Federal Court  Cour fédérale

Date: 20170106

Docket: T-1019-13

Citation: 2017 FC 5

Ottawa, Ontario, January 6, 2017

PRESENT: THE CHIEF JUSTICE

BETWEEN:

ASICS CORPORATION

Plaintiff

and

9153-2267 QUÉBEC INC.

Defendant

9279-1292 QUEBEC INC., JOSEPH NASSAR, and JEAN-PIERRE NASSAR

Third Parties in Alleged Breach

ORDER AND REASONS

I. Introduction

[1] In September of 2016, the Defendant [9153], its President (Joseph Nassar), its Vice-president (Jean-Pierre Nassar) and the corporate Third Party [9279] were ordered by this Court to

show cause why they should not be held in contempt of court for breaching a prior order [the Default Judgment] of this Court.

[2] 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. 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.

[3] During the show cause hearing on November 22, 2016 [the First Show Cause Hearing], the Plaintiff consented to a request by counsel to 9153, the two individuals mentioned above [the Two Individuals], and 9279 [collectively, 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 [the Second Show Cause Hearing] which is scheduled to take place on January 11, 2017.

[4] For the reasons set forth below, I have concluded that 9153 and the Two Individuals have shown cause why they should not be held to be in contempt of court for having breached the Default Judgment.

II. Preliminary Issue

[5] On November 17, 2016, the Court received a Motion Record on behalf of 9279 and the Two Individuals requesting an order for the following relief:

i. bifurcation of the show cause hearing, as described at paragraph 3 above;

ii. a separate hearing for 9279's opposition to the execution of a Writ of Seizure and Sale that was effected at two different retail locations in Montreal on August 11, 2016, and August 12, 2016, respectively;

iii. exclusion of an affidavit filed by Mr. Joseph Nassar, dated September 19, 2016 [the Nassar Affidavit], as part of 9279's Motion Record opposing the execution of the Writ of Seizure and Sale; and

iv. exclusion of the transcript of the cross-examination on the affidavit mentioned immediately above, that the Plaintiff conducted on Mr. Nassar on September 22, 2016, as well as the exhibits thereto.

[6] The foregoing Motion was served electronically on the Plaintiff, who opposed the Alleged Contemnors' request to have the Motion heard at the outset of the First Show Cause Hearing, on the basis that the Motion had not been properly served in accordance with the *Federal Courts Rules*, SOR/98–106 [the Rules] or filed with the Court.

[7] Given that the relief sought on the Motion was based on considerations relating to procedural fairness and the constitutional rights of some of the Alleged Contemnors, I decided to accept the Motion for filing and to hear it at the outset of the First Show Cause Hearing.

[8] With respect to the relief requested on the Motion, there is no longer any need for me to address the request for bifurcation described at paragraph 5(i) above, because the show cause hearing was bifurcated with the Plaintiff's consent.

[9] That bifurcation will also address the basis for the request, described at paragraph 5(ii) above, for a separate hearing of 9279's opposition to the execution of the Writ of Seizure and Sale. In this regard, counsel explained at the First Show Cause Hearing, that the Two Individuals were concerned that, if they were called upon to testify on behalf of 9279 in respect of its opposition to the execution to the Writ of Seizure and Sale, they could potentially be compelled on cross-examination to give testimony that would be self-incriminatory, for the purposes of the show-cause motion. Counsel submitted that this would be contrary to Rule 470(2), which states that "[a] person alleged to be in contempt may not be compelled to testify." Given that I have now determined that the Two Individuals are not in contempt of the Default Judgment, they need no longer be concerned about self-incrimination as alleged contemnors.

[10] Before turning to the request to exclude the Nassar Affidavit, I will address the request, described at paragraph 5(iv) above, to exclude the transcript of the testimony that he gave on cross-examination on September 22, 2016, as well as the exhibits thereto.

[11] Mr. Nassar participated in that cross-examination before becoming aware that this Court had ordered him, his brother, 9153 and 9279 to show cause why they should not be held in contempt of court for breaching the Default Judgment. He was also unaware at the time that such order [the Show Cause Order] specifically adjourned *sine die* 9279's motion to nullify the Writ of Seizure and Sale, pending the resolution of the contempt hearing. It was only at the end of his cross-examination that he was served with the Show Cause Order. He maintains that he would not have participated in the cross-examination had he known about the Show Cause Order.

