IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sather Ranch Ltd. v. Sather,* 2023 BCSC 926

Date: 20230601
Docket: S-122417
Registry: Kelowna

Between:

Sather Ranch Ltd.

Plaintiff

And

Joseph Wayne Palmer Sather

Defendant

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff:	S.R. Andersen
Counsel for the Defendant:	C. Flannigan
Place and Dates of Hearing:	Kelowna, B.C. September 21-23, 2022 November 24-25, 2022
Place and Date of Judgment:	Kelowna, B.C. June 1, 2023

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I. INTRODUCTION

[1] This case arises out of a dispute over the ownership of a parcel of land that was part of a cattle ranch in the South Okanagan. The primary issue is whether the defendant breached a fiduciary duty to the plaintiff by taking personal advantage of a corporate opportunity to acquire the land.

[2] The answer to that question is woven with the history of ranching on the land and the relationships between the people who lived and worked on the ranch and stood to benefit from its legacy. Without meaning any disrespect, after introducing them, I will refer to the people involved by their first names.

[3] The plaintiff Sather Ranch Ltd. ("SRL") was incorporated in 2013 to carry on the ranching operations of Sather Ranch. SRL is now in receivership. The receiver brings this action on behalf of the company.

[4] The defendant Joe Sather was one of two directors and owners of SRL. He is also the son of Palmer Sather, who started Sather Ranch and owned the land in question.

[5] The receiver alleges that SRL was pursuing an opportunity to purchase the subject land such that it was a "corporate opportunity" within the meaning of *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 1973 CanLII 23 [*Canaero*]. The receiver seeks a declaration that Joe breached his fiduciary duty to SRL when he purchased the property in his own name and an order that the land vest in SRL so that it can be sold and the net proceeds realized on for the benefit of the stakeholders in the company.

[6] Joe denies that he breached his fiduciary duty to SRL and argues that the opportunity to acquire the land was not a corporate opportunity, but rather a family opportunity. He argues that SRL was not in a position to acquire the land. He relies on the evidence of Carol Sather-Byman, Palmer's daughter and power of attorney, that she was unwilling to sell the property to SRL.

[7] The receiver sought judgment in the action on a summary trial application. After the parties exchanged application materials, they agreed in a consent order to have the witnesses cross-examined before the Court. I have had the benefit of hearing those cross-examinations and receiving comprehensive written and oral submissions from counsel. I have concluded that this matter is suitable for summary trial.

[8] I have found that Joe owed a fiduciary duty to SRL which he breached when he purchased the land in his own name. However, I am not prepared at this time to grant the remedy sought by the receiver. In my view, there are unique factors which may render the imposition of a constructive trust unjust in this case. Accordingly, I have invited the parties to make further submissions on an appropriate remedy.

II. BACKGROUND

A. History of Sather Ranch

[9] Sather Ranch was a commercial cattle ranching operation located in and around Penticton, British Columbia. It was started by Palmer Sather in about 1939 when Palmer was just 18 years old.

[10] Palmer operated Sather Ranch as a sole proprietorship. He built up the business by purchasing cattle with his earnings as a fireman and engineer with the Canadian Pacific Railway. Palmer retired from CP Rail in 1982 when he was 61 years old and started to get more serious about ranching. However, the ranch was primarily a labour of love; it was not a reliable source of income.

[11] It was also a family business. Palmer's brothers, Oscar and Rolf Sather, were involved in the early days of the ranch. Palmer's two children, Joe and Carol, also worked on the ranch. Joe contributed by doing chores and working with the cattle. Carol did the bookkeeping and administrative tasks for the ranch.

[12] Joe did not stay on the ranch. In 1964, he moved to Vancouver. In 1973, he moved to Calgary, where he started a real estate business. Joe continued to help with ranch work when he was in Penticton.

[13] The ranching operation primarily involved the following lands:

a) an 80-acre parcel of land known as the home ranch, which Palmer owned with his brother Oscar (the “Home Ranch”);

b) a 160-acre parcel of land known as the grazing lands, which Palmer owned in his own name (the “Grazing Lands”); and

c) approximately 150-acres of Crown range lands over which Palmer held a grazing license (the “Crown Range Lands”).

[14] The ranching operation involved an annual cycle. In May of each year, the cattle would be put out to graze for the summer on the Crown Range Lands. At the end of the summer, the cattle would be rounded up and, for the months of October and November, they would graze on the Grazing Lands. By the end of November, the cattle would be moved to the Home Ranch, where they would be fed and cared for over the winter. In mid-April, the cattle would be branded, and in May, they would be returned to the Crown Range Lands.

[15] Mike Street began working on Sather Ranch in the spring of 1995. Mike was interested in ranching. Palmer gave him an opportunity to learn the business in exchange for work on an unpaid basis. Over time, Mike acquired experience and took on more responsibilities. By 2000, he was attending auctions, determining which stock to cull, doing maintenance and helping Palmer with land issues.

[16] Palmer developed a number of health issues. On October 26, 2000, he granted powers of attorney to Joe and Carol. By 2003, his health had deteriorated significantly. Mike, who was much younger than Palmer, took over most of the physical labour on the ranch.

[17] In February 2009, Palmer was diagnosed with early onset dementia. His drivers license was subsequently revoked. He continued to spend time on the ranch, but he became increasingly forgetful and less able to manage the operations.

[18] In 2009, Palmer granted Mike a lease to live on the ranch. Mike located a trailer on the Home Ranch, where he lived until the property was sold by the receiver in the fall of 2020.

[19] Mike and Palmer worked side-by-side for many years. Mike considered Palmer a friend and a mentor. Mike's contribution was critical to the survival of the ranch, especially after Palmer was diagnosed with dementia.

[20] As Palmer's disease progressed, Joe and Mike took on more responsibility for the operations of the ranch. In 2009, Palmer added Joe and Mike to the grazing license for the Crown Range Lands. Mike became primarily responsible for the day-to-day ranch operations. Joe handled financial matters and important decisions for the ranch.

[21] By 2013, Palmer was no longer able to manage his affairs or any decisions relating to the ranch, and moved to a care facility.

B. Incorporation of SRL

[22] On March 21, 2013, Joe caused SRL to be incorporated under the laws of Alberta. SRL is owned by Joe and Mike through their respective holding companies. Joe and Mike are the sole officers and directors. There is no shareholder agreement.

[23] There is a conflict in the evidence over the plans for SRL. Mike's evidence is that he and Joe planned to acquire the assets of Sather Ranch, keep the existing ranch together, acquire additional properties with grazing licenses, and build a more profitable, sustainable operation.

[24] In his affidavit, Joe deposed that SRL was incorporated for the purpose of managing Palmer's cattle. He denied that there was a plan for the company to acquire the ranch assets from Palmer and keep the ranch together. Confronted with documentary evidence that SRL did in fact acquire ranch assets, Joe seemed to suggest those acquisitions were improper or unauthorized.

