

CANADA / JUDGMENT

Karras v. Wizedemy Inc.

2024 BCCA 216

COURT

British Columbia Court of Appeal

DECIDED

24 May 2024

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2024 BCCA 216 Karras v. Wizedemy Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Karras v. Wizedemy Inc.,

2024 BCCA 216

Date: 20240524

Docket: CA49799

Between:

John Karras and EasyGrades LLC

Appellants

(Defendants)

And

Wizedemy Inc. and Wizedemy, Corp.

Respondents

(Plaintiffs)

Before:

The Honourable Mr. Justice Abrioux

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia,

dated April 9, 2024 (Wizedemy Inc. v. Karras, 2024 BCSC 630,

Vancouver Registry Docket S241896)

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia

May 15, 2024

Place and Date of Judgment:

Vancouver, British Columbia

May 24, 2024

Summary:

The applicants bring an application seeking leave to appeal and a stay of execution of an interlocutory injunction restraining them for a period of 12 months from engaging in any education services business at Concordia and UBC. Held: Leave to appeal application granted, stay application dismissed. The proposed appeal has at least arguable merit, significance to the public and the proceedings, and will not unduly hinder the proceedings if heard on an expedited basis. Granting leave to appeal is in the interests of justice. Although there is arguable merit, the applicants have not demonstrated they will suffer irreparable harm nor that the balance of convenience favours granting a stay. Granting a stay is not in the interests of justice. The hearing of the appeal is expedited.

ABRIOUX J.A.:

Introduction

- [1] On April 9, 2024, the chambers judge granted an interlocutory injunction which enjoined and restrained the applicants, for a period of 12 months ending March 3, 2025, from engaging in any education services business at Concordia University and the University of British Columbia. The reasons are indexed at 2024 BCSC 630.

- [2] The applicants bring an application seeking leave to appeal the order and to stay its execution under ss. 31, 32 and 33 of the Court of Appeal Act, S.B.C., 2021, c. 6 [Act] and Rules 13, 20 and 57 of the Court of Appeal Rules, B.C. Reg. 120/2022 [CA Rules]. The respondents ("Wize") oppose both applications and seek to adduce fresh evidence, being the affidavit of Cyrus Moradian (the CEO of Wize), made May 7, 2024 regarding the applicants' alleged breaches of the order.
- [3] After an unsuccessful attempt before Registrar Outerbridge to have the applications heard on an expedited basis, they were heard on May 15, 2024.

Background

- [4] The salient background was summarized by Registrar Outerbridge in his unreported reasons dismissing the urgent application:
- [2] The parties to this appeal engage in educational services offering academic assistance to high school and university students through the distribution of educational tutoring products and services. Mr. Karras and EasyGrades LLC were engaged by the respondents beginning in June of 2020 to provide certain online tutoring and instructor services on their online platform, "Wizeprep". Since then, those services have expanded, including engagement and communication with students over Discord and various crash courses and mock exam sessions.
- [3] The underlying dispute relates to a breakdown in the relationship between the appellants and the respondents that occurred around February 2024. It was alleged that Mr. Karras was operating a competing service in violation of his contractual obligations including a restrictive covenant. In March of 2024, Mr. Karras' relationship with the respondents was terminated.
- [4] The respondents commenced an action against the appellants on 21 March 2024 seeking damages and injunctive relief. Within that action, an interlocutory injunction was then sought, seeking to restrain the appellants' activities. The injunction was granted by Justice Giaschi on 9 April 2024
- [5] Justice Giaschi's order restrains the appellants from various business activities, the use of the respondents' confidential information and intellectual property, as well as activities that would disparage the respondents. The order remains effective until the trial or further order of the Supreme Court.
- [5] There is a dispute as to whether the applicants are in full compliance with the judge's order.

