

**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 SUNWING TOURS INC.
(Motion regarding the Sunwing Trust Claim, returnable February 13, 2012)**

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PART I - OVERVIEW

1. Skyservice Airlines Inc. (“**Skyservice**”) was a provider of charter flight services to two main customers, Thomas Cook Canada Inc. (“**Thomas Cook**”) and Sunwing Tours Inc. (now Sunwing Vacations Inc.) (“**Sunwing**”).
2. On March 31, 2010, Thomas Cook, in its capacity as a secured creditor of Skyservice, and with the foreknowledge and co-operation of Skyservice, (but without any advance notice to Sunwing) brought an application for the appointment of a receiver over the assets of Skyservice. As a result of that application, FTI Consulting Canada Inc. was appointed as receiver of Skyservice (the “**Receiver**”). Upon the Receiver’s appointment, Skyservice abruptly ceased all operations.
3. Just days before the receivership and this abrupt halt in services, Skyservice sent two invoices to Sunwing, requesting payment for flights scheduled to be provided on and after March 31. Sunwing paid these invoices in full and as a result, paid over \$3,500,000 on the eve of insolvency for services that would never be provided. Skyservice requested and accepted these payments for services when it knew that such services would never be provided.
4. On March 29, 2010, two days before the receivership and shutdown, Skyservice employees identified and segregated the last payment received from Sunwing that related entirely to future flight services that would not be provided.
5. Shortly after the receivership commenced, Sunwing advised the Receiver in writing that it was asserting a property claim over the amounts paid to Skyservice just prior to the receivership, on the grounds of an actual and/or constructive trust.
6. The Receiver has brought a motion for a declaration that Sunwing has no such claim. Sunwing brings this cross-motion for an order that it is entitled to the recovery of the proceeds paid to Skyservice prior to the receivership, on the grounds that (a) the funds set aside and segregated by Skyservice represent a trust established in favour of Sunwing; and (b) in any event a constructive trust should be imposed over all funds collected by Skyservice from

Sunwing in respect of flights that Skyservice did not intend to provide and did not in fact provide.

PART II - THE FACTS

A. Sunwing's Relationship with Skyservice

7. Skyservice was a Canadian commercial charter airline that provided flights to Canadian tour operators, including Sunwing. At all material times, Sunwing carried on business as an operator of package tours and charter flights and a retail travel business in Canada, and was in that capacity a customer of Skyservice.

Affidavit of Mark Williams, sworn April 27, 2010 (“**Williams Affidavit**”) at para. 6

8. The relationship between Sunwing and Skyservice was reflected in a series of agreements between the parties, and was governed by the provisions of various legislation, including the regulations enacted under the *Canada Transportation Act*, S.C. 1996, c.10.

Williams Affidavit at paras. 7-8

Supplemental Affidavit of Mark Williams, sworn October 11, 2011 (“**Williams Supplemental Affidavit**”) at para. 21

i. The Agreements

9. Skyservice and Sunwing were parties to a commercial agreement dated June 11, 2006 (as amended, the “**Commercial Agreement**”), which set out the general terms and conditions pursuant to which Sunwing and Skyservice entered into individual agreements (such agreements, the “**Charter Agreements**”) for the charter of specific aircraft during the term of the Commercial Agreement. The term of the Commercial Agreement was scheduled to expire on October 31, 2013.

Williams Affidavit at paras. 7-9

Commercial Agreement, Tenth Report of the Receiver dated June 2, 2011 (“**Tenth Report**”), Appendix “I”

10. Skyservice and Sunwing entered into several Charter Agreements as provided by the Commercial Agreement, pursuant to which Sunwing agreed to charter a number of particular aircraft from Skyservice for a specified time period, and Skyservice agreed to operate the chartered aircraft.

Williams Affidavit at paras. 8, 10

11. The parties also entered into separate “Charter Transportation Agreements”, that set out the particular flight schedules for particular aircraft chartered pursuant to the Charter Agreements, and calculated a charter price for that flight schedule.

Williams Supplemental Affidavit at paras. 23-25

ii. Payments to Skyservice

12. Pursuant to the Commercial Agreement and the Charter Agreements, charter flights were provided by Skyservice to Sunwing pursuant to a cost-plus arrangement under which Sunwing was required to pre-pay Skyservice a “Charter Fee”. The Charter Fee was comprised of an overhead charge, a profit charge, and operating costs, all of which were to be calculated in accordance with formulas set out in the Commercial Agreement. The Charter Fee was based on an annual budget negotiated between Skyservice and Sunwing that reflected a projected schedule of operating costs, profit charges, and overhead charges.

Williams Affidavit at paras. 11-14

13. While the Charter Fee for each Charter Agreement was determined on the basis of this annual budget, the Commercial Agreement required that the Charter Fee be invoiced weekly in advance “on a fixed and per seat mile basis as set out in Appendix 8 according to the planned flying programme set out in the relevant Charter Agreement”. Appendix 8 of the Commercial Agreement set out the basis for the calculation of the Charter Fee, which provided for the total of all costs and charges, divided by the total seat miles planned. In this way, the total costs were allocated to particular scheduled flights.

