COURT OF APPEAL FOR BRITISH COLUMBIA

ON APPEAL FROM THE ORDERS OF THE HONOURABLE JUSTICE ELWOOD OF THE SUPREME COURT OF BRITISH COLUMBIA PRONOUNCED THE 1ST DAY OF JUNE, 2023 AND THE 11th DAY OF APRIL, 2024

BETWEEN:

JOSEPH WAYNE PALMER SATHER

APPELLANT
(DEFENDANT)

AND:

SATHER RANCH LTD.

RESPONDENT
(PLAINTIFF)

RESPONDENT'S CROSS-APPEAL FACTUM

SATHER RANCH LTD.

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SECTION 1 - RESPONDENT'S FACTUM ON APPEAL

CHRONOLOGY

Date	Event
March 2013 - July 2013	The Company acquires the cattle and other non-land assets from Palmer (through his attorneys Carol and Joe).
January 2017	The Company acquires the Home Ranch.
March 2017	Joe and Mike agree to have the Grazing Lands appraised for the purpose of having the Company offer to purchaser them.
April 9, 2017	The Company obtains an appraisal of the Grazing Lands valuing them at $115,000.
April 17, 2017	The Company executes a subject free written offer to purchase the Grazing Lands for $120,000 (the "**Offer**"). At Joe's suggestion, the Offer is revised to be subject-free. Mike delivers the Offer to Joe, who agrees to present it to Carol and to negotiate with her on behalf of the Company.
April 20, 2017	Joe sends an e-mail to Mike, copied to Carol, saying the grandkids would have the first opportunity to buy the Grazing Lands but if they didn't then the lands could be sold the Company.
April 23, 2017	The only grandkid who could potentially purchase the Grazing Lands was Joe's son Danny. On April 23rd, Joe confirms to Mike that he has convinced Danny to not buy the lands and that Danny has decided to not buy them.
June 30, 2017	Mike contacts Carol and learns that Joe has not delivered the Offer to her. Mike then sends her a copy of the Offer that day.
July 1, 2017	Joe emails Mike and say that he and Carol are "still having talks" about the Grazing Lands and that he is sure there will be a decision soon.
July 8, 2017	Joe tells Mike that he has decided to buy the Grazing Lands himself. He says the first time he considered that was when he spoke to Carol on June 30th. Mike objects to Joe purchasing the lands.
August 25, 2017	Carol signs a Form A transfer by which the Grazing Lands are transferred to Joe for a purchase price of $120,000.

OPENING STATEMENT

The judge found that Joe Sather breached the fiduciary duty he owed as a director of the company when he purchased lands in his own name for which the company had been negotiating. It was a clear and straightforward breach.

The appellant focuses on the alternative ground of liability – that the acquisition was a business opportunity "belonging to the company". This ignores that liability was grounded on the basis that the company was negotiating for the purchase of the lands. As a secondary ground of liability, the judge considered all of the relevant factors (including ripeness) in concluding it the business advantage belonged to the company.

The appellant says the judge erred by not giving adequate weight to Carol Sather's affidavit evidence. He properly weighed her evidence. The appellant says the judge misconstrued the nature of the corporate opportunity. The opportunity was, without doubt, to acquire the lands. The appeal should be dismissed with costs.

Although correct on liability, the judge made a number of errors in regard to remedy. Insufficient weight was given to the exemplary purpose, which required the judge to ensure that the fiduciary retained no benefit from his breach; the faithless fiduciary must account for all property wrongfully obtained. Here, the remedy was fashioned to enable him to retain 1/3 of the value obtained in breach of his duty.

There were a number of legitimate reasons why a constructive trust was both appropriate and preferable including: (1) the prophylactic purpose; (2) to ensure the benefit was fully and exactly wrested from the faithless fiduciary; and (3) to avoid the foreseeable difficulties of valuing the breach and having the lands sold under the COEA. There were no third parties that would be adversely affected by a proprietary remedy.

The trial judge also erred in the equitable compensation awarded. The most favourable use assumption ought to have assumed the lands had legal access. If the plaintiff's loss was smaller than the defendant's gain, the larger of the two valuations should have been awarded. Finally, the judge erred by reducing the claim for negative contingencies that on a balance of probabilities he found would not have occurred.

PART 1 - STATEMENT OF FACTS

1. The facts in this matter are not in dispute. The respondent accepts the findings of fact reported at 2023 BCSC 926 ("**LRFJ**"). The findings are set out by the trial judge at ¶3-4 and ¶9-96. Although the appellant quotes from those findings, he does so selectively such that the LRFJ themselves are a more reliable summation of the facts.

2. The trial judge requested further submissions on remedy leading to reasons reported at 2024 BCSC 598 ("**RRFJ**"). In the RRFJ, the trial judge summarized his factual findings on liability at ¶2-40.

3. Sather Ranch was a sole proprietorship operated by Palmer Sather.[1] As Palmer Sather aged and his health declined, he was unable to continue to manage the ranch operations.[2] His ranch hand, Mike Street ("**Mike**")[3], and his son, Joe Sather ("**Joe**"), decided to form a company to carry on the ranching business and acquire its assets to do so.[4] The company so formed was Sather Ranch Ltd. (the "**Company**" or "**SRL**"). The directors of the Company were Mike and Joe, who each, through their holding companies, owned 50% of the shares in the Company.[5]

4. One of the parcels of land involved in the ranching business that the Company was to acquire was a 160-acre parcel referred to as the "Grazing Lands", which were owned by Palmer Sather ("**Palmer**").[6] Palmer had given a power of attorney to his two children Carol Sather ("**Carol**") and Joe.[7]

[1] Amended Appeal Record ("**AR**") at page 43, LRFJ at ¶10.

[2] AR at page 44-45, LRFJ at ¶16-17 and ¶20.

[3] AR at page 44-45, LRFJ at ¶14 and ¶19-20, and at page 78-79, RRFJ at ¶12.

[4] AR at page 46, LRFJ at ¶29, and at page 76 and 77-78, RRFJ at ¶2 and ¶18.

[5] AR at page 45, LRFJ at ¶22 and at page 76 and 79, RRFJ at ¶3 and ¶17.

[6] AR at page 44, LRFJ at ¶13(b), and at page 76, RRFJ at ¶2.

[7] AR at page 44, LRFJ at ¶16, and at page 78, RRFJ at ¶16.

5. The key factual findings that ground liability are reproduced below.

> ¶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.
>
> …
>
> ¶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, <u>once we have ownership</u>, hopefully <u>we</u> 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.

…

¶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 …

…

> ¶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.[8]

6. The appellant is incorrect to say (at ¶20 of his Factum) that the trial judge did not consider Carol's evidence as to who would have the opportunity to buy the Grazing Lands before they would be offered to the Company.

7. Carol's affidavit was inconsistent on this point. At paragraph 5, she says that only the grandchildren had the first right to purchase it. At paragraph 6, she says that both the grandchildren and Joe had the first right to purchase it.[9]

8. Carol's affidavit is defective.[10] It does not comply with Rule 22-2(2) of the *Supreme Court Civil Rules*. Contrary to the Rules, it does not provide that critical opening paragraph that provides that "I, [name] of [address/city], [occupation], SWEAR (OR AFFIRM), that:". The Affidavit is thus an unsworn, and therefore inadmissible, document. The respondent objected to its admissibility and argued that it should be excluded altogether, or given little weight. The trial judge did not exclude it, but gave little weight to statements that conflicted with contemporaneous documents or were inconsistent with her actions and conduct.

9. The trial judge found that the evidence tendered by Joe and Carol was generally not reliable and to the extent it was contradicted by contemporaneous documents, those were to be preferred as they more accurately reflected the parties' intentions and positions at the relevant time.[11] This approach was undertaken in regard to the evidence as to the plans for the Company, the suitability of the lands for grazing, the alleged eviction

[8] AR at page 48-52, LRFJ.

[9] Appeal Book ("**AB**") at page 2, ¶5-6.

[10] AB, page 1.

[11] AR at page 46-48, 51 and 55-57; LRFJ at ¶25, ¶33, ¶41-42, ¶55-59, ¶85-89, ¶90-92.

of Mike from the property, and who had the right to acquire the lands (the grandchildren) before the Company could do so.

10. The trial judge was critical of the evidence in Carol's affidavit noting that it contained argument and inaccurate statements.[12] He also noted that her actions in transferring a number of assets to the Company were inconsistent, and could not be reconciled with, her affidavit evidence that she would not transfer assets to Mike or to any company with whom he was involved.[13]

11. The contemporaneous documents confirmed that the grandchildren were to have the first opportunity to purchase the Grazing Lands, failing which the Company could purchase the lands.[14] Carol was copied on that exchange of emails in which Joe confirmed that if the grandchildren did not purchase the lands, then the Company could. In cross-examination, Carol was asked the following question and gave the following answer:

> 31 Q And you knew that if none of the grandkids
> 32 purchased it, that the company wished to purchase
> 33 it?
> 34 A Yes.[15]

12. Carol was reluctant to acknowledge what was clear in the correspondence that if the grandchildren didn't purchase the Grazing Lands, that the Company could. She acknowledged that she was copied on that email correspondence and did not dispute that statement and did not suggest the Company could not purchase it. She also commented that if her brother (Joe) was for it that "he would have explained it to her and that she was sure he did, but she just couldn't remember".[16]

[12] AR at page 56, LRFJ at ¶90.

[13] AR at page 57, LRFJ at ¶92.

[14] AR at page 51, LRFJ at ¶55-59.

[15] Transcript, page 232, lines 31-34.

[16] Transcript, page 235 lines 25 to page 236 line 4.

13. She knew and understood that Joe had incorporated the company to carry on the ranch business and she was transferring the ranch related to assets to him so Joe, through the Company, could carry on the business.[17] A sale to Joe, practically speaking, meant a sale to the Company, which as noted had been incorporated to acquire these assets to carry on the ranching business.

PART 2 - ISSUES ON APPEAL

14. Did the trial judge make a palpable and overriding error in finding that Joe breached his fiduciary duty owed to the Company when he purchased lands in his own name for which the Company had been negotiating?

15. Did the trial judge make a palpable and overriding error in finding that the corporate opportunity was the opportunity to acquire the Grazing Lands?

PART 3 - ARGUMENT

16. Both alleged errors engage the trial judge's application of the facts to the principles regarding the doctrine of corporate opportunity. As a question of mixed fact and law, the trial judge's decision is entitled to deference. The appeal should only be granted if the trial judge made a palpable and overriding error.[18] He made no such error.

Diverting Property For Which The Company Had Been Negotiating

17. The doctrine has been stated by the Supreme Court of Canada as follows:

> "a director or senior officer … is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company".[19]

[17] Transcript, page 241 line 43 to page 242 line 1.

[18] *Housen* v. *Nikolaisen*, 2002 SCC 33 at ¶26. *7868073 Canada Ltd*. v. *1841987 Ontario Inc*., 2024 ONCA 371 at ¶68.

[19] *Canadian Aero Service Ltd*. v. *O'Malley*, [1974] SCR 592 ("***CanAero**")* at ¶24.

18. As expressed above, the doctrine has two branches.

a. It precludes a director from obtaining (without the company's approval) any property or business advantage for which the company has been negotiating ("**Category 1**).

b. It precludes a director from obtaining (without the company's approval) any property or business advantage belonging to the company ("**Category 2**").

19. Category 1 cases are straight forward. They turn on factual findings as to whether a company was negotiating for a particular property or business advantage.

