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SUMMARY TRIALS

Tips, Tactics, and Traps

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PAYNE LITIGATION

MODERN ADVOCACY

Taddy Mason LLC v. Jerry Smith Inc.

- Plaintiff: Taddy Mason LLC (“Mason”)
  - Telemarketing Company / Large Company / Litigation Budget
- Defendant: Jerry Smith Inc. (“Smith”)
  - Advertising Firm / Small Business / Fee Sensitive
- The Dispute: Breach of Part-Written, Part-Oral Contract
  - Mason is suing for unpaid consulting fees
  - Smith alleges unpaid fees are not provided for in the contract

When Should You Start Thinking About Summary Trial?

- Trick question …
- Mason should think about summary trial when drafting the NOCC
- Smith should think about summary trial when drafting the RTCC
- But why?

Summary Trials are Trials – 1

- Litigators think about trial strategy at the pleading stage
- However, the expectation is often that there will be a conventional trial (if the matter does not settle)
- The probability a party will bring a summary trial application is high and—anecdotally—seems to be increasing
- Not planning for summary trial is like not planning for trial

Summary Trials are Trials – 2

- Rule 9-7 creates a summary trial procedure, just like R. 12 creates a conventional trial procedure
- Even though the summary trial rule adopts some procedures from R. 8 (chambers applications), a summary trial is **not** like a regular chambers application
- Most summary trials will result in a final order that disposes of an entire claim or a significant issue (evidentiary rules and standards of proof are in full force)
- Summary trials can involve *viva voce* evidence, expert evidence, demonstrative evidence

Summary Trials are Trials – 3

- The most important tip:

Do not treat summary trials like chambers applications

Suitability? It's a Trap

- Unsuitability is not a "defence"
- A suitability argument is not a respondent's veto: *Inspiration Management*, see paras. 49 and 54
- Suitability is almost always argued and decided along with the merits
- Emphasizing suitability arguments can lead a respondent down a dangerous path
- Few suitability arguments succeed; courts and legislators will likely push more matters into summary trials or other alternative procedures (e.g. CRT) in the future

Merits First; Suitability Second

- You must be equally prepared to put on the best possible case for your client as you would be at the start of a conventional trial
- Move heaven and earth to add the procedures to the summary trial that you think are necessary to win—this usually includes proactive document discovery and requests, oral discovery, and obtaining admissions
- Suitability almost never justifies the same amount of time, energy, or ink as the merits (even if you *think* there is an overwhelming case on suitability)

Setting the Table For Success: Trial *À La Carte*

- A conventional trial is like going to a restaurant with a **set menu**:
  - You know will have openings, direct, cross, read-ins, experts, closing

- A summary trial is like going to a restaurant with an ***à la carte* menu**:
  - You must choose and ask for the procedures you think you'll need to succeed

  - The "hybrid" trial in *Forjay Management Ltd. v. 0981478 B.C. Ltd.,* 2019 BCSC 238, included 6 parties, two CPCs, document and 2 hours of oral discovery of adverse parties, 10 days of hearing, and evidence by affidavits with limited cross-examination

Setting the Table For Success: The Proactive Approach

- In most cases involving a genuine legal dispute and competent, professional counsel, a proactive, good faith approach will serve your client well
- Imposes a requirement for early case assessment—regardless of who you are acting for
- Give early notice of your intentions and position on summary trial (e.g. *Basha Sales Co. Ltd. v. Adera Equities Inc.*, 2017 BCSC 137)
- Whether you represent a party who wants a summary trial or a party who opposes a summary trial, you probably want to craft and control the roadmap and procedures

Setting the Table For Success: Obvious Exceptions

- If a party wants to use a summary trial application primarily as tool or weapon to inflict time-pressure on opposing counsel, leverage a key date for one of the parties, or to create or avoid some other financial or extra-legal strategic advantage, you may need to adjust your approach significantly

- How to deal with strategies that are sharp or downright unprofessional, and all the shades in between, is a topic for a different presentation

- Example: Service of a summary trial application on minimum notice in late December for a hearing date in early January and that had been sat on for months