[12] During the First Show Cause Hearing, the Plaintiff explained that it proceeded with that cross-examination because it had already been scheduled when the Show Cause Order was issued three days earlier, on September 19, 2016.

[13] This is not a justification for proceeding to cross-examine Mr. Nassar before informing him of the issuance of the Show Cause Order. In my view, the manner in which the Plaintiff proceeded in the circumstances was highly questionable and profoundly unfair. For this reason, I agreed at the outset of the First Show Cause Hearing to grant the request to exclude the transcript of cross-examination and exhibits in question from that hearing. For greater certainty, those materials shall also be excluded from the Second Show Cause Hearing, at which 9279 will be called upon to show cause why it is not in contempt of the Default Judgment. However, those materials will be admissible at the hearing of 9279's Motion in opposition to the Writ of Seizure and Sale. I will simply add for the record that I have not yet read those materials.

[14] I turn now to the request, described at paragraph 5(iii) above, to exclude the Nassar Affidavit, dated September 19, 2016. That affidavit was filed in support of 9279's Motion in opposition to the Writ of Seizure and Sale.

[15] 9279 submits that the Nassar Affidavit should be excluded from the show cause hearing because the admission of that evidence would contravene both Rule 470(2) against compelling testimony from a person alleged to be in contempt and s. 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 [the *Charter*]. The latter provision states: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence" (Emphasis added).

[16] At the First Show Cause Hearing, the Plaintiff expressed a preference for proceeding with the hearing in relation to 9153 and the Two Individuals, rather than postponing that part of the hearing until after the Plaintiff and I had had an opportunity to reflect further upon the request to exclude the Nassar Affidavit. The Plaintiff stated that it did not require that affidavit for the purposes of its allegations of contempt against 9153 and the Two Individuals (*Transcript of Proceedings held on November 22, 2016*, at pp. 30–31).

[17] Accordingly, the sole remaining issue is whether the affidavit in question is admissible in the Second Show Cause Hearing, which will focus solely upon whether 9279 should be found to be in contempt of court for having breached the Default Judgment.

[18] It is now settled law that the right to protection against self-incrimination set forth in s. 13 of the *Charter* does not extend to a corporation (*British Columbia Securities Commission v Branch*, [1995] 2 SCR 3, at para 39). This finding, together with the fact that the Nassar Affidavit was not compelled testimony, as contemplated by Rule 470(2), are dispositive of the issue regarding the admissibility of the Nassar Affidavit in the Second Show Cause Hearing.

[19] However, in the event that the Plaintiff wishes to bring another Motion to show cause against 9153 and the Two Individuals in the future, based on additional evidence, I will address below the admissibility of the Nassar Affidavit in respect of those Alleged Contemnors. I will do so in the interest of judicial economy. For the reasons that I will explain, I am satisfied that this affidavit would be admissible in such a Motion. In brief, in addition to the fact that the Nassar Affidavit was not compelled testimony, as contemplated by Rule 470(2), the Motion would not constitute an "other proceeding," as contemplated by s. 13 of the *Charter*.

[20] The Alleged Contemnors rely upon *Gennium Pharmaceutical Products Inc c Genpharm Inc*, 2009 QCCS 1066, aff'd 2009 QCCA 1691, at paras 18–19, to support their position that a show cause hearing is a separate proceeding, distinct from the underlying civil action. There, Justice Marc-André Blanchard reached that conclusion after observing the following: (i) the parties to a show cause hearing cede control over the hearing to the court; (ii) the special protections given to the persons who are required to show cause (including the right against self-incrimination and the benefit of the criminal burden of proof), as well as the different nature of the ruling sought, transform the nature of the litigation; and (iii) there is other Quebec jurisprudence in which it has been found that a contempt hearing is a distinct proceeding or

involves a distinct procedure. However, there was little or no analysis of this issue in the jurisprudence that Justice Blanchard cited on that point: *Syndicat des employés de l'Hôpital St-Michel Archange c Québec (Procureur général)*, [1977] CA 537, at paras 7-8 (Qc); *Modernfold (Bas St-Laurent) Ltée c New Castle Products (Canada) Ltd*, [1972] CA 790, at 791 (Qc); *Ace Holdings Corporation et al c La Commission des Écoles catholiques de Montréal*, [1972] 2 SCR 268, at 272 ; *Syndicat des employés de transport Dumont (CSN) c Nap Dumont Ltée*, [1978] CA 530, at para 5 (Qc); *Estrada c Young*, 2005 QCCA 493, at para 15.

