IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Visionlink Corp. v. Patterson,* 2023 BCSC 1341

Date: 20230713
Docket: S230965
Registry: Vancouver

Between:

Visionlink Corp.

Plaintiff

And

Stephen Patterson and Kitov Resources Ltd.

Defendants

Before: The Honourable Mr. Justice Coval

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	D.J. Manson S. Mak, Articled Student
Counsel for the Defendant, Stephen Patterson:	M.B. Funt F. Liedl
Appearing as Representative for the Defendant, Kitov Resources Ltd.:	R. Salinger
Place and Dates of Hearing:	Vancouver, B.C. July 4-5, 2023
Place and Date of Judgment:	Vancouver, B.C. July 13, 2023

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Introduction

[1] **THE COURT:** This is an application by Mr. Patterson to strike or dismiss this action, in which Visionlink Corp. seeks a declaration that it is the beneficial owner of around 1,000 acres of land in and around Stewart, British Columbia (“Lands”).

[2] Visionlink bases its claim on two declarations of trust, signed in 2005 and 2006, between itself and Kitov Resources Ltd. Kitov is the registered owner of the Lands. In these proceedings, Kitov supports Visionlink's claim to beneficial ownership of the Lands.

[3] In separate proceedings, Mr. Patterson has judgment against Kitov for approximately $300,000, which he registered against title to the Lands in 2021. Under the court order enforcement process for enforcing that charge, he has obtained a declaration that Kitov is the owner of the Lands and an order that the Lands be sold to satisfy his judgment.

[4] The issues for decision are whether Visionlink's claim that it beneficially owns the Lands should be:

1) struck under Rule 9-5(1)(d) of the *Supreme Court Civil Rules* as an abuse of process or collateral attack on the orders under the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78;

2) struck for failure to post security for costs as ordered on June 2, 2023; or

3) dismissed under a Rule 9-7 summary trial because Visionlink is not the beneficial owner of the Lands.

[5] For the reasons that follow, I strike Visionlink's claim on issue 1 as an abuse of process and collateral attack on Mr. Patterson's *COEA* declarations and orders. I do not strike or dismiss the claim on grounds 2 and 3.

Background Facts

Mr. Patterson's Judgments

[6] On July 29, 2021, Mr. Patterson obtained a trial judgment against Kitov and a related company for $238,422 for unpaid salary and reimbursement of expenses

(*Patterson v. Eilat Exploration Ltd.*, 2021 BCSC 1474). Visionlink was not a party to that action.

[7] These same Lands were in issue in Mr. Patterson's case against Kitov because, as part of his claim, he registered a certificate of pending litigation on their titles.

[8] Kitov, represented at trial by its shareholder and sole director and officer, Mr. Salinger, counterclaimed against Mr. Patterson, alleging the CPL was an abuse of process which caused it damage.

[9] In his trial Reasons, Justice Macintosh found Mr. Patterson had no claim to an interest in the Lands capable of supporting a CPL. He therefore cancelled the CPL, but dismissed Kitov's counterclaim because Mr. Salinger failed to prove the CPL had caused any damage.

[10] On June 6, 2022, Kitov's appeal from Justice Macintosh's judgment was dismissed as abandoned for failure to post security for costs.

[11] On August 3, 2022, Mr. Patterson was awarded trial costs of $39,255.77. On November 19, 2021, and August 15, 2022, Mr. Patterson registered, respectively, his damages and costs awards against Kitov on title to the Lands. He then proceeded with the *COEA* process to have the lands sold to pay his judgments. I am told his judgments now total around $300,000.

[12] In evidence in this application is an April 28, 2022 appraisal report estimating the market value for most (but not all) of the Lands at $860,000.

Mr. Patterson's *COEA* Proceedings

[13] On August 24, 2022, Mr. Patterson applied under s. 92 for Kitov to show cause why the Lands should not be sold. Kitov was served but did not appear.