20. Category 2 cases, by contrast, while easily stated can be difficult to apply. Harder cases involve fiduciaries who have left the employment of one company and who then later pursue some opportunity. Those cases raise the issue as to whether the business opportunity in question "belongs to the company" or, in the language of the cases, was a "fresh initiative" of the former fiduciary. These cases require the court to find the appropriate balance that ensures fiduciaries honour their obligations without creating an undue restraint on trade and competition.

21. This case falls within Category 1. The Grazing Lands were property for which the Company was negotiating. As such, no vexing question about whether the opportunity belongs to the Company arose.

22. The trial judge found that the facts of this case fell within the ambit of Category 1. Referencing the purchase of the Grazing Lands, he concluded that "at the very least, it was a "business advantage … for which [SRL] ha[d] been negotiating".[20] More accurately, it was simply property (rather than a business advantage) for which SRL had been negotiating. As such, liability was clearly established on the factual findings, none of which are in dispute before you.[21]

[20] AR at page 63, LRFJ at ¶113.

[21] The factual findings that ground liability are reproduced earlier at ¶5.

23. Absent consent of the company, there is no scope to argue that a director could acquire for himself property for which the company was negotiating. Those are the facts before you. The Company made an offer to purchase the lands. Without the consent of the Company, Joe then diverted that opportunity and purchased the lands himself. As such, Joe's purchase of the lands in his own name was a clear breach of his fiduciary duty. This is determinative of the appeal, which must be dismissed.

24. One circumstance that makes this case so straight forward was the Company was in fact incorporated to acquire the ranch assets (including the Grazing Lands) and to then carry on the ranching business. As noted by this Court in *Blueline Hockey Acquisition Co*. v. *Orca Bay Hockey Ltd. Partnership*, 2009 BCCA 34 ("***Blueline***"), the incorporation of the Company for the purpose of acquiring this asset (or business advantage) makes the fiduciary obligation clearer.[22] In that case, the claim was dismissed on the basis that there was no fiduciary duty owed because the parties had not entered into a partnership to pursue the acquisition of an interest in the Canucks as alleged.

Liability For Obtaining A Business Advantage Belonging To The Company

25. Although it was unnecessary to do so, the trial judge also analyzed whether the case fell within Category 2 and found that it did. Even if liability had been founded upon the trial judge's alternative finding that it was a "business advantage belonging to the company", the appellant still fails to show a reversible error.

26. The appellant asserts there are competing approaches to the extent to which a business opportunity must be "ripe" to give rise to a claim for breach of corporate opportunity. This assertion is incorrect; there are not competing approaches, merely different applications of what factors have more weight and relevance in any particular circumstance.

[22] *Blueline Hockey Acquisition Co*. v. *Orca Bay Hockey Ltd. Partnership*, 2009 BCCA 34 at ¶61.

27. The leading case from the Supreme Court of Canada is clear that it is a contextual analysis of various considerations and factors, summarized as follows:

> The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. 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.[23]

28. The trial judge correctly stated the above test. At ¶99 of the LRFJ, he quoted from Justice Balance's summary that includes the above quote and concludes that:

> … 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.[24]

29. When deciding if the business advantage belonged to the company, ripeness is just one of many factors to be considered. There is no mandated degree of "ripeness" that must be shown or established before liability will be found. Each case is to be decided based upon its circumstances taken in their totality. The trial judge understood this and focused, as he noted, on those *CanAero* factors upon which counsel had focused.[25] He made no error in doing so.

[23] *CanAero* at ¶48.

[24] AR at page 59, LRJF at ¶99 quoting with approval from *Sateri (Shanghai) Management Limited* v. *Vinall,* 2017 BCSC 491 at ¶325.

[25] AR at page 59, LRFJ at ¶100 where the judge directs his attention to the three factors (ripeness being one of them) that "figure most prominently on the facts **and submissions of the parties** …" [emphasis added].

30. The appellant refers to the *Blueline* decision as supporting that the law on "ripeness" may be uncertain. With respect, this Court in *Blueline* was not identifying uncertainty, but rather indicating its disapproval of an unduly rigid formulation of the factors identified in *CanAero* – including the degree to which an opportunity must be ripe. This Court addressed that as follows:

> ¶59 … I do feel constrained to acknowledge some doubt on my part concerning the trial judge's conclusion that no breach of duty occurred because no "ripening or maturing opportunity" existed in March 2004 that was appropriated by Mr. Aquilini in November. First, it is not clear whether the word "maturing" used by the Court in *CanAero* was intended to restrict the scope of the corporate opportunity doctrine to opportunities that are indeed "ripe" or "a sure thing". Laskin J. (as he then was) himself stated that the standards of loyalty to which the conduct of a director must conform must be tested by many factors, including the position held by the director, "the nature of the corporate opportunity, <u>its ripeness, its specificness</u>", the director's relation to it, the amount of knowledge he or she had, the circumstances in which it was obtained, the time elapsed between the termination of his or her relationship with the corporation, and the circumstances of that termination. (At 620; my emphasis.) As well, his Lordship said, "new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting." (At 609.)

31. The standards of loyalty to which the conduct of a director must confirm must be tested by many factors. This Court emphasized the need for ongoing flexibility where new fact scenarios may require a reformulation of existing principle to maintain the doctrine's vigour. The concern was about unduly restricting the doctrine by reading in a bright-line requirement in respect of any one factor, which is what the appellant asks this Court to do now. To the contrary, liability was to be assessed by looking at the circumstances in their totality as tested against all relevant factors.[26]

32. Although the decision in *Blueline* rested on the finding that no fiduciary duty is owed, the analysis regarding the *CanAero* factors is not done in a factual vacuum. In assessing the claim of the two plaintiffs that their business opportunity had been converted by Mr. Aquilini, the court was influenced by the context in which each party had

[26] See also *7868073 Canada Ltd*. v. *1841978 Ontario Inc*., 2024 ONCA 371 at ¶75.

agreed they each could leave at any time, that any transaction was still subject to approval or rejection by each family, that when Mr. Acquilini gave notice he was leaving the group the others did not object, that when he later sought to rejoin the group he was refused, and finally that the nature of the proposed acquisition *by the plaintiffs* changed significantly after Mr. Acquilini left. On that latter point, the judge felt that the transaction had "moved on" after Mr. Acquilini left and it was in that context that the trial judge raised the question of ripeness. She felt that not only had the plaintiffs refused to allow the defendant to participate, but they had in fact significantly changed the nature of the proposed transaction. Those two factors combined were fatal to establishing their case even if a fiduciary duty had been owed.

33. A reading of the cases in this area shows that there are not divergent streams of law, but merely different applications of factors/considerations expressed in *CanAero* to the particular facts in each case. The cases highlighted by the appellant each turn on their own unique facts.

34. As a question of mixed fact and law, these cases fall along a spectrum of particularity. As noted the Supreme Court of Canada, to the extent each case is decided upon its unique facts, then on the spectrum it approaches a matter of pure application, having little precedential value and being entitled to significant deference.[27]

35. Reviewing the cases relied upon by the appellant makes plain that each of those cases turned on their unique facts. They were matters of application. They have little precedential value. They don't reflect different approaches to the law, just the application of that law to the unique facts in each case.

36. The key factual contextual factors driving each particular decision relied upon by the appellant are summarized below:

a. *Moore International (Canada) Ltd*. v. *Carter* (1984) 56 BCLR 207 (CA) involved a former employee and two projects that were entered into by his

[27] *Housen* v. *Nikolaisen*, 2002 SCC 33 at ¶28.

new employer. In regard to the Gregory project, the evidence showed that the new employer was already pursuing that project so it wasn't an opportunity usurped by the departing employee (see ¶7 and ¶11). The other project was the Forestal project, which the judge made findings of fact was won by the new employer because it didn't require two terms (a down payment and EDC financing approval) that the plaintiff required. Because the new employer was prepared to take on more risk, it consequently won the contract (¶14-15). Therefore it was not a situation where the company "could not avail itself of the opportunity" as characterized by the appellant, but rather a factual finding that the business was properly won by the new company without any breach of duty.

b. *Pizza Pizza Ltd.* v. *Gillespie*, 1990 CanLii 4023 (OCJ Gen) was a summary dismissal of a claim for breach of fiduciary duty. The defendant had resigned from the plaintiff company who had a 30-minutes-or-free pizza business and later started a 30-minutes-or-free chicken business. The defendant signed a non-compete prohibiting him from competing in the *pizza* business. The Court found that the non-compete clause agreed to by the parties crystallized any duty the defendant had as a fiduciary to not compete (¶60). The Court found as a fact that the 30-minutes-or-free delivery concept was not unique to Pizza Pizza and did not originate with it (¶76). The Court acknowledged that liability for breach of fiduciary duty did not depend upon the company being able to take advantage of the opportunity itself (see ¶80). Although the Court placed emphasis on the word "ripe", the underpinning of the decision was that the opportunity was the result of the defendant's own initiative and planning and was not as a result of taking an opportunity that was available to the plaintiff or that the plaintiff was pursuing (see ¶82).

c. *Mountain-West Resources Ltd*. v. *Fitzgerald*, 2005 BCCA 48 involved an application to renew a writ and for an order for service *ex juris*. The chambers judge dismissed the application, and the appeal from that order

was also dismissed. This Court was of the view that the application could have been properly dismissed based on inexcusable delay and that would have been determinative (¶13). However, because the chambers judge focused on service *ex juris*, the Court also addressed that aspect. In relation to that aspect of the decision, this Court agreed with the chamber judge that there was no viable cause of action. The appellant had conceded that any fiduciary duty owed did not preclude the defendant from acting as a professional geologist and the Court notes he could be paid for those services in cash, by way of a future interest in a mining claim, or in some combination thereof (¶23). This finding, accepted by the Court, was fatal to the application. The Court also found that the defendant was relieved of his fiduciary obligations by the factual finding that there was an explicit understanding that the appellant's operations would remain dormant and that the defendant should pursue his own professional interests (¶27). Similar to *Blueline*, the agreement or understanding was akin to consent that the defendant was at liberty to pursue the opportunity himself.

d. *Tracey* v. *Tracey*, 2012 ONSC 3144 turned on the facts set out at ¶57 of the decision. The Court found as a fact that the plaintiff company had no intention of pursuing a distribution business and the master distributor (the proposed counterparty) would not have agreed to have a competitor distribute its products. The factual findings made it clear that this was not a corporate opportunity belonging to the plaintiff.

e. The appellant identifies *Consbec* v. *Walker*, 2016 BCCA 114 as the leading case in B.C. that limits liability for the corporate opportunity doctrine to case where the opportunity was "mature". That decision was decided on the basis (like *Blueline*) that the defendant did not owe any fiduciary obligation. He was just an employee (see ¶189). As such, he was not precluded from competing with his former employer (see ¶192).

f. In *Roppovalent* v. *Danis*, 2020 ONSC 5290, the company had two 50% shareholders who were separated spouses that were not speaking to each other resulting in the company being in deadlock. The unique circumstances of the company's deadlock due to the relationship between the former spouses rendered the company unable to pursue any agreement or step that required their cooperation. This case is limited to its facts.

g. *Martin* v. *ALPC Housing Solutions Inc.*, 2020 NSCA 35 involved a director of the lottery company who sold the lottery house to the company for a higher price than she purchased it back from the winner. The case turns on its unique facts. The director had very publicly, and with the knowledge of the other director, been communicating to potential lottery ticket buyers that she was interested in buying the property back from the winner. Although the lottery company was aware of her statements to lottery ticket buyers, it did not express any interest in buying the property back from the winner itself. Although consent was not formally sought or received, the fact that the other director knew she was pursuing it, did not object and did not seek to have the company pursue the purchase, in effect amounted to acquiescence, or consent, to the director pursuing the opportunity herself.[28] By contrast, SRL was actively pursuing the purchase of the company and had written an offer. The facts in *Martin* are thus clearly distinguished on its facts.