[21] In my view, the jurisprudence relied upon by the Plaintiff is more compelling.

[22] In *Merck & Co v Apotex Inc*, [1996] 2 FC 223 (TD) [*Merck*], Justice Mackay of what was then the Federal Court of Canada (Trial Division) explicitly addressed the issue of whether contempt proceedings are distinct and different from, and not the same or part of, the underlying civil proceedings from which the allegations of contempt arise. There, the issue was whether information obtained by the plaintiff [Merck] from the defendant [Apotex] pursuant to a court order could be used by Merck against Apotex in a hearing to show cause why Apotex should not be held in contempt of court for, among other things, breaching a permanent injunction and other terms of the order that had been issued following the trial of an action for patent infringement. In support of its argument regarding the distinct nature of contempt proceedings, Apotex noted that: those proceedings start by a different process; they may, and in that case did, involve different parties; the purposes of the proceedings are different, with punishment being the objective, rather than compensation or the protection of rights; and different principles of law apply to the

contempt proceedings than those applicable to a patent infringement action (*Merck*, above, at para 48).

[23] Nevertheless, Justice Mackay rejected Apotex's request for an order precluding Merck from using the disputed information in the show cause hearing. He did so after holding that "contempt proceedings to enforce the terms of a court's order, including the imposition of punishment for its breach, are an integral part of the proceedings in which the order was made" (*Merck*, above, at para 49). Elaborating, he stated:

> The contempt proceedings are an integral part of the Court's process arising in trial of the patent action, from its commencement to its conclusion including judgment and its enforcement. Those proceedings are not separate or distinct from the patent action and they are within the scope of the implied undertaking. The use of the information in these proceedings is not for a collateral or ulterior purpose, in terms of the implied undertaking (*Merck*, above, at para 53).

[24] In the course of reaching his decision, Justice Mackay discussed with approval the decisions in *Apple Computer Inc v Minitronics of Canada Ltd*, [1988] 2 FC 265 (TD) [*Apple*]; *McClure v Backstein*, 1987 CarswellOnt 416 (H Ct J) [*McClure*] and *Crest Homes plc v Marks*, [1987] AC 829, [1987] 2 All ER 1074 (HL) [*Crest Homes*].

[25] *Apple* was another decision of what was then the Federal Court of Canada (Trial Division). It concerned a hearing to show cause why the respondents (who were defendants in an underlying copyright and trademark infringement proceeding) were not in contempt of court for having breached an order issued in that civil action. In the course of finding the respondents in

contempt, Justice Strayer admitted certain documents that had been initially sought under an Anton Piller order, but were not then obtained because they had been taken into custody by customs officers, who subsequently were compelled to provide the documents to the applicant pursuant to an order issued in a proceeding under the *Criminal Code*, RSC 1985, c C-46. Although Justice Strayer's reasons focused on the factual matrix of the case before him, it was implicit that he would also have admitted the documents in question had they simply been seized under the Anton Piller order (*Apple*, above, at paras 36–37).

[26] *McClure*, above, concerned a motion for a contempt order that was brought by the plaintiff (creditor) against the defendant (debtor), after the latter breached an order to attend and answer various questions and undertakings. The issue that is relevant for the present purposes was whether evidence provided by the debtor on the disputed examination and various affidavits filed by the debtor could be considered on the motion for a contempt order. Justice Steele found that such evidence was admissible on the motion. In specifically addressing the issues raised by the debtor under ss. 11 and 13 of the *Charter*, Justice Steele held as follows:

> Assuming that Article 11 of the Charter applies, the fact that the debtor cannot be compelled to give evidence does not preclude his evidence on the examination and the various affidavits that have been filed by him from being considered by the court. The debtor submitted that the evidence given on examination could not be referred to on the basis that it was incriminating evidence in another proceeding and therefore was prohibited by Article 13 of the Charter. The contempt proceeding is an integral part of the entire civil action from its commencement to judgment, and to enforcement thereof. The prior evidence was not in another proceeding but in the same proceeding. In any event evidence in a civil proceeding is not "incriminating evidence" within the meaning of Article 13. The debtor chose to defend the civil action and he must comply with the law. Article 13 does not protect him. (See *Seaway Trust Co. v Kilderkin Investments Ltd*., 29 D.L.R. (4th) 456 at 470.