[14] Master Vos ordered a reference to the district registrar, under *COEA* s. 94, to ascertain, among other things, Kitov's interest in the Lands and whether they were

liable to be sold under Mr. Patterson's judgments (“Show Cause Order”). Kitov filed a notice of appeal of this decision but did not pursue it.

[15] On November 22, 2022, Master Muir, sitting as a registrar, completed the s. 94 registrar's report. Kitov again did not appear, although Mr. Salinger was served. Master Muir's report declared Kitov to be owner of the Lands and ordered Mr. Patterson's judgments to be paid from the sale proceeds.

[16] In December 2022, there was correspondence between Messrs. Patterson and Salinger in preparation for sale of the Lands.

[17] Mr. Patterson's *COEA* s. 96 application for an order for sale was scheduled to be heard on February 9, 2023. Once again, Kitov was served.

[18] On February 8, 2023, the day before the application, Visionlink filed its notice of civil claim in this action. As mentioned, it sought a declaration that it was the beneficial owner of the Lands, an order cancelling Mr. Patterson's certificates of judgment on the titles, and CPLs to be registered on title to the Lands, which I am told have not been registered.

[19] The next day, February 9, 2023, Mr. Patterson's *COEA* s. 96 application for an order for sale of the Lands was heard by Master Harper. Kitov did not appear but Mr. Manson appeared for Visionlink. He advised the court of Visionlink's claims in this action and sought an adjournment of the s. 96 hearing so that Visionlink could present evidence and argument to oppose Mr. Patterson's sale of the Lands under s. 96.

[20] Master Harper did not grant Visionlink's adjournment. She approved Master Muir's registrar's report and ordered the sale of the Lands, with Mr. Patterson having exclusive conduct of sale (“Order for Sale”). In response to Visionlink's submissions, Master Harper stayed execution of her order until March 13, 2023. Neither Visionlink nor Kitov has taken any steps to challenge the Order for Sale.

Visionlink's Claim to Beneficial Ownership

[21] In this action, Visionlink alleges that, when Mr. Patterson sued Kitov, registered his CPLs, and sought to enforce his judgments against the Lands, he knew that Kitov was holding the Lands in trust for Visionlink pursuant to the two declarations of trust. Mr. Salinger not only denies knowing of the declarations, he denies ever hearing of Visionlink before this claim was brought.

[22] Visionlink filed affidavits from Messrs. John McCordic, who founded Kitov in 2004, and Shlomo Samet, who was a director of Visionlink since its incorporation in 1996. Mr. Salinger, on behalf of Kitov, swore two affidavits of his own supporting Visionlink[1]. Their evidence of the context of the declarations of trust, and how Mr. Patterson came to know of them, is as follows.

[23] In 2005, Visionlink made interest-free loans of $582,600 to Kitov to finance its search for viable mining properties in northern British Columbia, and to prepare Kitov for an IPO of its shares once it acquired mining claims on suitable lands.

[24] In November 2005, Visionlink and Kitov agreed that Kitov would use up to $26,000 of the loan to buy just less than 1,000 acres of land in and around Stewart, to be held in trust by Kitov for the sole benefit of Visionlink (“November 2005 Lands”). The November 2005 Lands represent most but not all of the Lands.

[25] On November 21, 2005, Kitov executed a declaration of trust as trustee agreeing to hold the November 2005 Lands in trust for Visionlink as the sole beneficiary. In December 2005, Kitov took title to the November 2005 Lands.

[26] In September 2006, Visionlink and Kitov agreed to Kitov using around $20,000 more of its loan to purchase two additional lots for about $10,000 each, once again to be held in trust by Kitov for the sole benefit of Visionlink, (“September 2006 Lands”), thus completing the package of the Lands in issue. On or about

[1]Kitov Resources Ltd. was called Cambria Ice Field Resources Inc. until May 6, 2006, when it changed to the Kitov name. For clarity, I have used “Kitov” throughout.

September 14, 2006, Kitov executed a declaration of trust for the September 2006 Lands.

