

CANADA / JUDGMENT

Wizedemy Inc. v. Karras

2024 BCSC 630

COURT

Supreme Court of British Columbia

DECIDED

9 April 2024

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2024 BCSC 630 Wizedemy Inc. v. Karras

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wizedemy Inc. v. Karras,

2024 BCSC 630

Date: 20240409

Docket: S241896

Registry: Vancouver

Between:

Wizedemy Inc. and Wizedemy Corp.

Plaintiffs

And

John Karras and EasyGrades LLC

Defendants

Before: The Honourable Justice Giaschi

Oral Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Date of Hearing:

Vancouver, B.C.

April 2-3, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 9, 2024

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Introduction

- [1] THE COURT: We are here today for me to render oral reasons in this matter. I reserve the right to amend these reasons for grammar and clarity and to provide full citations and quotations where necessary.
- [2] The plaintiffs apply for four interlocutory injunctions as follows:
- a) Restraining the defendants, for a period of 12 months ending March 3, 2015, from engaging in any educational services business, that offers online products or services that are similar to those offered by the plaintiffs or that the defendant worked on while with the plaintiffs, at institutions where the plaintiff's products are offered (the "Non-Competition Injunction");
 - b) Requiring the defendants to destroy and permanently expunge all materials containing the confidential information or intellectual property of the plaintiffs (the "Expungement Injunction");
 - c) Enjoining the defendants from using the confidential information or intellectual property of the plaintiffs (the "Confidential Information Injunction"); and
 - d) Restraining the defendants from disparaging the plaintiffs (the "Non-Disparagement Injunction").
- [3] The defendants oppose the application.

Facts

- [4] The plaintiffs provide online educational and tutoring products to students. There are essentially two products that are relevant to this dispute. The first is a subscription product that gives students access to a wide range of videos and practice problems. The other is described as an "a la carte" product for university-specific courses. It includes tutorials and mock exams (the "Exam-Prep Product").
- [5] The defendant, John Karras, is an independent contractor under contract with the plaintiffs as detailed below. He is the owner and director of the corporate defendant EasyGrades LLC.
- [6] This action primarily concerns products offered by the plaintiffs at Concordia University ("Concordia") and the University of British Columbia ("UBC").
- [7] The plaintiffs maintain two "channels" on Discord in relation to the services provided at Concordia. Discord is an online service accessed through a voice, video and text chat app. It is essentially a meeting place. Discord channels are specific group chats or online rooms dedicated to a particular topic. The two channels at Concordia the plaintiffs maintain are associated with their Exam-Prep Product. One is a private channel for a particular course where tutoring is provided. The other is a public channel where users at Concordia can communicate with instructors and other students.

- [8] In November 2019, the plaintiffs acquired SOS Tutoring Inc. ("SOS"), a company in the same general business space. At the time of the acquisition, Mr. Karras was an instructor at SOS providing tutoring and other services to student clients of SOS pursuant to an agreement dated August 22, 2018.
- [9] Following the acquisition of SOS by the plaintiff, Mr. Karras continued to provide tutoring and other services on behalf of the plaintiffs.
- [10] Mr. Karras deposes in his affidavit:
- a) That he has been providing tutoring services at Concordia since 2010;
 - b) In October 2013 he commenced a full-time career as a tutor;
 - c) In January 2014 he entered into an agreement with SOS to provide tutoring services;
 - d) In January 2015 he started providing independent tutoring services to students at Concordia in courses not offered by SOS and to students in Montreal; and
 - e) In December 2016 he terminated his relationship with SOS but rejoined SOS in August 2018.
- [11] On June 4, 2020, Mr. Karras and Wizedemy Inc. ("Wize") entered into an agreement in relation to having Mr. Karras provide subscription services (the "Subscription Agreement").
- [12] On September 25, 2020, Mr. Karras and Wize entered into an agreement in relation to having Mr. Karras provide Exam-Prep Products (the "Independent Contractor Agreement" or "Exam-Prep Agreement").
- [13] This application is based on the terms and conditions of the Exam-Prep Agreement. Those terms included various definitions, a non-competition clause, provisions identifying what information was confidential and Wize's property, provisions identifying Wize's intellectual property, and a mutual non-disparagement clause.
- [14] The Exam-Prep Agreement contained the following definitions:
- "Confidential Information" means ... (b) the existence of the discussions between the Parties and information concerning the Services, Wize Course and Wize Materials (including, the Wize Course and the Wize Materials themselves)
- ...
- "Services" mean all of the services, duties and obligations to be observed and performed by Prof pursuant to this Agreement, including but not limited to the provision to Wize of the Wize Course, all in accordance with this Agreement, including, without limitation, in accordance with the obligations as further described in Schedule "A" of this Agreement.
- "Wize Course" means any and all materials created by Prof in the course of providing the Services to Wize, including materials created by Prof in connection with the development of Crash Courses, Tutorials, Crash Course Booklets and Solutions Manuals hereunder".

"Wize Materials" means any and all documents, practice questions, data, reports, notes or other materials provided by Wize to Prof to assist Prof in the creation of the Wize Course during the Term".

[15] The Exam-Prep Agreement contained the following clauses in relation to termination and non-competition.

4.2 Termination for Breach. Either Party may terminate this Agreement upon five (5) Business Days' notice in the event of a breach of any of the other Party's obligations hereunder, if such breach (if capable of being cured) is not cured by the expiry of such five (5) Business Days' notice.

