

CASENOTE: Canview Pty Ltd & anor v Gilmore [2024] FCA 551 (22 May 2024)

The Applicants, Canview Pty Ltd (**'Canview'**) and Vitura Health Ltd are related companies with Vitura Health as the holding company of Canview. Both are in the business of distributing medical cannabis products, with Canview's software operated by Canview and Vitura Health, as a conduit between doctors, pharmacies and patients who purchased.

The Respondent, Mr Gilmore, is the director of Code4 Cannabis Pty Ltd (**'C4C'**). Canview used C4C licensed software, on a cloud platform operated by C4C, to facilitate the sales of cannabinoid products.

1. The 'incidents'

The software licensing arrangement was contained in a Services Agreement between Canview and C4C; this provided (at clause 6.3):

The Supplier [ie C4C] agrees and acknowledges that the Customer [Canview] may grant the Supplier access to its systems, records and internal information (including but not limited to computer files, records, statements and documents) and the Supplier warrants that it will only access those documents for the purpose of carrying out the Services.

Two incidents occurred to give rise to the Federal Court proceeding which is the subject of this casenote. First, on 16 April 2024, the Respondent gained access to the Applicants' documents online; and the second between mid-November 2023 and 13 May 2024, when the Respondent accessed and downloaded many of the Canview documents – in each case, without the knowledge or authority of Canview.

Supreme Court of Queensland

On 15 April 2024, C4C sent a letter to Canview stating that it would terminate the Services Agreement. The Respondent alleged that there were breaches of cl 5.2 of the Services Agreement, which stated that Canview is not to 'decompile, disassemble, reverse engineer or otherwise attempt to derive the source code of the Software'.

Canview filed Supreme Court proceedings alleging that C4C's notice of termination was invalid. C4C defended, alleging:

- (a) that documents published on Canview's device storage SharePoint indicated that Canview had engaged in fundamental breaches of the Services Agreement; and
- (b) from 4 December 2023 to 29 March 2024 employees of Canview accessed Developer Tools, which is used to access source code of web applications, in breach of cl 5.2 of the Services Agreement.

The Applicants sought interlocutory relief in the Federal Court.

2. Hearing

Justice Meagher of the Federal Court of Australia heard the Applicants' application. Canview and Vitura Health sought relief, namely:

- (i) orders restraining Mr Gilmore and C4C from using, disseminating and copying confidential information obtained from the Applicants; and
- (ii) consequential relief, including copying and disclosure of the information.

Injunction

As is widely known, the elements required to be proved to establish an injunction fall into two categories:¹ first, a serious issue to be tried on the allegation of breach (also called a 'prima facie case'); and second that the injunction should go, on the balance of convenience between the parties, including whether damages would be an adequate remedy.

The Respondent conceded that a prima facie case existed. Accordingly, the main issue remained in this case was the question of the balance of convenience, and the form of the orders. Meagher J considered the likely effects of the competing orders sought; and found the order of the Respondent too narrow. In response, her Honour crafted an injunction preventing distribution of copied information, whilst attempting to ensure that the injunction would not prevent Mr Gilmore from defending the Supreme Court proceeding, or operating his C4C business.

For these reasons the Applicants' claim was allowed, and injunctions restraining the access of the Respondent to the Applicants' documents made.

Significance of the decision

This application, quite apart from its urgency, is significant for at least two reasons.

The first is few first-instance decisions consider the balance of convenience separately or thoroughly - and this is understandable. Given the state of the authorities (including LK Law, see below) that the questions of 'serious issue' and the balance of convenience are to be considered not separately but as a continuum, it often does not take much in the way of positive ruling on convenience to tip the scale in favour of an injunction.

The second is that the respondent has already indicated an intention to seek leave to appeal two of the orders made by Meagher J, and that will be likely to put this initial decision into sharper relief.

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30 May 2024

¹ Which according to cases, must be considered together: Karas v LK Law Pty Ltd [2023] FCAFC 15; (2023) 296 FCR 39 at [72], per Charlesworth, O'Callaghan and Colvin JJ.