

CANADA / JUDGMENT

Quick Pass Master Tutorial School Ltd. v. Zhao

2022 BCSC 1846

COURT

Supreme Court of British Columbia

DECIDED

21 October 2022

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2022 BCSC 1846 Quick Pass Master Tutorial School Ltd. v. Zhao IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Quick Pass Master Tutorial School Ltd. v. Zhao, 2022 BCSC 1846 Date: 20221021 Docket: S230931 Registry: New Westminster Between: Quick Pass Master Tutorial School Ltd. Plaintiff And: Li Min (Richard) Zhao Defendant Before: The Honourable Justice G.C. Weatherill Reasons for Judgment Counsel for the Plaintiff: E.L. Montague Counsel for the Defendant: F. Ju R. Kim, Articled Student Place and Dates of Trial: Port Coquitlam, B.C. October 4-7, 11-13, 2022 Place and Date of Judgment: New Westminster, B.C. October 21, 2022

Introduction

- [1] The plaintiff claims damages against the defendant for breach of non-competition, non-solicitation, and confidentiality agreements. It also seeks a permanent injunction enjoining the defendant from using or disseminating teaching materials developed by the defendant while he was under contract to the plaintiff.
- [2] The defendant denies any such breaches and, in any event, says that the agreements are unenforceable restraints of trade.

Background

- [3] Benson Wang ("Wang") is the principal of the plaintiff. He is a licenced realtor and mortgage broker. He provides his real-estate brokerage services through a personal holding company called Benson Wang Personal Real Estate Corp.
- [4] Since 2011, in addition to working as a realtor, Wang has provided tutorial services to, predominantly, Mandarin-speaking students wishing to obtain their real estate trading, mortgage broker, and/or rental property management licence(s). The annual enrollment in his programs steadily increased from less than ten in 2011 to over 500 in 2015.

- [5] In July 2015, Wang incorporated the plaintiff and since then has provided tutorial services through that entity. By 2016, the plaintiff operated from classrooms in three locations: in Vancouver, Burnaby, and Richmond. It had an agreement to refer students it tutored who successfully wrote the real estate licencing examinations to a realty company named "New Coast Realty" in exchange for a referral fee.
- [6] The licencing examinations are administered by the Sauder School of Business at the University of British Columbia ("UBC"). To be eligible to write the examination, a person must enroll as a student at UBC, complete all assignments required by the Sauder School of Business, and satisfy English language proficiency requirements.
- [7] In order to assist those wishing to obtain a licence, the Sauder School of Business publishes a course manual, a course workbook and annually publishes a list of approximately 1000 sample examination questions randomly selected from the 26 course chapters that are covered.
- [8] Wang described his tutoring approach as innovative. Because many of the legal and other concepts can be difficult for Mandarin-speaking students to comprehend, his focus is on teaching only the areas likely to be questioned on the licencing exam, rather than the full spectrum of information in the 26 course chapters covered in the UBC course materials. Wang developed this "practical approach" using his experience as a realtor and modifies it annually based upon continual receipt of "feedback" from students who have written the examination and who apprise Wang as to the questions that were asked. Each year, Wang or others retained by the plaintiff compare the newly published 1000 sample questions with those from the previous year in an attempt to gain further insight into the questions that are likely to appear on the examination. Wang testified that his approach has made it much easier for Mandarin-speaking students to study for the real estate licence examination because it only teaches them "what is necessary for them to pass" it.
- [9] Over the years, Wang developed various teaching materials, templates, and terminology translations for his students that combine graphics, flow charts, PowerPoint slides, videos, final exam overviews, and mock questions. These materials are presented in both English and Mandarin. The PowerPoint presentations alone comprise between 80 and 120 slides for each of the 26 chapters covered as part of the real estate "trading" program. They organize the 1000 random questions into categories based on these chapters and key words.
- [10] At the time of registration, each of the plaintiff's students is required to sign a "New Student's Registration Agreement" that included the following statement:
3. The school will teach you the tricks, the principles, and the concepts necessary for you to pass the exam []
- [11] Each student is also required to sign a Non-Disclosure Agreement, prohibiting any duplication or use of the plaintiff's course materials for any purpose other than as needed by them to prepare for the applicable exam. Wang agreed on cross-examination that he is

aware of students photographing his tutorial sessions and/or the plaintiff's tutorial materials despite this prohibition. Jun Zhou, a realtor and student of the plaintiff's tutoring classes during 2017 and 2018, testified that he observed many students taking pictures during the tutoring classes.

- [12] The defendant immigrated to Canada from China in 2013, after an 18-year career in China in the field of telecommunications product marketing. Upon his arrival in Canada, he attended the British Columbia Institute of Technology where he obtained a diploma in business management. He then enrolled in the Real Estate Trading program at UBC and obtained his real estate trading licence in 2016. He saw an advertisement published by the plaintiff for a tutor and applied for the job.
- [13] On June 9 2016, the plaintiff hired the defendant as an independent contractor to assist in the provision of tutoring services to its students. On that date, the defendant signed two contracts with the plaintiff entitled Independent Contractor Agreement and Non-Competition Agreement. They provided, in relevant part, as follows: Independent Contractor Agreement WHEREAS: A. The [plaintiff] is in the business of teaching, educating, and tutoring pre-licensing real estate individuals about real estate related products in a classroom and online environment (the "Class Sessions"). B. The [plaintiff] has developed proprietary teaching methods and materials to be used by its teachers during the Class Sessions. C. The [plaintiff] wishes to hire the [defendant] as an independent contractor, and the [defendant] wishes to work for the [plaintiff] as an independent contractor, for the purpose of providing teaching services in the [plaintiff]'s Class Sessions upon the terms and conditions set out in this Agreement []
1. Term The term of this Agreement shall begin on 09/06/2016 [] and continue until 09/06/2019 (the "Termination Date"), unless terminated earlier as set forth in this Agreement. []
 2. Services
 - (1) The [defendant] will provide the following services:
 - a. The [defendant] shall provide pre-licensing Tutorial Services to the [plaintiff], on an as needed basis.
 - b. Tutorial Services includes, but is not limited to:
 - i. Teaching the curriculum prepared and approved by the [plaintiff]; ii. Planning, preparing, and delivering lessons to all students in a Class Session; iii. Assigning work, correcting, and marking work carried out by his/her students; iv. Assessing, recording, and reporting on the development, progress, attainment and behaviour of students;