4.5. Effect of Termination. Upon termination of this Agreement by either Prof or Wize: (i) Prof shall destroy and permanently expunge all copies of data or information forming the Wize Materials, Wize Course(s) and Services in Profs possession or control; (ii) all intellectual property rights associated with or comprised in the Services, Wize Materials and Wize Course(s) shall remain vested in and be the property of Wize in accordance with Section 9 and Prof shall have no further rights or interest in relation to the Wize Course(s) and/or Wize Materials; and (iii) Prof shall return to Wize (at Wize's expense) all equipment and software reimbursed or provided by Wize.

..

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

[16] The Exam-Prep Agreement contained the following clauses in relation to confidential information.

9.1 Wize Confidential Information. Prof acknowledges and agrees that certain of the material and information made available to Prof by Wize for use in the performance of the Services, including but not limited to the Wize Materials, is Confidential Information. Prof recognizes that such Confidential Information is the sole and exclusive property of Wize, and Prof shall use Prof's best efforts and exercise utmost diligence to protect and maintain the confidentiality of all Confidential Information. Prof shall not, directly or indirectly, use Confidential Information for Prof's own benefit or for any purpose other than the provision of the Services, or disclose any

Confidential Information to any third party, whether or not such Confidential Information is acquired, learned, obtained or developed by Prof alone or in conjunction with others, except as such disclosure or use may be required in connection with the performance of the Services or as may be consented to in writing by Wize.

9.2 Return Upon Termination. The Confidential Information is and shall remain the sole and exclusive property of Wize regardless of whether such Confidential Information was generated by Prof or by others, and Prof agrees that upon termination of this Agreement Prof shall deliver promptly to Wize all such tangible parts of the Confidential Information including records, data, notes, reports, proposals, client lists, correspondence, materials, marketing or sales information, computer programs, equipment, or other documents or property that are in the possession or under the control of Prof without retaining copies thereof.

9.4 Equitable Relief. If Prof discloses or uses (or threatens to disclose or use) any Wize Confidential Information of Wize in breach of the confidentiality protections in this Agreement, Wize shall have the right, in addition to any other remedies available to Wize, to seek injunctive relief to enjoin such acts and any other available equitable relief, it being specifically acknowledged by Prof that any other available remedies may be inadequate.

[17] The Exam-Prep Agreement contained the following clauses in relation to intellectual property.

10.1 Intellectual Property. Wize shall own all right, title and interest (including all intellectual property rights) in all direct and indirect results of the Services performed by Prof for Wize (including, where applicable, the Wize Course(s) and all materials, models, specifications, creations, drawings, associated therewith) ("Work Product"). Prof hereby assigns and transfers to Wize, as and when created, all right, title and interest to the Work Product throughout the world, including all trade secrets, patent rights, copyrights and all other intellectual property rights therein. Prof hereby waives and agrees not to enforce any and all moral rights in the Work Product, including, without limitation, any limitation on subsequent modification or exploitation, to the extent permitted under applicable law. Prof further acknowledges and agrees that all Work Product is "work made for hire" (to the greatest extent permitted by applicable law). The Work Product, including, without limitation, the Wize Course, is Confidential Information of Wize. Without limiting the foregoing, Prof understands and agrees that Wize shall be entitled to continue to use and exploit all Wize Course without limitation and as it sees fit following termination of this Agreement.

10.3 Use of Wize IP. Prof agrees that no intellectual property, trademarks or other identifying marks, registered or not, other than the intellectual property, trademarks or other identifying marks specified by Wize shall be used in performing the Services or included in the Wize Course or the marketing, promotion, identification, or operation of the Wize Course, except with Wize's prior written consent. Prof may not use any Wize intellectual property, trademarks or other identifying marks, except as expressly permitted by Wize in writing. Prof covenants not to use any Wize intellectual property, trademarks or other identifying marks in a manner that degrades,

diminishes, or detracts from the goodwill associated therewith or use the Wize intellectual property, trademarks or other identifying marks in a manner which, in Wize's sole opinion, is scandalous, immoral, or satirical and at Wize's request, Prof will promptly change the manner of such use. Upon request from Wize, Prof shall immediately remove from any publication any information which Wize deems inappropriate to Wize's interests.

[18] The Exam-Prep Agreement contained the following clauses in relation to non-disparagement.

11.2 Mutual Non-Disparagement. Prof agrees not to make any statement or take any action that criticizes or disparages Wize, including its officers, directors, employees, representatives and agents, or that disrupts or impairs its normal operations; and Wize agrees not to make any statement or take any action that criticizes or disparages Prof or Profs performance, except that nothing in this Section 11.2 shall be interpreted to limit either Party's rights to confer with counsel or to provide truthful testimony pursuant to subpoena, discoveries or as otherwise required by law. This provision is in addition to, and not in lieu of, the substantive protections under applicable law relating to defamation, libel, slander, interference with contractual or business relationships, or other statutory, contractual, or tort theories.

[19] By letter dated May 15, 2023, the plaintiff offered to change the compensation structure of the Exam-Prep Agreement. The changes proposed included that: "The Independent Contractor Agreement shall be made between EasyGrades LLC and Wizedemy Inc." EasyGrades LLC is a company controlled by Mr. Karras. The letter concluded with the statement that there would be a formal contract and, until that contract was executed, all other terms and conditions would remain as between Wize and Prof. Karras.

[20] I pause in my recitation of the facts to note that neither party has suggested the May 15, 2023 letter removed Mr. Karras as a party to the contract or diminished his liability thereunder.

[21] The plaintiff's courses that Karras taught are listed in Exhibit B of Mr. Moen's affidavit. They are:

- a) At Concordia University, COMM 214, 215, 220, 225, 226, 305, 308 and Econ 201 and 203.
- b) At UBC, COMM 293, 294 and 298.