Setting the Table For Success: Discovery Procedures

- If you want to ensure no summary trial before complete documentary and oral discovery, you must proactively plan for it
- Incomplete discovery is not a veto on summary trials
- But incomplete discovery can be used to delay or avoid a summary trial (it is largely case-by-case)
- Cross-examinations on affidavits vs. full discoveries

Setting the Table For Success: Use a Case Planning Conference

- Asking the Court to lay out a roadmap and to give directions on desired procedures can make a summary trial proceed more like conventional trial

- If opposing counsel are reluctant to engage with you on planning a roadmap to the summary trial, or are ignoring you, set down a CPC (deadlines for the exchange of materials, including expert evidence and objections, as well as dates and length of the hearing, and the possibility of an agreed statement of facts)

- If you are concerned the opposing party might ambush you with a summary trial on minimum timelines or at a disadvantageous time or stage, a CPC can be used to flush out opposing counsel's intention

The Suitability Trap Looms Again

- Being proactive and ensuring that you have the discovery and additional procedures you need can undermine and eliminate suitability arguments
- This is one reason some lawyers might be reluctant to take the proactive approach when acting for a party who does not want a summary trial
- However, ask yourself whether the chance of winning on suitability is high enough to justify arguing a summary trial from a sub-optimal or disadvantaged position

Mason Wants a Summary Trial

- Give early notice of desired hearing length and timing of hearing and open the dialogue
- Start trying to book hearing dates as soon as possible
- This approach will help you down the road if opposing counsel tries to avoid or delay summary trial by complaining about discovery or other issues that could be answered with, “you’ve had months of notice”

How Can Smith Avoid Summary Trial?

- Another trick question …
- Ignoring the prospect of a summary trial or hoping the opposing party simply doesn't think to bring a summary trial until too close to trial **will not** prevent a summary trial
- Two examples of summary trials proceeding just months before conventional trial dates (trials adjourned in both cases because summary trial was still on reserve)
- Ignoring the prospect of a summary trial will only increase the chances of trial by ambush and that you will have a harder time planning and accessing the procedures needed for success

But Seriously, Smith Wants to Avoid a Summary Trial

Opposing a summary trial is difficult; you will likely need to bring your case within one or more of the following three key arguments:

1. **Expense and Efficiency:** There is a high chance the summary trial will not resolve the entire action. The overall time and expense of the action will be significantly increased with no real benefit

2. **Scope and Complexity:** A short summary trial based on only affidavits and arguments does not leave enough time or procedural or evidentiary flexibility to deal with some voluminous and/or complex matters. The court may however be more inclined to dismiss a summary trial application which deals with only one aspect of the claim (*litigating in slices*)

3. **True Credibility Issues:** The trier of fact will not be able to decide a necessary factual issue without seeing the witnesses testify. The factual issue cannot be resolved with other evidence and cannot be avoided.

Problems with the Three Key Arguments

1. **Expense and Efficiency:** Whether appropriate or not, judges probably (accurately) assume most conventional trials will not proceed. This means the time and expense of the action will not actually be increased if the summary trial does not fully dispose of the action. The summary trial might drive settlement (before or after), which decreases the expense of an action and frees resources for the Court

2. **Scope and Complexity:** Summary trials can be as long and as feature rich as needed to deal with voluminous and complex matters. Unless the summary trial would become as long as the conventional trial, a judge might still see the potential for savings by crafting a hybrid summary trial procedure;

3. **True Credibility Issues:** These issues are less common outside of criminal and family cases. Unless a case involves fraud or key conversations and an allegation of dishonesty, this will be a difficult argument. The potential for cross-examinations in or out of court also presents a complete answer for many credibility issues.

Wither Suitability?

- Is there any point in making suitability arguments? When and how should they be made?
- Keep in mind that in almost all cases, the judge will reserve on both the merits and suitability
- Suitability is best used to undermine the other party's evidence and to give the judge an escape hatch if she/he has trouble resolving the case on the existing record, or if an issue becomes more complex once the judge starts writing the reasons
- For example, argue that there is evidence that would rebut or confirm some other evidence, but it is not before the Court because of the summary procedure limitations
- Another example, argue that unless the judge finds a certain fact or piece of evidence is unnecessary to properly decide the merits, he/she must send the case to a full trial to deal with credibility or reliability of the evidence