

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE RECEIVERSHIP OF
SKYSERVICE AIRLINES INC.**

BETWEEN:

THOMAS COOK CANADA INC.

Applicant

- and -

SKYSERVICE AIRLINES INC.

Respondent

**FACTUM OF THE RECEIVER
FTI CONSULTING CANADA INC.
(Sunwing Trust Motion, returnable February 13, 2012)**

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PART I - OVERVIEW

1. Is Sunwing Vacations Inc. (“**Sunwing**”) an ordinary creditor of Skyservice Airlines Inc. (“**Skyservice**”), or can it elevate its claims ahead of other creditors by successfully asserting trust claims totalling about \$3.5 million?
2. Sunwing asserts multiple theories of why it has a trust – express trust, implied trust, constructive trust. To elevate its claim ahead of other creditors, Sunwing must establish the existence of the specific requirements of each type of trust. It cannot gloss over these requirements. Indeed, where the effect of recognizing trust claims would be to create priority over other creditors, careful scrutiny of each requisite element is particularly critical. Applying such scrutiny, it is apparent that Sunwing has not met the high burden required to move its claims ahead of other creditors.
3. Sunwing claims that an express or implied trust arose in its favour in respect of \$2,329,473 paid in relation to a March 23, 2010 invoice from Skyservice. Prior to the receivership, Skyservice transferred this amount from its general bank account to another account at the same bank that was used for cash deposits from in-flights sales of food, liquor and duty free items (the “**In-Flight Collections Account**”). Sunwing claims this transfer of funds evidences an intention to create an express or implied trust.
4. However, to establish an express or implied trust, the onus is on Sunwing to establish that Skyservice possessed the requisite intention to impose a trust benefiting Sunwing. It has not met that burden. To the contrary, the evidence shows there was no separate trust account, the amounts received from Sunwing were not segregated, there was no trust document (even though Skyservice created other express trusts in or around this time with trust documents) and there is

no clear evidence of an intention on the part of Skyservice to create a trust for the benefit of Sunwing.

5. Sunwing also claims a constructive trust on the basis that Skyservice was unjustly enriched in the amount of \$3,513,450.08 (inclusive of the \$2,329,473 claimed above), representing (i) the amount of the March 23, 2010 invoice; plus (ii) the portion of a March 17, 2010 invoice relating to flights that were ultimately not provided because the receivership intervened.

6. The test for a constructive trust to remedy unjust enrichment is well established. Sunwing must establish (i) that Skyservice was enriched; (ii) that Sunwing suffered a corresponding deprivation; and (iii) that there was no juristic reason for the enrichment. If unjust enrichment is established, Sunwing must then persuade the Court that it is appropriate to impose a constructive trust.

7. In this case, there are numerous juristic reasons for the enrichment. Most importantly, the payments were all made by Sunwing pursuant to contracts between Skyservice and Sunwing and pursuant to applicable law. In addition, the receivership, the insolvency regime and competing rights of other creditors constitute further juristic reasons for the funds to constitute part of the estate.

8. Imposing a trust upon amounts paid by Sunwing pursuant to a long-standing contractual arrangement, which nowhere provides that payments made in relation thereto will be held in trust, would elevate Sunwing's contractual claims ahead of other unsecured creditors. The direct impact of an alleged trust claim on the rights of third party creditors in an insolvency situation is the reason that the bar is set particularly high for those seeking to establish a trust in an

insolvency case. Sunwing has not met that test. Instead, like any other contractual counter-party that made pre-payments, paid deposits or delivered goods on credit pursuant to a contract prior to an insolvency filing, Sunwing is entitled to claim damages in the receivership to the extent its claims are made out pursuant to the contractual terms. There are no circumstances in this case that justify elevating Sunwing's claims to the prejudice of the other unsecured creditors.

9. In asserting its constructive trust claim, Sunwing attempts to portray itself as the victim of dishonest or immoral conduct by Skyservice leading up to the receivership on March 31, 2010. These arguments are not supported by the evidence and do not establish a basis to impose a constructive trust.

10. The evidence establishes that in the time leading up to the receivership, Skyservice's secured creditor, Thomas Cook Canada, Inc. ("TC"), which held a loan due on March 30, 2010, conducted its own contingency planning, including planning a receivership and revising its flight schedule in anticipation of Skyservice going out of business if the debt was not repaid. Equally, the evidence shows that Skyservice was continuing to pursue alternatives, with the receivership remaining only one of several possibilities up to March 31, 2010 or shortly before. According to Sunwing's own evidence, Skyservice was negotiating with Sunwing during this time to terminate Sunwing's obligations to Skyservice under the existing contractual arrangements (presumably, for a payment to Skyservice). Apparently, on March 30, 2010 it was clear that Skyservice would not be able to reach an agreement to secure the necessary working capital to continue operations.

11. For so long as Skyservice was seeking other solutions to save its business, it is not surprising that Skyservice would seek to continue to operate in the ordinary course and would not announce that it might go into receivership let alone refuse to accept payments under long-

standing and ongoing contracts. This evidence does not demonstrate dishonest or immoral conduct. Rather, it demonstrates that Skyservice acted in accordance with its contractual arrangements with Sunwing while pursuing alternatives available to it. On these facts, unjust enrichment - the basis upon which Sunwing seeks to impose the remedy of a constructive trust - has not been established.

12. In addition and in any event, a constructive trust would not be an appropriate remedy since the relevant equities are those between the trust claimant (Sunwing) and the other creditors. In all of the circumstances, the equities favour the other creditors and do not justify imposing a constructive trust.

PART II - THE FACTS

A. The Sunwing Agreements

13. Sunwing carries on business as an operator of package tours and charter flights.¹ Prior to the receivership, Sunwing chartered flight services from Skyservice² pursuant to a commercial agreement (as amended, the “**Commercial Agreement**”)³ and charter agreements based on a *pro forma* charter agreement (the “**Charter Agreement**”, and together with the Commercial Agreement, the “**Agreements**”).⁴

i. Invoices Based on Seasonal Budget Not Actual Costs

14. Pursuant to the Agreements, Sunwing was invoiced by Skyservice weekly throughout the flying season based on an estimated seasonal budget rather than actual costs. Sunwing and

¹ Tenth Report of the Receiver dated June 2, 2011, Motion Record of the Receiver at Tab 2 (the “**Tenth Report**”), p. 25, para. 23.

² *Ibid.*, p. 25, para. 25.

³ *Ibid.*, p. 24, para. 20.

⁴ *Ibid.*, p. 25, para. 25.