[27] On January 30, 2007, titles to the September 2006 Lands were registered in Kitov's name. Neither Visionlink nor Kitov ever registered the declarations of trust on title to any of the Lands.

[28] Kitov never underwent an IPO and never repaid the loan to Visionlink. Its version of events in these proceedings is that, after around May 2008 forwards, Kitov was only a holding company, holding the Lands in trust for Visionlink and a few mining claims on its own behalf that were eventually cancelled.

[29] Mr. Samet says he spoke occasionally with Mr. Salinger about Kitov's prospects, but the news was never good and so he moved on to other business and forgot about Visionlink's ownership of the Lands. Mr. Salinger, in his evidence, does not explain his about-face from the position that Kitov owned the Lands (as described below) to now saying Visionlink was always the true owner.

[30] From September 1, 2015 until March 15, 2017, Kitov employed Mr. Patterson, who was a chartered professional accountant at the time.

[31] Visionlink and Kitov allege that, since September 2015, Mr. Patterson knew that Kitov held the Lands as bare trustee for Visionlink, and Kitov had no beneficial interest in them. They say that, on or about September 15, 2015, Messrs. Salinger, Patterson and McCordic met at Mr. McCordic's office in North Vancouver. They discussed Kitov's business and financial statements. Mr. McCordic explained the details of purchasing the Lands and that they should not be included in Kitov's financial statements as assets of the company because they were held in trust for Visionlink. They say Mr. Patterson agreed with this approach. They say that Mr. McCordic asked Mr. Salinger to send copies of the 2005 and 2006 declarations of trust to Mr. Patterson, and that Mr. Salinger agreed to do so and later advised Mr. McCordic that he had done it. Mr. Salinger has put in evidence an email of September 21, 2015, to Mr. Patterson, purporting to send the declarations to him.

Visionlink's Current Status

[32] The evidence is that Visionlink was incorporated in New York in 1996 and dissolved in 2000 for failure to file tax reports. It was therefore already dissolved by the time of the alleged declarations of trust.

[33] Mr. Samet's evidence is that he only recently learned of the company's dissolution and has instructed an accountant to reinstate it under New York law. He attaches a letter from a New York CPA of March 9, 2023, estimating that process will take around three months.

[34] He also attaches what he says is a legal memo saying that, according to New York law, a dissolved corporation continues to function for the purpose of winding up its affairs and may sue in its name to do so. The document does not indicate its author and appears to be a printout of New York legal forms related to corporate dissolution.

Should the Claim Be Struck for Abuse of Process or Collateral Attack?

Governing Law

[35] Under Rule 9-5(1)(d), the court may strike a claim that is an abuse of process.

[36] Abuse of process is a flexible doctrine allowing the court to dismiss actions if its process is being used for improper purposes. It is a flexible doctrine "unencumbered by specific requirements" (*Krist v. British Columbia*, 2017 BCCA 78, para. 52).

[37] As explained in *Krist*, abuse of process is designed to prevent actions that violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice. It prevents re-litigation, essentially for the purpose of preserving the integrity of the court's process.

[38] Collateral attack is one application of the larger doctrine of abuse of process (*Sood v. Hans*, 2023 BCCA 138, para. 5; *Krist*, paras. 45-47). *Sood* tells us the

following about what constitutes a collateral attack and what sort of abuse of process it is designed to prevent.

1) A court order, made by a court having jurisdiction, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. Such an order may not be attacked collaterally.

2) A collateral attack is “made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.”

3) The purpose of the collateral attack doctrine is to prevent a party from “avoiding the consequences of an unfavourable decision”; or, to put it another way, “circumventing the effect of a decision rendered against it.”

4) A claim constitutes a collateral attack when it is “in effect” an appeal of an order, meaning it seeks to invalidate, or otherwise challenge, the legal force of the order.

Analysis

[39] Visionlink argues that its claim to establish its beneficial interest in the Lands is neither an abuse of process nor a collateral attack because its alleged unregistered beneficial interest in the lands, if proven, takes priority over Mr. Patterson's registered interest despite the Order for Sale.

