
CANADA / JUDGMENT

Quick Pass Master Tutorial School Ltd. v. Zhao

2018 BCSC 683

COURT

Supreme Court of British Columbia

DECIDED

1 May 2018

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2018 BCSC 683 Quick Pass Master Tutorial School Ltd. v. Zhao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Quick Pass Master Tutorial School Ltd. v. Zhao,

2018 BCSC 683

Date: 20180501

Docket: Vancouver

Registry: S180468

Between:

Quick Pass Master Tutorial School Ltd.

Plaintiff

And

Li Min (Richard) Zhao

Defendant

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

Counsel for the Plaintiff:

E. Montague

Counsel for the Defendant:

M. Stewart

Place and Date of Hearing:

Vancouver, B.C.

April 3, 2018

Place and Date of Judgment:

Vancouver, B.C.

May 1, 2018

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INTRODUCTION

- [1] Quick Pass Master Tutorial School Ltd. ("Quick Pass") seeks an interlocutory injunction to prohibit Li Min (Richard) Zhao, from competing with it, from soliciting its students, and from using what it says is Quick Pass's confidential or proprietary information until the trial of the dispute between the parties.
- [2] An interlocutory injunction is a discretionary remedy that allows the court to ensure that the subject matter of the dispute is preserved until completion of the trial. The party seeking the injunction must prove that there is a serious issue to be tried between the parties, that it will suffer irreparable harm if the injunction is not granted, and that the balance of convenience favours granting the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Although "irreparable harm" and "balance of convenience" are sometimes considered together, the parties treated them as separate elements, so I will do so as well.
- [3] Quick Pass offers real estate-related tutorial programs in various Lower Mainland locations to assist Mandarin speakers in sitting British Columbia's real estate licencing examinations. It hires real estate agents who are fluent in Mandarin as instructors.

- [4] Benson Min Hung Wang, the owner of Quick Pass, hired Mr. Zhao under a two-year contract as a real estate program instructor. The contractual terms prohibited Mr. Zhao from soliciting Quick Pass's students and from competing with it for specified periods. It also provided that Quick Pass owned all material relating to its business, including any material created by Mr. Zhao while under contract to Quick Pass, whether or not he created it at Quick Pass's direction.
- [5] Mr. Zhao was entitled to terminate the contract early and he did so. The day after the contract ended, he opened a competing tutorial school in Burnaby, BC. He has advertised and marketed his school to the Mandarin-speaking community, including to students of Quick Pass. He uses materials that he says he developed for use in his own program, but which he must have developed while working for Quick Pass since he opened his school the next day.
- [6] Mr. Zhao does not really dispute these facts. He says that these contractual terms are unenforceable.
- [7] I must decide whether Quick Pass has demonstrated that there is a "serious issue" to be tried in that the contractual provisions likely are enforceable, that Quick Pass would suffer irreparable harm if the injunction was not granted, and that the balance of convenience favours granting the injunction.
- [8] At the hearing, Mr. Zhao complained that he was not able to respond to Quick Pass's late-filed affidavits. Those affidavits were filed late because Mr. Zhao was late in filing his response to the application within. Mr. Zhao is responsible for the delay and has provided no explanation for it. Accordingly, he must live with the evidence as it stands.

FACTS

- [9] Mr. Wang incorporated Quick Pass on July 16, 2015 and is its sole director.
- [10] Quick Pass offers three types of programs, all relating to the real estate industry: the real estate tutorial program ("Real Estate Program"), a tutorial program for mortgage brokers, and a tutorial on rental property management. Quick Pass offers its programs at locations in Vancouver, Richmond, Burnaby, Coquitlam and North and South Surrey.
- [11] Quick Pass's Real Estate Program is based on the University of British Columbia's real estate licencing course ("UBC Course") and the associated licencing examination ("Exam"). Successful completion of the Exam is a prerequisite for being a licensed real estate agent in British Columbia. Quick Pass's teaching material is derived from the UBC Course and includes handouts, power point slides, mock exam questions and the like.

