COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Arbutus Investment Management Ltd. v. Russell,* 2023 BCCA 9

Date: 20230109
Docket: CA48093

Between:

Arbutus Investment Management Ltd.

Appellant
(Plaintiff)

And

Daniel J. Russell

Respondent
(Defendant)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Dickson
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated January 17, 2022 (*Arbutus Investment Management Ltd. v. Russell*, 2022 BCSC 72, Vancouver Docket S1810076).

Counsel for the Appellant:	T. Gilbert K. Sui T. Dumigan
Counsel for the Respondent:	W.E.J. Skelly B. Brock
Place and Date of Hearing:	Vancouver, British Columbia November 30, 2022
Place and Date of Judgment:	Vancouver, British Columbia January 9, 2023

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Justice Dickson
The Honourable Mr. Justice Grauer

Summary:

The appellant challenges the dismissal of its claim for damages and injunctive relief against the respondent for alleged breaches of fiduciary duty and contract following summary trial. The appellant alleges the evidentiary record before the judge was incomplete; it claims the judge erred in deciding the action was suitable for determination by means of summary trial and erred in his determination of whether the claims were barred by limitation periods. Held: Appeal dismissed. The judge did not err in finding the action was suitable for summary trial and it is, accordingly, unnecessary to determine the limitation issues. The judge's assessment that the existing record was sufficient to decide the issues was reasonable and open to him to make. The judge had tested the appellant's arguments and determined it had failed to establish that its case had merit. It was open to the judge to conclude it was just to decide the issues in the circumstances.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] The principal issue on this appeal is whether the judge erred in deciding that an action was suitable for determination by means of summary trial. Arbutus Investment Management Ltd ("AIM"), the appellant and plaintiff below, contends that the judge erred in dismissing its action in a summary trial given the existing state of the record. AIM argues document production was not complete, and further cross-examination or examinations for discovery were needed to test the defendant's evidence that he had not breached his obligations to the plaintiff and not caused it damage. It says only if further discovery occurred could the facts be found to decide the case justly. In short, AIM says it was procedurally unfair to proceed to a summary trial and dismiss its action.

[2] AIM argues the record before the judge was incomplete, and that he erred in his analysis of certain limitation issues. The limitation issues are not material to the disposition of the appeal if the judge was entitled to decide issues of breach and lack of damage at the summary trial.

[3] For the reasons that follow, I would dismiss the appeal.

Background

[4] AIM alleged that the defendant, Daniel Russell, had breached fiduciary duties, non-disclosure obligations and obligations under his shareholders' agreement by providing confidential information about AIM's proposed business to a number of individuals and competitors. It alleged further that Mr. Russell had engaged in a competitive business contrary to those obligations. These breaches were alleged to have deprived AIM of the opportunity to enter a business that would have been worth more than $4 billion, and deprived it of about $1.4 billion in profit.

[5] AIM's proposed business was creating an investment fund by securitizing life insurance policies. AIM's principal, Mark Hrehorsky, believed that he had identified a cost-effective means to evaluate life insurance policies for their suitability to be securitized and bundled into investment funds. The business opportunity involved buying life insurance policies from individuals who did not wish to continue paying premiums, maintaining the policies, substituting new beneficiaries, bundling the policies, and securitizing them into investment funds that could be sold to investors.

[6] Mr. Hrehorsky had first attempted to launch such a fund in 2002. In 2010, he approached Mr. Russell to assist him in raising capital and to make an equity investment in AIM. Mr. Russell was a former partner at Phillips, Hager & North ("PHN"), an investment firm owned by the Royal Bank of Canada ("RBC"). Mr. Russell agreed to Mr. Hrehorsky's proposal, and invested $1 million in AIM. He signed various documents, including a non-disclosure agreement ("NDA"), and a shareholders' agreement which, *inter alia*, defined AIM's business, protected confidential information and prohibited competition with AIM.

[7] Mr. Russell remained with AIM from about March 2010, until he resigned in October 2012. The business did not take off. It appears the life investment products were never acquired. Mr. Russell was unable to attract the necessary capital, and he lost his equity investment.

[8] In the fall of 2012, Mr. Russell took a volunteer position with the Vancouver Foundation, sitting on its Investment Committee. The Vancouver Foundation is a

community foundation that disburses money to charitable organizations from an endowment fund maintained by its Investment Committee.

