Federal Court  Cour fédérale

Date: 20170302

Docket: T-1019-13

Citation: 2017 FC 257

Vancouver, British Columbia, March 2, 2017

PRESENT: THE CHIEF JUSTICE

BETWEEN:

ASICS CORPORATION

Plaintiff

and

9153-2267 QUÉBEC INC.

Defendant

9279-1292 QUEBEC INC.

Third Party Opponent

ORDER AND REASONS

I. Introduction

[1] In this Motion, the corporate Third Party [9279] seeks various types of relief in relation to the execution of a Writ of Seizure and Sale [the Writ] that was issued by this Court. Among

other things, 9279 seeks to have the execution of the Writ set aside and nullified, and to have itself declared as the sole owner of the goods that were seized.

[2] The Plaintiff opposes this Motion on the basis that 9279 is being used by Joseph Nassar and Jean-Pierre Nassar [the Two Individuals] for the improper purpose of thwarting a judgment [the Default Judgment] issued by this Court against the Defendant [9153], after it was found to have infringed the Plaintiff's rights in certain trademarks, contrary to the *Trade-marks Act*, RSC 1985, c T-13.

[3] For the reasons set forth below, 9279's Motion shall be dismissed and 9279's corporate veil will be lifted to permit the Plaintiff to execute the Default Judgment against 9279.

II. Background

[4] In December 2013, this Court issued the Default Judgment against 9153, carrying on business as "jbloom", on an *ex parte* motion brought by the Plaintiff.

[5] According to information on its website, jbloom is a retailer of shoes and handbags in Montreal, Quebec. At the time the Default Judgment was issued, it had two locations, a "flagship" store at 1180 Ste-Catherine Street West, and another store at 1221 Mont-Royal Avenue East.

[6] Among other things, the Default Judgment stated that 9153 had infringed the Plaintiff's rights in certain trademarks, and it enjoined 9153, its officers, directors, shareholders, agents,

servants, employees, successors, assigns and those in privity with or controlled by the Defendant directly or indirectly from using or infringing the trademarks in question. The Default Judgment also required the Defendant to deliver up to the Plaintiff or destroy, within 30 days, all materials in its possession or under its control, the use of which would offend the injunction. In addition, the Default Judgment awarded the Plaintiff $43,500 in damages, plus applicable HST and interest, for past infringement, together with costs of $6,000, payable forthwith.

[7] On August 10, 2016, this Court issued the Writ, which was then executed at the two locations mentioned above, on August 11, 2016, and August 12, 2016, respectively. Those locations were formerly used by 9153 to sell its products, and are now used by 9279 to sell similar products.

[8] A few weeks later, on September 7, 2016, 9279 filed this Motion.

[9] Upon learning of the existence of 9279, the Plaintiff filed a separate motion dated September 14, 2016 for an order [the Show Cause Order] requiring 9153, the Two Individuals and 9279 [collectively, the Alleged Contemnors] to show cause why they should not be held in contempt for breaching the Default Order. That motion was granted on September 19, 2016, when this Court issued the Show Cause Order. At that time, the Court also adjourned *sine die* the hearing of this Motion with respect to the execution of the Writ, which had been scheduled to be heard on September 27, 2016.

[10] The hearing on the Plaintiff's show cause motion was held on November 22, 2016. At that time, the Plaintiff consented to a request by counsel to the Alleged Contemnors to bifurcate the hearing, in order to permit the Court to make a determination with respect to the allegations of contempt against 9153 and the Two Individuals, prior to dealing with the allegations against 9279. It was ultimately decided to deal with the latter allegations in a separate hearing that was scheduled to take place on January 11, 2017, the same day as the hearing of the present Motion.

[11] However, on January 9, 2017, a few days after I issued an Order and Reasons explaining why 9153 and the Two Individuals had shown cause why they should not be held in contempt of court for having breached the Default Judgment (*ASICS Corporation v 9153-2267 Québec Inc*, 2017 FC 5 [*ASICS*]), the Plaintiff withdrew its request for a contempt order against 9279. As a result, the hearing on January 11, 2017 [the Hearing] was confined to this Motion in respect of the Writ.

III. Preliminary Issue

[12] At the outset of the Hearing, the Plaintiff objected to 9279's attempt to serve and file responses to an undertaking that counsel to 9279 provided at the cross-examination of Mr. Joseph Nassar on the affidavit [the Affidavit] that was sworn by him and filed in support of this Motion opposing the Writ. That objection was based on several grounds, including the fact that those responses: (i) had been filed the day before the hearing, (ii) were voluminous (close to 100 pages), and (iii) in some cases, were in French. In addition, the Plaintiff had not had any opportunity to get them translated so as to be able to understand them, and the Plaintiff did not have any opportunity to re-examine Mr. Nassar in respect of those documents.

[13] The Plaintiff explained that it did not request an undertaking to produce the documents in question. Rather, when Mr. Nassar appeared to be cross-examined on September 22, 2016 without the documents identified in the Direction to Attend dated September 13, 2016, counsel to 9279 stated that he would "be willing to take an undertaking to go over this document and forward to you everything that we are in possession of within the next 24 to 48 hours" [the Undertaking]. The Plaintiff underscored that it did not consent to anything other than being served with those documents within 48 hours. Given that this did not occur, the Plaintiff requested that I (i) refuse to allow those documents to be filed, and (ii) draw an adverse inference in respect of their contents.

[14] 9279 responded that it did not produce the documents in question because it learned on September 22, 2016, upon being served with the Show Cause Order, that the Court had also adjourned this Motion *sine die* "pending the resolution of the contempt hearing". It maintained that the contempt hearing was not ultimately "resolved" until after I found in favour of 9153 and the Two Individuals, and after the Plaintiff then withdrew its request for a contempt order against 9279, on January 9, 2017, two days before the Hearing. Counsel to 9279 further maintained that, until the ultimate resolution of the contempt hearing, the adjournment of this Motion had the effect of staying any and all steps that had previously been contemplated in respect of the Motion. He added that, until the resolution of the contempt hearing, he should not have been required to file any materials that could breach his clients' rights against self-incrimination.

[15] I disagree.

[16] To begin, 9279's position that Prothonotary Milczynski's adjournment of this Motion had the effect of staying any and all steps that had previously been contemplated in respect of the Motion, was raised too late, because it was not mentioned by 9279 until the Hearing.

