Re Hamed Abbasian Ardestani
Court File No. 32-2544101

Re Noornie Davood
Court File No. 32-2544106

L. Brusven, counsel for the moving party, Covalon Technologies Inc. and Covalon Technologies Ltd.
W. Jaskiewicz, counsel for the bankrupts, Hamed Abbasian Ardestani and Noornie Davood

REASONS FOR DECISION
(Motion heard March 23, 2021)

The creditors, Covalon Technologies Inc. and Covalon Technologies Ltd. (collectively, "Covalon") bring the within motion for an order pursuant to s. 69.4 of the BIA, lifting the statutory stay of proceedings against the bankrupt spouses, Hamed Abbasian Ardestani ("Abbasian") and Noornie Davood ("Davood") (collectively, the "bankrupts") so that Covalon can continue to prosecute action CV-19-619092-00CL (Toronto) (the "Action").

The motion is necessary because the bankrupts each made assignments in bankruptcy on August 9, 2019 appointing MNP Ltd. as trustee (the "trustee"). The trustee takes no position on the motion.

Upon hearing submissions of the parties, I reserved my decision. I also reserved on the issue of costs of the motion pending release of my decision, with written costs submissions (maximum 3 pages in length) to be filed and uploaded to Caselines within 30 days of the release of these reasons.

For the following reasons, I grant Covalon's motion for lifting the stay of proceedings pursuant to s. 69.4 of the BIA as against both Abbasian and Davood.

Covalon's motion is brought pursuant to s. 69.4 of the BIA which reads as follows:

"A creditor who is affected by the [statutory stay of proceedings] may apply to the court for a declaration that the operation of [the stay] no longer operate in respect of that creditor….and the court may make such a 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 the stay]; or
(b) That it is equitable on other grounds to make such a declaration."

In *Re Ma* (2000), CanLII 22487 (ONSC); affirmed [2001] OJ No. 1189 (ONCA), the Ontario Court of Appeal confirmed that in considering an application for leave to continue an action, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued and that the role was one of ensuring that sound reasons, consistent with the scheme of the BIA exist for relieving against the otherwise automatic stay of proceedings.

At para. 20 in *Global Royalties Limited v. Brook*, 2015 ONSC 6277, Penny J. said:

"It is well established in the authorities that "sound reasons" constituting material prejudice or other equitable grounds includes:

(i) Actions against the bankrupt for a debt for which a discharge would not be a defence (s .178(1));
(ii) Actions involving sufficient complexity to make the summary procedure under s. 135 of the BIA inappropriate; and
(iii) Actions in which the bankrupt is a necessary party for the complete adjudication of matters at issue involving other parties."

And further at para. 24:

"Morawetz J. [as he then was] noted, in connection with the decision in *Re Ma*, that "the moving creditor need only plead specific facts which show that there are sound reasons to lift the stay, such as set of facts which, if believed, would fall within the ambit of s. 178(1)(d)" See *Ieluzzi, Re,* [2021] O.J. No. 2763 (Ont. S.C.J.)."

It is necessary to examine the nature of the allegations in the Action. In the Action, Covalon claims against both bankrupts, among others and among other relief:

1. damages for breach of contract, breach of confidence, breach of fiduciary duty, breach of duty of loyalty, fraud, conspiracy, theft, conversion, misappropriation, unjust enrichment, knowing assistance and knowing receipt;
2. punitive and aggravated damages;
3. a declaration that all money received by the defendants are held pursuant to a constructive trust;
4. an order for tracing any and all funds that have been misappropriated into any funds, real property or personal property and granting constructive trusts in respect thereof;
5. an accounting and disgorgement of revenues and monies obtained or attributable to direct or indirect solicitation of Covalon's clients and distributors, competition with Covalon's business and/or misuse of Covalon's confidential information; and
6. a declaration that any judgment granted is grounded in fraud and constitutes a debt that shall not be released by an order of discharge from bankruptcy.

The context within which the claims in the Action arise are not materially in dispute for the purposes of this motion. Covalon is in the business of manufacturing patent protected medical products for wound care, infection management and surgical procedures. Abbasian was an employee of Covalon and formerly held the position of Vice President, Business Development and senior executive. On April 8, 2019, Abbasian suddenly resigned on two weeks' notice. At the date of departure, it is alleged that Abbasian refused to return his mobile phone and return work related notebooks. Covalon subsequently reviewed Abbasian's electronic devices and learned that Abbasian had for the preceding two years passed Covalon's proprietary information to a third party in furtherance of a plan to build a competing business in Saudi Arabia, Covalon's largest market, contrary to a Confidentiality Agreement. There is no dispute from counsel for Abbasian that Abbasian is a fiduciary on account of his former position in Covalon.

It is alleged that Abbasian and Davood incorporated the defendant Coremed International Ltd. ("Coremed"), of which Davood is a director, in order to misappropriate Covalon's proprietary information and divert Covalon's corporate opportunities.