[9] In 2016, Mr. Hrehorsky became suspicious that Mr. Russell may have disclosed confidential information contrary to his obligations to AIM. In March 2017, AIM sent a letter to Mr. Russell alleging he had acted in breach of his fiduciary duties. AIM initiated this action against Mr. Russell in September 2018.

[10] Document production was a point of contention between the parties prior to trial. Mr. Russell initially produced some documents in December 2018, but was ordered by Master Harper to produce further documents on October 28, 2020.

[11] Mr. Russell brought an application for summary trial on June 8, 2021. The following day, AIM responded with an application to adjourn the summary trial. AIM's application was premised on the proposition that Mr. Russell had still not complied with his obligations under Master Harper's order, and so the summary trial was not ready to proceed. AIM's adjournment application was heard by Master Muir, who, on June 24, 2021, some few days before the summary trial was scheduled to start, rejected AIM's argument. She found that Mr. Russell had fulfilled his obligations to disclose documents, and that document production by him was complete. In reaching that conclusion, she specifically rejected the argument that metadata should be produced. In her view, the demands for further production were a "fishing expedition".

[12] AIM provided some particulars of Mr. Russell's alleged wrongdoings, focusing principally on events between 2010 and 2012. By the time of the summary trial, which began June 28, 2021, the particulars of Mr. Russell's alleged wrongdoings related to his communications with RBC, PHN, Polar Capital Corporation, and the Vancouver Foundation. AIM also alleged that Mr. Russell breached his duties by establishing a competing business, an allegation Mr. Russell denied. AIM said it needed further discovery to build its case against Mr. Russell and determine whether he had breached his obligations beyond what it considered it had already established.

The Judge's Determination of Suitability for Summary Trial

[13] I have found it helpful to review the issue before us by an examination not just of the reasons for judgment, but of the record as a whole and the live issues presented to the judge by AIM's counsel. That examination has assisted me in placing the judge's reasons in a proper context. Specifically, this scope demonstrates that the judge heard submissions about suitability in the context of the summary trial as it unfolded. He tested the merits of the contention that the matter was not suitable for summary trial in detailed colloquies with AIM's counsel.

[14] AIM contended that the matter was not suitable for summary trial, arguing Mr. Russell had not completed his document production. It argued that in order properly to assess when, what and to whom confidential information had been communicated, it needed access to the metadata from Mr. Russell's electronic devices and email accounts. It said it received document production that purported to comply with an order for production made by Master Harper only a few weeks before the summary trial. It argued that Mr. Russell had not complied with that order. Further production from Mr. Russell was required, following which further discovery or cross-examination would be necessary as a prelude to a conventional trial in which Mr. Russell's credibility could be properly tested and the necessary facts found. AIM argued it was reasonable to complete document disclosure before completing examinations for discovery. It had not had the opportunity to conduct further discovery.

[15] The judge began his analysis by referring both to the summary trial rule set out in R. 9-7(15)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], and the factors laid out by Chief Justice McEachern in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) [*Inspiration Management*]. He noted that those factors are not exhaustive.

[16] It is convenient to quote the judge at para. 45:

> In this particular case, I find the most relevant factors to consider in assessing the test to be as follows:
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> a) The matter is not overly complex. At its core, it simply asks whether Mr. Russell communicated confidential information, or commenced a competing business.
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> b) There are limited points of conflict in the evidence.
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> c) In any event, these issues are not dispositive of any of the key issues. Many of the "credibility issues" raised by AIM relate to the accuracy of statements made by Mr. Russell about the completeness of his document production. This is a hotly contested case. It is not unusual that document production issues will arise, nor that pressure by AIM would result in additional document production even after Mr. Russell first declared his production to be complete. I find that these allegations do not create a credibility issue of sufficient magnitude to undercut the suitability for a summary trial.
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> d) Although AIM complains that the document production is still not complete, the record before me suggests that production has been comprehensive. I note that AIM raised the status of document production as a basis for an application to adjourn this summary trial. Master Muir rejected the adjournment request. AIM argued that Mr. Russell had not respected Master Harper's October 28, 2020 document production order, but Master Muir disagreed. This decision was not appealed. I find that any attempt to relitigate that issue before me is subject to issue estoppel. The document production issue was squarely at issue between the same parties during the application to adjourn, and AIM's failure to appeal renders that decision final: *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para. 27.
>
> e) The cost of a conventional trial will be high, as the parties project a need for a 15-day trial. This length of trial will also create substantial delay, as the parties were considering a March 2023 trial window.
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> f) The large claim for damages asserted by the plaintiff does favour a full trial. However, I find the weight of this factor is moderated by my analysis of this issue below (i.e., that AIM has provided essentially no proof of harm). Furthermore, the fact that a claim is large is not fatal to its suitability for summary trial: *Canadian Imperial Bank of Commerce v. Charbonnages de France International S.A.* (1994), 95 B.C.L.R. (2d) 104 (C.A.) at para. 108. Finally, this factor is generally intended to protect the interest of the defendant from being prejudiced by a substantial damages award, not the interests of the plaintiff in proving entitlement to such an award: *British Columbia (Minister of Crown Lands) v. Cressey Development Corp.* (1992), 66 B.C.L.R. (2d) 146 (S.C.) at para. 8. To preclude a defendant from seeking to resolve a matter through summary trial because of a plaintiff's outsized assertion of damages effectively grants the plaintiff a

> "respondent's veto", contrary to Chief Justice McEachern's caution in *Inspiration Management* at 214. [Emphasis original.]

[17] The judge concluded that, on balancing the factors, he was in a position to make a fair and just determination by way of summary trial. He went on to observe that this was a trial and each party is obliged to put its "best foot forward". He noted:

> [49] Its adjournment application having failed, AIM was required to put all its cards on the table. At a summary trial, evidence can be weighed: *The Bank of Nova Scotia v. Robertson*, 2001 BCCA 580 at para. 11. Conflicts in the evidence can be resolved: *Zhao* at para. 6. At that point, there was no time left for AIM to collect further evidence or further documents. As the court stated in *Canadian Western Bank Leasing Inc. v. SSC Ventures (No. 98) Ltd.*, 2016 BCSC 223, "where a respondent fails to make use of pre-trial procedures and frustrates the proper functioning of the summary trial, they take a serious risk that the court will grant judgment relying upon the evidence it does have": para. 36. Where an application is brought by one party, the other may not simply insist on a full trial in the hopes that, with the benefit of viva voce evidence, "something might turn up": *Everest Canadian Properties* at para. 34.
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> [50] AIM's failure to meet its evidentiary burden permeates throughout the analysis that follows.

On Appeal

[18] At the core of AIM's oral argument is the proposition that an allegation of misuse of confidential intellectual property inherently relies for its proof on evidence from the defendant; for it is only the defendant who knows what they did with the confidential information. AIM's primary asset was its confidential intellectual property. This asset was protected only by non-disclosure obligations. It is against this backdrop AIM submits the judge fell into a number of errors.

[19] AIM contends, first, that the judge erred by applying issue estoppel to its suitability argument, thereby denying AIM a fair opportunity to discover Mr. Russell on what it alleged were approximately 1,000 recently produced documents. It says that the only issue before Master Muir was whether to adjourn the summary trial; her refusal to do so did not dictate a finding of suitability. Secondly, the judge erred in rejecting the argument that the status of document discovery entitled AIM to further discovery. Third, the judge failed to turn his mind to whether examinations for discovery had taken place on the late-produced documents. Fourth, the judge failed

to turn his mind to whether further cross-examination was necessary. Consequently, fifth, the judge erred by determining a summary trial was suitable on a record that was insufficient to resolve conflicting evidence.

Law

[20] A decision on the suitability of a case for summary trial is a discretionary one; it is afforded the same measure of deference as other discretionary decisions: *Morin v. 0865580 BC Ltd.*, 2015 BCCA 502 at paras. 46–47. This Court will not interfere with such a decision in the absence of error in principle or unless the discretion was not exercised judicially: *Hewson v. Peter Kiewit Infrastructure Co.,* 2017 BCCA 143 at para. 4. It is clear that there is no automatic bar to a trial judge resolving conflicts in the evidence or even making credibility findings, in appropriate circumstances, in a summary trial. Moreover, there is no general rule that discovery must have taken place in order for summary trial to be appropriate.

