COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Karras v. Wizedemy Inc.,*
2024 BCCA 301

Date: 20240802
Docket: CA49799

Between:

John Karras and EasyGrades LLC

Appellants
(Defendants)

And

Wizedemy Inc. and Wizedemy Corp.

Respondents
(Plaintiffs)

Before: The Honourable Justice Dickson
The Honourable Madam Justice Horsman
The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated April 9, 2024 (*Wizedemy Inc. v. Karras*, 2024 BCSC 630, Vancouver Docket S241896).

Oral Reasons for Judgment

Counsel for the Appellants:	B.J. Cabott S.E. Howe
Counsel for the Respondents:	A.N. MacKay S. Arrandale
Place and Date of Hearing:	Vancouver, British Columbia July 18, 2024
Place and Date of Judgment:	Vancouver, British Columbia August 2, 2024

Summary:

The appellants appeal an order granting an interlocutory injunction enjoining them for a period of 12 months from engaging in any education services business at Concordia and UBC. They say the judge erred in finding that the respondents had made out a strong prima facie case for enforcement of a non-competition clause, that the respondents would suffer irreparable harm, and that the balance of convenience weighed in favour of the respondents. The appellants also say the order differs substantively from the terms of the non-competition clause. Held: Appeal allowed in part. The judge did not make any reversible error in granting the injunction, however, the terms of the order differ substantively from the non-competition clause and should be rectified such that its terms are aligned with the non-competition clause, as the judge intended.

DICKSON J.A.:

Introduction

[1] This is an appeal from an order granting an interlocutory injunction enjoining the appellants, John Karras and EasyGrades LLC, from engaging in any educational services business at Concordia University and the University of British Columbia for a 12-month period. The injunction enforces a restrictive covenant in an agreement between the appellants, defendants below, and the respondents, Wizedemy Inc. and Wizedemy, Corp. (collectively, “Wize”). Pursuant to the agreement, Wize engaged Mr. Karras to provide tutoring and instructional services to students at Concordia and UBC, and Mr. Karras agreed not to provide competing products and services for 12 months after the agreement terminated. In the underlying action, Wize alleges that, among other things, Mr. Karras and his company breached the non-competition clause.

[2] According to Mr. Karras, the chambers judge made several errors in applying the test for an interlocutory prohibitory injunction based on a restrictive covenant. The appeal centers on his finding that Wize had made out a strong *prima facie* case for enforcement of the non-competition clause, which Mr. Karras says, properly scrutinized, is ambiguous, unreasonable, and unenforceable. He also says the judge erred in finding Wize would suffer irreparable harm unless the injunction was granted, and in assessing the balance of convenience. Moreover, he says, the order

that the judge granted differs substantively from the terms of the restrictive covenant sought to be enforced.

[3] In my view, the impugned order differs substantively from the non-competition clause and should be rectified to align with its requirements, as the judge manifestly intended. However, I am not persuaded that he made other reversible errors in granting the injunction. For that reason and those that follow, I would allow the appeal to the limited extent of varying para. 1 of the order to provide:

> The Defendants are enjoined and restrained for a period of 12 months ending March 3, 2025 from engaging in any education services business that offers any products or services that are directly competitive with, and available to, students at Concordia University and the University of British Columbia, unless prior written permission to such activity is given by the plaintiffs.

Background

[4] Mr. Karras is a tutor by profession. He provides tutoring and instructional services to business students, personally and through his company, EasyGrades LLC.

[5] Mr. Karras has provided his services at Concordia since 2010. Between 2014 and 2019, at times, he provided tutoring and instructional services independently, and, at other times, provided them as an independent contractor to student clients of SOS Tutoring Inc.

[6] Wize is a small company that provides online educational and tutoring products and services, including tutorials and mock exams (the “Exam-Prep Products”). It maintains two channels on Discord, an online meeting place, in relation to its services at Concordia: a private channel for a course where tutoring is provided, and a public channel where users can communicate with instructors and other students.

[7] In 2019, Wize acquired SOS. Mr. Karras was an instructor at SOS at the time. Following the acquisition, he provided tutoring and other services on behalf of Wize at Concordia and UBC pursuant to the terms of a series of agreements.

[8] In September 2020, Mr. Karras and Wize entered into an agreement in which Mr. Karras agreed to provide Exam-Prep Products to student clients of Wize. The agreement contained this restrictive covenant:

> 10.1 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.