[40] Visionlink argues for its priority over Mr. Patterson's charges on the Lands on two alternative grounds:

1) Mr. Patterson's interest in the Lands, as a judgment creditor, is subject to the equities in favour of Visionlink's unregistered interest given to it by Kitov before his judgment (*Chichak v. Chichak*, 2021 BCCA 286); and

2) Mr. Patterson's knowledge of Visionlink's beneficial interest makes his registered interest in the Lands "fraudulent" under s. 29(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, and therefore subject to Visionlink's interest.

[41] I agree that, on Visionlink's version of the facts, it has reasonable arguments for priority on both grounds.

[42] On ground 1, *Chichak* says a judgment creditor's registered interest over land is subject to the equities in favour of a third party's unregistered interest, given by the registered owner before the obtaining and registering of the judgment. The third

party has priority because a judgment creditor can take no more than the judgment debtor's actual interest in the land, and the judgment creditor generally has not acquired an interest in the property in reliance on the state of title (*Chichak*, paras. 10-26).

[43] On ground 2, if Mr. Patterson's knowledge of the alleged trust agreements when registering his judgment were proven, this could arguably constitute “fraudulent” conduct under s. 29(2) of the *LTA*. Arguably, that is, he had sufficient actual knowledge of the conflicting interest in the property to cause a reasonable person to make inquiries, and to defeat the respondents’ interests in circumstances contrary to common morality (*Stratton v. Richter*, 2022 BCCA 337; *Vancouver City Savings Credit Union v. Serving for Success Consulting Ltd.*, 2011 BCSC 124).

[44] In my view, however, Visionlink's two arguments for priority do not address the core of Mr. Patterson's application to strike its claim for collateral attack and abuse of process. Mr. Patterson's argument is based, not on the priority of his registered interest on title, but on the declarations and orders he obtained in the *COEA* process and particularly the Order for Sale. His argument is that, regardless of the merits of Visionlink's arguments, Visionlink's claims in this action are a collateral attack on the declarations and orders obtained in that process and also a more general abuse of the court's process. I agree with that submission.

[45] The Order for Sale was made by a court having jurisdiction. It therefore stands as binding and conclusive unless set aside on appeal or lawfully quashed, neither of which has been pursued by Kitov or Visionlink.

[46] The Order for Sale, among other things:

1) ordered the Lands to be sold in satisfaction of Mr. Patterson's judgments;
2) approved the registrar's report, which:
    a. declared Kitov was the “owner of an undivided interest in fee simple of the Lands and is indefeasibly entitled to an undivided interest in the estate in fee simple as of November 16, 2022”; and

b. ordered that the Lands were liable to be sold under the judgment and the proceeds of sale paid out as if levied under a writ of execution.

[47] In this action, Visionlink seeks a declaration that it, not Kitov, is the beneficial owner of the Lands. Kitov's response supports that position and consents to that relief. That relief is, in effect, an appeal of 2(a) because it seeks to invalidate or challenge the legal force of that declaration and circumvent it.

[48] Visionlink also seeks an order cancelling and discharging the registration of Mr. Patterson's certificates of judgment against title to the Lands. That relief is, in effect, an appeal of 1 and 2(b) because it seeks to invalidate or challenge the legal force of those orders and circumvent them.

[49] In my view, to seek this relief, Visionlink was required to reverse the Order for Sale. That is, Visionlink needed to appeal Master Harper's decision not to adjourn the s. 96 hearing pending its opportunity to submit evidence and argument to oppose the approval of the registrar's report and the Order for Sale, based on its claim of beneficial ownership. Further or alternatively, Kitov might have also applied for a reconsideration of the Order for Sale. To instead leave those orders and declarations in place, and use this action to seek declarations of beneficial ownership and orders cancelling Mr. Patterson's interest in the Lands, is a clear case of a collateral attack.