- v. Communicating, consulting, and co-operating with other members of the [plaintiff]; vi. Ensuring high standards of professional practice and quality of teaching and learning of the subjects; vii. Participate in [plaintiff] meetings related to the Class Session, for the better organization and administration of the delivery of the Class Session; and viii. Other duties and services required for the proper, and professional delivery of the Class Session. []
- 3. Compensation
 - (1) Subject to providing the services as outlined above, the [defendant] will be paid the sum of \$35 per hour, plus GST. []
- 4. Relationship
 - (1) It is understood that [defendant] is an independent contractor and not an agent of the [plaintiff]. The [defendant] cannot act for the [plaintiff] in any other capacity and may not make commitments or accept risks on behalf of the [plaintiff].
 - (2) The [defendant] will provide the [defendant]'s services to the [plaintiff] as an independent contractor and not as an employee. []
- 5. Confidentiality and Intellectual Property
 - (1) The [defendant] hereby acknowledges that it has read and agrees to be bound by the terms and conditions of the [plaintiff]'s confidentiality and proprietary information agreement attached hereto as Schedule "A" and which forms an integral part of this Agreement. [] [Schedule "A" set out comprehensive terms and was executed by the parties]. []
- 6. Non-Solicitation []
 - (2) During the term of the [defendant]'s active employment with the [plaintiff], and for two (2) years thereafter, the [defendant] will not divert or attempt to divert from the [plaintiff] any business the [plaintiff] had enjoyed, solicited, or attempted to solicit, from its customers, prior to termination or expiration, as the case may be.
- 7. Termination []
 - (4) If the [defendant] has no on-going Class Sessions or if the [sic] all of the [defendant]'s obligations end within thirty (30) calendar days, then the [defendant] may terminate this Agreement at any time at its sole discretion upon providing to the [plaintiff] thirty (30) calendar days' notice of [defendant]'s intention to do so. []
- 8. Obligations Surviving Termination of this Agreement
 - (1) All obligations to preserve the [plaintiff]'s Confidential Information, Intellectual Property and other warranties and representations set forth herein shall survive the termination of this Agreement.

- (2) Clauses [], 6(2) [] shall survive the termination of this Agreement. Non-Competition Agreement [] Compensation
3. For as long as this Non-Competition Agreement is in effect, the [defendant] may charge an additional: \$15.00 per hour on each invoice issued to the [plaintiff] pursuant to the terms and conditions of the Independent Contractor Agreement. Non-Compete
4. The [defendant] agrees with and for the benefit of the [plaintiff] 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 [plaintiff], by the [defendant], or by mutual agreement), the [defendant] 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 [plaintiff], in Vancouver, Burnaby, and Richmond, British Columbia.
5. The [defendant] 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 [plaintiff] during and for a period of eighteen (18) months following termination of the Independent Contractor Agreement.
- [14] Section 6(2) of the Independent Contractor Agreement shall be referred to hereafter as the "Non-Solicitation Clause". Sections 3 to 5 of the Non-Competition Agreement shall be collectively referred to as the "Non-Compete Clause".
- [15] Schedule "A" to the Independent Contractor Agreement defined the plaintiff's confidential and proprietary information and provided that any material created or contributed to by the defendant, whether or not at the plaintiff's direction, was to be included in the plaintiff's confidential and proprietary information. The relevant portions of Schedule "A" are copied below, and shall be referred to hereafter as the "Confidentiality Clause". The defendant agreed to return all such material to the plaintiff or destroy it at the plaintiff's request:
1. [] 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 [plaintiff]. []

3. The [plaintiff] shall exclusively own, and the [defendant] does hereby assign to the [plaintiff], all Proprietary Property which the [defendant] conceives, develops or contributes to in the course of the [defendant's] Engagement with the [plaintiff] []. Material or information conceived, developed, or contributed to by the [defendant] outside work hours on the [plaintiff's] premises or through the use of the [plaintiff's] property and/or assets shall also be Proprietary Property and be governed by this Agreement [].
4. The [defendant] shall, both during and after the [defendant's] Engagement with the [plaintiff], 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 [plaintiff]. The [defendant] 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 [defendant] prior to the date of this Agreement and which respect to which the [defendant] does not have any obligation of confidentiality; or (iii) is required to be disclosed by law []. The [defendant] shall return or destroy, as directed by the [plaintiff], Confidential Information, Proprietary Property and any other [plaintiff] property to the [plaintiff] upon request by the [plaintiff] at any time. [] []
11. []. The [defendant] further agrees that irreparable harm will be suffered by the [plaintiff] in the event of the [defendant's] breach or threatened breach of any of his or her obligations under this Agreement, and that the [plaintiff] 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 [defendant] from engaging in or continuing any such breach hereof. []
- [16] The defendant was paid \$35 per hour for the services he provided to the plaintiff, including teaching hours and hours spent on preparing materials and other activities. The defendant was also paid for the time he incurred in editing and revising the plaintiff's teaching materials. The plaintiff paid the defendant an additional \$15 per hour of teaching in consideration of the Non-Compete Clause.
- [17] Subsequent to the defendant commencing his provision of services, he and the plaintiff agreed that the defendant would be paid \$30 per hour for travel time as well as a bonus based on performance. The plaintiff also agreed to increase the defendant's total hourly rate for teaching on weekends from \$50 to \$60.
- [18] The plaintiff provided the defendant with its proprietary teaching materials which the defendant used in the provision of his services.
- [19] The defendant testified that, after a few months of teaching for the plaintiff, he found that the PowerPoint slides he had been given by the plaintiff did not suit his style of thinking and teaching. He created his own version of the slides organized in a different fashion. He considered his slides to be of superior quality, being, in his view, simpler and easier for his students to understand. He testified that he developed the slides at his own home on his own

time, without reference to any of the plaintiff's slides and that 99% of the content was publicly available on UBC's website.