> *McClure*, above at para 9. See also *Blatherwick v Blatherwick*, 2016 ONSC 2902, at paras 42–45 [*Blatherwick*].

[27] *Crest Homes*, above, concerned two copyright actions by the plaintiff against the defendants. The House of Lords upheld the use of information, obtained as a result of an Anton Piller order issued in a second action, as well as from affidavits sworn by the defendants in that action, in contempt proceedings that arose out of a first action involving the same parties and issues. In reaching that conclusion, Lord Oliver of Aylmerton stated:

> The proper policing and enforcement or observance of orders made and undertakings given to the court in an action are, in my judgment, as much an integral part of the action as any other step taken by a plaintiff in the proper prosecution of his claim. The normal procedure where the contempt complained of is that of a party to the action is to apply for committal by motion in that action as an incidental step in the action. There is, in my judgment, nothing "collateral" or "alien" about enforcement of the court's order in the action in which discovery is obtained and I do not entertain any doubt at all that documents disclosed on discovery in the action can perfectly properly be used for the purpose of taking such a step without in any way infringing the implied undertaking and without the necessity of obtaining the prior leave of the court.
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> *Crest Homes*, above, at 1083.

[28] I agree with the reasoning adopted in the foregoing jurisprudence, to the effect that a show cause hearing that arises out of an alleged breach of an order in an underlying civil action is an integral part of that same action. It is not a distinct or "other proceeding."

[29] On the particular facts of this case, it would be anomalous if the Alleged Contemnors could voluntarily file affidavit evidence for the purpose of opposing a validly issued Writ of Seizure and Sale, and then prevent the Plaintiff from relying on that same evidence in a hearing

to show cause why they are not in breach of the very judgment that the Plaintiff sought to enforce through that Writ of Seizure and Sale. In my view, section 13 of the *Charter* does not protect such prior voluntary affidavit evidence, adduced within the same proceeding. The compelled "*quid*" to support the "*quo*" of such protection is missing (*R v Nedelcu*, 2012 SCC 59, at paras 6–8, 91–92).

[30] I will simply add as a final comment on this preliminary issue that I recognize that, if the evidence sought to be adduced on a show cause hearing had been obtained in the course of another proceeding, involving a different cause of action, section 13 might well apply (*Merck & Co Inc v Apotex Inc*, [1998] 3 FC 400, at para 21 (TD)).

III. The First Show Cause Hearing—Assessment

[31] My assessment of the First Show Cause Hearing is fairly straightforward. The Plaintiff adduced very little evidence of any breach of the Default Judgment by 9153 or the Two Individuals. With the sole exception of non-payment of the damages (plus interest) and costs set forth in the Default Judgment, that evidence does not establish beyond a reasonable doubt that 9153 or the Two Individuals are in breach of that judgment. As to the non-payment of the damages and costs, the Plaintiff has not established that its efforts to obtain such payment have been such that the Court should exercise its discretion to find 9153 or the Two Individuals in contempt of court for their failure to have made such payment to date. The exercise of such discretion is not warranted in the absence of a demonstration that a plaintiff has endeavoured to enforce a judgment for payment of damages in the ordinary way and been unsuccessful.

A. *The Law*

[32] Civil contempt has three elements which must be established beyond a reasonable doubt. First, the order or judgment that is alleged to have been breached must state clearly and unequivocally what should and should not be done. Second, the party alleged to be in breach must have actual knowledge of the order or judgment in question. Third, that party must have intentionally done the act that the order or judgment prohibits, or intentionally failed to do the act that the order or judgment compels (*Carey v Laiken*, 2015 SCC 17, at paras 32–35 [*Carey*]; Rule 469).

[33] With respect to the third element, all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact a breach of a clear order of which the alleged contemnor has had notice. There is no additional requirement to establish "contumacious" intent, that is to say, an intention to disobey, in the sense of desiring or knowingly choosing to disobey the order or judgment in question. (*Carey*, above, at paras 39–42, and 47.)

