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

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.
(for an interpretation of the Arrangement Agreement and for an order with respect to liability arising from the KPMG Report, returnable September 27, 2011)

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PART I—OVERVIEW

1. This motion requires the court to do two things.

2. First, the court must interpret a provision of a contract. In doing so, it must apply certain well settled principles of contractual interpretation: a contract must be interpreted as a whole, with meaning given to all of its provisions; the court should adopt an interpretation that accords with sound commercial principles and good business sense; where a contract is ambiguous, the parties' subsequent conduct after contracting may be considered; evidence of a party's subjective intent is inadmissible; and evidence of the negotiations that led to the contract is inadmissible.

3. Second, the Receiver asks the court to invoke its supervisory jurisdiction over this receivership proceeding to grant an order providing liability protection to auditors, which will

permit the release of their relevant report and will enable the Receiver to advance the administration of the receivership.

4. On the contractual interpretation issue, the provision in question is found in an arrangement agreement that governed the sale of a charter airline in 2007. The agreement provided that part of the purchase price would be placed in escrow pending the determination of the amount contributed to the airline's EBITDA by several different tour operators (referred to as "TO"s). In each case, if the relevant EBITDA threshold was met, the selling shareholders would get the funds placed in escrow; if not, the airline would get the funds. The dispute relates to one of the TOs – Conquest Vacations – and whether the required contribution to EBITDA of $2 million over a specified period of time was achieved.

5. The disputed provision governs the method by which the applicable EBITDA is to be determined:

> "2.11(e)(viii) If Amalco sends a First EBITDA Notice Letter and/or a Second EBITBA Notice Letter, the following provisions shall apply:
>
> I. the parties agree that the applicable EBITDA contributed by the TO's programs for the applicable period shall be determined based on the audited financial statements of Amalco for such period (excluding interest earned on cash balances as provided in clause (vii) above). *If the financial year of Amalco does not end on April 30th, then the parties agree, acting reasonably, to determine the applicable EBITDA on the basis of internally generated financial statements for the applicable periods and which are reviewed by Amalco's auditors. Such determinations shall be final and binding on the Parties.* ..." [Emphasis added.]

6. There is no controversy as to what was to happen if the airline's year end did not change from April 30 (the year end before the Arrangement Agreement): the parties would be bound by the determination of the auditor as set out in the audited financial statements. However, there is disagreement as to what was to happen if the year end changed – which in fact occurred:

(a) The Receiver (on behalf of the airline) contends that the auditor would be engaged to review internally generated financial statements for the applicable period to determine the EBITDA in question, with the parties being bound by the auditor's determination on the review.

(b) The former shareholders, on the other hand, contend that the auditor's review would be merely advisory, and that if the year end changed the airline and the former shareholders would have to agree on the correct EBITDA regardless of the results of the internally generated financial statements or the auditor's review.

7. There is no question that Section 2.11(e)(viii) is inelegantly drafted, and that the provision is ambiguous in the sense that linguistically both the Receiver's proposed interpretation and the proposed interpretation of the former shareholders are plausible. However, the Receiver's interpretation ought to be adopted. It is the only interpretation that gives effect to all the contractual language. It is the only interpretation consistent with commercial efficacy and reasonableness. It is the only interpretation consistent with the parties' subsequent conduct after contract formation.

8. The main evidence relied on by the former shareholders in support of their proposed interpretation is evidence of their subjective intent and evidence of the negotiations that led to the arrangement agreement. Such evidence is inadmissible and must, as a matter of law, be entirely disregarded in the interpretive process.

9. On the court supervisory issue and the advancement of the receivership process, the auditors have prepared a report setting out their conclusion on the applicable EBITDA but because of the nature of the engagement, they are unwilling to release the report to the parties

without protection from liability. The former shareholders have been asked to execute documentation that would provide such protection, but have refused to do so. The effect has been to block the issuance of the report, which in turn has stalled the resolution of the dispute for about two years.

10. The blockage is impeding the administration of the receivership. Even if the Receiver's interpretation of the contract is not accepted, having the auditor's report will be of assistance in moving the dispute towards a resolution. Accordingly, the court ought to invoke its supervisory jurisdiction over the receivership and grant an order providing the auditor with the liability protection it needs to be able to release its report.

PART II—THE FACTS

The receivership

11. On March 31, 2010, FTI Consulting Canada Inc. was appointed as receiver (the "**Receiver**") of all of the assets, undertakings and properties of Skyservice Airlines Inc. ("**Skyservice**"), a charter airline. The appointment was made pursuant to section 243(1) of the *Bankruptcy and Insolvency Act (Canada)* and section 101 of the *Courts of Justice Act (Ontario)*.