[22] The plaintiffs say that they noticed a significant drop in revenue associated with their products at Concordia in 2024. The Discord channels associated with courses taught by Mr. Karras were "uncharacteristically quiet, and Mr. Karras was resistant to updating materials or developing new materials. Upon further investigation, the plaintiffs say they discovered that Mr. Karras:

- a) Used third-party websites to, inter alia, sell products that are in direct competition with Wize products and used their confidential information;
- b) Created a separate Discord server and directed students to that server;

- c) Advertised services unaffiliated with the plaintiffs; and
- d) Developed and taught content he refused to develop for the plaintiffs.

[23] On March 23, 2024, the plaintiffs terminated the agreements with Mr. Karras.

[24] Following the termination of the agreements, the plaintiffs say Mr. Karras, inter alia, continued to sell products that compete with their products and to use their confidential information.

[25] In his affidavit, Mr. Karras denies competing with the plaintiffs prior to his termination. However, he admits to providing services to students after his termination as he believed the agreements he had signed were not enforceable.

Legal Principles

[26] The parties agree that the three-part test from *RJR-MacDonald Inc. v. Canada* (Attorney General), [1994] 1 S.C.R. 311, 1994 CanLII 117 (SCC) [RJR-MacDonald] is to be applied. They disagree on the first prong of the test.

[27] The applicable test for an injunction is sometimes referred to as a three-part test from *RJR-MacDonald*, and sometimes as a two-part test, referencing *British Columbia (Attorney General) v. Wale*, [1987] 2 W.W.R. 331, 1986 CanLII 171 (BCCA) [Wale].

[28] As set out in *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, at paras. 37-38 [Vancouver Aquarium], there is no practical difference between the two-part and three-part test. Both tests require:

- a) an assessment of the merits of the case;
- b) a consideration of whether the applicant will suffer irreparable harm if the application is not granted; and
- c) an assessment of the balance of convenience.

[29] Ultimately, the question is whether it is just and equitable that an injunction should be issued.

[37] The test for issuing an injunction is well-known and stated in *RJR-MacDonald Inc. v. Canada* (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 at 334. The chambers judge refers to the two-part formulation of the test from *Wale*. There is no practical effect to the distinction between the two-part test and the three-part test: *Coburn v. Nagra*, 2001 BCCA 607 at para. 7. Before issuing an interlocutory injunction, there must be a preliminary assessment of the merits of the case to ascertain that there is i) a serious question to be tried, ii) a consideration of whether the applicant will suffer irreparable harm if the application were dismissed, and finally, iii) an assessment of the "balance of convenience", that is, which of the parties would suffer the greater harm from the granting or refusing the injunction pending a decision on the merits of the case. As noted in *Google Inc.* at para. 25,

the fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case.

- [38] In *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120 at para. 26, the Court discussed the overall nature of the test in *RJR-MacDonald*, and said:

For the moment, let me observe that the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.

- [30] In *Este v. Esteghamat-Ardakani*, 2020 BCCA 202, at para. 35, the Court of Appeal stated that the three-part test is more commonly applied to private disputes, such as the one before me. Accordingly, as the matter before me is a private dispute, I intend to use the framework of the three-part test, as have the parties in their submissions before me.

Serious Question or Strong Prima Facie Case

- [31] The first prong of the *RJR-MacDonald* test is an assessment of the merits. Two different standards have been developed in the caselaw for this assessment. In some cases, the party seeking the injunction must prove that there is a serious question to be tried. In other cases, the applicant must establish a strong prima facie case. The difference is significant.
- [32] The test of a serious question to be tried is a low threshold that merely requires the applicant to establish that the claim is not frivolous or vexatious: *RJR-MacDonald* at paras. 49 and 55. In contrast, the test of a strong prima facie case requires the applicant to establish "that there is a strong likelihood on the law and the evidence presented that the applicant will be ultimately successful" at trial: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 17.
- [33] The parties agree that, in respect of the Non-Competition Injunction, the plaintiff must establish a strong prima facie case. They also agree that in respect of the Non-Disparagement Injunction, the lesser test of a serious question to be tried applies. They disagree on the first prong test for the Expungement Injunction and Confidential Information Injunction. The plaintiffs submit that the lesser test of "serious question to be tried" applies to these injunctions. The defendants submit it is a strong prima facie case.

- [34] Turning first to the Expungement Injunction, although the parties made minimal submissions on this particular injunction, the defendants have correctly identified it as a mandatory injunction in their written submissions. It compels the defendants to take a positive action. The applicable test for a mandatory injunction is a strong prima facie case: *Canadian Broadcasting Corp.*, at para. 15.
- [35] Concerning the Confidential Information Injunction, the defendants submit that this injunction will effectively restrict their ability to provide their services and earn an income. Accordingly, they say this injunction is equivalent to the Non-Competition Injunction and a similar test of strong prima facie case should be applied. They rely on *Accurate Material Testing Ltd. v. Keshavarzi*, 2023 BCSC 1302 at para. 32 [*Accurate Material Testing Ltd.*] and *Capital Direct Lending Corp. v. Blanchette*, 2019 BCSC 1068 at paras. 30-37. However, these cases both involved restrictive covenants, not the use of confidential or proprietary information.
- [36] In contrast, in *JTT Electronics Ltd. v. Farmer*, 2014 BCSC 2413, which like the present case, concerned both an injunction restricting the defendant from competing contrary to the terms of a restrictive covenant and an injunction restricting the defendant from using the plaintiff's confidential information, Justice Voith (as he then was) held that the test of a fair or serious question to be tried applied to the confidential information injunction.
- [37] Similarly, in *Quick Pass Master Tutorial School Ltd. v. Zhao*, 2018 BCSC 683 at paras. 29-31 [*Quick Pass*], Justice Iyer held that the test to be applied for restraining confidential information was a serious question to be tried. (See also *Edward Jones v. Voldeng*, 2012 BCCA 295 at paras. 10 and 50, where the lesser test was applied to the use of confidential information).
- [38] In my view, the plaintiff must establish that they have a strong prima facie case for the Non-Competition and Expungement Injunctions. The lesser test of serious question to be tried applies to the Confidential Information and Non-Disparagement Injunctions.