Commercial Agreement, section 11.5, Tenth Report, Appendix “I”

14. The Charter Agreements relating to specific aircraft also provided that the weekly payments to be paid by Sunwing to Skyservice were to be based on the "Charter Fee", as defined in the Charter Agreements, for the number of "Rotations" [return flights] to be flown in the ensuing week. As such, the amounts invoiced and paid were tied to specific flights anticipated. Adjustments were made if there were changes to the flight schedule. The invoiced weekly amounts varied from week to week, depending on the seat miles anticipated for the week invoiced.

Williams Supplemental Affidavit at para. 16-17

15. Each invoice rendered by Skyservice to Sunwing referenced flights for a particular period.

Williams Supplemental Affidavit at para. 17

iii. The Obligation to Make Pre-Payments

16. The practice of paying in advance was not an arrangement that was negotiated between Sunwing and Skyservice. Payments were made in advance in order to satisfy regulatory requirements, which the contractual arrangements between the parties reflected. Section 43(3) of the *Air Transportation Regulations*, S.O.R./88-58 made under the *Canada Transportation Act*, S.C. 1996, c.10 required that Sunwing, as a tour operator, pay Skyservice, as an air carrier, the full contract price for air transportation, at least seven days prior to the commencement of a tour flight.

Williams Supplemental Affidavit at para. 21-25

17. It was never contemplated by Sunwing or Skyservice that as a result of the pre-payments, Skyservice would receive more than it was entitled to for the specific flights provided for by the Charter Transportation Agreements. As such, to the extent that the pre-payments based on budgeted flights exceeded the liability for the flights that were provided, the Commercial Agreement provided for a reconciliation of budgeted costs to actual costs and a refund of any overpayments.

Commercial Agreement, section 11.5, Tenth Report, Appendix "I"

Form of Charter Agreement, Appendix 1 to Commercial Agreement, Tenth Report, Appendix "I"

B. Prepayments for Charter Flights Not Provided

18. When Skyservice ceased operations on March 31, 2010, Sunwing had made prepayments to Skyservice in respect of charter flights scheduled on and after March 31, 2010.

19. On March 17, 2010, Skyservice issued invoice number REV-005130 to Sunwing in the amount of \$3,189,731.34, representing flights scheduled for the period of March 27 to April 2, 2010 ("**Invoice 5130**"). Invoice 5130 was paid in full by Sunwing by wire transfer on March 19, 2010.

Williams Affidavit at paras. 25-26

Invoice 5130, Williams Affidavit, Exhibit B

20. Of the amount paid by Sunwing on account of Invoice 5130, \$1,064,367.04 was on account of flights scheduled from March 31 to April 2, 2010 which Skyservice did not provide.

Williams Affidavit at para. 25

21. On March 23, 2010, Skyservice issued invoice number REV-005146 to Sunwing in the amount of \$2,449,083.04, representing flights scheduled for the period of April 3 to April 9, 2010 ("**Invoice 5146**"). Sunwing paid Invoice 5146 in full by wire transfer on March 26, 2010, together with certain other amounts on account of another invoice. The payment for Invoice 5146 consisted of the amount of \$2,329,473 in cash, plus the application of a credit note in the amount of \$119,609.86.

Williams Affidavit at paras. 27-28

Invoice 5146, Williams Affidavit, Exhibit C

Tenth Report at paras. 56-60

22. None of the charter flights pre-paid for under Invoice 5146 were provided by Skyservice. The aggregate amount prepaid by Sunwing to Skyservice for flights that were not provided as a result of the receivership is \$3,513,450.08.

C. Chronology of Events Leading to Receivership

23. As disclosed in the Receiver's Pre-Appointment Report dated March 31, 2010, Skyservice had two primary customers – Sunwing and Thomas Cook – which accounted for approximately 98% of Skyservice's revenues.

Pre-Appointment Report to the Court submitted by FTI Consulting Canada Inc., in its capacity as Proposed Receiver dated March 31, 2010 ("**Pre-Appointment Report**") at para. 13

24. Thomas Cook was not only a customer of Skyservice, but was also a secured creditor of Skyservice as a result of having purchased the debt obligations owed by Skyservice to certain other lenders pursuant to an Assignment and Assumption Agreement effective February 12, 2010. Simultaneously with the assignment of the debt and security, Thomas Cook and Skyservice entered into an Amended and Restated Credit Agreement (the "**Credit Agreement**"). The debt obligation owing under the Credit Agreement was due and payable on March 30, 2010.

