COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Justice Elwood of the Supreme Court of British Columbia pronounced on June 1, 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 FRESH EVIDENCE APPLICATION
Joseph Wayne Palmer Sather

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Part 1: Facts

A. Introduction

1. The appellant and respondent by cross appeal Joe Sather ("Joe") opposes this application for fresh evidence.

2. This application is brought out of time without explanation for its delay. The respondent and cross appellant Sather Ranch Ltd. ("SRL") has been in possession of the alleged fresh evidence for months, and Joe's affidavit attaching the promissory note since March 31, 2025. SRL has unfairly delayed bringing this application until the eve of the appeal. This prejudices Joe in his ability to respond with evidence, and asks the Court to deal with the issues raised in the absence of full briefing and argument. The application should not be allowed to proceed.

3. If the court exercises its discretion to abridge time and hear the motion, the *Palmer* criteria are not satisfied: (i) SRL offers no evidence of any efforts to obtain the evidence for trial and has failed to act with diligence; (ii) SRL asserts the evidence "will assist the Court" which does not meet the test for fresh evidence. It is irrelevant and could not change the result; and (iii) SRL opaquely suggests that the result could have been different, but does not explain what it seeks as a remedy on appeal if the evidence is admitted, which is unfair to Joe and unhelpful to the Court. This application should be dismissed with costs to Joe.

B. Background

4. Joe's affidavit deposing the purchase price was paid with a promissory note was delivered to counsel for SRL on March 31, 2025.

5. The parties subsequently appeared before the chambers judge on April 8, 2025. The appearance was further to his direction that they may reappear should they require assistance arriving at a quantified judgment. Joe's subsequent affidavit was included in the application record before the chambers judge.

6. In response to a submission from counsel for SRL that Joe should not get credit for the promissory note against the damages award, the chambers judge directed

Joe to produce any documents showing payment of the promissory note within 28 days to receive credit for those payments.

7. Joe was unable to produce any documentary evidence, and the parties settled the Order without providing Joe credit for payment of the purchase price.

8. On May 20, 2025 counsel for SRL advised that he intended to bring an application for fresh evidence to explain to the division how the judgment was to be quantified and asserted it would be misleading for the Court to not be advised that Joe did not get credit for the purchase price.

9. On May 21, 2025 counsel for Joe consented to SRL providing the Court with a copy of the Order quantifying the judgment (Exhibit "C" to the Curran Affidavit) and an explanation of how it was quantified.

10. On May 22, 2025 counsel for SRL advised that what the vendor agreed to accept for the purchase price is "determinative" of a negative contingency. This application was filed on May 26, 2025.

Part 2: Issues

11. Should SRL be granted an abridgment of time to proceed with its fresh evidence motion? If so, should the evidence be admitted?

Part 3: Analysis

A. <u>No abridgment of time should be granted</u>

12. As a threshold matter, this Court should not exercise its discretion to allow SRL to bring this late-breaking fresh evidence application.

13. SRL has not provided an explanation for why it did not give the requisite 30 days notice required under the Rules for a fresh evidence application. It has produced no evidence to support the blanket assertion that this evidence was only "recently made available". This is flatly incorrect. Joe's affidavit was made available to SRL

on March 31, 2025. SRL had everything it needed to bring this application by at least mid-April but waited until the last moment to spring this on Joe and the Court.

14. This delay prejudices Joe because with only two days to respond to the motion, there is little to no practical way to respond with evidence to new arguments raised by SRL in apparent efforts to impugn his credibility, which are irrelevant to the issues raised in this appeal. Had this been raised in April as required, supplemental materials could have been adduced. SRL's delay leaves this Court in an unenviable position of having to deal with the fresh evidence application without full briefing.

B. The evidence does not satisfy the *Palmer* criteria

15. If this Court is inclined to hear this application, none of the documents affixed to the Curran Affidavit meet the test for the admission of fresh evidence on appeal.[1]

(i) SRL fails to set out the correct test for the admission of fresh evidence

16. Although SRL's application correctly quotes the *Palmer* criteria, it goes on to apply a different, incorrect test for the admission of fresh evidence.