[9] Mr. Karras provided tutoring services to student clients of Wize between September 2020 and March 2024. However, Wize alleges, in February 2024, it noticed a significant drop in revenue associated with its products at Concordia. On further investigation, it says that it discovered Mr. Karras had: used third-party websites to sell products in direct competition with Wize products and used its confidential information; created a separate Discord server and directed students to that server; advertised services unaffiliated with Wize; and developed and taught content he refused to develop for Wize. As a result, Wize hired new tutors, commenced the underlying action, and, on March 23, 2024, terminated its agreements with Mr. Karras.

[10] Among other things, Wize alleges that, post-termination, Mr. Karras continued to provide products and services in breach of the non-competition clause. Mr. Karras denies having competed with Wize prior to termination of the agreements. However, he admits to providing services to students thereafter based on his belief that the agreements were not enforceable.

[11] The application for an interlocutory injunction enforcing the non-competition clause and other restrictive covenants came on for hearing on April 2, 2024. Among

other relief, Wize sought an injunction prohibiting Mr. Karras from engaging in any education services business that offers any products or services directly competitive with and available to students at the same institutions as any Wize products or services that Mr. Karras worked on while at Wize, including but not limited to Concordia and UBC.

[12] On April 9, 2024, the judge granted an interlocutory injunction with respect to the non-competition clause (the "Non-Competition Injunction"), together with other injunctive relief. The Non-Competition Injunction provides:

> 1. The defendants are enjoined and restrained, for a period of 12 months ending March 3, 2025, from engaging in any education services business at Concordia and UBC.

Reasons for Judgment: 2024 BCSC 630

[13] The judge began by noting the requirements of the well-known test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 for injunctive relief, namely, an assessment of the merits of the case; a consideration of whether the applicant will suffer irreparable harm if the application is not granted; and an assessment of the balance of convenience: at para. 28. Citing *R. v. Canadian Broadcasting Corp*., 2018 SCC 5, he also noted the standard Wize must meet on a merits-assessment in respect of the Non-Competition Injunction is a strong *prima facie* case, which requires an 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: at paras. 32, 38. After finding the requirement for irreparable harm applies where an alleged breach of a negative covenant is pleaded, he turned to the first issue for determination: had the plaintiff established the merits requirement?

Merits Assessment

[14] The judge reviewed the affidavit evidence when assessing the merits of Wize's claim for injunctive relief with respect to the non-competition clause. In doing so, he noted that Wize's CEO, Cyrus Moradian, described the competitive activities

in which Mr. Karras allegedly engaged, and Mr. Karras sought to explain some of those activities, but did not deny "that he offered products for sale": at paras. 47, 51–56. The judge stated that, for the purposes of the application, he was satisfied that Mr. Karras "secretly developed his own website to sell products that are in direct competition with those the plaintiffs sell" and "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": at para. 57.

[15] Next, the judge addressed Mr. Karras' submission that Wize had failed to establish a strong *prima facie* case for two reasons: it had wrongfully terminated the agreements between the parties and the non-competition clause was unenforceable. He rejected both submissions.

[16] After dealing with the wrongful termination issue, the judge turned to Mr. Karras' submission that the non-competition clause was unenforceable because it was overbroad and unreasonable. He noted that Mr. Karras relied on *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301 in support of its argument "that the relationship in issue is akin to an employment agreement and that the clause must be subject to a heightened scrutiny", which level of scrutiny the clause could not survive: at para. 66.

[17] The judge did not accept Mr. Karras' argument on the appropriate level of scrutiny:

> [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.

[18] The judge went on to identify the salient questions for determining whether the non-competition clause was enforceable as reasonable as between the parties: i) did Wize have a proprietary interest worthy of protection; ii) if so, would less restrictive measures adequately protect that interest; and, iii) if not, was the non-competition clause no broader than necessary in terms of its geographical reach, duration, and activities prohibited: at para. 70. He was satisfied that Wize had a proprietary interest worthy of protection, and that less restrictive measures would not adequately protect that interest:

> [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.
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> [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.

[19] The judge was also satisfied that the non-competition clause was not overbroad or ambiguous in terms of its geographical reach, duration, and prohibited activities. In particular, he accepted that a 12-month non-competition period was not overbroad: at para. 74. Nor, he stated, were the prohibited activities overbroad:

> [75] … 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.

[20] As to the breadth of the clause's geographical reach, the judge said this:

> [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.
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> [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.