[50] In my view, proceeding with this action instead of appealing the Order for Sale is also a more general form of abuse of process. These proceedings, seeking to re-litigate ownership of the Lands and their sale under the Patterson judgments, violate the principles of judicial economy, consistency, finality, and the integrity of the administration of justice in ways that go beyond just collateral attack.

[51] There are two aspects to this more general abuse of process. The first is that the ss. 92-97 *COEA* order for sale is designed as a cautious, three-step process to bring certainty and finality to the issue of whether the judgment debtor owns the lands in question, and whether they should be sold to pay the judgment creditor's

registered charge. As part of this, it contemplates adjudication of competing claims to the land, such as Visionlink's. It is thus an abuse of the caution, certainty, and finality contemplated by that process to seek to circumvent it in other proceedings rather than seek to overturn it by appeal.

[52] The intended caution, certainty and finality is evident in the statutory three-step process which was properly followed in this case.

Step One: ss. 92, 93 Show Cause Order

[53] Under s. 92(1), the judgment creditor is to "call on" the judgment debtor and on any trustee or other person having a legal estate in the land to show cause why the land should not be sold to pay the judgment.

[54] If neither the judgment debtor nor any other party shows cause under s. 92, then, under s. 93, there must be a summary determination, trial or inquiry before a court officer for “ascertaining the truth of the matters in question, and whether the land… is liable for the satisfaction of the judgment” (emphasis added).

[55] The Show Cause Order was the outcome of this show-cause hearing under ss. 92, 93. Kitov was served with that application but did not appear.

[56] In that order, the truth of the matters to be ascertained included “the nature and particulars of the interest of the Judgement Debtor in the Lands and of the Judgement Debtor's title thereto” and “how the proceeds of a sale of the Lands should be distributed.”

Step Two: s. 94 Registrar's Report

[57] Under s. 94(1), a s. 92 order must include a reference to the district registrar to find, and report to the court about (among other things) what land is liable to be sold under the judgment, the interest of the judgment debtor in the land, and of his or her title to it and how the proceeds are to be distributed.

[58] The registrar's report states that Mr. Salinger was served and did not appear.

[59] It declares that Kitov “is the owner of an undivided interest in fee simple of the Lands and is indefeasibly entitled to an undivided interest in the estate in fee simple as of November 16, 2022.”

[60] It orders that the Lands be sold and that the proceeds of sale, after payment of certain taxes, levies, and costs, be distributed as if levied under a writ of execution.

Step Three: ss. 96, 97 Order for Sale

[61] Under s. 94(5), a s. 94 registrar's report “requires confirmation by the Supreme Court, and all persons affected by it must have notice of the application for confirmation, and on application the court may confirm all or part of the report, and may alter it or may refer it back to the district registrar.”

[62] This confirmation was sought as part of the Order for Sale application.

[63] Under s. 96(1), if a judgment debtor's land is to be sold, the court must declare what land or interest that is and direct the sale of it by the sheriff.

[64] Under s. 97(1), before granting a s. 96 order, if it appears there may be persons interested in the land to be sold whose names are unknown, the court may order the publication of notices or advertisements calling on them to come in and establish their respective claims.

[65] Under s. 97(2), persons who have not come and established their claims within the time allowed “<u>are absolutely debarred from all right, title and interest in and to the land”</u> (emphasis added), even if they are out of the jurisdiction of the court or under disability.

[66] As mentioned, Kitov was served with Mr. Patterson's application for the order for sale, and Visionlink appeared through counsel.

[67] The February 9, 2023 Order for Sale "received and approved" the registrar's report, which declared Kitov to be the owner of the Lands in fee simple. It ordered

the Lands to be sold in satisfaction of Mr. Patterson's judgments and gave him exclusive conduct of sale. It stayed the order for 15 days because of Visionlink's objections.