37. The legal test and factors are not in doubt. The test, and factors to be considered, were clearly expressed by the Supreme Court of Canada in *CanAero*. All properly note that ripeness is but one factor in this contextual analysis.

38. The trial judge correctly referred to *CanAero* and considered the various factors. That exercise was a question of mixed fact and law. As set out in *CanAero*, the only way that Joe (as a continuing director) could have acquired the Grazing Lands without that

[28] *Martin* v. *ALPC Housing Solutions Inc.*, 2020 NSCA 35 at ¶40.

being a breach of fiduciary duty would have been if he obtained the consent of the other director Mike Street. The Company had been specifically formed to acquire the ranch asset and carry on the ranch business. No such consent was sought or obtained. The Company was actively pursuing the purchase of the lands. In the face of that corporate pursuit, Joe breached his fiduciary duty when he bought the lands himself.

Purpose Not Advanced By Permitting Director To Divert Opportunity

39. In paragraph 70 of the Factum, the appellant refers to Professor Rotman's text regarding the balance of interests. As noted earlier, the difficult cases are those involving restraint of trade and the ability of individuals who have continuing fiduciary obligations to compete against their prior employer or prior company. The balancing of those interests are not engaged in this appeal. Joe was and remains a director of the Company. The Company was formed to acquire the Grazing Lands. Having voluntarily incorporated the Company to purchase this asset, there is no unfairness in requiring Joe to discharge his fiduciary duty to the company so incorporated.

Source Of Opportunity Not Determinative In This Case

40. In paragraph 77 of the Factum, the appellant focuses on the source of the opportunity as an important factor. In many cases, that is an important factor in assessing whether the opportunity belonged to the company. In this case, however, Joe voluntarily incorporated a company to acquire the assets to carry on the ranching business that his father had operated.

41. While it is true that Joe stood to acquire a 50% interest in the lands when his father passed away, he was also a 50% shareholder in the Company. Either way, he was to end up with a 50% interest, whether the Company purchased it or he inherited it.

42. As noted by this Court in *Blueline,* once he incorporated the Company to acquire the assets and carry on the business and more specifically once the Company took steps

to acquire the land, he was precluded from doing so personally.[29] This doesn't "handcuff" him unfairly. He did all of those things voluntarily.

Negotiating For Purchase (Not Just Use) Of Lands

43. The appellant asserts that the trial judge made a palpable and overriding error in characterizing the opportunity as one to purchase, not just to use, the Grazing Lands. The trial judge made no such error.

44. The evidence made clear that the Company was incorporated to *acquire* the ranching assets and then carry on the ranching business.[30] The trial judge specifically found that the directors had formulated a plan to acquire the Grazing Lands.[31]

45. The directors then took steps in furtherance of that plan. The lands were appraised.[32] A written offer to purchase (not lease or use) the lands based on the appraisal was prepared.[33] At Joe's suggestion, the offer to purchase was made subject-free. Pursuant to the plan, Joe was to then present the offer to purchase to Carol.[34] Rather than do so, Joe then purchased the Grazing Lands, which conduct gave rise to these proceedings.

46. The trial judge did not err in finding that the corporate opportunity was the opportunity to *purchase* the lands.

PART 4 - NATURE OF ORDER SOUGHT

47. An order dismissing the appeal with costs.

[29] *Blueline* at ¶61-62.

[30] AR at page 42 and 45-49; LRFJ at ¶3, ¶24-33 ¶40, ¶47.

[31] AR at page 49-50, LRFJ at ¶47-51.

[32] AR at page 50, LRFJ at ¶52.

[33] AR at page 50, LRFJ at ¶53

[34] AR at page 50, LRFJ at ¶54.

SECTION 2 - RESPONDENT'S CROSS APPEAL FACTUM

PART 1 - STATEMENT OF FACTS

48. The trial judge summarized his factual findings on liability at ¶11-28 of the RRFJ and summarized his finding on liability as follows:

> ¶32 In the Reasons, I found that, by acquiring the Grazing Lands 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. I found that Joe put his personal interest in conflict with his duty to SRL, and ought not to have purchased the property without the approval of the company (para. 136).[35]

49. The trial judge found that Joe's breach of fiduciary duty irreparably damaged his relationship with Mike, which led both men to withdraw financial support for the Company leading to the appointment of a receiver in July of 2018.[36]

50. The remedy sought by the plaintiff receiver was a constructive trust. As noted, the trial judge requested additional submissions in ¶145-154 of the LRJF. In particular, the trial judge referred to the four conditions identified in *Soulos* v*. Korkontzilas*, [1997] 2 S.C.R. 217 at ¶43 and concluded that the first two conditions had been met and requested further submissions regarding conditions number 3 and 4 reproduced below:[37]

> (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.

51. The plaintiff receiver had argued that a legitimate reason for ordering a constructive trust was the prophylactic purpose, to ensure that fiduciaries remain faithful

[35] AR at page 80, RRFJ.

[36] AR at page 53, LRFJ at ¶69-70 and at page 80, RRFJ at ¶30.

[37] AR at page 71, LRFJ at ¶148.

to their duty of loyalty and to avoid conflict of their own personal interest with the interests of the company. The trial judge addressed that argument as follows:

> ¶57 In this case, I found that the corporate opportunity that Joe intercepted was an opportunity to acquire the Grazing Lands as grazing lands for the ranching operation.
>
> ¶58 The receiver argues that this finding "conflated" the corporate opportunity with the motivation for why SRL sought to acquire the Grazing Lands. The receiver argues that it is irrelevant why SRL sought to acquire the lands; the corporate opportunity was to acquire them.
>
> ¶59 I disagree. Had SRL acquired the Grazing Lands, it would have acquired all of the incidents and benefits of legal ownership, including the right to sell the property at market value if Joe and Mike decided to wind up the business. However, contrary to what the receiver submits, the reasons why SRL was pursuing this property are not irrelevant. The circumstances of the corporate opportunity at issue are relevant to the nature of the breach and the appropriate remedy.
>
> …
>
> ¶62 A unique feature of this case is that SRL is no longer in business and no longer has any corporate use for the asset. SRL has ceased to operate as a ranch; it does not require any land on which to graze any cattle. The receiver seeks the land only to sell it and divide up the proceeds. In other words, the property no longer has any unique value to SRL itself.
>
> ¶63 A constructive trust is not the only means of deterring misconduct by fiduciaries. Equitable compensation also enforces the fiduciary relationship and deters wrongful conduct. Equitable compensation does this by restoring the value of the lost opportunity at the date of trial with the benefit of hindsight, without some of the limitations of common law damages: *Southwind* at paras. 72 and 74.
>
> ¶64 In my view, the "prophylactic purpose" of equitable remedies would be adequately served in this case by equitable compensation. A constructive trust would be disproportionately punitive having regard to the nature of the breach and SRL's interest in the property.[38]

52. The plaintiff receiver had argued that a second legitimate reason for ordering a constructive trust was the inadequacy of damages. Damages were inadequate for two reasons. First, Joe had no assets other than the Grazing Lands from which he could

[38] AR at page 88-89, RRFJ.

satisfy any monetary award.[39] Second, an *in specie* award avoided the difficulties of assessing damages or the risk that the actual realizable value of the lands would differ from any damages so assessed (noting that the lands would have to be sold to realize on any such judgment in any event).

53. The trial judge addressed the evidence supporting those submissions as follows:

> ¶39 The receiver confirms that the Grazing Lands do not presently have legal access. The receiver's intention, if a vesting order is made, is to improve the access and sell the property. The receiver estimates that the realizable value of the property would be roughly double with legal access.
>
> ¶40 The Grazing Lands are registered in Joe's name. Joe does not own any other real property in British Columbia. Joe recently filed an affidavit in the Court of Appeal in opposition to an application for security for costs of his appeal from the Reasons. In that affidavit, he deposed that he has no funds with which to pursue the appeal except with the assistance of *pro bono* counsel.[40]

54. The trial judge addressed this argument the damages would be inadequate and that an *in specie* award was preferable as follows:

> ¶65 The receiver argues that the authorities establish that where the defendant has acquired property that would have been acquired by the plaintiff, then a constructive trust is the preferred remedy.
>
> ¶66 This may be an accurate statement of the law; however, its application in this case is premised on the receiver's assertion that "but for Joe Sather's breach of fiduciary duty, the Grazing Lands would have been purchased by the Company".
>
> ¶67 There has been no finding that but for Joe's actions SRL would have acquired the Grazing Lands. In the Reasons, I found that but for Joe's conduct there was a real possibility SRL would have acquired the Grazing Lands; however, I did not find that SRL would have acquired the property. The evidence did not support that finding. The evidence was that the acquisition was still subject to two contingencies: would Carol agree to sell the property to SRL; and, could SRL raise the purchase price?

[39] Respondent's Appeal Book ("**RAB**") at page 168-172, Affidavit #1 of Joe Sather.

[40] AR at page 83, RRFJ.

> ¶68 The receiver argues that these contingencies are irrelevant because the remedy it seeks is based solely on the defendant's gain, which is simply title to the property, less the price Joe paid and any expenses he incurred. In my view, that position begs the question of whether the receiver has shown that a constructive trust is the appropriate remedy.
>
> …
>
> ¶72 As stated, I did not make an affirmative finding in this case that, but for Joe's actions, SRL would have acquired the Grazing Lands.
>
> …
>
> ¶82 The receiver also argues that a constructive trust should be awarded because it would be difficult to enforce a monetary award. As the receiver notes, Joe has no assets except the Grazing Lands with which to satisfy an award of damages.
>
> …
>
> ¶85 If a damage award is made, the receiver says it would have no option but to register the judgment on title and then take steps to sell the Grazing Lands pursuant to the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78. In doing so, the receiver says it would be limited to selling the lands "as is" and it would not have the authority to improve access to the lands, which it submits would likely diminish the realizable value.
>
> ¶86 The difficulty with this submission is that it presumes that SRL is entitled to damages equal to the maximum realizable value of the lands. If equitable compensation is awarded, SRL would be entitled to damages based on a fair market value for the lands on the date of trial, discounted by applying negative contingencies. In other words, a monetary award would be less than the "as is" realizable value of the property.[41]

55. Finally, the trial judge felt that a constructive trust would be "unfair to Joe and his family" because it would not be a proportionate remedy as it would "ignore the contingencies that remained before [the Company] could purchase the property".[42]

[41] AR at page 90-93, RRFJ.

[42] AR at page 94, RRFJ at ¶91.

56. In addressing the two contingencies referenced earlier in his reasons, the trial judge concluded as follows:

> ¶105 In my view, there was more than an even chance Carol would have agreed to sell the Grazing Lands to SRL if Joe had acted in accordance with his duty, but her agreement was materially less than a sure thing.
>
> …
>
> ¶107 I conclude that there was more than an even chance Joe and Mike would have raised the purchase price, but again, materially less than a sure thing.
>
> ¶108 Considering all of the above—and recognizing that damages are to be assessed, not calculated,—I would assess the negative contingencies at 33%. Put differently, I would assess the value of the lost opportunity at 66% of the value of the Grazing Lands.[43]

57. Thus having found that the plaintiff had established on a balance of probabilities that it would have acquired the Grazing Lands, the judge awarded damages equal to 67% of the value of that property.