[34] However, where the alleged breach is based on a failure to comply with an order or judgment to pay a sum of money, an intention to evade that obligation on the part of the alleged contemnor must be demonstrated (*Vidéotron Ltée v Industries Microlec Produits Électroniques Inc.*, [1992] 2 SCR 1065, at para 19 [*Vidéotron*]). Such an intention to evade can be inferred from a refusal to pay and to provide a legitimate explanation for such failure, despite opportunities to do so or to demonstrate an inability to pay (*Trans-High Corporation v Hightimes*

Smokeshop and Gifts Inc., 2015 FC 1104, at para 12; *Canada (Minister of National Revenue) v Money Stop*, 2013 FC 133, at paras 15 and 18). The onus is not on the plaintiff to proactively demonstrate an ability to pay, but rather on the alleged contemnor to raise this as a defence (*North Arm Transportation Ltd v Gulf Kanayak*, [1987] FCJ No 1016 (QL) (TD) [*North Arm*]; *Metaxas v Galaxias (The)*, [1988] FCJ No 355 (QL) (TD); *Daigle c St-Gabriel de Brandon (Corp municipale de la paroisse)*, 1991 CanLII 3806, at para 13 (Qc CA) [*Daigle*]; see also Rule 467(1)(c)).

[35] Where the three elements required to demonstrate contempt have been established, the Court retains the discretion to decline to find an alleged contemnor in contempt. In considering whether to exercise that discretion, the Court must keep in mind that the contempt power should be used cautiously and with great restraint, as it is an enforcement power of last rather than first resort (*Carey*, above, at para 36). It is not available merely as a means to enforce judgment (*Vidéotron*, at para 23). Before it is resorted to, where the breach in question concerns the non-payment of a monetary award, the plaintiff should demonstrate that it has unsuccessfully endeavoured to enforce the order or judgment in the ordinary way, and been unsuccessful (*Daigle*, above, at para 9; *Hyundai Motor America v Cross Canada Auto Body Supply (West) Limited*, 2007 FC 120, at para 15).

B. *Assessment of the Evidence*

[36] Pursuant to Rule 470(1), evidence on a motion for a contempt order, except a motion requesting a show cause hearing, must be oral, unless the Court directs otherwise.

[37] Further to its obligation under Rule 470(1), the Plaintiff put forth one witness, Mr. Michael Kerr, who is a litigation clerk employed at Ridout & Maybee LLP, the Plaintiff's law firm.

[38] Mr. Kerr's testimony consisted of responses to questions from counsel regarding documents that were attached as exhibits to an affidavit that he swore, dated September 14, 2016, and filed as part of the Plaintiff's Motion Record for the show cause hearing.

[39] With respect to the alleged breaches of the Default Judgment, there were five principal documents, three of which concerned service of the Default Judgment, and two of which concerned its alleged breach.

[40] The three documents concerning service were copies of a 21-page facsimile [the Fax] dated May 9, 2014, and two delivery confirmations received by Ridout & Maybee LLP from FedEx. The Fax was sent to the facsimile number identified on the website of "jbloom" and addressed to the Two Individuals and Mr. Gilbert Nassar, while the two delivery confirmations indicated that they were delivered to two separate addresses identified on jbloom's website. jbloom is the name under which 9153 carried on business between early 2006 and early 2015. One of the delivery confirmations indicated that the package had been signed for by "M. Malo" on May 12, 2014, while the other one indicated that the package had been signed for by "J. Nassar" on May 16, 2014.

[41] The Fax consisted of a cover page, a copy of the Default Judgment and a letter from the Plaintiff's counsel to jbloom enterprise, the Two Individuals, and Mr. Gilbert Nassar. Mr. Kerr testified that he found 21 pages of the Fax together as a single document in Ridout & Maybee's files, and that the confirmation sheet that reflects that 21 pages were sent "looks exactly the same as any other fax confirmation we get."

[42] With respect to the two delivery confirmations from FedEx, Mr. Kerr once again testified that they were obtained from Rideout & Maybee LLP's files. He added that he does not have any signed confirmations of receipt from the recipients, and that this is the only type of confirmation that is received from FedEx when it delivers packages.

[43] The Plaintiff relied on the business records provision in s. 30(1) of the *Canada Evidence Act*, RSC 1985, c C-5 to justify the admission of the Fax and the FedEx delivery confirmations into evidence, as Mr. Kerr testified that he was not the person who sent the Fax and he did not have any further evidence to provide with respect to the FedEx delivery confirmations.

[44] Leaving aside the issues that the Alleged Contemnors have raised with respect to service, including the delivery which was "signed for" by "M. Malo," the aforementioned evidence suggests that Mr. Joseph Nassar, who is identified in 9153's corporate records as being its President, was served with the Default Judgment on either May 9, 2014, or May 16, 2014.