Skyservice agreed on an operating budget prior to the beginning of the flying season based on the parties' estimate of costs and profit charges for Sunwing's anticipated flight program.⁵ The Commercial Agreement defines the budget in Clause 11.4, which provides:

“The agreed projected schedule of Operating Costs for each Season, projected Profit Charges and projected Overhead Charges for the relevant Season in each Holiday Year shall, when applied to the Programme for each Season in the relevant Holiday Year, form the budget for such Season in such Holiday Year (the “Budget”).⁶

15. The parties divided the total budgeted cost by the anticipated number of seat miles for the season to come up with an “average seat mile” (“ASM”) figure.⁷ Skyservice then delivered invoices to Sunwing on a weekly basis that invoiced a portion of the total budgeted cost calculated by multiplying the anticipated number of miles to be flown in a certain week by the ASM (the “**Charter Fee**”).⁸ Payment was due from Sunwing the week before the flying took place.⁹ The relevant clause in the Commercial Agreement provides as follows:

“The Charter Fee applicable to each Charter Agreement in any Holiday Year shall be calculated in accordance with a Budget for such Holiday Year agreed between the Parties pursuant to Clause 11.4 and invoiced weekly in advance on a fixed and a per-seat mile basis as set out in Appendix 8 according to the planned flying programme set out in the relevant Charter Agreement (the “Tariff”) subject to all Charter Fee payments under the relevant Charter Agreement being reconciled in accordance with Clause 11.5.”¹⁰

ii. Agreements Provide for Reconciliation at Season End

16. The Agreements contemplate that the invoiced amount may be more or less than the actual costs (plus profit) of operating flights and provide a mechanism to reconcile the invoiced amounts to actual amounts at the end of the flying season:

⁵ *Ibid.*, pp. 25-26, para. 26(i).

⁶ *Ibid.*, p. 24, para 20; Commercial Agreement dated June 11, 2006, Motion Record of the Receiver at Tab 2, I (“**Commercial Agreement**”), p. 155, clause 11.4.

⁷ Tenth Report, *supra* note 1, p. 26, para. 26(ii).

⁸ *Ibid.*, p. 26, para. 26(iii).

⁹ *Ibid.*, pp. 26-27, para. 26(iv).

¹⁰ *Ibid.*, p. 30, para. 31; Commercial Agreement, *supra* note 6, p. 146, clause 5.1.2.

- (a) Clause 11.5 of the Commercial Agreement provides for reconciliation at the end of the season, as follows:

“FCC[Sunwing] and Skyservice shall conduct a reconciliation of actual Operating Costs against the projected schedule of Operating Costs at the end of each Season. ...¹¹ [emphasis added]

- (b) Clause 4.2 of the Charter Agreement provides that adjustments may be made based on the actual number of round-trip flights (or “Rotations”) and actual seat miles flown, within 10 days of the end of each month, and then a final adjustment after the end of the season, as follows:

“Charterer shall pay to Skyservice the Charter Fee applicable to the Program on a weekly basis. Each weekly payment shall be based on the Charter Fee for the number of Rotations scheduled to be flown in the ensuing week. Any necessary adjustments to take into account the number of actual Rotations operated during the preceding month shall be made within ten (10) days of the end of each month. A final adjustment for the actual number of Rotations and the actual Seat Miles flown by the Aircraft, together with applicable surcharges, shall be made [each Season within ninety (90) days of the end of the first such Season or in the case of the second Season,] within sixty (60) days following the end of the Term. ...”¹² [emphasis added]

17. During the course of the Skyservice/Sunwing relationship, there were circumstances in which the actual costs allocated to Sunwing (as determined months after the costs were paid) were less than the costs allocated to Sunwing using the ASM. In those circumstances, when the reconciliation was performed, the parties agreed that Skyservice would subtract the difference from the budget for the following season. In other words, a form of “credit” was provided, but no payment was involved.¹³

¹¹ Commercial Agreement, *supra* note 6, p. 155, clause 11.5.

¹² Charter Agreement, Motion Record of the Respondent at Tab 2, I (“Charter Agreement”), p. 167, clause 4.2; Tenth Report, *supra* note 1, p. 27, para. 26(vi).

¹³ Tenth Report, *supra* note 1, pp. 27-28, para. 26 (vii).

18. There were also circumstances in which the ASM was adjusted when there was a change to the estimated budget for the season, thereby changing the amounts invoiced each week: In the 2009/2010 year the ASM was increased when it became clear that Sunwing would require approximately 20% fewer flight services than had been budgeted for the season. This is consistent with a relationship in which the weekly invoices from Skyservice to Sunwing were not invoices for specific costs incurred by Skyservice for the specific scheduled flights, but rather, represented the agreed price for flight services allocated based on a formula using the ASM and number of seat miles projected for the week.¹⁴

19. The Agreements also contemplate reconciliation of amounts owing upon termination of the Commercial Agreement by Sunwing prior to the expiry of the Term where Skyservice has committed an event of default. Article 16.2 provides that, in such event “Skyservice shall on demand pay any amounts owing to [Sunwing] pursuant to this Agreement or any Charter Agreement” and, upon receipt of such amounts, “[Sunwing] shall pay to Skyservice any amounts owing by [Sunwing] to Skyservice”. This provision speaks to the payment of amounts “owing” and does not provide for “return” of any amounts held “in trust” or otherwise “belonging” to Sunwing.¹⁵

iii. Advance Payment Protection

20. The Agreements provide specific protection for advance payments made by Sunwing. Clause 4.3 of the Charter Agreement, entitled “Advanced Payment Protection”, does not require payments to be held in trust but rather provides for security by letter of credit, bond or other security:

¹⁴ Tenth Report, *supra* note 1, p. 43, para. 83.

¹⁵ Tenth Report, *supra* note 1, p. 32, para. 38; Commercial Agreement, *supra* note 6, p. 160, clause 16.2.

“All advance payments made by Charterer under this Agreement shall be secured by Skyservice with a letter of credit, bond or other security as required by law. All limitations on the liability of Skyservice under this Agreement are without prejudice to this Section 4.3 and the rights of Charterer under any security provided pursuant to it. Skyservice will comply with the requirements of the Canada Transportation Act, 1996 (Canada) and the regulations adopted thereunder regarding advance payments to air carriers by charter operators and shall provide Charterer on or before the first Flight pursuant to this Agreement a copy of the security instrument issued by a Canadian financial institution establishing that all advance payments for Flights to be made pursuant to this Agreement are fully secured.”¹⁶

iv. No Trust Language

21. There is no language in either the Commercial Agreement or the Charter Agreement referring to a trust or requiring payments to be held in trust nor is there a clause in the Commercial Agreement requiring funds received on account of a Charter Fee to be held in a segregated account. To the contrary, clause 24.1 of the Commercial Agreement and section 8.1 of the Charter Agreement contain an acknowledgement that nothing in the agreement creates a fiduciary relationship as between the parties.¹⁷ Clause 4.2 of the Charter Agreement also clarifies that “all payments are to be received into Skyservice’s bank account in immediately available funds in full, free and clear of any deductions, withholding taxes, duties and levies.”¹⁸

B. Invoices At Issue

i. March 17, 2010 invoice (REV-005130)

22. The March 17, 2010 invoice was issued in the amount of \$3,189,731.34, which represents the portion of the Budget allocated to seat miles on flights scheduled for the period March 27-April 2, 2010.¹⁹ \$1,064,367.04 of the total March 17, 2010 invoice represented the portion of the

¹⁶ Charter Agreement, *supra* note 12, pp. 174-175, clause 4.3.

¹⁷ Tenth Report, *supra* note 1, p. 33, para. 39; Commercial Agreement, *supra* note 6, p. 164, clause 24.1; Charter Agreement, *supra* note 12, p. 180, clause 8.1.

¹⁸ Tenth Report, *supra* note 1, p. 34, para. 44; Charter Agreement, *supra* note 12, p. 174, clause 4.3.

¹⁹ Tenth Report, *supra* note 1, p. 36, para. 52.

