COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aulakh v. WIT Management Corp.,*
2023 BCCA 108

Date: 20230307
Docket: CA48542

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Between:

Inderjit Aulakh

Appellant
(Defendant)

And

WIT Management Corp.

Respondent
(Plaintiff)

And

J.J. Cool & Co. Ltd.

Respondent
(Defendant)

And

Brian Atkins and WTC Group Inc.

Respondents
(Defendants by way of Counterclaim)

Before: The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Willcock
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated September 2, 2022 (*Wit Management Corp. v. Aulakh*, 2022 BCSC 1572, Vancouver Docket S210353).

Counsel for the Appellant: B.B. Olthuis
N.P.R. Bond

Counsel for the Respondents, WIT Management Corp. Brian Atkins and WTC Group Inc.: S.C. Driver
L. Morris

Place and Date of Hearing:	Vancouver, British Columbia January 9, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 7, 2023

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Justice Skolrood

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Summary:

This is an appeal of an order granting an interim injunction enjoining the appellant and the corporate entities he controls from trespassing on a portion of industrial property. The appellant submits the chambers judge erred in finding the respondent made out a serious question to be tried in respect of the trespass claim, in assessing the balance of convenience, and in defining the boundaries of the property affected by the injunction. Held: Appeal dismissed. The appellant makes out no error of law in the manner in which the chambers judge considered whether there was a serious question with respect to whether the appellant was trespassing. The judge did not err in her assessment of the balance of convenience. She found that an injunction would lead to a reduction in business, the kind of harm that can be compensated for by damages. Finally, there is no evident misapprehension with the manner in which the boundaries of the area reserved for the respondent's use were determined.

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Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] This is an appeal from an order granting an interim injunction enjoining the appellant, Inderjit Aulakh, from trespassing on a portion of industrial use land located in New Westminster, B.C. The injunction was granted for reasons indexed at 2021 BCSC 2281 (the "First Reasons"), reconsidered at 2022 BCSC 246 (the "Second Reasons") and supplemented at 2022 BCSC 1572 (the "Third Reasons").

[2] An order granting an interim injunction is a limited appeal order. Leave to bring this appeal was granted on October 5, 2022, for reasons indexed at 2022 BCCA 356. The factual background, judicial history and issues on this appeal are canvassed in detail in the reasons for granting leave. I will not repeat that analysis, but summarize essential facts as follows.

[3] Mr. Aulakh owns and operates Trans BC Freightways (2007) Ltd. ("TBC"), a trucking company. Mr. Atkins owns and operates WTC Group Inc. ("WTC") and WIT Management Corp. ("WIT"), transloading companies (collectively "the respondent").

[4] In 2011, Mr. Aulakh and Mr. Atkins incorporated J.J. Cool & Co. Ltd. ("Cool Co."), to purchase industrial property at 400 Ewen Avenue in New Westminster. Mr. Aulakh provided the initial capital for the purchase of the property and he owned the shares of Cool Co. After completion of some remediation, WTC

and TBC began to provide integrated trucking, transloading and storage facilities on the site. The terms of the agreement upon which the property was jointly used were verbal and informal but were eventually incorporated, in part, in a shareholders' agreement between Mr. Aulakh, Mr. Atkins, TBC, WIT and Cool Co. (entered into in September 2018, and backdated to February 18, 2011).

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[5] The parties used the property harmoniously until about 2018, when disputes arose with respect to Mr. Atkins' companies' contribution to the repayment of Mr. Aulakh's initial capital outlay. In late 2020, Mr. Atkins' transloading companies stopped working with TBC.

[6] WIT commenced an action against Mr. Aulakh and Cool Co. in January 2021, seeking a declaration with respect to WIT's beneficial interest in Cool Co. shares, an order requiring Mr. Aulakh to transfer ownership of Cool Co. shares to WIT, and an order to provide WIT with access to Cool Co.'s accounting records. Mr. Aulakh filed a counterclaim, seeking damages from WIT, WTC and Mr. Atkins for ceasing to use TBC's trucking services, which he claimed was a breach of a joint venture agreement.