The Chambers Judgment

- [6] The judge was satisfied that the three-part test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 [RJR-MacDonald] was to be applied, with the applicable first prong requiring a strong prima facie case on the merits: at paras. 26, 38.
- [7] He found that Mr. Karras secretly competed with Wize during and after the contract, his conduct went to the very root of the contract, and Mr. Karras "flagrantly breached [his agreement with Wize] by setting up competing services and selling competing products": at paras. 49, 57, 62, 116.
- [8] The judge considered whether the non-competition clause was enforceable with respect to it being ambiguous, overbroad, the activities it prohibited, its duration and its geographical applicability: at paras. 66-77.
- [9] He concluded that the respondents met the onus of establishing that the non-competition clause was reasonable as between the parties, the applicants had not established that the clause was not in the public interest and that the respondents had established a strong prima facie case: at paras. 78-81.
- [10] The judge also accepted that the respondents would suffer irreparable harm including "a drastic reduction in revenue at Concordia and that the potential consequences to the [respondents] include the possibility of bankruptcy" and "the severe financial impact to the [respondents] of the [applicants] competing in apparent contravention of an agreement Mr. Karras freely entered into": at paras. 102, 104.
- [11] The judge also found when assessing the balance of convenience that damages would not adequately compensate the respondents but that they would be a sufficient remedy if Mr. Karras were to be successful. The judge went on to note that Mr. Karras provided no evidence of his assets. He thus declined to infer that "he and his family will be destitute if the injunction is granted": at paras. 107-108, 111.
- [12] The judge considered that injunctive relief was just and equitable given the circumstances between the parties, Mr. Karras' level of sophistication, the equality of bargaining position between the parties and the deficiencies in Mr. Karras' affidavit evidence: at paras. 115-116.

Leave to Appeal

Legal Framework

- [13] As the party seeking leave to appeal, the applicants bear the onus of establishing the conditions for leave to appeal on a balance of probabilities: *V.F. v. E.B.*, 2011 BCCA 238 at para. 22 (Chambers).

[14] The test for granting leave to appeal in this Court is set out in *Landmark Solutions Ltd. v. 1082532 B.C. Ltd.*, 2020 BCCA 74 at para. 2 (Chambers). Under the rubric of the interests of justice, the following factors will be considered:

- a) whether the appeal is *prima facie* meritorious or on the other hand frivolous;
- b) the significance, if any, of the point on appeal to the practice or the public;
- c) the significance of the point raised to the action itself; and
- d) whether the appeal will unduly hinder the progress of the action.

[15] The decision as to whether to grant or deny injunctive relief is discretionary, and appeals from orders granting this relief are exceptional since the law is well-settled and the appeal will typically turn on the facts of the case: *Dehydration Research LLC v. EnWave Corporation*, 2022 BCCA 347 at paras. 56-58 (Chambers).

Analysis

Merits of the Proposed Appeal

[16] One of the contracts entered into between the parties was the "Exam Prep Agreement" which provided:

11.1 Non-Competition. Prof acknowledges that, by reason of performing the Services, Prof will receive the value and advantage of special training, skills and expert knowledge and experience of Wize and the clients and employees of Wize. It is the expressed intent and agreement of Prof and Wize that such training, skills, knowledge and experience be used solely and exclusively in the best interests of Wize. Prof therefore agrees that, during the term of this Agreement and for a period of twelve (12) months from the date of termination of this Agreement, however caused, Prof will not, for any reason, directly or indirectly, either as an individual or as a partner or as part of a joint venture, or as an employee, contractor, consultant or in any other capacity, be engaged or employed in any education services business that offers any products or services that are directly competitive with, and available to students at the same institutions as any Wize products or services that Prof worked on while with Wize, unless prior written permission to such activity is given by Wize.

[Emphasis added.]

[17] The applicants advance several grounds regarding the merits of the appeal but I will focus on three, being: 1) the injunction is substantively broader and more ambiguous than the restrictive covenant itself; 2) the restrictive covenant is ambiguous; and 3) the injunction is in effect final and not interlocutory as there is no reasonable likelihood that a trial will occur before it expires.