Budget allocated to the seat miles on the flights that were scheduled to be flown for Sunwing between March 31 and April 2, 2010 but not actually provided.²⁰

ii. March 23, 2010 invoice (REV-005146)

23. The March 23, 2010 invoice was issued in the amount of \$2,449,083.04 for flights for the period April 3-9, 2010.²¹ Skyservice received a single payment from Sunwing on March 26, 2010 into Skyservice's Canadian general account at HSBC (the "**Canadian General Account**") in the amount of \$2,685,435.58. This related to two invoices: the March 23, 2010 invoice and a passenger tax invoice in the amount of \$355,969.25, which taxes are payable in arrears.²²

24. A credit note in the amount of \$119,609.86 was applied in payment of the difference between the amount received from Sunwing on March 26, 2010 and the total amount due under the two above-listed invoices, with the remaining difference of \$6.85 representing bank charges.²³ Accordingly, the amount paid by Sunwing in the March 26th wire transfer for this invoice was actually \$2, 329,466.33 not the entire invoice amount, with the remainder covered by a credit note.

iii. Unpaid Invoices Issued by Skyservice to Sunwing

25. Amounts were due from Sunwing to Skyservice arising under the Agreements for flying that took place prior to March 31, 2010.²⁴ In particular, the following amounts have been invoiced to Sunwing and remain unpaid:

²⁰ *Ibid.*, p. 37, para. 55.

²¹ *Ibid.*, p. 36, para. 52.

²² *Ibid.*, pp. 37-38, para. 59.

²³ *Ibid.*, p. 38, para. 60.

²⁴ *Ibid.*, pp. 38-39, para. 63.

Invoice #	Description	Amount
REV-005183	Fuel differential for the month of March 2010	US \$554,296.56
SALES000000826	Travel taxes (March 19-28, 2010)	US \$25,875.00
SALES000000822	Travel taxes (March 15-31, 2010)	\$647,445.25
SALES000000823	Travel taxes (March 15-31, 2010)	US \$787,683.00

C. Treatment of Funds Received From Sunwing

26. Prior to the receivership, all funds received by Skyservice from Sunwing were deposited into the Skyservice Canadian General Account or the Skyservice general U.S. dollar account at HSBC.²⁵

27. On March 29, 2010, in advance of the potential insolvency, Skyservice employees undertook to identify payments that had been made to Skyservice that related entirely to future flying that Skyservice was contracted to perform.²⁶

28. This review identified four separate amounts totalling \$2,731,802.76, which Skyservice transferred from the Skyservice Canadian General Account to the In-Flight Collections Account: (a) \$2,329,473 in respect of the Sunwing payment made on March 26, 2010 (being the difference between the total Sunwing payment on March 26, 2010 of \$2,685,435.58, which applied to two invoices, and the \$355,969.25 amount due for passenger taxes, minus bank charges); and (b) three other amounts totalling \$402,329.76 from third parties.²⁷

29. These funds were co-mingled in the In-Flight Collections Account along with funds that were already in that account, which totalled \$56,303.97 as at March 26, 2010.²⁸

²⁵ *Ibid.*, p. 44, para. 87.

²⁶ *Ibid.*, p. 45, para. 90.

²⁷ *Ibid.*, p. 45, para. 91.

²⁸ *Ibid.*, p. 47, para. 95.

30. The Receiver was unable to locate any contemporaneous documentary evidence that would indicate the reason for isolating the funds.²⁹ Skyservice created a series of trusts to address certain other matters prior to the receivership by way of formal trust documents and delivery of funds to a separate trust account held by a law firm as trustee. In contrast, although occurring at around the same time, no such trust document appears to have been created in this case (nor were the funds transferred to a trust account or third party trustee).³⁰

31. The Receiver further sought to obtain evidence of parties as to their recollection of why the funds were isolated.³¹ Various rationales were provided: the funds were transferred to another account out of an abundance of caution, they were transferred to ensure the funds were protected from misuse or misappropriation, and they were transferred because they related solely to future flying and should therefore have been refundable (although note this latter view does not appear to coincide with the operation of the Agreements as described above).³²

32. Rob Giguere, a former Skyservice principal who was involved at the time the funds were moved to the In-Flight Collections Account, informed the Receiver that these funds were transferred to keep track of the funds as they were not certain of the receivership timelines and there was never any intention on the part of Skyservice to create a trust. Mr. Giguere further advised that they had created trusts for other monies at the same time, understood the difference between establishing a trust and simply transferring the funds to a different account (recognizing that by moving the funds to a different account rather than creating a trust, the funds remained in

²⁹ *Ibid.*, p. 45, para. 92.

³⁰ *Ibid.*

³¹ *Ibid.*, p. 46, para. 93.

³² *Ibid.*

the control of Skyservice to be used by Skyservice, without restriction), and made a decision to not create a trust with these funds.³³

33. Following the appointment of the Receiver, the amounts in the In-Flight Collections Account, together with the amounts in the other Skyservice accounts at HSBC were deposited into the Receiver's account.³⁴

34. Pursuant to an agreement reached between the Receiver and Sunwing, the Receiver transferred \$2,329,473 to a separate account held by the Receiver, where these funds remain. This transfer was pursuant to the terms of a letter agreement with Sunwing, which was without prejudice to Sunwing's arguments as to the characterization of any funds for the purpose of establishing whether it had a valid trust claim.³⁵

D. Correspondence or Other Evidence

35. The Receiver has not found any correspondence between Skyservice and Sunwing or other evidence prior to the receivership in which a trust or proprietary interest was asserted by Sunwing or in which Skyservice was required or asked to segregate the funds provided to it by Sunwing.³⁶

E. Security Posted by Skyservice with Sunwing

36. Clause 4.3 of the Charter Agreement requires all advance payments made by Sunwing under the agreement to be secured.³⁷ This is consistent with the regulations governing Skyservice: the Regulations Respecting Air Transportation (SOR/88-58) (the "**Regulations**")

³³ *Ibid.*; Answers to Written Questions for Receiver, Compendium, Tab 6 ("Answers to Written Questions for Receiver"), question 10 and Schedule E (e-mails from R. Giguere). Note that these e-mails were not attached to an affidavit of Mr. Giguere.

³⁴ Tenth Report, *supra* note 1, p. 48, para. 99.

³⁵ *Ibid.*, p. 48, para 100.

³⁶ *Ibid.*, p. 52, para 113.

³⁷ Charter Agreement, *supra* note 12, p. 174, clause 4.3.

pursuant to the *Canada Transportation Act*, require a “financial guarantee” to be posted by the applicant (in this case, Skyservice), to protect advance payments made by the charterer (in this case, Sunwing).³⁸

37. Neither the Regulations nor the Charter Agreement provide for funds received from Sunwing as advance payments to be held in trust for Sunwing. Rather, each provides that security is to be posted to secure any advance payments and that any amount to which Sunwing is entitled under the contract for unperformed services is to be refunded by the financial institution that issued the guarantee.³⁹

38. In this case, Skyservice arranged for its bank to issue a letter of credit (the “**Skyservice LC**”) to FCC (now Sunwing).⁴⁰ The Skyservice LC was not backed by a cash deposit of Skyservice but instead was backed by a letter of credit provided by FCC (now Sunwing) and issued by the Royal Bank of Scotland in the same amount as the Skyservice LC.⁴¹

39. The Receiver understands that Sunwing did not resort to the security arrangements contemplated by the Commercial Agreement and Regulations by calling upon the Skyservice LC.⁴²

F. Events Leading to the Receivership

40. TC was a Skyservice customer that chartered flights from Skyservice under the Sunquest brand.⁴³ TC and Sunwing were Skyservice’s two main customers.⁴⁴

³⁸ Tenth Report, *supra* note 1, p. 49, para. 104.