- [20] The defendant worked for the plaintiff from June 9, 2016 until October 31, 2017.
- [21] On January 1, 2017, the plaintiff "merged" its tutoring programs with those being offered by New Coast Realty. Wang became a realtor with New Coast Realty. The plaintiff used a classroom at New Coast Realty's premises as its Richmond location. It charged its students an enrollment fee of \$1,100 per year. Those who wished to continue with the tutoring after one year as well as those who wished to take an additional program were charged a "renewal" or "return" fee at a reduced rate.
- [22] Within several months of the merger, three to four of the plaintiff's teachers left the plaintiff.
- [23] David Wang ("David") took the plaintiff's Real Estate Trading tutorial program from February 2017 to July 2017. He testified that both he and other students in his class often took pictures of the PowerPoint slides used during the class, including while both Wang and the defendant were teaching. He testified that neither he nor any of the other students were ever asked by an instructor to stop doing so. Several of the photographs he took during one of the defendant's classes were introduced in evidence.
- [24] On September 21, 2017, unbeknownst to the plaintiff, the defendant incorporated a company called "Richard Zhao Real Estate School Limited" ("RZRESL"). He testified that he did so because he had been having a dispute with Wang for several months about the amount of bonus he was to receive and he decided to have a "Plan B" in the event the dispute was not resolved.
- [25] On September 23, 2017, the defendant advised Wang that he was terminating the Independent Contractor Agreement effective October 31, 2017. He provided formal notice of the termination the following day. Wang testified that the defendant told him he intended to set up a competing tutorial business in Richmond and Burnaby and that he had no intention of complying with the Confidentiality Clause. The defendant testified that, although he and Wang had discussions between September 21 and September 23 in an effort to revolve the bonus payment dispute, he does not recall details of what was discussed.
- [26] Wang urged the defendant to ensure that he returned all of the plaintiff's training materials and to comply with the Non-Compete Clause. The defendant responded that he considered the Non-Compete Clause to be unenforceable.
- [27] The defendant did not teach any classes for the plaintiff from September 30, 2017 to October 31, 2017. He testified that he was unable to do so because he was injured in a car accident on September 29, 2017. He testified that he had been traumatized by his car accident and was experiencing driving anxiety and post-traumatic stress disorder.

- [28] The defendant testified that, in mid-October 2017, he visited the offices of Nu Stream Realty Inc. on Kingsway in Burnaby ("Nu Stream") to inspect its classroom as a potential location for his new tutoring school. Nu Stream's office was a short walking distance of his Burnaby home which meant he did not have to drive.
- [29] On October 27, 2017, in furtherance of his "Plan B", the defendant sent an email to someone name Karen Chang at Nu Stream stating: Hi Karen I have mentioned when I started providing teaching service to Benson, the independent contractor agreement signed contained a non-competition clause. I consult my lawyer and he believes there is little chance that these clauses are enforceable. And he encourages me to go ahead. Even there would be a trial, it would happened around 2 years later, while the non competition period is specified as 18 months. Still I think it is better to let you know there is potential risk that Benson may sue me regarding this. []
- [30] On October 31, 2017, the defendant sent the plaintiff an email enclosing certain of the teaching materials that had been provided to him. He did not return any of the teaching materials, including PowerPoint slides, he had developed and used to teach the plaintiff's students prior to October 31, 2017. He testified he kept these materials because it was his understanding at the time that they were not covered by the Confidentiality Clause. On cross-examination, the defendant admitted that he also kept electronic copies of the teaching materials he did return to the plaintiff, stating that he did so to ensure he had proof that they had been returned.
- [31] On November 1, 2017, the defendant commenced doing business in Burnaby under the name RZRESL. He also entered into a commercial arrangement with Nu Stream to promote and provide real estate tutoring services to Mandarin-speaking students in various locations including "Burnaby Kingsway". Commencing November 1, 2017, the defendant as well as Nu Stream, actively advertised and "mass marketed" on various media platforms including WeChat. The defendant described the WeChat platform as enabling him to "viral market" to as many people as possible.
- [32] On cross-examination, the defendant acknowledged that many of the students he taught while working for the plaintiff were members of various of his 358 WeChat Groups who he knew would be the recipients of his mass marketing campaign. He denied having intentionally targeted these students as prospective students for his new school, insisting that he could not forbid them from reading his advertisements. However, he agreed that referrals from the plaintiff's students he had taught was helpful to his business development.
- [33] RZRESL/Nu Stream charged students an enrollment fee of \$800.
- [34] The defendant's promotional and tutoring materials included "sample handouts" and PowerPoint slides that were substantially identical to those used by him while working for the plaintiff. He testified that, while some of his slides utilized information from the plaintiff's slides, most of the slides he used after November 1, 2017 were developed by him

from scratch after that time. He later conceded on cross-examination that, in fact, many of his slides were copies of those he had used while employed by the plaintiff, while others had "many similarities".

- [35] The defendant provided tutorial services in direct competition with the plaintiff from Nu Stream's classroom commencing with a "final review" class on November 6, 2017, advertised as being open to anyone. Vickie Tsi, a former employee of the plaintiff, testified that she attended that class and observed the defendant in the process of providing a "final exam class" to approximately 30 to 40 people in a classroom. The defendant testified that his purpose in hosting the class was "to demonstrate my competence" in offering tutorial services. He testified that he did not specifically invite any of the plaintiff's students, although he conceded it is possible that some of the plaintiff's students likely received notice of the class because they were his WeChat friends.
- [36] Ms. Tsi testified that she was advised by several of the plaintiff's existing or prospective students that they decided to attend the defendant's tutoring classes instead of the plaintiff's because the defendant was offering the classes for a reduced fee.
- [37] Wang agreed on cross-examination that at least six of the plaintiff's teachers left its employ during 2017, including the defendant. Five of these six teachers subsequently opened tutoring classes in competition with the plaintiff, although only one of these businesses is still in operation. Wang also agreed that, at the time the defendant left the plaintiff's employ on October 31, 2017, the defendant was considered by him to be the plaintiff's best Real Estate Trading Pre-Licence program teacher to Mandarin-speaking students. He hired three other teachers to replace those that had left, although only one of them, Blair Wong, proved to be sufficiently qualified.
- [38] Wang testified that, after October 31, 2017, he worked many hours to enhance and improve the quality of the plaintiff's teaching materials because he was concerned that the plaintiff would lose its competitive edge to RZRESL. The plaintiff also added tutoring programs, including a pre-licencing tutoring program for a general contractor building licence issued by British Columbia Housing, reduced its enrollment fees, and began selling its tutoring materials to students without the need for enrollment in one of its programs. He also changed his strict policy that prohibited his students from electronically recording the tutorials to permitting such recordings because RZRESL was allowing them.
- [39] On December 29, 2017, the defendant held another free "introductory lesson" at Nu Stream's classroom. Justin Kuang, a then employee of the plaintiff, deposed in affidavit #1, sworn April 2, 2018, in support of an application filed by the plaintiff on March 19, 2018, in relevant part, as follows:

3. On December 29, 2017, at the request of Benson Wang, principal of the plaintiff, I attended at an introductory free lesson at the defendant's real estate certification tutorial class at the defendant's premises located at 100 - 4555 Kingsway in Burnaby, B.C. The class was taught by the defendant. There were approximately 19 students in attendance.
 4. During the class, the defendant made some statements about the plaintiff school and about its principal Benson Wang. In particular, the defendant compared his education to that of Benson Wang, stating that he was much higher qualified as Benson had only high school education while he had a university masters degree. He also said our school is much better as "other school's materials" were only in black and white while theirs used colour to define and assist in the learning process. He showed hard copies of what he said were "other school's materials" in black and white, and flipped through some of these for the class to see. I recognized that the black and white materials he was showing the class were teaching materials from the plaintiff.
- [40] During his evidence-in-chief, the defendant denied having made any of the statements attributed to him by Mr. Kuang. He testified that the statements were made, not by him, but rather by one of the attendees at the class named James Liang. The defendant testified that he immediately put a stop to Mr. Liang's disparaging remarks because they were "inconsistent with my value system of integrity and honesty".
- [41] The defendant testified that, in early 2018, he developed a completely new set of PowerPoint slides from UBC's materials, without use of or reference to any of the materials he had previously used. He testified that his new work product was based entirely on a new template he created using UBC's published course materials. He testified that he did so because he realized that his understanding of the Confidentiality Clause might have been incorrect. On cross-examination, he reluctantly conceded that in many respects the slides were very similar to the slides he had used while teaching for the plaintiff, but he insisted that the information in all of the slides had been sourced from UBC's course materials. At one point he was taken to a slide which he insisted was a "good example" of something that was "exactly as shown" in the UBC textbook, but when taken to the textbook he conceded it was not.
- [42] On March 29, 2018, the defendant swore affidavit #1 in response to the plaintiff's application for an interlocutory injunction in which he deposed, inter alia, that:
32. On October 31, 2017, as promised and as required by the Agreements, I delivered to the Plaintiff via email all of the materials I had developed, including those for which I was not paid. I delivered to the Plaintiff a total of 621 pages, at the time, amounting to all of the written course materials that I had created over the course of my work for the Plaintiff. These materials covered chapters 2 through 26 of the UBC materials. I never taught chapter 1. []

33. Being aware of my obligations under the Agreements, 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 that I created or were provided to me while working for the Plaintiff. I used my own skill and judgment in developing my new materials with reference to the materials published by UBC.
- [43] RZRESL enrolled 138 students between November 1, 2017 and April 30, 2018.
- [44] On May 1, 2018, the plaintiff obtained an interlocutory injunction restraining the defendant from competing with it anywhere in Vancouver, Burnaby, or Richmond until April 30, 2019, being the expiry date of the non-compete clause. As a result, the defendant moved RZRESL's operations from Burnaby to New Westminster. The defendant testified that the new location was an approximate ten-minute drive from the Burnaby location. All of RZRESL's students who were enrolled on April 30, 2018 transferred to its new location.
- [45] In mid-2018, Wang severed his relationship with New Coast Realty (which had changed its name to "LeHomes Realty First". The plaintiff leased other space in Richmond which it used for teaching its tutoring programs. Wang agreed on cross-examination that the location of the new space was inferior to the classroom the plaintiff had previously used at New Coast Realty.
- [46] On August 31, 2018, Nu Stream and the defendant terminated their commercial agreement.
- [47] In October 2018, the defendant entered into a "Real Estate Pre-Licensing Tutorial Program Agreement" with LeHomes Realty First, the same entity with which the plaintiff had previously entered referral fee agreement. The defendant testified that, since approximately May 2019, his tutoring is provided on-line. The defendant continues to use the PowerPoint slide materials he created in early 2018 with some updates and modifications.
- [48] Commencing in early 2019, the defendant began teaching the mortgage broker program in addition to the real estate trading program. He acknowledged that some of the chapters used in the two programs overlap.
- [49] The defendant conceded that several students who attended the plaintiff's classes while he taught there became students of RZRESL.
- [50] The plaintiff's enrollment and income (net of GST & fees etc.) in respect of its real estate trading tutoring program for the relevant months were as follows: Year Month No. of Students Total
 2016 January February March April May 26 (est.) \$23,567 (6-mo. avg) June 26 (est.) \$23,567 (6-mo. avg) July 45 \$37,009 August 27 \$25,771 September 31 \$27,551 October 23 \$22,030 November 23 \$21,949 December 7 \$7,090
 2017 January 20 \$19,950 February 58 \$56,852 March 53 \$53,980 April 52 \$52,113 May 65 \$68,708 June 37 \$34,816 July 41 \$39,010 August 38 \$35,070 September 46 \$43,821 October 37 \$26,461 November 25 \$22,888 December 10 \$9,643
 2018 January 24 \$19,913 February 6 \$5,110 March 19 \$6,902 April 19 17,166 May 20 \$18,648 June 18 \$18,382 July 11 \$10,180 August 8 \$8,352 September 10 \$8,837 October 19 \$18,522 November 8 \$6,653 December 5 \$4,665
 2019 January 8 \$6,093 February 11 \$9,237

March 9 \$7,003 April 17 \$13,045 May 10 \$8,030 June 7 \$3,601

- [51] Wang agreed on cross-examination that each of the following factors likely impacted the plaintiff's enrollment after the defendant's departure:
- a) the departure of the plaintiff's best real estate trading teacher;
 - b) the departure of the other five teachers in 2017;
 - c) inflation, which caused an increase in expenses and, hence, an increase in fees that the plaintiff charged;
 - d) a new and enhanced English language requirement;
 - e) an inferior location in Richmond after the plaintiff severed its relationship with New Coast Realty; and
 - f) competition from the defendant's company.