[18] The respondents take the position that ongoing breaches by the applicants disentitle them to be granted leave to appeal the order.

[19] They also raise several substantive responses to the applicants' alleged grounds of error. In regard to those I have just identified, they submit: 1) the allegation that the order is broader than the restrictive covenant is, at best, a submission for rectification of the order; 2) the allegation that the restrictive covenant is ambiguous is an attempt to re-argue the motion below in a vacuum; and 3) the injunction is not final but should be considered "temporary".

[20] I will first consider certain of the submissions regarding the restrictive covenant and the scope of the order. In the reasons, the judge stated that the respondents applied for the order on the following terms:

[2]

a) Restraining the defendants, for a period of 12 months ending March 3, [2025], from engaging in any educational services business, that offers online products or services that are similar to those offered by the plaintiffs or that the defendant worked on while with the plaintiffs, at institutions where the plaintiff's products are offered.

[21] He granted the order on the following terms:

The Defendants are enjoined and restrained for a period of 12 months ending March 3, 2025, from engaging in any educational services business at Concordia University and the University of British Columbia.

[22] It appears, therefore, that the judge substituted out (from the restrictive covenant): "any education services business that offers any products or services that are directly competitive with, and available to students at the same institutions as any Wize products or services that Prof worked on while with Wize", substituting into the order: "any educational services business, at Concordia University and the University of British Columbia".

[23] The respondents say that the applicants' allegation that the non-competition order is broader than the restrictive covenant itself is, at best, a submission for rectification of the order and, at worst, an out-of-context misreading of the reasons.

[24] They also submit that the applicants will have a full opportunity at trial to argue ambiguity with the benefit of a full factual record.

[25] The difficulty with this latter argument is that the trial will likely occur well after March 2025 when the order expires.

[26] Furthermore, the order has been entered and it is arguable, as submitted by the applicants, that rectification is not possible in that the judge is functus.

[27] The judge also recognized certain difficulties with the non-competition clause, in particular, that it was open to two interpretations:

- [76] Finally, in terms of geography, the defendants submit that the clause is ambiguous. They say that it can mean either that Mr. Karras is prohibited from working at any institution where Wize offered its products and services, or that Mr. Karras is restricted from working at institutions where he worked on products and services.
- [77] I agree that the clause is difficult to interpret. However, it is capable of interpretation and, in my view, the latter interpretation is the correct one. If one breaks down the operative parts of the clause there are two conditions. The first is that the products and services are directly competitive with Wize. The second is that those products and services must be "available to students at the same institutions as any Wize products or services that Prof worked on while with Wize". The second condition limits the reach of the clause to institutions where Mr. Karras worked on Wize products, namely Concordia and UBC.
- [78] Therefore, in my view, the plaintiffs have met the onus on them to prove the non-competition clause is reasonable as between the parties.
- [28] Bearing in mind that the merits threshold is relatively low (*Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16 (Chambers)), there are, in my view, at least three issues which identify an arguable case of sufficient merit to warrant scrutiny by a division of this Court, being:
- a) the breadth of the order in comparison to the restrictive covenant;
 - b) the judge's decision to prefer one interpretation of the restrictive covenant over another; and
 - c) the effect of the expiry of the order before the trial of the underlying proceeding.
- [29] In my view, the applicants have satisfied the merits threshold.

Significance to the Public/Practice

- [30] The applicants submit that the issues on appeal are significant to the public as the order affects third party students who are attending and enrolled in university undergraduate programs. The order was granted in the middle of the semester and as mid-term and final exams quickly approached. The order impacts these students and is disruptive to their learning during a critical period in their university education.
- [31] I consider this factor to be marginal, at best in the analysis, as the semester has now ended but I do recognize that if leave is not granted, there may be an effect on students over the ensuing months.
- [32] That said, the nature of an order which on its face is to be considered interlocutory, but which encompasses the entirety of the time frame governed by the non-competition clause and will expire before a trial where its validity can be comprehensively addressed, is worthy of this Court's attention.