³⁹ *Ibid.*, p. 51, para. 106.

⁴⁰ *Ibid.*, p. 51, para. 106.

⁴¹ *Ibid.*, p. 51, para. 109.

⁴² *Ibid.*, p. 51, para. 111.

⁴³ Affidavit of Karim Nensi sworn March 31, 2010, Compendium of Documents at Tab 7 (“**Nensi Affidavit**”), paras. 4-5.

⁴⁴ Answers to Written Questions for Receiver, *supra* note 33, question 11.

41. In January or February 2010, First Choice Canada Inc. (“FCC”) amalgamated with Red Seal Tours Inc.⁴⁵ As a result of the amalgamation, Skyservice’s former customer FCC was amalgamated to become Sunwing, an entity owned by the Sunwing Group and related to Thomson Airways Limited, thereby providing it with access to alternate aircraft.⁴⁶ After the amalgamation was announced, Skyservice commenced an application against Sunwing claiming that the amalgamation would threaten Skyservice’s existence. In the affidavit of Robert Giguere sworn in December 14, 2009 in relation to the application, he states:

“Skyservice’s business model is dependent on its relationship with tour operators. In point of fact, Skyservice has only two main clients, Thomas Cook and First Choice, representing 47% and 44% , respectively, of Skyservice’s total revenues. If First Choice is able to consummate the transaction with Sunwing Travel without Skyservice’s consent, the result will be the loss of a significant portion of Skyservice’s business, thus ultimately threatening Skyservice’s continued existence.”⁴⁷

42. Despite Skyservice’s application, which was ultimately withdrawn, the amalgamation was completed in January or February 2010. According to the affidavit filed in support of the receivership application, in January 2010, Skyservice’s principal secured lenders, Roynat Inc. and Integrated Private Debt Fund LP (the “Lenders”) took the view that the amalgamation called into question Skyservice’s ability to remain a going concern over the long term such that there was an event of default under the Credit Agreement, in addition to other events of default.⁴⁸

43. On February 12, 2010, TC purchased the secured debt obligations owed by Skyservice to the Lenders and all security granted in connection thereto.⁴⁹

⁴⁵ Tenth Report, *supra* note 1, p. 24, para. 21; Nensi Affidavit, *supra* note 43, para. 16.

⁴⁶ Tenth Report, *supra* note 1, pp. 24-25, para. 22.

⁴⁷ Answers to Written Questions for Receiver, *supra* note 33, question 11.

⁴⁸ Nensi Affidavit, *supra* note 43, para. 18.

⁴⁹ *Ibid.*, paras. 18 and 22.

44. To the best of the Receiver's knowledge, TC had some limited flights scheduled to take place in April 2010.⁵⁰ Because the industry is seasonal, the planes used by Skyservice during the winter season for TC/Sunquest passengers are returned to TC for the summer season to be used in Europe (consistent with this schedule, the Charter Agreements with TC expired between March 27 and April 26, 2010).⁵¹ While there were only limited TC flights scheduled for April, 2010, the Receiver understands that the TC flight schedule was revised in or about February, 2010 such that no TC flights were scheduled for April, 2010.⁵²

45. It is the Receiver's understanding that the receivership remained only one of several possibilities right up to the receivership or shortly before, with Skyservice attempting to negotiate alternatives to the receivership.⁵³ Skyservice was in negotiation with Sunwing during this time to, among other things, come to terms and schedule termination of the Agreements following the Sunwing amalgamation described above.⁵⁴

46. The Nensi Affidavit refers to Skyservice's efforts to "structure its affairs with a view to continuing in the long term"⁵⁵ after TC's acquisition of the secured debt and to the fact that it was "on March 30, 2010 [that] it was clear that Skyservice would not be able to reach an agreement with any other party to secure the necessary working capital or to achieve the cost structure for a long-term viable model for continued operations."⁵⁶

⁵⁰ Answers to Written Questions for Receiver, *supra* note 33, question 6.

⁵¹ Nensi Affidavit, *supra* note 43, paras. 5 and 12.

⁵² Answers to Written Questions for Receiver, *supra* note 33, question 7.

⁵³ *Ibid.*, question 8.

⁵⁴ Affidavit of Mark Williams, sworn April 27, 2010, Compendium of Documents at Tab 1, para. 29.

⁵⁵ Nensi Affidavit, *supra* note 43, para. 29.

⁵⁶ *Ibid.*, para. 33.

PART III - THE ISSUES

47. There are two key issues on this motion:
- (a) Has Sunwing established that Skyservice had the requisite intention to create an express or implied trust over the \$2,329,473 unilaterally transferred by Skyservice into the In-Flight Collections Account in favour of Sunwing?
 - (b) Has Sunwing established that Skyservice was unjustly enriched by \$3,513,450.08 (or any portion thereof) - with no juristic reason for such enrichment – such that a constructive trust should be imposed over those funds in favour of Sunwing despite the Agreements, Regulations and insolvency regime?
48. Both should be answered in the negative.

PART IV - LAW & ARGUMENT

A. There is No Express or Implied Trust

49. In order to create a trust, three certainties must be present: certainty of intention, certainty of subject matter, and certainty of objects.⁵⁷ The issue in this case is whether there was the requisite certainty of intention to create a trust over \$2,329,473 in favour of Sunwing.
50. The onus for establishing that there was an intention to create a trust lies with the party asserting the existence of the trust - in this case, on Sunwing:

The difficulty of ascertaining on available evidence that a declaration of trust took place is often considerable. The burden of proof that the donor intended to make himself a trustee is on those who allege such a trust and many factors may reveal the true intent.

⁵⁸
....

⁵⁷ Donovan Waters, *Waters' Law of Trusts in Canada*, 3rd ed., (Toronto: Thomson Carswell, 2005) at p. 132 (“*Waters' Law of Trusts*”), Brief of Authorities of the Receiver, Tab 1.

⁵⁸ *Ibid.* at p. 192 (emphasis added); See also *McEachren v. Royal Bank of Canada*, 1990 CarswellAlta 234 (Alta. Q.B.), Sunwing Book of Authorities, Tab 2, at para. 83.

51. In circumstances such as this, where Sunwing alleges that Skyservice was both the settlor and the trustee, it is particularly difficult to establish a trust:

133 In cases such as the present one, where what is argued is that the alleged settlor (Confederation Life) and the proposed trustee (the Confederation Life Trustees, or the Human Resources Committee acting under the direction of the Board of Directors) are in effect one and the same, particular difficulties arise. *Waters, supra*, at pp.150-151 deals with such difficulties in the following passage [emphasis added; footnotes omitted]:

The principles applicable to this mode of making a gift are perfectly clear. The owner of the legal or equitable interest in the property in question must make it evident that he intends to constitute himself a trustee, *he must leave no doubt* as to what property interest of his is to be the subject of the trust, and he must similarly leave no doubt as to who is to be the trust beneficiary. In other words, the three certainties must be established as in the case of the creation of all trusts. As Jessel M.R. pointed out in *Richards v. Delbridge* [(1874), L.R. Eq. 11], however, an authority quoted in many Canadian judgments, it is not necessary that the donor use the words, "*I declare myself a trustee*": *words of any kind, and even conduct, are sufficient, provided it is satisfactorily shown that the donor did in fact intend to constitute himself a trustee. ...*⁵⁹

52. Nothing in the contractual relationship between Sunwing and Skyservice expressly (or by necessary implication) required Skyservice to hold, in trust, the \$2,329,473 unilaterally transferred by Skyservice into the In-Flight Collections Account. Moreover, despite executing trust documents for other amounts during the same timeframe prior to the receivership, Skyservice did not execute any documents that purported to pass to Sunwing the beneficial ownership of the \$2,329,473 that Skyservice then held, nor did Skyservice relinquish possession or control of such funds.