Irreparable Harm

- [39] Irreparable harm constitutes harm that cannot be quantified in monetary terms or cannot be cured. Examples of irreparable harm include: where one party will be put out of business, permanent market loss or loss of customers, irreparable damage to reputation, loss of the ability to exploit a market, and the inability of a defendant to pay damages: *Vancouver Aquarium* at para. 57; and *Accurate Material Testing Ltd.* at paras. 35-36.
- [40] The evidentiary foundation for irreparable harm must be more than speculative but "clear proof of irreparable harm is not required": *Wale* at para. 50; *Vancouver Aquarium* at paras. 58-60.

[41] The plaintiffs submit that irreparable harm is a subordinate consideration where a negative covenant is sought to be enforced. In support of this, they refer me to *Li v. Rao*, 2019 BCCA 264 at para. 67 [Li], where Justice Savage, wrote:

"where a party breaches a negative covenant, an injunction will be regularly granted".

[42] However, this comment by Justice Savage J. must be read in context. At para. 61 he addressed the relative importance of irreparable harm and the merits assessment in cases involving negative covenants. At para. 64 he referred to various authorities that had held proof of irreparable harm was not an absolute requirement. However, at para. 65 he addressed *Belron Canada Inc. v. TCG International Inc.*, 2009 BCCA 577 [Belron], noting that the court in Belron rejected the submission that irreparable harm need not be considered where a strong *prima facie* case of a breach of a negative covenant had been made out.

[65] Some decisions of this Court have expressed less willingness to grant injunctions as a general rule where a party has breached a negative covenant. In *Belron Canada Inc. v. TCG International Inc.*, 2009 BCCA 577, this Court rejected the appellant's argument that there was no basis for the chambers judge to consider irreparable harm or balance of convenience after determining there was a strong *prima facie* case of breach of a negative covenant. It reviewed various case authorities, including the cases cited above, and held:

[21] In my opinion, these cases cannot be read as enunciating the fairly rigid proposition argued by [the appellant]. In addition, all of them except [*Coast Hotels Ltd. v. Northwest Hotels Inc.*, 2001 BCCA 496] pre-date *RJR-MacDonald*. There is emphasis in some of these cases that apparent breach of a negative covenant in a commercial agreement will usually attract an injunctive order. But these authorities do not preclude consideration of irreparable harm and balance of convenience as later clearly enunciated in *RJR-MacDonald* to be part of the applicable test. Each of the cases cited by [the appellant] was decided on the particular circumstances of the case and the most that can be said about them being in support of [the appellant's] proposition is that irreparable harm on some sets of facts has been seen to be a lesser consideration.

[22] It is probably correct to say that in most commercial cases involving sophisticated and solvent litigants in which a strong *prima facie* case is made out that there has been or will be breach of a negative covenant, an interim injunction will be granted. But this area of law would not be well served by formulating a rule, as suggested by [the appellant], that the injunction should always be granted absent exceptional circumstances. The questions of irreparable harm and balance of convenience should be addressed. Each motion for an interim injunction should be determined on a discretionary basis under the three-part test. On the present state of the law, there is no basis for holding that the test is not of general application.

[Emphasis in original.]

[43] In my view, considering all of the paras. 62-67 of Li, irreparable harm remains a relevant consideration where a breach of a negative covenant is pleaded. However, depending on the circumstances, its relative importance may be diminished. This is a factor that, in my view, is best considered when I address the balance of convenience and whether it is ultimately just and equitable that the injunction be granted.

Analysis

Has the plaintiff established the merits requirement?

[44] As indicated, the plaintiff must establish a strong prima facie case for the Non-Competition and Expungement Injunctions. I will address these first. I will then address the Confidential Information and Non-Disparagement Injunctions, where the plaintiffs must meet the lesser test of a serious question to be tried.

Non-Competition Injunction

[45] The plaintiffs rely primarily on clause 11.1 of the Exam-Prep Agreement and the affidavit evidence of Cyrus Moradian and Sean Moen.

[46] In summary, clause 11.1 provides that during the term of the agreement and for a period of 12 months from the date of termination, the defendants would not engage in any education services business that offers any products or services that are directly competitive with, and available to students at the same institutions as any Wize products or services that Prof worked on while with Wize.

[47] The affidavit #1 of Cyrus Moradian sets out the alleged competitive activities engaged in by Mr. Karras during the term of the agreement and post-termination. In summary, he deposes that:

- a) In February 2024,
 - i. there was a dramatic drop in revenue from Exam-Prep Products at Concordia University,
 - ii. the Discord channels for the courses Mr. Karras taught were uncharacteristically quiet, and
 - iii. Mr. Karras was uncharacteristically resistant to updating materials for his courses.
- b) Mr. Moradian monitored a weekly tutorial channel held by Mr. Karras and noted that Mr. Karras referenced a new discord channel he would be transitioning to;
- c) On February 5 and 6 2024, Mr. Moradian communicated with Mr. Karras regarding the inactivity on the COMM 220 Discord Channel;
- d) Mr. Moradian created an alias student account to further investigate what was happening. Under that account, he was invited to a channel that Mr. Karras had set up and had been using since at least January 2024;