PART 2 - ERRORS IN JUDGMENT

58. The trial judge erred in the selection of the appropriate remedy. There was a combination of errors made by the judge in his approach to the question of remedy, including:

a. by not requiring the faithless fiduciary to disgorge and deliver up the property and benefit obtained as a result of his breach of fiduciary duty;

b. by failing to give sufficient weight to the exemplary purpose of the remedy for a breach of a fiduciary duty;

c. by finding that the requirements for a constructive trust were not met;

d. by giving weight to irrelevant considerations;

[43] AR at page 97, RRFJ.

e. by not granting an *in specie* proprietary remedy that was available and sought by the plaintiff.

59. In addition (and in the alternative), the trial judge erred in the remedy granted and in particular how the quantum of equitable compensation was calculated. The trial judge erred:

a. by failing to have the appraiser assume the lands had legal access when valuing the damages, and

b. by reducing the quantum of damages for negative contingencies.

PART 3 - ARGUMENT

60. The trial judge erred in his approach to remedy. The plaintiff had sought an order requiring the faithless fiduciary to disgorge the benefit received through the remedy of a constructive trust. The judge incorrectly held that the requirements for a constructive trust were not met and his order did not require the faithless fiduciary to fully account for the benefit obtained. Instead, the judge awarded equitable compensation by way of an *in personam* judgment. The judge erred both in his approach to the remedy sought and in his approach to the remedy granted.

Standard Of Review

61. Although the selection of the appropriate remedy is a matter of discretion, the exercise of that discretion is not entitled to deference where it is exercised on the basis of an error of law, an erroneous principle or irrelevant considerations.[44] The errors noted herein fall within the scope of review that is not entitled to deference.

62. In addition, the criteria for the exercise of discretion are legal criteria, and their definition, and any a failure to apply them or a misapplication of them, raise questions of

[44] *Indalex Ltd. (Re)*, 2013 SCC 6 ("***Indalex***") at ¶236; *Canada (Attorney General)* v. *Collins Family Trust,* 2022 SCC 26 at ¶62.

law which are subject to appellate review on a standard of correctness.[45] An error in the application of the *Soulos* factors as to whether the requirements for a remedial constructive trust have been established is an error of law reviewable on a correctness standard.[46]

Errors Made In Refusing To Order A Constructive Trust

63. The trial judge erred in the selection of the appropriate remedy. There was a combination of errors made by the judge in his approach to the question of remedy, as noted earlier. Each of these errors are addressed in the sections that follow.

Faithless Fiduciary Must Account For All Property Wrongfully Obtained

64. For over 200 years, the law has required a faithless fiduciary to disgorge and deliver up the property or benefit obtained from his breach of fiduciary duty. This Court summarized that well established principle in *Baillie v. Charman* (1992), 70 BCLR (2d) 193 (CA), as follows:

> ¶28 This issue was properly raised in the pleadings in para. 32(a) of the statement of claim wherein it was alleged that Charman breached his fiduciary duty to Baillie "as a director, officer and shareholder of General Mortgage Charman participated in the profits realized by General Mortgage on the sale of the lands to (Hall)." **The principle that a fiduciary must account for profits** was first recognized in *Keech v. Sanford* (1726), Sel. Cas. Ch. 61, 25 E.R. 223, extended and clarified in the House of Lords in *Regal (Hastings) Ltd. v. Gulliver*, [1967] A.C. 134n, [1942] 1 All E.R. 378, considered again in *Boardman v. Phipps*, [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.), and adopted with approval by a unanimous judgment of Laskin J. (as he then was) in *Canadian Aero Service Ltd. v. O'Malley, supra*. In extending the principle to senior corporate personnel, Mr. Justice Laskin wrote at p. 606 [S.C.R.]:
>
> > *It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest.* Descending from the generality, the fiduciary relationship goes at least this far: **a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either**

[45] *Interfor Corporation* v. *Mackenzie Samwill Ltd*., 2022 BCCA 228 at ¶26.

[46] *Indalex* at ¶236.

> **secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating**; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company. **[emphasis added]**
>
> ¶29 **The principle is a strict one and, unlike most claims for equitable relief, requires no proof of loss by the fiduciary's principal, nor is there any requirement to establish fraud, deception or mala fides as is the case in "secret profit" cases.** Indeed, the cases establish that a beneficiary may benefit from the fiduciary's action, as was the case in *Boardman v. Phipps, supra*. **The principle is clear that if a fiduciary profits, such profits must be accounted for and paid over to the principal.** As I understand the authorities, the only viable defence to such an equitable claim is a full and complete disclosure of all material facts by the fiduciary to his principal, or beneficiary, and a consequent informed consent by the principal, or beneficiary, to the fiduciary's acting in his own interest with a view to his obtaining a profit. **[emphasis added]**

65. As articulated by the Court, a remedy that would permit the wrongdoer to profit from their wrongful conduct would be a “reproach to justice” and a result that a court of equity cannot countenance.[47]

66. The trial judge erred in principle by not requiring the faithless fiduciary to disgorge the property he acquired (the Grazing Lands) in breach of his fiduciary duty. Instead, his order resulted in the faithless fiduciary retaining title to the property he acquired in breach of duty and having an *in personam* liability calculated at approximately 2/3 of the value of the lands and benefit so obtained in breach of his fiduciary duty thereby enabling him (by design) to retain at least 1/3 of the benefit obtained through his breach of duty.

67. Because of the importance of the exemplary purpose, the court must be vigilant to not permit the possibility for “efficient breach”, the so called efficiency where the benefit to the defendant from breaching exceeds the loss caused to the plaintiff. The contractual theory of efficient breach has no place in the context of fiduciary relationships, where it is

[47] *Ruwenzori Enterprises Ltd.* v. *Walji*, 2006 BCCA 448 at ¶41 and ¶44.

essential that above all else, the fiduciary honours and discharges his fiduciary obligations that are relationships of trust upon which many institutions depend.

68. In the context of fiduciary law, disgorgement is the correct remedy where the defendant's gain is larger than the plaintiff's loss.[48] This Court also approved that approach in *Jostens Canada Ltd.* v*. Gibsons Studio Ltd.*, 1999 BCCA 273 where in reviewing the remedy granted for breach of fiduciary duty, this Court concluded:

> ¶24 Mr. Justice Cowan concentrated on this equitable form of compensation and used Jostens' figures to make an assessment of the benefit or gain derived by Gibsons from their breach of the obligation of good faith and fidelity. In my respectful opinion he correctly applied the rule described in *Halsbury* where the equitable remedy is said to be "measured by the gain to the defendant" and the same equitable rule enunciated by Chancellor Von Koughnet in *Wightman v. Helliwell* where the remedy was described as "to wrest from him any benefit he has, or is taken to have, derived from the use of the trust money."

Failing To Give Sufficient Weight To Exemplary Purpose Of Remedy For Breach Of Fiduciary Duty

69. In fashioning the remedy, the trial judge gave insufficient weight to the exemplary purpose of the remedy for a breach of fiduciary duty. This question was closely tied to *Soulos* factor #3 as to whether there was a legitimate reason to grant a constructive trust.

70. In *Fiduciary Law*, Professor Rotman makes clear that the predominant purpose and function of remedies for breach of fiduciary duty is that they be exemplary. The relief should be crafted *primarily* to deter fiduciaries from breaching their duties by removing all incentives and benefit from doing so. The author explains this purpose as follows:

> This chapter does not attempt to be a thorough accounting of the various measures of relief available to breaches of fiduciary duty … Rather, it examines fiduciary relief on a more theoretical level. It presents a conceptual framework for the effective fashioning of fiduciary relief. This framework portrays fiduciary relief as predominantly exemplary in function. Characterizing fiduciary relief in this matter is consistent with the fiduciary concept's foundational purpose of maintaining the integrity of socially and economically valuable or necessary relationship of high trust and

[48] *Indutech Canada Ltd.* v*. Gibbs Pipe Distributors Ltd.*, 2013 ABCA 111 at ¶45.

> confidence that facilitate and flow from human interdependency. Maintaining the integrity of such interactions requires deterring fiduciaries from engaging in misconduct. Since the fiduciary concept fulfils its purpose through deterrence, the fiduciary concept's emphasis on exemplary forms of relief is both logical and appropriate.
>
> While, as indicated in Chapters 5 and 9, the fiduciary concept is not primarily concerned with doing justice between the parties to individual fiduciary interactions, this idea is not completely ignored. Indeed, one cannot properly implement fiduciary relief without regard for the unique facts and circumstances of individual associations. In spite of the need to consider individual circumstances, the exemplary nature of fiduciary relief remains predominant. …[49]

71. Later in the chapter, Professor Rotman refers to the constructive trust remedy as a mechanism to achieve the exemplary purpose as follows:

> The constructive trust may be used either to restore losses suffered by wronged beneficiaries or to force the disgorgement of gains made by the wrongful fiduciaries. It may also be used to provide relief where a beneficiary is deprived of actual or potential ability to earn profit, as in the case of corporate opportunity discussed in Chapter 7. This holds true even in circumstances where beneficiaries are unable to benefit from the opportunity personally, as under the fact situation in *Keech v. Sandford*. Under any of these scenarios, the constructive trust removes the beneficial interest in the property in question from the fiduciary in breach while vesting it in the wronged beneficiary. Thus, it may serve both restitutionary and compensatory purposes. More basically, though, the constructive trust acts as a deterrent by removing benefits from fiduciaries engaging in misconduct.[50]

72. In his text, Professor Waters also addresses the use of the constructive trust to fulfil the exemplary purpose that is the object of fashioning a remedy for breach of fiduciary duty:

> The same rules apply to those who owe fiduciary obligations, even if there is no express trust. It became evident as early as the eighteenth century that, though no trust created by any person existed, claimants wished to

[49] Leonard Rotman, *Fiduciary Law* (Toronto: Thompson Canada Limited, 2005) at page 686-687.

[50] *Ibid* at page 717-718.

> invoke the jurisdiction of the equity courts and the trust doctrine of accountability when others had made profits by allegedly taking advantage of the claimants. Proceeding from analogy with the trust arising from express or implied intention, the courts made it clear that they were prepared to hear these claims and award equitable relief provided that the particular claimant could show there was a fiduciary relationship between the claimant and the person who had allegedly taken advantage of the claimant. Such a fiduciary relationship arises from the placing of trust and confidence by the claimant in the fiduciary, it was said, and Equity would impose express trust obligations upon the fiduciary who abused that trust and confidence. The fiduciary therefore became, and was described as, a constructive trustee.
>
> …
>
> If a fiduciary makes a gain through his office, it is clear that the gain must be given up. This has nothing to do with bad faith as such. The rule against profits is a strict one, which is designed to ensure that the fiduciary acts, as equity requires, from the purest motives; he must be motivated only by the best interests of his beneficiary. However, such a profit can be disgorged in two ways. We might say that the fiduciary is personally accountable – he owes a debt, equal to the amount of the gain. This was the holding in *Lister & Co. v. Stubbs*. Alternatively, we might say that he has an obligation to transfer the gain, and since this is an obligation relating to specific property, therefore it generates a constructive trust. In *Attorney-General for Hong Kong v. Reid*, the Privy Council decided that a trust was appropriate. The English courts continue to struggle with this issue. In *Soulos v. Korkontzilas*, the Supreme Court of Canada also held that a trust could be appropriate in such a case. The Court held that to establish a constructive trust to take away a wrongful gain, these four conditions must generally be satisfied …[51]

73. In her concurring decision in *Canson Enterprises Ltd.* v. *Boughton & Co.* [1991] 3 SCR 534, Justice McLachlin referenced the exemplary purpose and its importance to protecting fiduciary relationships as follows:

> ¶61 … The essence of a fiduciary relationship, by contrast, is that one party pledges to act in the best interest of the other. **The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged.** The freedom of fiduciary is diminished by the nature of the obligation he or she has

[51] Donovan Waters, Mark Gillen and Lionel Smith, *Waters' Law of Trusts in Canada,* 4th ed. (Toronto: Thompson Reuters Canada Limited, 2012) at page 526-527).

