upon the termination of the lease to the location in Florida specified pursuant to each agreement to be free of all liens and accompanied by specified technical records. The GTA set out an elaborate and prescriptive regime governing the method of redelivery.

7 The GTA also specified events of default, which included the appointment of an administrator, and set out the rights of Wells Fargo on the occurrence of an event of default. The rights of Wells Fargo on the occurrence of an event of default were expressed to include rights to do all or any of the following: to "cancel [Leaseco's] rights of possession and use under any and all [l]eases"; to "terminate [Wells Fargo's] obligations to lease any [aircraft engines] to [Leaseco]"; to demand that Leaseco redeliver any aircraft engine as if on the expiration of the lease or, in the alternative at the option of Wells Fargo, to enter on premises where the aircraft engine was located "and take immediate possession of and remove the same".

8 Following the appointment of the Administrators on 20 April 2020, Willis on 16 June 2020 made a demand for redelivery of the aircraft engines to a specified location in Florida pursuant to the lease agreements, which the Administrators rejected. The Administrators on the same day proffered to Willis an opportunity to take control of the aircraft engines where the aircraft engines happened then to be located in Australia, which was rejected.

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9 On 30 June 2020, Wells Fargo and Willis commenced a proceeding in the Federal Court for declarations and other orders against, among others, Leaseco and the Administrators. The proceeding was heard by Middleton J on 17 August 2020. On 3 September 2020, his Honour delivered reasons and made orders the effect of which was to compel Leaseco and the Administrators to redeliver the aircraft engines to the specified location in Florida substantially in accordance with the regime governing the method of redelivery set out in the GTA⁸.

10 Three weeks later, the Full Court constituted by McKerracher, O'Callaghan and Colvin JJ heard an appeal from the orders of Middleton J. The Full Court rendered its decision allowing the appeal on 7 October 2020.

11 Special leave to appeal to this Court was granted on 12 April 2021. The aircraft engines having been returned in the meantime to the United States, the urgency that had existed in the Federal Court no longer existed in this Court.

12 Underlying the question in the appeal is a question as to the construction of the obligation to "give possession" imposed by Art XI(2) of the Protocol. That underlying question is of general importance within the aviation industry. The immediate practical significance of answering the question in the appeal lies in the bearing the answer will have on the determination of whether the expenses incurred in returning the aircraft engines to the United States are to be borne by Wells Fargo or by the general body of creditors of Leaseco.

The Convention

13 The Convention establishes a legal framework for the asset-based financing and leasing of mobile equipment that is of high value or particular economic significance. The Convention does so by providing for the creation and registration of "international interests" to be recognised by "Contracting States" in uniquely identifiable objects within three categories: "airframes, aircraft engines and helicopters", "railway rolling stock" and "space assets"⁹.

8 *Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (administrators appointed)* [2020] FCA 1269.

9 Article 2(3) of the Convention.

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14 The Protocol is a protocol to the Convention applicable to uniquely identifiable objects within the first of those three categories, "airframes, aircraft engines and helicopters". The Protocol refers to them as "aircraft objects"¹⁰.

15 The rules of construction set out in the Convention and the Protocol provide that the Convention and the Protocol are to be read together as a single instrument¹¹, to be known as "the Convention on International Interests in Mobile Equipment as applied to aircraft objects"¹², and that the Protocol is to prevail to the extent of any inconsistency with the Convention¹³.

16 To ascertain the content of the obligation to "give possession" imposed by Art XI(2) of the Protocol, it is necessary to examine the combined operation of the Convention and the Protocol. To understand how those two instruments operate together, it is instructive first to consider the generic operation of the Convention, and then to note specific modifications introduced by the Protocol. Conformably with the applicable principles of interpretation¹⁴, both the generic operation of the Convention and the specific modifications introduced by the Protocol are best understood by having regard to the Official Commentary on the Convention and the Protocol prepared by Professor Sir Roy Goode and approved for distribution by the Governing Council of the International Institute for the Unification of Private Law ("the Official Commentary")¹⁵.