[17] In any event, at a special sitting by teleconference held on December 21, 2016, a schedule for the hearing and the filing of materials in respect of this Motion was set and confirmed in an oral direction that I issued later that day. At that time, it was agreed that the Plaintiff would file its motion record by January 6, 2017. In addition, counsel to 9279 stated that he did not intend to file anything else in respect of the Motion. As of that date, it should have been abundantly clear to all concerned that the adjournment of this Motion, which Prothonotary Milczynski pronounced in the Show Cause Order, had been lifted.

[18] In addition, after I informed the parties that I had concluded that 9153 and the Two Individuals had shown cause why they should not be held in contempt of court, I made it very clear that the transcript of Mr. Nassar's cross-examination would be admissible at the Hearing, but not at the hearing of the show cause motion in respect of 9279. Accordingly, there was no longer any scope for anyone's right to protection against self-incrimination to be violated. This is because I had already conveyed my conclusion in respect of the show cause motion, as it related to the Two Individuals, and I had made it clear that the transcript of the cross-examination of Mr. Nassar, together with the exhibits thereto, would not be admissible at the hearing of the show cause motion in respect of 9279. Implicit in this was that any documentation produced in connection with the Undertaking also would not be admissible in that hearing (which ultimately did not take place).

[19] I will simply add that it is now settled law that the right to protection against self-incrimination set forth in section 13 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 does not extend to a corporation (*British Columbia Securities Commission v Branch*, [1995] 2 SCR 3, at para 39).

[20] Considering all of the foregoing, it was not reasonable for 9279 to have then waited until the day before the Hearing to file the documents that it had previously undertaken to provide, particularly given that it knew that counsel to 9153 do not speak French, and would therefore not have had an opportunity to understand the documentation that is in that language. 9279 would also have known that filing such documentation at such date would effectively preclude the Plaintiff from re-examining Mr. Nassar on the documentation. For those reasons, I decided not to admit the documentation pertaining to the Undertaking that 9279 attempted to file with the Court the day before the Hearing.

[21] With respect to the adverse inference that the Plaintiff has requested I draw from 9279's failure to produce that documentation within 24 – 48 hours of Mr. Joseph Nassar's cross-examination, I have concluded that this would not be appropriate in the circumstances.

[22] I recognize that the Direction to Attend requested Mr. Nassar to bring those documents to his cross-examination and that this was not done due to an oversight on the part of the "stagiaire" who was working at that time for the law firm representing 9279. I agree with the Plaintiff that

the fact that the stagiaire inadvertently omitted to inform both Mr. Nassar and his counsel of that request did not justify Mr. Nassar's failure to bring those documents along with him, and did not justify counsel's failure to ensure that those documents were produced at the cross-examination, or in any event, sooner than they were in fact produced.

[23] However, I am mindful that counsel to 9279 offered the Undertaking before he became aware that the Court had issued the Show Cause Order. That Order was only served on counsel at the end of Mr. Nassar's cross-examination. I have already commented on the unfairness that this created for 9279 (*ASICS*, above, at para 13). Moreover, the language of the Show Cause Order could well be read as having not simply adjourned the hearing of this Motion pending the resolution of the contempt hearing, but also to have suspended any steps that had previously been contemplated, including the filing of a responding motion record and the honouring of undertakings previously given. In the circumstances, it was not unreasonable for counsel to have failed to produce the documentation in question before the special sitting by teleconference that was held on December 21, 2016, discussed above. Unfortunately, the end of year holidays then intervened. Considering all of these particular circumstances, I will not draw an adverse inference from counsel's failure to produce the documentation in question until the eve of the Hearing.

IV. Assessment of 9279's Motion to Nullify and Set Aside the Execution of the Writ

A. *9279's Alleged Ownership of the Seized Goods*

[24] 9279 seeks to nullify and set aside the seizure that was effected when the Writ was executed, on the basis that it legitimately owns the goods that were seized and it is not a party named in the Writ. It notes that the Writ only directed the seizure of the property of the Defendant, 9153, for the purposes of then realizing from the seizure the damages, plus interest, and costs awarded in the Default Judgment. It maintains that none of the circumstances that would permit this court to lift the corporate veil in order to permit the Plaintiff to enforce the Default Judgment against 9279 have been established.

[25] In support of its position regarding its legitimate ownership of the seized goods, 9279 states the following:

i. 9279 is a distinct legal person, separate from its shareholders, its directors and 9153.

ii. Contrary to the Plaintiff's assertions, 9279 was incorporated before the issuance of the Default Judgment. Specifically, as demonstrated by the corporate documents attached at Exhibits R-1 and R-2 to the Affidavit, 9279 was incorporated on March 19, 2013, approximately nine months before the issuance of the Default Judgment, on December 6, 2013.

iii. The *Procès Verbal "Saisie Exécution" Mobilière* that was completed by the bailiff in respect of both of the retail locations where the seizure was effected, identified 9153, not 9279, as the person whose goods were the subject of the Writ.

iv. The lease for the location at 1221 Mont-Royal Ave. East is between Jean-Pierre Nassar (as sublandlord) and 9279 (as subtenant). It does not mention 9153

whatsoever. The term of that lease is from July 1, 2015 to December 31, 2019. Accordingly, on the date of seizure (August 12, 2016), 9279 was the only legal occupant of the premises. This is confirmed in the Occupation Certificate, issued by the City of Montreal on May 22, 2015, in advance of 9279's occupation of the premises. That document identifies 9279 as the business occupant at 1221 Mont-Royal East, and states that it must be posted on the premises.

v. Similarly, an Offer to Lease in respect of the premises at 1184 Ste-Catherine Street West identifies 9049-5144 Quebec Inc. as the landlord and 9279 as the tenant. The term of that lease is stated to be August 1, 2014 to July 31, 2017, with occupation beginning on March 1, 2014, to permit renovations. And, once again, the Certificate of Occupation, issued on May 8, 2014, identifies 9279 as the sole occupant of the premises.

vi. In addition, examples of electricity bills from Hydro Quebec in respect of the premises at 1221 Avenue Mont-Royal East and 1180 Ste-Catherine Street West, and covering periods that pre-date the dates of seizure at those premises, are addressed to 9279.

vii. Samples of invoices for shoes sourced by 9279 have dates that precede the dates of seizure at the two premises.

viii. Finally, Mr. Nassar, President of 9279, stated at paragraphs 16-21 of the Affidavit filed in this Motion that all of the goods seized were purchased by, and belong to, 9279.