> undertaken – an obligation which "bespokes loyalty, good faith and avoidance of a conflict of duty and self-interest": *Canadian Aero Service Ltd. v. O'Malley*, [1974] SCR 592 at 606, 40 DLR (3d) 371, 11 CPR (2d) 206. **In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.**
>
> …
>
> ¶65 … **But the better approach, in my view is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy** …
>
> ¶66 … And it is clear that tort law is incompatible with **the well developed doctrine that a fiduciary must disgorge profits gained through a breach of duty, even though such profits are not made at the expense of the person to whom the duty is owed** …[52] **[emphasis added]**

74. In *Soulos* v. *Korkontzilas*, [1997] 2 SCR 217 ("***Soulos***"), Justice McLachlin against referred to exemplary purpose required to protect relationships of trust and the institutions that depend on those relationships as follow:

> ¶17 The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution **imposed by law** not only to remedy unjust enrichment, but **to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain**. **This served the end**, not only of doing justice in the case before the court, but **of protecting relationships of trust and the institutions that depend on these relationships**. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.
>
> **[emphasis added]**

75. The trial judge erred in principle by not fashioning a remedy that furthers the exemplary purpose. To the contrary, by permitting the faithless fiduciary to retain a benefit obtained from the breach, the remedy undercuts the institution that the remedy is

[52] *Canson*, concurring decision of Justice McLachlin.

designed to protect. It rewards the breach. It provides incentives for other fiduciaries to breach their duties, obtain a benefit and then only have to partially disgorge the property or benefit so acquired.

Erred By Finding The Requirements For A Constructive Trust Were Not Met

76. Closely related to the error in failing to have the exemplary purpose guide the remedy, the trial judge erred in his assessment of whether factors #3 and #4 from *Soulos* were met such that a constructive trust remedy was appropriate.

77. In *Soulos*, the Supreme Court of Canada identified four prerequisites that must *generally* be satisfied before a constructive trust based on wrongful conduct will be ordered. The Court addressed that as follows:

> ¶45 In *Becker v. Pettkus, supra*, this Court explored the prerequisites for a constructive trust based on unjust enrichment. This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows ed., *Essays on the Law of Restitution* (1991), I would identify four conditions which generally should be satisfied:
>
> > (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.

78. In the LRFJ, the trial judge found that conditions #1 and #2 were satisfied and requested further submissions on #3 and #4. The trial judge erred in his consideration of those remaining factors.

79. In relation to factor #3, the trial erred in concluding that a partial damage award would fulfil the prophylactic purpose such that purpose was not a legitimate reason to seek a constructive trust in these circumstances. As noted, the remedy must further the exemplary purpose to deter fiduciaries from breaching their duty. The caselaw is clear that purpose is only advanced by orders that insist upon the faithless fiduciary not retaining *any* property or benefit derived from his breach. Contrary to this foundational principle, the order was fashioned so that the faithless fiduciary retained 1/3 of the value derived from his breach.

80. A second legitimate reason for seeking a proprietary remedy is that an *in specie* remedy is available and by returning the very property in issue the Court can avoid the potential problems associated with granting an award of damages.

81. In *Murphy Oil Co*. v. *Predator Corp*, 2006 ABQB 680, the Court considered the appropriate remedy where a 25% interest in a property had been acquired in a breach of confidence. A constructive trust was granted over the 25% interest and in discussing the remedy, the Court commented as follows:

> ¶120 The background and circumstances in which a constructive trust may be considered have been canvassed in some detail by McLachlin J. in *Soulos v. Korkontzias*, [1997] 2. S.C.R. 217. There, it was considered a discretionary remedy, with some flexibility to deal with cases where good conscience seems to require that a wrongful act by the defendant not leave him unjustly enriched. **It has been applied as a remedy** in breach of confidence actions, **especially where the result of the breach remains intact, and where damages are not a suitable remedy**.
>
> ¶121 Generally, the cases about the misuse of confidential information, and breach of confidence, establish that **if the wrongdoer acquires actual property that would otherwise have been acquired by the plaintiff, an *in rem* remedy such as a constructive trust may be well suited to right the wrong, especially if it directs the title of the property to the party in whose name it would have been "but for" the breach**. On the other hand, where the nature of the detriment is that a competitor obtained a time advantage in getting into the market with a competitive product, then the best remedy may be damages for the loss of dominance of the market for that period of time.
>
> ¶122 Here, the 25% interest has been isolated, and by virtue of the factual background the plaintiffs have actually paid all the expenses of the

> development of the wells, the bid prices for the lands (through their settlement with Ricks) and have operated the disputed lands and wells thereon. As a result, **the cleanest, easiest and fairest solution** is to impress that 25% holding with a constructive trust and direct that it be transferred to the plaintiffs. There is no evidence of expenditures by the defendants that need be reimbursed. Where Predator is found to have utilized confidential information to the detriment of the plaintiffs and specifically to overbid on lands that the plaintiffs bid for and desired, **constructive trust is the ideal remedy**.
> **[emphasis added]**

82. This case was referred to the trial judge for the principle that if an *in specie* award was available that is preferable because it is, in the words of the court, the "cleanest, easiest and fairest solution". Unfortunately, the trial judge incorrectly seized on the language "if the wrongdoer acquired actual property that would otherwise have been acquired by the plaintiff" as requiring "but for" causation as a requirement to order a constructive trust. Although the Alberta Court of King's Bench made that statement (presumably because the Court felt it was established in that case), but-for causation is not a requirement as is clear from binding caselaw from the Supreme Court of Canada and from this Court.

83. This error is set out the RRFJ as follows:

> ¶65 The receiver argues that the authorities establish that where the defendant has acquired property that would have been acquired by the plaintiff, then a constructive trust is the preferred remedy.
>
> ¶66 This may be an accurate statement of the law; however, its application in this case is premised on the receiver's assertion that "but for Joe Sather's breach of fiduciary duty, the Grazing Lands would have been purchased by the Company".
>
> ¶67 There has been no finding that but for Joe's actions SRL would have acquired the Grazing Lands. In the Reasons, I found that but for Joe's conduct there was a real possibility SRL would have acquired the Grazing Lands; however, I did not find that SRL would have acquired the property. The evidence did not support that finding. The evidence was that the acquisition was still subject to two contingencies: would Carol agree to sell the property to SRL; and, could SRL raise the purchase price?
>
> ¶68 The receiver argues that these contingencies are irrelevant because the remedy it seeks is based solely on the defendant's gain, which is simply

> title to the property, less the price Joe paid and any expenses he incurred. In my view, that position begs the question of whether the receiver has shown that a constructive trust is the appropriate remedy.[53]

84. The caselaw referenced in ¶65 should have referenced that the authorities establish that where the defendant has acquired property that [the Company was pursuing], then a constructive trust is the preferred remedy.

85. In ¶66, the trial judge incorrectly imposed on the plaintiff an obligation to establish its loss on a but-for basis, when the remedy is directed at the defendant's gain, not the plaintiff's loss. The constructive trust remedy did not require but-for causation. The plaintiff did not need to show that, but for the breach of fiduciary duty, the Company would have acquired the lands. Even if the Company could not have acquired the acquired the lands, a director is precluded from acquiring the lands himself and if he does acquire them, he must account to the Company. In *CanAero,* the Supreme Court of Canada held that a plaintiff did not have to show that, but-for the faithless fiduciary's breach, that it would have obtained the opportunity, in order to be entitled to a remedy.[54] This Court has also reiterated that the duty to account arising from a breach of fiduciary duty does not depend upon proof of *any* loss by the fiduciary's principal.[55] Similarly, the Supreme Court of Canada has also recently reiterated that disgorgement is a remedy for breach of fiduciary duty that is available without any proof of damage. It only requires that the defendant gained a benefit, with no proof of deprivation to the plaintiff being required.[56]

86. It was the wrong question to inquire into whether the Company would have completed the purchase. The appellant did complete the purchase. Joe acquired the property in breach of his fiduciary duty. When he did so, he deprived the Company from completing the purchase.

[53] AR at page 90, RRFJ.

[54] *CanAero* at ¶24, ¶31 and ¶51.

[55] *Baillie* v. *Charman* (1992), 70 BCLR (2d) 193 (CA) at ¶29.

[56] *Atlantic Lottery Corp. Inc.* v. *Babstock*, 2020 SCC 19 at ¶24 and ¶32.

87. A fiduciary that breaches his duty by acquiring property personally is not entitled to prove that the Company would not have been able to complete the purchase itself. The rule is inflexible and the court should not receive evidence or argument that the Company did not suffer a loss or that the loss should be reduced for negative contingencies.[57] The court should not entertain the faithless fiduciary's speculation about what might have happened if he had fulfilled his duty.

88. Even if the Company could not have acquired the acquired the lands, the director is precluded from acquiring it himself and if he does acquire the lands, he must account to the Company.

89. Where the defendant has acquired property in breach of his fiduciary duty, then a constructive trust is the "cleanest, easiest and fairest" solution. The reasons for this include fundamental fairness and the avoidance of the frailties and imperfections of a damage award. Those frailties and imperfections are relevant considerations for the court in selecting the appropriate remedy. As expressed by the Court in *Smithries Holdings Inc.* v. *RCV Holdings Ltd*., 2019 BCSC 802:

> ¶67 … Where there are difficulties of valuation or assessment, they may be taken into account by a court of equity as consideration supporting proprietary relief to avoid the uncertainty: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at para 199…"

90. In *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 SCR 574, Wilson J. expressed this point in more detail as follows:

> ¶92 … Since the result of LAC's breach of confidence or breach of fiduciary duty was its unjust enrichment through the acquisition of the Williams property at Corona's expense, it seems to me that **the only sure way in which Corona can be fully compensated for the breach in this case is by the imposition of a constructive trust** on LAC in favour of Corona with respect to the property. **Full compensation may or may not be achieved through an award of common law damages depending upon the accuracy of valuation techniques. It can most surely be achieved in this case through the award of an *in rem* remedy.** I would therefore award such a remedy. The imposition of a constructive trust also

[57] *Raso* v. *Dionigi* (1993), 12 OR (3d) 580 (CA) at ¶23-29.

> ensures, of course, that the wrongdoer does not benefit from his wrongdoing, an important consideration in equity which may not be achieved by a damage award.[58] **[emphasis added]**

91. On the facts of this matter, the property acquired in breach of the fiduciary duty remains intact. Joe continues to own the Grazing Lands that he purchased in breach of his fiduciary duty. An *in rem* remedy is therefore appropriate to transfer title of the Grazing Lands to the Company. The *in rem* remedy ensures that any appreciation (or deprecation) in the value of the lands will accrue to the plaintiff and importantly that the faithless fiduciary does not retain any benefit from his wrongful conduct.[59] The remedy sought is the "cleanest, easiest and fairest solution" because it avoids altogether the difficulty in valuing damages and the risk of over-compensation or under-compensation.