Reference: Ninth Report of the Receiver, para. 1; Motion Record, Tab 2, p. 13

The EBITDA escrow amount dispute

12. In 2007, a predecessor of Skyservice was acquired from its then-shareholders (the "**Former Shareholders**") by a wholly-owned subsidiary of Gibralt Capital Corporation incorporated for this purpose ("**AcquisitionCo**"). The transaction proceeded by way of a plan of

arrangement, and was governed by an arrangement agreement dated as of August 14, 2007 (the "**Arrangement Agreement**").

Reference: Ninth Report of the Receiver, para. 9 and Appendix A; Motion Record, Tabs 2 and 2A, pp. 15 and 24 ff.

13. Immediately following the acquisition, through a series of amalgamations involving AcquisitionCo and other predecessors of Skyservice, the current Skyservice was formed. As a result, Skyservice has become entitled to the rights of AcquisitionCo under the Arrangement Agreement. The Receiver is seeking to enforce the rights of Skyservice.

Reference: Ninth Report of the Receiver, para. 10; Motion Record, Tab 2, p. 15

14. Pursuant to Section 2.11 of the Arrangement Agreement, a portion of the purchase price was paid into escrow upon closing. Several disputes have arisen in respect of the escrowed amounts. The one at issue in this motion relates to Section 2.11(e)(vi) of the Arrangement Agreement (the "**EBITDA Escrow Amount**"). Section 2.11(e)(vi) provides as follows (with the key provisions emphasized]:

> "Notwithstanding anything to the contrary in the foregoing, *in the event that the TO's [Conquest Vacations'] programs for the period November 1, 2007 to April 30, 2008 have contributed a minimum of $2,000,000 to EBITDA for such period the Escrow Agent shall release and pay, in addition to and at the same time as the First EBITDA Amount, the Second EBITDA Amount to the Shareholders*, other than Dissenting Shareholders, in proportion to the number of shares held by such Shareholders, as directed as provided for in the Escrow Agreement by the Principal Shareholder and the Minority Shareholder Representative on behalf of such Shareholder. If (A) all of Amalco's [Skyservice's] operations for the period November 1, 2007 to April 30, 2008, in the aggregate, have contributed $1,000,000 or more in excess of Amalco's budgeted total EBITDA in the amount to be determined by the Parties for the said period, or (B) Amalco's actual total EBITDA for the period November 1, 2007 to October 31, 2008 exceeds the budgeted total EBITDA determined by the Parties for the same period by $1,000,000, the Escrow Agent shall release and pay the Second EBITDA Amount (but not the First EBITDA Amount) to the Shareholders, other than Dissenting Shareholders, in proportion to the number of shares held by such Shareholders, as directed as provided for in the Escrow Agreement by the Principal Shareholder and the Minority Shareholder Representative on behalf of such Shareholders. All calculations pursuant to this clause (vi) shall be

determined in accordance with the foregoing clauses of this Section 2.11(e)". [Emphasis added.]

Pursuant to Section 2.11(e)(viii)(II), if the Second EBITDA Amount is not payable to the Former Shareholders, it is payable to Skyservice.

Reference: Ninth Report of the Receiver, paras. 11-13; Motion Record, Tab 2, pp. 15-16

Events in 2009: the dispute over the EBITDA Escrow Amount crystallizes

15. On March 2, 2009, counsel for the Former Shareholders wrote to Skyservice requesting release of the Second EBITDA Amount (as defined in the Arrangement Agreement) on the basis that one or more of the conditions in Section 2.11(e)(vi) had been met.

Reference: Ninth Report of the Receiver, para. 14 and Appendix C; Motion Record, Tabs 2 and 2C, pp. 16 and 163-4

16. On March 5, 2009, Skyservice responded that the amount contributed to Skyservice's EBITDA for the period November 1, 2007 to April 30, 2008 by Conquest Vacations (the relevant tour operator or "TO" under the Arrangement Agreement) was only $1,930,941 – in other words, short of the $2,000,000 threshold needed for the Second EBITDA Amount to be released to the Former Shareholders.