Affidavit of Karim Nensi sworn March 31, 2010 ("**Nensi Affidavit**") at paras. 22-23

25. Thomas Cook had a similar contractual arrangement with Skyservice regarding the supply of charter flights, and was subject to the same regulations requiring pre-payment under the federal legislation. Under section 2.05 of the Credit Agreement, among other things, Thomas Cook agreed to pay its tariffs to Skyservice in its capacity as a customer of Skyservice, without set-off or deduction against amounts owing under the Credit Agreement. The amount and timing of the payable tariffs were set out in Schedule "C" to the Credit Agreement.

Nensi Affidavit at para. 31

Credit Agreement, section 2.05, Nensi Affidavit, Exhibit C

26. As of February, 2010, when it entered into the Credit Agreement with Skyservice, Thomas Cook had flights scheduled for April, 2010. However, the parties revised that schedule in February in order to eliminate any April flights for Thomas Cook.

Answers to Written Questions for Receiver, received December 22, 2011
("Receiver's Answers to Written Questions"), questions 6

27. The financial difficulties at Skyservice continued subsequent to the assignment of its debt to Thomas Cook. It is apparent that Thomas Cook was preparing itself for the cessation of business after March 30, 2010. An application for the appointment of a receiver was contemplated by Thomas Cook as early as March 9, 2010, if not earlier.

Dockets for Osler, Hoskin & Harcourt LLP, Affidavit of Steven Golick
sworn September 15, 2011, Exhibit "B", Supplementary Motion Record of
Thomas Cook Canada Inc. dated September 15, 2011 at page 45

28. On March 12, 2010, Skyservice and Thomas Cook entered into a First Amending Agreement to the Credit Agreement dated as of March 12, 2010 (the "**Amending Agreement**"). According to the affidavit of Karim Nensi filed on the receivership application, the sole purpose of that Amending Agreement was to replace Schedule "C" to the Credit Agreement, adjusting the tariffs payable on March 23, 2010 by Thomas Cook to Skyservice, in order to reflect a change in the flight schedule. The Receiver has advised that the amendment to Schedule "C" eliminated a tariff payment that had been scheduled for March 2, 2010. However, this does not explain what flights were changed or what adjustment was made to the tariff payable on March 23, 2010, as attested to by Karim Nensi.

Nensi Affidavit at para. 31 and Exhibit G

Receiver's Answers to Written Questions, question 7

29. In any event, the Receiver advises that the last charter payment made by Thomas Cook to Skyservice was pursuant to an invoice issued on March 23, 2010, for flights to occur up to March 30, 2010.¹

Receiver's Answers to Written Questions, questions 6

30. The Receiver's Pre-Appointment Report to the Court dated March 31, 2010 confirmed that all flights for Thomas Cook from April 1 onward had been rescheduled to other aircraft.

¹ The March 23 invoice also incorrectly included amounts for flights in April that had been cancelled in February by Thomas Cook. On March 25, Skyservice issued Thomas Cook a credit note for the overpayment.

The Pre-Appointment Report also advised that Sunwing flights had not been rescheduled as Sunwing “may not have been prepared for the potential of Skyservice ceasing operations”. Cancelling flights scheduled for the period after March 30, 2010 meant that Thomas Cook was not required to make pre-payments for such flights: the same payments that Sunwing made and in respect of which it now brings this claim.

Pre-Appointment Report at para. 23

31. On March 25, 2010, Skyservice forwarded \$7.4 million to its legal counsel, Cassels Brock & Blackwell LLP, to be held in trust for certain amounts owing to employees, under the Manitoba *Workers Compensation Act*, and amounts owing in respect of an Air Travellers Security Charge. Approximately \$6.3 million was paid out of these funds prior to the appointment of the Receiver on March 31, 2010.

Second Report of the Receiver dated June 10, 2010 at paras. 13-14

32. On March 29, 2010, Skyservice identified payments that had been made to it that related entirely to future flights which Skyservice was scheduled to perform but that its management knew Skyservice would not provide. This review identified four amounts totalling \$2,731,802.76, made up of: (a) the \$2,329,473 paid by Sunwing in cash on account of Invoice 5146; and (b) three other amounts paid to Skyservice by third parties. The Receiver has advised that it is not aware of any payments received from any other parties by Skyservice in the two weeks prior to March 31, 2010 that related to flying to be provided on or after March 31, 2010.

Tenth Report at paras. 90-91

Receiver’s Answers to Written Questions, question 5

33. Skyservice segregated the amounts identified by transferring them to a separate bank account referred to as the “In Flight Collections Account”, which account had not, to that point, been used by Skyservice to store or deal with payments received on account of charter flights, but which had been used for monies collected from passengers in respect of sales made during flights.

