IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Witmar Holdings Ltd. v. Stober Construction Ltd.,* 2023 BCSC 1378

Date: 20230809
Docket: S137239
Registry: Kelowna

2023 BCSC 1378 (CanLII)

Between:

Witmar Holdings Ltd.

Plaintiff

And

Stober Construction Ltd.

Defendant

Before: The Honourable Justice Walkem

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	S.C. Driver
Counsel for the Defendant:	M.E.A. Danielson
Place and Date of Hearing:	Kelowna, B.C. July 27, 2023
Place and Date of Judgment:	Kelowna, B.C. August 9, 2023

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Introduction

[1] The plaintiff, Witmar Holdings Ltd. ("Witmar"), brought an application for an interim injunction preventing the defendant, Stober Construction Ltd. and its servants, agents, employees or contractors (collectively "Stober"), from trespassing over the airspace of 3195 Walnut Street, Kelowna, BC, particularly by operating a crane over the property. Witmar is the registered owner of 3193 Walnut Street, 3195 Walnut Street, and 3255 Watt Road, Kelowna, BC (a building complex known as "Palisade"). Stober is the registered owner of 3340 Lakeshore Road, Kelowna, BC (a building complex known as "Morvala").

[2] Though the notice of application pled nuisance as well as trespass, Witmar only sought an interim injunction on the basis of trespass. It was agreed between the parties that in British Columbia, incursion of a crane over the airspace of an adjoining property is appropriately considered under the rubric of the tort of trespass.

Factual Basis

[3] The Palisade includes three multi-unit residential buildings which the plaintiff leases to individual tenants. The building at 3195 Walnut Street has a rooftop amenity space and terrace with a pergola (the "Terrace"), 30 residential units and an office used by the plaintiff for 6 employees. The Terrace is used for recreational purposes by tenants and for maintenance and repairs.

[4] The dispute between the parties is regarding a crane installed by Stober in the course of a construction project on their property. It has capacity to overswing the Palisade, including the Terrace, by 20 metres.

[5] The factual basis was largely agreed to as set out in the application, except where noted. The following paras. from the application set out the dispute:

> 12. The ability to use the Terrace is promoted by the Palisade publicly and to its tenants. Events are organized on the space and maintenance and repairs are occasionally necessary. Unfettered access and the ability to use the property without interference are of preeminent importance to the Plaintiff. Further, Witmar Holdings Ltd.

office space, with 6 full time employees and 30 residential units is located directly below the travel of the north crane.

13. The Defendant began construction on a proposed project … [on their property of a multi-building project, involving several] towers.

14. A crane is installed on the north end of The Movala initially to operate up to 38m tall (36m + 2m climbing piece) (124'-0") and then, over the course of construction, to increase to a height of 60m (196'-10") as the North tower progresses. The crane will be encroaching on the Palisade by approximately [20 metres (amended in argument from 49 metres listed in the NOA) in the airspace above] … 3195 Walnut Street [including the Terrace].

15. On February 22, 2022, Stober delivered an e-mail to Witmar which included a draft tower crane airspace letter agreement and a crane swing map identifying the location and swing radius of the proposed cranes.

16. On March 7, 2022, Witmar declined providing access to Stober tower cranes citing the recent tragedy of the toppled crane in downtown Kelowna and advising that the location proposed would put undue stress and hardship on the Palisade's tenants enjoyment.

17. The recent tragedy referenced in the March 7, 2022 refers to the unfortunate accident on July 12, 2021 on St. Paul Street in Kelowna at the Brooklyn on Bernard project (the "**Brooklyn on Bernard Collapse**").

18. The Brooklyn on Bernard Collapse is believed to have occurred when the contractors were dismantling a crane. The catastrophic collapse resulted in the death of four construction workers on the construction site and the death of another individual struck by the crane boom in an adjacent building unrelated to the construction.