[26] 9279 submits that the foregoing evidence is sufficient to give rise to a presumption that it, and it alone, is the legitimate owner of the seized goods, and that the onus is upon the Plaintiff to meet the strict test for lifting the corporate veil, to permit the Plaintiff to execute the Default Judgment against the seized goods and 9279.

[27] I agree. However, for the reasons set forth below, I have also concluded that the Plaintiff has met the strict test for lifting the corporate veil against 9279 in this proceeding.

B. *Applicable Legal Principles*

[28] It is common ground between the parties that lifting the corporate veil can only be done in exceptional circumstances. In the province of Quebec, those circumstances are limited to where a corporation's distinct legal identity has been, or is being, invoked against a person acting in good faith so as to dissemble fraud, abuse of right or a contravention of a rule of public order (art 317 CCQ; *Gestion André Lévesque inc c Compt'le inc*, 1997 CanLII 10424, at para 15 (Qc CA)).

[29] In this context, "fraud" includes acts of bad faith pursued with an objective of frustrating the exercise of another person's rights or interests, or of escaping the application of the law (*Méthot c Banque fédérale de développement du Canada*, 2006 QCCA 648, at paras 75-80 [*Méthot*]). It also includes acts pursued with an element of subterfuge or camouflage (*Corp d'hébergement du Québec c Gestion VSP (1982) inc*, [2001] JQ no 1834 (QL), at para 40 (Sup Ct) [*Corp d'hébergement du Québec*]), as well as situations where the corporation constitutes a

"sham" or a vehicle to shield wrongdoing or improper conduct by shareholders who are able to treat the corporation as their *alter ego* (*Nevsun Resources Ltd v Delizia Limited*, 2016 FC 393, at paras 44, 50 [*Nevsun*]).

[30] In addition, "abuse of right" includes the exercise of rights in bad faith, with the intent of causing prejudice to another person, as well as the exercise of rights in an excessive or unreasonable manner, including through negligence and carelessness (*Méthot*, above, at paras 82-83).

[31] Finally, "the words contravention of a rule of public order" would appear to be sufficiently broad to capture situations where the failure to lift the corporate veil would yield a result "too flagrantly opposed to justice" (*Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2, at para 12 [*Kosmopoulos*]).

C. *Should 9279's Corporate Veil be Lifted to Permit the Plaintiff to Enforce the Default Judgment against 9279?*

[32] Based on the facts and considerations discussed below, the Plaintiff submits that 9279 is under the complete control of Joseph Nassar and Jean-Pierre Nassar, and was incorporated for the sole purpose of evading the Default Judgment. The Plaintiff therefore submits that 9279's corporate veil should be pierced to allow the Default Judgment to be enforced against 9279.

[33] Given the evidence discussed below, I am satisfied that 9279's corporate veil should be pierced for that purpose. Even though 9279 was incorporated prior to the issuance of the Default Judgment, it did not become operational until well after service of the Default Judgment was effected on Joseph Nassar and jbloom.

(1) *The jbloom Trade Name*

[34] As noted earlier in these reasons, the style of cause of the Default Judgment identifies 9153 as "9153-2267 Québec Inc., doing business as 'jbloom'".

[35] According to Quebec's Registraire des entreprises, 9153 carried on business under the names ENTREPRISE JBLOOM LTD and ENTREPRISE JBLOOM LTÉE between February 2006, the time of its incorporation, and February 2015, when 9153 declared that it was no longer using those names. Notwithstanding that declaration, Joseph Nassar stated on cross-examination that he believes the jbloom name is "still attached" to 9153.

[36] According to another printout from that same source, 9279 does not use any names other than its numbered company name. However, during cross-examination, Joseph Nassar stated that jbloom is one of the trade names used by 9279, and that one or more of its stores carries on business under the jbloom banner, even though 9279 has not obtained a license for that name. It appears that 9279 began to use that name when the operations at the store on Ste-Catherine Street West allegedly were transferred from 9153 to 9279, on August 1, 2014. According to 9279's counsel, 9279 was entitled to begin using the jbloom name as soon as 9153 declared that it was

no longer using it. However, that does not change the fact that 9153 appears to have an ongoing interest in the jbloom name, and in fact used that name at the same time as 9279 between August 1, 2014 and July 1, 2015. In addition, until at least September 13, 2016, 9153's address was identified on jbloom's website as the address of jbloom's corporate head office. I will simply add in passing that 9279 does not appear to have registered the jbloom name, as required by the *Act Respecting the Legal Publicity of Enterprises*, CQLR c P-44.1.

(2) *Corporate Structure and Addresses*

[37] The corporate records of 9153 and 9279 identify Joseph Nassar as the President and Jean-Pierre Nassar as the Vice-President of each of those companies. Those records also identify those Two Individuals as the founders and sole shareholders of both companies, although on cross-examination Joseph Nassar stated that another brother, Gilbert Nassar, was a shareholder of, and equal partner in, 9153 from its incorporation until its liquidation in mid-2014. He also stated that his mother was a partner in, and the secretary of, 9279 at one time. He could not remember when that was or for how long.

[38] The corporate records of 9153 and 9279 also reflect that the head offices of those companies are in the same building, namely, 1414 Rue Chomedey, Montreal, Quebec. 9153 is located in unit 351 of that building, while 9279 is located in unit 457. On cross-examination, Joseph Nassar stated that he owns both of those units and lives in unit 457, while Jean-Pierre lives in unit 351 together with their mother. Before moving into those units, the address of each

company was 350 Prince-Arthur Street, Montreal, which was rented by Joseph Nassar but inhabited by his mother.

(3) *Website and E-mail Address*

[39] During cross-examination, Joseph Nassar stated that the e-mail address to which the Plaintiff's counsel him sent a communication in 2013 is being transferred from 9153 to 9279. However, he acknowledged that the e-mail address was used by both companies between the time that 9279 began to operate at the 1180 Ste-Catherine Street West location in August 2014, and when it began to operate at the 1221 Mont-Royal Avenue East location in July 2015. He added that the transfer of the e-mail address from 9153 to 9279 may not yet be complete.