53. In the absence of formal trust documentation, the court is to look at "the surrounding circumstances and the evidence as to what the parties intended, as to what was actually agreed and as to how the parties conducted themselves to determine whether there was 'certainty of

⁵⁹ *Canada (Attorney General) v. Confederation Life Insurance Co.*, 1995 CarswellOnt 318 at para. 133, aff'd by 1997 CarswellOnt 62 ("*Confederation Life*"), Brief of Authorities of the Receiver, Tab 2.

intention.”⁶⁰ However, while it is true that “[a] trust may be construed from conduct alone,...it is unlikely that such evidence will conclusively reveal the necessary intention.”⁶¹

54. In order to establish ‘certainty of intent’ the party alleging the trust must “establish on a balance of probabilities on an objective test, that there was certainty of intent to create a trust.”⁶²

55. The evidence in this case does not meet the test of establishing that there was certainty of intention to create a trust over the \$2,329,473. To the contrary:

- (a) Skyservice did not execute trust documents despite having created several other trusts at the same time in relation to which trust documents were executed;
- (b) Skyservice did not transfer the funds to a separate trust account held by a law firm trustee as it had done with the other trusts created in the period prior to the receivership;
- (c) The Agreements governing the Skyservice-Sunwing relationship did not require Skyservice to hold these amounts in trust; to the contrary, the Agreements provided that all payments are to be received into Skyservice’s bank account in immediately available funds;
- (d) In anticipation of the receivership, \$2,329,473 was transferred to an existing Skyservice account, the In-Flight Collections Account, along with certain other amounts where the funds were co-mingled with funds already in that account and other funds that were transferred to this account in or around the same time.

These amounts were not “segregated” as stated by Sunwing (although the

⁶⁰ *Elliott (Litigation guardian of) v. Elliott Estate* (2008), 45 E.T.R. (3d) 84 (Ont. S.C.J.), per Lauwers J. at paras. 26-29, citing *Byers v. Foley* (1994), 16 O.R. (3d) 641 at 645 (Ct. (Gen. Div.)), Brief of Authorities of the Receiver, Tab 3.

⁶¹ *Waters’ Law of Trusts*, *supra* note 57 at p. 133, Brief of Authorities of the Receiver, Tab 1.

⁶² *Re Infoplac Ticket Centres Ltd.* (2009), 62 C.B.R. (5th) 135 (Ont. S.C.J., Cumming J.) at paras. 2-4 (“*Re Infoplac Ticket Centres*”), Brief of Authorities of the Receiver, Tab 4.

Receiver is currently holding these funds in a segregated account pursuant to an agreement with Sunwing that is without prejudice to the arguments being made on this motion);

- (e) Skyservice continued to control the funds in the In-Flight Collections Account up until March 31, 2010, the date of the receivership, when these funds were transferred to the Receiver. There were no documents or restrictions on the account that limited Skyservice's ability to access or use these funds in its discretion. The fact that Skyservice did not in fact use these funds for other purposes in the days leading to the receivership does not establish that Skyservice "had no intention to deal with them in any way other than by returning them to Sunwing" as Sunwing alleges;
- (f) The transfer of the \$2,329,473 to the In-Flight Collections Account was done by Skyservice on a unilateral and wholly voluntary basis;
- (g) While Sunwing states (at paragraph 47 of their factum) that the funds were transferred by Skyservice "because they related solely to future flights and should therefore have been refundable in their entirety", (i) this was only one of the non-contemporaneous explanations obtained by the Receiver when it attempted to ascertain Skyservice's intended purpose in identifying and transferring such amounts; (ii) this view is inconsistent with the operation of the Agreements. That is, the Agreements do not provide that invoiced amounts are "refundable in their entirety" if the flights referenced in that invoice are not provided. Rather, the Agreements provide for a complex reconciliation mechanism at the end of the season and alternate security for prepayments in the form of a letter of credit; and

- (iii) the concept that the payments were “refundable” is actually consistent with a debtor-creditor relationship and is not indicative of a trust relationship;
- (h) The evidence of Rob Giguere, the President of Skyservice in the relevant time, was that there was never an intention on the part of Skyservice to create a trust with these monies. He had created trusts for other monies at the same time, understood the difference between establishing a trust and simply transferring funds to a different account, and made a decision to not create a trust with these funds.⁶³ Mr. Giguere’s evidence was that he and his management team were of the view that it would be prudent to keep track of the funds received by Skyservice that related entirely to future flying, that the funds were transferred to the In-Flight Collections Account out of an abundance of caution, and that they were transferred to ensure the funds were protected from misuse or misappropriation;⁶⁴
- (i) Skyservice created trusts in the period before the receivership, which trusts were documented and funds transferred to and held in a trust account with external legal counsel.⁶⁵ Payments were also made to certain parties in advance of the receivership, as Sunwing points out at paragraph 36 of its factum. Sunwing offers no explanation as to why Skyservice did not either establish a trust account with external legal counsel – as it clearly knew how to do - or just pay Sunwing directly prior to the receivership, if its intention had been to create a trust for the benefit of Sunwing or otherwise ensure that Sunwing received the funds. To the contrary, its conduct in *not* taking these steps and instead merely transferring the

⁶³ Tenth Report, *supra* note 1, p. 46, para. 93.

⁶⁴ Answers to Written Questions for Receiver, *supra* note 33, question 10.

⁶⁵ Tenth Report, *supra* note 1, p. 46, para. 93.

\$2,329,473 to the In-Flight Collections Account is more consistent with the explanation offered by Mr. Giguere, which is that Skyservice did *not* intend to create a trust.

56. Accordingly, there is insufficient evidence to establish on a balance of probabilities that Skyservice had the intention to create a trust when it transferred these funds to a non-trust account that it controlled. If there had been evidence of such an intention, the Receiver would have to consider further whether fraudulent conveyance and preference issues arise as a result since establishment of a trust in favour of one creditor that was not entitled to a trust pursuant to the contractual relationships would appear to give that creditor a preference.

B. No Constructive Trust Arises

57. Sunwing also argues that this Court should impose a remedial constructive trust to remedy an alleged unjust enrichment.

i. No Unjust Enrichment

58. To establish unjust enrichment, Sunwing must demonstrate that there has been (i) an enrichment, (ii) a corresponding deprivation, and (iii) the absence of a “juristic reason” for the enrichment/deprivation.⁶⁶

59. As expressed in Houlden & Morawetz:

“The fundamental question to ask in considering whether there is an absence of juristic reason for the enrichment is: What were the legitimate or reasonable expectations of the parties when the deal or occurrence took place? Where a bank advances money to a creditor pursuant to a line of credit, there is a juristic reason for the enrichment, and consequently the doctrine of constructive trust has no application.”⁶⁷

⁶⁶ *Garland v. Consumers' Gas*, [2004] 1 S.C.R. 25, Sunwing Book of Authorities, Tab 6, at para. 30.