Tenth Report at para. 91

34. It is the evidence of the Receiver that it has made inquiries of Rob Giguere, former President of Skyservice, and Graham Bailey, former CFO of Skyservice, regarding the segregation of these funds. Mr. Giguere has confirmed to the Receiver that accounting staff were instructed to identify payments that had been made to Skyservice that related entirely to future flying that Skyservice was contracted to perform, and to transfer any such amounts to a separate Skyservice account so that Skyservice could keep track of those funds. Mr. Giguere has advised the Receiver that the amounts were “isolated for tracking” and were transferred in order to ensure that the funds were “protected from misuse or misappropriation”. Mr. Bailey has advised the Receiver that the funds were transferred because “no part of the deposits would have been consumed in preparation for future flying and should therefore have been refundable in their entirety.” [emphasis added]

Receiver’s Answers to Written Questions, question 10

35. On that same day, Skyservice’s officers and directors informed Skyservice’s counsel of their intention to resign their positions on March 30, 2010. The resignations occurred at approximately 5:30 p.m. on March 30, 2010.

Nensi Affidavit, at para.40

36. Also on March 30, 2010, subsequent to the segregation of funds, and the cancellation of Thomas Cook’s flights, Skyservice paid Gibralt Capital Corporation (“**Gibralt**”) the amount of more than \$7 million, which it says was payment in full of its secured indebtedness to Gibralt. None of the money Skyservice transferred to the In-flight Collections Account was applied to that payment. Indeed, none of the money set aside was spent by Skyservice on any expenses prior to the receivership.

Nensi Affidavit at para. 33

Pre-Appointment Report at para. 18

Tenth Report at paras. 94-100

D. The Receivership and the Knowledge of Sunwing

37. On March 31, 2010, this Court granted an Order appointing the Receiver and imposing a stay of proceedings (the “**Receivership Order**”). As a result of the Receivership Order, Skyservice ceased all operations on March 31, 2010.

Tenth Report at para. 1

38. Sunwing did not receive any notice or information from Skyservice that Skyservice would not be operating on or after March 31, 2010, nor did it receive any notice or warning from Thomas Cook.

Williams Affidavit at paras. 23, 26, 28, 32, 33

Supplemental Williams Affidavit at para. 4

39. It is apparent that Thomas Cook considered this lack of notice to Sunwing, and was aware that Sunwing would be “confronted with a ‘hard stop’” of flight services and would “have to immediately take steps to address the travel requirements of its customers.”

Nensi Affidavit at para. 46

40. However, the Credit Agreement ensured that Sunwing would have no knowledge of these steps from Thomas Cook. Indeed, it ensured that Sunwing would have no knowledge (at least from Thomas Cook) that Thomas Cook had even become a secured lender to Skyservice, or that the financing provided was due to be repaid on March 30, 2010. The Credit Agreement provided that:

“The Lender agrees that so long as there is no Event of Default, it will not without the consent of the Borrower take any action, directly or indirectly, to encourage, initiate or engage in discussions or negotiations with, or provide any information to Tui, [defined as Sunwing Travel Group Inc., TUI Travel PLC, TUI Canada Holdings Inc. and Sunwing Tours Inc.] or any Affiliate of Tui, concerning the business or affairs of the Borrower (other than as required by law in connection with any enforcement of security or remedies hereunder or under the Loan Documents). The Borrower agrees that it will advise the Lender of any action taken by or on behalf of the Borrower, directly or indirectly, to encourage, initiate or engage in

discussions or negotiations with, or provide any information to Tui, or any Affiliate of Tui, concerning the business or affairs of the Borrower other than in the ordinary course of business.”

Credit Agreement at section 2.10, Nensi Affidavit, Exhibit C

41. Until March, 2010, Sunwing was in close negotiations with Skyservice regarding, among other things, the proposed orderly termination of Sunwing’s arrangements with Skyservice under the Commercial Agreement and otherwise. However, it is clear that Sunwing was shut out of any discussions with Skyservice that would have permitted it to become aware of Skyservice’s financial circumstances and make arrangements accordingly.

Williams Affidavit at paras. 29-36

42. As a result of inquiries of the Receiver, it has been disclosed that the creditor with the largest claim in the receivership is Thomas Cook, with a claim in excess of \$42 million. Two other affiliates of Thomas Cook have asserted additional claims in excess of \$3.6 million. The next largest claim has been asserted by Sunwing, which, at approximately \$21 million, is less than half the total amount of the Thomas Cook claims.

Receiver’s Answers to Written Questions, question 4

PART III -ISSUES

43. This motion raises the following 2 issues;

- i) As at the date of the receivership was Skyservice holding \$2,329,473 in an express or implied trust for Sunwing?
- ii) Irrespective of the answer to (i), should the court impose a constructive trust in respect of any or all of the \$3,513,450.08 received by Skyservice from Sunwing in respect of flights that were never provided?

PART IV -ARGUMENT

A. Express or Implied Trust

44. It is submitted that in segregating on March 29 the \$2,329,473 received from Sunwing for future flights, Skyservice effectively created a trust over these assets for the benefit of Sunwing. This trust arose not by virtue of any terms in the commercial agreements between the parties but rather as a result of Skyservice's actions on and after March 29.

45. The existence of an express or implied trust is predicated upon the presence of the "three certainties": certainty of subject-matter, certainty of object and certainty of intention. All three certainties are present in respect of the segregated \$2,329,473.