[21] Based on the foregoing analysis, the judge was satisfied that Wize had met its onus of proving the non-competition clause was reasonable as between the parties. He also rejected Mr. Karras' argument that it was not in the public interest to uphold the clause, and concluded that Wize had established a strong *prima facie* case for enforcing the non-competition clause on the merits: at paras. 80–81.

[22] After dealing with the other forms of injunctive relief sought, the judge turned to the question of irreparable harm.

Irreparable Harm

[23] As he did in assessing the merits, the judge began with a review of the affidavit evidence. He accepted Mr. Moradian's evidence that Wize was forced to heavily discount its prices because of the competing courses Mr. Karras was offering. He also accepted evidence of Wize's CFO, Sean Moen, to the effect that revenue generated from Exam-Prep Products at Concordia was financially important to Wize, there had recently been a drastic reduction in revenue at Concordia as a result of Mr. Karras' alleged breaches, and the potential consequences to Wize "if the revenue profile at Concordia declined to near zero" included the possibility of bankruptcy: at paras. 100–102.

[24] The judge rejected Mr. Karras' submission that he was keeping track of students registered for his services, and therefore Wize's damages could be calculated. In his view, that submission "does not address the severe financial impact to the plaintiffs of the defendants competing in apparent contravention of an agreement" into which he had freely entered. Nor, the judge stated, did keeping track of students "address the loss of market share and damage to the plaintiff's reputation". Accordingly, he was satisfied that Wize had proven irreparable harm if the injunctions Wize sought were denied: at paras. 103–105.

Balance of Convenience

[25] Next, the judge considered the balance of convenience, bearing in mind the factors set out in *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, 64 B.C.L.R. (2d) 96 at 102. He found that damages would not adequately compensate Wize for losses they had suffered and would continue to suffer if the injunctive relief sought was denied: at para. 107. In contrast, he found that, if Mr. Karras succeeded, damages would be an adequate remedy. In particular, he noted, "[a]lthough 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": at para. 108.

[26] The judge also considered the harm Mr. Karras would suffer if the injunction was granted, including his submissions that the goodwill he had generated at Concordia would diminish, he could not get up and running at other universities quickly, and he was struggling to pay bills: at para. 109. Although he accepted that it would take Mr. Karras more than one year to start a new tutoring business at another university, he noted that he works remotely and stated nothing prevented him from working as a tutor at other universities or obtaining employment outside the field of education for a one-year period: at para. 110. In addition, he declined to infer that "[Mr. Karras] and his family will be destitute if the injunction is granted", noted that Wize appeared to have a strong *prima facie* case, and observed that it was Mr. Karras who "altered the status quo by breaching the agreement": at paras.111–112.

[27] All things considered, the judge was satisfied the balance of convenience favoured granting the Non-Competition Injunction: at para. 114.

On Appeal

[28] According to Mr. Karras, the judge failed to properly apply the test for an interlocutory prohibitory injunction based on a restrictive covenant. Specifically, he says, the judge erred by:

1. determining that the non-competition clause was reasonable in the face of ambiguity;

2. applying a benign rather than heightened level of scrutiny to the reasonableness of the restrictive covenant;

3. determining that Wize had a proprietary interest worthy of protection in students' relationships with their tutors that cannot be protected by less restrictive measures;

4. determining that Wize would suffer irreparable harm;

5. determining that the balance of convenience favoured granting the Non-Competition Injunction; and

6. granting an order that is substantively different than the order sought by Wize and the non-competition clause.

Discussion

Standard of review

[29] The standard of review on an appeal from an interlocutory injunction is highly deferential. The decision to grant an interlocutory injunction is discretionary. This Court will not rehear the application or reweigh the evidence. Absent an error in principle or a palpable and overriding error of fact, this Court will defer to the judge's discretion: *Garcha Bros Meat Shop Ltd. v. Singh*, 2022 BCCA 36 at paras. 19–20.

[30] A question of contractual interpretation is a question of mixed fact and law. As such, in the absence of an extricable question of law, it is subject to a deferential standard of review: *Garcha Bros* at paras. 78–79.

Did the judge err in determining that the non-competition clause was reasonable in the face of ambiguity?

[31] Mr. Karras contends the non-competition clause is ambiguous and therefore unenforceable. This is so, he says, because the reasonableness of a restrictive covenant generally cannot be demonstrated in the face of ambiguity, citing *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at paras. 27, 43.