- [12] Mr. Zhao immigrated to Canada in 2013. He is fluent in Chinese and English and has about 20 years of experience in marketing. He obtained a Certificate in Business Administration from BCIT in 2015. He decided to become a real estate agent, and he passed the Exam in 2016.
- [13] On June 9, 2017, Mr. Zhao signed two contracts with Quick Pass, agreeing to teach real estate tutorials for a term of two years, ending in June 2019: the "Independent Contractor Agreement (Schedule A of which contained a "Confidential and Proprietary Information Agreement"), and a "Non-Competition Agreement" (collectively, the "Contracts").
- [14] The Contracts prohibit Mr. Zhao from competing with Quick Pass in Vancouver, Burnaby or Richmond for 18 months following termination of the Contracts:
4. The Contractor agrees with and for the benefit of the Company that during and for a period of eighteen (18) months from the date of termination of the Independent Contractor Agreement (whether such termination is occasioned by the Company, by the Contractor, or by mutual agreement), the Contractor will not, for any reason, directly or indirectly, either as an individual or as a partner or joint venture or as an employee, sales representative, principal, consultant, agent, shareholder, officer or director for any person, firm, association, organization, syndicate, company or corporation or in any other manner whatsoever: carry on, be engaged in, be concerned with, be interested in, advise, lend money to, guarantee the debts or obligations of, or permit his or her name or any part of it to be used or employed by, any person, business, firm, association, syndicate, company, organization or corporation concerned with or engaged or interested in a business which is the same as, or competitive with, the business of the Company, in Vancouver, Burnaby, and Richmond, British Columbia.
 5. The Contractor shall not profit from, directly or indirectly, nor engage in the business of pre-licensing real estate training, and real estate educating in a manner which is the same as, or competitive with, the business of the Company during and for a period of eighteen (18) months following termination of the Independent Contractor Agreement.

("Non-Competition Clause")

- [15] Mr. Zhao was compensated for agreeing to the Non-Competition Clause:

For as long as this Non-Competition Agreement is in effect, the Contractor may charge an additional \$15.00 per hour on each invoice issued to the Company pursuant to the terms and conditions of the Independent Contractor Agreement.

- [16] The Contracts also prohibit Mr. Zhao from soliciting Quick Pass's students or "customers" for two years:

During the term of the Contractor's active employment with the Company, and for two (2) years thereafter, the Contractor will not divert or attempt to divert from the Company any business the Company had enjoyed, solicited, or attempted to solicit, from its customers, prior to termination or expiration, as the case may be.

("Non-Solicitation Clause")

[17] The Contracts define Quick Pass's "confidential and proprietary information," and provide that any material created or contributed to by Mr. Zhao, whether or not at Quick Pass's direction is Quick Pass's confidential and proprietary information; Mr. Zhao is required to return all such material to Quick Pass or destroy it at Quick Pass's request:

Confidential Information includes but is not limited to teaching materials, examination, teaching methods, marketing plans, proposals, contracts, technical and/or financial information, databases, software and know-how. All Confidential Information remains the confidential and proprietary information of the Company...

The Company shall exclusively own, and the Consultant does hereby assign to the Company, all Proprietary Property which the Consultant conceives, develops or contributes to in the course of the Consultant's Engagement with the Company Material or information conceived developed, or contributed to by the Consultant outside work hours on the Company's premises or through the use of the Company's property and/or assets shall also be Proprietary Property and be governed by this Agreement

The Consultant shall, both during and after the Consultant's Engagement with the Company, keep all Confidential Information and Proprietary Property confidential and shall not use any of it except for the purpose of carrying out authorized activities on behalf of the Company. The Consultant may, however, use or disclose Confidential Information which,

- i. Is or becomes public other than through a breach of this Agreement;
- ii. Is known to the Consultant prior to the date of this Agreement and which respect to which the Consultant does not have any obligation of confidentiality; or
- iii. Is required to be disclosed by law

The Consultant shall return or destroy, as directed by the Company, Confidential Information, Proprietary Property and any other Company property to the Company upon request by the Company at any time

The Consultant further agrees that irreparable harm will be suffered by the Company in the event of the Consultant's breach or threatened breach of any of his or her obligations under this Agreement, and that the Company will be entitled to seek, in addition to any other rights and remedies that it may have at law or equity, a temporary or permanent injunction restraining the Consultant from engaging in or continuing any such breach hereof.

("Confidential Information Clause")

- [18] Under the Contracts, Quick Pass paid Mr. Zhao \$35.00 per hour for the services he provided to Quick Pass, including teaching hours and hours spent on preparing materials and other activities. Quick Pass paid him an additional \$15.00 per hour of teaching in consideration of the Non-Competition Clause.
- [19] Mr. Zhao felt that Quick Pass's teaching material needed improvement. He deposes that he developed better teaching material and began using it in the classes he taught under the Contracts for the benefit of "hundreds" of students and the benefit of Quick Pass. He says he wanted Mr. Wang to pay him more for developing these materials but Mr. Wang refused to do so.
- [20] Mr. Wang deposes that he asked Mr. Zhao to redevelop Quick Pass's Real Estate Program materials and paid him to do so.
- [21] Mr. Zhao incorporated his school, the "Richard Zhao Real Estate School Limited" ("Zhao School") on September 21, 2017, while he was still under contract with Quick Pass.
- [22] Mr. Wang's uncontradicted affidavit evidence about how Mr. Zhao terminated the Contracts is as follows:

On September 23, 2017, the defendant told me that he intended to quit working for Quickpass and open his own tutorial school which would directly compete with the Plaintiff in the cities of Richmond and Burnaby. At that time I reminded the defendant of his obligations under the [Contracts]. He told me that such non-competition clauses are not enforceable in Canada, and that there are many ways around it. I told him that the non-competition clauses covered only Burnaby, Vancouver and Richmond, and asked him why he couldn't go teach in Coquitlam or Surrey. He responded that he intended to teach in Burnaby, and added that as the Plaintiff had the big pie of the market in Burnaby why he couldn't have a small piece of the pie. I reminded him of his contractual obligations to return all tutorial handouts, power point slides and notes, and to destroy any copies. He said I had no control over that. He said if I take legal action, he will retaliate by spending a whole month recreating the plaintiff's teaching materials and posting them on YouTube for free, which he suggested would destroy the market.

- [23] Mr. Zhao opened his business on November 1, 2017, the day after the date of termination of the Contracts. The Zhao School is located in Burnaby, a city named in the Non-Competition Clause. Mr. Zhao advertised the November 1 opening of his School on "WeChat," a social media platform that is very popular in the Chinese community. He also marketed the Zhao School on various internet sites, social media platforms, by email, and in a weekly newspaper.
- [24] Mr. Zhao denies that he used any Quick Pass material in the Zhao School. He deposes:

Being aware of my obligations under the [Contracts], I developed all new materials for a second time on which I intended to rely in order to provide real estate tutorial services to the public. I did not use or copy any of the materials I created or were provided to me while working for the Plaintiff. I used my own skill and judgment in developing any materials with reference to the materials published by UBC.

- [25] Mr. Zhao says that there is necessarily some similarity between his materials and the materials that he developed for Quick Pass because both are based on the UBC Course materials. Neither Quick Pass's nor Mr. Zhao's full teaching materials were in evidence, so it is not possible for me to compare them. However, since Mr. Zhao opened his school the day after he left Quick Pass, and the Confidential Information Clause deems any such material created by Mr. Zhao during the term of the Contracts to be the proprietary and confidential information of Quick Pass, it is more likely than not that the material he created for the Zhao School was created while Mr. Zhao was under contract to Quick Pass. This means that if the Confidential Information Clause is enforceable, Mr. Zhao breached it.
- [26] Hai Tao (Justin) Kuang is a former employee of Quick Pass who, at Mr. Wang's request, attended one of Mr. Zhao's free introductory lessons on December 29, 2017. He deposes that Mr. Zhao referred to Mr. Wang directly and described why his program was superior to that of Quick Pass. There is also affidavit evidence from two former Quick Pass students that Mr. Zhao invited them to join his WeChat group and/or promoted the Zhao School to them as superior to Quick Pass. Mr. Wang's affidavit evidence includes screen shots of Mr. Zhao promoting the Zhao School to his WeChat group and screen shots of members of Mr. Zhao's WeChat group that Mr. Wang identifies as current or former Quick Pass students.
- [27] Mr. Zhao denies that he has ever commented publicly or privately on Quick Pass as compared to the Zhao School. Since there is no evidence of a motive to fabricate their statements, I prefer the evidence of Mr. Kuang, and the two Quick Pass students to that of Mr. Zhao.
- [28] For the purposes of this application, Quick Pass has led sufficient evidence to establish that Mr. Zhao was soliciting Quick Pass's customers and was competing with Quick Pass contrary to the Non-Solicitation Clause and the Non-Competition Clause. If these provisions are enforceable, it is very likely that Mr. Zhao breached them.

IS THERE A SERIOUS ISSUE TO BE TRIED?

Confidential Information Clause

- [29] At the hearing of the application counsel for Quick Pass said that he was seeking a permanent injunction barring Mr. Zhao from ever using any material he developed during the term of the Contracts. Counsel for Mr. Zhao did not object. However, a permanent injunction is only available after the plaintiff has conclusively established its rights: *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2014 NLCA 46; Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (release 26, 2017) (Toronto: Thomson

Reuters, 1992), ch. 1 at para. 1.45. The evidence before me is insufficient to do so. I will therefore only consider whether Quick Pass has met the test for an interlocutory injunction with respect to the confidential information issue.