- e) On February 20, 2024, Mr. Moradian registered for Wizeprep's weekly tutorials for COMM 214/215 under a student alias. He was given a link by Mr. Karras to a Discord channel that Mr. Karras had set up;
 - f) For COMM 308, Mr. Karras had also set up his own Discord channel. A message attached to the affidavit from Mr. Karras dated January 28, 2024, indicated that this would be the channel to be used during the semester, not the Wizeprep Discord channel;
 - g) By following the links, Mr. Moradian discovered a website that Mr. Karras had set up. A page from that website was attached to the affidavit. The URL bore the name "Karras" and the page indicated the price for a mock exam for COMM 214/215 to be \$60. Mr. Moradian purchased the mock exam;
 - h) On February 21, 2014, for COMM 294 at UBC, Mr. Karras posted a message on his own Discord channel directing students to use that channel for questions;
 - i) On February 23, 2024, Mr. Karras did the same in respect of COMM 298;
 - j) On February 25 and 27 2024, Mr. Moradian registered for Wizeprep's weekly tutorials for COMM 220, 225, 305 and 308 under a student alias. He was directed by Mr. Karras to Karras' own Discord channel for these courses;
 - k) On February 28, 2024, Mr. Moradian purchased and watched Weeklies for COMM 221 from Mr. Karras' website. He included a screen capture from that session which showed the Wize logo despite it not being a Wize channel; and
 - l) Also, on February 28, 2024, Mr. Moradian asked Mr. Karras again about the low level of activity on channels. Mr. Karras replied saying he would "try to get discord more active" and suggesting that direct messaging or Instagram might be the reason. Mr. Karras did not mention his own Discord channels.
- [48] As a consequence of these various discoveries, on March 3, 2024, a termination letter was sent to Mr. Karras terminating his agreements immediately.
- [49] The activities engaged in by Mr. Karras after the termination include: continuing to teach students, as he admitted in his affidavit, and is, in any event, abundantly clear on the totality of the evidence.
- [50] Additionally, on March 6, 2024, Mr. Moradian purchased a COMM 220 weekly tutorial from Mr. Karras' website and observed Mr. Karras access a documents folder which contained Wize materials including Wizeprep booklets for various courses.
- [51] Mr. Karras deposes that since January 2010, he has provided private tutoring to students outside of SOS and Wize. He specifically deposes that Wize was aware of this and never objected. He offers no evidence corroborating that Wize was aware of this and I do not accept his bald statement that they were.

- [52] Mr. Karras purports to explain the existence of the separate Discord channels that Mr. Moradian discovered. Mr. Karras deposes that in January 2024, he had difficulty accessing Wize's Discord server and channels and, as a consequence, he could not communicate with students. Mr. Karras says that he set up a separate Discord server so he could communicate with students. He specifically deposes that he did not set up a separate server to divert students from Wize.
- [53] I do not accept Mr. Karras' explanation for the existence of the separate Discord server. He completely failed to explain the messages between himself and Mr. Moradian on February 5 and 6, 2024, where Mr. Moradian specifically asked why the channels were so quiet. Mr. Karras responded that he did not know. He did not advise Mr. Moradian that he had set up backup channels and that the discussions had moved to those backup channels. Similarly, Mr. Karras did not respond to the February 28, 2024, message from Mr. Moradian (where he was asked about the low level of activity on channels) by stating he had set up alternate channels.
- [54] Mr. Karras additionally purports to justify the backup channels by deposing that in February 2023, one year prior, he advised Wize's operations manager that he had set up a backup server. Mr. Karras attaches messages between him and the operations manager purporting to confirm this discussion. However, the attached messages say nothing about a backup server having been set up.
- [55] Mr. Karras further deposes that he set up his own website after Wize terminated the agreement. I do not accept that the website was set up after he was terminated. Mr. Moradian specifically deposed that he accessed the website on at least two occasions in February 2024 and that he purchased materials from the website. His evidence is corroborated by screenshots from the website.
- [56] Mr. Karras' affidavit is also notable for what it does not contain. Specifically, although Mr. Moradian deposes to purchasing products on the Karras' website on two occasions, Mr. Karras does not deny that he offered products for sale.
- [57] For the purposes of this application, I am satisfied that during the term of the Exam-Prep agreement and continuing:
- a) Mr. Karras secretly developed his own website to sell products that are in direct competition with those the plaintiffs sell; and
 - b) Mr. Karras created a Discord server and channels separate from those of the plaintiffs and directed students to that server and channels in direct competition with the plaintiffs.
- [58] The defendants submit that the plaintiffs have not established a strong prima facie case because:
- a) They wrongfully terminated the contract by not giving the requisite five days notice and are therefore not entitled to rely on the non-competition clause; and

b) The non-competition clause is unenforceable.

[59] I do not accept either of these submissions.

[60] The first submission is based in part on clause 4.2 of the agreement which provides

Either Party may terminate this Agreement upon five (5) Business Days' notice in the event of a breach of any of the other Party's obligations hereunder, if such breach (if capable of being cured) is not cured by the expiry of such five (5) Business Days' notice.

[61] The defendants say that this clause obligated the plaintiffs to provide five days notice. The plaintiffs say that the 5-day notice requirement is in respect only of breaches that cannot be cured.

[62] Clause 4.2 is grammatically awkward and not a model of clarity. However, I am satisfied that the parties intended the notice requirement to apply only to breaches of the contract that were capable of being cured. I am further satisfied that the breaches complained of are not ones that are capable of being cured. By clause 11.1, Mr. Karras was required to use his "training, skills, knowledge and experience solely and exclusively in the best interests of Wize". His offering of competing products and services to students and his concealment of this goes to the very root of the contract between the parties and is not a breach that can be cured.