92. Valuing damages here would be difficult. The value of the lands is uncertain and the real value won't be known until it is properly exposed to the market and a buyer is found. As the lands would have to be sold in any event (as discussed later), unless the sale price equals the valuation, the damage award will be imperfect. If the price the lands sell for is less than the judgment amount, then the plaintiff would be notionally over-compensated (a residual amount will remain owing on the judgment after the lands are sold that the plaintiff could continue to enforce against the defendant). If the price the lands sell for is more than the judgment amount, then the plaintiff would be under-compensated and the defendant will retain some benefit from his breach of fiduciary duty. This problem can be avoided altogether with an *in rem* award whereby the lands vest in the plaintiff so that the plaintiff then recover their realizable value, whatever that value is.

93. A further legitimate reason that satisfied the third *Soulos* criteria was the clear evidence that a monetary award would be insufficient because of the difficultly in

[58] See also ¶72 (Laforest J., Lamer J concurring).

[59] *Chung* v. *Chung*, 2022 BCSC 1592 at ¶70 and ¶77. See also *Ruwenzori Enterprises Ltd.* v. *Walji*, 2006 BCCA 448 at ¶41-44 and *Zhong Tie Enterprises Inc.* v. *Topcorp Development Inc.,* 2024 BCSC 224 at ¶271, ¶273 and ¶274.

enforcing a judgment. This Court has confirmed that is a valid consideration when considering whether there is a legitimate reason to grant a constructive trust.[60]

94. The evidence before the trial judge included an affidavit from Joe in which he deposed that he was indigent and had no assets other than the Grazing Lands that the Receiver sought to recover.[61] Consequently, if a monetary judgment was awarded, the lands would still have to be sold. The Plaintiff would have to register the judgment on title to the lands and would then have to go through the cumbersome process of having them sold pursuant to the *Court Order Enforcement Act* (the "***COEA***"). Importantly, the lands would have to be sold "as is".

95. The Grazing Lands do not presently have legal access. There was evidence before the Court that legal access would potentially double the realizable value of the lands.[62] If the Receiver was limited to selling the lands as a judgment creditor pursuant to the provisions of the *COEA*, then it would be limited to selling the lands "as is" and would not have the authority to apply to obtain legal access for the lands. This would likely diminish the realizable value of the lands to the prejudice of all intersted parties, including both the Company and appellant. The appellant is also a creditor in the receivership who will receive proceeds and is a 50% shareholder who would receive half of whatever proceeds remain after creditors are paid. Therefore any impediment to the Company's ability to maximize the realizable value also prejudice the appellant.

96. The trial judge was dismissive of that concern and addressed it as follows:

> ¶86 The difficulty with this submission is that it presumes that SRL is entitled to damages equal to the maximum realizable value of the lands. If equitable compensation is awarded, SRL would be entitled to damages based on a fair market value for the lands on the date of trial, discounted by

[60] *Tracy* v. *Instaloans Financial Solutions Centres (BC) Ltd*., 2010 BCCA 357 at ¶35. See also *Zhong Tie Enterprises Inc.* v. *Topcorp Development Inc.,* 2024 BCSC 224 at ¶273-274.

[61] RAB at page 168-172.

[62] RAB at page 165-166, Affidavit #3 of Cecil Cheveldave at ¶12.

> applying negative contingencies. In other words, a monetary award would be less than the "as is" realizable value of the property.

97. As illustrated in the above quote, the trial judge failed to appreciate that the governing law required him to wrest from the faithless fiduciary the property wrongfully obtained (i.e. the maximum realizable value). Normally, in quantifying that award (if an *in rem* remedy was not available), the plaintiff would have been entitled to the benefit of the most-favourable use presumption.[63] In this case, that would have required the trial judge to assume that the lands in fact had legal access. However, the trial judge erred in not considering how the lack of a proprietary remedy would prevent the plaintiff receiver from realizing the full value of the lands in issue. He ordered that an appraisal of the lands be obtained to determine the value as of September 2022 and did not direct the appraiser to assume legal access had been established.[64]

98. In summary, there were a number of legitimate reasons to grant a constructive trust in the circumstances to: (1) fully deter fiduciaries from breaching fiduciary obligations; (2) to ensure the property gained from the breach was fully and exactly wrested from the faithless fiduciary; (3) to avoid the difficulty of enforcing and/or collecting a money judgment; and (4) to avoid the foreseeable difficulties in valuing the breach and then having the lands sold under the *COEA* to funds those damages.

99. The foregoing addressed the errors in the assessment of the third *Soulos* factor. The judge also erred in his approach the fourth *Solous* factor. The fourth factor was expressed by the Supreme Court of Canada as follows:

> (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**. **[emphasis added]**

100. This last factor was aimed primarily at having the courts give due consideration to the implications of granting a property interest. Although framed broadly, both

[63] *Southwind* v. *Canada*, 2021 SCC 28 at ¶78-83.

[64] AR at page 98 and 100, RRFJ at ¶109-110 and ¶121.

commentators[65] and the courts[66] have considered this factor as being directed at Justice McLachlin's example – namely, whether intervening creditors would be prejudiced. The Receiver is not aware of any cases, other than the decision below, that considered the interests of someone other than affected creditors under this part of the test. The trial judge, however, considered this factor in regard to the faithless fiduciary and his family.

101. While it is appropriate to consider the potential impact of a constructive trust on third party creditors not before the Court, it is submitted that this factor was not intended to simply re-open the court's discretion to apply its own subjective assessment of fairness.

102. Here, there were no intervening creditors who would be prejudiced. The judge erred by giving weight to irrelevant considerations resulting is his assessment that a constructive trust would be unjust. The trial judge addressed these considerations in the RRFJ as follows:

> ¶90 When I issued the Reasons, I was concerned that a constructive trust would have an unjust effect on Joe's children. Joe testified that he settled a trust in November 2017 that gave beneficial ownership of the Grazing Lands to his children Danny and Julia. However, it is now clear that Joe never alienated legal title to the Grazing Lands. Accordingly, he never created a valid trust and he did not give a beneficial interest to his children.
>
> ¶91 Nonetheless, I remain concerned that a constructive trust would be unfair to Joe and his family because it would not be a proportionate remedy. A constructive trust would not be responsive to the facts of this case. It would ignore the contingencies that remained before SRL could purchase the property. It would be disproportionate to Joe's breach of fiduciary duty

[65] Donovan Waters, Mark Gillen and Lionel Smith, *Waters' Law of Trusts in Canada,* 4th ed. (Toronto: Thompson Reuters Canada Limited, 2012) at page 497.

[66] *Soulos* at ¶51; *306440 Ontario Ltd*. v. *782127 Ontario Ltd*. 2014 ONCA 548 at ¶15 and ¶32; *Grant* v. *Ste. Marie (Estate of)*, 2005 ABQB 35 at ¶17; *Hillsboro Ventures Inc.* v. *Ceana Development Sunridge Inc*., 2024 ABKB 658 at ¶161-170; *Brookfield Bridge Lending Fund Inc*. v. *Vanquish Oil & Gas Corporation*, 2008 ABQB 444 at ¶55; *Bank of Montreal* v. *1870769 Ontario Inc*., 2022 ONSC 5100 at ¶115-139; *Kingsett Mortgage Corp et al* v. *Stateview Homes et al*., 2023 ONSC 2636 at ¶70-72.

> and SRL's interest in the property. For these reasons, the imposition of a constructive trust would be unjust.[67]

103. The judge felt that the constructive trust was disproportionate because of four factors. First, he gave weight to the fact that Joe would have inherited a half interest in the lands when his father passed away.[68] Second, he suggested that by purporting to lease the lands to the Company, that maintained the *status quo*.[69] Third, he felt the purchase was not a "sure thing" and that the Company might have ceased operating.[70] And fourth, he put undue weight on the *motive* to acquire the property (to keep the ranch together and to be used to graze cattle) rather than focusing on what the corporate opportunity itself was – which was simply to purchase the lands.[71] These irrelevant factors led the judge to conclude that a constructive trust would be unfair to the faithless fiduciary and to his children.

104. **The Will.** The fact that Joe was a beneficiary under Palmer's will is irrelevant. Under the will, Joe would have received a half interest in the property. That would not have altered his duty to the Company to facilitate its acquisition of the Grazing Lands. Had he become a part owner pursuant to the will, his duty would simply have expanded to include the obligation to agree to the sale – at the price all parties acknowledged was provident - in his dual capacity as director of the purchaser and as vendor. Further, had the Company acquired the lands as intended, Joe was a 50% shareholder and half of its value would again accrue to him. He stood to acquire the same notional interest in the property whether it passed to him under the will or whether the Company completed the purchase. The only scenario under which he could attain a higher interest was the present instance when he breached his fiduciary duties and acquired a 100% interest in the Grazing Lands.

[67] AR at page 94, RRFJ.

[68] AR at page 69 and 81, LRFJ at ¶137(a) and RRFJ at ¶33(d).

[69] AR at page 69 and 81, LRFJ at ¶137(b) and RRFJ at ¶33(e).

[70] AR at page 81-82, RRFJ at ¶33(c) and ¶33(f).

[71] AR at page 69 and 81, LRFJ at ¶137(a) and RRFJ at ¶33(b).

105. **The Unauthorized Lease and the *Status Quo*.** These one-page leases secretly signed by Joe on behalf of the Company and without the Receiver's knowledge or authorization are further evidence of his duplicitous and self-interested conduct. Joe never communicated those one-page lease documents he prepared and signed (using different signatures for the two parties) without authority to anyone.[72] The leases were prepared for the sole purpose of deceiving the tax authorities and thus for his own personal benefit by reducing his tax payable. It is not a mitigating factor. To the contrary, it is merely part of Joe's ongoing deceitful behavior. His acquisition of the Grazing Lands significantly changed the *status quo*, rather than maintained them. Mike and Joe each held a half interest in the Company. Neither had any control or veto right. Placing a significant asset required by the Company into the hands of a single shareholder thereby fundamentally changed that balance of power, thereby disturbing the *status quo*. The *status quo* was, in fact, an intention to acquire the Grazing Lands, for the benefit of the Company, not one of its directors. Joe's duty was to facilitate that objective, not subvert it for his own benefit.

106. **Not a Sure Thing.** The error in requiring the plaintiff to establish but-for causation is addressed earlier at paragraphs 81 to 85.

107. **To Acquire for Grazing Not Resale.** The opportunity, as noted earlier at paragraphs 43-46, was to purchase the lands. The motivation for the purchase is irrelevant. With respect, it is important to not confuse or conflate the motivation for pursuing the lands with the corporate opportunity itself (which was to acquire the lands). The corporate opportunity was to acquire them and with that came all the incidents of ownership, including the right to later sell the lands.

[72] AR at page 52, RRFJ at ¶65. Transcript (Cross Examination of Joe) at page 212-214 regarding his use of two different signatures on the leases that he signed without the Receiver's authority. Leases in RAB at pages 109-112. Lack of Authority, RAB at page 163, Affidavit #2 of Cecil Cheveldave at ¶21.

108. The factors that led the trial judge to conclude that a constructive trust would be "disproportionately punitive"[73] were not appropriate or relevant considerations. There is no "justified" breach of fiduciary duty. There is no right to partial compensation where the but-for causation cannot be established (or is in doubt). A faithless fiduciary's breach is not excused where he has dependents. The object of selecting a remedy is to wrest from the faithless fiduciary whatever property he acquired in breach of his duty. It does not require proof of *mala fides* or but-for causation. Liability is strict.