[25] Correspondence from around the time that he incorporated SRL provides more reliable evidence of Joe's intentions. Joe's emails and text messages from that time demonstrate that he shared Mike's plans for the company. Joe and Mike may have had different long-term objectives for their investments in the company: Mike wanted to expand the ranch; and Joe, who is 21 years older, wanted to retire and eventually sell his interest to Mike. However, Joe supported Mike's plans for SRL.

[26] Joe treated Mike as the logical person to carry on the ranching operation. In correspondence from around the time he incorporated SRL, Joe described Mike as a "key person" without whom the ranch could not operate. Joe also described Mike as an "adopted son" and expressed confidence in his management of the ranch.

[27] One of the plans for SRL was to expand the ranch and increase the size of the herd. On March 21, 2013, the day that SRL was incorporated, Joe wrote an email to Mike that said:

> Sather Ranch is now incorporated… Finally we can start separating this whole mess and get my sister out of it… I'm thinking about the land we could acquire to expand the ranch… Get up to the 500 mark [in the number of cattle].

[28] In an email dated January 23, 2014, Joe wrote:

> You're absolutely right Mike… We really should be running a lot more cows as it would [be] just about the same amount of work whether you feed 50 head or 500 head. I think our original goal was to have 500 head within 10 years. So let's get it up to at least 250 head within a year…

[29] It is clear from their correspondence that Joe and Mike planned to acquire the assets that SRL required to operate the ranch business. Shortly after SRL was incorporated, Joe and Mike caused SRL to acquire the cattle and other non-land ranch assets from Palmer, in part by assuming a liability to the Bank of Montreal. As the land leases used by the ranch came due, Joe and Carol transferred those from Palmer to SRL as well.

[30] By July 31, 2013, SRL owned over $200,000 in livestock inventory and $100,000 in motor vehicles, fencing and equipment.

[31] In January 2017, Joe and Mike caused SRL to purchase the Home Ranch, which was owned two-thirds by Palmer and one-third by the estate of Palmer's late brother, Oscar.

[32] SRL's offer to purchase the Home Ranch was accepted by Carol in her capacity as power of attorney for Palmer, and by Constance Sather in her capacity as the executor of Oscar's estate.

[33] In her evidence at trial, Carol confirmed that she understood that, as Palmer's power of attorney, she sold the ranch assets to SRL so that SRL could carry on the operations of the ranch in Palmer's absence.

C. The Grazing Lands

[34] Palmer acquired the Grazing Lands in the 1950s and used them continuously as part of Sather Ranch until his incapacity in or about 2013. After its incorporation, SRL continued to use the Grazing Lands each October and November. As powers of attorney for Palmer, Joe and Carol allowed SRL to graze its cattle on the Grazing Lands in exchange for paying the property taxes on the property.

[35] In his affidavit, Joe deposed that, sometime in the 1990s, Palmer told him that an engineer with the City of Penticton told Palmer there was a large gravel deposit on the Grazing Lands, and the City had drilled some exploratory holes on the property. According to Joe, the potential value of royalties on the possible gravel deposit may be between $15 million and $30 million. Joe says he shared this information with Mike.

[36] Joe's hearsay evidence of what Palmer told him the City engineer told Palmer is inadmissible as proof of a gravel deposit on the Grazing Lands. Joe's opinion of the potential value of the resource is also inadmissible. However, the evidence that Joe and Mike believed there was a potentially valuable gravel deposit on the Grazing Lands is relevant and admissible to shed light on their actions.

[37] Joe further deposed that, sometime between 2009 and 2014, the City, the Province and the Penticton Bike Club discussed plans to turn Campbell Mountain, a

large area that includes the Grazing Lands, into a park for hikers and mountain bikers. Joe deposed that, to Mike's knowledge, government officials discussed an offer to purchase the Grazing Lands at a price between $1 million and $1.2 million.

[38] Again, Joe's hearsay evidence of what government officials said is inadmissible as proof of a plan or an offer to acquire the Grazing Lands; however, his evidence of his and Mike's understanding that there was a potential purchaser is relevant and admissible to shed light on their actions.

[39] Notably, there is no evidence that Palmer, Joe or Mike investigated the potential gravel deposit further or invited interest in the property for the purpose of developing a park. Instead, they continued to use the property as grazing lands for the Sather Ranch herd each October and November.

D. Steps by SRL to Acquire the Grazing Lands

[40] Mike's evidence is that he and Joe planned for SRL to acquire the Grazing Lands from Palmer and agreed that purchasing these lands was necessary to ensure the long-term viability of the ranching operation, particularly as they had plans to expand the size of the herd.

[41] Joe's evidence is that the Grazing Lands were never integral to the ranching operation because they lacked water, fencing and power, and the only access to the property was across Crown land. In his affidavit, Joe deposed that the Grazing Lands are not suitable for cattle ranching.

[42] I reject Joe's evidence. It is not credible. The Grazing Lands were used by Sather Ranch for decades as part of the yearly movement of cattle. There is no evidence that the ranching operation could be sustained without using the Grazing Lands during the months of October and November.

[43] A grazing license under the *Range Act,* S.B.C. 2004, c. 71 was essential to the ranch operations. Both the Home Ranch and the Grazing Lands were, in turn, essential to maintaining the grazing license.

[44] Sections 10(1)(b) and 29 of the *Range Act* require that the license holder own or hold under lease private lands that are sufficient to sustain their cattle for that part of each year when the cattle are not on Crown range lands. This requirement is known as commensurability.

[45] The Sather Ranch grazing license required, as a condition under the heading "commensurability", that:

> The Agreement Holder will use the unfenced portions of associated private lands in conjunction with this agreement as per Exhibit C.

[46] The first two properties in Exhibit C to the grazing license are the Home Ranch and the Grazing Lands. Ownership or a lease over these lands was required for SRL to maintain its grazing license. While there were other leasehold properties listed in Exhibit C, there is no evidence SRL had access to suitable land to take the place of the Grazing Lands in the yearly rotation of the herd.

[47] Up until July 2017, Joe supported Mike's plan to acquire for SRL the Grazing Lands and keep the ranch together as a corporate asset. Joe seemed to acknowledge his conflict of interest as both a director of SRL and a power of attorney for Palmer. The plan he discussed with Mike was to present an appraisal of the Grazing Lands to Carol, as the more independent power of attorney, and seek her agreement to sell the property to SRL at a fair value.