[40] With respect to the website, Joseph Nassar initially stated that it had never been owned by 9153 and had always been operated by 9279. He added that there was never any overlap between the types of shoes sold by 9153 and 9279.

[41] However, he later acknowledged that he did not know who had registered the website, that he thought it may have started in 2011 (which was well before 9279 was incorporated), and that he was not sure whether the domain name was ever transferred from 9153 to 9279. He also conceded that the business address indicated on the website is that of 9153, although he stated that this was a mistake. In addition, he stated that online orders were processed at the retail locations. This appears to have included the locations that were operated by 9153 and 9279, respectively, between August 2014 and July 2015.

(4) *The Lease at 1221 Mont-Royal Avenue East*

[42] The "Commercial Sublease" of this retail location states that it is between Jean-Pierre Nassar, in his capacity of sublandlord, and 9279, in its capacity as subtenant. However, it was executed by Joseph Nassar and his mother. Joseph signed on behalf of himself and his brother Jean-Pierre. The words "a jbloom shoes" were written beside Jean-Pierre's name, while the words "a jbloom" were written beside 9279's name. It is not immediately apparent why jbloom was being linked to each of the parties to the purported sublease.

[43] Even more curiously, each of Jean-Pierre, Joseph and their mother were identified as "President", although it is not clear of which entity, particularly since Jean-Pierre appears to be the sublandlord in his personal capacity, and 9279 can only have one president.

[44] There are also other irregularities with respect to this document. For example, the head lease between, on the one hand, Ming-Yen Huang and Lee Chun (as landlords), and on the other hand, Morshed Yassin (as tenant), permitted a sublease to be made but expressly prohibited a subsub lease to be made. A sublease was in fact entered into between Mr. Yassin (as lessor) and both Jean-Pierre Nassar and Gilbert Nassar (as sublessors). However, Jean-Pierre then purported to enter into a sub-sublease with 9279, in contravention of the prohibition against such a transaction in the head-lease, and without any apparent involvement of his brother Gilbert.

[45] In addition, although the sublease was notarized, the sub-sublease (titled "Commercial Sublease") was not notarized.

(5) *Hydro Bills*

[46] 9279 submitted invoices from Hydro Quebec in support of its Motion. Those invoices are for certain weeks between March 2015 and July 2015 and between May 2016 and July 2016. They are all addressed to 9279.

[47] An invoice dated July 28, 2016, in respect of the retail location at 1221 Mont Royal Avenue East, contains a service history that reflects services provided back to July 2015, when 9279 claims to have taken over that location from 9153. However, another invoice dated July 30, 2015 shows a service history that goes back to June 4, 2013. According to Joseph Nassar, this was before 9279 began to operate. The client number on the former invoice is 107 851 064, whereas the client number on the latter invoice is 100 325 811. It is not clear why there was a change in client number, when the name of the client on both invoices is 9279's. However, the dates match up with when 9279 allegedly took over the premises at 1221 Mont Royal Avenue East.

[48] Similarly, an invoice dated May 13, 2016, in respect of services rendered to the premises at 1180 Ste-Catherine Street West, reflects a service history dating back to July 2015, whereas an invoice dated July 16, 2015 in respect of that same address reflects a service history dating back to May 2013. Once again, the client number on the former invoice is 107 851 064, whereas the client number on the latter invoice is 100 325 811. In contrast to the situation with respect to the invoices in respect of the location at 1221 Mont Royal Avenue East, the date of the change in

client numbers does not line up with when Joseph Nassar alleged that 9279 took over operations from 9153 at the 1180 Ste-Catherine Street West location, namely, August 1, 2014.

(6) *9279's Payment of a Judgment against 9153*

[49] As discussed below this Court issued a default judgment against 9153 on behalf of Adidas AG, in August 2015. Notwithstanding that the judgment was issued against 9153, Joseph Nassar stated on cross-examination that 9279 paid the damages awarded in that judgment, after some of 9279's assets were seized pursuant to a Writ of Seizure and Sale.

(7) *Liquidation of 9153*

[50] In his cross-examination, Joseph Nassar explained that the reason jbloom's operations were shifted from 9153 to 9279 is that he and his brother Jean-Pierre could not get along with their brother Gilbert, who at that time was allegedly an equal partner in 9153. Accordingly, Joseph and Jean-Pierre decided to start "a new company" and "liquidate everything" in the old company.

[51] This claim was not supported by any evidence in the motion record or subsequently filed, although Gilbert Nassar's name is on the sublease for the premises at 1221 Mont Royal Avenue, and he was one of the persons to whom the Plaintiff faxed a letter together with a copy of the Default Judgment in May 2014. The Plaintiff concedes that Gilbert was listed as a director of

9153 at that time. However, no records regarding the disposition of any assets were provided to support Joseph Nassar's assertion regarding his brother Gilbert and the alleged liquidation.

[52] Initially, Joseph Nassar explained that all of the assets of 9153 were liquidated, and that 9279 purchased entirely new inventory and other assets. He repeated several times that "everything" was sold, replaced or changed, including the computers, the safes, the shelves, the benches and the security systems of the two stores in question. He maintained that 9279 did not purchase any of the assets of the two stores in question, and that it simply "got an empty store." He stated that Gilbert took some of the assets that were previously in the two stores to a new location, where he started a new company. This included the shelves, benches and counters, but not the inventory, which allegedly was all sold to customers or was given to the Salvation Army. He added that the proceeds of sale were used to pay suppliers, that there were no proceeds left over after that, and that 90 percent of the employees in 9279 are new.

[53] However, when pressed for specifics, he reversed himself with respect to the security surveillance system and the counter at the Ste-Catherine Street West store. He also stated that some of the shelves at the store on Mont-Royal Avenue East had remained from when that store was operated by 9153.

(8) *Timing Considerations*

[54] As noted in part IV.A of these reasons above, 9279 was incorporated on March 19, 2013, approximately nine months before the issuance of the Default Judgment. This was also more

than two months before the date of an e-mail communication that the Plaintiff states may have been its first contact with either jbloom or 9153. It was also approximately three months before the Statement of Claim in this proceeding was served on Joseph Nassar, although he stated during his cross-examination that his communications with counsel to the Plaintiff began in 2012.