17 Foundational to the generic operation of the Convention is the constitution of an "international interest". If created or provided for by an agreement meeting

10 Article I(2)(c) of the Protocol.

11 Article 6(1) of the Convention.

12 Article II(2) of the Protocol.

13 Article 6(2) of the Convention.

14 See Art 31 of the Vienna Convention on the Law of Treaties (1969).

15 Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment, Official Commentary*, 4th ed (2019), as approved for distribution by the UNIDROIT Governing Council pursuant to Resolution No 5 adopted by the Cape Town Diplomatic Conference.

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certain formal requirements¹⁶, any of three types of interest will be constituted as an international interest¹⁷.

18 The first is an interest granted by the chargor under a "security agreement"¹⁸, defined as "an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person"¹⁹. The second is an interest vested in the conditional seller under a "title reservation agreement"²⁰, defined as "an agreement for the sale of an object on terms that ownership does not pass until fulfilment of the condition or conditions stated in the agreement"²¹.

19 The third – that applicable here – is an interest vested in the lessor under a "leasing agreement"²², defined as "an agreement by which ... the lessor ... grants a right to possession or control of an object ... to ... the lessee ... in return for a rental or other payment"²³. The Official Commentary explains the meaning of the word "possession" in that definition, and by implication elsewhere in the Convention and the Protocol, as follows²⁴:

"The word 'possession' (in the French text, *possession*) must here be given a broad meaning. In civil law systems, for example, the concept of possession requires a combination of factual possession of an object and an

16 Article 7 of the Convention.

17 Article 2(2) of the Convention.

18 Article 2(2)(a) of the Convention.

19 Article 1(ii) of the Convention.

20 Article 2(2)(b) of the Convention.

21 Article 1(II) of the Convention.

22 Article 2(2)(c) of the Convention.

23 Article 1(q) of the Convention.

24 Official Commentary at 27 [2.30].

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intention to hold it as owner, so that an equipment lessee is not a possessor but a 'detainer' (*détenteur*) whose rights are in essence contractual rather than proprietary. But both have rights that can be asserted against third parties other than those with a better right. The word 'possession' is therefore to be construed as covering both possession in the common law sense and *détention* in the civil law sense".

20 Within the meaning of the Convention – and within the meaning of the Protocol – each of a chargee under a security agreement, a conditional seller under a title reservation agreement and a lessor under a leasing agreement is a "creditor"²⁵. Correspondingly, each of a chargor under a security agreement, a conditional buyer under a title reservation agreement and a lessee under a leasing agreement is a "debtor"²⁶.

21 Chapter III of the Convention is concerned with the remedies available to a creditor in the event of "default", being the occurrence of an event that the creditor and the debtor have agreed to constitute a default²⁷ or (in the absence of agreement as to what will constitute a default) a default which substantially deprives the creditor of what the creditor is entitled to expect under the agreement²⁸. Article 8 makes elaborate provision for the remedies of a chargee under a security agreement. Article 10 makes somewhat sparser provision for the remedies of a conditional seller under a title reservation agreement or a lessor under a leasing agreement.

22 By operation of Art 8(1), a chargee under a security agreement can exercise one or more of a range of specified remedies, one of which is to "take possession or control of any object charged to it". Alternatively, by operation of Art 8(2), the chargee may apply for a court order authorising or directing any of the acts referred to in Art 8(1). Article 8(3) provides that a remedy specified in Art 8(1) "shall be exercised in a commercially reasonable manner", adding that "[a] remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised

25 Article 1(i) of the Convention.

26 Article 1(j) of the Convention.

27 Article 11(1) of the Convention.

28 Article 11(2) of the Convention.

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in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable".

23 By operation of Art 10, a conditional seller under a title reservation agreement or a lessor under a leasing agreement can "terminate the agreement and take possession or control of any object to which the agreement relates"²⁹ or "apply for a court order authorising or directing either of these acts"³⁰. The Official Commentary explains that "[w]hether the agreement must be expressly terminated before possession is taken or whether ... the act of taking possession is to be regarded as an implied termination of the agreement are matters to be determined by the applicable law and the terms of the agreement"³¹. In contrast to Art 8, Art 10 contains nothing to require a remedy for which it provides to be exercised by the seller or lessor in a commercially reasonable manner.