[48] In an email to Joe dated March 4, 2017, Mike wrote:

> … I'm going to get an appraisal on the 160 acres [the Grazing Lands] and try to get that for the middle of April so we can try and work something out while you are here…

[49] Joe responded by email the following day, expressing his agreement with the plan for SRL to use the appraisal to acquire ownership of the Grazing Lands from Carol. Joe also indicated that he hoped to convince Carol on behalf of SRL to agree to vendor take-back financing:

> Sounds good… Yes, <u>the appraisal will be great on the 160 acres</u>. I'm hoping that <u>we</u> can get Carol to accept an offer whereby my dad, and/or his estate, will carry like 90% of the financing, at least until <u>we</u> can raise money ourselves to buy it. In the meantime, I'm going to try to find out about getting

> an access easement across the Crown land. Then, once we have ownership, hopefully we can get legal access. Also going to check out the gravel resource and demand… just for our benefit.
>
> [Emphasis added.]

[50] On March 19, 2017, Joe followed up with Mike via email to see if he had obtained the appraisal. Mike confirmed that he was taking the appraiser out to the Grazing Lands the next day. He also informed Joe that he had seen Carol at a local restaurant and told her that he had ordered an appraisal and hoped that they could work out a deal in April, to which Carol had said "great". Joe responded to Mike with "OK, sounds good".

[51] The correspondence evidence contradicts Joe and Carol's evidence in their affidavits that Mike "took it upon himself" to have the Grazing Lands appraised. Joe supported obtaining the appraisal, and neither Joe nor Carol objected at the time to a plan that would see the property transferred to a company in which Mike had an ownership interest. Moreover, neither said at the time that Palmer wanted to keep the property in the family. Neither said that Carol was unwilling to sell the property to SRL.

[52] The appraisal of the Grazing Lands was dated April 9, 2017. It provided a valuation of $115,000.

[53] Mike completed and signed an offer on behalf of SRL to purchase the Grazing Lands for $120,000. The offer was dated April 17, 2017, and was open for acceptance until April 19, 2017. The offer was not subject to financing. At Joe's suggestion, Mike revised an initial draft to make it subject-free.

[54] Mike delivered the offer to Joe, who agreed to present it to Carol and negotiate with her on behalf of SRL.

E. The Family's Interest in the Grazing Lands

[55] On April 20, 2017, Joe sent an email to Mike, copied to Carol and two of Palmer's grandchildren, raising his family's interest in keeping the Grazing Lands in the family if one of the grandchildren wanted to purchase it:

> Hi Mike
>
> Sorry for taking so long to get back to you about the Offer on the 160 acres. Carol and I talked extensively about the Offer and about my Dad's estate, etc. We are not in a rush to sell the 160 acres … There is some interest from Danny and Julia to purchase the 160 acres and any of Dad's grandkids would get the first chance to buy the land.

[56] Significantly, however, Joe's email also acknowledged SRL's plan to acquire the property and continue to use it for the ranching operations. He wrote:

> If [the grandchildren] decide not to purchase the land, then it could be sold to Sather Ranch. And, even if the kids did buy the land, it can continue to be used by Sather Ranch Ltd. on the same terms (which would be put in writing). I'll let you know of any decision by the family Mike.

[57] The only grandchild who could potentially purchase the Grazing Lands was Joe's son Danny Sather. Joe testified that he encouraged Danny to purchase the property. However, in a text message to Mike on April 23, Joe wrote: "I think I've convinced Danny that he <u>shouldn't</u> buy it, so not to worry Mike…" (emphasis added). In a second text message to Mike that day, Joe wrote: "I talked to Danny, he won't be buying the 160 acres".

[58] Danny testified that, because he had recently purchased another property, he was not interested in purchasing the Grazing Lands.

[59] Mike testified that, with Danny and the other grandchildren passing on an opportunity to purchase the property, he expected Joe to finalize the negotiations with Carol and complete the acquisition on behalf of SRL.

F. Joe's Acquisition of the Grazing Lands

[60] Mike did not hear anything further about the Grazing Lands until June 30, when he called Carol and discovered that Joe had not delivered the offer to her. Mike sent Carol a copy of the signed offer that had expired on April 19.

[61] On July 1, Joe sent an email to Mike indicating that he was still in discussions with Carol and expected a decision soon:

> … I'm still having talks with Carol about the 160 acres. I'm sure a decision will be soon … I'll be out around the 21st or 22nd of August to finish cleaning out the house. Hopefully we'll be able to finalize the 160 acres by then …

[62] On July 8, Mike attended a BBQ at Joe's house in Calgary. At the BBQ, Joe told Mike that Joe intended to purchase the Grazing Lands in his own name. This led to a heated argument.

[63] In email correspondence following the BBQ, Mike objected to Joe's intention to acquire the property in his own name. Mike reiterated his understanding of SRL's plan to buy both the Home Ranch and the Grazing Lands and keep the ranch together. Joe responded that his buying the Grazing Lands did not split up the ranch, and there was never a plan to purchase the Grazing Lands, "just a hope that we could buy it". Joe also wrote that he only thought of buying the land himself on June 30 when he met with Carol.

[64] On August 25, Carol executed a Form A transfer as power of attorney for Palmer to transfer the Grazing Lands to Joe for a purchase price of $120,000, the same price that was offered by SRL.

[65] On October 1, Joe entered into a lease agreement leasing the Grazing Lands to SRL from October 1, 2017 to September 30, 2018, in exchange for a rent equivalent to the annual property taxes. He did not tell Mike about the lease. It appears that Joe signed the lease both in his own capacity and on behalf of SRL, using slightly different signatures.

[66] Palmer died on October 20, 2017.

[67] On November 7, Joe caused the Form A transfer to be registered in the Land Title Office, transferring title to the Grazing Lands into his name. Joe also settled a trust in November 2017 that gave beneficial ownership of the Grazing Lands to his children, Danny and Julia Sather.

[68] Joe claimed a farm classification exemption from the property transfer tax on the Grazing Lands. In a document he submitted to the BC Assessment Authority, Joe stated under oath that the land was still being used to graze cattle:

> This is pasture land used every fall for grazing cattle. Use has not changed in the past 65 years while owned by the Sather family.

[69] The dispute over the Grazing Lands irreparably damaged the relationship between Joe and Mike. Both men stopped providing financial support to the ranching operation. Not long after the BBQ in July 2017, SRL ceased operating as a viable business.

[70] On July 17, 2018, the Court appointed a receiver and manager over all of the assets of SRL.

[71] In 2018, the BC Assessment Authority assessed the value of the Grazing Lands for property tax purposes at $880,000. Joe appealed this assessment, stating under oath that he intended to use the property for grazing his own cattle or else sell the property:

> The use of the land has not changed; use for cattle grazing in October and November each year. This property is unfenced which enables my cattle and anybody else's cattle to graze on this land.
>
> Sather Ranch Ltd., effectively owned 50% by Joe Sather and 50% by Mike Street is no longer operating a cattle business. It is currently in receivership and being dissolved.
>
> It is my intention to continue grazing my own cattle on this property and I intend to fence the property in 2019 or sell the property to the province of British Columbia, and/or the city of Penticton for development of a park, in which case, it will not be used for farming or pasture grazing.
>
> [Emphasis added.]