Issues

[52] The following issues require determination in this case:

- a) Are the Non-Solicitation Clause and the Non-Compete Clause enforceable as restrictive covenants?
- b) Is the Confidentiality Clause enforceable as against the defendant?
- c) If so, were any of those clauses breached by the defendant?
- d) If so, what compensatory damages if any is the plaintiff entitled to be awarded?
- e) Is the plaintiff entitled to an award of punitive damages?
- f) Is the plaintiff entitled to a permanent injunction as against the defendant?
- g) Is an award of special costs against the defendant warranted? Credibility and Reliability Wang

[53] Wang was an intense witness who gave his evidence in a precise and assertive manner. On cross-examination, he had difficulty keeping calm, often launching into lengthy diatribes about the strength of the plaintiff's case. It was obvious from his demeanour as a whole that he is passionate in his belief that the plaintiff has been wronged by the defendant's conduct. He produced voluminous detailed analyses comprising comparisons, charts, and graphs in an effort to make his point. I find that, although Wang was a credible witness, his many analyses were replete with hearsay, assumption, and unsubstantiated hypotheses and, to the extent they were admissible in evidence, they are to a large extent flawed and unreliable. Vickie Tsi, David Wang, and Jun Zhou

- [54] Each of Vickie Tsi, David Wang, and Jun Zhou testified in an honest and forthright manner. I have no difficulty accepting their respective evidence in its entirety. The defendant
- [55] The defendant gave his evidence-in-chief in a confident manner. However, on cross-examination, he obfuscated and became verbose and defiant. Although the he initially maintained that none of the PowerPoint slides he used for his classes after October 31, 2017 belonged to the plaintiff, he ultimately, although reluctantly, conceded that many of those materials were copies of those he had used while he was employed by the plaintiff.
- [56] In his March 29, 2018 affidavit and again during his examination for discovery on October 8, 2020, the defendant gave evidence under oath that, on October 31, 2017, he returned all of the teaching materials he had created and used while teaching at the plaintiff's school. That evidence was false.
- [57] The defendant's repeated protestations that he relied on UBC's published course materials for all of the PowerPoint slides he developed "from scratch" and has used since the beginning of 2018 without reference to any of the materials he had used prior to November 1, 2017 were also demonstrably false. It was obvious that the genesis of most, if not all, of the content of those slides was the plaintiff's teaching materials, which the defendant had slightly reorganized, reformatted, and/or reworded to make them appear different. The defendant's assertion that his was a new template utilizing his own work product was devoid of credibility.
- [58] I find that the defendant's evidence regarding each of the following was untruthful:
- a) that he did not decide to start his own competing school until after September 23, 2017;
 - b) that he was unable to work between September 30 and October 31, 2017;
 - c) that on October 31, 2017, he returned all of the materials he had developed while engaged by the plaintiff under the Independent Contractor Agreement, that he developed all of his new materials from scratch and that he did not use or copy any of the materials he had created or that were provided to him while so engaged;
 - d) that he did not intentionally solicit the plaintiff's former and current students, including those he had taught, to become students of his new school;
 - e) that the words attributed to him by Mr. Kuang during the December 29, 2017 class were uttered by James Liang, one of the other students who was in attendance;
 - f) that all of his work product came from UBC and that he did not use a single one of the plaintiff's concepts, ideas or Power Point slides in the creation of his 2018 tutoring slides in his own way.

[59] I have no difficulty finding that the defendant's evidence on most, if not all, material issues was false and contrived in an attempt to achieve success in this action. The harsh reality is that once a witness has been shown to be deceptive and untruthful in giving his evidence, that witness can no longer expect the court to consider him to be a trusted source of the truth. Accordingly, I do not accept the defendant's evidence on any material issue.

Analysis

Is the Non-Solicitation Clause and Non-Compete Clause Enforceable?

[60] The Non-Solicitation Clause and the Non-Compete Clause are restrictive covenants because they restrain trade or employment freedom. Such clauses are presumptively unenforceable unless the plaintiff demonstrates they are reasonable as between the parties and are consistent with the public interest: *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301, at paras. 16-17 [IRIS]. A higher level of scrutiny is applied to restrictive covenants in contracts of employment than in contracts relating to the sale of a business: *IRIS*, at paras. 19-22. The degree of scrutiny regarding whether the clauses are reasonable as between the parties must reflect the reality of both the parties' relative bargaining power and the bargain struck: *Quick Pass Master Tutorial School Ltd. v. Zhao*, 2018 BCSC 683 at para. 34.

[61] This is not a case of unequal bargaining power such that a higher level of scrutiny is necessary. Neither party occupied a meaningfully stronger bargaining position when the Independent Contractor Agreement and the Non-Competition Agreement were negotiated and executed. Indeed, there was very little, if any, variance in their respective negotiating strength. The defendant proudly testified as to his high level of education and significant experience in marketing. Moreover, he negotiated an additional \$15 per hour expressly in consideration for his agreement not to compete with the plaintiff for 18 months after his relationship with the plaintiff ended, an almost 43% increase in his compensation.

[62] The appropriate level of scrutiny having been determined, the burden is on the party seeking to enforce the restrictive covenant to establish, on the balance of probabilities: (i) that there is a proprietary interest worthy of protection; (ii) that it cannot be adequately protected by a less restrictive measure; and (iii) that the covenant is reasonable in terms of the activity being restricted, the geographical area of the restriction and the duration of the restriction: *IRIS* at para. 25. Non-Compete Clause

[63] The defendant submits that the Non-Compete Clause is unenforceable because its terms are ambiguous and overly broad and, therefore, unreasonable. He points out that, while both clauses 4 and 5 are limited to 18 months from the date of termination:

- a) Clause 4 restricts the defendant from being "engaged in", "concerned with" or "interested in" a "business which is the same as, or competitive with" the plaintiff's business in Vancouver, Burnaby, and Richmond, British Columbia. The defendant submits that the phrases in parentheses are ambiguous and overly broad, that the "business" of the plaintiff is undefined and unreasonably restricts the defendant from being involved in any function in any area of real estate; and
 - b) Clause 5, although specific to "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 plaintiff, is not limited to a geographical location.
- [64] The defendant submits that the two clauses are separate and distinct and that their respective enforceability must be determined disjunctly. He relies on the decision of the Supreme Court of Canada in *KRG Insurance Brokers v. Shafron*, 2009 SCC 6 at paras. 46-50 [Shafron], where the court rejected a finding that the doctrine of notional severance could be used to determine it was likely in the reasonably contemplation of the parties that the phrase "Metropolitan City of Vancouver" meant "the City of Vancouver, the University of British Columbia Endowments Lands, Richmond, and Burnaby".
- [65] As was explained by the court in Shafron at paras. 29-30, illegal features of a contract can, in limited circumstances, be removed so as to render the contract enforceable. There are two types of severance: "blue-pencil" severance (the offending provision can be removed by running a blue pencil through it without affecting the meaning of the part remaining) and "notional" severance (reading down an illegal provision in order to make the contract enforceable, such as changing a usurious illegal interest rate to legal rate): Shafron at paras. 29-30.
- [66] In my view, there is no need to consider the doctrines of "notional severance" or "blue-pencil severance" in this case because nothing needs to be struck out or read down. The two clauses must be read together in context. There is no issue of ambiguity to be resolved regarding the plaintiff's business--it is expressly defined in the "Whereas" provision on the first page of the Independent Contractor Agreement. Clause 5 simply provides further specificity and clarity to clause 4.
- [67] I find that, when read together, clauses 4 and 5 make clear that the plaintiff had a proprietary interest worthy of protection that, in all of the circumstances, could not be adequately protected by a less restrictive measure. I also find that, read together, the clauses are reasonable in terms of restricting the defendant's ability to compete with the plaintiff in the business of pre-licensing real estate training and education in the cities of Vancouver, Burnaby, and Richmond for 18 months, particularly given the fact that the defendant negotiated and was paid an additional \$15 per hour as consideration for his agreement to accept the restraints imposed by the Non-Compete Clause.
- [68] The Non-Compete Clause is enforceable. Non-Solicitation Clause

- [69] The Non-Solicitation Clause stipulates that the defendant will not, for two years after the termination date, attempt to solicit "away from the [plaintiff] any business the [plaintiff] had enjoyed, solicited or attempted to solicit from its customers" before the termination date.
- [70] Counsel for the plaintiff submits that the two-year term was reasonable in light of the evidence that the typical duration of the plaintiff's contracts with its clients was one year with the potential for a renewal and/or return that extended the contract beyond one year. He submits that, because most solicitations in the plaintiff's business are done online through social media platforms, a specific geographic restriction would have served little purpose and provided no effective protection.
- [71] I agree with counsel for the defendant that the Non-Solicitation Clause is overly broad because it effectively restricts the defendant from soliciting anyone regardless of whether the defendant had any prior dealings with the individual. Moreover, the defendant would have no way of identifying a person as a customer of the plaintiff. As was stated by this court in *Phoenix Restorations Ltd. v. Brownlee*, 2010 BCSC 1749 at para. 40:
- [40] The difficulty with the clause, however, is that it is not limited to the clients with whom Brownlee dealt. [] The Non-Solicitation Clause prohibits Brownlee from soliciting any of Phoenix's customers or actively seeking prospective clients or customers, including those with whom he had no dealings. Such a clause appears to be broader than necessary to protect Phoenix's legitimate proprietary interest. []
- [72] That analysis applies with equal force in this case. I find that the Non-Solicitation Clause is an unenforceable restraint of trade. Is the Confidentiality Clause Enforceable?
- [73] The defendant does not take issue with the enforceability of the Confidentiality Clause. Did the Defendant Breach any of the Contracts? Non-Compete Clause
- [74] I have no difficulty concluding on the evidence as a whole that the defendant breached the Non-Compete Clause commencing on November 1, 2017. Further, I conclude that the breach was deliberate and calculated. Non-Solicitation Clause
- [75] Given my finding that the Non-Solicitation Clause is unenforceable, there is no need to consider whether that clause was breached. However, had I found that the Non-Solicitation Clause was enforceable, I, nevertheless, would have concluded on the evidence as a whole that the plaintiff failed to prove it was breached by the defendant.
- [76] Although it is clear that the defendant commissioned and/or instigated numerous advertising campaigns (on social media platforms and other forms of media) and that several of the plaintiff's former/current students attended the defendants' classes after November 1, 2017, no evidence was led that one was causally connected to the other. None of the defendant's advertisements referenced the plaintiff by name. A general advertisement announcing a new business and business location, without mentioning the former employer's name, does not breach a non-solicitation agreement: *Dr. P. Andreou Inc. v. McCaig*, 2007 BCCA 159 at para. 35. Confidentiality Clause

- [77] As stated above, I reject the defendant's evidence to the effect that the materials he used to teach the Real Estate Trading tutorials after November 1, 2017 were entirely his own work product, developed without reference to the plaintiff's teaching materials or the materials used by him while teaching at the plaintiff's schools. It is obvious from even a cursory examination of the materials that they were to a significant degree identical, in all material respects, to those used by him when teaching the plaintiff's students while he was engaged by the plaintiff as an independent contractor. The genesis of the materials was the plaintiff and were covered by its copyright and the Confidentiality Clause, as were the changes made to them by the defendant prior to October 31, 2017.
- [78] The defendant's attempt to disguise his post-November 1, 2017 teaching materials by changing some of the language and order of the PowerPoint slides, and by changing the plaintiff's watermark: "Copyright of Quick Pass Master Tutorial School Ltd." to "Copyright Richard Zhao" and later to "Source of Information: UBC" does not change their genesis.
- [79] I find that the defendant utilized the Plaintiff's Teaching Materials as the primary source of his teaching materials after November 1, 2017.
- [80] The Confidentiality Clause makes it clear that all materials conceived, developed or contributed to by the defendant while employed by the plaintiff were the plaintiff's property, regardless of whether they were created during or outside of "work hours" and that such materials were assigned by the defendant to the plaintiff. It embraces all of the tutoring materials the defendant developed during prior to November 1, 2017, including the PowerPoint slides and other materials the defendant may have created on his home computer (collectively the "Plaintiff's Teaching Materials"). The defendant's failure to deliver these materials to the plaintiff prior to November 1, 2017 was a conscious decision he made in the mistaken belief that they were not the property of the plaintiff.
- [81] I find that the defendant realized, in no later than December 2017, that his use of the Plaintiff's teaching materials may be in breach of the Confidentiality Clause. He then went to great lengths to change some of the formatting, graphics and wording in an attempt to further conceal the fact that the genesis of his work product was, in truth, the plaintiff's work product.
- [82] In order to found an action for breach of a confidentiality clause, the information in question must have the necessary quality of confidence. A list of the factors to be considered is found in *Foreman v. Chambers et al*, 2006 BCSC 1244 at para. 61, citing *Pharand Ski Corp. v. Alberta* (1991), 80 Alta. L.R. (2d) 216 (Q.B.):
- a) the extent to which the information is known outside the owner's business;
 - b) the extent to which it is known by employees and other involved in the owner's business;
 - c) the extent of measures taken by the owner to guard the secrecy of the information;
 - d) the value of the information to the owner and his competitors;