24 Article 12 is headed "Additional remedies". The relevant effect of Art 12 is to spell out that (subject to a requirement for consistency with specified "mandatory provisions"³²) a creditor is not prevented from exercising such other remedies as are available to it under the "applicable law", meaning the domestic rules of the law applicable by virtue of the rules of private international law of the forum State³³, including remedies agreed between the parties. The Official Commentary explains that "[i]t is therefore open to the parties to agree on cumulation of Convention remedies and those additional remedies provided or permitted by the applicable law"³⁴. Though Art 12 permits additional remedies agreed between the creditor and the debtor, it affords those remedies no enhanced status.

25 Chapter V of the Convention makes extensive provision for the registration of an international interest in an International Registry established under the

29 Article 10(a) of the Convention.

30 Article 10(b) of the Convention.

31 Official Commentary at 79 [2.121].

32 See Art 15 of the Convention.

33 See Art 5(3) of the Convention.

34 Official Commentary at 80 [2.123].

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Convention. Suffice it for present purposes to note that an international interest can be registered, so as to become a "registered interest"³⁵, by either a creditor or a debtor with the consent of the other³⁶.

26 Chapter VIII of the Convention, comprising Arts 29 and 30, addresses the effects of an international interest as against third parties. By operation of Art 29, a registered interest has priority over a subsequently registered interest and also over an unregistered interest³⁷, except for a "non-consensual interest"³⁸ created by operation of law that is permitted to have priority without registration pursuant to a declaration of a Contracting State pursuant to Art 39(1). Pursuant to Art 39(1)(a), Australia has made such a declaration in respect of statutory liens registered in accordance with the *Air Services Act 1995* (Cth)³⁹.

27 By operation of Art 30(1), an international interest is effective in "insolvency proceedings against the debtor" if registered prior to the commencement of the insolvency proceedings. "[I]nsolvency proceedings" are defined to include any "collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation"⁴⁰. "Insolvency administrator" correspondingly means "a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law"⁴¹. For the purposes of the Convention – and correspondingly for the purposes of the Protocol – "insolvency proceedings" accordingly include administration under Pt 5.3A of the *Corporations Act*, which

35 Article 1(cc) of the Convention.

36 Article 20(1) of the Convention.

37 Article 29(1) of the Convention.

38 Article 1(s) of the Convention.

39 Australia, Declaration Deposited Under the Cape Town Convention on International Interests in Mobile Equipment Relating to Article 39(1) (2015).

40 Article 1(l) of the Convention.

41 Article 1(k) of the Convention.

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commences with the appointment of an administrator who is then an "insolvency administrator".

28 Article 30(3)(b) then introduces an important qualification to the operation of Art 30(1) by providing that nothing in Art 30 affects "any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator". The purpose and effect of Art 30(3)(b), in the language of the Official Commentary, is to preserve "rules of insolvency procedure designed to limit the enforcement of security or other property rights in the interests of the general body of creditors, for example, by imposing an automatic stay on the enforcement of security and other in rem rights in order to facilitate a reorganisation"⁴².

29 The rules of procedure relating to the enforcement of rights to property preserved by Art 30(3)(b) of the Convention in relation to international interests registered before the appointment of an administrator include the restrictions imposed by s 440B of the *Corporations Act* on the exercise of rights that a third party has in property of, or in the possession of, a debtor in administration under Pt 5.3A of the *Corporations Act*. Relevant to the particular position of Wells Fargo as lessor of the aircraft engines in the possession of Leaseco at the time of the appointment of the Administrators are the restrictions set out in Item 3(b) of the table in s 440B of the *Corporations Act*, which operate to prevent a lessor from exercising any right to "take possession of" or "otherwise recover" leased property without the consent of the administrator or the leave of the court.