[72] Joe did not own any cattle in November 2018.

[73] The cattle that SRL owned were sold by the receiver in November 2019.

[74] Joe continued to renew the lease with SRL for the Grazing Lands, signing on behalf of SRL each year until 2022, even after the receiver wound up the ranching operation and sold the cattle.

[75] As of July 1, 2020, the assessment value of the Grazing Lands for property tax purposes was $1,587,000.

[76] In his affidavit, Joe deposed that he has received offers to purchase the Grazing Lands, including an offer of $1,200,000.

[77] On September 18, 2020, the receiver sold the Home Ranch for $1,600,000.

III. ANALYSIS

A. Palmer's Intentions - Hearsay Objection

[78] The affidavits by Joe and Carol contain evidence of statements by Palmer about his desire that the Grazing Lands remain in the family and not be sold to Mike or any person or company related to Mike.

[79] Insofar as these and other statements attributed to Palmer are tendered by Joe for the truth of Palmer's intentions or state of mind, they are hearsay and presumptively inadmissible. Joe argues that the statements should be admitted for the truth of their contents under the principled exception to the rule against hearsay.

[80] The parties referred to a number of authorities on the admissibility of statements allegedly made by deceased persons concerning their intentions, including *Anderson v. Anderson*, 2010 BCSC 911, *Lee v. Chau Estate,* 2021 BCSC 70 and *Simard v. Simard Estate,* 2021 BCSC 1836.

[81] In this case, there is good reason to doubt the reliability of the statements attributed to Palmer. Joe and Carol do not provide any timeframe or context for the statements. It is not possible to determine whether Palmer understood what was going on or had the capacity to accurately express his intentions. While there was no medical evidence, it is clear from other evidence that Palmer's capacity was in serious doubt by 2013 at the latest.

[82] However, it is not necessary to determine whether the statements are admissible for the truth of their contents. This case does not turn on Palmer's intentions with respect to the Grazing Lands, because those intentions are not

directly relevant to the claim that Joe breached his fiduciary duty to SRL. Proof of Palmer's intentions would simply be an explanation of Joe's personal interest in acquiring the property. If the opportunity was a corporate opportunity within the meaning of the case law discussed below, then Joe's motivation to personally acquire the property is irrelevant. Palmer's intentions were not binding on SRL and could not override Joe's obligations to SRL.

[83] On the other hand, Joe and Carol's understanding of Palmer's intentions is relevant to the nature of the opportunity for SRL to acquire the Grazing Lands. While Carol's potential refusal to sell to SRL would not exonerate Joe from his fiduciary duties to the company, her willingness to consider an offer from SRL is relevant context to whether the opportunity was "ripe" within the legal meaning discussed below. This context turns on the credibility of Joe and Carol's evidence of their understandings of Palmer's intentions. It is a non-hearsay use of the statements attributed to Palmer.

[84] Joe and Carol's evidence that they believed Palmer did not want the Grazing Lands to be sold to Mike or a company related to Mike is not credible. It is inconsistent with the objective evidence of Palmer's relationship with Mike, the correspondence between Joe and Mike referred to above, and the actions of both Joe and Carol prior to the BBQ on July 8, 2017.

[85] Joe was not a credible witness generally. Joe's affidavit contained argument and statements that could not be reconciled with the email and text correspondence. Under cross-examination, Joe was argumentative and evasive. He resisted making any admission that he perceived to be against his interests, even going so far as to suggest, without evidence, that emails or text messages might not be authentic. His sworn statements to the tax authorities about the use of the Grazing Lands after he acquired the property were untrue.

[86] I reject Joe's evidence that he evicted Mike from the Home Ranch at Palmer's demand in 2013. Mike continued to live on the Home Ranch for seven years after the supposed eviction. Even assuming Palmer asked Joe to evict Mike, Joe knew or

ought to have known that Palmer was confused as a result of his dementia. The correspondence demonstrates that Joe continued to treat Mike as a legal tenant on the ranch, a trusted partner in SRL and the logical person to buy Joe out when he retired and continue the ranching operation that was Palmer's true legacy.

[87] If Joe believed that his father really wanted to keep the Grazing Lands in the family and not sell the property to SRL, he never told Mike about that restriction until he decided to purchase the Grazing Lands himself.

[88] Joe supported Mike's plan to acquire the Grazing Lands for SRL and keep the ranch properties together. Even after Joe raised the grandchildren's potential interest in the Grazing Lands in April 2017, he told Mike that, if the grandchildren passed on the opportunity, SRL could purchase the property. According to Joe, he he only thought of buying the land himself on June 30, when he met with Carol to discuss SRL's offer. Even then, Joe told Mike that he was continuing to negotiate with Carol as of July 1 and expected to finalize a deal for SRL in August. In other words, contrary to the sworn evidence in his affidavit, Joe acted at all times prior to the BBQ on July 8 as if a sale to SRL was a real plan and a real possibility.

[89] For these reasons, I do not accept Joe's evidence that he was acting on his understanding of his father's intentions to keep the Grazing Lands in the family.

[90] While Carol was more forthright under cross-examination than Joe, her affidavit also contained argument and inaccurate statements about Mike's trustworthiness and his relationship with Palmer. In cross-examination, Carol acknowledged that she treated and regarded Mike "like family". Carol testified that Mike was trusted by her family and that Mike was the logical person to own and operate the ranch business. She also acknowledged that Mike's involvement in SRL was the only way that Palmer's ranching legacy would be continued.

[91] As power of attorney, Carol transferred the non-land ranch assets (the cattle, vehicles and equipment) to SRL in the spring of 2013. She then transferred Palmer's

interest in the Home Ranch to SRL in January 2017. Carol knew at the time she approved these transactions that Mike was a 50% owner of SRL.

[92] If her evidence of her father's intentions was accurate, it makes no sense that Carol would agree to sell the Home Ranch to a company partly owned by Mike in January 2017, and then refuse to sell the Grazing Lands to the same company in April 2017. Both properties were part of Sather Ranch and Palmer's legacy for more than 60 years. If she truly believed her father did not want Mike to own any part of the ranch, Carol would not have agreed to sell the Home Ranch to SRL. Carol does not explain how or why she distinguished between the two properties and why she believed Palmer wanted the Grazing Lands kept in the family and away from Mike but not the Home Ranch.

[93] There is no evidence that Palmer purchased the Grazing Lands as a separate investment property. While there is some hearsay evidence of a potential gravel deposit on the Grazing Lands, there is no evidence that Palmer considered the Grazing Lands a separate bequest for his family. Unlike his personal residence, Palmer did not single out the Grazing Lands as a bequest to his children in his will. Rather, the will gave his executors the authority to manage and sell his business, which was Sather Ranch. If anything, the evidence suggests that Palmer would want to see the ranch kept together as a going concern.