[21] Judges are entitled to address multiple factors in assessing whether a summary trial is suitable because many different factors can influence a judge's conclusion, including whether it would be unjust to decide an issue or whether the court is unable to find the facts necessary to the issues or fact or law. Here, at para. 40, the judge referred to R. 9-7(15)(a) of the *Rules*, which states:

> (15) On the hearing of a summary trial application, the court may
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> > (a) grant judgment in favour of any party, either on an issue or generally, unless
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> > > (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
> > >
> > > (ii) the court is of the opinion that it would be unjust to decide the issues on the application…

[22] It is also relevant, as the judge observed, to consider whether a party has taken those steps it reasonably ought to take to be prepared for a summary trial. Or, in other words, whether a party has put its "best foot forward", as the judge put it.

[23] The judge addressed all three of these considerations in this case.

Discussion

Did the judge err in finding the case suitable for summary trial?

[24] I do not think AIM has advanced any plausible argument on appeal that the evidentiary record before the judge was insufficient to allow him to find the facts necessary to decide the issues of fact and law. There were no issues of credibility or other conflicts in the existing evidentiary record that would compel the conclusion that the judge was unable judicially to find the facts. Instead, it would appear the thrust of AIM's argument was directed toward a different proposition: namely, that it was unjust or procedurally unfair to decide the issues because the summary trial was premature. AIM's view is that it ought to have been granted the opportunity to develop further evidence, principally through Mr. Russell, to establish its case.

[25] The critical problem with AIM's argument is that, in my opinion, it was unable to point to anything concrete or material in the document production or elsewhere that could lay a foundation for arguing that further discovery was needed. The argument that further discovery was essential had no air of reality; it was, simply, just a fishing expedition.

[26] On reviewing the judge's reasons and the record of the trial it is apparent that the judge was fully alive to these issues. In my view, the driving factors underlying the judge's conclusion that the matter was suitable for summary trial were threefold: first was the judge's determination that he could decide the necessary issues of fact and law on the record before him; second was the judge's recognition that AIM had had ample opportunity to prosecute its case, and to discover evidence establishing liability and damages, but had not laid any plausible foundation to establish that its case had any real merit that further discovery might strengthen; and third was the judge's assessment that in all of the circumstances, it would not be unjust to decide the issues.

i. The judge could decide the issues of fact and law

[27] In my view, the judge did not err in determining that the record was sufficient to decide the necessary issues of fact and law, and did not err in applying issue

estoppel to AIM's arguments on one aspect, but only one aspect, of the suitability analysis.

[28] The judge limited his consideration of issue estoppel solely to the question of whether AIM could relitigate, at the summary trial, Master Muir's finding of fact that Mr. Russell had complied with Master Harper's document production order. Master Muir found certain facts relating to document production in the context of deciding whether the summary trial should be adjourned. She concluded that Mr. Russell's document production was sufficient for the purpose of Master Harper's order, rejected the argument that the so-called metadata had to be produced, and found that AIM's demand for further document production was nothing more than a fishing expedition. The judge heard and tested submissions that the metadata was critical to AIM's opportunity to advance its case.

[29] It is evident from a review of the judge's reasons, and oral submissions at trial, that the judge did not confine his suitability analysis to the question of whether document discovery was complete. The judge was aware that whether Mr. Russell had fulfilled his obligations to produce documents was only one consideration factoring into a determination of suitability. The judge did not say, expressly or impliedly, that the issue of suitability had been determined by a finding that Mr. Russell had complied with his document disclosure obligations. Accordingly, I would not accede to AIM's submission that the judge failed to turn his mind to considerations relevant to suitability beyond whether document production was complete.

[30] Beyond the judge's proper application of issue estoppel, he also expressly contemplated the sufficiency of the record, and entertained AIM's submissions on its shortcomings. The judge tested AIM's argument that, notwithstanding the completion of document discovery, further examinations for discovery or cross-examination on Mr. Russell's documents were necessary or should be permitted in order to test his credibility or to establish a proper evidentiary foundation for finding facts said to be in

issue. He examined documents that AIM argued supported an inference that Mr. Russell had wrongfully disclosed confidential information.

[31] In testing the arguments advanced by AIM, the judge was testing not only the merits of the claim on the existing record, but also whether there was any purpose in referring the matter to a conventional trial. This was responsive to AIM's argument that a summary trial was unsuitable because a conventional trial was necessary in order for a factfinder to find the facts.