[32] According to Mr. Karras, the words "available to students at the same institutions as any Wize products or services that Prof worked on while with Wize" are capable of more than one reasonable interpretation of the geographical reach of the prohibition in the non-competition clause. For that reason, he says, the clause is ambiguous and the judge erred in finding that Wize had established a strong *prima facie* case for its enforceability.

[33] In support of his submission, Mr. Karras emphasizes that Wize proposed a different interpretation of the non-competition clause than that adopted by the judge, namely, that it prohibited Mr. Karras from working at any institution where Wize offers its products and services, not just Concordia and UBC. He argues that both possible interpretations of the clause are reasonable, and therefore the clause is ambiguous and unenforceable. Moreover, he says, the judge acknowledged the existence of ambiguity, but nonetheless found a strong *prima facie* case was established on the merits. In Mr. Karras' submission, in doing so, he committed a clear error in principle.

[34] I am not persuaded by this submission.

[35] As Justice Smith explained in *Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 BCCA 97, a covenant is ambiguous if its meaning cannot be objectively determined. Ambiguity only arises where, on a fair reading of a contract as a whole, the language of the covenant in question is reasonably capable of more than one meaning. A covenant is not ambiguous simply because it is difficult to construe or its proper construction is a matter of differing opinions. If the meaning of a covenant is capable of being ascertained by application of the plain and ordinary meaning of the

words and the ordinary rules of grammar, it is not ambiguous: *Rhebergen* at paras. 72–74.

[36] In *Shafron*, Justice Rothstein explained why an ambiguous restrictive covenant is *prima facie* unenforceable:

> [27] … The reasonableness of a covenant cannot be determined without first establishing the meaning of the covenant. The onus is on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms. An ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate reasonableness in the face of an ambiguity.
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> …
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> [43] Normally, the reasonableness of a restrictive covenant is determined by considering the extent of the activity sought to be prohibited and the extent of the temporal and spatial scope of the prohibition. This case is different because of the added issue of ambiguity. As indicated, a restrictive covenant is *prima facie* unenforceable unless it is shown to be reasonable. However, if the covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable. Thus, an ambiguous restrictive covenant is, by definition, *prima facie* unreasonable and unenforceable. Only if the ambiguity can be resolved is it then possible to determine whether the unambiguous restrictive covenant is reasonable.

[37] The judge found that the non-competition clause was “difficult to interpret”, but “capable of interpretation”. In other words, contrary to Mr. Karras’ submission, he did not accept that the clause was ambiguous in the sense described in *Shafron*, namely, that “what is prohibited is not clear as to activity, time, or geography”. Rather, applying the ordinary meaning of the words and rules of grammar, the judge broke down the operative parts of the non-competition clause and identified two conditions: that the products and services at issue are i) directly competitive with Wize; and ii) “available to students at the same institutions as any Wize products or services that [Mr. Karras] worked on while with Wize”. He interpreted the second condition as limiting the geographical reach of the prohibition to Concordia University and UBC.

[38] I see no extricable legal error in the judge’s approach to or interpretation of the non-competition clause. It is entitled to deference on appeal.

Did the judge err by applying a benign rather than heightened level of scrutiny to the reasonableness of the restrictive covenant?

[39] Next, Mr. Karras contends the judge erred in principle by applying a benign, rather than heightened, level of scrutiny in assessing the reasonableness and enforceability of the non-competition clause. In his submission, the parties' relationship was more akin to the relationship of an employer and employee than the relationship of a vendor and purchaser in the sale of a business. That being so, he says, a rigorous level of scrutiny of the reasonableness of the non-competition clause was required, citing *IRIS*. However, the judge conducted his assessment based on a benign level of scrutiny, and did not indicate that the clause would have met an appropriately heightened level of scrutiny. It follows, Mr. Karras submits, that the judge's entire assessment of the reasonableness and enforceability of the non-competition clause was erroneous.

[40] In support of his submission, Mr. Karras emphasizes that restrictive covenants are restraints of trade, and, as such, contrary to public interest, citing *Shafron*. For that reason, he says, they are only justified and enforceable if the restriction in issue is reasonable with respect to the interests of the parties and the public. He goes on to emphasize that in *Shafron* the Court held that, in the employment context, restrictive covenants are subject to a more rigorous level of scrutiny than those found in contracts for the sale of a business due to the greater freedom of contract between a buyer and seller than an employer and prospective employee. He also emphasizes that the sale of a business typically involves a goodwill payment, and the absence of such a payment justifies a more rigorous level of scrutiny in the context of a contractual relationship akin to employer-employee, such as his relationship with Wize.