[55] In the Affidavit, Joseph Nassar stated that 9279 began its operations in August 2014, at the Ste-Catherine Street West location. This was more than eight months after the issuance of the Default Judgment, and well after that Judgment was served on 9153, in May 2014, although a Certificate of Occupation was issued to 9279 for this location, on May 8, 2014, the day before the Judgment was faxed to the Two Individuals and their brother Gilbert. A FedEx delivery confirmation indicates that the Judgment was delivered to this location on May 12, 2014. A second delivery confirmation was signed for by "J. Nassar" at another location on May 16, 2014.

[56] The Affidavit also states that 9279 did not commence operations at the location situated at 1221 Mont-Royal Avenue East until July 1, 2015. This was approximately six weeks before a default judgment was issued in this Court against 9153 in favour of Adidas AG (*Adidas AG v 9153-2267 Québec Inc et al* (12 August 2015), T-68-15, (FC) [*Adidas*]). According to Recorded Entries of the Court filed by the Plaintiff, the Statement of Claim in that matter, alleging trademark infringement, was filed in January 2015 and served the following month. On March 1, 2016, Prothonotary Morneau considered it appropriate to authorize a seizing bailiff "to use all the necessary strength to proceed to the service of the writ of seizure and sale, to use a locksmith

and to use all the necessary strength to proceed with the execution of the writ" in that matter (*Adidas AG v 9153-2267 Québec Inc et al* (1 March 2016), T-68-15, (FC)).

[57] It is also relevant to note that another Statement of Claim was filed against 9153 in that general time-period. According to Recorded Entries of this Court filed by the Plaintiff, that Statement of Claim was filed in December 2013. Those entries indicate that an affidavit of service was filed on January 20, 2014, confirming service of the Statement of Claim on the Defendant by process server on January 21, 2014. On November 9, 2015, Prothonotary Morneau issued an order rejecting 9279's motion opposing seizure in that matter, after concluding that 9153 and 9279 were in fact the same entity and that the latter's corporate veil ought to be lifted (*Hummel Holdings A/S v 9153-2267 QUÉBEC INC (ENTREPRISE JBLOOOM LTD) D/B/A JBLOOM SHOES* (9 November 2015), T-1988-13, (FC) [*Hummel Holdings*]). Although I do not accept the Plaintiff's submission that Prothonotary Morneau's decision to lift the corporate veil is *res judicata* for the purposes of this Motion, I nevertheless consider it to be relevant to note that that proceeding was ongoing during the period when 9153 was liquidated.

[58] In addition, it is also noteworthy that, on cross-examination, Joseph Nassar suggested that the "old" inventory at the retail store located at 1221 Mont Royal Avenue East was not sold until the change in possession of those premises from 9153 to 9279, on July 1, 2015.

(9) *Credibility of Joseph Nassar*

[59] A review of the transcript of Joseph Nassar's cross-examination by counsel to the Plaintiff reveals numerous inconsistencies, reversals of position and a generally evasive demeanor.

[60] In addition to the problems that I have discussed with respect to the evidence given by Joseph Nassar in respect of jbloom's website and certain assets that were kept by 9279 when jbloom's operations at the locations on Ste-Catherine Street West and Mont Royal Avenue East were allegedly transferred from 9153 to 9279, there are other problems.

[61] For example, he claimed to have no recollection of having received any notification regarding the Statement of Claim in this proceeding, at the time an e-mail was exchanged between counsel in August 2013. However, an affidavit of delivery signed by a bailiff states that the Statement of Claim was served on Joseph Nassar on June 17, 2013. That service was made several weeks after the Plaintiff's counsel sent a letter to "jbloom enterprise" at the Ste-Catherine Street West location and at another location in May 2013. Later in his cross-examination, Joseph Nassar denied again both the fact of having received a copy of the Statement of Claim and the fact that he was at the location at the time the bailiff said the document was delivered to him in person. He also denied ever having received the above-mentioned letters that were sent to jbloom in May 2013.

[62] In addition, Joseph Nassar repeatedly denied ever having received the Default Judgment, notwithstanding that a FedEx Delivery Confirmation indicates that "J. Nassar" signed on May

16, 2014 for the package that the Plaintiff sent to "Joseph/Jean-Pierre/Gilbert Nassar". When asked about this, he suggested that Gilbert may have signed for that package. He did not explain why Gilbert would not have brought the document to his attention, given that he (Joseph) was the President of 9153. When asked about the letter and Default Judgment that were faxed to jbloom on May 9, 2014, he simply replied that jbloom's "fax machine sometimes doesn't work". However, a fax transmittal sheet attached to the affidavit of a clerk at the law firm representing the Plaintiff confirmed that the full 21 pages of the fax were transmitted.

[63] Joseph Nassar also denied selling "Oliver" shoes on jbloom's website in July 2014, notwithstanding the fact that an archived snapshot of that website on July 10, 2014 indicates that three styles of "Oliver" shoes were being sold on that website on that day.

[64] Moreover, after being shown an official record indicating that he is the President of 9279, he corrected his earlier statement that he is the Vice-President of that company. In this regard, he observed that he didn't know that he was "President", that it didn't matter because he and his brother are equal partners, and that therefore it doesn't matter who is President and who is Vice-President.

[65] More generally, it is readily apparent from a review of the transcript of the cross-examination that Mr. Nassar's memory is fairly good in respect of matters that support his version of the facts, yet invariably poor in respect of matters that could be of assistance to the Plaintiff. Examples of the latter include service of the Default Judgment on him, whether in

person or by fax, other attempted communications from the Plaintiff or its representatives, the contents of documents, and whether shoes displayed on jbloom's website were available in 2014 and 2015 from both the store operated by 9279 on Ste-Catherine Street West and the store operated by 9153 on Mont Royal Avenue East.

[66] With all of this in mind, I find that Joseph Nassar is not a credible witness. I therefore have not given much weight to his evidence, except where it was corroborated by other evidence, or amounted to admissions against his interest.