19. On March 9, 2022, Stober responded to the March 7, 2022 e-mail of Witmar by providing further particulars to consider which included:

    (a) no live loads or counterweights would pass over the Palisade;

    (b) the free-swinging of the jib outside of business hours was a safety feature;

    (c) the crane operators are experienced and will contract with specialists for erection and dismantling;

    (d) insurance of $10,000,000 per incident was in place and Witmar would be added as an additional insured party;

    (e) Stober would provide written notices regarding the construction plan that could be distributed to tenants; and

    (f) a reciprocal agreement that would enable Witmar to secure access over Movala should Palisade be developed in the future.

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20. On March 9, 2022, Witmar requested further particulars regarding a potential reciprocal agreement related to potential development at the Palisade.

21. On March 10, 2022, Stober provided particulars regarding a potential reciprocal agreement related to potential development at the Palisade.

22. On March 10, 2022, Stober advised they would not grant access to the airspace above the Palisade.

23. On March 18, 2022, Stober delivered an e-mail to Witmar in response to the March 10, 2022 e-mail of Witmar noting that a proposed crane airspace access agreement had been refused and providing the following points as rationale to reach an agreement:

    (a) Crane Safety Protocols recommend that the cranes "free swing" or "weather vane" to avoid shear forces. The jib section of the crane would be approximately 140 feet above the top of the buildings and that neither live loads or counterweights would pass over the property. Stober suggests no realistic risk to property or its occupants due to the crane's presence;

    (b) The Movala was anticipated to have a positive impact on the Palisade; and

    (c) The mutual agreement that The Movala would grant a similar right to swing over the property would eliminate uncertainty should future development occur at the Palisade.

24. On October 7, 2022, Stober e-mailed Witmar to again attempt to reach an agreement on a crane airspace access agreement. Stober delivered a draft agreement and suggested the agreement was a reasonable balance of interest between adjacent land owners. Stober suggested no impact on use at all and no realistic risk to property or occupants. The attached easement agreement included an amount of $7,500 as "partial consideration" for an easement to permit the crane to swing over the Palisade.

[6] On February 7, 2023, Witmar issued a cease and desist letter to Stober, stating that:

> … [A]ny crane operations in its airspace were unacceptable and would cause undue stress and anxiety to the tenants living directly below the crane. In particular, we understand that the crane is positioned to operate directly above certain of the Palisade Property's residential units as well as a common rooftop patio that is accessible by all three buildings on the Palisade Property. This private rooftop is an open space for residents that becomes increasingly frequented by them in the spring and summer. Any airspace trespass above this high traffic area would therefore be highly disruptive to the residents' use and enjoyment of the Palisade Property.

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[7] A $10,000 with prejudice offer for use of the airspace, and an additional $5,000 for legal fees, was made by Stober to Witmar on February 23, 2023.

[8] On March 7, 2023, a representative of Witmar replied to Stober with the following:

> On behalf of the residents at the Palisade Apartment we are declining access to your tower cranes. In light of the recent tragedy of the toppled crane downtown, this would put undue stress hardship on our tenants enjoyment. Sorry for any inconvenience that this might impose.

[9] Reply correspondence from Stober sent on March 18, 2023 had a section entitled “Crane Safety Protocols”, which indicated the crane would not “impact the use of [Witmar’s] property by its occupants during the construction period at all, and there would be no realistic risk to [Witmar’s] property or its occupants due to the crane’s presence.”

[10] Witmar’s response was sent within a minute of this offer, and was comprised solely of the word “Sorry”.

[11] No agreement between the parties was reached.

[12] Stober says the crane counterweight is never over the Palisade and that the crane itself, while bearing loads, is not operated over the Palisade. Stober questioned whether there was any evidence that the crane itself was ever over the Palisade.

[13] Part of the evidence before me was that when cranes are not in use they are allowed to weathervane as a safety feature. Weathervaning is a process where the brake fixing a crane in place is released and the crane is allowed to swing fully with the direction of the wind. This process prevents the crane from being fixed and subject to the force of high winds. The evidence of Walter Weisstock, owner and general manager of Witmar, was that he had personally seen the crane over the Palisade on several occasions. I also understood that when the crane was allowed to weathervane when not in use, it would freely swing over the Palisade depending on the direction of the wind.