[94] It is unclear when Carol decided to offer the Grazing Lands to Joe at the same price as SRL had offered. She appears to have had a discussion with Joe about the matter on June 30. However, in her affidavit, she attributed the final decision to Mike's behaviour at the BBQ on July 8 and his subsequent actions:

> In July 2017, my brother Joe informed me that Mike Street was angry because of our decision to sell the property to Joe rather than to him or Sather Ranch Ltd. <u>After discussions about this property with my family and considering Mike Street's actions since then, we, as a family, decided to refuse any future offers from Mike Street or any corporation or person associated with him.</u>
>
> [Emphasis added.]

[95] Considering the evidence as a whole, I do not accept Joe's position that, based on her understanding of Palmer's intentions, Carol would never have agreed to sell the Grazing Lands to SRL.

[96] That said, SRL still needed Carol's agreement to acquire title to the lands. It is difficult to say whether or when that agreement would have been forthcoming. After Palmer died on October 20, 2017, title to the Grazing Lands would have passed to his executors, Joe and Carol, who are also equal beneficiaries of the estate residue.

B. The Law of Corporate Opportunity

[97] In *Canaero*, the Supreme Court of Canada established the following key principles that govern the law of corporate opportunity:

a) a fiduciary owes the duties of loyalty, good faith and avoidance of a conflict of duty and self-interest to the beneficiary of the fiduciary duty (at 606);

b) corporate directors are precluded from obtaining for themselves, either secretly or without the approval of the company on full disclosure of the facts, any property or business advantage either belonging to the company or for which it has been negotiating (at 606-07);

c) this is especially so where the director is a participant in the negotiations on behalf of the company (at 607);

d) there is a strict ethic in this area of law which disqualifies directors from usurping for themselves maturing business opportunities which the company is actively pursuing (at 607); and

e) there may be situations where a profit gained must be disgorged even where it was not gained at the expense of the company, on the ground that a director must not be allowed to use their position to make a profit even if it was not open to the company to participate in the transaction (at 609).

[98] At page 610 of *Canaero*, the Court explained that the strict ethic imposed on directors is a recognition of the degree of control which their positions give them in corporate operations and an acknowledgement of the importance of the corporation in the life of the community and the need to compel obedience to the norms of exemplary behaviour.

[99] Justice Ballance helpfully summarized the law flowing from *Canaero* in *Sateri (Shanghai) Management Limited v. Vinall*, 2017 BCSC 491 [*Sateri*]:

> [324] *Canaero* held that a corporate fiduciary was forbidden to usurp for personal use or divert to another with whom the fiduciary was associated, a maturing business opportunity that the company was actively pursuing. Speaking for the Court, Laskin J. cautioned that attempting to lay down a rigid test of the doctrine would be reckless and repugnant to the fluid and expansive nature of the fiduciary concept. Instead, his Lordship preferred, as a starting point, consideration of a non-exhaustive list of factors, stating at 620:
>
> > ... Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.
>
> [325] Thus, the question of whether a fiduciary has appropriated a corporate opportunity to self or diverted it to another in breach of the no conflict and no profit rules is evaluated on a case-by-case basis taking into account the *Canaero* factors and others pertinent to the particular case at hand.

[100] Joe was a director of SRL. He does not dispute that he owed SRL a fiduciary duty. The three factors from *Canaero* that figure most prominently on the facts and submissions of the parties are: (i) the nature of the opportunity and whether it was a corporate opportunity; (ii) the ripeness or maturity of the opportunity and whether SRL was in a position to take advantage of it; and (iii) the knowledge about the opportunity, Joe's relation to it and how he acquired that knowledge.

C. Application of the *Canaero Factors*

i. Nature of the Opportunity

[101] The main question is whether the opportunity to acquire the Grazing Lands was "corporate". The term "corporate opportunity" is used in *Canaero* to refer to "any property or business advantage either belonging to the company or for which it has been negotiating" (emphasis added): at 606–07.

[102] First, it is important to define the opportunity at issue.

[103] The opportunity in this case was an opportunity to acquire the Grazing Lands from Carol, as Palmer's power of attorney, for $120,000, using an appraisal based on a highest and best use of the lands as grazing lands by the individual that owned the grazing rights to the adjacent Crown Range Lands.

[104] SRL's objective in pursuing this opportunity was to keep the ranch together to ensure the long-term viability of the ranching operation and provide a sustainable base from which to expand the size of the herd.

[105] Notably, the opportunity at issue was not an opportunity to acquire a potential gravel deposit or a parcel of land to be sold by SRL at a profit to a local government to develop a mountain bike park. SRL was formed to carry on the operations of Sather Ranch, not to develop or sell the ranch properties. The appraisal on which SRL justified its offer to Carol did not appraise the property as a gravel deposit or for a potential sale to local government.

[106] Two British Columbia cases have discussed the question of whether an opportunity "belonged" to a company. First, in *Nature-Control Technologies Inc.* v. Li, 2014 BCSC 1868 [*Nature-Control*], Justice Warren developed the following analysis based on the authorities to determine whether a particular business opportunity belonged to the plaintiff company:

> [208] In Fiduciary Law (Toronto, Thomson Carswell, 2005) at p. 435, the author refers to an American case, *Miller v. Miller*, 222 N.W. 2d 71 (Minn.S.C., 1974) [*Miller*], as outlining "three primary formulations" for determining whether an opportunity "belongs to" the company, as follows:

> … it appears that courts have opened or closed the business opportunity door to corporate managers upon the facts and circumstances of each and by application of one or more of three variant but often overlapping tests or standards: (1) The "interest or expectancy" test, which precludes acquisition by corporate officers of the property of a business opportunity in which the corporation has a "beachhead" in the sense of a legal or equitable interest or expectancy growing out of a pre-existing right or relationship; (2) the "line of business" test, which characterizes an opportunity as corporate whenever a managing officer becomes involved in an activity intimately or closely associated with the existing or prospective activities of the corporation; and (3) the "fairness" test, which determines the existence of a corporate opportunity by applying ethical standards of what is fair and equitable under the circumstances.

[209] *Miller* identified the most significant facts and circumstances relevant to the question, as follows:

> Whether the business opportunity presented is one in which the complaining corporation has an interest or an expectancy growing out of an existing contractual right; the relationship of the opportunity to the corporation's business purposes and current activities-whether essential, necessary, or merely desirable to its reasonable needs and aspirations-; whether, within or without its corporate powers, the opportunity embraces areas adaptable to its business and into which the corporation might easily, naturally, or logically expand; the competitive nature of the opportunity-whether prospectively harmful or unfair-; whether the corporation, by reason of insolvency or lack of resources, has the financial ability to acquire the opportunity; and whether the opportunity includes activities as to which the corporation has fundamental knowledge, practical experience, facilities, equipment, personnel, and the ability to pursue. The fact that the opportunity is not within the scope of the corporation's powers, while a factor to be considered, should not be determinative, especially where the corporate fiduciary dominates the board of directors or is the majority shareholder.