- [30] The Confidential Information Clause is not a restrictive covenant. Rather, it is "intended to protect the right of a business to keep confidential the information it hopes will help it to compete so the usual relatively low threshold applies to it" (Phoenix Restorations Ltd. v. Drisdelle, 2014 BCSC 1497 at para. 17). This means that Quick Pass need only prove that its claim with respect to this clause is not frivolous or vexatious and the court need not engage in an extensive review of the merits of the claim (Phoenix at para. 22).
- [31] Mr. Zhao argues that the information in dispute is not capable of being confidential information. The contractual prohibition applies to "teaching materials, examination, teaching methods, marketing plans, proposals, contracts, technical and/or financial information, databases, software and know-how". I am satisfied that some of the described information could be confidential information. That is all that is necessary for Quick Pass to establish that there is a serious issue to be tried.

Non-Solicitation Clause and Non-Competition Clause

- [32] The Non-Solicitation Clause and the Non-Competition Clause are restrictive covenants because they restrain trade or employment freedom. This means the usually low threshold for establishing that there is a serious issue to be tried is elevated. As the Supreme Court of Canada recently stated, the applicant must show a "strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful" at trial: R. v. Canadian Broadcasting Corp., 2018 SCC 5 at para. 18 (emphasis in original).
- [33] Restrictive covenants are presumptively unenforceable unless they are reasonable between the parties and consistent with the public interest: IRIS The Visual Group Western Canada Inc. v. Park, 2017 BCCA 301, at para. 16.
- [34] Generally, courts scrutinize restrictive covenants in employment contracts more closely than restrictive covenants in contracts for sale and purchase of a business for two reasons. First, the inequality of bargaining power between an employer and employee is greater than that between other contracting parties. Second, a purchaser of a business generally pays for the business's goodwill whereas an employee is not paid for this: Shafron v. KRG Insurance Brokers (Western) Inc., 2009 SCC 6 at paras. 21-22. However, the appropriate degree of scrutiny must reflect the reality both of the parties' relative bargaining power and of the bargain struck.
- [35] Quick Pass is a relatively small business. According to Mr. Zhao, it had four or five instructors including himself, and Mr. Wang was the supervisor. Mr. Zhao deposed that he is a licensed real estate agent with extensive experience in business marketing. Based on the evidence, I consider that the inequality of bargaining power between the parties was less than that usually presumed in an employment relationship. Further, Mr. Zhao was paid

\$15.00 per hour expressly in consideration for not competing with Quick Pass. Both of these features distinguish this case from IRIS. The restrictive covenants in this case are not subject to a high level of scrutiny.

- [36] To be enforceable, the Non-Solicitation Clause and the Non-Competition Clause must be necessary in the sense that a less restrictive measure is not adequate, and they must be no broader than necessary in terms of their geographical, temporal and activity restrictions: IRIS at para. 25. Has Quick Pass established a strong prima facie case supporting each provision?
- [37] The Non-Solicitation Clause does not contain an express geographic restriction. The clause applies for two years.
- [38] What does it prohibit Mr. Zhao from doing? Mr. Zhao argues that it prevents him from providing tutorial services at all because it prohibits him from soliciting anyone Quick Pass has ever attempted to solicit, and there is no way to know who those people might be. I do not read the clause so broadly. It requires Mr. Zhao not to solicit "away from the Company any business the Company had enjoyed, solicited or attempted to solicit from its customers" before the termination date (my emphasis). In my view, the Non-Solicitation Clause prevents Mr. Zhao from soliciting individuals on Quick Pass's customer list as it existed on October 31, 2017.
- [39] Quick Pass did not lead evidence to justify the Non-Solicitation Clause was no broader than necessary. For example, it did not explain why, unlike the Non-Competition Clause, the term was two years and there was no geographic restriction. I conclude that Quick Pass has failed to establish there is a serious issue to be tried in respect of the Non-Solicitation Clause because it has not made a out a strong prima facie case that it is enforceable.
- [40] I reach a different conclusion with respect to the Non-Competition Clause.
- [41] The Non-Competition Clause is expressly limited to the particular geographical locations in which Quick Pass offers its programs. I do not accept Mr. Zhao's submission that listing the cities in which he may not compete is vague. Naming the cities identifies the geographic restriction as the area within the city limits of the named municipalities. The provision specifies the prohibited activity as the business of "pre-licensing real estate training and real estate educating," which corresponds directly to the services Mr. Zhao provided to Quick Pass.
- [42] The prohibition continues for 18 months. Mr. Zhao says this is unjustifiably long, and Mr. Wang submits it is not. Bearing in mind the applicable level of scrutiny, I find that the length of the restriction does not significantly diminish the strength of Quick Pass's claim. I note that the Non-Competition Clause does not prohibit Mr. Zhao from advertising his services. I also place weight on the fact that that Quick Pass paid Mr. Zhao \$15.00/hour in consideration for this clause. I conclude that Quick Pass has established a strong prima facie case in support of its claim based on the Non-Competition Clause.