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Three-Part Test

[14] The test for determining if an injunction should be granted was set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 1994 CanLII 117 [*RJR-MacDonald*] as follows:

1. Is there a serious question to be tried?
2. Is there evidence the plaintiff will suffer irreparable harm if the injunction is not granted?
3. Does the balance of convenience weight in favour of granting the injunction?

[See also *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 12.]

[15] I address each of these steps below.

1. Is there a serious question to be tried?

[16] With respect to the first prong of the test, the threshold has been found to be low and generally requires a finding that "the claim is neither frivolous nor vexatious": *RJR-MacDonald* at 337.

2. Is there evidence the plaintiff will suffer irreparable harm if the injunction is not granted?

[17] The question of irreparable harm on an application for an interim injunction requires an assessment of whether a refusal to grant relief could so adversely affect the plaintiff's interests that it would result in a situation where the harm could not be remedied if the plaintiff was ultimately successful: *RJR-MacDonald* at paras. 63-64. Irreparable harm has been found to be that which cannot be quantified or corrected through a monetary award. Some examples have included:

- Inability on the part of the defendant to pay, or difficulty in quantifying damages: *RJR-MacDonald;*

- Interference with an ongoing business: *Zeo-Tech Enviro Corp. v. Maynard*, 2005 BCCA 392;
- Harm that “cannot be quantified in money” such as Indigenous *sui generis* interest in lands or resources: *Yellow Quill First Nation v. Saskatchewan (Minister of Environment and Resource Management*, 1999 SKQB 82; see also *Reece v. Canada (Attorney General)*, 2022 BCSC 865;
- Reputational interests: *RJR-MacDonald; Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395;
- Loss of goodwill: *Garcha Bros Meat Shop Ltd. v. Singh*, 2022 BCCA 36 at paras. 106–107; and
- Trespass (to land or chattels): *Cermaq Canada Ltd. v. Stewart*, 2017 BCSC 2526; *OSED Howe Street Vancouver Leaseholds Inc. v. FS Property Inc.,* 2020 BCSC 1066 [*OSED*].

[18] The onus is on the applicant to establish that they will suffer irreparable harm if the injunction is not granted.

3. Does the balance of convenience weigh in favour of granting the injunction?

[19] The third branch of the test requires a weighing of the balance of convenience between the parties. In *RJR-MacDonald* at para. 62, the Supreme Court of Canada adopted this definition of the balance of convenience from Justice Beetz in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, [*Metropolitan Stores*] at para. 35: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits".

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Analysis

I. Serious question to be tried

[20] The facts of this case are quite similar to *OSED* where Justice Baker considered an application for an injunction preventing the overswing of a crane over a building (and recreational terrace) on an adjoining property. The parties entered an agreement which limited the days and hours the defendant ("FSP"), would trespass into the plaintiff's ("*OSED*") airspace. Despite the agreement, FSP unilaterally decided that the hours were too restricted and the costs too high, and chose to exceed the terms of their agreement by operating a crane through *OSED*'s airspace without restriction.

[21] *OSED* then sought, and was granted, an interim injunction. At the first stage of the test, Baker J. determined the issues raised a serious issue to be tried, and found it had been established in the authorities that a construction crane which enters into the airspace of another is trespass. I generally adopt the reasoning of Baker J. in *OSED* and apply it at this stage.

[22] On the evidence before me, I am satisfied there is a serious question to be tried and that the passage of Stober's crane into Witmar's airspace amounts to trespass.

II. Irreparable Harm

[23] At para. 31 of *OSED*, the irreparable harm that the plaintiff alleged would result if the injunction was not granted included that "tenants cannot use the terrace while the crane is in operation for safety reasons and that this is a significant interruption in its business." Specific concerns related to the counterweight of the crane, the proximity of the counter jib moving over *OSED*'s terrace and the restriction created to tenants of the building in accessing the terrace, and the potential harm to the reputation of *OSED*'s building.