Donovan Waters, *Waters' Law of Trusts in Canada*, 3rd ed., (Toronto: Thomson Carswell, 2005) at 132

46. There is no uncertainty as to the identity of the trust property. Skyservice identified the \$2,329,473 paid by Sunwing in cash on account of Invoice 5146 and set it aside. Skyservice held these specific funds apart after their identification and segregation on March 29, 2010 and the Receiver continues to hold them in a segregated account.

47. There is similarly no uncertainty as to the intended object or beneficiary of the segregated funds. The funds were funds received from Sunwing for undelivered flights and accordingly were segregated "because they related solely to future flights and should therefore have been refundable".

Tenth Report at para 93

48. Where the parties may be at odds is whether there existed in respect of the segregated \$2,329,473 the requisite intention to create a trust.

49. When looking for the intention of a putative settlor, there is no need for any technical words or expressions in a trust document or oral communication. Certainty of intention can be inferred from the conduct of a party and the circumstances surrounding a transaction.

Waters, supra . at 132-134

Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General), 1998 CarswellAlta 771 at para. 43 (Alta. Q.B.)

McEachren v. Royal Bank, 1990 CarswellAlta 234 at para. 104 (Alta. Q.B.)

Randall v. Nicklin, 1984 CarswellNB 216 at paras. 23-24 (N.B.C.A.)

50. On March 29, 2010, on the eve of its impending receivership, Skyservice identified and segregated a payment it received from Sunwing which related entirely to future flights which Skyservice knew it would not provide. Skyservice transferred these funds into a separate bank account which was not previously used to store payments on account of flights.

51. These actions can only be explained as evidencing Skyservice's intention to hold these funds for the benefit of Sunwing. The explanations given for the segregation included that they were "isolated for tracking", "to ensure that they were protected from misuse and misappropriation" and because they "related solely to future flying" and therefore were considered to be "refundable" to Sunwing.

Tenth Report at para 93

Receiver's Answers to Written Questions, question 10

52. As set out above, Skyservice made several large payments in the following days, but did not use any of the segregated funds for these payments or any other expenses. Skyservice was clearly treating these funds separately from its general operating funds and had no intention to deal with them in any way other than by returning them to Sunwing.

53. By its conduct on and after March 29, Skyservice clearly exhibited the requisite intention to create a trust; by its conduct it effectively declared itself to be a trustee holding the segregated \$2,329,473 for the benefit of Sunwing.

54. All three requisite elements of a trust are thus evident with respect to the segregated \$2,329,473. A trust therefore exists with respect to this amount and such funds must be paid over to Sunwing.

B. Constructive Trust – Payments For Flights That Were Not Provided

55. Whether or not the court finds an express or implied trust in respect of the segregated \$2,329,473, it is submitted that Skyservice would be unjustly enriched if it were permitted to retain the \$3,513,450.08 it collected from Sunwing in respect of flights that it did not at the time intend to provide and did not in fact provide. In these circumstances it is submitted that the \$3,513,450.08 is subject to a constructive trust in favour of Sunwing.

56. The remedial constructive trust is imposed without reference to intention to create a trust, and is a broad and flexible equitable tool used to determine beneficial entitlement to property.

Kerr v. Baranow, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 50

57. A remedial constructive trust is an appropriate remedy to prevent unjust enrichment.

Ibid., at para. 31

58. At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain. Its requirements are three-fold: an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment.

Ibid., at paras 3, 31-32

Becker v. Pettkus, [1980] 2 S.C.R. 834 at para. 38

Garland v. Consumers' Gas Co., 2004 S.C.C. 25 at para 30

59. Courts consistently take a straightforward economic approach to the first two elements of the test for unjust enrichment, with little debate as to enrichment and corresponding deprivation. It is not disputed that Sunwing paid \$3,513,450.08 to Skyservice on account of charter flights scheduled to be provided by Skyservice from March 31 to April 9, 2010, none of which were provided. If the estate is permitted to retain such funds, Skyservice, and consequently its estate, will be enriched by the payments made by Sunwing. It is also evident that Sunwing was correspondingly deprived of the same amount.

Kerr v. Baranow, *supra*, at para. 37

60. In respect of the third element of an unjust enrichment claim, the Supreme Court of Canada has written:

The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case.

Ibid., at para. 40

61. There can be no juristic reason for Skyservice to retain the monies it received from Sunwing in these circumstances. The evidence shows that Skyservice sought and received the monies in question under the pretext that flights would be provided between March 31 and April 9 when it was apparent that this would not be the case. As noted above :

i) Skyservice knew in February, 2010 that Thomas Cook, its only other major customer and a secured creditor, had cancelled all flights after March 30, 2010, the same date that Skyservice's secured debt to Thomas Cook came due. Skyservice therefore knew that Thomas Cook was planning as early as February for the end of Skyservice's business after March 30, 2010 and that Thomas Cook was taking steps to protect itself from this eventuality. Skyservice must, therefore, have foreseen a cessation of its business after March 30.

ii) Thomas Cook had started preparing for a receivership application as early as March 9, 2010. By at least March 25 (before the payment of \$2,329,473 was accepted from Sunwing on March 26) Skyservice was itself preparing for this event. It had, in anticipation of the pending receivership, forwarded \$7.4 million to its counsel to be held in trust for certain amounts owing to employees, under the Manitoba *Workers Compensation Act*, and amounts owing in respect of an Air Travellers Security Charge. Approximately \$6.3 million was paid out of these funds prior to March 31, 2010. This conduct

evidences Skyservice's knowledge of the pending receivership and of the fact that it would not be providing the services for which it was accepting monies.