[63] In any event, the cases relied upon by the defendants are distinguishable. The defendants rely upon cases involving a wrongfully dismissed employee, namely, *General Billposting Co. v. Atkinson*, [1909] A.C. 118 (H.L.) and *Globex Foreign Exchange Corporation v. Kelcher*, 2011 ABCA 240 at para. 54 [Globex].

[64] However, Mr. Karras is not an employee, but an independent contractor, and he was not wrongfully terminated. Additionally, in *Avidworx Productions Ltd. v. Culbertson*, 2015 BCSC 135 at para. 96, Justice Crawford questioned whether Globex was the law in British Columbia and held that it was properly a matter for trial.

[65] Accordingly, I am not satisfied that the plaintiffs wrongfully terminated the contract such that they are disentitled to rely upon the non-competition clause.

[66] The defendants further submit that the plaintiffs have not made out a strong prima facie case because the non-competition clause is unenforceable. Relying on *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301 at paras. 20-24 [IRIS], the defendants say that the relationship in issue is akin to an employment agreement and that the clause must be subject to a heightened scrutiny. They further say the clause cannot survive such a higher level of scrutiny. They say it is overbroad and therefore unreasonable. They further say that it is not permitted for me to "blue pencil" or read down the clause, relying on *SkyCope Technologies Inc. v. Jia*, 2023 BCSC 1288 at para. 223, and IRIS.

- [67] The plaintiffs submit that the clause is reasonable and that it is permissible to read down the clause. They rely on Quick Pass Master at para. 52 and DaKow Ventures Ltd. v. Daski Contracting Ltd., 2018 BCSC 2016 at para. 47.
- [68] I do not agree that the non-competition clause should be subjected to a higher level of scrutiny, as the defendants submit. It is not apparent that there was an inequality of bargaining power as between Mr. Karras and the plaintiffs. Mr. Karras had been operating as a tutor since 2010 both on his own, through incorporated companies and as an independent contractor for SOS. He was knowledgeable and experienced in the field at the time he entered into the agreements with Wize. In fact, vis a vis Concordia specifically, he appears to have had much more knowledge and experience in the business of tutoring than Wize. Additionally, Wize itself is a small company. Mr. Moradian deposes that it has only 8 full-time employees. In my view, this case is more akin to Quick Pass where Iyer J. declined to impose a higher level of scrutiny.
- [69] It is not disputed that for a non-competition clause to be enforceable the plaintiff must prove it is reasonable as between the parties. The onus then shifts to the defendants to show it is unreasonable in reference to the public interest: IRIS at para 17.
- [70] The questions to be addressed are:
- a) Do the plaintiffs have a proprietary interest worthy of protection?
 - b) If so, would less restrictive measures adequately protect that interest? and
 - c) If not, is the non-competition clause no broader than necessary in terms of its geographical reach, duration, and activities prohibited: IRIS at para. 25, Quick Pass at para. 36.
- [71] I have little difficulty in holding that the plaintiffs have a proprietary interest worthy of protection. Over several years the plaintiffs have developed course materials. They have paid tutors such as Mr. Karras, and paid them handsomely, to develop these materials for specific courses. These materials are the property of the plaintiffs, as clauses 9.1 and 10.1 of the agreement make clear. The plaintiffs' proprietary interest in these materials is worthy of protection.
- [72] I am equally satisfied that the plaintiffs' proprietary interest cannot be adequately protected by means other than a non-competition clause. It can be expected that students will develop a relationship with tutors while taking Wize courses. If such tutors were free to establish competing courses or sell competing products the very business model of Wize would be undermined.
- [73] Despite the able arguments of the defendants' counsel, I am also satisfied that the non-competition clause is not overbroad.

- [74] The duration of the non-competition clause is for 12 months from the date of termination. Such a period is not overly broad. In *Quick Pass*, a longer period of 18 months was held to be reasonable.
- [75] The activities prohibited during that 12-month term are also not overly broad. Although the clause is wordy, it prohibits the defendants from engaging in education services businesses that are directly competitive with Wize products and available to students. The clause is appropriately limited such that it restricts only activities that are directly competitive with Wize.
- [76] Finally, in terms of geography, the defendants submit that the clause is ambiguous. They say that it can mean either that Mr. Karras is prohibited from working at any institution where Wize offered its products and services, or that Mr. Karras is restricted from working at institutions where he worked on products and services.
- [77] I agree that the clause is difficult to interpret. However, it is capable of interpretation and, in my view, the latter interpretation is the correct one. If one breaks down the operative parts of the clause there are two conditions. The first is that the products and services are directly competitive with Wize. The second is that those products and services must be "available to students at the same institutions as any Wize products or services that Prof worked on while with Wize". The second condition limits the reach of the clause to institutions where Mr. Karras worked on Wize products, namely Concordia and UBC.
- [78] Therefore, in my view, the plaintiffs have met the onus on them to prove the non-competition clause is reasonable as between the parties.
- [79] I now address whether the defendants have met the onus on them to prove the non-competition is not in the public interest.
- [80] The defendants say it is not in the public interest to uphold the clause because it will create undue additional stress on students and because students should be afforded the opportunity of obtaining their tutoring from a trusted and reliable tutor. I do not accept these arguments. Students are in no different position from customers of other businesses.
- [81] Accordingly, the plaintiffs have established a strong *prima facie* case for the enforcement of the non-competition clause on the merits.

Expungement Injunction

- [82] The plaintiffs rely on clause 4.5 of the agreement as establishing a strong *prima facie* case for the Expungement Injunction. That clause provides, *inter alia*, that on termination the "Prof shall destroy and permanently expunge all copies of data or information forming the Wize Materials, Wize Course(s) and Services in Profs possession or control".