[24] *OSED*'s evidence was that the "crane continues to move through the air space over the terrace on a daily basis without restriction" and that while FSP argued the crane was safe, "tenants do not want to use the terrace while a counter

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jib weighing 10,600 lbs hangs almost 6 feet into the terrace air space." *OSED* also argued that FSP had violated its agreement "to provide tenants with certain hours in which they could use the terrace without concern of the overhead counter jib and counterweight", and in the result, "when tenants wish to use the terrace FSP will stop the use of the crane over the terrace.": *OSED* at paras. 35-36.

[25] There, as here, the defendant pointed to *Janda Group Holdings Inc. v. Concost Management Inc.,* 2016 BCSC 1503 [*Janda*]. In *Janda*, the court held that the intermittent crane overswing was a nuisance not a trespass and found damages could provide an adequate remedy for the nuisance it found (Here, both parties agree that, after *OSED*, the matter should be considered as a trespass). In briefly considering the issue of irreparable harm in *Janda*, the court determined the brief passage of an unloaded crane into the neighbouring airspace did not amount to irreparable harm, and emphasized the need for give and take in a busy city where construction cranes are common.

[26] Justice Baker distinguished *Janda* as follows:

> [36] FSP relies on *Janda* and *Kingsbridge* for the proposition that an overhead crane does not of itself create irreparable harm. For the reasons expressed above, I do not find these cases to be helpful in terms of their analysis. Nevertheless, the interference by FSP is more serious than in the case of *Janda*, where only the unloaded boom of the crane moved through the air space. Further, in *Janda* there is no evidence that the boom was moving over a designated outdoor recreational space. Similarly, in *Kingsbridge* there was no evidence of a heavy counterweight passing over an outdoor recreational space.

[27] The basis of irreparable harm proposed by Witmar in this case is similar to the facts in *OSED* in that it involves a non-consent to overswing a crane over an outdoor recreation space. Witmar points to the possibility the crane may swing over the Terrace while in use, or may freely swing overhead while in weathervaning mode. It is acknowledged that unlike the facts in *OSED*, Stober says it will not run a counterweight or loads over the Terrace. However, Witmar argues that without specific hours where tenants can have access to the Terrace uninterrupted by a crane swinging overhead, tenants and workers are inhibited in accessing the Terrace.

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[28] Witmar argues its workers need to access the Terrace to do maintenance and repair and are inhibited from access while the crane is passing overhead. Witmar also asserts that the interference with their tenants' use of the Terrace harms the reputation of the Palisade. The basis of irreparable harm in *OSED* was similar to that alleged here. As Stober does here, the defendant in *OSED* argued that the prospective harm alleged was speculative and that they followed safety protocols which ensured that there was no evidence of real risk to tenants from their use of the space where the crane had an overswing. Stober additionally argues it has taken steps to restrict the overswing during operations, and as outlined above, does not intend to run loads over the Palisade, only to overswing during weathervaning (which swings are acknowledged to follow the wind and be unrestricted) or while repositioning the crane while it is in operation.

[29] Acknowledging the give and take suggested in *Janda*, I note that does not appear to have occurred in these circumstances. When Stober could not impose the agreement it wanted, it simply proceeded unilaterally. There did not appear, on the record before me, to be a meaningful response to the safety concerns of Witmar. For example, there was no proposed schedule which would have allowed for the use of the Terrace by tenants and workers without crane overswing or for an agreement for no-go hours or days. Further, as in *OSED* and unlike *Janda*, the main issue at play here is that the crane passes over a designated outdoor recreation space.

[30] Witmar sought to introduce evidence, which they said should be received as expert evidence of Niamh Ni Chróinín, a civil engineer. The evidence was that the project could have been achieved with the use of a different type and number of cranes that would not have required the same incursion into Witmar's airspace. Stober was opposed to the consideration of this evidence, and questioned the qualification of the affiant as an expert, and the conclusions in her affidavit. I do not find it necessary to consider the affidavit. Whether or not there were options, or cheaper ways for the construction to occur, is not necessary to the analysis here. The fact of the matter is that Stober chose to proceed as it did without reaching an agreement with Witmar. Stober chose to erect the crane in the manner it did and to

commence operations unilaterally, with full knowledge that Witmar had unresolved concerns and did not consent to the trespass of its airspace.

