

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

GRACE AD SHADE, BEAVER VALLEY HOLDINGS LIMITED and PREMIERE SELF
STORAGE INC.

Applicants

and

TDCI BRACEBRIDGE INC., CLIVE FIGUEIRA and CAROL TARBACK

Respondents

APPLICANTS' FACTUM

(For Motion to be heard in Chambers on September 14, 2015 at 9:30)

September 10, 2015

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Trustee in the bankrupt estate of Carol Tarback

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FACTUM OF THE APPLICANTS

PART I – THE NATURE OF THE MOTION

1. The Applicants apply to this Honourable Court for Orders:
 - (a) Declaring that subsection 69.3(1) of the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3 (the “Act”) no longer operates with respect to the Applicants’ motion to enforce the settlement agreement whereby Carol Tarback (“**Tarback**”) agreed to transfer her remaining shares of TDCI to Beaver Valley Holdings Ltd. (“**BVHL**”), and in exchange the Applicants agreed not to enforce the costs award against Tarback, not to pursue further claims against Tarback, and to permit Tarback access to Premiere

Self Storage Inc. ("**Premiere**") lockers owned by BVHL to permit Tarback to remove her personal effects (the "**Motion to Enforce the Settlement**").

- (b) Declaring that the Applicants are granted leave to bring the Motion to Enforce the Settlement against Tarback.

PART II – FACTS

2. The Applicants and Tarback entered into a settlement agreement whereby Tarback agreed to transfer her remaining shares of TDCI to Beaver Valley Holdings Ltd. ("**BVHL**"), and in exchange the Applicants agreed not to enforce the costs award against Tarback, not to pursue further claims against Tarback, and to permit Tarback access to the Premiere Self Storage Inc. ("**Premiere**") lockers owned by BHL to permit Tarback to remove her personal effects (the "**Settlement**").

REFERENCE: Affidavit of Holly LeValliant, sworn September 10, 2015 ("**Affidavit of Holly LeValliant**"), para 5

3. On July 31, 2015, Tarback attended at Premiere and arranged to have her personal effects removed from Premiere's lockers, in accordance with the Settlement.

REFERENCE: Affidavit of Holly LeValliant, para 6

4. Subsequent to Tarback removing her personal effects from the lockers, Tarback refused to transfer TDCI's shares to BVHL pursuant to the Settlement.

REFERENCE: Affidavit of Holly LeValliant, para 7

5. As a result, the Applicants brought the Motion to Enforce the Settlement against Tarback.

REFERENCE: Affidavit of Holly LeValliant, para 8

6. In a letter dated September 3, 2015, Tarback's Trustee advised Mr. Fisher that Tarback had declared bankruptcy, so the Motion to Enforce the Settlement against Tarback was stayed pursuant to subsection 69.3(1) of the *Bankruptcy and Insolvency Act*.

REFERENCE: Affidavit of Holly LeValliant, para 9

7. The Applicants would be materially prejudiced if they were refused leave to proceed with the Motion to Enforce the Settlement against Tarback.

REFERENCE: Affidavit of Holly LeValliant, para 10

8. It would be inequitable, after partial performance of the Settlement, to allow Tarback to avoid her obligations under the Settlement.

9. The shares have no commercial value, but they have administrative value to the Applicants. In an email dated September 4, 2015, Mr. Fisher offered on the Applicants' behalf to purchase the shares for \$500.00, or he would bring the Motion herein to request the court's assistance to lift the stay of proceedings.

REFERENCE: Affidavit of Holly LeValliant, para 11

PART III – LAW

10. Subject to subsection 69.4 of the Act, on the filing of a notice of intention by an insolvent person, no creditor has any remedy against the insolvent person or the

insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

REFERENCE: *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3 subsection 69.3

11. A creditor who is affected by the operation of subsection 69.3(1) of the Act may apply to the court for a declaration that the section no longer operates in respect of that creditor and the court may make such declaration, subject to any qualifications that the court considers proper, if it is satisfied

- (a) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
- (b) that it is equitable on other grounds to make such a declaration.

12. The granting or refusal of leave to proceed is a matter entirely within the discretion of the court.

REFERENCE: *Wychreshuk v. Sellors (Trustee of)* (1988), 71 C.B.R. (N.S.) 37, 55 Man. R. (2d) 89 (Q.B.); affirmed (1989), 73 C.B.R. (N.S.) 267 (Man. C.A.)

13. This Honourable Court has the jurisdiction to determine whether leave should be granted to allow the Applicants to proceed with the Motion to Enforce the Settlement against Tarback. A motion for leave pursuant to subsection 69.3(1) of the Act may be brought before the ordinary court, rather than the bankruptcy court, when combined with a motion properly brought before the ordinary court, as it would be costly to bring two separate motions.

REFERENCE: *Carleton University v. Mercier* (2001), 21 C.B.R. (4th) 227, 2001 CarswellOnt 121 (Ont. S.C.J.)

14. The court may provide relief against the automatic stay of proceedings if the Applicant establishes that there are sound reasons consistent with the scheme of the Act to do so.

REFERENCE: *Re Ma* (2001), 24 C.B.R. (4th) 68, 2001 CarswellOnt 1019

15. Whether Tarback is financially able to defend against the Motion to Enforce the Settlement is not a relevant consideration in determining whether the court should grant leave to lift the stay. The financial ability of the bankrupt to defend the action while in bankruptcy is not a factor to be considered by the court in deciding whether to grant leave.

REFERENCE: *Re Catahan* (2003), 40 C.B.R. (4th) 3, 2003 CarswellOnt 1217 (Ont. S.C.J.)

16. In determining whether the grant leave, the court does not need to determine whether the Motion to Enforce the Settlement would succeed. It is not the function of the court to inquire into the merits of the action sought to be commenced or continued, but only whether the action is the kind of action that should be allowed to proceed.

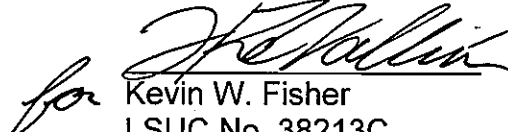
REFERENCE: *Re Cravit* (1984), 54 C.B.R. (N.S.) 214, 47 C.P.C. 31 (Ont. S.C.); *Re Keeling* (1976), 22 C.B.R. (N.S.) 192 (Ont. S.C.); *Re Fransisco* (1995), 32 C.B.R. (3d) 29 (Ont. Gen. Div.)

PART IV – ORDER REQUESTED

17. On the basis of the foregoing, the Applicants respectfully seek an order that the stay of proceedings against Tarback be lifted so that they may proceed with the Motion to Enforce the Settlement.

All of which is respectfully submitted, this 10th day of September, 2015.

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Trustee in the bankrupt estate of Carol Tarback

GRACE AD SHADE et al.

-and- TDCI BRACEBRIDGE INC. et al.

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Court File No. CV-14-10678-00-CL

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RCP-E 4C (July 1, 2007)

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