



NO. KEL-S-S-122417
KELOWNA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SATHER RANCH LTD.

PLAINTIFF

AND:

JOSEPH WAYNE PALMER SATHER

DEFENDANT

NOTICE OF APPLICATION

Name of Applicant: C. Cheveldave & Associates Ltd., in its capacity as Receiver and Manager, without security, of all of the assets, undertakings and property of Sather Ranch Ltd., appointed by the Order of the Honourable Mr. Justice Walker on November 21, 2019.

To: Defendant and to his Counsel

TAKE NOTICE that an application will be made by the applicant to the presiding master or judge at the courthouse at 1355 Water Street, in the City of Kelowna, in the Province of British Columbia,, **via MS Teams**, on **February 7, 2022** at **9:45 a.m.** for the orders set out in Part 1 below.

The applicant provides the following contact details for the hearing:

Address: Lawson Lundell LLP
Suite 403 - 460 Doyle Avenue
Kelowna, B.C. V1Y 0C2
Attention: Scott R. Andersen

Phone No.: (250) 979-8546

Email: scott.andersen@lawsonlundell.com

PART 1: ORDERS AND DECLARATIONS SOUGHT

1. A declaration that the Defendant:

- (a) owed a fiduciary duty to the Plaintiff which duty was breached when the Plaintiff purchased the Grazing Lands (as defined below) in his own name;
 - (b) had a trust obligation to the Plaintiff, which obligation was breached;
 - (c) has been unjustly enriched by his conduct in connection with the purchase of the Grazing Lands and that the Plaintiff has been correspondingly deprived thereby, without juristic reason;
 - (d) holds the Grazing Lands in trust for the Plaintiff.
2. An order that the Grazing Lands be conveyed to the Plaintiff upon such terms and conditions as this Court deems just and appropriate.
 3. In the alternative, an order for damages payable by the Defendant to the Plaintiff.
 4. An order that there be an accounting of all income and profit in connection with the Grazing Lands subsequent to the Purchase and an order that the Defendant pay the amount of such income and profit to the Plaintiff.
 5. An order for costs on a special costs basis, or alternatively costs.

PART 2: FACTUAL BASIS

6. Sather Ranch Ltd. (the “**Company**”) was incorporated pursuant to the laws of Alberta.
7. The Company is owned by Mike Street (“**Mike**”) and Joseph Wayne Palmer Sather (“**Joe**”) through their respective holding companies 0882126 BC Ltd. and AMX Real Estate Inc. Mike and Joe are the sole officers and directors of the Company.
8. On July 17, 2018, this Court appointed G. Moroso & Associates Inc. (“**Moroso**”) as Receiver and Manager of the Company and all its assets.
9. On November 21, 2019, C. Cheveldave & Associates Inc. (the “**Receiver**”) was appointed and substituted as receiver of the Company and all of its assets. The Receiver brings this action and application on behalf of the Company and not on its own behalf.
10. Prior to the incorporation of the Company in or about 2013, “Sather Ranch” was a cattle ranch owned and operated by Joe’s father Palmer Sather (“**Palmer**”). The ranch operated from the following properties located in and around Penticton, British Columbia:
 - (a) an 80.3-acre parcel identified by PID 011-781-441 (the “**Home Ranch**”);
 - (b) a 160-acre parcel identified by PID 002-215-594 (the “**Grazing Lands**”); and
 - (c) certain Crown lands over which the Company has a grazing licence.