Reference: Ninth Report of the Receiver, para. 15 and Appendix D; Motion Record, Tabs 2 and 2D, pp. 16 and 165

The KPMG Report

17. The Former Shareholders asked for audited financial statements to support Skyservice's position with respect to the Conquest EBITDA. Since Skyservice had changed its financial year end, the requested audited financial statements were not available. Accordingly, the parties

started to negotiate the basis on which internally generated financial statements would be reviewed by Skyservice's auditors, KPMG LLP ("**KPMG**").

Reference: Ninth Report of the Receiver, paras. 16-19 and Appendices E to H; Motion Record, Tabs 2 and 2E to 2H, pp. 16-17 and 166-173

18. Skyservice and the Former Shareholders then embarked on a series of discussions to agree upon an engagement letter with KPMG. The engagement letter included an appendix setting out agreed upon procedures for the review of the Conquest EBITDA. The discussions went on over a period of about four months, between May and August 2009, and concluded with Skyservice substantially accepting the comments of the Former Shareholders on the draft documents.

Reference: Ninth Report of the Receiver, paras. 20-26 and Appendices I-O; Motion Record, Tabs 2 and 2I-2O, pp. 17-18 and 174-211

19. The result was a revised draft engagement letter, which was dated August 25, 2009.

Reference: Ninth Report of the Receiver, para. 26 and Appendix O; Motion Record, Tabs 2 and 2O, pp. 18 and 201-211

20. On the basis of the August 25, 2009 version of the engagement letter, KPMG proceeded with a review of Skyservice's EBITDA derived from Skyservice's program with Conquest Vacations for the period November 1, 2007 to April 30, 2008 (among other things). KPMG has prepared a report (the "**KPMG Report**") to summarize its findings.

Reference: Ninth Report of the Receiver, para. 27; Motion Record, Tab 2, pp. 18-19

21. Despite having agreed to the basis for KPMG's review, upon learning of KPMG's conclusions (which would see the disputed escrow amounts paid to Skyservice, not the Former Shareholders) the Former Shareholders took a different position. They adopted the interpretation

of Section 2.11(e)(viii) that they are now asserting on this motion, and they refused to execute documentation requested by KPMG for the release of the KPMG Report.

Reference: Ninth Report of the Receiver, paras. 28-30 and Appendices P-R; Motion Record, Tabs 2 and 2P-2R, pp. 19 and 212-214

Commercial efficacy, commercial certainty and the Former Shareholders' change in position

22. Johnny Ciampi, who represented Skyservice in the negotiation of the Arrangement Agreement, has sworn an affidavit in support of the Receiver's motion. That affidavit made the following points about commercial efficacy, commercial certainty and the Former Shareholders' change in position:

(a) Business people like certainty to the extent it is achievable.

(b) Business people dislike litigation, and prefer to have mechanisms in place to avoid having disputes become litigious.

(c) The Former Shareholders' theory that if the year end changed the EBITDA would be determined by agreement between the parties does not make commercial sense. Such a mechanism would be a recipe for deadlock and litigation, neither of which is desirable.

(d) It would not have made commercial sense for the parties to go through the effort of settling upon the terms of KPMG's review, as they did, or for the parties to allow KPMG to go through the review (which was not an inexpensive endeavour) if the review was to be nothing more information that had no binding role in negotiations between the parties as to what the correct EBITDA was.

(e) It was only after learning of KPMG's conclusion in October 2009 that the Former Shareholders changed their position and began to assert the position they are now asserting.

Reference: Affidavit of Johnny Ciampi, paras. 6, 8, 11 and 12; Supplementary Motion Record, Tab 1

23. Mr. Ciampi was cross-examined on his affidavit, but was not challenged on any of the foregoing points. Accordingly, his evidence in this regard stands unchallenged.

Reference: Cross-examination of Johnny Ciampi

Events since the receivership order

24. After the receivership order on March 31, 2010, the Receiver reviewed the issue of whether to pursue the EBITDA Escrow Amount (as well as several other disputed escrow amounts, which are not at issue in this motion). The Receiver concluded that it is in the best interests of the estate and the creditors of Skyservice to pursue recovery of the disputed amounts, including the EBITDA Escrow Amount.

Reference: Ninth Report of the Receiver, para. 32; Motion Record, Tab 2, p. 19

25. The Receiver therefore approached KPMG and requested that it release the KPMG Report for use in resolving the dispute with the Former Shareholders. KPMG advised that it was not prepared to do so without a signed engagement letter from the Receiver and without signed release letters from the Former Shareholders. The letters are intended by KPMG to protect them from exposure to claims in respect of their work. The Receiver and KPMG have agreed on the terms of an engagement letter and release, and the Receiver is prepared to sign such

documentation, leaving only the issue of liability protection for KPMG in the way of a release of the KPMG Report.