The Protocol

30 The Protocol modifies the generic operation of the Convention in respect of international interests in aircraft objects against the background of provisions of the Convention on International Civil Aviation (commonly known as the Chicago Convention)⁴³ which establish rules governing "aircraft", being either helicopters or airframes with aircraft engines installed⁴⁴. Those modifications include

42 Official Commentary at 396 [4.220].

43 Convention on International Civil Aviation (1944).

44 Article I(2)(a) of the Protocol.

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requiring their registration on a register maintained by a "registry authority"⁴⁵ in a Contracting State.

31 The Protocol contains two provisions which modify the generic operation of the Convention in ways that bear on the question in the appeal.

32 The first provision is Art IX. Headed "Modification of default remedies provisions", Art IX provides in relevant part:

"1. In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter:

- (a) procure the de-registration of the aircraft; and
- (b) procure the export and physical transfer of the aircraft object from the territory in which it is situated.

2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor.

3. Article 8(3) of the Convention shall not apply to aircraft objects. Any remedy given by the Convention in relation to an aircraft object shall be exercised in a commercially reasonable manner. A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the agreement except where such a provision is manifestly unreasonable.

...

5. The registry authority in a Contracting State shall, subject to any applicable safety laws and regulations, honour a request for de-registration and export if:

- (a) the request is properly submitted by the authorised party under a recorded irrevocable deregistration and export request authorisation; and

⁴⁵ Article I(2)(o) of the Protocol.

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- (b) the authorised party certifies to the registry authority, if required by that authority, that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged or that the holders of such interests have consented to the de-registration and export.

..."

33 Article IX modifies the remedies available to a creditor under Arts 8 and 10 of the Convention in the event of default in two uncontroversial respects. The first modification is, by Art IX(1), to provide to the creditor (whether a chargee, conditional seller or lessor) additional Convention remedies to the extent at any time agreed to by the debtor (whether a chargor, conditional buyer or lessee). The additional remedies are: to procure de-registration of the aircraft with the co-operation of the registry authority of the Contracting State under Art IX(5); to procure export of the aircraft object with the co-operation of the registry authority of the Contracting State under Art IX(5); and to procure physical transfer of the aircraft object from the territory in which it is situated. The other modification is, by Art IX(3), to subject all of the Convention remedies available to the creditor in relation to an aircraft object to the requirement that the remedy be exercised in a commercially reasonable manner. Whilst Art IV(3) of the Protocol permits the debtor and creditor by agreement to derogate from or vary the effect of other provisions of the Protocol, it specifically prevents them derogating from or varying the effect of Art IX(3).

34 The provision of the Protocol central to the appeal is Art XI, which is headed "Remedies on insolvency". Where, pursuant to Art 30(1) of the Convention, an international interest is effective in insolvency proceedings against a debtor, to the extent that Art XI is applicable, Art XI operates to displace the operation of Art 30(3)(b).

35 Article XI is expressed to apply only where a Contracting State that is the "primary insolvency jurisdiction"⁴⁶ has made a declaration pursuant to Art XXX(3)⁴⁷. The "primary insolvency jurisdiction" encompasses the place of

46 Article I(2)(n) of the Protocol.

47 Article XI(1) of the Protocol.

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<i>Keane</i>	<i>J</i>
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<i>Steward</i>	<i>J</i>

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incorporation of the debtor in respect of which there has occurred an "insolvency-related event"⁴⁸, here, the commencement of insolvency proceedings.

36 Article XXX(3) allows for a choice between two alternative versions of Art XI. Australia has chosen Alternative A⁴⁹. Alternative A is expressed in the following terms:

- "2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:
 - (a) the end of the waiting period; and
 - (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.
3. For the purposes of this Article, the 'waiting period' shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.
4. References in this Article to the 'insolvency administrator' shall be to that person in its official, not in its personal, capacity.
5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:
 - (a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and
 - (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

48 Article I(2)(m)(i) of the Protocol.

49 Australia, Declaration Deposited Under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment Regarding Article XXX(3) (2015).