Significance to the Proceeding

[33] The proposed appeal is significant to the proceeding. The order will expire before the likely trial date.

Impact on the Progress of the Action

[34] Were I to order that the appeal be expedited, this appeal will not impact the progress of the underlying proceeding. The appeal could be heard by a division of the Court during the week of July 15, 2024.

Conclusion on Leave

[35] The judge correctly identified the legal framework and comprehensively set out his reasons for granting the order. I am mindful that this Court is reluctant to grant leave to appeal from discretionary orders, and leave will only be granted where the applicant shows an arguable case that the order is clearly wrong, a serious injustice will occur, or the discretion was exercised on a wrong principle or not exercised judicially: *Dehydration* at para. 55.

[36] This application for leave, when considered within the overarching rubric of the interests of justice, is very close to the line. And yet, since: 1) it is arguable that the proposed appeal has some merit; 2) the order affects to some extent the applicants' ability to conduct its business as a going concern; and 3) the proposed appeal can proceed before a division of the Court in mid-July 2024, I conclude it is in the interests of justice to grant leave. I would add that I have also taken into account what I observed above, being that the order encompasses the entire timeframe provided in the non-competition clause. Had it been framed as a final order, leave would not be required.

[37] Having decided that leave should be granted, I will not comment further on the ultimate merits of the appeal.

[38] I would add that I have considered the respondents' submissions regarding the applicants' alleged breaches of the order. In my view, while a factor in the interests of justice analysis on the leave application, it is more appropriate in the circumstances of this case to consider this issue in the context of the application for a stay.

Stay Application

Legal Framework

[39] To obtain a stay, the applicants must satisfy the three-part test set out in *RJR-MacDonald* at 334, 337, 340-342:

- (1) Is there a serious question to be tried?
- (2) Will the applicant suffer irreparable harm if the stay is refused?
- (3) Does the balance of convenience favour granting the stay?

- [40] The overarching consideration is whether granting the stay is in the interests of justice: British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia, 2022 BCCA 289 at para. 6 (Chambers).

Position of the Parties

- [41] The applicants submit that if leave to appeal is granted, then the merits part of the test will be met.
- [42] They say that irreparable harm will follow if a stay is not granted, largely due to the fact that Mr. Karras has built his tutoring network at Concordia over the past decade and without his presence for 12 months due to the injunction, he will suffer a loss of market share from student turnover and reduced word-of-mouth referrals.
- [43] They also submit that the balance of convenience favours granting a stay because in any event, the respondents are able to continue operating their business with or without an injunction.
- [44] The respondents submit that the applicants have not established that they will suffer irreparable harm nor that the balance of convenience weighs in their favour. They say that the applicants have been able to establish courses at McGill, Queens and Dalhousie universities within a month of the order being made, despite deposing in the Supreme Court proceedings that it would take them 24 months to get up and running at other institutions.
- [45] They also point to several alleged breaches of the order which commenced on April 9, 2024 being the date it was pronounced. These breaches are outlined in their fresh evidence application which I am satisfied meet the Palmer test, in that the evidence pertains to events which occurred after the order was made, is credible, and is also relevant in the sense that it bears upon a decisive or potentially decisive issue on this application: Bent v. Platnick, 2020 SCC 23 at paras. 49-50.

Serious Question

- [46] As Marchand, J.A. (as he then was) stated in Creative Wealth Media Lending LP 2016 v. Access Road Capital, LLC, 2023 BCCA 208 (Chambers):
- [33] The merits threshold is low, and "[a] prolonged examination of the merits is generally neither necessary nor desirable": RJR-MacDonald at 338. A judge must be satisfied the issues raised on appeal are neither frivolous nor vexatious. The appropriate question is whether there is a serious question to be tried, not whether the applicant can establish a strong prima facie case: RJR-MacDonald at 335.
- [47] Since I have already determined that the applicants have satisfied the merits threshold for obtaining leave, the appeal meets the low merits threshold for granting a stay.