[31] In *OSED*, FSP argued that it would suffer significant financial loss if not allowed unrestricted use of the *OSED* airspace, and if the injunction were granted, including overtime required by restricted crane operation hours; increased cost of an extended build time; greater staff and office costs; and, strain on FSP's overall financial position.

[32] Here, Stober makes similar arguments. Stober argues it has many employees and people actively engaged in the construction process who would be impacted if the project was halted, and that the cost of the project will be significantly driven up by any delay. Stober further argues the people who have purchased the units in the building they are constructing will be severely inconvenienced by the delay as they are waiting for their homes to be completed. On this point, they argue there is a multimillion dollar financial risk to them if those who have pre-purchased units cancelled their purchases as a result of the delay, as is permitted per the sales contracts - a risk they suggest is elevated because of increased interest rates and the changing financial climate. Stober submits it may be impossible to change the current configuration of the crane to eliminate the overswing, or that to do so would be prohibitively costly and potentially dangerous.

[33] Generally, I observe that the costs Stober argues were largely incurred by itself, when it undertook a self-help remedy and erected the crane which would trespass into Witmar's airspace without reaching agreement. Though the amounts of potential damages Stober alleges are significant, they are monetary amounts.

[34] Here, I find on a balance of probabilities that the operation of the crane as proposed will cause irreparable harm to Witmar. Though it is said to be only an unloaded crane passing over the airspace, the airspace over the Terrace is a recreational space used by tenants and workers of the Pallisade. Witmar, its tenants and workers, have a legitimate interest in the airspace above the Palisade, including the Terrace. That airspace is being trespassed upon by the overswing of the crane.

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[35] Overall, I find that Witmar will suffer irreparable harm if the injunction is not granted.

III. Balance of Convenience

[36] The factors to be considered in weighing the balance of convenience were set out by the Court of Appeal in *Canadian Broadcasting Corporation v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96, 1992 CanLII 960, at p. 102, and adopted in *OSED* at para. 41 as follows:

> a) 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;
>
> b) the likelihood that if damages are finally awarded they will be paid;
>
> c) the preservation of contested property;
>
> d) other factors affecting whether harm from the granting or refusal of the injunction would be irreparable;
>
> e) which of the parties has acted to alter the balance of their relationship and so affect the status quo;
>
> f) the strength of the applicant's case; and
>
> g) any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

Adequacy of Damages

[37] The primary concern raised by Witmar is the safety of its tenants and workers. An affidavit submitted by Witmar raised the possibility that it had a higher than average vacancy rate during construction. I do not consider that argument. There was no evidence to tie the vacancy rate to the crane overswing.

[38] As in *OSED*, I do not find that the harm alleged by Witmar can be compensated by damages. Witmar is concerned with the safety of its tenants and workers, and of the interference with their use of the Terrace. This interference is ongoing and proposed to last for at least another year, and likely longer.

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Likelihood damages will be paid if finally awarded

[39] Rule 10-4(5) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, states that "[u]nless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages."

[40] Here, Stober argues that Witmar has not issued a guarantee. It also suggests a restructuring may be occurring within Witmar. They say that while Mr. Weisstock, owner, director and general manager of Witmar, has offered a personal guarantee, he is not a party and there is no guarantee of his ability to pay in the event that Stober is ultimately successful. Stober argues there is a strong likelihood it stands to lose a significant amount of money for which there is no guarantee that it will be compensated.

[41] I have considered this a neutral factor, as between the parties.