11. In the spring of 1995, Mike began working at the ranch with Palmer. Initially, he worked on a volunteer basis to learn about ranching. As Palmer aged and as Mike acquired more experience, he began to take on more responsibilities. By 2003, Palmer's health had deteriorated significantly and, without Mike, the ranch would have had to cease operations. From 2003 to 2010, Mike had primary responsibility for the operation of the ranch and for Palmer's safety and care at the ranch.
12. In 2009, Palmer invited Mike to move onto the Home Ranch so he could spend more time on the ranch operations and Mike leased a portion of the Home Ranch improving it with septic and power and installed a modular home where he resided until late 2019.
13. In or about October of 2000, Joe and his sister Carol Arleen Sather-Byman ("**Carol**") were granted power of attorney for Palmer.
14. By 2012, Palmer was no longer capable of remaining involved in the ranch or making management decisions due to his declining mental health, and he was in debt to Bank of Montreal ("**BMO**") due to ongoing operational losses. Joe proposed that he and Mike take over the ranch and to that end they agreed to incorporate the Company and to acquire the ranch assets from Palmer.
15. Further to that objective, they transferred the land leases from Palmer to the Company, and utilized the grazing license that was in the name of Palmer, Joe and Mike as joint tenants. They assigned values to their respective initial contributions of additional assets, which were reflected in the shareholder loan account. The Company also acquired 77 cows from Palmer in exchange for assuming liability for Palmer's \$68,145 loan obligation to BMO.
16. Correspondence between Mike and Joe from that period of time sets out their plans for the ranch and Company. The basic plan was for the Company to purchase the Home Ranch and Grazing Lands from Palmer (or Palmer's estate), and to then expand the ranch to approximately 500 head of cattle, and eventually Mike would buy out Joe's interest in the Company.
17. Mike and Joe considered each other family, and because Joe lives in Calgary, the business of the Company was operated informally through text messages, emails, and phone calls. There is no shareholder agreement, and the only formal corporate documents signed by Mike and Joe as directors are those related to bank financing.
18. In furtherance of the business plan, in February 2017 the Company purchased the Home Ranch, which at that time was owned 2/3 by Palmer and 1/3 by the Estate of his late brother, Oscar Sather. The Company's offer was accepted by Joe and his sister Carol in their capacity as power of attorney for Palmer, and by Constance Sather in her capacity as the Executrix of Oscar's Estate.
19. Mike's evidence is that after acquiring the Home Ranch, he and Joe continued to plan for the Company's purchase of the Grazing Lands and they agreed that purchasing that parcel was

necessary to ensure the long-term viability of Company, particularly as they had plans to expand the size of the herd as noted. His evidence is supported by contemporaneous correspondence between them.

20. Mike's evidence is that he and Joe agreed to have the Grazing Lands appraised and to then have the Company make an offer to purchase the Grazing Lands. In furtherance of that agreement and plan, in March of 2017, Mike made arrangements to have the Company obtain an appraisal of the Grazing Lands and arranged financing for the purchase.
21. In mid March 2017, Mike communicated to Carol that the Company planned to make an offer to purchase the Grazing Lands once the appraisal was completed, to which Carol apparently responded "that sounds great".
22. The appraisal was completed in April of 2017 concluding the value of the Grazing Lands to be \$115,000. A contract of purchase and sale dated April 17, 2017 was prepared by which the Company offered to purchase the Grazing Lands for \$120,000. The offer was signed by Mike on behalf of the Company, and Mike delivered the offer to Joe.
23. Mike's evidence is that Joe was to present the offer to Carol, although it later became apparent that Joe had discussed the offer but did not actually deliver it to her on behalf of the Company.
24. Joe told Mike that he and Carol had talked "extensively" about the offer and had agreed that Palmer's grandchildren should be given an opportunity to purchase the Grazing Lands, but that if none of them wished to purchase them, then the Company could do so.
25. Inquiries were made with the grandchildren. By May 2017 it was confirmed that none of them wished to purchase the Grazing Lands.
26. With the one obstacle to the Company's purchase resolved, Mike expected Joe and Carol to finalize and sign the Company's offer. Having not heard that had been completed, Mike called Carol on June 30, 2017 and discovered that Joe had not delivered the offer to Carol. Mike then did so by email that day.
27. On July 1, 2017, Joe represented to Mike that Joe was continuing to have discussions with Carol about the Company purchasing the Grazing Lands, and that he anticipated it would be resolved by August 2017.
28. Contrary to that representation, Joe had apparently decided in late June 2017 to purchase the Grazing Lands in his own name and in breach of his fiduciary obligations owed to the Company.
29. On July 8, 2017, Joe advised Mike that he intended to purchase the Grazing Land in his own name. Mike, on behalf of the Company, objected to this.

30. On August 25, 2017, Carol executed a Form A transfer of the Grazing Lands to transfer the lands from Palmer to Joe (the “**Form A**”). Carol signed the Form A pursuant to the power of attorney.
31. Joe did not obtain Mike’s consent to purchase the Grazing Lands, and at all times Mike maintained that the Company required them for the furtherance of its business plan, that the Grazing Lands were integral to the Company’s operations, and that the Company, not Joe, should purchase them.
32. Palmer died on October 20, 2017. Joe and Carol then acted as co-administrators of Palmer’s estate (the “**Estate**”).
33. On November 7, 2017, the Form A was registered in the Land Title Office under registration number CA6429130 transferring the Grazing Lands from Palmer to Joe for a purchase price of \$120,000.
34. The tax assessed value of the Grazing Lands as of July 1, 2020 was \$1,587,000.
35. On September 18, 2020, the Receiver sold the Home Ranch for \$1,600,000.