⁶⁷ Houlden and Morawetz, *Bankruptcy and Insolvency Analysis*, Part IV, F§5 — Trust Property, Brief of Authorities of the Receiver, Tab 5.

60. In this case, there are multiple “juristic reasons” for Skyservice to retain the \$3,513,450.08 paid by Sunwing in March, 2010.⁶⁸ These include the Agreements, the Regulations, and the receivership, insolvency regime and competing rights of other creditors.

61. A contract and a contractual debtor-creditor relationship have been held to constitute sufficient juristic reason to overcome allegations of unjust enrichment. As expressed by Houlden & Morawetz, “If the indebtedness to a creditor arises from the bankrupt’s breach of contract, the doctrine of constructive trust has no application. Constructive trust cannot be used where the relationship giving rise to the indebtedness is contractual.”⁶⁹ As this Court stated in *Infoplace Ticket Centres Ltd.*:

“A constructive trust is a remedy in situations of unjust enrichment. The constructive trust assertion has no force in the present situation, for two reasons. First, as I have held, Infoplace held the monies from the sale of passes pursuant to the sale contract with the City. That is, there was no unjust enrichment because there was a juristic reason (the contract between the City and Infoplace) whereby Infoplace received the funds [from] the sale to transit customers of the passes.... Therefore, having found that the City was not the beneficiary of an express or implied trust with Infoplace as trustee, the claim of the City is simply that of a creditor of Infoplace...”⁷⁰ [emphasis added]

62. Similar caselaw in the insolvency context was summarized by Justice Blair in *Confederation Life* as follows:

201 The caselaw indicates that a contractual debtor-creditor relationship will be sufficient to establish the existence of a juristic reason for an enrichment that can be accounted for on the basis of that contractual relationship. I note, for example, the decision of the Saskatchewan Queen’s Bench in *Royal Bank v. Pioneer Trust Co. (Liquidator of)* (1988), 68 C.B.R. (N.S.) 124 and the decision of the Ontario Court of Justice (General Division) in *Pikalo v. Morewood Industries Ltd. (Trustee of)* (1991), 7 C.B.R. (3d) 209. Both of these decisions arose in an insolvency context.

⁶⁸ Of note, it is unclear if there has been an enrichment and “corresponding” deprivation as a result of the insolvency since Skyservice is not enriched by these funds.

⁶⁹ Houlden and Morawetz, *Bankruptcy and Insolvency Analysis*, Part IV, F§5 — Trust Property, Brief of Authorities of the Receiver, Tab 5.

⁷⁰ *Re Infoplace Ticket Centres*, *supra* note 622 at para. 15, Brief of Authorities of the Receiver, Tab 4.

202 In *Pioneer Trust, supra*, the trust company had obtained \$30,000 in cash from the Royal Bank on February 7, 1985, in exchange for a cheque in the same amount in favour of the Royal Bank. Later that day the Minister of Finance directed the Superintendent of Insurance to take control of Pioneer Trust's assets. Proceedings under the Winding-up Act were commenced, and a liquidator was appointed. The cheque was returned to the Royal Bank. The Royal Bank submitted a claim to the liquidator. It then brought an action, claiming, among other things, that the liquidator held the sum of \$30,000 in trust for it as a constructive trustee.

203 In dealing with this claim Gerein J. readily accepted that there was an enrichment and corresponding deprivation. However, because the parties were in a debtor-creditor relationship there was a juristic reason for the enrichment. According to Gerein J. at p. 133:

It is not unjust in law to hold the plaintiff to that status with the attendant consequences. To do otherwise would have no basis in law and would cause wrongful harm to the other creditors.

204 In *Pikalo, supra*, Chadwick J. dealt with a claim for a constructive trust by a lessor in the context of a bankruptcy of the lessee. The court viewed the lessor as an unsecured creditor and described the relationship between the parties as being "purely contractual". In holding that this fact took the claim outside the realm of constructive trust, Chadwick J. said at p. 214:

As in most bankruptcy cases, the unsecured creditor may suffer financial hardship in the appearance of an unjust enrichment or benefit to either the bankrupt estate or a secured creditor, such as the bank in this case.⁷¹ [emphasis added]

63. Indeed, the receivership and the insolvency regime may themselves be juristic reasons sufficient to justify an enrichment/deprivation, particularly where, as occurred in this case, the amounts are paid pursuant to a contractual arrangement or debtor-creditor relationship. The Ontario Court of Appeal held that:

“...the debtor/creditor relationship, the manner in which the funds were dealt with, the existence of the bankruptcy proceedings, and the general insolvency nature of the proceedings were juristic reasons [for the enrichment and deprivation].”⁷² [emphasis added]

⁷¹ *Confederation Life, supra* note 59 at paras. 201-204, Brief of Authorities of the Receiver, Tab 2.

⁷² *Citizens Bank of Rhode Island v. Paramount Holdings Canada Co.*, 48 C.B.R. (5th) 211 at para. 2, Brief of Authorities of the Receiver, Tab 6; See also *Re White* (2006), 25 C.B.R. (5th) 282 (Ont. S.C.J. Registrar) at paras. 22-23 and 31, Brief of Authorities of the Receiver, Tab 7.

64. While Sunwing alleges that the receipt of these funds was not authorized by contract, the evidence is to the contrary. There had been no breach of the Agreements at the time the relevant invoices were sent and the payments accepted, and such invoices were sent and payments accepted in accordance with the contractual terms and accepted practise between the parties.

65. The Agreements provide that Sunwing is to pay and Skyservice is to receive advance payments calculated based on a formula that relates to flights scheduled for a future week that may or may not in fact occur. In other words, the Agreements provide that Skyservice is entitled to accept payments based on a formula calculated in relation to flights that do not in fact occur.

66. The Agreement also specifically addresses what happens if the payments made by Sunwing (calculated in relation to the planned flight schedule) do not reflect the actual costs or actual flights. That is, in the event flights are not provided or even in the event the Agreements are breached by Skyservice and terminated by Sunwing as a result, the Agreements provide a mechanism to reconcile amounts owing by Skyservice to Sunwing and by Sunwing to Skyservice. Since the advance payments reflect a portion of an agreed upon seasonal budget rather than precise costs of the scheduled flights, it provides for a reconciliation based on the complex formulas upon which the payments are calculated (which would consider the amounts owing by Sunwing to Skyservice pursuant to the unpaid invoices described above).

67. When payments were made by Sunwing to Skyservice, those payments were made pursuant to the Agreements. To the extent funds ultimately become owing pursuant to reconciliations performed under those Agreements (which the Receiver does not comment upon

in this motion), a debtor-creditor relationship is formed between Skyservice and Sunwing pursuant to the Agreements.⁷³

68. The Agreements and Regulations also provide protection for advance payments made by Sunwing in the form of a letter of credit. In other words, the Agreements and Regulations contemplate that Skyservice will accept and retain payments from Sunwing that may ultimately exceed the amounts owing by Sunwing as determined under the Agreements and, rather than providing that this is not permitted or that funds are held in trust for Sunwing, the Agreements and Regulations provide Sunwing with the protection of a letter of credit. Sunwing has elected to not avail itself of the letter of credit in this case.