Reference: Ninth Report of the Receiver, paras. 33-34; Motion Record, Tab 2, p. 20

26. The Receiver's counsel asked the Former Shareholders to execute the documentation requested by KPMG. They refused.

Reference: Ninth Report of the Receiver, paras. 35-37 and Appendices T-V; Motion Record, Tabs 2 and 2T-2V, pp. 20 and 216-240

Reasonableness of KPMG's position and impracticability of retaining anyone else

27. The Receiver is of the view that KPMG's request for protection against claims by the Receiver and the Former Shareholders is a reasonable one given the nature and scope of KPMG's engagement. The Receiver believes that any other independent accountant engaged to undertake the work would likely require the same protections that KPMG is seeking.

Reference: Ninth Report of the Receiver, paras. 39-40; Motion Record, Tab 2, p. 22

28. However, engaging someone else is not practical. Doing so would require another accountant to undertake the work that KPMG has already completed, which would be an unwarranted and inefficient duplication of efforts. Given the passage of time and the dispersal of Skyservice's employees, it would be an extremely costly, time consuming and difficult endeavour for anyone other than KPMG to compile the information needed to undertake the analysis in question.

Reference: Ninth Report of the Receiver, para. 41; Motion Record, Tab 2, p. 22

The evidentiary issue

29. There is an issue between the parties as to the admissibility of certain paragraphs of the affidavit of Ronald Patmore, served by the Former Shareholders. The Receiver has objected to the admissibility of paragraphs 30, 32, 33 and 34 of Mr. Patmore's affidavit, as well as the words "and was inconsistent with my discussions with Johnny Ciampi in the fall of 2007 discussed above" in paragraph 61. The Receiver cross-examined Mr. Patmore on some of these paragraphs, but without prejudice to the position that those paragraphs are inadmissible. Counsel for the Former Shareholders agreed to the cross-examination proceeding on that basis.

Reference: Cross-examination of Ronald Patmore, Q7 to Q10 and exhibit A

PART III—THE ISSUES

30. ***The interpretation issue.*** **What is the proper interpretation of Section 2.11(e)(viii) of the Arrangement Agreement?** The Receiver's interpretation should be accepted. The parties are bound by the determination of Conquest EBITDA established by KPMG's review.

31. ***The receivership supervision issue.*** **Should an order be granted that will facilitate the issuance of the KPMG Report?** Yes.

PART IV—THE LAW AND ARGUMENT

The interpretation issue

The main governing principles of contractual interpretation

32. The main principles governing the interpretation of commercial contracts are well settled and not in dispute. They were summarized by the Ontario Court of Appeal in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*. A commercial contract is to be interpreted:

(a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

(b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;

(c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and

(d) to the extent there is any ambiguity in the contract, in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.[1]

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[1] There is some reason to believe that ambiguity may not be a precondition to the consideration of sound commercial principles. Until *Ventas*, a consistent line of authorities held that sound commercial principles should be considered and did not set any precondition of ambiguity: see *Scanlon v. Castlepoint Development Corporation* (1992), 11 OR (3d) 744 (CA) at 770; Brief of Authorities of the Receiver, Tab 9; and *Kentucky Fried Chicken v. Scott's Food Services Inc.* (1998), 114 OAC 357 (CA) at paras. 27; Brief of Authorities of the Receiver, Tab 6. There is no indication that *Ventas* intended to overrule that consistent line of authorities. However, since there is ambiguity in this case, the question of whether it truly is a precondition to the consideration of sound commercial principles is moot.

Reference: *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 OR (3d) 254 at para. 24; Brief of Authorities of the Receiver, Tab 10

33. As set out below, these principles support the Receiver's interpretation rather than that of the Former Shareholders.

Subsequent conduct

34. In addition to the main principles set out in *Ventas*, another principle of contract interpretation is relevant to this motion: where a contract is ambiguous, evidence of the parties' subsequent (i.e., post contracting) conduct is admissible as an aid to contractual interpretation.