(10) *Summary and Analysis*

[67] I consider that the evidence discussed above is sufficient to displace the initial presumption to which 9279's evidence gave rise in support of the legitimacy of its ownership of the seized assets. Indeed, in my view, the evidence establishes on a balance of probabilities that 9279 is the *alter ego* of its principals, Joseph Nassar and Jean-Pierre Nassar. It also establishes that the jbloom business was transferred from 9153 to 9279 over the course of 2014 and 2015 for the dishonest and improper purpose of evading the Default Judgment, and potentially other judgments, issued against 9153 by this Court (*Corp d'hébergement du Québec*, above; *Nevsun*, above). I am satisfied that such transfer was effected in bad faith and in a manner that masked what was being done, so as to prevent or impair the Plaintiff, and potentially others, from exercising their right to recover monetary awards granted to them in judgments of this Court (*Méthot*, above). Stated differently, I have concluded that 9279, which appears to have been dormant prior to the service of the Default Judgment, was used as a vehicle for wrongdoing,

namely, to avoid the execution of that Judgment. In my view, a failure to lift the corporate veil in these circumstances would yield a result "flagrantly opposed to justice" (*Kosmopolous*, above).

[68] In brief, the evidence establishes that 9153 and 9279 are both under the complete control of Joseph Nassar and Jean-Pierre Nassar. Those individuals are the only owners and officers of the two companies, the head offices of those companies are located in the same building, in condominium units that they respectively inhabit, in one case with their mother, and they appear to make all material decisions with respect to those entities. Both of those condominium units are owned by Joseph Nassar.

[69] The evidence also establishes a comingling of the jbloom trade name, its website and its e-mail address, each of which was used by both 9153 and 9279 between at least August 1, 2014 and July 1, 2015 (*Setanta Sports Canada Ltd v 1053007 Ontario Inc*, 2011 FC 99, at para 16 [*Setanta*]). Indeed, Joseph Nassar conceded that the website and e-mail address may continue to be owned by 9153. The evidence discussed at paragraphs 46-48 above in relation to the Hydro Quebec invoices suggests that there is also some comingling of debts between 9153 and 9279. In addition, the address of the head office of 9153 continued to be held out as the address of the head office of jbloom until at least September 13, 2016, long after jbloom's business had allegedly been completely transferred to 9279.

[70] This overlap between the operations of the two companies was also manifested by 9279's payment of the judgment issued by this Court in favour of Adidas AG, discussed at paragraph 49 above.

[71] There is also evidence that very little regard is paid to who signs what and in which capacity, as between Joseph Nassar, Jean Pierre Nassar, their mother, 9153 and 9279. This is nowhere better demonstrated that with respect to the "Commercial Sublease", discussed at paragraphs 42-45 above. Joseph Nassar also conceded that it doesn't matter who, as between him and Jean-Pierre, has which officer title in which company, as they are both equal owners of the companies.

[72] In addition, I find the timing of the alleged transfer of that business, beginning on August 1, 2014, just months after the service of the Default Judgment upon "J. Nassar", and well after the service of the Statement of Claim in this proceeding, to be indicative of an improper purpose to avoid the execution of the Default Judgment (*Setanta*, above, at para 16).

V. Conclusion

[73] For the reasons set forth above, this Motion is dismissed. The Plaintiff may proceed to realize upon the seized assets for the purposes of executing the Default Judgment.

[74] In its Notice of Motion for the Show Cause Hearing, the Plaintiff requested, among other things, an Order entrusting the goods seized pursuant to the Writ to the possession of a bailiff,

instead of allowing those goods to remain in place. However, during that hearing, the Plaintiff agreed to maintain the *status quo* until I made determinations in respect of the allegations of contempt against 9279, and in respect of 9279's opposition to the Writ. As a result, the seized goods remained in place.

[75] Now that the Plaintiff has withdrawn its request for a contempt order against 9279 and I have made my determination in respect of 9279's opposition to the Writ, I am prepared to grant the Plaintiff's request. I do so because I am satisfied that Joseph Nassar and Jean-Pierre Nassar, who are the controlling minds of 9279, have demonstrated by their past conduct that they have little respect for orders issued by this Court. In my view, entrusting the seized goods to the possession of a bailiff will significantly assist the Plaintiff to achieve the objective of the Writ, namely, to facilitate the enforcement of the Default Judgment.

[76] In its written submissions on this Motion, the Plaintiff requested an Order declaring that 9279 and 9153 are jointly and severally liable for all of each other's debts to the Plaintiff, and for the payment of judgments issued in favour of the Plaintiff. However, apart from the mention that was made of the awards made in favour of third parties in *Adidas*, above, which Joseph Nassar stated has now been paid, and in *Hummel Holdings*, above, no evidence was led with respect to debts to the Plaintiff other than the awards set forth in the Default Judgment. There was also no evidence of other judgments in favour of the Plaintiff.

[77] In these circumstances, I am reluctant to issue an order in the broad terms requested by the Plaintiff. Instead, I will order that 9279 is jointly and severally liable with 9153 in respect of

the awards set forth in the Default Judgment. In the interests of justice, and considering the equities, and to reduce the scope for further litigation in respect of the Default Judgment, I am also prepared to extend this particular order to include Joseph Nassar and Jean-Pierre Nassar (*Méthot*, above, *Corp d'hébergement du Québec*, above; *Fidelity Electronics of Canada Ltd v Fuss*, [1995] OJ No 4319 (QL), at para 3 (CA); *Setanta*, above, at para 17; *Gregorio v Intrans-Corp*, [1994] OJ No 1063 (QL), at para 28 (CA); *Island Getaways Inc v Destinaire Airlines Inc*, [1996] OJ No 4157 (QL), at para 58 (Ct J (Gen Div))).

VI. Costs

[78] Subsequent to the Hearing, the Plaintiff and 9279 each filed bills of costs in respect of the present Motion by 9279 and the Plaintiff's show cause motion. The Plaintiff also filed a bill of costs in respect of its enforcement of the Default Order. I will address each of these separately below.

A. *Motion Opposing Seizure*

[79] The Plaintiff requested costs on a solicitor-client basis, together with punitive and exemplary damages, in respect of this Motion. On the particular facts of this case, I will grant those requests.

[80] Solicitor-client costs "are very rarely granted" and are generally only awarded if a party displays "reprehensible, scandalous, or outrageous conduct" or if such costs are justified by "reasons of public interest" (*Quebec (Attorney General) v Lacombe*, 2010 SCC 38, at para 67;

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, at para 77; *Young v Young*, [1993] 4 SCR 3, at 134).