- e) the amount of money or effort expended by the owner in developing the information; and
 - f) the ease or difficulty with which the information could be properly acquired or duplicated by others by their independent endeavours.
- [83] The mere assembly of publicly available facts by itself does not render the information confidential. Rather, the information must be difficult to assemble, assembled in an innovative manner or analysed in an innovative manner: Foreman at para. 65.
- [84] The defendant submits that the materials in question did not have the necessary quality of confidence because the primary source of the materials was the UBC course materials which are publicly available. I reject that submission as devoid of merit in fact or in law. Although derived from publicly available information, the materials in question were an original creation of the plaintiff after significant time and effort was spent by Wang reading and analyzing voluminous source documents and assembling the tutoring course in an innovative fashion that was desirable to Mandarin-speaking students. The process was time consuming and required initiative and expertise in real estate law, practices, and procedures. If, as the defendant suggests, anyone with access to the internet could have created the materials, there would have been little or no value in the services that the plaintiff was providing to students and the business would undoubtedly have been a resounding failure. That was not the case here, as evidenced by the business records of the plaintiff.
- [85] The defendant also submits that the PowerPoint slides in question were of little importance and that the plaintiff took few measures to guard the confidentiality of the material. He submits that it was disseminated to the plaintiff's teachers and some students took pictures of the slides in the classrooms in violation of the Non-Disclosure Agreement they had signed. He submits that the students who were enrolled in New Coast Realty's classes at the time of the merger with the plaintiff were not required to sign a non-disclosure agreement at all. He also submits that students could easily have made notes during the classes and disseminated them to others.
- [86] I reject each of these submissions. The evidence is clear that the plaintiff took pains to ensure the confidentiality of the materials, including in the form of the Non-Disclosure Agreements as well as the Confidentiality Clause itself. While the steps taken by the plaintiff to protect the confidentiality were not perfect, they were sufficient to demonstrate the value of the material to the plaintiff and its desire to maintain confidentiality over the work product. The mere fact that there were instances of students using their cell phone cameras to take pictures of the PowerPoint slides without consequence does not establish an unreasonable lack of control over the information.
- [87] Finally, the defendant submits that the PowerPoint slides in question were created by the defendant on the basis of his own skill and experience during the course of his employment with the plaintiff and that he was fully entitled to make use of the knowledge he acquired while working for the plaintiff: Genesta Manufacturing Ltd. v. Babey et al (1984), 48 O.R. (2d)

94 (H. Ct. J.) at para. 43. While that may well be true, the defendant did not simply use the "know-how" he acquired in his new enterprise; he appropriated to himself the actual work product he had created while employed by the plaintiff.

- [88] I find that the defendant breached the Confidentiality Clause. Compensatory Damages
- [89] The innocent party to a breach of contract is entitled to be put in the same position, so far as a monetary award can do so, as it would have been in had the contract not been breached. The loss must be causally connected to the breach and not too remote: *Houweling Nurseries Ltd. v. Fisons Western Corporation* (1988), 49 D.L.R. (4th) 205 (B.C.C.A.) at 209.
- [90] The question in this case is whether the plaintiff has satisfied its onus of establishing, on the balance of probabilities, that it would have been in a more favourable financial position but for the breach.
- [91] The defendant argues that the plaintiff has failed to prove any loss caused by the breach of the Non-Compete Clause because there was nothing preventing him from opening his tutoring school in New Westminster rather than in Burnaby. Had he done so, the outcome would have been the same. But that is nothing but conjecture. The defendant led no evidence as to what he would have done had he not breached the Non-Compete Clause. The court has no way of knowing whether he would have opened his school in New Westminster (as he ultimately did after the injunction was granted) or in some other location or not opened at all. That evidence could easily have been led but was not. There is a gap in the evidence.
- [92] The defendant submits that where the absence of evidence makes it impossible to assess the plaintiff's no-breach position, it is entitled to nominal damages only: *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 at para. 75 (C.A.). He further submits that where the quality of the evidence presented by the plaintiff is less than what could reasonably have been expected, the plaintiff will bear the consequences of inadequate proof: *Seaport Crown Fish Co. Ltd. v. Vancouver Port Corporation*, [1999] B.C.J. No. 1953 (S.C.).
- [93] There is no question that the plaintiff's student enrollments and income declined significantly during the six-month period between November 1, 2017 and May 1, 2018 when he ceased operating his competing business in Burnaby. Wang's evidence was that he was not aware of any material change in the plaintiff's competitive market during this period of time other than that the defendant commenced competing against it.
- [94] However, Wang agreed during cross-examination that the plaintiff has no way of measuring with any degree of accuracy what the impact on its business was of the defendant opening up a competing business in Burnaby as opposed to what the impact would have been had he opened up his business in New Westminster from the outset. He conceded that he could only say it was "possible" that the plaintiff lost income from referral fees, renewals and word-of-mouth referrals as a result of the competition from RZRESL.