[32] The inference from reviewing the judge's reasons, in light of record, is that the judge was also exploring whether there was any "air of reality" to AIM's theory of liability and damage. Much time, for example, was spent discussing whether Mr. Russell's involvement with the Vancouver Foundation could possibly amount to a breach of any kind, given that there was no evidence that the Vancouver Foundation was in the same business as AIM. AIM's argument betrayed a fundamental misapprehension of the activities of the Vancouver Foundation, and the reason why it has any interest in life insurance policies. The simple point is that the Vancouver Foundation attracts funds by being named as a charitable beneficiary of life insurance policies. It does not operate a securitized fund.

[33] The judge also spent time exploring the proposition that Mr. Russell would have any incentive to breach his duties in circumstances where he had invested $1 million in AIM and stood to benefit directly from its success. In this context, the judge was simply testing the plausibility of AIM's theory of the case, and whether it could find any support in the evidentiary record.

[34] Further, the judge tested whether there was any evidence of any business competing with AIM's proposed business. As the judge rightly noted, if such a competitive business were operating in the marketplace and foreclosing AIM's opportunity to launch its own fund, then evidence of that business could be expected to be in the public domain because it would be soliciting clients to invest in a fund similar to that proposed by AIM. There was no such evidence. As the judge also noted during submissions, AIM's business never existed. It never acquired the life

insurance policies it proposed to securitize. AIM had produced an "expert" report suggesting that, in 2010, AIM had a business plan with a present value in excess of $4 billion, leading to potential profits in excess of $1 billion. The judge expressed puzzlement that, if such extraordinary returns were available, AIM had not raised the money and entered the business, regardless of Mr. Russell's failure to raise capital.

[35] Evidence laying a foundation for a claim that a competitive business existed would not depend on further examination for discovery, or be solely available through Mr. Russell. No such evidence existed. The judge discussed, for example, a document originating with PHN that was advanced by AIM during the trial, years after the action had started. AIM said this supported the existence of a competitive business. The judge refused to admit it, correctly, in the circumstances. But, in any event, it was evident that the document provided not a scintilla of support to AIM's case.

[36] It is clear that the judge was not persuaded that an evidentiary foundation to establish even a *prima facie* case of breach or damages existed, or depended on developing further evidence. As is evident from his analysis of the evidence, the judge was sceptical that, on any fair reading of many of these documents, any inference of wrongdoing could be supported.

[37] Regardless, even if, as the judge acknowledged, it was arguable that Mr. Russell might have breached his duties in some cases, there was no evidence of any damages. This, in my view, was an important conclusion that supports the judge's suitability determination.

[38] It is clear from reviewing the judge's analysis, that he was satisfied that he could find on the evidence that, notwithstanding any arguable breaches by Mr. Russell, there was no satisfactory evidentiary foundation to ground a damage claim against Mr. Russell. He expressly referred to this as a factor justifying a summary trial. It seems to me that this conclusion was open to the judge on the evidence, and that there was no realistic prospect that any further discovery of Mr. Russell could shed any light on that conclusion.

ii. The judge was aware of AIM's procedural history

[39] The second pillar of the judge's suitability determination was his awareness of the procedural history of the action. AIM had many procedural tools available to it to lay a foundation to its case. To the extent it had used these tools, such as contacting third parties whom Mr. Russell had or might have dealt with, it produced no useful evidence. To the extent it failed to use these tools, it took the risk of not doing so. The judge was alive to all of the procedural steps taken in the action, and did not accept that AIM had put its best foot forward.

[40] The action had been ongoing for several years before the summary trial. Mr. Russell had signalled his intention to have the case dealt with by summary trial from the outset. Indeed, this summary trial application was the third. AIM had exhausted its right to examination for discovery, having conducted seven hours of discovery. That discovery was open-ended, in the sense that it was not restricted to, or in any way constrained by, the existing state of document production. As the judge noted in colloquy, AIM had the right to ask Mr. Russell any relevant questions about any of the issues arising in the action. AIM had not applied for additional time to conduct further examinations for discovery. It had not applied for cross-examination on the affidavits. In the judge's view, AIM had not done that which it needed to do to take advantage of its procedural rights in order to be ready for summary trial. AIM had sought information from third parties, but produced no incriminating evidence. It had not taken steps to secure production of documents it suggested were important but which were in the possession of third parties, such as, for example, Mr. Russell's non-compete agreement with RBC, which he said he no longer had.