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
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6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.
7. The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.
8. With regard to the remedies in Article IX(1):
 - (a) they shall be made available by the registry authority and the administrative authorities in a Contracting State, as applicable, no later than five working days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and
 - (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.
9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.
10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.
11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.
12. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests.

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13. The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article."

37 Pursuant to Art XI(3), Australia has declared the "waiting period" for the purposes of Art XI(2)(a) to be the period of 60 days⁵⁰.

38 Implicit in Art XI(2)(b), and in the structure of Alternative A as a whole, is the assumption that the rules of insolvency procedure preserved by Art 30(3)(b) of the Convention will have resulted in an automatic stay of the enforcement of such right to possession as the creditor would be able to exercise under Art 8 or Art 10 of the Convention or under domestic law (including under an agreement between the creditor and the debtor) as preserved by Art 12 of the Convention. The Official Commentary explains⁵¹:

"The underlying premise is that the commencement of the insolvency proceedings produces a stay on the creditor's right to possession. Where this is not the case or where any stay has been lifted the creditor becomes entitled to possession even if the waiting period has not expired. In other words, paragraph 2(b) is to be interpreted as if it read 'would be entitled, or becomes entitled, to possession of the aircraft object notwithstanding the insolvency proceedings or other insolvency-related event'."

39 Unless the stay of enforcement imposed under the applicable rules of insolvency procedure is lifted so as to engage Art XI(2)(b), Art XI(2) operates to oblige the debtor or insolvency administrator (as applicable in the particular insolvency proceedings) to "give possession" of the aircraft object to the creditor no later than the end of the waiting period of 60 days from the insolvency-related event.

40 In the meantime, Art XI(5)(a) operates to oblige the debtor or insolvency administrator to preserve and maintain the aircraft object and its value in accordance with the underlying agreement between the creditor and the debtor, and Art XI(6) operates to ensure that the debtor or insolvency administrator is not precluded from using the aircraft object under arrangements designed to preserve and maintain it and its value. If, by the end of the 60-day waiting period, the debtor

50 Australia, Declaration Deposited Under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment Regarding Article XXX(3) (2015).

51 Official Commentary at 516 [5.64].

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or insolvency administrator has cured all defaults (other than a default constituted by the opening of insolvency proceedings which is incurable) and has agreed to perform all future obligations under the agreement, Art XI(7) permits the debtor or insolvency administrator to retain possession of the aircraft object.

41 Through the combination of Art XI(6) and Art XI(7), the debtor or insolvency administrator is therefore able to avail itself of a one-off 60-day opportunity, from the commencement of the insolvency proceedings until the end of the waiting period, to use the aircraft object to attempt to trade out of default. If the debtor or insolvency administrator is unwilling or unable to avail itself of that opportunity, then the debtor or insolvency administrator must perform the obligation imposed by Art XI(2) no later than the end of the 60-day period.

The content of the obligation imposed by Art XI(2) of the Protocol

42 That brings us to the content of the obligation imposed on the debtor or insolvency administrator by Art XI(2) of the Protocol to "give possession" of the aircraft object to the creditor.

43 Wells Fargo argues that the obligation is to deliver (in the case of a debtor who is a chargor) or redeliver (in the case of a debtor who is a conditional buyer or a lessee) the aircraft object to the creditor in compliance with the agreement between the debtor and the creditor. The argument is that the need to deliver or redeliver the aircraft object in compliance with the agreement either is inherent in the requirement to "give possession" to which Art XI(2) refers or arises in the performance of that obligation as an aspect of the requirement of Art IX(3) that "[a]ny remedy given by the Convention ... shall be exercised in a commercially reasonable manner".

44 The argument cannot be accepted. Unlike Art IX(1) of the Protocol, Art XI(2) of the Protocol does not in form or in substance give an additional remedy to the creditor. Neither Art XI(9) nor Art XI(13) of the Protocol suggests to the contrary. And although Art X(6) of the Protocol refers to "the remedies in Article IX(1)", the Official Commentary notes that this is a "drafting slip" and that the reference should be to Art 13 of the Convention⁵². The requirement of Art IX(3) of the Protocol therefore has no application to the performance of the obligation that Art XI(2) imposes on the debtor or insolvency administrator.