[68] In my view, it is an abuse of process for Visionlink to try, in these proceedings, to circumvent the statutory process designed for caution, certainty, and finality. This is particularly so when it appeared at the final stage of the process and obtained a stay, thereby creating the opportunity for an appeal of the order.

[69] The second aspect of the case that supports striking for abuse of process are the overall circumstances of Visionlink and Kitov's conduct, including: the questionable validity of the declarations of trust Mr. Salinger's numerous pleadings and affidavits claiming Kitov to be the exclusive owner of the Lands; and the delay and expense Mr. Patterson has been put to in trying to collect on his 2021 judgment.

[70] The specifics that, taken together, constitute abuse of process are:

1) Mr. Patterson's CPL was registered against the Lands in 2017. Kitov and/or Visionlink have had all that time to bring forward these claims of beneficial ownership.

2) Visionlink is a dissolved New York corporation. It was incorporated in 1996 and dissolved by proclamation in 2000. On Mr. Samet's evidence, he learned of Mr. Patterson's claims against the Lands in January 2023. Over the past five to six months, Visionlink has taken no steps to prosecute this action. It has provided no expert evidence that it can bring this action, that it can be reinstated under New York law, or that the declarations of trust were valid and effective despite being entered into years after it was dissolved.

3) Mr. Patterson's evidence includes numerous Kitov pleadings, and affidavits by Mr. Salinger or his family members, alleging that Kitov is the owner of the Lands and is entitled to exclusive possession, never referencing Visionlink's alleged beneficial owner. By my count, Mr. Salinger has caused Kitov to claim ownership of the Lands in six different proceedings, from 2016 to 2021, against various defendants, mainly seeking damages for trespass and damage to the Lands. Many of these claims were filed by Mr. Manson as counsel for Kitov, though he now represents Visionlink in its claim that Kitov was never the beneficial owner.

In other proceedings, Mr. Salinger has sworn an affidavit referring to the Lands as a Kitov asset. He has sworn a different affidavit saying the Lands are actually held by Kitov in trust for him.

4) On February 9, 2023, Mr. Manson filed another claim seeking identical relief as in this action but did not serve it. The plaintiff in that case is Mr. Samet doing business as Visionlink Corp. However, in his affidavits, Mr. Samet never claims that he personally is the beneficial owner of the Lands. That claim is therefore a collateral attack and abuse of process for all the reasons that this one is, but also because Mr. Samet's claim to own the Lands appears to be frivolous and vexatious.

5) Neither Visionlink nor Kitov paid the 2021 property taxes for the lands. In August 2022, Mr. Patterson paid over $9,000 to avoid a tax sale. It appears he will have to deal with this same issue again shortly. Mr. Patterson has been attempting to enforce his judgments since 2021, including by going through the entire *COEA* process.

[71] In sum, I find that Visionlink's claim and Mr. Samet's separate claim should be struck for being a collateral attack on the Order for Sale and an abuse of process.

Should the Claim Be Struck for Failure to Post Security for Costs?

[72] Having struck the action for collateral attack and abuse of process, I will be brief regarding Mr. Patterson's other two applications.

[73] On June 2, 2023, I ordered Visionlink to post $50,000 security for Mr. Patterson's costs in this action within 15 days. The reasons stated that, if it did not, then Mr. Patterson had liberty to apply to dismiss the action. Mr. Patterson applies for the action to be struck for Visionlink's failure to post the security as ordered.

[74] Both parties relied on *Tresoro Mining Corp. v. Mercer Gold Corporation (B.C.)*, 2016 BCSC 867, which says that the remedy for such a breach should take into account all the circumstances, including the plaintiff's efforts to post, possibility of future compliance, and the merits of the action.

[75] Mr. Funt argues for dismissal because the evidence of efforts to post is thin, there is little prospect of future compliance, the merits of the action are weak, and

the existence of the claim is prejudicial to Mr. Patterson's ability to sell the Lands and realize on his judgment.

[76] Mr. Manson argues that dismissal would be “draconian” (*Tresoro*, para. 35). The usual order in these circumstances would be to provide Visionlink some more time to post. Mr. Manson asks for 60 days, as was granted in *Tresoro*.