[83] The defendants' sole response to the Expungement Injunction is that the effect of the injunction would be the destruction of the materials which is not an interlocutory order but would effectively be a final order.

[84] In the absence of any evidence that there are copies of the materials to be ordered to be destroyed, I agree with the defendants that an order requiring the destruction of the materials in Mr. Karras' possession would effectively be a final order and such relief is not available.

[85] I therefore will not address the Expungement Injunction further

Confidential Information Injunction

[86] As indicated, the plaintiffs need only show that their claims concerning the confidential information are not frivolous or vexatious.

[87] The plaintiffs rely on the clauses of the agreement that establish their sole proprietary right and interest in the materials in Mr. Karras's possession. In particular:

- a) Confidential Information is defined as including Wize Course and Wize Materials;
 - b) Wize Course is in turn defined as including "any and all materials created by Prof in the course of providing the Services to Wize";
 - c) Clauses 4.5 and 9 provide that all intellectual property rights associated with or comprised in the Services, Wize Materials and Wize Course(s) shall remain vested in and be the property of Wize and Prof shall have no further rights or interest in relation to the Wize Course(s) and/or Wize Materials;
 - d) Clause 9.1 provides "Prof recognizes that such Confidential Information is the sole and exclusive property of Wize Prof shall not, directly or indirectly, use Confidential Information for Prof's own benefit or for any purpose other than the provision of the Services"; and
 - e) Clause 9.2 provides the "Confidential Information is and shall remain the sole and exclusive property of Wize regardless of whether such Confidential Information was generated by Prof or by others, and Prof agrees that upon termination of this Agreement Prof shall deliver promptly to Wize all such tangible parts of the Confidential Information".
- [88] Importantly, Mr. Karras does not deny that he continues to use course materials he prepared while under contract with the plaintiffs. Rather, he deposes that he developed course materials beginning in 2010 and that over time he has revised, adapted and modified these materials, including during his time with Wize. He deposes that they are his materials and he still uses them. He further deposes that it would likely be impossible for him to strip his course materials of the adoptions and modifications he made while working with Wize.

- [89] The admissions made by Mr. Karras clearly establish that the plaintiffs' claim (that he is in breach of the confidential information provisions of the agreement) is not frivolous or vexatious.
- [90] However, there is an issue as to what materials are subject to the confidentiality provisions. More particularly, it is clear that materials that Mr. Karras had created prior to being under contract with Wize are not covered by the agreement. This would include materials that he prepared while he was under contract with SOS, since SOS is not a party to this action. Although the plaintiffs purchased SOS, they have neither pleaded nor established that the contract between SOS and Mr. Karras was assigned to them. Similarly, they have not pleaded or established that whatever rights SOS had in materials prepared by Mr. Karras were transferred to them.
- [91] Accordingly, the plaintiffs have only established a serious issue to be tried with respect to materials prepared by Mr. Karras from the date of the agreement, which is to say, from September 25, 2020.

Non-Disparagement Injunction

- [92] The plaintiffs rely on clause 11.2 of the agreement in which the defendants agreed not to make any statement or take any action that criticizes or disparages Wize.
- [93] In his affidavit, Mr. Moradian deposes to various comments made by Mr. Karras which are alleged to be disparaging. These comments include:
- a) He told students he had been fired by Wize;
 - b) He told students his replacements hired by Wize were not good;
 - c) He encouraged students to start a class action against Wize;
 - d) He encouraged students to request refunds from Wize;
 - e) He told students "fuck those guys" in reference to Wize; and
 - f) He represented to students that accessing his materials on Wize was illegal.
- [94] Mr. Karras' comments were, in my view, critical and disparaging of Wize. The defendants did not suggest otherwise. Rather, they submit that the non-disparagement clause did not survive the termination of the contract and, therefore, the plaintiffs cannot rely on it. The plaintiffs counter that the survival clause, clause 14.8, applies to extend the operation of the non-disparagement clause post-termination.
- [95] I do not need to resolve the issue of whether the non-disparagement clause survives the termination of the agreement. The applicable merits test is whether the plaintiffs claim is frivolous or vexatious. It is clearly not.

Irreparable Harm

[96] I now turn to irreparable harm. The plaintiffs claim they will suffer irreparable harm if the injunctions are not granted. The defendants submit that any damage suffered by the plaintiffs can be compensated for in damages. They also say that Mr. Karras will suffer irreparable harm if the injunctions are granted. However, this part of the injunction test does not involve harm suffered by the defendant. That is better considered in the assessment of the balance of convenience.

[97] Mr. Moradian deposes that, as a consequence of Mr. Karras' actions, the plaintiffs have had to heavily discount prices, hire and train new staff and significantly adjust their business plan.

[98] Mr. Moen, the CFO of Wize deposes to even more drastic consequences flowing from the alleged breaches of the agreement by Mr. Karras. He deposes that:

- a) approximately 70% of the plaintiffs' total revenue is generated from Exam-Prep Products;
- b) 95% of its revenue from Exam-Prep Products is generated at Concordia; and
- c) 68% of revenue from Exam-Prep Products at Concordia was generated in courses involving Mr. Karras.

[99] Mr. Moen acknowledges that the full impact of Mr. Karras' conduct is not quantifiable but states that there was a 24% drop in revenue year over year for COMM 220 for the period January 1 to March 3, 2024 and an 83% drop from March 4, 2024.

[100] Mr. Moen further deposes that:

- a) It was anticipated that Wize would reach profitability in 2025 but, as a consequence of Mr. Karras' actions, he no longer has confidence in his projections;
- b) Concordia is by far Wize's most profitable university and key to Wize's growth; and
- c) If the revenue profile at Concordia declined to near zero "there is a very good chance it could bankrupt the company".