52 Official Commentary at 506 [5.49].

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45 The content of the obligation imposed by Art XI(2) needs to be understood in the context that Art XI of the Protocol is framed to apply in circumstances where the creditor has a right to take possession of the aircraft object under Art 8 or Art 10 of the Convention by reason of the occurrence of an event of default and where the enforcement of that right is restricted by reason of the commencement of insolvency proceedings through the operation of rules of insolvency procedure preserved by Art 30(3)(b) of the Convention. What Art XI(2) of the Protocol does in those circumstances is to impose an obligation on the debtor or insolvency administrator, performance of which can be delayed during the waiting period of 60 days when the debtor or insolvency administrator is permitted by Art XI(6) to use the aircraft object. If and when performed, performance of the obligation to "give possession" triggers an ability on the part of the creditor to exercise the right to take possession that the creditor has under Art 8 or Art 10 of the Convention notwithstanding the rules of insolvency procedure preserved by Art 30(3)(b) of the Convention. The operation of Art 30(3)(b) of the Convention is overridden to that limited extent. Article XI(13) of the Protocol then ensures that the Convention as modified by Art IX of the Protocol applies to the exercise by the creditor of the Convention right to take possession. In particular, it ensures that the requirement of commercial reasonableness referred to in Art IX(3) of the Protocol applies to the exercise of the Convention right to take possession.

46 There is no reason to attribute to the term "possession" in Art XI(2) of the Protocol anything other than the constant meaning that the term has in Art XI(5) and Art XI(7) of the Protocol, in Art 8 and Art 10 of the Convention and elsewhere in the Convention and the Protocol. Throughout the Convention and the Protocol, the reference to "possession" is to physical control to the exclusion of others.

47 For the debtor or insolvency administrator to "give possession" to the creditor within the meaning of Art XI(2) of the Protocol is for the creditor to be "given the opportunity to take possession" within the meaning of Art XI(5) of the Protocol: it is for the debtor or insolvency administrator to take whatever steps may be necessary to provide an opportunity for the exercise of the right to take possession which the creditor has under Art 8 or Art 10 of the Convention. If the creditor then chooses to take up the opportunity to exercise that right to take possession, the rules of insolvency procedure preserved by Art 30(3)(b) of the Convention will not stand in the way.

48 Having taken possession of the aircraft object in the exercise of such right as the creditor has to take possession, the creditor is then in a position to exercise further rights under Art IX(1) of the Protocol to procure the de-registration of the aircraft and the export and physical transfer of the aircraft object. Article IX(5) of the Protocol contemplates that the creditor, in exercising those further rights, may

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take steps to procure the physical transfer of the aircraft object from the territory in which it is situated. And Art XI(8) of the Protocol obliges the Contracting State where the aircraft object is located to "expeditiously co-operate with and assist" the creditor in this regard.

49 The strength of the argument on behalf of Wells Fargo lies in the notion that the expression "give possession" in Art XI(2) of the Protocol, considered in isolation, might be thought to comprehend the burden of the effort and expense necessary to return the aircraft object to the physical possession of the creditor at a nominated location. But as Arts IX(1), IX(5) and XI(8) make plain, under the Protocol the physical transfer of the aircraft object from the territory of a Contracting State where it might happen to be located is something quite different from giving or taking possession. It is the creditor who is to undertake, and be responsible for, the burden of the effort and expense of the physical transfer of aircraft objects from the Contracting State to the location nominated by the creditor. This aspect of the context in which Art XI(2) of the Protocol operates tends distinctly against Wells Fargo's argument that this burden is necessarily part of "giving possession".