[41] Mr. Karras contends the judge erred in holding that the circumstances of this case were similar to those in *Quick Pass Master Tutorial School Ltd. v. Zhao*, 2018 BCSC 683 in connection with the appropriate level of scrutiny of the restrictive covenant. He notes that, in *Quick Pass*, Justice Iyer, as she then was, declined to impose a high level of scrutiny in assessing the reasonableness of a non-

competition clause in a contract between a tutorial business and an instructor it hired to provide tutoring services. However, according to Mr. Karras, the judge failed to recognize the key distinction between *Quick Pass* and this case which supported applying different levels of scrutiny, namely, in *Quick Pass* the defendant received consideration expressly in exchange for his agreement not to compete, whereas in this case there was no such payment. Moreover, he says, the judge erroneously focused on his level of sophistication and experience as a tutor, which was irrelevant because the salient question was whether his agreement with Wize was more akin to an employment contract or a contract for the sale of a business.

[42] I am not persuaded by these submissions.

[43] In my view, the judge did not commit reversible error by deciding, as a matter of law, the level of scrutiny to which the non-competition clause should be subjected. Rather, in the context of an interlocutory application and based on a limited record, he decided that Wize had established a strong *prima facie* case that the clause was reasonable and therefore enforceable. As Justice Grauer explained in *Garcha Bros*, questions of which party, as a matter of law, has the onus of establishing the reasonableness of a restrictive covenant or the level of scrutiny to which it should be subjected "should be left until they are raised squarely on a complete record that would allow the court to assess fully the nature of the relationships between the parties to the contract and the context in which the covenant was made—in other words, at trial": *Garcha Bros* at para. 95.

[44] Bearing in mind the relevant context, the interim nature of the application, and the limited record, in my view there was sufficient material before the judge to support his conclusion that Wize had established a strong *prima facie* case that the non-competition clause was reasonable and enforceable regardless of the applicable level of scrutiny. Accordingly, his conclusion is entitled to deference on appeal.

[45] It follows that I would not give effect to this ground of appeal.

Did the judge err in determining that Wize had a proprietary interest worthy of protection in students' relationships with their tutors that cannot be protected by less restrictive measures?

[46] Mr. Karras goes on to contend the judge erred in principle in finding that Wize had a proprietary interest worthy of protection in students' relationships with their tutors. In his submission, a business cannot protect the relationships it may have with its clients, and the judge held only that Wize had a proprietary interest worthy of protection in course materials which could not be protected by means other than a non-competition clause. According to Mr. Karras, an interest in course materials and an interest in relationships between tutors and students are entirely different interests. In addition, and in any event, he says, to the extent that protection of either may be appropriate, both could be adequately protected by a less restrictive measure, namely, a non-solicitation clause.

[47] I do not accept these submissions.

[48] In *Elsley v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916 at 927, the Court held that in an employment-like context in which an employee obtains "personal knowledge of and influence over the customers of his employer", a restrictive covenant which protects trade connections may be reasonable and enforceable. Moreover, the non-competition clause in this case included express reference to Mr. Karras' acquisition of knowledge of Wize's clients and their agreement that this acquired knowledge should "be used solely and exclusively in the best interests of Wize".

[49] To repeat, at paras. 71 and 72 of his reasons, the judge stated:

> [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.
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> [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.

[50] In my view, in finding that Wize had a proprietary interest worthy of protection in Wize "materials" and that its interest could not be adequately protected by means other than the non-competition clause, the judge was including Wize's trade connections with its student clients in his analysis of the proprietary interest capable of protection. Bearing in mind the principle discussed in *Elsley* and the express language of the non-competition clause, I see no error in principle or fact in his conclusion on either point.

Did the judge err in determining that Wize would suffer irreparable harm?

[51] Mr. Karras contends further that the judge misapprehended the evidence and erred in principle in determining that Wize would suffer irreparable harm unless he granted the Non-Competition Injunction. In his submission, on the evidence presented, the harm alleged was speculative and there was no evidence that "there has been a drastic reduction in revenue at Concordia". For example, he says, only one out of eight courses at Concordia appeared to have decreased revenues, and it was speculation to suggest there was a risk of bankruptcy, especially given Wize's continued operations and its failure to provide fundamental evidence to support this bald assertion. In addition, and in any event, Mr. Karras submits, the evidence showed that any potential losses could be calculated and thus were quantifiable.