Irreparable Harm

[48] As explained in *Creative Wealth*:

[35] "Irreparable" harm refers to harm that "either cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other". In assessing irreparable harm, I must consider whether denying the stay could "so adversely affect the applicant's own interest that the harm could not be remedied" if the appeal is allowed: *RJR-MacDonald* at 341.

[37] Irreparable harm can be established if, in substance, an appeal would become moot if a stay is not granted: *Chandler v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 120 at para. 18; *0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.*, 2022 BCCA 261 at para. 38

[49] In my view, the applicants have failed to establish irreparable harm.

[50] In the reasons, the judge stated:

[110] I accept Mr. Karras' evidence that tutoring has been his sole source of income for 10 years and that it will take more than one year to start up a new tutoring business at another university. However, he works remotely and nothing is preventing him from obtaining employment as a tutor at other universities. He does not need to start his own business from scratch. Similarly, nothing is preventing him from obtaining employment outside the field of education for a period of one year.

[111] Additionally, Mr. Karras has provided no evidence of his assets and I decline to infer that he and his family will be destitute if the injunction is granted. He was paid very handsomely while he worked with Wize. For example, he earned \$390,000 in 2022 and \$445,000 in 2023.

[51] In his affidavit in support of these applications, Mr. Karras states that since April 9, 2024, he has offered services at other universities, however, only one student had registered for those services as he does not have the same reputation or goodwill at these universities.

[52] He has not, however, provided any financial records including a list of assets to substantiate his allegation that if a stay is not granted, he and his family will suffer serious financial consequences, let alone become "destitute".

[53] Nor, in my view, has Mr. Karras provided any meaningful response to the materials contained in Mr. Moradian's affidavit which, on their face, outline several breaches of the order. In his reply affidavit, the only explanation provided is that he was updating the website, but Mr. Karras fails to explain why this required him to open enrolment to courses he was prohibited from offering and receiving payment for those courses.

[54] Mr. Moradian was also monitoring the applicants' website in the timeframe following April 9, 2024. He deposes that on April 27, 2024, he purchased a Final Exam Crash Course and was able to access the materials for it for which he paid a fee. There is nothing in the reply affidavit which disputes this account nor that the funds were returned.

Balance of Convenience

[55] It is for the applicants to establish that the balance of convenience militates in favour of granting a stay. They have not done so for the following reasons:

- (a) They appear to have engaged in ongoing breaches of the order until, at least, April 27, 2024. This, standing alone, could provide a sufficient basis for dismissing the stay application: see *Vancouver (City) v. Weeds Glass & Gifts Ltd.*, 2019 BCCA 190 at paras. 64 and 71 (Chambers).
- (b) There is little, if anything beyond Mr. Karras' bald assertion on the evidentiary record, from which it can be concluded that he and his family will suffer irreparable financial consequences, let alone become destitute if the stay is not granted.
- (c) The applicants have been able to establish their business at other universities and it is not possible to assess to what extent they have been successful based on the dearth of relevant information provided by them.

[56] There is also the fact that, having made inquiries, I can advise the parties that this appeal can be heard by a division of the Court during the week of July 15, 2024.

Conclusion on Stay

[57] For these reasons, it is not in the interests of justice that a stay be granted and the application to stay the judge's order is dismissed.

Disposition

[58] The application seeking leave to appeal is granted. The application for a stay is dismissed.

[59] I also order that:

- this appeal be set down for hearing on an expedited basis during the week of July 15, 2024;
- the appellants are to file and serve the appeal record, appeal book, book of transcripts and the appellants' factum by June 14, 2024;
- the respondents are to file and serve the respondents' appeal book and book of transcripts, if any, and the respondent's factum by July 5, 2024;
- the appellants are to file and serve their reply factum, if any, by July 10, 2024; and
- if the parties agree, a joint book of authorities is to be filed by July 5, 2024, failing which they are to file their respective books of authorities by July 5, 2024.

"The Honourable Mr. Justice Abrioux"

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