109. The concerns that Justice McLachlin mandated be considered when she directed judges to consider if there were any factors that would render the imposition of a constructive unjust was not meant to simply re-open a discretion to the trial judge's own subjective sense of fairness. It was constrained to considering whether any third parties (particularly intervening creditors) would be adversely affected by the proprietary nature of the relief (as opposed to an *in personam* award). There were no such creditors that would be adversely affected here. The analysis of that consideration to the facts here should not have gone beyond that and the trial judge should have found that the fourth prerequisite from *Soulos* was satisfied on the evidence – there were not factors that would render the granting of a constructive trust unjust in the circumstances.

Erred By Disregarding The Plaintiff's Right To Require The Actual Property Be Disgorged

110. It is noteworthy that the leading case on equitable compensation involved a situation where an *in specie* remedy was not possible because the lands had been flooded and could not be returned.[74] In those circumstances, the plaintiff sought, and the Supreme Court of Canada granted, equitable compensation. However the Court noted that where an *in specie* remedy is available, that will often be the most appropriate:

> ¶68 When the Crown breaches its fiduciary duty, the remedy will seek to restore the plaintiff to the position the plaintiff would have been in had the Crown not breached its duty (*Guerin*, at p. 360, citing *Re Dawson*; *Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1)

[73] AR at page 89, RRFJ at ¶64.

[74] *Southwind* v. *Canada*, 2021 SCC 28.

> (N.S.W.) 399 (S.C.); *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 440) **When it is possible to restore the plaintiff's assets *in specie*, accounting for profits and constructive trust are often appropriate** (see *Guerin*, at pp. 360-61; *Hodgkinson*, at pp. 452-53). When, however, restoring the plaintiff's assets *in specie* is not available, equitable compensation is the preferred remedy (*Canson*, at p. 547). The LSFN seeks equitable compensation in this case because what it lost — its land — cannot be returned. It is therefore unnecessary to consider gains-based remedies.[75] **[emphasis added]**

111. As explained by this Court, historically compensation in equity could only be granted where an *in specie* remedy was no longer available:

> ¶36 I again have an uncomfortable feeling that whatever error has occurred may well have originated in the approach to damages that was taken by the parties in the court below. Historically, in equity, there was no jurisdiction to award damages. Depending on the nature of the equitable claim, the recognized remedies include injunctions, rescission or restitution, declarations of constructive trust for breaches of fiduciary duty and compensation where an in specie remedy was no longer available.[76]

112. The trial judge could have ordered Joe to sell the Grazing Lands and to account for the net proceeds realized to the Company. The beneficiary, however, can quite understandably not want the sale controlled by the faithless fiduciary. For this reason, the court can order a constructive trust and an *in specie* award to avoid the problem of forcing the beneficiary to rely on the realization efforts of the faithless fiduciary.

113. The right of the plaintiff to require the faithless fiduciary to deliver up the actual property or benefit obtained was confirmed by the Supreme Court of Canada in *Zwicker* v. *Stanbury*, [1953] 2 SCR 438 where the Court wrote:

> ¶7 The law is clearly laid down by Viscount Sankey in *Regal (Hastings) v. Gulliver*[3], as follows: —
>
> > The respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature

[75] *Ibid.*

[76] *Baillie* v. *Charman* (1992), 70 BCLR (2d) 193 (CA) at ¶36.

> to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds *any property* so acquired as trustee, he is bound to account for *it* to his *cestui que trust*.
>
> ¶8 With respect, the learned trial judge and the full court have failed to appreciate the effect of the above, holding as they do, that the respondents are not liable to account for the property itself, i.e., the shares, but only for any profit which they have made or may make out of the shares. Such a view is quite erroneous. In *Pearson's case*,[4], the Master of the Rolls, Sir George Jessel, had held with respect to a person in the position of the individual respondents, that he is liable
>
> > at the option of the *cestuis (sic) que trust*, to account either for the value at the time of the present he was receiving, or to account for *the thing itself* and its proceeds if it had increased in the value.
>
> …
>
> ¶10 Had the property which the respondents received been of a nature other than shares of the respondent company there would have been no difficulty in directing the individual respondents to transfer such property to the company, or at the option of the company, to pay to the company its value. In none of the cases above referred to did any question other than the value of the shares arise.

114. As noted by the Supreme Court of Canada, the plaintiff is entitled to elect whether the defendant has to deliver up the property itself (i.e. the shares) rather than just account for any profit the defendant might make from the shares.

115. This is consistent with the principle that a plaintiff may choose the remedy most advantageous to him or her.[77] Where it is more advantageous to require the actual property obtained in breach of the fiduciary duty be restored, then the constructive trust may be used to achieve that and it is appropriate for the plaintiff to so require.

116. Along the same vein, if the defendant's gain is bigger than the plaintiff's loss, then the plaintiff is entitled to have the defendant's gain stripped from him.[78] If the negative

[77] *Canson Enterprises Ltd.* v. *Boughton & Co*, [1991] 3 SCR 534 at ¶27.

[78] *Moore International (Canada) Inc*. v. *Carter* (1984), 56 BCLR 207 (CA) at ¶23.

contingencies reduced the valued of the equitable compensation such that it was less than the value of the land themselves (as by definition they would be), then that required the court to instead strip the defendant of the gain and, at the plaintiff's election, require the actual property acquired in breach of duty to be delivered up.

117. The trial judge erred by giving insufficient weight to the plaintiff's preference for a proprietary remedy and insufficient weight to its *bona fide* reasons for that preference.

Errors Made In The Remedy Granted

118. In addition (and in the alternative), the trial judge erred in the remedy granted and in particular how the quantum of equitable compensation was calculated. The trial judge erred:

a. by failing to have the appraiser assume the lands had legal access when valuing the damages, and

b. by reducing the quantum of damages for negative contingencies.

119. In calculating damages in equity, the court is to assume the plaintiff would have made the most favourable use of the lands.[79] In the circumstances of this case, the appraiser should have been instructed to assume legal access will be obtained prior to sale and the appraisal and judgment amount should reflect that use and value. As noted, that is expected to potentially double the value of the lands.[80]

120. In deciding whether to value damages based on the plaintiff's loss or the defendant's gain, in equity the court is to select the measure of damages that is larger.[81] If the negative contingencies made the calculation of the plaintiff's loss smaller than the defendant's gain, then as matter of law the court ought to have instead awarded a remedy

[79] *Southwind v. Canada*, 2021 SCC 28 at ¶83. Leonard Rotman, *Fiduciary Law* (Toronto: Thompson Canada Limited, 2005) at page 734.

[80] RAB at page 165-166, Affidavit #3 of Cecil Cheveldave at ¶12.

[81] *Moore International (Canada) Inc*. v. *Carter* (1984), 56 BCLR 207 (CA) at ¶23.

based on the fiduciary's gain, which must be stripped from the faithless fiduciary. Further, the trial judge erred further in discounting for contingencies that he found would not have arisen on a balance of probabilities.

PART 4 - NATURE OF ORDER SOUGHT

121. The Respondent Receiver seeks:

a. a declaration that Joe holds the Grazing Lands as constructive trustee for the Company;

b. an order that title to the lands vest in the Company, on such terms and conditions as the Court deems appropriate. In the alternative, an order that Joe account to the Company for all benefits received arising from his breach of fiduciary duty;

c. in the further alternative, an order that the equitable compensation granted be assessed at 100% of the fair market value of the Grazing Lands at the date of trial, less the price paid for the lands by Joe and any property taxes or other expenses incurred to maintain the property up to the date of trial;

d. an order that Joe pay special costs to the Company.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 3, 2025

Scott R. Andersen
Counsel for C. Cheveldave &
Associates Ltd., Court Appointed
Receiver of Sather Ranch Ltd.

APPENDIX A: LIST OF AUTHORITIES

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22.	*Martin* v. *ALPC Housing Solutions Inc*., 2020 NSCA 35	18
23.	*Moore International (Canada) Inc*. v. *Carter* (1984), 56 BCLR 207 (CA)	15, 46, 47
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30.	*Sateri (Shanghai) Management Limited* v. *Vinall,* 2017 BCSC 491	13
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36.	*Zhong Tie Enterprises Inc.* v. *Topcorp Development Inc.,* 2024 BCSC 224	38, 39
37.	*Zwicker* v. *Stanbury*, [1953] 2 SCR 438	45

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35.	Donovan Waters, Mark Gillen and Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thompson Reuters Canada Limited, 2012) at page 526-527	31, 41
36.	Leonard Rotman, *Fiduciary Law* (Toronto: Thompson Canada Limited, 2005) at pages 686-687; and 734	29, 30, 47

APPENDIX B: ENACTMENTS

Supreme Court Civil Rules, Rule 22-2(2)

Form and content of affidavit

(2) An affidavit

(a) must be expressed in the first person and show the name, address and occupation of the person swearing or affirming the affidavit,

(b) if the person swearing or affirming the affidavit is a party or the lawyer, agent, director, officer or employee of a party, must state that fact,

(c) must be divided into paragraphs numbered consecutively, and

(d) may be in Form 109.

Court Order Enforcement Act [RSBC 1996] CHAPTER 78, Sections 88 to 106

Application to register judgment

88 (1)After October 30, 1979, a judgment creditor may apply under the *Land Title Act* to register, against the title to specified land, a judgment or a renewal of the registration of a judgment, in the same manner as a charge is registered by delivering to the registrar a certificate of judgment or, if permitted by an enactment, a copy of an order, which is included in the words "certificate of judgment".

(2) In subsection (1), **"judgment creditor"** includes, in a proper case, the clerk of the Provincial Court acting on behalf of the judgment creditor.

(3) A certificate of judgment must be

(a) sealed with the seal of the court in which the judgment was entered or recovered, and

(b) signed by the registrar of the court.

(4) A judgment entered or obtained in the Provincial Court is sufficient for registration purposes if it is certified to be a true copy by the clerk or judge of that court.

(5) A photocopy, satisfactory to the registrar, of a certificate of judgment registered under this section, may be received by the registrar in support of an application under the *Land Title Act* to register

(a) the judgment against other specified land, or

(b) a renewal of a judgment,

in the same manner and with the same effect as if the original certificate were produced.

Notice to owner

89 (1)In this section, **"owner"** includes a person alleged by the judgment creditor to be a judgment debtor and to have acquired from or through a registered owner, by transfer, transmission or otherwise, an estate or interest in the land in question.

(2) The registrar, on completion of a registration under section 88 must, by registered mail, send to the owner against whose title the judgment has been registered a notice in the prescribed form, together with a copy of the certificate of judgment.

(3) Except as provided in section 91 (4), subsection (2) does not apply to a renewal of a judgment.

(4) If no reply is received from the owner as provided in the notice, no further act by the registrar is required in respect of the notice.

(5) If the owner alleges that he or she is not the judgment debtor referred to in the certificate of judgment, the registrar must make further inquiry or investigation the registrar considers necessary or advisable and, for that purpose, the registrar may

(a) take evidence under oath or otherwise,

(b) require the production of records, and

(c) decide whether or not the owner is, in fact, the judgment debtor and whether the judgment does or does not affect the land described.

(6) If the registrar is satisfied from the evidence taken under subsection (5) that the owner is not the same person as the judgment debtor, the registrar must make an order accordingly.

(7) The registrar must at once deliver or mail by registered mail to the owner and the judgment creditor a copy of the order.

(8) If the judgment creditor does not, within 21 days after the order is delivered or mailed, proceed under subsection (10), the registrar must cancel the registration of the judgment; but if the judgment creditor or his

or her solicitor approves of the order, the registrar may cancel the registration at once.