Second Report of the Receiver dated June 10, 2010 at paras. 13-14

62. Skyservice continued to invoice and accept pre-payments from Sunwing through to the very eve of the receivership, knowing, at least by the time the last payment was received from Sunwing, that its contractual obligations would not be honoured. Skyservice would have known that Sunwing would suffer considerable economic harm and logistical difficulty upon the cessation of Skyservice's operations. Skyservice would also reasonably have known that collecting pre-payments on the eve of its receivership for flights that would not be provided would give rise to a windfall to its creditors.

63. Sunwing had no choice but to pre-pay Skyservice for flights, as this was mandated by the federal legislation. In such context, Sunwing was not voluntarily a creditor of Skyservice.

Ellingson, Re, 2000 BCCA 458, 2000 CarswellBC 1684 at para. 32

64. As such, the contractual relationship between Skyservice and Sunwing does not provide a juristic reason in this case for the unjust enrichment of Skyservice and consequently the creditors of its estate.

Brown & Collett Ltd., Re, 1996 CarswellOnt 619 (Court of Justice (Gen. Div., Comm. List)), at para. 67

65. Where, as here, Skyservice's enrichment (i.e. its receipt and retention of the monies without either the actual or intended delivery of services) was not authorized by contract, statute, or any other common law or equitable obligation, the court must consider the legitimate expectations of the parties and moral and policy based arguments about whether the particular enrichment is unjust.

Kerr v. Baranow, supra, at paras. 43-44

66. Furthermore, as noted by Justice Winkler (as he then was) in *Re Brown & Collett*,

Principles of unjust enrichment may properly be considered in a commercial context, with the aim of promoting sound commercial conscience and honest dealing between parties. In

order to determine whether or not there exists a valid juristic reason, it is incumbent upon the court to ascertain whether there is any legal obligation, contractual or otherwise, which will justify an enrichment, keeping in mind at all times the legitimate expectations of the parties. In a commercial setting, the court must remain mindful of the goal of promoting honest dealing and sound commercial conscience.

Brown & Collett Ltd., Re, supra, at para. 57

67. It is self-evident that Sunwing would reasonably and legitimately have expected that Skyservice would not accept and retain payment for flights it did not plan to provide. Moreover Skyservice's conduct in seeking, accepting and retaining payment for services it did not provide and did not plan to provide is inconsistent with sound commercial conscience and honest dealings between parties and cannot be sanctioned by accepted standards of morality or public policy.

68. It is accordingly submitted that Skyservice was unjustly enriched by its receipt and retention of the \$3,513,450.08 paid in respect of undelivered services and that a constructive trust in favour of Sunwing should be judicially imposed over Skyservice's assets to that extent.

69. Courts have imposed constructive trusts as a remedy in circumstances where one party to a proposed transaction has purported to take the benefit of the transaction without providing consideration in return.

70. In *Re Ellingsen*, for example, a vendor gave possession and transferred ownership registration of a truck to a purchaser without receiving payment. When the purchaser subsequently went bankrupt, the vendor sought return of the truck. The British Columbia Court of Appeal, despite finding that the vendor acted imprudently, held that the truck was subject to a constructive trust in favour of the vendor even though the effect was to diminish the assets available to satisfy other creditors of the bankrupt purchaser. In the result, the Court accepted the vendor's argument that the purchaser's creditors would unfairly enjoy a windfall if the truck formed part of the assets available to them.

Ellingson, Re, supra, at paras. 4, 22, 28

71. Sunwing's position as an involuntary creditor of Skyservice is similar to that of the vendor in *Re Ellingsen*. If the unjust enrichment is not remedied, the result is a windfall to creditors.

72. The fact of the intervening insolvency and receivership of Skyservice does not justify the enrichment at the expense of Sunwing. A constructive trust, if appropriately established, may have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of the debtor. The particular circumstances of this case as described above demonstrate that Sunwing does not stand on the same footing as the general creditors of the estate.

Ellingson, Re, supra, at paras. 36-37

73. Courts have imposed constructive trusts over the assets of an insolvent party to prevent a windfall to other creditors where the insolvent party's estate would otherwise be unjustly enriched at the expense of a particular party. That is this case. The fact of the receivership does not alter or otherwise justify the unjust nature of the enrichment. This is particularly so where the largest claimant in the pool of creditors, who stands to benefit the most from the windfall, is Thomas Cook, the same party that was intimately aware of Skyservice's impending end, and was uniquely in a position to protect itself from the loss of flights after March 30, 2010.