[7] In September 2021, WIT amended its pleadings to include a claim in trespass and a claim for an injunction restraining "Aulakh and the Aulakh Group" (defined in the pleadings as TBC and "other entities in the trucking industry") from trespassing on "the WIT portion of the WTC Property".

[8] The injunction application was heard on October 8, 2021. On November 23, 2021, the chambers judge issued the First Reasons, concluding, first, that the pleadings and the evidence before her raised serious questions to be tried. Neither WIT's claim that the Aulakh Group had committed trespass nor the claim that Mr. Aulakh had engaged in conduct oppressive to WIT's interest in Cool Co. was frivolous. With respect to the trespass claim, the chambers judge concluded:

> [42] The evidence about which portions of the Property the two groups used, and whether they used it exclusively, is disputed between the parties. It is not appropriate for me to make any findings regarding that on an interim application.

> [43] However, what is not disputed is that the management of Cool Co., which owns the Property, is at the heart of the dispute. The evidence is clear that the parties contemplated a transfer of shares to the plaintiff at some point. It is also clear that from the outset, the parties agreed that the plaintiff would be operating its transloading business on some portion of the Property. It is also not contested that the defendant has significantly increased its activities and use of the Property starting the end of last year. Given all the evidence adduced, I also infer that a transloading business requires a significantly larger footprint on the Property to operate than a trucking company.
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> [44] Based on the foregoing, I agree with the plaintiff that its claim in trespass is not frivolous or vexatious.

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[9] With respect to the oppression claim, she held:

> [45] Similarly, I am persuaded that the oppression claim raises a serious issue. While the parties dispute whether the plaintiff has made sufficient contributions to trigger the transfer of shares, there is no dispute that the plaintiff has paid significant amounts of money. The issue at trial will turn on the characterization of these payments, and payments made by the defendant.
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> [46] Underlying that dispute, however, is the uncontested fact that Mr. Aulakh holds 50% of the shares in Cool Co. for the benefit of the plaintiff. The lack of any substantive defence to the orders sought in paras. 5–6 strongly suggests that there has been conduct not in keeping with Mr. Aulakh's duties as set out in the Agreement (although I make no finding on that point). Both parties agree that their business relationship and ability to operate amicably deteriorated dramatically since last fall, but at all times Mr. Aulakh was bound by duties he owed to the plaintiff as set out in the Agreement.
>
> [47] On that basis, I am satisfied that the oppression claim is not frivolous or vexatious. Therefore, the plaintiff has met the first step of the *RJR-MacDonald* test.

[10] Second, she concluded that WIT would suffer irreparable harm if an injunction was not granted: presumptive harm arising from interference with an interest in property; risk of injury arising from safety concerns with respect to the unregulated use of the property by competing businesses; and difficult-to-quantify business losses arising from the alleged oppressive operation of Cool Co.

[11] Finally, the judge held the balance of convenience favoured granting an injunction restraining the Aulakh Group's use of property exclusively occupied by

WTC. In doing so, she discounted Mr. Aulakh's submission that such an injunction would irreparably damage TBC's business, holding:

> [69] I am mindful of Mr. Aulakh's assertion that granting the injunction will have a severe impact on his business. He deposed it is possible he could be "put out of business" before trial if the injunction was granted. However, that is a harm that is capable of being quantified. For the same reason I was not persuaded by the plaintiff's complaint about that reduced business supports the injunction, I do not find this factor favours the defendant's position.

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[12] Interim orders were made with respect to the operation of the Cool Co. business, but no order was made enjoining the use that could be made of the property for the following reasons:

> [74] While I have found the evidence does favour granting an injunction on the basis of the plaintiff's claim in trespass, the order sought is problematic. For convenience I reproduce it here. Paragraph 7 of the Draft Order seeks, "an order restraining [Mr. Aulakh] and the Aulakh Group from trespassing on the [plaintiff's] portion of the [Property].
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> [75] The problem is that I have not made a finding as to what is "the plaintiff's portion of the Property". This means the order as stated would be unclear, and possibly unenforceable for that reason.
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> [76] Nor do I believe it would be appropriate to make a finding in the context of this interim application. The parties dispute what portions of the Property have been used by which entities, and for how long. While I accept the plaintiff has met the *RJR-MacDonald* test for an injunction, in part on the basis of its evidence supporting the trespass claim, but that conclusion did not turn the acceptance of either party's delineation of areas of the Property they respectively used. Rather, it was based to a large degree on the evidence about safety concerns, the undisputed evidence that the plaintiff had for many years used some portion exclusively for its transloading business, and the nature of duties owed to the plaintiff by Mr. Aulakh under the Agreement.
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> [77] Although the orders already granted will immediately impact Cool Co.'s management, I am aware that there is a strong possibility of further conflict or stalemate because no party enjoys majority control of Cool Co.
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> [78] However, my recollection of the evidence is that there was overlap in the parties' evidence as to which portions of the Property were used by the plaintiff for its transloading operations. It would be appropriate to grant an order over those areas, plus a reasonable corridor to ensure access (if that was in dispute).

[13] The judge, therefore, gave the parties leave to either submit a draft order for an interim injunction restraining the Aulakh Group from using the portion of the

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property exclusively or primarily used for the WIT transloading operations before the fall of 2020 or, alternatively, if the parties could not agree on a description of how to identify the portion of the property to which the draft order should apply, she gave them leave to make further submissions on the following terms:

> [79] ...
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> b) If counsel do not reach an agreement as set out in the preceding paragraph, they may:
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> i. request a brief hearing before me restricted to the issue of how to identify a portion of the Property to which para. 7 of the Draft Order should apply;
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> ii. nothing shall be filed for that hearing, and counsel will be restricted to refer only to material already included in the application record that was before me; …

[14] The parties could not reach an agreement. On January 13, 2022, WIT's counsel filed a requisition for a hearing before the chambers judge to have her settle the issue. On January 19, TBC's counsel filed an application for reconsideration of the orders made in November 2021, on the basis that the judge had erred, *inter alia*, by:

a) granting an injunction reflecting the conclusion that the Atkins Group was entitled to exclusive use of some portion of the property, despite elsewhere expressing the view that exclusivity of use had not been established; and

b) finding that Mr. Aulakh's contention that "it is possible he could be 'put out of business' before trial if the injunction is granted", was a harm capable of being quantified and therefore not irreparable.

[15] The chambers judge heard WIT's application to settle injunction terms in the morning of January 21, 2022, and TBC's reconsideration application in the afternoon. On February 16, 2022, the chambers judge issued the Second Reasons, dismissing TBC's reconsideration application. She did not address the application to settle the "boundary" issue that precluded the issuance of the injunction.

[16] When the parties sought information with respect to the judgment on that issue, which they considered to be under reserve, they were advised the chambers judge was of the view she had not reserved judgment. On May 19, the parties jointly advised the registry that the terms of the court's order with respect to the trespass injunction had been spoken to in January, but had not been finalized, and no order had been entered.

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[17] Having received no response, the parties again wrote to the registry on July 18, 2022. They provided the court with excerpts from the record of the January proceedings, in which counsel for WIT advised the chambers judge that "the purpose of this morning's hearing is to outline the boundaries of the area that Mr. Aulakh and his entities are enjoined from trespassing on, and that was something that was left open in your reasons for judgment at paragraph 79 of your reasons." The record indicated that the judge had advised the parties at the conclusion of the hearing with respect to the "boundary issue" that judgment was reserved pending the consideration of the reconsideration application set to be heard in the afternoon.

[18] Following the receipt of the second request for judgment on the boundary issue, the judge issued the Third Reasons on September 2, 2022, in which she addressed the outstanding question very briefly as follows:

> [8] … These reasons address that issue. I reviewed the affidavit material filed for October 8, 2021.
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> [9] Further to paras. 78 and 79(b) of the Injunction Judgment, the injunction restrains Mr. Aulakh and what the parties referred to as the Aulakh Group (or any of the businesses purporting to operate under either entity) from trespassing on that portion of the Property (defined in para. 2 of the Injunction Judgment as 400 Ewen Street in New Westminster) outlined in red on the map included as Exhibit "D" to the affidavit of Brian Atkins made August 18, 2021.