[45] Turning to the alleged breach of the Default Judgment, as indicated above, Mr. Kerr was questioned with respect to two documents. Those documents were attached at Exhibits D and E

to his affidavit. The first of those documents, dated May 8, 2014, is a copy of a printout of several pages from jbloom's website, which indicated that 9153 was selling shoes embossed with the plaintiff's trademarks, each under the name "Oliver Sneaker." Mr. Kerr testified that he found copies of those pages in Ridout & Maybee LLP's files.

[46] The second of the aforementioned documents was another printout of several pages, this time from an archived page from the Wayback Machine Internet Archive. It was dated July 10, 2014. Mr. Kerr testified that he couldn't remember whether he printed this document from Ridout & Maybee LLP's files, but he did go onto the above-mentioned internet archive website to view these pages.

[47] In contrast to the first document, the pages in this second document did not contain any pictures of shoes embossed with the Plaintiff's trademarks. One of the pages referred in three different places to "Image de Oliver-Basket," which I understand to mean "picture of Oliver-Sneaker." Those words appear to replace a picture that existed in the original website page. However, no actual pictures of shoes or other products containing the Plaintiff's trademarks were present in the printout, and there was no reference either to the model numbers (F6188 and D8007) identified in the Default Judgment or to the "jBloom Oliver" SKU number (ME-81001) identified in the Show Cause Order.

[48] In my view, the two printouts discussed above do not establish beyond a reasonable doubt that 9153 or the Two Individuals breached the terms of the Default Judgment after the date

upon which they were served with the Judgment, namely, sometime between May 9, 2014, and May 16, 2014.

[49] The Default Judgment enjoined 9153 and the Two Individuals from using or infringing the Plaintiff's trademarks in Canada; directing public attention to its wares or business in such a way as to cause or be likely to cause confusion between the Plaintiff's wares and those of 9153; passing off 9153's wares or business as and for those of the Plaintiff, through use of the Plaintiff's trademarks or any confusingly similar variations of them; using those trademarks in such a manner as to depreciate the value of the goodwill attached to them; and authorizing, inducing or assisting others to do any of the foregoing acts.

[50] In addition, the Default Judgment required 9153 and the Two Individuals to deliver up to the Plaintiff, or to destroy, all materials in its possession, etc., which would offend the Default Judgment; and to delete all references to such products from the website located at jbloomshoes.com.

[51] However, the two printouts discussed above do not demonstrate beyond a reasonable doubt that 9153 or the Two Individuals did anything described in the Default Judgment after service occurred sometime between May 9, 2014, and May 16, 2014. This is because those printouts do not demonstrate on that standard of proof that 9153 was actually selling shoes or other products containing the Plaintiff's trademarks, or confusingly similar marks, or was selling shoes identified by the model numbers F6188 or D8007, or by the SKU number ME-81001, after May 8, 2014 (the date of the first printout).

[52] This leaves the award of $43,500 in damages for past infringement, plus applicable HST and prejudgment and post judgment interest, as well as $6,000 in costs, which the Default Judgment stated were "payable forthwith and for which the Defendants are jointly and severally liable."

[53] There is only one Defendant in this proceeding, namely, 9153. That was the only person who was ordered to show cause why it should not be held in contempt for failing to pay the damages award, plus interest, together with costs, as described above. Accordingly, this particular alleged breach of the Default Judgment concerns only 9153 in this Motion to show cause.

[54] As discussed at paragraph 34 above, an alleged contemnor cannot be found to be in contempt of court in respect of a failure to pay a monetary award in favour of another party unless it has been demonstrated beyond a reasonable doubt that the alleged contemnor intended to evade that obligation. Such an intention to evade can be inferred from a refusal to pay and to provide a legitimate explanation for such failure, despite opportunities to do so, or to demonstrate an inability to pay. The onus is not on the plaintiff to proactively demonstrate an ability to pay, but rather on the alleged contemnor to raise this as a defence.

[55] To the extent that the authorities cited by the Plaintiff (*North Arm*, above; *Blatherwick*, above; *Innovation and Development Partners/IDP Inc v Canada*, [1993] FCJ No 1192 (QL) (TD); *Canada Revenue Agency v Bélanger*, 2015 FC 35) may conflict with the Supreme Court of Canada's teachings on this point in *Vidéotron* and *Carey*, above, the latter authorities prevail.