(9) If the registrar decides that the owner is the judgment debtor, the registrar must make an order accordingly and promptly deliver or mail by registered mail a copy of the order to both the judgment creditor and the owner.

(10) If the judgment creditor does not approve of an order made under subsection (6) or an owner does not approve of an order made under subsection (9), he or she may, within 21 days after the registrar's order is delivered or mailed to him or her, make an application in the nature of an appeal to the Supreme Court, and section 309 of the *Land Title Act* applies in respect of the application.

(11) If the registrar cancels the judgment under subsection (8), the judgment creditor must at once pay the owner $25 as compensation for expenses incurred as a result of the registration of the certificate of judgment.

(12) The compensation payable under subsection (11) constitutes a debt recoverable in the Provincial Court.

(13) If a notice under subsection (2) is mailed to the person referred to in subsection (1) a copy must also be mailed to the registered owner.

(14) This section does not apply in respect of a judgment registered on an application made under section 87.

Additional compensation

90 (1) Even though payment has been made under section 89 (11), if the registrar has cancelled the registration of a judgment under section 89 and the owner against whose land the judgment was registered has sustained damage or incurred costs or expenses, by reason of the judgment creditor without reasonable cause having registered the judgment, the owner may apply to a court for compensation.

(2) The court may award a sum it considers just, taking into account the amount paid or to be paid under section 89 (11).

(3) The court may take into consideration evidence that all proper and necessary steps were not taken by the judgment creditor to ensure that the judgment debtor was the same person as the registered owner whose name is similar.

(4) A registered owner may make a claim for compensation under this section against a judgment creditor by reason of his or her having registered a judgment against a person alleged to be a judgment debtor and to have acquired from or through a registered owner, by transfer, transmission or otherwise, an estate or interest in the land in question.

Expiration and renewal

91 (1) Except for a nonexpiring judgment, registration of a judgment ceases, at the expiration of 2 years after the date of the application for registration or the date of the last application to renew registration, to form a lien and charge on the land affected by the registration unless, before the expiration of the 2 years, application is made to renew the registration of the judgment.

(2) The registration of a judgment may be renewed at any time before the end of 2 years after the registration or last renewal of registration of the judgment.

(3) An application for the renewal of a judgment must comply with the requirements of the *Land Title Act*.

(4) On receiving an application for the renewal of a judgment, the registrar must comply with section 89 if notice in the prescribed form has not been previously sent in respect of the same judgment and the same land.

(5) If a renewal of registration is effected under this section and an endorsement is made in the register, and there is a subsisting entry of the judgment in the register of judgments, the entry is deemed to be cancelled as to the interest of the judgment debtor in the land described in the register.

(6) Section 86 (5) applies to renewals registered under this section.

Procedure for enforcing charge

92 (1)If a judgment creditor has registered a judgment under this Act, and alleges that the judgment debtor is entitled to or has an interest in any land, or that any land is held subject to the lien created by registration of judgment under section 82, a motion may be made in Supreme Court Chambers, by the judgment creditor calling on the judgment debtor, and on any trustee or other person having the legal

estate in the land in question, to show cause why any land in the land title district in which the judgment is registered, or the interest in it of the judgment debtor, or a competent part of the land, should not be sold to realize the amount payable under the judgment.

(2) If the judgment debtor is dead, the motion to show cause must call on those to whom the interest of the deceased in the land in question has passed, and on any trustee or other person having the legal estate in it.

(3) Any notice of application or order made on it under this section may, in any case where in the opinion of the court personal service cannot be reasonably effected, be served in a manner the court directs, and the court may in any case allow service of the notice of application or order to be made out of the jurisdiction.

Determination of disputed questions

93 On an application under section 92, the proceedings must be had, either in a summary way or by the trial of an issue, or by inquiry before an officer of the court, as the court thinks necessary or convenient, for the purpose of ascertaining the truth of the matters in question, and whether the land, or the interest in it of the judgment debtor, is liable for the satisfaction of the judgment.

Reference to ascertain land and settle priorities

94 (1)If an order is made on an application under section 92, there must be included in the order a reference to a district registrar of the Supreme Court

(a) to find what land is liable to be sold under the judgment,

(b) to find what is the interest of the judgment debtor in the land and of his or her title to it,

(c) to find what judgments form a lien and charge against the land and the priorities between the judgments,

(d) to determine how the proceeds of the sale are to be distributed, and

(e) to report all the findings to the court.

(2) The district registrar must deal with all judgments registered against the land whether registered before or after the judgment on which the proceedings are taken.

(3) Unless good reason is found to the contrary, the creditor first taking proceedings is entitled to his or her costs in priority to all claims under the judgment whether before or after his or her own.

(4) The district registrar must serve all persons affected by his or her inquiries.

(5) The report, when made, 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.

Registrar may retain sufficient sum to satisfy claim under *Creditor Assistance Act*

95 If a person has a contested claim pending under the *Creditor Assistance Act*, he or she may give notice of it to any district registrar to whom a reference has been made under section 94, and the district registrar must provide in his or her report for the retention of a sufficient sum to give that person the share of the proceeds to which he or she would be entitled if that person had a judgment for the amount he or she claims, and the sum must be retained until the contestation of the claim is disposed of under the *Creditor Assistance Act*.

Order for sale of land

96 (1)If in a summary way or on the trial of an issue, or as the result of inquiries under sections 92 to 95, or otherwise, any land or the interest of any judgment debtor in it is found liable to be sold, an order must be made by the court declaring what land or what interest in it is liable to be sold, and directing the sale of it by the sheriff.

(2) Despite subsection (1), if a premises situated on the land or interest in it of a judgment debtor is the home of the debtor, the court may defer the sale, subject to the performance by the judgment debtor of terms and conditions of payment or otherwise as the court imposes.

(3) If in any case substituted service has been ordered by the court on the judgment debtor of the notice of civil claim or notice of family claim, as the case may be, or other process in the proceeding in which the judgment is obtained, the land ordered to be sold must not be sold by the sheriff until it has been advertised as provided in section 97 for 6 months after the order for sale.

(4) Despite subsection (3), on application by the judgment creditor to the Supreme Court, the court may shorten the period of 6 months referred to in that subsection, or make any other order in that behalf it thinks fit.

Court may direct notification of claimants not before court

97 (1)If, on an application for an order for the sale of land, it appears to the court, on affidavit setting out the fact, that there may be persons interested in the land to be sold whose names are unknown to the judgment creditor, the court may, if it thinks fit, direct advertisements to be published at times and in a manner the court thinks fit, calling on all persons claiming to be interested in the land to come in and establish their respective claims to it in chambers in a time to be limited by the court.

(2) After the expiration of the time limited, all persons who have not come in and established their claims, whether they are in or out of the jurisdiction of the court, including persons under disability, are absolutely debarred from all right, title and interest in and to the land.

Pending litigation

98 A notice of application for an order under section 92 may contain a description of the land in question, and on filing it with the proper officer, signed by the solicitor of the applicant, a certificate of pending litigation may be issued for registration, and if the application is refused in whole or in part, a certificate of the order may be issued for registration.

Costs in discretion of court

99 The costs of and incident to all the proceedings authorized by sections 92 to 98 are in the discretion of the court.

Time of sale of land

100 The sheriff must not offer the land for sale within a period less than one month from the day on which the order for the sale of it is delivered to the sheriff.

Notice of sale

101 (1)Before land is offered for sale under any order, the sheriff must advertise in the Gazette, specifying the following:

(a) the particular property to be sold;

(b) the name or names, if more than one, of the plaintiffs and defendants in every proceeding;

(c) the charges, if any, appearing on the register against the land;

(d) the date of the registration of encumbrances or charges;

(e) the time and place of the intended sale;

(f) the amount of the judgment.

(2) For 7 days next preceding the sale, unless otherwise ordered by the court, the sheriff must similarly advertise in a newspaper of general circulation published or circulating in the county in which the land is located, and must, before or immediately after the first publication of the advertisement, post in his or her own office a printed or written copy of the notice of sale, in a suitable frame to be provided by the sheriff for the purpose.

(3) The court in which the order for sale is made may dispense with any of the requirements of this section, except as to advertising in the Gazette, or may modify or make other provisions as to advertising.

Form of notice of sale

102 Notices of sale must be printed or written in a legible manner, and may be in Form A of Schedule 3, or to a similar effect.

Purchase of land by plaintiff or mortgagee

103 (1)A plaintiff, or any mortgagee of the land offered for sale, is at liberty to purchase at any sale by the sheriff, and acquires the same estate, interest and rights as any other purchaser.

(2) If a mortgagee becomes the purchaser of land sold for his or her mortgage debt, or any part of it, the mortgagee must give the mortgagor a release of the debt, or of a proportionate part of it, the proportion to be ascertained and certified, in Form B of Schedule 3, by the sheriff.

(3) If the land purchased by the mortgagee is subject to a mortgage or other pecuniary charge, other than his or her mortgage, that has priority over the execution under which the land has been sold, or if any other person becomes the purchaser at the sale of land on which there is a mortgage or other pecuniary charge that has priority over the execution, if

the person entitled to the encumbrance enforces payment of the amount of it, or any part of it, or any interest or costs, then the purchaser must repay to the mortgagor or other person who has been enforced to make any payment the amount paid, or a proportionate part of it, ascertained or to be ascertained under subsection (2).

(4) In default of repayment by the purchaser under subsection (3) within one month after demand, the person who has made the payment, the person's executors or administrators, may recover from the purchaser the amount paid, with interest, in a proceeding for money had and received; and until the money has been repaid with interest the person or his or her executors or administrators have a charge for it on the land purchased.

No sale on day of sale

104 If, at the time set for the sale under an order, no bidders appear, or if in the opinion of the sheriff the biddings are not sufficient to justify a sale, the sheriff may adjourn the sale.

Conveyance of land sold

105 (1)On a sale of land under this Part, the sheriff must execute to the purchaser a conveyance, under the sheriff's signature and seal, of the land sold, in Form C of Schedule 3, or to similar effect, and must in the conveyance fully, distinctly and sufficiently describe the land and interest in it that has been sold.

(2) The conveyance referred to in subsection (1), when delivered to the purchaser, and registered in the land title office for the land title district in which the land is located, vests in the purchaser, according to the nature of the property sold, all the legal and equitable estate and interest of the execution debtor in it at the time of the registration against the land of the first judgment, as well as at the time of the sale, or at any intermediate time, discharged from the first judgment and from all judgments and other charges against the execution debtor and his or her land, subsequent to the first judgment.

(3) Despite subsection (1) and (2), if the execution debtor's interest in the land sold under this Part is that of a mortgagee or a vendor under an agreement to sell the land, the conveyance executed by the sheriff under subsection (1) vests in the purchaser no right to payment of any money

paid by or on behalf of the mortgagor or the purchaser under the agreement to sell the land, as the case may be, prior to receipt of notice of the judgment by the mortgagor or the purchaser, or his or her personal representative.

(4) Notice of a judgment is sufficient for subsection (3) if it sets out

(a) the style of proceeding of the proceeding in which the judgment was obtained,

(b) the amount of the judgment,

(c) the date of pronouncement of the judgment,

(d) the date of entry, if any, of the judgment,

(e) the name of the judgment creditor, and

(f) the date of the notice.

Proceeds of sale to registrar of Supreme Court

106 In case of a sale under an order for sale of land, all money made on the sale must, immediately after the making of it, and after deducting the sheriff's fees and incidental expenses, be delivered to the registrar of the court where the order for sale was made, or out of which the writ was issued, with a statement of the land sold and the money made on the sale.