[81] In addition to being exceptional, solicitor-client costs are generally awarded only in relation to reprehensible, scandalous, or outrageous conduct by one of the parties in connection with the litigation between the parties (*Apotex Inc v Canada (Minister of National Health and Welfare)*, [2000] FCJ No 1919 (QL), at paras 7-8 (FCA)).

[82] In *Microsoft Corp v 9038-3746 Quebec Inc*, 2007 FC 659, at para 16, Justice Harrington defined "reprehensible", "scandalous" and "outrageous" as follows:

> "Reprehensible" behaviour is that deserving of censure or rebuke; blameworthy. "Scandalous" comes from scandal which may describe a person, thing, event or circumstance causing general public outrage or indignation. Among other things, "outrageous" behaviour is deeply shocking, unacceptable, immoral and offensive (see: *Oxford Canadian Dictionary*).

[83] In my view, the bringing of this Motion by 9279, after having been a party to deliberate and improper actions taken by its principals, Joseph Nassar and Jean-Pierre Nassar, to evade the enforcement of the Default Judgment, was outrageous and reprehensible.

[84] Joseph Nassar and Jean-Pierre Nassar were at all relevant times the directing minds of both 9279 and 9153. Together with 9279 and 9153, they deliberately and flagrantly attempted to evade the Plaintiff's enforcement of the Default Judgment by liquidating the assets of 9153 and transferring the jbloom business to 9279, in an attempt to avoid 9153's liability for the damages and costs awards set forth in paragraph 5 of the Default Judgment.

[85] Then, after bringing this Motion, Joseph Nassar, conducted himself during the cross-examination on the Affidavit in a manner which led me to find that much of his testimony was not credible, including with respect to his denial of having been served with the Default Judgment and the Plaintiff's Statement of Claim, as well as with respect to jbloom's website, his initial claim that all of 9153's assets were liquidated and his claim that he didn't know that he was the President of 9279. Those were all matters that were of significant importance to this Motion. His evidence appears to have been governed more by a desire to advance a version of the facts and events that he considered to be in his interest, rather than by a desire to honour his affirmation to tell the truth (*Microsoft*, above, at para 18). The transcript of his cross-examination reveals that his overall attitude with respect to the Default Judgment was dismissive and outrageous (*Luis Vuitton Malletier SA v Yang*, 2007 FC 1179, at paras 58-59).

[86] Accordingly, I consider it appropriate to award the Plaintiff the full amount of its actual costs of $33,317.49, plus disbursements in the amount of $6,129.87, for a total amount of $39,447.36.

[87] I also consider it appropriate to award punitive and exemplary damages in the amount of $20,000. This is because of the serial and cavalier nature of 9153's attempts to evade orders issued by this Court (*Setanta*, above, at para 17). In addition to attempting to evade the enforcement of the Default Order, 9153 and 9279 endeavoured to avoid the default judgment that was issued in *Adidas*, above. In Joseph Nassar's own words, 9279 paid the damages ordered in that judgment only because "we had no choice", given that a Writ of Seizure and Sale had been issued in respect of 9279's assets. 9279 then brought a motion opposing seizure in a third

proceeding, which was rejected after Prothonotary Morneau concluded that 9153 and 9279 were in fact the same entity and that the latter's corporate veil ought to be lifted (*Hummel Holdings*, above).

B. *The Show Cause Motion*

[88] Turning to the show cause motion, I reserved my decision on costs after issuing my decision in respect of the Show Cause Hearing, because that hearing had been bifurcated and my decision only dealt with 9153 and the Two Individuals. I considered it appropriate to await the outcome of the contempt proceeding as it related to 9279, before making a determination on costs (*ASICS*, above, at para 63). However, shortly before the Hearing of the present Motion brought by 9279, the Plaintiff withdrew its request for finding of contempt against 9279. So I will now make my determination with respect to costs on the show cause motion.

[89] Counsel to the Alleged Contemnors requested solicitor-client costs plus punitive damages in respect of the show cause motion that was brought by the Plaintiff.

[90] However, in my view, the particular facts pertaining to that motion do not meet the test, discussed above, for the imposition of solicitor-client costs. In brief, in bringing and conducting that motion, the Plaintiff did not engage in any conduct that was reprehensible, scandalous or outrageous. It brought that motion only after it received 9279's Motion opposing the seizure in execution of the Default Judgment, on the basis that it (9279) was the legitimate owner of the assets seized. Prior to that point in time, the Plaintiff was unaware that 9153's assets had been liquidated and that the jbloom business had essentially been transferred to 9279. The Plaintiff

also had some reliable evidence, based on screen shots of jbloom's website dated May 8, 2014, that suggested that 9153 had deliberately breached the Default Judgment by, among other things, continuing to infringe the Plaintiff's trademarks and by failing to deliver up all materials identified with those trademarks.

[91] However, that evidence predated by a few days the date on which 9153 was served with the Default Judgment. As a result, it was not proven beyond a reasonable doubt that the Alleged Contemnors had willfully breached the Default Judgment. The result may well have been different had the screen shots in question been taken after 9153 had been served with the Default Judgment a few days later. In any event, while the Plaintiff's evidence was not sufficient to prevail on the show cause motion, the Plaintiff did not act in a manner that was reprehensible, scandalous or outrageous in bringing and then conducting the show cause motion.

[92] In my view, the Alleged Contemnors are only entitled to costs calculated in accordance with approximately the mid-point of Column III, of Tariff B to the *Federal Courts Rules*, SOR/98-106. I am prepared to rely on their calculation of $6,208.65 (which includes GST and QST), plus $448.07 for disbursements, for a total of $6,657.72, which appears to me to be entirely appropriate in the circumstances.

[93] The Alleged Contemnors also claimed punitive damages in respect of the show cause motion, because of the manner in which they were informed of, and served with, the Show Cause Order. In brief, they were served at the end of Joseph Nassar's cross-examination on his affidavit. In *ASICS*, above, at para 13, I observed that the manner in which the Plaintiff

proceeded in that regard was highly questionable and profoundly unfair. For this reason, I agreed at the outset of the Show Cause Hearing to grant the Alleged Contemnors' request to exclude the transcript of cross-examination and exhibits in question from both parts of that bifurcated hearing. In my view, that was the appropriate remedy in the circumstances. I do not consider it appropriate to order punitive damages to further emphasize the Court's disapproval of the manner in which counsel to the Plaintiff effected service of the Show Cause Order.