69. Finally, the Agreements are clear that there is no fiduciary relationship created between Sunwing and Skyservice and does not use any language indicative of a trust. Imposing a trust in these circumstances, in which the Agreements were complied with prior to the appointment of the Receiver, would be contrary to operation of the Agreements and the intentions of the parties as evidenced by the language of the Agreements.

70. The case law cited by Sunwing in which a contract does not provide a juristic reason for enrichment are all plainly distinguishable from the case at bar. For instance, in *Brown & Collett*, the party that had contracted to receive, reconcile and remit funds attributable to the other party instead applied the funds it received to its own use in a “blatant breach of the agreement.” In that case, the Court explicitly recognizes that where enrichment occurs in the framework of a contract, it constitutes a valid juristic reason:

“If Brown & Collett had incurred the enrichment within the framework of the contract with Hay, the existence of the contract would indeed constitute a juristic reason for the enrichment. Brown & Collett did not act within the agreement however, and it was

⁷³ As noted above, when the reconciliation was conducted in practise and the reconciliation determined that Sunwing had effectively overpaid in a season, Sunwing was granted a credit rather than any direct payment.

through the breaches referred to above that the enrichment was incurred. Given that Brown & Collett violated the agreement, it is not open to it to now claim that the existence of the agreement constitutes a valid juristic reason for the enrichment. To accept such a defence would be to allow Brown & Collett to use the very contract which it breached as a justification for the enrichment flowing from that breach, and to profit from its wrongdoing.” [emphasis added]⁷⁴

71. In this case, Skyservice received the funds from Sunwing “within the framework of the contract” with Sunwing. There was no breach of the Agreements prior to the receivership.⁷⁵

72. In *Re Ellingsen*, a case cited by Sunwing involving the delivery of a truck to a purchaser who subsequently filed for bankruptcy, the Court found that there was a condition precedent to the agreement of purchase and sale for the truck. The condition precedent – that financing be provided – was never fulfilled such that the contract was ineffective.⁷⁶ As a result, in that case there was no contract to form a juristic reason, making that case plainly distinguishable.

73. Accordingly, Sunwing has not established the existence of an unjust enrichment in this case since there were juristic reasons for Sunwing to accept and for the Receiver to retain the \$3,189,731.34. The payments made by Sunwing pursuant to the Agreements place it in the very same position as any other contractual counter-party that made pre-payments, paid deposits or delivered goods on credit pursuant to a contract prior to an insolvency filing. There is no basis to impose the remedy of a constructive trust.

74. The case law cited by Sunwing that requires the court to consider the legitimate expectations of the parties and moral and policy based arguments are predicated on a finding that there is an absence of established categories of juristic reason.⁷⁷ In this case, since the

⁷⁴ *Re Brown & Collett Ltd.*, 1996 CarswellOnt 619, Sunwing Book of Authorities, Tab 8, at para. 72.

⁷⁵ See also *Credifinance Securities Ltd., Re.* (2010), 63 C.B.R. (5th) 250, Brief of Authorities of the Receiver, Tab 8, upheld on appeal at 2011 ONCA 160, Sunwing Book of Authorities, Tab 9.

⁷⁶ *Re Ellingson*, 2000 BCCA 458, Sunwing Book of Authorities, Tab 7, at paras 17 and 22 (“*Ellingson*”).

⁷⁷ *Kerr v. Baranow*, 2011 CarswellBC 240, Sunwing Book of Authorities, Tab 4, at para. 43.

Agreements, Regulations and the insolvency regime each constitute a juristic reason, the second step in the analysis does not apply.

ii. Constructive Trust Should Not be Imposed

75. Even if unjust enrichment were to be found on the facts of this case, the Court would then have to determine whether imposing a constructive trust is an appropriate remedy:

209 A finding of unjust enrichment provides a gateway to the imposition of a constructive trust. It does not automatically open the gate, however. The process is two-staged. If an unjust enrichment has occurred the next step is to determine whether the imposition of a constructive trust *is an appropriate remedy in the circumstances*.

...
212 A number of guideposts have been established by the courts to help in navigating the path between the unjust enrichment gateway and the imposition of a constructive trust. They include:

- a) whether a monetary award would be sufficient in the circumstances;
- b) whether there is a sufficient factual connection or link between the contribution leading to the unjust enrichment and the property or asset in question;
- c) whether the claimant reasonably expected to obtain a proprietary interest in the property or asset; and,
- d) whether the competing equities point toward the imposition of a constructive trust.⁷⁸

76. In the context of an insolvency, the test for imposing a constructive trust is high given the competing rights of other creditors involved:

“...In an insolvency context the Act provides a code by which legislators have balanced the rights of all those adversely affected by the insolvency. The legal rights of creditors should not be defeated by the Bankruptcy Court unless it would be unconscionable not to recognize the pleaded equitable remedy. The judicial discretion to grant a remedy by finding a constructive trust to correct an inequity, which may be an obvious solution in a matter involving only two parties in a marital property context, must be exercised with a little more reticence when the rights of *bona fide* third parties come into play.”⁷⁹

⁷⁸ *Confederation Life*, *supra* note 59 at paras. 209 and 212, Brief of Authorities of the Receiver, Tab 2.

⁷⁹ *Re McKinnon* (2006), 19 C.B.R. (5th) 253 (N.B.Q.B. Registrar) at para. 19, Brief of Authorities of the Receiver, Tab 9; see also *Ridgewood Forest Products Ltd., Re.*, (2007) 45 C.B.R. (5th) 68 at para. 48, Brief of Authorities of the Receiver, Tab 10; See

77. In fact, the Ontario Court of Appeal recently held that before a court can impose a constructive trust to remedy an injustice in bankruptcy proceedings, it is a prerequisite that the bankrupt obtained the property through misconduct:

[33] There is no question that the remedy of constructive trust is expressly recognized in bankruptcy proceedings. Both the case law and authors of texts make this clear, although the test for proving the existence of a constructive trust in a bankruptcy setting is high: L.W. Houlden & Geoffrey Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: WL Can, 2011) at F§5(1). The authors add this at F§5(8): “A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct.” (citations omitted).

...

[36] An example of commercial immorality is described in *Ascent* as being where a bankrupt and its creditors benefit from misconduct by the bankrupt which was the basis upon which the property was obtained. The Registrar held that to permit an estate to retain the property in such circumstances amounts to an unjust enrichment, and the court can impose a constructive trust on an estate’s assets to remedy the injustice...

[37] Thus a constructive trust in bankruptcy proceedings can be ordered to remedy an injustice; for example, where permitting the creditors access to the bankrupt’s property would result in them being unjustly enriched. The prerequisite is that the bankrupt obtained the property through misconduct. The added necessary feature is that it would be unjust to permit the bankrupt and creditors to benefit from the misconduct.⁸⁰ [emphasis added]

78. Sunwing attempts to argue that Skyservice knew of the impending receivership and that Skyservice received these funds “under the pretext that flights would be provided,” suggesting that this was somehow improper. However, neither the evidence nor the case law supports Sunwing’s allegations.

79. The evidence is that while TC cancelled flights in April, there were only a limited number of flights scheduled for April and that, despite TC’s actions, Skyservice was continuing

also *Re Ellingson*, *supra* note 766 and *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477 (C.A.), leave to appeal refused [1996] S.C.C.A. No. 26. at 479, Brief of Authorities of the Receiver, Tab 11.