[77] Mr. Samet's evidence regarding efforts to post the security was in his affidavit of July 3, 2023. He said he was travelling on business outside of the United States and so did not learn of the June 2 order until that deadline had passed. He said Visionlink has no money or assets other than its alleged beneficial interest in the Lands. He expected to be able to raise the money in 45-60 days from friends and business colleagues who advise they will purchase Visionlink's shares as soon as Visionlink has been restored to the New York corporate registry.

[78] Mr. Manson also argues that the security need not be posted because there was equity in the Lands to pay Mr. Patterson's costs if successful. I do not accept that argument. As Mr. Manson acknowledged, it was not made at the prior hearing when the form of security was argued and ordered. Also, if Mr. Patterson is successful, this means that Visionlink is not the owner of the Lands and so he could not recover his costs from Visionlink's equity in them.

[79] Having found the claim to be struck on the grounds above, I will say only that I would not strike it on this basis because I see that as too severe a remedy. I would have given Visionlink 30 more days from now to post the security.

[80] As in *Tresoro*, Mr. Patterson would then have been able to apply again to dismiss the claims in dispute. As Justice Steeves said in *Tresoro*, “Needless to say, repeated failure to post adequate security in the allotted time will weigh strongly in favour of dismissing the claim” (para. 39).

Should the Claim Be Dismissed Under Rule 9-7 Because Visionlink is not the Beneficial Owner of the Lands?

[81] In my view, Visionlink's claim to beneficial ownership of the Lands is not suitable for summary determination, at least at this early stage of the proceedings.

[82] Summary determination would likely require holding Visionlink's declarations of trust to be invalid or a sham. This would require either a finding that Visionlink failed to prove they were valid under New York law, or credibility findings against Messrs. McCordic and Salinger, both of whom claim the declarations were genuine.

[83] Other credibility issues would be Mr. Salinger's reasons for repeatedly claiming Kitov owned the Lands, Mr. Samet's explanations for losing sight of them, and Mr. Patterson's claim not to know of them. During the hearing, Mr. Salinger went to great lengths to emphasize the credibility findings against Mr. Patterson in Justice Macintosh's reasons and elsewhere. Typically, such credibility findings would require seeing the witnesses and assessing their testimony.

[84] Mr. Patterson relies on *Amacon Alaska Development Partnership v. ARC Digital Canada Corp*., 2023 BCCA 34, for the principle that in appropriate circumstances, it is perfectly acceptable for a summary trial judge to make credibility findings on affidavit evidence alone (paras. 40-41).

[85] A negative credibility inference can be drawn, for example, from the implausibility and vagueness of the affidavit evidence, or a reasonable inference from a circumstantial piece of evidence that supported a credibility finding. Such inferences may be particularly appropriate where both parties ask to have the matter resolved by summary trial, knowing credibility was a live issue, and have had sufficient opportunity to put their best cases forward.

[86] Mr. Funt may be correct that some of these assessments are unnecessary in deciding Visionlink is not the beneficial owner of the Lands, and those that are necessary might be made based on the implausibility of its evidence and the inferences drawn from conduct.

[87] But in my view, it is too early in the proceedings to make these determinations and findings in a summary trial. Had Visionlink's claims not been a collateral attack and abuse of process because of the *COEA* orders, I would have allowed it more time to develop the merits of its case before conducting a summary trial, for such things as document discovery, examination for discovery of Mr. Patterson, and expert evidence to address the legal issues arising from Visionlink's dissolution and potential reinstatement.

Conclusion

[88] This action, and Mr. Samet's Vancouver Registry Action No. S230979 seeking the same relief, are struck in their entirety for abuse of process and collateral attack.

[89] Unless the parties wish to speak further to costs, Mr. Patterson is awarded costs against Visionlink at Scale B. I will dispense with the need for Kitov's signature on the order.

"Coval J."