35. This law in respect of subsequent conduct has been described by the Ontario Court of Appeal in the following terms:

> "Subsequent conduct may be used to interpret a written agreement because '... it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at the earlier date.' S.M. Waddams, *The Law of Contracts*, 3rd Edition (1993), at ¶323. Often, as Thomson J. wrote in *Bank of Montreal v. University of Saskatchewan* (1953), 9 W.W.R. (N.S.) 193 at 199 (Sask. Q.B.); '... there is no better way of determining what the parties intended than to look to what they did under it.'
>
> Lambert J.A. discussed the relevance of subsequent conduct in *Re Canadian National Railways and Canadian Pacific Limited,* [1979] 1 W.W.R. 358 at 372 (B.C.C.A.), aff'd, (1979), 105 D.L.R. (3d) 170 (S.C.C.):
>
> > ' In Canada the rule with respect to subsequent conduct is that, if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or an ambiguity or as uncertainty or as difficulty of construction.'

Reference: *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 OR (3d) 97 (CA) at 108; Brief of Authorities of the Receiver, Tab 7

36. As set out below, the parties' subsequent conduct reinforces the Receiver's interpretation.

The evidentiary issue

37. There are two well settled rules governing the admissibility of evidence on an issue of contractual interpretation that are relevant to this motion.

38. First, the Supreme Court of Canada has unequivocally held in *Eli Lilly & Co. v. Novopharm Ltd.* that evidence of a party's subjective intentions is not admissible:

> "The trial judge appeared to take *Consolidated-Bathurst* to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. *The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.*" [Emphasis added.]

Reference: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 SCR 129 at para. 54; Brief of Authorities of the Receiver, Tab 3

39. Second, evidence of negotiations is not admissible in the interpretation of a contract. This is a longstanding rule, dating back to the seminal decision of the House of Lords in *Prenn v. Simmonds*, which has been accepted in many Canadian cases. The rationale for the rule is that evidence of negotiations is not probative because bargaining positions change during the course of negotiations, with the result that only the final agreement represents a consensus of the parties. In *Chartbrook Ltd. v. Persimmon Homes Ltd.*, a 2009 decision, the House of Lords considered

and rejected a challenge to the longstanding rule. *Chartbrook* has subsequently been followed in Canada (by the Alberta Court of Appeal).

Reference: *Prenn v. Simmonds*, [1971] 3 All ER 237 (HL); Brief of Authorities of the Receiver, Tab 8

Eco-zone Engineering Ltd. v. Grand Falls – Windsor (Town), [2000] NJ No 377 (CA) at para. 11; Brief of Authorities of the Receiver, Tab 2

Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (c.o.b. CAA Manitoba), [2003] 9 WWR 385 (Man C.A.) at para. 23; Brief of Authorities of the Receiver, Tab 4

Chartbrook Ltd. v. Persimmon Homes Ltd., [2009] UKHL 38 at paras. 32-41; Brief of Authorities of the Receiver, Tab 1

Keephills Aggregate Co. v. Riverview Properties Inc., [2011] AJ No 348 (CA) at para. 13; Brief of Authorities of the Receiver, Tab 5

40. It is important to note that these two exclusionary rules apply whether or not the contract is ambiguous. Evidence of subjective intent is *never* admissible – such evidence would be inconsistent with the basic premise of the common law of contract, which is that it is the parties' *objective* intent (what a reasonable third party observer would conclude that the contracting parties meant) rather than their *subjective* intent that governs. Similarly, evidence of negotiations is *never* admissible – such evidence is not probative and as a matter of law is not admissible.

41. Although the Former Shareholders make some effort to dress up the evidence in question as "context", paragraphs 30, 32, 33 and 34 of Mr. Patmore's affidavit, as well as the words "and was inconsistent with my discussions with Johnny Ciampi in the fall of 2007 discussed above" in paragraph 61, address the subjective intent of the Former Shareholders and the positions they took in the course of negotiations. Such evidence is inadmissible and must be entirely disregarded.

Application of the principles

42. Application of the foregoing principles, without the inadmissible evidence sought to be adduced by the Former Shareholders on subjective intent and negotiations, leads to the conclusion that the Receiver's proposed interpretation of Section 2.11(e)(viii) is the correct one.

43. What Section 2.11(e)(viii) actually says is as follows:

> "I. the parties agree that the applicable EBITDA contributed by the TO's programs for the applicable period shall be determined based on the audited financial statements of Amalco for such period (excluding interest earned on cash balances as provided in clause (vii) above). If the financial year of Amalco does not end on April 30th, then the parties agree, acting reasonably, to determine the applicable EBITDA on the basis of internally generated financial statements for the applicable periods and which are reviewed by Amalco's auditors. *Such determinations shall be final and binding on the Parties.* ..." [Emphasis added.]