[101] I accept the evidence of Mr. Moradian that the plaintiffs have had to heavily discount prices because of the competing courses offered by Mr. Karras, some of which are offered free of charge. I do not accept there is any particular irreparable harm in having to hire new staff or in adjustments to the business plan. His evidence of these consequences is vague and imprecise.

[102] I accept Mr. Moen's evidence of the financial importance of Concordia to the plaintiffs, that there has been a drastic reduction in revenue at Concordia and that the potential consequences to the plaintiffs include the possibility of bankruptcy.

- [103] The defendants submit that Mr. Karras is keeping track of students who have registered for his services and the particular courses for which they have registered. The defendants therefore say that the plaintiffs' damages can be calculated. I do not accept this submission. Mr. Karras has not shown how he keeps track of students or whether he tracks former Wize students.
- [104] More importantly, this does not address the severe financial impact to the plaintiffs of the defendants competing in apparent contravention of an agreement Mr. Karras freely entered into. Nor does keeping track of students address the loss of market share and damage to the plaintiff's reputation.
- [105] I am satisfied that the plaintiffs have proven irreparable harm if the injunctions are not granted.

Balance of Convenience

- [106] In *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, 64 B.C.L.R. (2d) 96 at 102, 1992 CanLII 560 (C.A.), the Court of Appeal listed some of the factors to consider when assessing the balance of convenience:
- [I]n assessing the balance of convenience a judge should consider these points: -- the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.
- [107] I agree with the plaintiffs that damages will not adequately compensate the plaintiffs for the losses they have suffered and will continue to suffer if the defendants are not enjoined from competing, using the plaintiff's confidential information and disparaging the plaintiffs.
- [108] In contrast, if Mr. Karras is successful in the defence of the action, damages will be an adequate remedy. Although Mr. Moen has deposed to the possibility of bankruptcy if the revenues at Concordia continue to decline, granting the injunctions should positively affect the plaintiff's revenue situation such that they will be able to pay any damages awarded to the defendants caused by the injunctions and for which they have given an undertaking.
- [109] Mr. Karras deposes that tutoring has been his sole source of income for the past decade and is how he supports his spouse and three young children. He says that if he is not able to provide his tutoring services at Concordia for a year, the goodwill he has generated will diminish. He further deposes that he cannot simply begin tutoring at other universities as it will take him 24 months to learn the curriculum and 60 months to generate enough income to support his family. He also says that he is already struggling to pay bills.

- [110] I accept Mr. Karras' evidence that tutoring has been his sole source of income for 10 years and that it will take more than one year to start up a new tutoring business at another university. However, he works remotely and nothing is preventing him from obtaining employment as a tutor at other universities. He does not need to start his own business from scratch. Similarly, nothing is preventing him from obtaining employment outside the field of education for a period of one year.
- [111] Additionally, Mr. Karras has provided no evidence of his assets and I decline to infer that he and his family will be destitute if the injunction is granted. He was paid very handsomely while he worked with Wize. For example, he earned \$390,000 in 2022 and \$445,000 in 2023.
- [112] I also take into account that the plaintiffs appear to have a strong prima facie case and that it was Mr. Karras who altered the status quo by breaching the agreement and then being less than truthful when questioned by Mr. Moradian.
- [113] I also take into account that the students at Concordia are to some degree innocent victims of what has transpired. However, the public interest in holding people to their bargains outweighs the transient interest in allowing students to choose their tutors.
- [114] Considering all of the above, I am satisfied that the balance of convenience favours granting the injunctions

Just and Equitable

- [115] I am further satisfied that it is just and equitable for the injunctions to be granted.
- [116] Mr. Karras is an educated, knowledgeable and sophisticated individual. There was no inequality of bargaining power between him and the plaintiffs and, he freely entered into the agreements with Wize, agreements that he was fully capable of reading and understanding. He flagrantly breached those agreements by setting up competing services and selling competing products.

Unclean Hands

- [117] Before concluding, I address a final argument made by the defendants. They submit that the plaintiffs are not entitled to injunctive relief because they have unclean hands. Specifically, they say that the plaintiffs have continued to use Mr. Karras's image, name and likeness to market their products without his consent. They further say that this is in breach of the Privacy Act, R.S.B.C. 1996, c. 373.
- [118] The evidentiary basis for this submission is Mr. Karras' affidavit where he deposes that Wize continues to use photos and video recordings of him
- [119] I do not accept that the plaintiffs have unclean hands, which is to say I do not accept that their conduct is of such an illegal or unconscionable nature that they should be denied equitable relief.

[120] First, Mr. Karras does not depose as to when the plaintiffs were using photos and videos of him. The events giving rise to Mr. Karras' termination and subsequent events have all occurred in a relatively short time frame. The plaintiffs have simply not had the time to review and remove Mr. Karras' photos.

[121] Second, it is far from clear that the plaintiffs do not have the right to use videos in which Mr. Karras appears. Videos arguably come within the definition of confidential information or materials that Mr. Karras prepared while working with Wize.

[122] Third, whether there has, in fact, been a breach of the Privacy Act is best left for determination on a full record at trial.

Order

[123] Accordingly, I make the following interlocutory orders:

- a) The defendants are enjoined and restrained, for a period of 12 months ending March 3, 2015, from engaging in any educational services business, at Concordia and UBC;
- b) The defendants are enjoined and restrained from using the confidential information or intellectual property of the plaintiffs until trial or further order of this Court; and
- c) The defendants are enjoined and restrained from disparaging the plaintiffs until trial or further order of this Court.

[124] [Discussion of Costs]

[125] The plaintiffs are awarded the costs of the application, in the normal course.

"Giaschi J."

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Prepared on 26 October 2026 · Esheria