IS THERE IRREPARABLE HARM?

[43] The Supreme Court of Canada explained what 'irreparable harm' means in *RJR-MacDonald Inc.* at para. 59:

"Irreparable" refers to the nature of the harm suffered, rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation

[Citations omitted.]

[44] In *Edward Jones v. Voldeng*, 2012 BCCA 295, the Court of Appeal indicated that the nature of the harm flowing from non-competition covenants and prohibitions on the use of confidential information is usually irreparable:

37 Non-competition covenants restrict a departing employee from seeking business generally. It usually will not be possible to tell whether business is lost to the employee's new employer as a result of prohibited competition as opposed to legitimate competition. Such damages, not being calculable, generally do constitute irreparable harm. To similar effect are actions which may damage the reputation of a former employer, or the general use of confidential information.

[45] Mr. Wang deposes that Quick Pass has experienced a noticeable decline in the number of its clients and that he is aware that some former Quick Pass clients have "switched over" to the Zhao School. He adds:

As a lot of our business is based on personal referrals and reviews by existing and past clients, the loss of every client can result in significant loss of future business.

[46] In the circumstances of this case, I accept that the harm to Quick Pass will be irreparable if it is successful at trial on its claim based on the Non-Competition Clause in that it will not be possible to distinguish between legitimate competition and prohibited competition.

[47] Similarly, release of confidential information creates a type of harm to business reputation that is difficult to quantify: *6180 Fraser Holdings Inc. v. Ali*, 2012 BCSC 247 at para. 36.

[48] I am satisfied that Quick Pass has established this element in respect of the Confidential Information Clause and the Non-Competition Clause.

WHOM DOES THE BALANCE OF CONVENIENCE FAVOUR?

[49] This stage requires assessing which party would suffer the greater harm from granting or refusing the injunction pending a decision on the merits based on factors including the adequacy of damages as a remedy for each party, preservation of the status quo, the strength of the applicant's case, and the public interest: *Ipsos S.A. v. Reid*, 2005 BCSC 1114 at para. 81, citing *Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd.*, [1992] 64 B.C.L.R. (2d) 96 (C.A.). These factors do not comprise a checklist; they simply provide assistance in

determining the relative risks of harm to the parties in relation to the injunction sought: British Columbia (Attorney General) v. Gitanmaax Band, [1986] B.C.J. No. 1395 at para. 52.

- [50] Turning first to the Non-Competition Clause, I find that in the circumstances, the balance of convenience favours Quick Pass. Quick Pass's claim is relatively strong, and, if it succeeds, damages will be very hard to quantify. Granting the injunction will only require Mr. Zhao to relocate his school to accord with the Contracts he signed. An award of damages can compensate for the costs he incurs.
- [51] I reach a different conclusion with respect to the Confidential Information Clause, based primarily on the strength of Quick Pass's claim and the impact of an injunction on Mr. Zhao. The only information Quick Pass described as in issue was the teaching material. I agree with Mr. Zhao that there is a real issue as to whether this is confidential information. I have doubts about the enforceability of the Confidential Information Clause because of its breadth in purporting to apply to virtually everything Mr. Zhao created while under the Contracts. If granted, an injunction with respect to the confidential information would have a severe impact on Mr. Zhao: he could not operate his business at all. In the circumstances, the balance of convenience favours Mr. Zhao.

CONCLUSION

- [52] In conclusion, I grant the plaintiff's application for an interlocutory injunction respecting the Non-Competition Clause. However, I would modify the wording of the order requested by Mr. Zhao to correspond more precisely with the tutorial program offered by Quick Pass that he instructed.
- [53] Mr. Zhao, either as an individual or as a partner or joint venture or as an employee, sales representative, principal, consultant, agent, shareholder, officer or director for any person, firm, association, organization, syndicate company or corporation is restrained from competing with the plaintiff in any aspect of the business of providing pre-licensing real estate training anywhere in Vancouver, Burnaby and Richmond British Columbia until April 30, 2019, or until the trial or other disposition of this action, or until further order of this court.
- [54] I decline to grant Quick Pass the interlocutory relief it seeks in relation to the Non-Solicitation Clause and the Confidential Information Clause.
- [55] As success on the application was divided, each party shall bear its own costs.

"TYER J."

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