[210] In my view, in determining whether the sale of bleaching products was an opportunity belonging to Nature-Control, the approach reflected in *Miller* has much to commend it. I note that in *Canaero*, at p. 612, Laskin J. cited with approval the approach taken in another American decision, *Burg v. Horn* (1967), 380 F. 2d 897, which reflected the "line of business" test referred to in *Miller*. (See also *Mountain-West Resources Ltd. v. Fitzgerald*, 2005 BCCA 48 at para. 17.)

[211] Applying this approach, I will first consider whether Nature-Control had an interest in or expectancy to the bleaching product business arising out of an existing contractual right. In other words, did Nature-Control have the right to market the bleaching products either pursuant to the Letter of Intent or a subsequent agreement?

…

> [235] The next factor for consideration suggested in Miller is whether the bleaching product business was essential to Nature-Control's current activities, or whether it was merely desirable.
>
> …
>
> [238] I next turn to consider whether the bleaching product business embraced areas adaptable to Nature-Control's business and into which it might easily, naturally, or logically have expanded. It makes sense, at this stage, to also consider whether the bleaching product business included activities as to which the Nature-Control had knowledge, practical experience, facilities, equipment, personnel, and the ability to pursue.
>
> [Emphasis added.]

[107] A similar analysis is reflected in *Northern Natural Resource Development Corp. v. Edwards, Deceased*, 2017 BCSC 2372 [*Edwards*] where at para. 140, Justice Hyslop quoted with approval the following passage from *Matic et al. v. Waldner et al.,* 2016 MBCA 60, leave to appeal to SCC ref'd, 37161 (19 January 2017):

> [128] Key to the analysis is the determination of whether the opportunity "belonged" to the corporation. This requires a contextual analysis and various overlapping tests have been referred to in the case law and academic authority. In Dr. Leonard I Rotman, Professor, *Fiduciary Law* (Toronto: Thomson Carswell, 2005), the author refers to American jurisprudence and describes three primary formulations which assist in determining when corporate opportunities exist (at p 435):
>
> > [I]t appears that courts have opened or closed the business opportunity door to corporate managers upon the facts and circumstances of each and by application of one or more of three variant but often overlapping tests or standards: (1) The "interest or expectancy" test, which precludes acquisition by corporate officers of the property of a business opportunity in which the corporation has a "beachhead" in the sense of a legal or equitable interest or expectancy growing out of a preexisting right or relationship; (2) the "line of business" test, which characterizes an opportunity as corporate whenever a managing officer becomes involved in an activity intimately or closely associated with the existing or prospective activities [of] the corporation; and (3) the "fairness" test, which determines the existence of a corporate opportunity by applying ethical standards of what is fair and equitable under the circumstances.
>
> [Emphasis added].

[108] In my view, SRL had a "beachhead" or "expectancy" in relation to the Grazing Lands, based on Mike's pre-existing relationship with Palmer, SRL's purchase of the

Home Ranch, the permission from Carol and Joe to use the Grazing Lands for ranching operations and the addition of Joe and Mike's names to the grazing licence to use the adjoining Crown Range Lands.

[109] In my view, the Grazing Lands were integral to the ranching operations of SRL. The lands were used by SRL each year in October and November. As explained above, they were necessary to maintain the existing grazing licence and important for any expansion of the herd.

[110] On the other hand, it must be acknowledged that ownership of the Grazing Lands was not essential. The cows could be grazed and the grazing licence could be maintained with a leasehold interest in the Grazing Lands. Thus, while ownership was desirable, it was not essential. I will return to this point below.

[111] Nonetheless, the opportunity to acquire the Grazing Lands was intimately or closely associated with the existing and prospective activities of SRL and thus meets the line of business test. The company had the knowledge, experience, facilities, equipment, personnel, and the ability to pursue a ranching operation on the lands. On his own, Joe did not have these resources.

[112] I disagree with Joe's contention that the offer to purchase the Grazing Lands was unauthorized or expired. While there was no formal director's resolution to acquire the property, Joe and Mike did not conduct business that way. As Joe lived in Calgary and Mike lived on the ranch, they conducted most of their business by email and text messages. As set out above, Joe approved the offer at the time it was drafted. He never revoked his approval. Nothing turns on the fact the original offer was only open for acceptance until April 19, 2017. Mike, Joe and Carol continued to treat the offer as a valid offer to purchase by SRL.

[113] In my view, the opportunity to buy the Grazing Lands on favourable terms belonged to SRL. At the very least, it was a "business advantage…for which [SRL] ha[d] been negotiating": *Canaero* at 607.

ii. Ripeness/Maturity of the Opportunity

[114] Joe argues that the opportunity to buy the Grazing Lands was not "ripe", for two reasons. First, he argues there is no evidence Carol would have agreed to sell the Grazing Lands to SRL. He relies on the Carol's evidence, discussed above, that she would not sell the property to Mike or any company in which Mike had an interest. Second, Joe argues that SRL was not in a financial position to purchase the Grazing Lands. SRL's financial statements showed a growing deficit of about $250,000. Further, Joe points out that SRL did not have financing in place if Carol did not agree to a vendor take-back mortgage.

[115] The receiver cites the decision of the Manitoba Court of Appeal in *Matic* for the Court's discussion at paras. 133–138 of whether and to what extent a business opportunity must be mature for its diversion by a director to constitute a breach of fiduciary duty. After comparing caselaw from Alberta, Ontario, and Newfoundland, the Court in *Matic* adopted the Newfoundland approach and concluded that "a breach of fiduciary duty can occur when the diverted opportunity is a potential, rather than a mature opportunity, or one that the corporation is not actively pursuing" (para. 144).

[116] Joe reminds the Court that the binding authority is *Canaero*, and to the extent that *Matic* contradicts *Canaero* it should be given no weight. Joe cites a decision of this Court in *Consbec Inc. v. Walker*, 2014 BCSC 2070, aff'd 2016 BCCA 114, where Justice Hyslop, at para. 140, quoted with approval from an Ontario Superior Court of Justice decision, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 at 246–247, 1990 CanLII 4023 (Gen. Div.) for stating the following:

> By "ripe" I understand the case law to mean that the opportunity available to the corporation is a prize ready for immediate grasping -- not a general course of future conduct which is merely being explored…
>
> [Emphasis added.]

[117] I am not persuaded that the basic proposition of law in *Matic* – that a breach of fiduciary duty can occur when the diverted opportunity is a potential, rather than a

fully mature opportunity - is inconsistent with *Canaero* or the law in this Province.