17. SRL's application seeks to adduce fresh evidence before the Court on the footing that it would "assist" or "benefit" this Court in deciding the issues in the cross appeal. SRL says, for example, that the appraisal report would quantify damages, while the promissory note would assist the Court in addressing the issue of whether the vendor would have agreed to vendor take-back financing.

18. Whether something is helpful, of assistance, or beneficial for the Court is not the test. It may always be helpful to add context for an appeal, but that is not the purpose of fresh evidence. SRL's application is wrongfooted and patently tactical.

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[1] Joe consents to Exhibit "C" being before the Court. It is an Order, not evidence.

(ii) SRL has adduced no evidence of due diligence

19. SRL has produced no evidence to establish that the promissory note could not have been, by exercise of due diligence, obtained for the proceedings before the chambers judge. There is simply no explanation in evidence for this, other than counsel's argument that the promissory note should have been produced earlier in litigation. SRL has produced no evidence of any efforts to obtain disclosure of documents underlying the sale of the lands at any stage of this proceeding. SRL did not take all reasonable steps available to a litigant to obtain and put this evidence before the Court below.

20. As SRL has failed to act with due diligence, the *Palmer* test will "generally foreclose admission" of any additional evidence the party seeks to adduce on appeal: *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 61 ("*Barendregt*").

(iii) The evidence is not relevant to a decisive issue

21. The second branch of the *Palmer* test queries whether the evidence is relevant to a decisive or potentially decisive issue. SRL asserts the evidence of the promissory note is relevant to the judge's finding that there was no evidence confirming SRL's commitment to provide the necessary funds or the terms of the anticipated financing. Consistent with the chambers judge's finding, there remains no evidence confirming SRL's commitment to funds or terms of anticipated financing. The promissory note from Joe to Palmer is not evidence of a financing commitment by SRL and is not material to that issue. The balance of the evidence relates to quantifying the judgment. That evidence is not relevant to an issue before the Court, as it was generated in response the chambers judge's Order in the April 11, 2024 Reasons (the "**Remedy Reasons**") which SRL appeals.

(iv) The promissory note, had it been before the judge, would not have changed the result

22. SRL has failed to explain how the promissory note, alone or with other evidence, "possesses such strength or probative force" that it might have changed the result: *Barendregt* at para. 64. Put another way, there is no basis to say this evidence

would have been "practically conclusive of the result": *Park v. Sarmadi*, 2023 BCCA 75 at para. 37.

23. SRL asserts the promissory note would have affected the judge's Order on remedy because it demonstrates the vendor would have ultimately agreed to vendor take-back financing and accordingly SRL could have completed the purchase. Palmer, the vendor, was deceased at the time of trial. The question before the judge was whether Carol Sather, not Palmer, would have agreed to vendor take back financing a executor of Palmer's estate. This evidence could not impact the judge's finding that there was a possibility Carol would have agreed to vendor take-back financing, but the evidence was uncertain: Remedy Reasons para 33 (c)(ii). The issue of whether SRL could have acquired the lands was also subject to another contingency: whether Carol would have consented to selling to SRL at all.

24. Further, the evidence that Joe paid the purchase price with a promissory note was before the trial judge at the April 8, 2025 appearance. There was no suggestion that the trial ought to be re-opened.

25. Finally, SRL does not articulate how the fresh evidence it seeks to admit impacts the disposition of the appeal other than to say it "could have" affected the result. Is SRL asking the Court to make a different factual finding than the trial judge? A different percentage calculation of contingency? If so, how? Is SRL seeking a new trial? This lack of clarity and full briefing of the issue betrays the strategic purpose of this application and underscores the prejudice to Joe and the Court.

Part 4: Order Sought

26. The application should be dismissed.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this May 28 of 2025.

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Kaleigh Milinazzo
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Kaleigh Milinazzo, Counsel for the
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