50 Telling strongly against Wells Fargo's argument is also that no right to procure the expeditious de-registration of the aircraft or the export and physical transfer of the aircraft object is available to the debtor or the insolvency administrator during the waiting period of 60 days from the insolvency-related event or at all. For Art XI(2) to impose an obligation to deliver or redeliver the aircraft object to the creditor by the end of the waiting period would effectively negate the opportunity afforded to the debtor or insolvency administrator by Art XI(6) and Art XI(7) to use the aircraft object to attempt to trade out of default during that same period.

51 To construe the obligation imposed by Art XI(2) of the Protocol as being to facilitate the exercise of the creditor's right to take possession under Art 8 or Art 10 of the Convention aligns the operation of Art XI(2) with the operation of the provision of the *United States Bankruptcy Code*⁵³ on which Alternative A of Art XI

53 11 USC §1110.

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of the Protocol was substantially based⁵⁴. The obligation imposed by that provision to "surrender and return"⁵⁵ equipment to a secured party, lessor or conditional vendor has been construed to mean no more than that "you get [the equipment] immediately and you get it as is, where it is"⁵⁶.

52 To so construe the obligation also attributes to Art XI(2) of the Protocol an operation consistent with the "underlying purpose" of Art XI as identified in the Official Commentary⁵⁷, being "to reflect the realities of modern structured finance, in particular to facilitate capital market financing, by ensuring as far as possible that, within a specified and binding time-limit, the *creditor* either (a) *secures recovery of the object* or (b) obtains from the debtor or the insolvency administrator, as the case may be, the curing of all past defaults and a commitment to perform the debtor's future obligations".

Application

53 Applying that construction of the obligation imposed by Art XI(2) of the Protocol, the position of Wells Fargo under the Convention as modified by the Protocol and in force under the Act can be summarised as follows.

54 On the appointment of the Administrators, Wells Fargo had a right under Art 10 of the Convention to take possession or control of the aircraft engines and had rights under the GTA preserved by Art 12 of the Convention which included to demand redelivery of the aircraft engines as if on the expiration of the leases. Without the consent of the Administrators or the leave of the court, Wells Fargo was constrained by the operation of s 440B of the *Corporations Act* as preserved by Art 30(3)(b) of the Convention from exercising any of those rights.

55 The Administrators' invitation to Willis, and in effect to Wells Fargo, to take control of the aircraft engines where they were situated in Australia fulfilled the obligation to "give possession" imposed on the Administrators and Leaseco by Art XI(2) of the Protocol. That invitation allowed Wells Fargo to exercise its right

54 See Gray, Gerber and Wool, "The Cape Town Convention aircraft protocol's substantive insolvency regime: a case study of Alternative A" (2016) 5 *Cape Town Convention Journal* 115 at 123-130.

55 11 USC §1110(c)(1).

56 *In re Republic Airways Holdings Inc* (2016) 547 BR 578 at 586.

57 Official Commentary at 514-515 [5.61] (emphasis added).

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to take possession under Art 10 of the Convention notwithstanding s 440B of the *Corporations Act* as preserved by Art 30(3)(b) of the Convention so as to assume physical control of the aircraft engines to the exclusion of others.

56 If Wells Fargo chose to exercise its right under Art 10 of the Convention, Art IX(3) of the Protocol required it to do so in a commercially reasonable manner. And if Wells Fargo chose to exercise its right under Art 10 of the Convention, Wells Fargo also had the ability to exercise additional rights under Art IX(1) of the Protocol as enhanced by Art XI(8) of the Protocol to procure the expeditious de-registration of the aircraft on which the aircraft engines were installed and to procure the expeditious export and physical transfer of the aircraft engines subject to any statutory lien registered in accordance with the *Air Services Act*.

57 Unaffected all the while was Wells Fargo's right under the GTA as preserved by Art 12 of the Convention to demand redelivery of the aircraft engines. Similarly unaffected was the operation of s 440B of the *Corporations Act* as preserved by Art 30(3)(b) of the Convention to constrain the exercise of that right to demand redelivery under the GTA.

Disposition

58 The appeal is to be dismissed with costs. Certain consequential orders are to be made to accommodate the arrangement between the parties which facilitated the return of the aircraft engines pending the outcome of the appeal.