[41] The judge was entitled to evaluate the record of what steps had been taken, and when, including the state of document production, and determine whether it would be appropriate to decide the issues on a summary trial. This was a discretionary decision. In this case, AIM has not identified an error in principle. Rather, it contests the weighing and balancing of factors the judge was entitled to consider.

[42] In short, the judge concluded that AIM had not availed itself of the procedural opportunities that were open to it. He concluded that, as a result, AIM had courted the risk that a judge might conclude that the necessary facts could be found to decide the case on the record as it stood. The judge was entitled to take these considerations into account in exercising his discretion.

iii. The judge determined it was just to decide the issues in the circumstances

[43] The judge's suitability analysis was ultimately predicated on his determination that it would not be unjust to decide the issues in the circumstances.

[44] I acknowledge that a relatively short period of time, a matter of a few weeks, had lapsed between the completion of document production pursuant to Master Harper's order and the hearing of the summary trial. However, the judge understood that compressed timeline. In November 2021, some 381 documents had been produced. A further 587 had been produced in February 2021, several months before the summary trial. Only a further 19 were produced as late as April 2021. The point that production was "recent" or "late" was made to the judge repeatedly by counsel. The judge was aware that, with the adjournment application having failed just days before the summary trial, AIM no longer had time to gather more documents or evidence.

[45] The judge heard counsel's argument that it was reasonable for AIM not to take any further procedural steps, such as seeking further examination for discovery, until such time as document production was complete. In light of all of the other factors weighed by the judge, the judge evidently did not accept that, in the circumstances of this case, AIM had done what it should have done in a timely fashion to be prepared. Moreover, as I have attempted to show, the judge, particularly in the colloquy with counsel, was testing whether anything in the documents warranted further examination for discovery in order to pursue material trains of inquiry arising out of the documents. He evidently concluded that going beyond the documents to permit further examination was in the nature of a fishing

expedition, and represented little more than a hope that something might show up, even though nothing of significance had yet been established in the evidence.

[46] No doubt there will be cases where a judge will quite rightly decide that to push on to a summary trial in the absence of further documents disclosure, examination for discovery or cross-examination on affidavits would indeed be unfair. In those circumstances, it would be premature to conclude that the matter is suitable for summary trial. I can see nothing in the reasons or in the record that suggests that the judge was unaware of these considerations.

[47] In this case, as I have noted, relatively few documents were produced in the last tranche of production, and the suggestion that about 1,000 new documents had been produced pursuant to Master Harper's order is, I am persuaded, an exaggeration. Many of the documents had been produced much earlier, even if in a somewhat redacted and disorganized form. The supplementary lists were substantially a reorganization of previous production.

[48] The judge made a discretionary call that he could find the facts on the evidence before him and that it would not be unjust to do so. I do not think that decision rested on any error in principle; it is simply the product of the judge weighing and balancing the various considerations that properly go into a decision whether a matter is suitable for summary trial.

Conclusion

[49] The passages from the reasons for judgment quoted above demonstrate that the judge weighed a number of different factors in concluding that the matter was suitable for a summary trial. All of those factors were properly considered by the judge in the exercise of his discretion. No error in principle underlying the exercise of discretion has been demonstrated. Ultimately, the judge must be persuaded that he can find the facts on the record and it would not be unjust to do so. AIM contended that because the judge refused it the opportunity to develop further evidence, AIM was not only deprived of the chance to advance its case against Mr. Russell, which it suggests could only be made out through testing his evidence by cross-examination,

but the judge was left with an insufficient record to make the necessary findings of fact. This argument was advanced at a high level of generality. AIM did not demonstrate to my satisfaction any deficiencies in the record that prevented the judge making the necessary findings of fact to decide the case.

[50] In short, I discern no proper basis on which this Court could interfere with the judge's conclusion that this case was suitable for a summary trial. It is, accordingly, unnecessary to deal with the limitation issues advanced by AIM.

Disposition

[51] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Justice Dickson"

I agree:

"The Honourable Mr. Justice Grauer"