The Former Shareholders would read the italicized words as applying only if the year end did not change. In other words, they would read the words "[s]uch determinations shall be final and binding on the Parties" as coming *before* the statement of what is to occur when the year end changes rather than *after* it:

> "I. the parties agree that the applicable EBITDA contributed by the TO's programs for the applicable period shall be determined based on the audited financial statements of Amalco for such period (excluding interest earned on cash balances as provided in clause (vii) above). *Such determinations shall be final and binding on the Parties.* If the financial year of Amalco does not end on April 30th, then the parties agree, acting reasonably, to determine the applicable EBITDA on the basis of internally generated financial statements for the applicable periods and which are reviewed by Amalco's auditors. ..." [Emphasis added.]

44. To give effect to all of the language used by these sophisticated commercial parties, in the order in which they actually used the language, the words "[s]uch determinations shall be final and binding on the Parties" should be read as applying to both possible scenarios (year end

does not change, and year end does change). Those words should not be read as applying only to the first scenario, in which the year end does not change.

45. The Receiver's proposed interpretation makes much better business sense than does that of the Former Shareholders.

46. If Skyservice's year end did not change, there would be no mismatch between the period covered by the audited financial statements and the period relevant to the EBITDA issue, and the audited financial statements could be used. If the year end changed, there would be a mismatch and the audited financial statements would not be usable. Thus new financial statements for the appropriate period would have to be created, and then reviewed by the auditors. Section 2.11(e)(viii), while somewhat inelegantly drafted, did no more than provide for the special financial statements and special review for the appropriate period. It did not change the basic notion that determination of EBITDA – a technical accounting issue – would be by the auditor, not by business people, and that the business people would be bound by the auditor's determination.

47. Business people prefer certainty and dislike litigation. The Former Shareholders' approach provides no mechanism if the parties cannot agree what the EBITDA is, aside from costly and lengthy litigation in which the EBITDA issue would be determined from scratch with each side adducing expert accounting evidence and with the court choosing between that evidence. It is difficult to conceive of a more cumbersome mechanism to settle upon a technical accounting question. The Receiver's interpretation, by contrast, is that the parties provided a straight forward mode of determination of EBITDA, one which is binding on the parties and therefore certain.

48. The parties' subsequent conduct reinforces the conclusion that the Receiver's interpretation is to be preferred. For many months, the Former Shareholders proceeded to negotiate the terms of KPMG's review and allow that review to take place, without ever asserting the position that the KPMG review was advisory only and would merely be the basis for negotiations between the parties. This course of conduct cannot be reconciled with the interpretation the Former Shareholders are now asserting.

The receivership supervision issue

49. Whether or not the Receiver is correct in its interpretation of Section 2.11(e)(viii), the KPMG Report is needed to advance the receivership process. The dispute over the EBITDA Escrow Amount has essentially not advanced in about two years. It is in the interest of Skyservice's creditors that the dispute be resolved. If the Receiver's interpretation is correct and the KPMG Report is released, the dispute is at an end. If the Receiver's interpretation is incorrect, the KPMG Report is still needed in order to avoid the need to reinvent the wheel by having a new firm of accountants replicate the KPMG Report.

50. The Receiver's proposed solution – a court-ordered bar on claims against KPMG – is the least intrusive means of accomplishing the necessary goal. It has not been objected to by any party, and would not prejudice anyone.

PART V—RELIEF REQUESTED

51. The Receiver therefore requests an order in the form of the draft order found at Tab 3 of the Motion Record. The Receiver also requests its costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16TH DAY OF SEPTEMBER, 2011.

Geoff R. Hall

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

SCHEDULE "A" – LIST OF AUTHORITIES REFERRED TO

1. *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 OR (3d) 254
2. *Scanlon v. Castlepoint Development Corporation* (1992), 11 OR (3d) 744 (CA)
3. *Kentucky Fried Chicken v. Scott's Food Services Inc.* (1998), 114 OAC 357 (CA)
4. *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 OR (3d) 97 (CA)
5. *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 SCR 129
6. *Prenn v. Simmonds*, [1971] 3 All ER 237 (HL)
7. *Eco-zone Engineering Ltd. v. Grand Falls – Windsor (Town)*, [2000] NJ No 377 (CA)
8. *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (c.o.b. CAA Manitoba)*, [2003] 9 WWR 385 (Man C.A.)
9. *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38
10. *Keephills Aggregate Co. v. Riverview Properties Inc.*, [2011] AJ No 348 (CA)

SCHEDULE "B" – TEXT OF RELEVANT PROVISIONS OF STATUTES, REGULATIONS AND BY-LAWS

None.

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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