Credifinance Securities Ltd., Re, 2011 ONCA 160, 2011 CarswellOnt 1218

Ascent Ltd., Re, 2006 CarswellOnt 116 (Ont. S.C.J. Reg.)

General Motors Corp. v. Peco Inc., 2006 CarswellOnt 987 (S.C.J.)

74. This is not a case where Skyservice was prevented from delivering flights that it expected to deliver, as a result of some unknown and unforeseen event or precipitous creditor action. Skyservice knew in February that Thomas Cook had cancelled all flights after the end of March. It knew that Thomas Cook had protected itself against the cessation of business after the maturity of its loan. It knew that Thomas Cook was preparing for a receivership, which was undertaken with the cooperation of Skyservice. By the time the last payment was made by Sunwing, Skyservice was taking steps to protect creditors and plan for a stoppage.

With all of this knowledge, rather than refusing to accept the payment from Sunwing and cancel its flights, Skyservice accepted the money and set it aside.

75. In this case if an implied trust is not found to exist then as a result of the insolvency of Skyservice, absent the imposition of a constructive trust, Sunwing will have no effective remedy for its unjust enrichment claim and other creditors of Skyservice will reap a windfall at Sunwing's expense. Accordingly it is submitted that the court should find not only that Skyservice was unjustly enriched by its receipt and retention of \$3,513,450.08 in respect of flights it did not provide and did not intend to provide, but also that the imposition of a constructive trust in respect of such sum (or at a minimum over the \$2,329,473 accepted on March 26 and segregated on March 29) is the appropriate remedy in the circumstances of this case.

PART V -RELIEF SOUGHT

76. Sunwing respectfully requests an order declaring that the amounts claimed in the Sunwing Trust Claim are subject to a proprietary or trust interest and requiring the Receiver to pay over to Sunwing the funds subject to such trusts. Sunwing further requests its costs of this motion on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of February, 2012.


Steven J. Weisz/Katherine McEachern

Lawyers for Sunwing Tours Inc.

SCHEDULE "A" - LIST OF AUTHORITIES

1. Donovan Waters, *Waters' Law of Trusts in Canada*, 3rd ed., (Toronto: Thomson Carswell, 2005)
2. *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)*, 1998 CarswellAlta 771 (Alta. Q.B.)
3. *McEachren v. Royal Bank*, 1990 CarswellAlta 234 (Alta. Q.B.)
4. *Randall v. Nicklin*, 1984 CarswellNB 216 (N.B.C.A.)
5. *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269
6. *Becker v. Pettkus*, [1980] 2 S.C.R. 834
7. *Garland v. Consumers' Gas Co.*, 2004 S.C.C. 25
8. *Ellingson, Re*, 2000 BCCA 458, 2000 CarswellBC 1684
9. *Brown & Collett Ltd., Re*, 1996 CarswellOnt 619 (Court of Justice (Gen. Div., Comm. List))
10. *Credifinance Securities Ltd., Re*, 2011 ONCA 160, 2011 CarswellOnt 1218
11. *Ascent Ltd., Re*, 2006 CarswellOnt 116 (Ont. S.C.J. Reg.)
12. *General Motors Corp. v. Peco Inc.*, 2006 CarswellOnt 987 (S.C.J.)

SCHEDULE "B" – LEGISLATIVE PROVISIONS

Air Transportation Regulations, S.O.R./88-58

INTERPRETATION

2. In these Regulations and Part II of the Act, ...

"air carrier" means any person who operates a domestic service or an international service; ...

"inclusive tour charter" or "ITC" means a passenger flight operated according to the conditions of a contract entered into between an air carrier and one or more tour operators that requires the tour operator or tour operators to charter the entire passenger seating capacity of an aircraft for resale by them to the public at an inclusive tour price per seat; ...

"tour operator" means a charterer with whom an air carrier has contracted to charter an aircraft in whole or in part for the purpose of operating an inclusive tour;

...

Division V

Inclusive Tour Charters

...

43. (3) Every contract respecting an ITC originating in Canada is subject to the following conditions:

(a) the tour operator agrees to pay to the air carrier, at least seven days before the commencement of the tour flight, the full contract price for air transportation in accordance with the tariff of the air carrier that is on file with the Agency and in

(b) subject to paragraph (c), the tour operator agrees to sell any inclusive tour in respect of participants therein who are two years of age or older on the day the tour commences at not less than the inclusive tour price, which price shall not be less than the sum of the following:

(i) a price per seat obtained by multiplying the great-circle distance computed for the charter air transportation of each ITC participant by the ITC tariff rate per seat mile of the air carrier applicable at the time of travel and in effect on the date the charter contract is signed, and

(ii) an amount equal to the product of \$16 and the number of nights during which accommodation is made available pursuant to subparagraph (d)(ii), except that no such amount