Leave to Appeal

[19] On the application for leave to appeal Justice Fitch held:

> [53] I am satisfied that it is arguable the chambers judge erred in principle or was clearly wrong in imposing the interim trespass injunction. I rely here on

> Mr. Aulakh's submission that: (1) the inability of the chambers judge to ascertain a "WIT portion" of the property could only lead to the conclusion that WIT had failed to make out a serious question to be tried in trespass; (2) concerns about safety cannot ground proprietary rights; (3) a claim in oppression cannot "come in aid" of a trespass claim so as to supply the missing possessory element; and (4) the chambers judge erred in finding that the potential for Mr. Aulakh to go out of business if the injunction were imposed did not constitute irreparable harm. …

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Issues

[20] The appellant contends the chambers judge erred in three respects:

a) in finding that WIT had made out a serious question to be tried in respect of its trespass claim;

b) in her assessment of the balance of convenience; and

c) in her assessment of the record as concerns "overlap" as to the WIT portion of the property.

Analysis

Serious Question

[21] The appellant says an injunction restraining its right to use any portion of the property must be founded upon an arguable claim to exclusive use of that property. He says the judge erred in two respects in weighing that claim. First, in failing to clearly address the evidence that neither party to the agreement to purchase and use the property had a right to exclusive possession of any part of the property. Second, in finding that WIT (as opposed to another entity, specifically WTC) had a proprietary interest in the property.

The case for a right of exclusive possession of certain property

[22] The appellant contends that in order to obtain an injunction, WIT needed to establish a claim (sufficient to meet the "serious question" standard) to an exclusive right to possession of the land, or some of it, and to establish (to the same standard) that Mr. Aulakh had directly and physically disturbed that possession.

[23] The case cited in support of this proposition, *British Columbia v. Newmont Mines Ltd*. (1982), 37 B.C.L.R. 1, 1982 CanLII 450 at para. 21 (C.A.), does not address the strength of the case that must be established, or the nature of the interest that must be made out, to ground injunctive relief. It simply affirms that an action in trespass can be maintained where an exclusive right of possession is disturbed. There is no doubt that there must be some evidence of exclusive possession in order to make out a trespass claim, since "A person who merely uses land together with others may not maintain trespass": Canadian Encyclopedic Digest, Trespass II.3.(a), s. 47, citing *Bailey v. McNeily* (1861), 1861 CarswellOnt 37 (U.C. Q.B.).

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[24] The appellant says instead of addressing the strength of the respondent's claim to exclusive possession, the chambers judge granted the relief sought because:

a) the parties contemplated a transfer of shares to WIT at some point;

b) they agreed that WIT would be operating its transloading business on some portion of the property; and

c) Mr. Aulakh had significantly increased his companies' activities and use of the property since late 2020.

[25] He says these factors do not speak to a right of exclusive possession, and do not substantiate a claim in trespass. He says the judge wrongly used the oppression claim as a basis upon which to grant an injunction that could only be founded upon a property right. That is reflected in the conclusion that what the appellant refers to as the "trespass injunction" did not turn on the acceptance of either party's delineation of areas of the property they respectively used.

[26] The appellant says the evidence before the judge was that while WTC operated its transloading business at more than one location, TBC had no other place of business, and no part of the property was used exclusively by the Atkins or Aulakh Groups. He says the evidence was that the parties' payments to Cool Co.

were based on the amount required to service the mortgage, not market rent, and that neither party had an exclusive right of possession as a tenant.

[27] The respondent notes that the foundation of its claim in trespass was WTC's exclusive possessory right as a commercial tenant on the property. It says the judge properly left the determination of whether WTC is a commercial tenant to the trier of fact. Her task was only to see that the case met the low threshold of "a serious question to be tried": *Marine Harvest Canada Inc. v. Morton*, 2017 BCSC 2383.