⁸⁰ *Credifinance Securities Ltd., Re*, 2011 CarswellOnt 1218, Sunwing Book of Authorities, Tab 9, at paras. 33, 36 and 37.

to pursue alternatives, with the receivership remaining only one of several possibilities right up to the receivership.

80. In terms of the case law, Sunwing has not provided and the Receiver is not aware of any authority establishing that knowledge of the possibility of the commencement of a receivership application by a third party requires a company to refuse to accept payments on invoices issued pursuant to a long-standing and ongoing contract and that failure to refuse payments in such circumstances vitiates the juristic reasons permitting the payments to be received and retained. Such a policy would be highly detrimental to companies that are pursuing re-financings and other options in the face of a default and possible creditor actions.

81. Sunwing's efforts to impose a constructive trust over these funds – contrary to the Agreements and Regulations - would in effect elevate Sunwing's claim and deprive the other unsecured creditors of these funds. As Justice Blair noted:

214 I think it warrants noting, however, that the mere fact of insolvency and the mere "need to give priority" to a claimant in such a situation is not, by itself, sufficient to trigger the automatic application of the constructive trust mechanism. Priority is almost always a "need" for someone in an insolvency. Tempered against the inadequacy consideration is the need to be aware of the effect of a declaration of constructive trust in such a context — the beneficiary of the trust essentially becomes a secured creditor, thus taking priority over all other unpaid general creditors. Hence the imposition of a constructive trust cannot be an automatic consideration simply because a monetary award is obviously not an adequate remedy. While priority will almost always be required by the claimant in an insolvency, it must also be just and appropriate in the circumstances to make an order that will have the effect of granting it.⁸¹

82. While Sunwing suggests that it would be without a remedy if a constructive trust is not imposed, the fact is that Sunwing is entitled to claim damages in the receivership on an unsecured basis to the extent its claims are made out pursuant to the Agreements – just like any

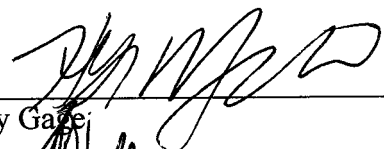
⁸¹ *Confederation Life*, *supra* note 59 at para. 214, Brief of Authorities of the Receiver, Tab 2; See also *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

other contractual counterparty. There are no circumstances in this case that elevate Sunwing's claims to a trust claim and no basis upon which to prejudice the other unsecured creditors by paying Sunwing in preference to them. The interests of other unsecured creditors who would be prejudiced by the removal of these funds from the Skyservice estate – contrary to the operation of the Agreements between Skyservice and Sunwing – constitute competing equities that mitigate against imposing a constructive trust in this case.

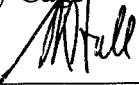
PART V - CONCLUSION & ORDER SOUGHT

83. For all of these reasons, the Receiver respectfully seeks an order that it may spend or distribute all funds without regard to Sunwing's alleged proprietary or trust claim, an order determining that the amounts claimed are not subject to a proprietary or trust interest as alleged by Sunwing, and an order dismissing the Sunwing cross-motion.

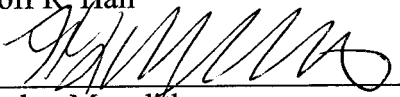
**ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 9th DAY OF
FEBRUARY, 2012.**



 Jamey Gage



 Geoff R. Hall



 Heather Meredith

McCarthy Tétrault LLP
 Counsel for FTI Consulting Canada Inc.,
 in its capacity as court-appointed
 receiver of Skyservice Airlines Inc.

SCHEDULE “A” – LIST OF AUTHORITIES REFERRED TO

1. Donovan Waters, *Waters’ Law of Trusts in Canada*, 3rd ed., (Toronto: Thomson Carswell, 2005) at p. 132
2. *Canada (Attorney General) v. Confederation Life Insurance Co.*, 1995 CarswellOnt 318, aff’d by 1997 CarswellOnt 62
3. *Elliott (Litigation guardian of) v. Elliott Estate* (2008), 45 E.T.R. (3d) 84 (Ont. S.C.J.)
4. *Re Infoplac Ticket Centres Ltd.* (2009), 62 C.B.R. (5th) 135 (Ont. S.C.J.)
5. Houlden and Morawetz, *Bankruptcy and Insolvency Analysis*, Part IV, F§5 — Trust Property
6. *Citizens Bank of Rhode Island v. Paramount Holdings Canada Co.*, 48 C.B.R. (5th) 211
7. *Re White* (2006), 25 C.B.R. (5th) 282 (Ont. S.C.J. Registrar)
8. *Credifinance Securities Ltd., Re.* (2010), 63 C.B.R. (5th) 250, upheld on appeal at 2011 ONCA 160
9. *Re McKinnon* (2006), 19 C.B.R. (5th) 253 (N.B.Q.B. Registrar)
10. *Ridgewood Forest Products Ltd., Re.*, (2007) 45 C.B.R. (5th) 68
11. *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477 (C.A.), leave to appeal refused [1996] S.C.C.A. No. 26.
12. *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217

From Sunwing Book of Authorities:

13. *McEachren v. Royal Bank of Canada*, 1990 CarswellAlta 234 (Alta. Q.B.)
14. *Garland v. Consumers’ Gas*, [2004] 1 S.C.R. 25
15. *Re Brown & Collett Ltd.*, 1996 CarswellOnt 619
16. *Kerr v. Baranow*, 2011 CarswellBC 240
17. *Re Ellingson*, 2000 BCCA 458

**SCHEDULE “B” – TEXT OF RELEVANT PROVISIONS OF STATUTES,
REGULATIONS AND BY-LAWS**

Air Transportation Regulation (SOR/88-58) pursuant to the Canada Transportation Act

65. (1) The Agency shall not consider an application for a program permit to operate an ABC unless the applicant has a financial guarantee with a Canadian financial institution, in a standard form provided by the Agency, that provides that any advance payment in respect of the ABC is fully protected from the time it is received by the applicant from the charterer.

(2) An air carrier shall, at least 30 days before the cancellation or termination of a financial guarantee referred to in subsection (1), file a copy of a new or renewed, as the case may be, financial guarantee with the Agency.

(3) A financial guarantee referred to in subsection (1) shall specify

(a) that any amount to which a charterer is entitled under the contract for unperformed ABC transportation be fully and promptly refunded by the Canadian financial institution that issued the guarantee;

(b) that any amount refunded in accordance with paragraph (a) be deposited in a trust account in the name and for the benefit of the charterer;

(c) that any money withdrawn from the trust account be used only for the payment of replacement air transportation or refunds to the proposed users of the ABC, either directly or through the appropriate travel agent or provincial authority;

(d) that the financial institution that issued the financial guarantee will not amend or cancel the financial guarantee without first giving 45 days notice to the Agency; and

(e) the name of the province under the laws of which the financial guarantee is to be interpreted.

(4) An application for a program permit made pursuant to subsection 48(1) to operate an ABC shall include

(a) a statement by each charterer, signed and witnessed, certifying that the charterer is in possession of

(i) in the case of a letter of credit, the original of the letter of credit applicable in respect of the ABC, or

(ii) in the case of any other type of financial guarantee, a copy of the financial guarantee applicable in respect of the ABC; and

(b) a copy of the financial guarantee applicable in respect of the ABC.

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

B E T W E E N :

THOMAS COOK CANADA INC.

- and -

SKYSERVICE AIRLINES INC.

Court File No. CV-10-8647-00CL

ONTARIO

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

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