Notably, in *Matic*, the Manitoba Court of Appeal relied on two decisions of this Court:

> [142] I agree with and adopt the view of Sigurdson J in *Pan Pacific Recycling Inc v So*, 2006 BCSC 1337 (CanLII) (at para 175):
>
> > To the extent that these terms suggest that fiduciaries are only barred from taking opportunities that the corporation is actively pursuing, they are probably misleading. The question of whether a fiduciary has breached his duty by taking a particular opportunity is a question of fact that can turn on many factors, some of which are set out by Laskin J. in *Canadian Aero* at p. 620.
>
> [143] See also *First Majestic Silver Corp v Davila*, 2013 BCSC 717 (CanLII) at paras 150-52, aff'd on other grounds 2013 BCCA 458, 344 BCAC 262.
>
> [144] Due to the strict ethic that is imposed on directors, a breach of fiduciary duty can occur when the diverted opportunity is a potential, rather than a mature opportunity, or one that the corporation is not actively pursuing. Again, as noted in Canadian Aero, there is no strict formula to apply, and the existence of a corporate opportunity will depend upon the particular facts.

[118] In *Pan Pacific Recycling Inc. v. So,* 2006 BCSC 1337 [*Pan Pacific*], one of the decisions cited by the Manitoba Court of Appeal, Justice Sigurdson explained the use of the term "maturing" in *Canaero* as follows:

> [177] While the term "maturing" may be appropriate in the case of *Canadian Aero*, where the fiduciaries usurped an opportunity for which they had negotiated on behalf of the company but had not yet come to fruition, the corporate opportunity doctrine has a much wider scope. In *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 278, the House of Lords held directors of a company to a strict standard. Despite the fact that the corporation could not have availed itself of the opportunity because of a lack of funds, the Lords found that the directors had breached their duty to the corporation and required them to disgorge their profits. This approach has been followed in cases such as *Redekop v. Robco Construction Ltd*. (1978), 7 B.C.L.R. 268 and *Abbey Glen Property Corp. v. Stumborg*, (1975), 65 D.L.R. (3d) 235 (Alta.), in which the court found that directors must account to the corporation for shares they have purchased, even though the third party selling the shares insisted that they take the shares personally and declined to sell to the corporation.
>
> [Emphasis added.]

[119] In *Redekop v. Robco Construction Ltd.* (1978), 7 B.C.L.R. 268 at 274, 1978 CanLII 251 (S.C.) Justice Meredith held, based on an analysis of *Canaero,* that "the law is clear" that the attitude of a third party in refusing to sell to the company and

insisting on selling to the director personally does "not exonerate [the director] from his duty to [the company]."

[120] In *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2009 BCCA 34 [*Blue Line*], leave to appeal to SCC ref'd, 33134 (16 July 2009) the Court of Appeal contemplated whether the Court in *Canaero* meant to restrict the scope of the corporate opportunity doctrine to opportunities that are "ripe", especially given Justice Laskin's comment that each case must be tested by many factors and that new fact situations may require a reformulation of existing principles: at paras. 59–61. At para. 61, the Court in *Blue Line* said:

> If and when the point is ever argued, then, a Canadian court might well take the view that the appropriation of an opportunity "belonging to" a corporation by a director or former director merits equitable intervention even where the opportunity is not a "mature" one.

[121] In *M.A. Concrete Ltd. v. Truter*, 2015 BCSC 229, the standard applied at para. 176 was that the opportunity be "more than a mere concept". On appeal, the Court of Appeal contrasted ripe opportunities with "theoretical possibilities": *M.A. Concrete Ltd. v. Truter,* 2016 BCCA 138 at para. 11.

[122] In *Movassaghi v. Steels Industrial Products Ltd*., 2012 BCSC 1663 at para. 237, the Court held the opportunity was not mature as it was "nothing more than a vague concept".

[123] I conclude from these authorities that, while maturity is a relevant factor, the opportunity need not be so mature that it is a sure thing. For instance, in *Pan Pacific*, at para. 176, the Court held that to show causal connection, the company need not prove that "but for the breach [it] would have taken up the opportunity in question and would have made the profit in question".

[124] As stated, I do not accept the suggestion that Carol would <u>never</u> have agreed to sell the Grazing Lands to SRL. In my view, there was a real possibility she would have sold the property to SRL once Danny had passed on the opportunity.

[125] Likewise, there was a real possibility SRL could have financed the purchase price. Joe told Mike in an email that he hoped to convince Carol to agree to vendor take-back financing. Mike's evidence is that, in the event Carol did not agree to vendor take-back financing, he had arranged private financing until SRL could obtain bank financing.

[126] Mike did not provide any details of the private financing or the proposed bank loan. The person with whom he says he arranged the private financing did not provide an affidavit confirming her commitment. There is also no evidence SRL applied for bank financing.

[127] However, both Mike and Joe took SRL's opportunity to purchase the Grazing Lands seriously. It may not have been a sure thing, but it was a real possibility until Joe decided to purchase the property himself.

[128] In my view, the opportunity was sufficiently within reach for SRL such that its ripeness militates in favour of finding a breach of fiduciary duty in the circumstances.

iii. Joe's Knowledge and How He Acquired it

[129] Joe of course knew about the Grazing Lands long before he became a director of SRL. The general opportunity to acquire and potentially profit from the Grazing Lands was known to him as a member of the Sather family.

[130] However, the specific opportunity to acquire the property for $120,000, without probate fees or property transfer taxes is something that arose as a result of Joe's involvement in SRL. Moreover, the appraisal that Joe used to justify the purchase price he paid for the property was obtained by SRL for company purposes, not for Joe's personal use.

[131] In *First Majestic Silver Corp. v. Davila*, 2013 BCSC 717 [*First Majestic*], aff'd 2014 BCCA 214, the Court rejected the defendant's argument that the opportunity was not "corporate" because "its existence was known in the business community": at para. 127. The Court stated that there is no requirement that the opportunity be

confidential to SRL or a trade secret to be considered a "corporate" opportunity: *First Majestic* at para. 127. Such an argument "ignores that…a director commits a breach of fiduciary duty when he puts his interest in conflict with that of the company" regardless of whether the subject matter of the conflict is confidential: *First Majestic* at para. 128.

[132] In *Pan Pacific* at para. 173, the Court quoted with approval from *Snell's Equity* 31st Ed. by John McGee K.C. (London: Sweet & Maxwell, 2005) at 181 which states that:

> …Under the fiduciary conflict rule, the director will be in breach of fiduciary duty in such cases even if the information came to him in a private capacity, rather than in his capacity as a director, provided the director ought to have disclosed the information to the company.

[133] In this case, Joe brought his knowledge of the property to SRL and worked with Mike to acquire the Grazing Lands for SRL using the appraisal obtained for SRL and Joe's family relationship with Carol. In the circumstances, Joe ought to have disclosed his own interest in personally acquiring the property to his co-director, Mike.