(A) shall be less than \$60, or

- (B) for tours of more than 10 nights, need be more than \$160;
- (c) the tour operator agrees to sell any inclusive tour in respect of participants therein who are two years of age or older but less than 12 years of age on the day of commencement of the tour, and are to share accommodation with a participant in the same ITC paying an inclusive tour price established in accordance with paragraph (b), at not less than the inclusive tour price, which price shall not be less than the sum of the following:
 - (i) a price per seat obtained by multiplying the great-circle distance computed for the charter air transportation of each ITC participant by the ITC tariff rate per seat mile of the air carrier applicable at the time of travel and in effect on the date the charter contract is signed, and
 - (ii) an amount equal to the product of \$8 and the number of nights during which accommodation is made available pursuant to subparagraph (d)(ii), except that no such amount
 - (A) shall be less than \$30, or
 - (B) for tours of more than 10 nights, need be more than \$80;
- (d) the tour operator agrees to provide to all tour participants, against payment of the applicable inclusive tour price,
 - (i) transportation,
 - (ii) except at the point of origin, accommodation forthwith on arrival and on a continuing basis until check-out prior to departure at all points in the tour itinerary where a night is spent, including points where
 - (A) the planned time of arrival of the inclusive tour at the airport or land terminal is prior to 06:00 hours local time, or
 - (B) the planned time of departure of the inclusive tour is later than 03:00 hours local time, and
 - (iii) tour features pursuant to the provisions of paragraph (e);
- (e) the tour operator agrees that all tour features included in the inclusive tour price will be
 - (i) where the ITC is to be operated with aircraft having an MCTOW greater than 35,000 pounds (15,900 kg), clearly identified in the application referred to in paragraph (2.1)(b), and

- (ii) made available to all tour participants paying the inclusive tour price, who shall not receive any refund in respect of unused tour features;
- (f) the tour operator agrees to require and ensure that
 - (i) all tour participants observe paragraphs 43.1(c) and (d), and
 - (ii) each participant purchase a complete ITC program established pursuant to paragraph (d) and described in the brochure referred to in paragraph (l) at a price that is not less than the minimum inclusive tour price approved by the Agency for that ITC;
- (g) the tour operator agrees to ensure that, for tours between Canada and a point or points in Bermuda, the Caribbean, the Bahamas, Mexico, Central America or the northern coastal regions of South America including Colombia, Venezuela, Guyana, Surinam, French Guiana and the islands adjacent thereto, the return air transportation of a tour participant from the last stop on the tour itinerary shall not be commenced prior to the 72nd hour after the scheduled hour and day of that participant's departure from the point of origin of the tour;
- (h) the tour operator agrees to ensure that, for tours between Canada and a point or points other than those described in paragraph (g), the return air transportation of a tour participant from the last stop on the tour itinerary shall not be commenced prior to the sixth day after the scheduled date of that participant's departure from the point of origin of the tour;
- (i) the tour operator agrees that no tour participant will be accorded any rebates or other benefits that would have the effect of altering any applicable inclusive tour price set out in the brochure referred to in paragraph (l) describing the tour purchased by that participant;
- (j) in the case of a tour to be performed by a non-Canadian carrier, the tour operator agrees to ensure that the first stop on the itinerary is in the territory of the carrier's country and is of such a duration that ongoing transportation or return transportation from that territory shall not be commenced prior to the fourth day after the scheduled day of departure from the point of origin of the tour, except that the duration of such a first stop need not be longer than 72 hours from the scheduled hour and day of departure of the ITC where that country is within the area specified in paragraph (g);
- (k) where the ITC is to be operated with aircraft having an MCTOW greater than 35,000 pounds (15,900 kg), the tour operator agrees that any public solicitation carried out and all tickets issued by the tour operator or that operator's agents in respect of the ITC before the Agency has issued a program permit therefor shall include notice that the ITC is subject to the approval of the Agency;
- (l) the tour operator agrees to make available to each agent engaged in the sale of the ITC passenger seats and to any member of the public, on request, a tour brochure describing accurately

- (i) all inclusive tour prices offered in the program and the conditions under which those prices apply,
- (ii) the transportation to be provided, including the name of the air carrier and the names of each point of origin and each point of destination,
- (iii) the accommodation, including the names of commercial organizations providing sleeping facilities, and
- (iv) where applicable, tour features, clearly indicating
 - (A) tour features included in the tour program and the inclusive tour price, and
 - (B) tour features available for purchase from the tour operator by tour participants on an individual basis at a specified charge additional to the inclusive tour price; and
- (m) the tour operator agrees to provide the air carrier with the information required by the Agency concerning the tour operator.

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.

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

BETWEEN:

THOMAS COOK CANADA INC.

-and-

SKYSERVICE AIRLINES INC.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

FACTUM OF SUNWING TOURS INC.
(Motion regarding the Sunwing Trust Claim,
returnable February 13, 2012)

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