PART 3: LEGAL BASIS

36. This application is brought pursuant to Rule 9-6, or alternatively Rule 9-7.
37. The Receiver pleads and relies upon Alberta’s *Business Corporation Act*, including but not limited to sections 121.
38. The seminal case in Canada relating to the corporate opportunity doctrine is *Canadian Aero Service Ltd. v. O’Malley*, 1973 CarswellOnt 236 (S.C.C.) (“**Canaero**”). At paragraphs 24-25, the Supreme Court of Canada affirmed the following key principles:
 - (a) The fiduciary duty of directors and officers entails obligations of loyalty and good faith, and an obligation to avoid a conflict of duty and self-interest. As such, directors and officers are precluded from obtaining for themselves – either secretly or without the approval of the company after full disclosure of the facts – any property or business advantage which “belongs” to the company, or for which the company has been negotiating. With respect to the latter, it is particularly the case where the director or officer in question has been a participant in the negotiations on behalf of the company.
 - (b) The application of this rule is strict: directors and officers are disqualified from usurping for themselves or diverting to a related party a “maturing business opportunity” which the company is actively pursuing. This disqualification may apply even after a director or officer resigns from the company in circumstances where (i) the resignation was prompted or influenced by the pursuit of the corporate opportunity, or (ii) the opportunity only became known by reason of the director or officer’s former position rather than any independent reason.

39. The aforementioned duties were owed by Joe, who was a director and officer of the Company.
40. Joe and Mike, as the directors of the Company, had discussions about and formed the intent for the Company to purchase the Grazing the Lands from Palmer. They then took several steps evidencing the Company's intent to acquire the lands, including having them appraised, arranging financing, preparing a written offer to purchase them, delivering that offer to Carol, and making inquiries to confirm that none of Palmer's grandchildren wished to purchase the Grazing Lands.
41. The opportunity to purchase the Grazing Lands was a "corporate opportunity" within the meaning of the relevant case authorities. The opportunity to purchase those lands belonged to the Company and could not be taken by Joe, except with the informed consent of the Company. To avoid liability, the fiduciary must be able to show that the company gave informed consent or otherwise acquiesced to the fiduciary acting while in a conflict: *Matic v. Waldner*, 2016 MBCA 60, leave to appeal ref'd 2017 CarswellMan 21 (S.C.C.) at ¶ 149-151. In the case of a two-director company, consent of the company likely means consent of the disinterested director: *Nature-Control Technologies Inc. v. Li*, 2014 BCSC 1868, at ¶198.
42. Joe never sought the consent of the Company (or more properly, of Mike) before purchasing the Grazing Lands.
43. Neither the Company nor Mike consented to the purchase.
44. Joe's personal acquisition of the Grazing Lands, without disclosure to or approval from Mike, constitutes a breach of the fiduciary, loyalty, disclosure, good faith and trust duties he owed to the Company. Joe breached his fiduciary duty to the Company by putting himself in a position of conflict; by choosing his personal interests over those of the Company; and by taking the opportunity without the informed consent of the Company or its clear rejection of the opportunity.
45. Where property has been acquired in circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, including where there has been a breach of a fiduciary or loyalty duty, equity converts him into a trustee on behalf of the wronged party: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.
46. There are no factors which would make the imposition of a constructive trust unjust in the circumstances of this case.

PART 4: MATERIAL TO BE RELIED ON

47. Affidavit #1 of Mike Street sworn on January 4, 2022;
48. Affidavit #1 of Cecil Cheveldave sworn on January 14, 2022;

49. Such further and other materials as counsel may advise and this Honourable Court may consider.

The applicant estimates that the application will take **45 minutes**.

This matter is not within the jurisdiction of a Master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application:

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed Application Response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
- (d) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated at the City of Kelowna, in the Province of British Columbia, this 17th day of January 2022.



Scott R. Andersen
Lawson Lundell LLP
Solicitor for the Court Appointed Receiver

This Notice of Application is filed by the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 403 – 460 Doyle Avenue, Kelowna, British Columbia, V1Y 0C2.

To be completed by the court only:

Order made

☐

in the terms requested in paragraphs _____ of Part 1 of this Notice of Application

☐

with the following variations and additional terms:

| | |
|-------|---|
| Date: | _____ |
| | Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master |

APPENDIX

The following information is provided for data collection purposes only and is of no legal effect.

THIS APPLICATION INVOLVES THE FOLLOWING:**Other –●**

NO. KEL-S-S-122417
KELOWNA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SATHER RANCH LTD.

PLAINTIFF

AND:

JOSEPH WAYNE PALMER SATHER

DEFENDANT

NOTICE OF APPLICATION



Barristers & Solicitors
403 – 460 Doyle Avenue
Kelowna, British Columbia
V1Y 0C2
Phone: (778) 738-2610
Attention: Scott R. Andersen