[56] In the First Show Cause Hearing, the Plaintiff did not adduce evidence to demonstrate beyond a reasonable doubt that 9153 had refused to pay the aforementioned damage award, plus interest, together with costs, despite having been provided with one or more opportunities to provide a legitimate explanation for their failure to pay those awards, or to demonstrate an inability to pay. Apart from the evidence with respect to service of the Default Judgment and an accompanying letter from the Plaintiff's counsel, by way of the Fax and the two FedEx deliveries discussed above, there was no evidence that the Plaintiff took any further steps to obtain payment of the damages and costs awards, before recently taking steps to enforce the damages and cost awards in the usual manner. With respect to the latter steps, the Plaintiff simply provided evidence with respect to the execution of the Writ of Seizure and Sale at two of jbloom's retail locations, on August 10, 2016, and August 11, 2016. The hearing of the Alleged Contemnors' Motion opposing that Writ of Seizure and Sale has now been scheduled for January 11, 2017. In these circumstances, the Plaintiff is not currently in a position to establish beyond a reasonable doubt that it has unsuccessfully endeavoured to enforce the $43,500 award of damages, plus interest, together with its award of $6,000 in costs, in the usual manner.

[57] Accordingly, I decline to find that 9153 is in contempt of the Default Judgment at this point in time, solely because of its failure to pay the $43,500 award of damages, plus interest, together with the cost award of $6,000.

[58] I acknowledge that the Plaintiff provided evidence of e-mail correspondence between Mr. Elliott Gold, who is a partner in Ridout & Maybee LLP, and "Joseph" on behalf of jbloom Shoes, dated May 30, 2013, and June 3, 2013. Given the findings that I have made with respect

to the other evidence discussed above, I find that this e-mail correspondence, which predates the date of the Default Judgment, has little probative value in respect of whether 9153 or the Two Individuals should be found to be in contempt of court for having breached the Default Judgment.

[59] The same is true with respect to the Plaintiff's evidence that this Court has issued a default judgment and a Writ of Seizure and Sale in favour of Adidas AG against 9153, and in favour of Hummel Holdings A/S *et al* against 9153, in respect of conduct that is similar to that which led to the issuance of the Default Judgment and a Writ of Seizure and Sale against 9153 in this proceeding.

IV. Conclusion

[60] For the reasons set forth above, the Plaintiff has not demonstrated beyond a reasonable doubt that 9153 and the Two Individuals are in contempt of court for having breached the Default Judgment. Stated differently, 9153 and the Two Individuals have shown cause why they should not be held to be in contempt of court.

[61] In its Notice of Motion for this hearing, the Plaintiff requested, among other things, an order entrusting the goods seized pursuant to the Writ of Seizure and Sale that was executed on August 10, 2016, and August 11, 2016, to the possession of a bailiff, instead of allowing those goods to remain in place. However, during the hearing, the Plaintiff agreed to maintain the *status quo* until I have made determinations in respect of the allegations of contempt against 9279, and

in respect of the Alleged Contemnors' opposition to the Writ of Seizure and Sale. Thus, the seized goods will remain in place until that time.

[62] The Plaintiff also requested the dismissal of 9279's Motion opposing the execution of the Writ of Seizure and Sale dated August 10, 2016. That request is premature at this time. The hearing of that Motion has now been scheduled for January 11, 2017.

[63] I will reserve my decision on costs until the outcome of the Second Show Cause Hearing has been determined.

ORDER

THIS COURT ORDERS THAT:

1. 9153 and the Two Individuals have shown cause why they should not be held in contempt of Court for having breached the Default Judgment.

2. The Second Show Cause Hearing shall be held on January 11, 2017, immediately before the hearing of 9279's Motion opposing the execution of the Writ of Seizure and Sale issued by this Court on August 10, 2016.

3. The Nassar Affidavit shall be admissible at both the Second Show Cause Hearing and the aforementioned Motion brought by 9279.

4. The transcript of the cross-examination of Mr. Joseph Nassar that took place on 22 September 2016, together with the exhibits thereto, shall be admissible at the hearing of that Motion brought by 9279, but not at the Second Show Cause Hearing.

