



COURT OF APPEAL FILE NO. CA49175
Joseph Wayne Palmer Sather v. Sather Ranch Ltd.
Memorandum of Argument of the Respondent/Appellant by Cross Appeal

COURT OF APPEAL

ON APPEAL FROM the orders of the Honourable Justice Elwood of the Supreme Court of British Columbia pronounced on the 1st day of June 2023 and the 11th day of April 2024

BETWEEN:

Joseph Wayne Palmer Sather

Appellant
Respondent by Cross Appeal
(Defendant)

AND:

Sather Ranch Ltd.

Respondent
Appellant by Cross Appeal
(Plaintiff)

**MEMORANDUM OF ARGUMENT ON AN APPLICATION
TO ADDUCE FRESH EVIDENCE**

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PART 1: FACTS

A. Overview

1. In its cross appeal, C. Cheveldave & Associates Ltd., as court-appointed receiver (the **Receiver**) of Sather Ranch Ltd. (the **Company**), challenges the trial judge's approach to remedy. The Receiver's position is that the judge erred in both declining to order a constructive trust remedy and his calculation of equitable damages.
2. On the latter point, the Receiver submits that the judge improperly reduced the quantum of damages for negative contingencies, including uncertainty as to whether the Company could have completed the purchase the subject property (the **Grazing Lands**). The non-defaulting director had sworn evidence that the Company had arranged the necessary financing. There was also evidence that Mr. Sather hoped to have the vendor agree to take-back financing. At the remedy hearing, Mr. Sather invited the Court to discount the damages over uncertainty as to whether the Company would have in fact been able to finance the purchase. The trial judge agreed to do so finding that "there was no evidence confirming the commitment to provide the necessary funds or the terms of the anticipated financing."¹
3. On this issue, the Receiver seeks leave pursuant to Rule 59 to adduce evidence that was not before the court below; namely, the Affidavit #2 of Cindy Curran, made May 22, 2025 (the "**Curran Affidavit**"). The Curran Affidavit attaches:
 - (a) the first three pages of an appraisal of the Grazing Lands dated February 4, 2025 (the "**Appraisal**"), which was obtained by the parties in accordance with para. 122 of the judge's reasons for judgment on remedy;²
 - (b) an affidavit sworn by the appellant Mr. Sather on March 28, 2025 (the "**Sather Affidavit**") attaching, among other things, a promissory note dated August 24, 2017 being the manner in which Mr. Sather "paid" the purchase price for the Grazing Lands; and

¹ [Sather Ranch Ltd. v. Sather](#), 2024 BCSC 5598 (**RRFJ**) at para. 106.

² [RRFJ](#) at para. 122.

- (c) a consent order in the underlying action filed May 13, 2025, confirming the calculation of the judgment amount ordered by the trial judge.
4. Admission of the Curran Affidavit will assist the Court in deciding the cross appeal in several ways:
- (a) it will benefit the Court to have the quantification of the damages in evidence, now that the Appraisal has been obtained and the order finalized;
 - (b) Mr. Sather's promissory note directly addresses the issue of negative contingencies: as the vendor accepted a promissory note from Mr. Sather, there can be little (if any) doubt that the vendor would have agreed to take-back financing for the Company's purchase (as was Mr. Sather's original plan³); and
 - (c) the new evidence also contradicts other evidence that Mr. Sather has put before this Court regarding his financial position.⁴
5. Allowing this evidence will provide the division hearing this appeal and cross appeal with a complete picture of the financial circumstances underlying this proceeding. Given that this evidence was only recently made available, the Receiver also seeks an order abridging the time required to bring this application, pursuant to Rule 57.

PART 2: ISSUES

6. Should the Receiver be granted leave to adduce the Curran Affidavit?

³ Respondent's Appeal Book, page 52 – Email from Joe Sather dated March 5, 2017.

⁴ See Affidavit #1 of Joseph Wayne Palmer Sather, made December 1, 2023, para. 20: "My sister and I received about \$150,000 each from the estate. I used my share to pay for the [Grazing Lands] and any funds leftover went toward expenses and debts" (emphasis added).

PART 3: ANALYSIS

A. Test to admit fresh evidence

7. The test governing the admission of new evidence is set out in *R v. Palmer*,⁵ and includes the following criteria:
 - (a) the evidence could not, by the exercise of due diligence, have been obtained for the trial;
 - (b) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
 - (c) the evidence is credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence is such that, if believed, it could have affected the result at trial.⁶
 8. The *Palmer* test is purposive, fact-specific, and driven by an overarching concern for the interests of justice. It ensures that the admission of additional evidence on appeal will serve to “narrow rather than expand as [a] case proceeds up the appellate ladder”.⁷
- #### **B. Admission of the Curran Affidavit does not raise concerns of finality and order**
9. The first criterion from *Palmer* requires litigants to take all reasonable steps to present their best case at an initial hearing. This ensures finality and order in the judicial process.⁸ However, even where the due diligence aspect of the *Palmer* test is not met, the Court retains discretion to allow fresh evidence in any event.⁹
 10. In respect of the Curran Affidavit, there can be no complaints about the Receiver’s due diligence (or lack thereof) in putting this evidence forward. The appraisal and consent order both follow and post-date the underlying orders.