[94] I will simply add that, during the Hearing, I learned that counsel to the Plaintiff had informed Prothonotary Milczynski in writing, at the time he sent her the draft of the Show Cause Order that she requested, that he hoped to serve Mr. Nassar with that Order, the show cause motion record, and other listed materials on the date of Mr. Nassar's cross-examination. This demonstrated that the Plaintiff's counsel believed that the adjournment did not have the effect of staying his cross-examination of Mr. Nassar, which he disclosed would be on September 22, 2016. It does not appear that Prothonotary Milczynski communicated a different understanding of the Show Cause Order to the Plaintiff's counsel. I also note that paragraph 5 of the Show Cause Order contemplated that at least one additional step would be taken by the Plaintiff, namely, service of certain documents. In other words, it was clear from the terms of the Show Cause Order that all steps in relation to the present Motion had not been stayed.

C. *Enforcement of the Default Judgment*

[95] The Plaintiff also requested reimbursement for its costs of enforcing the Default Judgment. When calculated in accordance with Tariff B, those costs are $5,642.09, under both Column III and Column V. The Plaintiff is entitled to those costs. Given that I have already

expressed the Court's disapproval of the manner in which 9153, 9279, Joseph Nassar and Jean-Pierre Nassar conducted themselves with respect to the Default Judgment, I do not consider it to be appropriate to further express the Court's disapproval by ordering solicitor-client costs in respect of this cost item as well.

D. *Settlement Discussions*

[96] Finally, I should note for the record that I am cognizant of the fact that there were settlement discussions between the parties and that, in the context of those discussions, counsel to 9153 alluded to the possibility of bringing a contempt motion concerning the manner in which the Alleged Contemnors were served with the Plaintiff's Show Cause Order, as discussed above. Given the determinations that I have made with respect to costs, I do not consider it appropriate to issue a further cost award in respect of this matter. I also recognize that this possibility was raised in the context of a heated exchange between counsel. However, I will remind counsel that such conduct is improper (*Barreau du Québec c Oberman*, 2016 QCCDBQ 40, at paras 28-34 (CanLII); *Barreau du Québec c Jurju Bala*, 2012 QCCDBQ 21, at paras 36-43 (CanLII)

[97] I also note for the record that I am aware that 9153 or 9279 (it is not clear which) offered to settle the dispute between the parties for a sum of $35,000, "inclusive of capital, interest, expenses, fees and costs". That offer was made on December 1, 2016, after the Plaintiff was successful in obtaining the Default Judgment for damages and costs totalling in excess of $55,000, plus HST and interest, and after it had incurred substantial costs attempting to enforce that judgment. In my view, the sum of $35,000 offered at that time is not such as to warrant any adjustment to the costs that I have awarded the Plaintiff above.

E. *Summary*

[98] For the reasons set forth above, 9279, Joseph Nassar and Jean-Pierre Nassar are jointly and severally liable with 9153 for solicitor-client costs plus disbursements, together with punitive and exemplary damages in respect of this Motion by 9279 opposing the seizure that was effected pursuant to the Writ. These amounts total $39,447.36 + 20,000 = $59,447.36.

[99] In addition, 9279, Joseph Nassar and Jean-Pierre Nassar are also jointly and severally liable with 9153 for the Plaintiff's other costs of enforcement, totalling $5,642.09.

[100] The Plaintiff is liable for the Alleged Contemnors' costs in respect of the show cause motion, totalling $6,657.72. This amount may be set off against the above amounts, such that the Plaintiff is not required to effect a separate and distinct monetary transfer to the Alleged Contemnors.

[101] The Plaintiff's request for a timetable for payment of damages and costs awards in the Default Judgment, together with the cost awards described above will be granted. 9153, 9279, Joseph Nassar or Jean-Pierre Nassar shall pay those awards in their entirety within 30 days of the date of the Order below, unless they furnish proof of impecuniosity on a balance of probabilities within that time. If they fail to pay those awards or furnish proof of impecuniosity by the end of that time period, the Plaintiff may bring a motion requiring them to show cause why they should not be held in contempt of court.

ORDER

THIS COURT ORDERS THAT:

1. 9279's Motion opposing the execution of the Writ and seeking various other types of relief is dismissed.

2. 9279's corporate veil shall be lifted to permit the Plaintiff to execute the Default Judgment against 9279.

3. 9279, Joseph Nassar and Jean-Pierre Nassar shall be jointly and severally liable with 9153 for the awards set forth in the Default Judgment.

4. The goods seized on August 11, 2016 and August 12, 2016 pursuant to the Writ shall be entrusted to the possession of a bailiff, rather than being permitted to continue to remain in their current location.

5. 9153, Joseph Nassar and Jean-Pierre Nassar shall be jointly and severally liable with 9279 for solicitor-client costs plus disbursements ($39,447.36), as well as punitive damages in the amount of $20,000, in respect of 9279's Motion opposing the execution of the Writ, described above.

6. 9279, Joseph Nassar and Jean-Pierre Nassar shall be jointly and severally liable with 9153 for the Plaintiff's other costs of enforcement, totalling $5,642.09.

7. The Plaintiff is liable for the Alleged Contemnors' costs in respect of the show cause motion, totalling $6,657.72. This amount may be set off against one of the

above amounts that is in excess of $6,657.72, such that the Plaintiff is not required to effect a separate and distinct monetary transfer to the Alleged Contemnors.

8. 9153, 9279, Joseph Nassar or Jean-Pierre Nassar shall pay the amounts described in paragraphs 3, 5 and 6 of this Order above in their entirety, less the amount of $6,657.72 described in paragraph 7 above, within 30 days of the date of this Order, unless they furnish proof of impecuniosity on a balance of probabilities within that time. If they fail to pay those awards or furnish proof of impecuniosity by the end of that time period, the Plaintiff may bring a motion requiring them to show cause why they should not be held in contempt of court.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ASICS CORPORATION v 9153-2267 QUÉBEC INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 11, 2017
ORDER AND REASONS:	CRAMPTON C.J.
DATED:	MARCH 2, 2017

APPEARANCES:

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