5. Costs shall be addressed after outcome of the Second Show Cause Hearing has been determined.

"Paul S. Crampton"
Chief Justice

APPENDIX 1 — Relevant Legislation

Federal Court Rules	***Règlements de la Cour fédérale***
Contempt	*Outrage*
466. Subject to rule 467, a person is guilty of contempt of Court who	466. Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque :
(a) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;	a) étant présent à une audience de la Cour, ne se comporte pas avec respect, ne garde pas le silence ou manifeste son approbation ou sa désapprobation du déroulement de l'instance ;
(b) disobeys a process or order of the Court;	b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour ;
(c) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court;	c) agit de façon à entraver la bonne administration de la justice ou à porter atteinte à l'autorité ou à la dignité de la Cour ;
(d) is an officer of the Court and fails to perform his or her duty; or	d) étant un fonctionnaire de la Cour, n'accomplit pas ses fonctions ;
(e) is a sheriff or bailiff and does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes a rule the contravention of which renders the sheriff or bailiff liable to a penalty.	e) étant un shérif ou un huissier, n'exécute pas immédiatement un bref ou ne dresse pas le procès-verbal d'exécution, ou enfreint une règle dont la violation le rend passible d'une peine.
Right to a hearing	*Droit à une audience*
467. (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt	467 (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint :
(a) to appear before a judge at a time and place stipulated in the order;	a) de comparaître devant un juge aux date, heure et lieu précisés ;
(b) to be prepared to hear proof of the act with which the person is charged, which	b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description

shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(c) to be prepared to present any defence that the person may have.

suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle ;

c) d'être prête à présenter une défense.

Ex parte motion

(2) A motion for an order under subsection (1) may be made *ex parte.*

Requête ex parte

(2) Une requête peut être présentée *ex parte* pour obtenir l'ordonnance visée au paragraphe (1).

Burden of proof

(3) An order may be made under subsection (1) if the Court is satisfied that there is a prima facie case that contempt has been committed.

Fardeau de preuve

(3) La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis qu'il existe une preuve *prima facie* de l'outrage reproché.

Service of contempt order

(4) An order under subsection (1) shall be personally served, together with any supporting documents, unless otherwise ordered by the Court.

Signification de l'ordonnance

(4) Sauf ordonnance contraire de la Cour, l'ordonnance visée au paragraphe (1) et les documents à l'appui sont signifiés à personne.

Contempt in presence of a judge

468. In a case of urgency, a person may be found in contempt of Court for an act committed in the presence of a judge and condemned at once, if the person has been called on to justify his or her behaviour.

Outrage en présence d'un juge

468. En cas d'urgence, une personne peut être reconnue coupable d'outrage au tribunal pour un acte commis en présence d'un juge et condamnée sur-le-champ, pourvu qu'on lui ait demandé de justifier son comportement.

Burden of proof

469. A finding of contempt shall be based on proof beyond a reasonable doubt.

Fardeau de preuve

469. La déclaration de culpabilité dans le cas d'outrage au tribunal est fondée sur une preuve hors de tout doute raisonnable.

Evidence to be oral

470. (1) Unless the Court directs otherwise, evidence on a motion for a contempt order, other than an order under subsection 467(1), shall be oral.

Témoignages oraux

470. (1) Sauf directives contraires de la Cour, les témoignages dans le cadre d'une requête pour une ordonnance d'outrage au tribunal, sauf celle visée au

paragraphe 467(1), sont donnés oralement.

Testimony not compellable

(2) A person alleged to be in contempt may not be compelled to testify.

Témoignage facultatif

(2) La personne à qui l'outrage au tribunal est reproché ne peut être contrainte à témoigner.

Assistance of Attorney General

471. Where the Court considers it necessary, it may request the assistance of the Attorney General of Canada in relation to any proceedings for contempt.

Assistance du procureur général

471. La Cour peut, si elle l'estime nécessaire, demander l'assistance du procureur général du Canada dans les instances pour outrage au tribunal.;

Penalty

472. Where a person is found to be in contempt, a judge may order that

Peine

472. Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :

(a) the person be imprisoned for a period of less than five years or until the person complies with the order;

a) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance ;

(b) the person be imprisoned for a period of less than five years if the person fails to comply with the order;

b) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance ;

(c) the person pay a fine;

c) qu'elle paie une amende ;

(d) the person do or refrain from doing any act;

d) qu'elle accomplisse un acte ou s'abstienne de l'accomplir ;

(e) in respect of a person referred to in rule 429, the person's property be sequestered; and

e) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429 ;

(f) the person pay costs.

f) qu'elle soit condamnée aux dépens.

FEDERAL COURT

SOLICITORS OF RECORD

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