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[28] Doing so required her to be satisfied that WTC might be able to make out a right to exclusive possession, but did not require her to be satisfied WTC could make out that claim with certainty or as a tenant. The respondent notes that in *Patterson v. De Smit*, [1949] 3 D.L.R. 178, 1949 CanLII 308 (O.N.C.A.) Justice Roach (at 181) described a right to exclusive possession as the key to a trespass claim in the following terms:

> The plaintiffs' claim … does not depend upon title but upon possession. The very essence of trespass is an interference with possession and it therefore was incumbent on the plaintiff to prove that at the relevant time they were in *de facto* possession of the lands in question. A mere right of property without possession is not sufficient to support such an action. This does not mean, however, that the question of title is unimportant …

[29] He continued (at 182) by addressing how possession is established:

> In "An Essay on Possession in the Common Law," by Pollock and Wright, 1888, Sir Frederick Pollock, … says at pp. 12-3, that possession "may be paraphrased as effective occupation or control"; that "in common understanding, that occupation at any rate is effective which is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment", but that "much less than this will often amount to possession in the absence of any more effectual act in an adverse interest". Then quoting from Terry, Principles of Anglo-American Law, he says that :
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> > "Indeed it seems correct to say that 'any power to use and exclude others, however small, will suffice, if accompanied by the *animus possidendi*, provided that no one else has the *animus possidendi* and an equal or greater power.'"

[30] The respondent says a serious question to be tried with respect to trespass can be established by demonstrating that it exercised *de facto* possession of part of

the property, and for practical purposes excluded strangers from interfering with its use and enjoyment of the portion of the property upon which it carried on its transloading business.

[31] It argues that when the boundaries were addressed at the second hearing, it made submissions with respect to the boundaries of the area exclusively used by WTC, making reference to a map of the property and the parties' evidence with respect to the historic use of the property (before the acts of the Aulakh Group said to interfere with WTC's transloading operations). It says the appellant's position was that there was no overlap in the parties' evidence as to which portions of the property were used either exclusively or primarily by the Atkins Group for its transloading operations.

[32] The appellant contends the chambers judge failed to identify the reasonable corridor for access that she mentioned in her first set of reasons. It was the appellant's submission that the respondent's claim to exclusive possession was inconsistent with the means of access to the industrial property it had exercised over the years. It says the judge ignored the evidence on the necessity of ensuring access to the property for the Aulakh Group's trucking operations. However, the appellant made no submissions with respect to a corridor for access at the second hearing. For that reason, the respondent says a corridor for access was not in dispute. Further, it says the area defined by the injunction leaves the appellant a reasonable access corridor.

[33] As a result of the position taken by the appellant at the second hearing, the respondent says it was not only open to the judge to rely on WTC's submissions to define the area of exclusive occupancy, but she also had no other option as no other boundaries were proposed.

[34] The judge found that the parties understood that the respondent would operate its transloading business on some portion of the property, and that transloading requires a significantly larger footprint to operate than a trucking company. In my view, this finding demonstrates that she directed her attention

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toward the *de facto* possession and use of the property by the parties. In para. 76 of the First Reasons, cited above, she states that her finding that an injunction was warranted was based on "the undisputed evidence that the plaintiff had for many years used some portion exclusively for its transloading business".

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[35] It is correct to say that, in granting the injunction, the judge placed some reliance upon safety concerns, both in weighing the strength of the claim to exclusive possession of a portion of the property and in weighing the balance of convenience.

[36] The safety concern was the "extremely risky situation" arising from two entities operating transloading businesses on the property. The evidence that the operator of a transloading business requires exclusive possession of the premises where the business operates, could fairly have been considered in addressing the appellant's argument that no party had exclusive possession of any part of the property. Primarily, however, the judge found (at para. 62) that the safety concerns weighed heavily in favour of the plaintiff when assessing the balance of convenience. In my view, there is no apparent legal error in the chambers judge's treatment of the evidence of a safety risk arising from competing use of the property. That risk spoke both to the need to exercise some exclusive control of property to engage in this business, and the need for an order for its continuing safe management in the face of conflict affecting the balance of convenience.

[37] Although she sought further submissions with respect to "how to identify the portion of the Property to which the Draft Order should apply", the chambers judge was satisfied, after hearing further submissions and again reviewing the record, that the area of exclusive occupation could be identified as that portion of the property at 400 Ewen Street in New Westminster outlined in red on the map included as Exhibit "D" to the affidavit of Brian Atkins made August 18, 2021: Third Reasons at para. 9. In doing so, she was not finally defining the areas of exclusive use; rather, she was enjoining interference with WIT's transloading business pending a final determination of the parties' respective rights.