- [95] Wang also agreed that several factors unrelated to the defendant's breach of the Non-Compete Clause likely impacted the plaintiff's enrollment after October 31, 2017, including no longer being able to provide tutoring from its best teacher (in the form of the defendant), the departure of the other five teachers in 2017, inflation and the need to increase fees, a new and enhanced English language requirement, and an inferior location in Richmond after the plaintiff severed its relationship with New Coast Realty.
- [96] The fact that damages are difficult to assess does not mean that the court should relieve the wrongdoer of the necessity to pay them: *Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada*, [1976] 1 S.C.R. 267 at 289. In some cases, the best that can be achieved is a rough estimate as to the amount of damages that have been suffered: *Nickel v. Takhar*, 2020 BCSC 1462 at para. 62. The court can and should draw inferences from the evidence as to the probable extent of the loss and determine the quantum of the loss as best it can.
- [97] Counsel for the plaintiff submits that a fair assessment of the plaintiff's damages would be \$130,000, being the difference between its income during the six-month period immediately preceding the breach and the six-month period following the breach. He argues that such an assessment would also compensate the plaintiff for the defendant having used his breach of the Confidentiality Clause as a "springboard" allowing him to begin competing immediately because it would have taken the defendant several months, at least, to create his teaching materials from scratch.
- [98] However, the \$130,000 figure does not take into consideration any of the factors unrelated to the defendant which are referred to above. It also assumes no contingency for the substantial possibility that the defendant, who enjoyed the reputation as being the plaintiff's best teacher, would have opened his school in New Westminster rather than in Burnaby.
- [99] Taking all of the foregoing into consideration, I assess the plaintiff's damages for breach of the Non-Compete Clause and the Confidentiality Clause at \$50,000. Permanent Injunction
- [100] The principles to be considered when determining whether the grant of a permanent injunction is warranted were set out by this court in *Grosz v. Guo*, 2020 BCSC 997 at paras. 73-74:
- [73] Final or permanent injunctions are an extraordinary remedy, and the court must exercise its discretion to grant such relief cautiously. Because of their potentially broad and restrictive scope, and the potential consequences of their breach (including being found in contempt of court), injunctive orders must be tailored to the specific circumstances of the case in which they are ordered, and they must not go beyond what is reasonably necessary to effect compliance: *Cambie Surgeries [Corp. v. British Columbia]*, 2010 BCSC 396, at para. 39. [74 In *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46 at para. 72, the Newfoundland and Labrador Court of Appeal held that the question of whether to grant a permanent injunction may be resolved by answering the following questions:

- (i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed); (ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction? (If not, the injunction claim should be dismissed); (iii) Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy); (iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's prima facie entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);
- (v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction? (vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[101] Almost five years have elapsed since the defendant terminated the Independent Contractor Agreement. Since that time, there have been numerous iterations of the teaching materials he uses. To require that he now identify in the current version all of the plaintiff's confidential property and untangle from it the publicly available information and the defendant's own work product created by him from scratch after October 31, 2017 would be a herculean task and an exercise that is not warranted in this case.

[102] In my view, the damages I have awarded will be an adequate remedy. Punitive Damages

[103] The plaintiff argues that an award of \$25,000 in punitive damages ought to be awarded in this case because of the defendant's conduct in competing with the plaintiff in flagrant breach of the Non-Compete Clause and in planning and deliberately taking steps to hamstring the plaintiff's business by usurping to himself the teaching materials he developed and used for his tutoring classes while employed by the plaintiff.

[104] Where, as here, the case is one in breach of contract, punitive damages will only be available in circumstances where, apart from the breach sued upon, the defendant has committed an "independent breach": *Whiten v. Pilot Insurance Co*, 2002 SCC 18 at para. 31. They are the exception rather than the rule. They are only awarded where there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour: *Whiten* at para. 94.

- [105] The defendant's conduct was a deliberate breach of contract committed by him for his own self-interest, but there is no evidence that an independent breach was committed.
- [106] I decline to award punitive damages in this case. Special Costs
- [107] The plaintiff seeks an order for special costs against the defendant for his "conduct in the litigation, in particular the clear evidence that he lied and falsified evidence both in examination for discovery and in an affidavit filed in connection with the injunction application ".
- [108] Special costs are not awarded simply because a witness was untruthful. Something more is required, such as evidence of a motive to mislead the court by, for example, fabricating evidence or defending an action on the basis of facts known to be untrue: *Pacific Wagondepot Ltd. v. Hudson West Development Ltd.*, 2017 BCSC 1993 at para. 8. As was recently stated by this court in *Palmer v. Pazniak*, 2022 BCSC 513, at paras. 12-13:
- [12] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Justice Gropper provided a comprehensive overview of the legal principles for awarding special costs at para 73:
- [73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:
- a) the court must exercise restraint in awarding special costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
 - d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
 - e) special costs can be ordered against parties and non-parties alike; and
 - f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

- [13] I will emphasize the first point, which is that the court must exercise restraint in awarding special costs. Justice Gropper held that it is the exceptional element of something more that brings the law of special costs into focus. In *Yeomans v. Buttar*, 2021 BCSC 1394 [Yeomans], at para 14, Justice Kent held similarly in a motor vehicle action that special costs awards require exceptional circumstances, and the court will generally exercise restraint in that regard.
- [109] The issues to be determined in this case cannot be described as unusual or difficult. However, the defendant deliberately chose to respond to the injunction application with a sworn affidavit he plainly knew was false, with the improper motive of misleading the court into believing he had fully complied with the terms of the Confidentiality Clause and had returned all of the teaching slides he had created while employed by the plaintiff. This conduct falls into the category of situations that attract a finding of reprehensibility as discussed in *Palmer* at para. 12.
- [110] In my view, such deceit should not be tolerated and should attract consequences. An award of special costs is warranted.

Conclusion

- [111] The Non-Compete Clause is enforceable against the defendant.
- [112] The Non-Solicitation Clause is an unenforceable restraint of trade.
- [113] The Confidentiality Clause is enforceable against the defendant.
- [114] The defendant breached the Non-Compete Clause and the Confidentiality Clause. The plaintiff is entitled to judgment against the defendant in the amount of \$50,000.
- [115] The plaintiff's claim for a permanent injunction is dismissed.
- [116] The plaintiff's claim for an award of punitive damages is dismissed.
- [117] The plaintiff is entitled to special costs of this action. "G.C. Weatherill J."

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