[42] Stober submits that it is a large and well-established company, and has the ability to pay damages if damages are ultimately ordered against it. A term of the injunction could be to require such undertaking. In *obiter*, I note that the spectre of large economic losses should not be allowed, on their own, to tip a consideration on the balance of convenience. Such consideration would weigh heavily in favour of parties with great financial means and against parties with legitimate interests which require the court’s protection, but without any significant financial means. Weighing the balance on an injunction should never be reduced to assessing the party with the greater financial wherewithal and therefore greater potential for financial loss.

Preservation of a contested party

[43] This factor was not in issue.

Would harm from the granting or refusal of the injunction be irreparable?

[44] Stober argues its damages are primarily economic and outlines the large monetary scale of economic loss that it should face. The loss alleged by Witmar is

not exclusively (or even primarily) economic. Witmar is concerned with the ability of its tenants and workers to use a public recreational space in the Palisade. The proposed construction will last for over another year, and will impact their use for at least that time. There is no agreement in place between the parties which would restrict use of the crane to certain hours or days, so as to ensure that there are times when the Palisade's tenants and workers were assured of not being subject to a crane overswing. I consider that this factor favours a granting of the injunction.

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Which of the parties has acted to alter the balance of their relationship and so affect the status quo?

[45] Here, there was evidence that the process of negotiating a licence for access to the airspace broke down between the parties. It is suggested by Stober, though this was not on the record, that this was an effort of Witmar to seek more funds. The record shows that Witmar consistently expressed concern about tenant and worker safety, especially in light of multiple deaths caused by a crane collapse in the area. The record indicates that Stober did not think Witmar's expressed safety concerns were reasonable and so does not appear to have meaningfully responded to them. I find the fact that Stober acted without securing an agreement on the use of airspace (following an "act first, perfect the permission later" self-help strategy) strongly favours Witmar's application.

Strength of the Plaintiff's Case

[46] For the reasons outlined above, I find that Witmar has a strong case for trespass. I further find their evidence supports that they will suffer irreparable harm should the injunction not be granted.

Factors impacting the public interest

[47] Stober argues that construction oftentimes requires adjoining property owners to work together, and incidents of crane overswing onto adjoining properties may be unavoidable in the course of modern construction projects. This was also the perspective of the court in *Janda.*

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[48] In *OSED*, at para. 53, the defendant argued: "in modern society, neighbours in dense neighbourhoods must engage in give and take to accommodate construction, including the use of overhead cranes." As outlined above, there, *OSED* had been willing to enter an agreement but reserved "modest use" of its terrace without the cranes overhead for its tenants. FSP did not find that usage sufficient and so unilaterally went beyond it.

[49] In the circumstances before me, Stober simply abandoned its efforts to seek agreement on use of airspace above the Palisade and proceeded unilaterally. There was no time (agreed or not) reserved for Witmar, its tenants and workers, when overswings would not occur, aside from when it was convenient for Stober (when they were not working, or after hours, or days off for their crews). Stober, as outlined above, argues there is a public interest in the employment it generates and other economic benefits, and for the people who purchased its units to not disrupt the project.

[50] I find that the public interest weighs in favour of Witmar. The public has an interest in encouraging the resolution of such matters through negotiation and agreement rather than a trespass now–perfect permission later (only if required by the courts to do so) strategy. Overall, I find that the balance of convenience favours granting the injunction sought by Witmar.

Conclusion

[51] Although I have found Witmar has met the burden of showing an interim injunction should be granted in its favour for many of the same reasons as found in *OSED*, I note the distinction in *OSED* is the pre-existence of an agreement which permitted the defendant there to undertake their work during agreed upon times.

[52] On the circumstances before me, I am not prepared to order an open-ended injunction. I order an interim injunction restraining Stober, its servants, agents, employees and contractors, from trespassing over the air space at 3195 Walnut Street, Kelowna, B.C. for a period of four months with leave to Witmar to make an

application for a further extension. I would hope that a time-limited injunction will provide the parties with an incentive to reach a negotiated agreement.

[53] Witmar, or Walter Weisstock as its owner, will provide Stober with an undertaking as to damages as a term of this Order.

[54] Witmar is entitled to costs in the cause.

"A. Walkem J."

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