It is alleged that Abbasian surreptitiously worked on a Feasibility Study on behalf of Cure, a company through which Covalon marketed and sold its products in the Middle East through an exclusive distributorship. It is alleged that Covalon's proprietary information was used to prepare the Feasibility Study and that, when finished, Abbasian sent the final copy to Davood.

It is alleged by Covalon that all of the defendants conspired to and did misappropriate Covalon's proprietary information and business opportunites. It is specifically alleged that Davood assisted in Abbasian's scheme as she was the founding director of Coremed, was intimately involved in Abbasian's plan to misappropriate Covalon's proprietary information and divert Covalon business. Further, Covalon alleges (and it is not disputed by counsel for Davood) that Davood received payment of $25,000 USD into her personal bank account from Cure's CEO as payment for Abbasian's theft of Covalon's proprietary information used for the Feasibility Study. Further specific allegations against Davood are found at paras. 41-43 of the amended statement of claim and allege knowing assistance, unjust enrichment and knowing receipt respecting the misappropriated property and payment therefor.

It is in this context that I am required to determine if Covalon is "materially prejudiced" and if there are "sound reasons consistent with the scheme of the BIA" to lift the statutory stay of proceedings. In my view, applying the principles noted above, I conclude that Covalon is materially prejudiced by the operation of the statutory stay of proceedings and, further, I conclude there are sound reasons to permit the Action to continue. I am therefore prepared to grant Covalon's motion.

As against Abbasian, it is my view that the allegations made against Abbasian are, if proven, of the nature that would fall within s. 178(1)(d) or (e) of the BIA being a debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary duty or a debt or liability resulting from obtaining property by false pretences or fraudulent misrepresentation on the basis of *Global Royalties* and *Ieluzzi, supra.*

As against Davood, there is some dispute whether she obtained property by false pretences within the meaning of s. 178(1)(e) of the BIA. In my view, it is not necessary to determine the applicability of that provision (and perhaps that issue is best determined on a full record available at the trial of the Action) because I conclude that Davood is a necessary party to the Action. She is a founding director of Coremed, she received $25,000 USD from Cure and she received the Feasibility Study from Abbasian. Covalon seeks tracing remedies against her. Covalon alleges that Davood was intimately involved in the misconduct giving rise to the Action. Her presence as a party to the Action is necessary to allow for a complete adjudication of the case. In my view, there cannot be a complete adjudication of the issues in the Action without Davood as the principal of Coremed as the alleged recipient of the alleged misused proprietary information and as the alleged conduit through which the alleged defalcations were effected.

Furthermore, in my view, and it is settled law on this point, that rights of examination of non parties under the Rules of Civil Procedure is not a satisfactory substitute. Covalon is entitled to pursue trust and tracing remedies against Davood – and have such determinations bind her - if it is learned that she has such monies or assets obtained as a result of the alleged misuse of Covalon's proprietary information or otherwise passed on Covalon's proprietary information to others unknown to Covalon.

In respect of both Abbasian and Davood, it is clear that the allegations in the Action are sufficiently complex such that the summary procedures under s. 135 of the BIA are inappropriate.

I comment on the position of the bankrupts that Covalon is not a creditor of Abbasian and/or Davood. I disagree. The bankrupts are indebted to Covalon in respect of a $175,000 claim, which has been proven, for a costs award granted in the Action. As well, Covalon is perhaps a contingent creditor for a greater amount – it is appropriate to lift the stay of proceedings to allow the Action to proceed to permit Covalon to establish its contingent claim. In my view, Covalon is in the position of not being able to prove its contingent claim because of the nature of the allegations in the Action and that many of the matters are within the bankrupts' knowledge. In my view, it is "equitable on other grounds" – i.e. allow Covalon to quantify its claim, if it can, that satisfies me that it is equitable to allow the Action to proceed against both bankrupts. Otherwise, Covalon may be precluded from establishing its full claim.

I also wish to address the submission of counsel for Abbasian wherein it is said that Covalon suffered no damages as a result of the Abbasian's misappropriation of Covalon's proprietary information. In my view, this issue is more appropriately determined upon a full and proper record, as opposed to on a motion for interlocutory relief. In any event, in my view, Covalon is entitled to trace through the misappropriation of its proprietary information, noting that there appear to be non bankrupt defendants against whom the Action is permitted to proceed.

As well, Covalon clearly seeks declaratory relief that the debt survives bankruptcy. In my view, the costs order in the Action might arguably survive bankruptcy if the underlying facts are established such that the costs award might also survive bankruptcy.

Declaratory Relief Sought

Upon the hearing of the motion, Covalon sought a declaration that the bankrupts are not released from the debt in the Action. This declaratory relief was not sought in the motion and is not granted on that basis alone. Further, it would appear to me that the declaratory relief is properly granted either in the Action on a full record or upon further motion following judgment, if granted and so advised.

Orders according.

Costs reserved. Written costs submissions (maximum 3 pages) may be filed and uploaded to Caselines within 30 days of the date of release of these reasons.

Master M. Jean Digitally signed by Master M. Jean

Master M. Jean
June 23, 2021