⁵ [\[1980\] 1 S.C.R. 759](#).

⁶ [Barendregt v. Grebliunas](#), 2022 SCC 22 (**Barendregt**) at paras. 29, 34.

⁷ [Barendregt](#) at para. 31, citing [Public School Boards’ Assn. of Alberta v. Alberta \(Attorney General\)](#), 2000 SCC 2 at para. 10.

⁸ [Barendregt](#) at para. 36.

⁹ [Ascent Developments Corp. v. Stonehenge Projects Inc.](#), 2016 BCCA 287 at para. 65.

11. It is unfortunate that Mr. Sather's August 24, 2017 promissory note—which is material to issues before the judge and now this Court on appeal—was only disclosed by Mr. Sather on March 28, 2025 in relation to the quantification of the judgment. It ought to have been disclosed in discovery. Had disclosure been made, it would have been before the trial judge. To the extent there has been delay in procuring this evidence, that delay is solely at the hands of Mr. Sather.

C. The Curran Affidavit is relevant to decisive issues on appeal

12. There can be no dispute that the Curran Affidavit is relevant to the cross appeal. The appraisal and consent order simply quantify the damages ordered by the judge. This information will benefit the Court in deciding the Receiver's cross appeal on remedy.
13. As set out above, the promissory note directly addresses the judge's reduction of the Receiver's damages based on uncertainty as to whether vendor take-back financing would have been acceptable had the Company purchased the Grazing Lands. This issue was argued in the court below, but on an evidentiary record that did not include Mr. Sather's promissory note. The Receiver will argue that the existence of the promissory note, and in particular the vendor's acceptance of that note in payment of the purchase price, dispels any doubt as to the viability of vendor take-back financing and thus of the Company's ability to complete the subject purchase.

D. No issues of credibility

14. The third *Palmer* criterion asks whether the new evidence is “credible in the sense that it is reasonably capable of belief”.¹⁰ Evidence that is based on hearsay or unidentified sources will not meet this threshold.¹¹
15. The Curran Affidavit was made by a legal assistant for the Receiver's counsel. There should be no objection as to its credibility, as the affidavit merely appends documents known to and possessed by both parties (including evidence from Mr. Sather filed in the below court).

¹⁰ [Barendregt](#) at para. 29.

¹¹ [Port Alice Specialty Cellulose Inc. \(Bankruptcy\) v. ConocoPhillips Co.](#), 2005 BCCA 299 at para. 23.

16. Although the Sather Affidavit may give rise to questions of Mr. Sather's credibility—as his disclosure of the promissory note contradicts his earlier evidence that he used estate funds to pay for the Grazing Lands—that internal inconsistency is not a ground on which to refuse the Curran Affidavit. It would be self-serving for Mr. Sather to object to the inclusion of his own sworn evidence on the basis that it gives rise to credibility concerns.

E. The Curran Affidavit could have affected the decision below

17. On its cross appeal, the Receiver will submit that an earlier disclosure of the promissory note by Mr. Sather would have affected the judge's order on remedy. The judge's perception that there was insufficient evidence that the vendor would have agreed to take-back financing contributed to a material (33%) reduction of the Receiver's damages. Had the promissory note been in evidence at that time, it is more than plausible that the judge would have arrived at a different result.
18. While the fourth branch of the *Palmer* test does not squarely apply in respect of the Appraisal and consent order (which followed the decisions below), both will serve to quantify the damages ordered by the judge and provide the Court with a complete, updated picture of the final award.

F. Conclusion

19. While the Curran Affidavit is "new evidence" in that it was not before the judge, it does not present any facts or documents unknown to Mr. Sather: he is a recipient of the Appraisal, a signatory to the promissory note, and a party to the consent order. This evidence satisfies the *Palmer* criteria and does not prejudice Mr. Sather's ability to argue his case. It is in the interests of justice to allow this evidence to inform the Court's decision.

PART 4: ORDER SOUGHT

20. That the Receiver be granted leave to adduce the Curran Affidavit in this appeal.

Dated at the City of Kelowna, in the Province of British Columbia, this 26th day of May, 2025.



Lawson Lundell LLP
Solicitors for
C. Cheveldave & Associates Ltd. (as court-
appointed receiver of Sather Ranch Ltd.)