[38] In my view, the appellant has not established that the chambers judge erred in her analysis of whether the pleadings and the evidence before her raised a serious question with respect to whether the Aulakh Group was trespassing upon that portion of the property over which WIT had exercised exclusive possession. Reading all three judgments as a whole and in context, I am of the view that they reflect an appreciation of the case that must be made out to support an injunction. I would not accede to the argument that the "trespass injunction" was wrongly founded upon evidence of oppression or contractual rights.

Identity of the rights holder

[39] Alternatively, the appellant says there was no support in the record for the conclusion that the parties agreed that WIT (as opposed to WTC) was operating the transloading business on the property. He says there was no reference in the record to WIT doing so. The record describes WTC's operations, but the appellant says WTC makes no claim in the underlying proceedings.

[40] The respondent says the argument that WIT was required to establish its entitlement to an injunction, as a distinct entity, was not raised in either oral or written argument at the first or second hearings. At all times, the parties accepted and used the definitions of the Aulakh Group and the Atkins Group that appear in the following passage in the First Reasons:

> [8] The plaintiff and WTC Group Inc. are companies owned by Brian Atkins and his family, and all are involved in the transloading industry (the "Atkins Group"). Mr. Aulakh and his family own and operate Trans BC Freightways (2007) Ltd. ("Trans BC"). They also own and operate other entities in the trucking industry, and their group of companies is referred to as the Aulakh Group. For ease of reference in this judgment, a reference to either the Atkins Group or the Aulakh Group is meant to include reference to the plaintiff and defendant respectively, or any of each group's constituent entities.
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> [Emphasis added.]

[41] The respondent says it was not called upon to address the issue, and the record is incomplete. The appellant acknowledges it has "reframed" the argument that no claim in trespass is made out by WIT, emphasising for the first time on

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appeal that WIT, as a distinct entity, has not made out that claim. It says the position it now takes is not inconsistent with its position throughout that there is no viable claim in trespass. It contends that the issue can fairly be addressed here for the first time, and no prejudice is occasioned by doing so.

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[42] The injunction application was heard on the footing that neither party took issue with the distinction between the rights and obligations of Mr. Atkins, WIT and WTC. It is correct to say that the pleadings are imprecise and somewhat confusing. The application for injunctive relief was brought by the plaintiff in the underlying proceedings—WIT Management Group—but also by WTC Group Inc. and Mr. Atkins, who were only defendants by way of counterclaim and sought no relief on their own behalf. In response to the motion, however, the appellant did not take issue with the individual applicant's entitlement to seek an injunction based on WTC's use of the property. The appellant explicitly acknowledged that "the Atkins Group" provided transloading services on the property, without differentiating between WIT and WTC. It is significant that even on the reconsideration application, after the chambers judge had ordered an injunction in favour of WIT, the appellant did not take issue with WIT's entitlement to an injunction on the ground that WTC is the operating company with a claim to possession.

[43] The respondent says that any deficiency in the pleadings, specifically the fact that WTC is only a defendant by counterclaim and does not plead a claim in trespass, is answered by the fact that injunctive relief may be granted even when there is no claim in an action for a permanent injunction: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, R. 10-4(1); *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39(1); *Delmas v. Orion* 2000 *Technologies Ltd.*, [1997] B.C.J. No. 836 at para. 11, 1997 CanLII 2060 (S.C.); *Telus Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 581 at paras. 41–42.

[44] In my view, we should not hear the appeal on this ground. Leave to address new issues should be granted in exceptional circumstances, described recently by Justice Voith, writing for the Court in *Baring v. Grewal*, 2022 BCCA 42:

> [127] Appellate courts are reluctant to entertain issues raised for the first time on appeal. In *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457, this Court explained:
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>> [44] … [T]his court generally does not consider submissions that were not advanced in the proceeding giving rise to the order appealed. The general advisability of a restrained approach has long been recognized. So in *S.S. "Tordenskjold" v. S.S."Euphemia"* (1908), 1908 CanLII 38 (SCC), 41 S.C.R. 154, citing *The "Tasmania"*, 15 App. Cas. 223, Justice Duff observed that an issue not raised at trial but presented for the first time on appeal "ought to be most jealously scrutinized". In *Quan v. Cusson*, 2009 SCC 62, the Supreme Court of Canada addressed the circumstances in which a new issue may be raised on appeal, referring with approval at para. 36 with Justice Duff's observation in *Lamb v. Kincaid* (1907), 1907 CanLII 38 (SCC), 38 S.C.R. 516:
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>>> A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.
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> See also *Braber Equipment Ltd. v. Fraser Surrey Docks Ltd.* et al, 1999 BCCA 579 at para. 5; *Stahlke v. Stanfield*, 2010 BCCA 603 at paras. 22–23; *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at para. 21; *Wang v. Jiang*, 2021 BCCA 132 at para.22.
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> [128] Furthermore, leave is generally required to raise a new issue on appeal. The court will only entertain a new issue on appeal where the issue is truly new, the court has a complete evidentiary record and the interests of justice support making an exception to the general rule: *Quan v. Cusson*, 2009 SCC 62 at paras. 36–42; *Bartch v. Bartch*, 2018 BCCA 271 at paras. 30–31.
>
> [129] Leave to introduce a new issue is generally denied if raising the issue requires new evidence to be led. Justice Binnie, in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club*, 2002 SCC 19, explained the rationale for the principle against hearing new issues on appeal:
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>> [32] … Unless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited.

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[45] In my opinion, we should not give leave to the appellant to raise the distinction between the rights of WIT and WTC as an issue undermining the injunction. The issue is new. When leave was sought to appeal before Fitch J.A. in chambers, this issue was not canvassed. The interests of justice do not require that we address it (indeed the parties themselves did not regard the distinction as significant below). I agree with the respondents that we do not have a sufficient evidentiary record and findings of fact to address the question.

Balance of Convenience

[46] The appellant submits the chambers judge erred in law by failing to consider the risk of insolvency of TBC to be a risk of irreparable harm when weighing the balance of convenience. Mr. Aulakh deposed: "If my companies and I are stopped from using the portions of the Property that we are currently using, business will be significantly affected. […] The Aulakh group of companies doesn't have alternative locations like the Atkins Group does, and it's possible we could be put out of business before the case goes to trial."

[47] The appellant says the Court in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, 1994 CanLII 117 (S.C.C.) [*RJR*] specifically identified the risk of insolvency as a risk of harm that cannot be quantified, and it was an error of law to fail to consider such a risk to be irreparable. Justices Sopinka and Cory, for the majority in *RJR*, wrote:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. <u>Examples of the former include instances where one party will be put out of business by the court's decision</u> (*R.L. Crain Inc. v. Hendry* (1988), 1988 CanLII 5042 (SK KB), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin,* 1985 CanLII 154 (BC CA), [1985] 3 W.W.R. 577 (B.C.C.A.)). ...
>
> [Emphasis added.]

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[48] There is no doubt that is the case. However, as the respondent submits, the chambers judge did not find that the defendant would be put out of business if an injunction was issued. Rather, she found that an injunction would lead to a reduction in business, the kind of harm that can be compensated for by damages.

[49] In my opinion, the respondent is correct that Mr. Aulakh's testimony that he faced a risk of bankruptcy was a bare assertion unsupported by the evidence. As Bennett J.A., writing for the Court on this point, noted in *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, at para. 60, there must be a foundation, beyond mere speculation, that irreparable harm will result from the issuance of an interlocutory injunction because such relief is a significant remedy, and "should be invoked only when the test in *RJR-MacDonald* is satisfied on a sound evidentiary foundation".

[50] Mr. Aulakh did not adduce any evidence that the injunction sought by the respondent would interfere with the operation of his trucking company. It could certainly stand as an obstacle to the creation and growth of a new transloading company, but that risk was speculative, not defined in the evidence. That being the case, I would not accede to the argument that the judge erred in failing to find the harm likely to arise from the injunction would be irreparable.