D. Conclusion on Corporate Opportunity

[134] In my view, the law on corporate opportunity applicable to the facts of this case is well-captured in the following passage from a decision by Justice Trainor in *Sheather v. Associates Financial Services Ltd.* (1979), 15 B.C.L.R. 265 at 269–70, [1979] B.C.J. No. 1195 (S.C.):

> This whole process involves what has been referred to as the corporate opportunity doctrine. With respect to that, this has been said, that the rule is said to be that, <u>if an opportunity came to a director in his individual capacity and is one which by its nature falls into the line of the corporation's business and there is a practical advantage to it or is an opportunity in which the corporation is in actual or expected interest, the officer is prohibited from permitting his self-interest to be brought into conflict with the corporation's interest and may not take the opportunity for himself</u>, and whether or not the director has appropriated something for himself that in all fairness should belong to his corporation, the determination of this question is always one of

> fact to be determined from the objective facts and surrounding circumstances.
>
> [Emphasis added.]

[135] The opportunity for Joe to purchase the Grazing Lands in his personal capacity was one which by its nature fell into the line of SRL's business and would have been of practical advantage to SRL. Joe's duty in the circumstances was to advance the interests of SRL, not to promote his own interest or his family's interest in acquiring the lands.

[136] In acquiring the property at the time he did and for the price that he paid, Joe breached his fiduciary duty to SRL by taking advantage of an opportunity either belonging to SRL or for which SRL was negotiating. In so doing, Joe put his personal interest in conflict with his duty to SRL. He ought not to have purchased the property without the approval of the company.

[137] Having said this, three unique factors must also be recognized in this case:

a) First, as discussed above, the corporate opportunity at issue was to acquire the Grazing Lands for the ranch to sustain the herd and maintain the grazing licence over the the associated Crown Range Lands; it was <u>not</u> an opportunity to acquire a potential gravel deposit or to resell the property at a profit.

b) Second, Joe entered into a lease with SRL that maintained the status quo and satisfied the conditions of the grazing licence. This lease is not a complete answer to his breach of fiduciary duty because Joe did not disclose his own interest in purchasing the Grazing Lands or obtain Mike's consent. However, it is a relevant factor in this case.

c) Third, Joe stood to inherit an interest in the Grazing Lands as a beneficiary under Palmer's will if Palmer died before a sale to SRL was concluded.

[138] I will return to these factors below in a discussion of the appropriate remedy.

E. Suitability for Summary Trial

[139] Rule 9-7(15)(a) of the *Supreme Court Civil Rules* provides that, on the hearing of a summary trial application, the Court may grant judgment unless: (i) the Court is unable to find the facts necessary to decide the issues; or (ii) the Court is of the opinion it would be unjust to decide the issues on the application.

[140] The presiding judge on a summary trial application must be able to resolve any material disputes in the evidence on the critical issues. A summary trial judge cannot "simply choose between one affidavit and another": *Cory v. Cory*, 2016 BCCA 409 at para. 10. However, conflicts in the evidence do not necessarily mean the issues are unsuitable for a summary trial: *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 at para. 182, aff'd 2011 SCC 44.

[141] In this case, I had the unique advantage of detailed cross-examinations of each of the critical witnesses, together with extensive references to email and text message correspondence. The only real difference between the hybrid mode of trial in this case and a full trial was that the evidence-in-chief of the witnesses was read by counsel from the affidavits. Those affidavits were relatively brief, and fully tested on cross-examination.

[142] While credibility was in issue, the cross-examinations and the documents allowed me to resolve the material disputes on the critical issues. In my view, a trial judge would not be in any better position to resolve the conflicts. There was no impediment to me finding the necessary facts that arose from the hybrid mode of trial.

[143] Subject to the following comments on remedy, it would not be unjust to decide the issues on this application. My concerns with the appropriate remedy can be addressed with further submissions and, if necessary, additional affidavit evidence.

[144] I find that this matter is suitable for summary trial.

F. Remedy

[145] The receiver seeks an order that the Grazing Lands vest in SRL so that they can be sold by the receiver and the net proceeds realized on for the benefit of the stakeholders in the company.

[146] The remedy sought is a form of constructive trust. In *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217, 1997 CanLII 346 [*Soulos*], the Supreme Court of Canada held that there are two grounds on which a court can impose a constructive trust: (a) breach of an equitable obligation, and (b) unjust enrichment: at para. 43. Although both grounds are pleaded in the notice of civil claim, the receiver focussed on the doctrine of corporate opportunity and breach of fiduciary duty at the summary trial. This is likely because the evidence does not support a finding of unjust enrichment.

[147] Writing for the majority in *Soulos*, Justice McLachlin identified four conditions which generally should be satisfied to justify a constructive trust based on wrongful conduct at para. 45:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[148] Conditions (1) and (2) are made out on the findings set out above. Conditions (3) and (4) were not fully addressed by the parties in their closing submissions.

[149] It is important to recognize that SRL ceased operating as an active ranch for financial reasons shortly after Joe acquired the Grazing Lands. It is unclear whether SRL could have stayed in business if Joe had not purchased the Grazing Lands. Without the breakdown in trust that occurred at and following the BBQ, Joe and Mike may have continued to support the ranch, both financially and through their labours.

On the other hand, the financial challenges facing the ranch were significant and may only have been made worse by taking on debt to acquire the Grazing Lands.

[150] Joe's acquisition of the Grazing Lands did not itself harm SRL's operations, at least not in the short term. The lease between Joe and SRL would have allowed SRL to graze its cattle on the land at no greater cost in October and November of 2017. Joe continued to renew the lease until 2022. On the other hand, he also expressed interest in selling the land.

[151] I have found that the corporate opportunity in this case was not an opportunity for SRL to benefit financially from a resale of the Grazing Lands. A sale by the receiver now that the ranch has ceased operations may result in a financial windfall for some of the stakeholders and a financial deprivation for Joe and his family.

[152] A remedy of constructive trust does not necessarily require the plaintiff to establish a loss as a result of the breach of fiduciary duty; where it is the appropriate remedy, the courts recognize that a constructive trust may in some circumstances result in a windfall: *Soulos,* at paras. 22 and 43.

[153] However, "there must be no factors which would render imposition of a constructive trust unjust in all the circumstances": *Soulos,* at para. 45.

[154] There should be no right without a remedy; once it is proved that a fiduciary breached their duty then equity will provide an appropriate remedy. I have found that Joe breached his fiduciary duty to the company. I find that I require further submissions from the parties to determine an appropriate remedy that is just and equitable in all the circumstances.

IV. CONCLUSION

[155] There will be a declaration that Joe owed a fiduciary duty to SRL which he breached when he purchased the Grazing Lands in his own name.

[156] The parties will make further submissions on a remedy. They may do so by making a request through trial scheduling to appear before me on a mutually available date. The receiver will deliver written submissions and any new affidavit materials two weeks prior to the hearing. Joe will respond to the submissions and

and provide any new affidavit materials one week before the hearing. The receiver may reply two business days before the hearing.

[157] The parties may speak to costs in their submissions on remedy.

"Elwood J."