[52] I do not accept these submissions. The judge conducted a fact-specific inquiry that was grounded in the evidence. In my view, Mr. Karras is asking us to reweigh that evidence and reach a different conclusion on the irreparable harm issue. That is not the role of this Court.

[53] Mr. Karras has applied to adduce fresh evidence on appeal that is said to be relevant to the irreparable harm issue. The proposed fresh evidence consists of an investor update that the appellant received from Wize after the hearing in the court below that reported on Wize's financial performance in the period December 1, 2023

to February 29, 2024. Mr. Karras notes, among other things, that the update included information that Wize's revenue increased during this period, and that a drop in revenue from the Exam-Prep Products was offset by an increase in Subscription Products. He argues that this evidence shows that Wize did not, in fact, face financial peril if an injunction was not granted, as found by the judge.

[54] The parties agree that this application is governed by the well-known test for the receipt of fresh evidence, most recently set out by the Supreme Court of Canada in *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 29. Wize forcefully argues that Mr. Karras has not met the requirement of due diligence, as the evidence he now seeks to tender was available to him, as an investor, at the time of the hearing before the judge.

[55] In my view, it is unnecessary to address the due diligence requirement because Mr. Karras has not, in any event, shown that the proposed evidence, if believed, could have affected the result. Wize's evidence before the judge was not that the company was in immediate financial difficulty or on the brink of bankruptcy. Instead, as I have noted, Wize's evidence spoke to the possibility of bankruptcy "if the revenue profile at Concordia declined to near zero". In other words, the evidence was of a potential future harm to Wize if Mr. Karras was permitted to continue to provide tutoring services in direct competition to Wize in breach of the terms of the restrictive covenant. The potential future harm, as found by the judge, included the loss of market share. Mr. Karras' proposed fresh evidence does not contradict or undermine Wize's evidence, and, in my view, could not have affected the judge's conclusion that Wize had demonstrated irreparable harm.

[56] I would not give effect to this ground appeal.

Did the judge err in determining that the balance of convenience favoured granting the Non-Competition Injunction?

[57] Mr. Karras also contends the judge misapprehended the evidence and erred in principle in assessing the balance of convenience. In particular, he says, the judge failed properly to consider and give weight to his critical role as his family's sole

breadwinner and his inability to establish a reasonable cash flow in the face of the Non-Competition Injunction. According to Mr. Karras, when those factors are considered properly and together with Wize's ability to continue operating its business, the balance of convenience clearly tips in favour of declining to grant the Non-Competition Injunction.

[58] Again, in my view, Mr. Karras is asking that we reweigh the evidence and reach a different conclusion than the judge reached on the balance of convenience. However, I see no error in principle or fact in connection with the conclusion he reached, which is entitled to appellate deference.

Did the judge err in granting an order that is substantively different than the order sought by Wize and the non-competition clause?

[59] Finally, Mr. Karras contends the judge erred in granting an order that differs substantively from the order sought by Wize and from the non-competition clause. Consequently, he says, the Non-Competition Injunction restricts not only activities that are directly competitive with Wize, but all educational services business at Concordia and UBC. In other words, he submits, the order is erroneously broader in scope than the non-competition clause.

[60] I agree with Mr. Karras. In my view, the judge manifestly intended to make an order consistent with his interpretation of the meaning of the non-competition clause, but did not do so. As noted, in his reasons, he found that "[t]he clause is appropriately limited such that it restricts only activities that are directly competitive with Wize". That finding is not reflected in or consistent with the language of the order. Accordingly, I would remedy the defect by varying para. 1 of the order to read:

> The defendants are enjoined and restrained for a period of 12 months ending March 3, 2025 from engaging in any education services business that offers any products or services that are directly competitive with, and available to, students at Concordia University and the University of British Columbia, unless prior written permission to such activity is given by the plaintiffs.

Conclusion

[61] For all of the foregoing reasons, I would dismiss the application to adduce fresh evidence and allow the appeal only to the limited extent of varying para. 1 of the order as set out above.

[62] **HORSMAN J.A.**: I agree.

[63] **IYER J.A.**: I agree.

[64] **DICKSON J.A.**: The application to adduce fresh evidence is dismissed. The appeal is allowed to the extent of varying para. 1 as described in these reasons.

"The Honourable Justice Dickson"