Misapprehension of the Record

[51] The appellant takes issue with the manner in which the boundaries of the area reserved for the respondent's use were determined following the second hearing. It submits that the evidence at the first hearing was insufficient for the judge to draw boundaries, and that evidence was not supplemented for the second hearing. It argues that when the chambers judge rendered judgment on the matter, she simply referred to having read the affidavit material filed, and provided a conclusion without addressing the previously identified inadequacies in the record. It says:

> The chambers judge did not articulate her reasons for coming to this conclusion. She did not explain how the description in Mr. Atkins' first affidavit – which is (a) cursory, (b) not obviously derived from or reflecting personal

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> knowledge, (c) couched in expressly uncertain terms (repeatedly referring to "approximate" boundaries), (d) silent as to any exclusive possessory interest of WIT's (as opposed to WTC's), and (e) extensively challenged by the evidence of Messrs. Aulakh and Hayer – satisfies her earlier expressed conclusion that any trespass injunction should be restricted to those portions of the property in respect of which the parties agreed WIT used for its transloading operations. [Emphasis in original.]

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[52] The appellant does not submit that the reasons are insufficient to permit appellate review. Rather, the appellant says the reasons suggest the judge was under the misapprehension that there was no conflict in the evidence with respect to the portion of the property WTC used for transloading, referred to as the "overlap" in the evidence.

[53] Most of the frailties of Mr. Atkins' evidence identified by the appellant do not support the view that the judge was under a misapprehension. If Mr. Atkins' evidence was, as the appellant suggests, (a) cursory, (b) not obviously derived from or reflecting personal knowledge, (c) couched in expressly uncertain terms (repeatedly referring to "approximate" boundaries), or (d) silent as to any exclusive possessory interest of WIT's (as opposed to WTC's), that did not evidently contribute to a misapprehension on the judge's part.

[54] The appellant's complaint of substance is that Mr. Atkins' description of the area used by WIT was "extensively challenged by the evidence of Messrs. Aulakh and Hayer". It says there was disagreement with respect to the property occupied by WIT, that dispute was not resolved, and it was a misapprehension to believe it could be resolved by review of the record.

[55] The respondent says the chambers judge found the evidence to be clear that the parties agreed the respondent (including its constituent parts) would be operating its transloading business on some portion of the property. It says she granted an injunction that would preclude the Aulakh Group from interfering with WIT's transloading operations on property that had historically been used for that purpose. It was her impression that there was some agreement with respect to where those operations had been located, and she invited the parties to define the

bounds of that area for the purpose of an interim order. The respondent says it was not the judge's intention to grant an injunction affecting only that property the parties could agree had been historically used by the Atkins Group for transloading operations. For that reason, she gave the parties leave to make further submissions to resolve the question on the existing record if they could not come to agreement. I agree. It is clear that while the judge was hopeful she would not have to do so, she intended to look to the existing record to determine what area had been used by WIT for its transloading operations if the parties could not come to terms. I can see no evident misapprehension.

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Conclusion

[56] The chambers judge made what she considered to be an interim order. It was clearly intended to minimize irreparable harm between the making of the order and the resolution of the competing claims at trial. At the outset of the hearing of this appeal, we were advised that the trial, which had been set for hearing on January 16, 2023, had been adjourned. That is unfortunate, given the expense of this appeal—an expense that might have been avoided if the trial proceeded as planned.

[57] It is also unfortunate that judgment on the application for an injunction was adjourned from September 2021 to January 2022, and then reserved until September 2022. This commercial dispute should have been addressed more promptly by the parties and by the court.

[58] While interim injunctive relief is intended to permit the parties to carry on in business without suffering irreparable harm, such orders do impose costs on parties. They may be granted where there is a serious question with respect to the infringement of a right, not a substantive enquiry into the merits of the claim. Occasionally, interim injunctive relief will be granted to a party that is ultimately unsuccessful in making out a case on the merits. For that reason, parties who obtain injunctions must prosecute their claims expeditiously, and the courts must also act

with reasonable dispatch in addressing cases where injunctions are sought or granted.

[59] In the case at bar, I am of the view that the appellant has not demonstrated any reviewable error on the part of the chambers judge. For that reason, I would dismiss the appeal. For the other reasons I have discussed, I would urge the parties to promptly resolve their dispute.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Justice Skolrood"

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