



COURT OF APPEAL FILE NO. CA49175
Joseph Wayne Palmer Sather v Sather Ranch Ltd.
Amended Appeal Record

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:p

JOSEPH WAYNE PALMER SATHER

Appellant
Respondent by Cross Appeal
(Defendant)

AND:

SATHER RANCH LTD.

Respondents
Appellant by Cross Appeal
(Plaintiff)

AMENDED APPEAL RECORD
Joseph Wayne Palmer Sather

Counsel for the Appellant, Joseph Wayne
Palmer Sather:

KALEIGH F. MILINAZZO

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Ranch Ltd.:

SCOTT R. ANDERSEN

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Court File No. **KEL-S-S-122417**
No. _____
Kelowna Registry

In the Supreme Court of British Columbia

BETWEEN:

SATHER RANCH LTD.

PLAINTIFF

AND:

JOSEPH WAYNE PALMER SATHER

DEFENDANT

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

TIME FOR RESPONSE TO CIVIL CLAIM

A response to civil claim must be filed and served on the plaintiffs,

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: Statement of Facts

1. The Plaintiff, Sather Ranch Ltd. ("**SRL**"), is a company organized and existing pursuant to the laws of the Province of Alberta, is extra-provincially registered and carries on its business as a cattle ranch in British Columbia, and has a registered and business office located at 1335 Commercial Way, Penticton, British Columbia V2A 3H4.
2. SRL is in Receivership pursuant to an Order of this Court pronounced on September 17, 2018 (the "**Receivership Order**"). The Receiver and Manager of SRL, G. Moroso & Associates Inc., has expressly authorized the commencement and prosecution of this action by SRL, pursuant to its authority under the Receivership Order.
3. The Defendant, Joseph Wayne Palmer Sather ("**Sather**"), is a real estate agent and businessman who resides at 10635 Oakmoor Way SW, in the City of Calgary, in the Province of Alberta, T2W 2L1.
4. At all material times, Sather was an officer and director of SRL, and Michael Street ("**Street**") was the only other officer and director of SRL.

5. At all material times, Sather was in the position of a fiduciary in respect of SRL, owed a duty of utmost good faith and loyalty to SRL, and was in a position of trust in respect of SRL.
6. The business of SRL is operated from various real properties (the “**Ranch**”) located in and around Penticton, British Columbia. One of the properties comprising the Ranch is an unimproved parcel consisting of 160 acres, bearing Parcel Identifier 002-215-594, and currently legally described as:

District Lot 2514S Similkameen Division Yale District

(the “**Grazing Lands**”).

7. The Grazing Lands are integral to the business of SRL, and were, prior to November 7, 2017, owned by Sather’s father, Palmer Sather.
8. In or about April 2017, Sather and Street agreed that it would be in the best interests of SRL to purchase the Grazing Lands from Palmer Sather.
9. At that time, Palmer Sather was under a legal disability, and his affairs were being jointly managed by Sather and his sister, Carol Arleen Sather-Byman (“**Carol Sather**”).
10. On or about April 17, 2017, SRL presented an offer to purchase the Grazing Lands (the “**SRL Offer**”) to Sather, in his capacity as one of Palmer Sather’s legal representatives.
11. The SRL Offer included a purchase price of \$120,000, which was based upon an independent appraisal obtained by SRL.
12. The SRL Offer was open for acceptance until April 19, 2017, and proposed a completion date of May 15, 2017.
13. On April 20, 2017, Sather advised Street that Carol Sather had rejected the SRL Offer as she wished to provide Palmer Sather’s grandchildren with a first option to purchase the Grazing Lands.

14. Sather further advised Street that he and Carol Sather had agreed that if Palmer Sather's grandchildren declined to purchase the Grazing Lands, the Grazing Lands would then be sold to SRL.
15. By August 2017, Palmer Sather's grandchildren had indicated that they did not wish to purchase the Grazing Lands.
16. Palmer Sather died in October 2017. Sather and Carol Sather were acting as co-administrators of his estate (the "**Estate**").
17. On or about November 7, 2017, without notice to Street or to SRL, and contrary to the commitment made by Sather and Carol Sather to SRL as referred to in paragraph 14 hereof, Sather purchased the Grazing Lands from the Estate, for a purchase price of \$120,000 (the "**Purchase**").
18. The Purchase was contrary to the best interests of SRL and was undertaken in a clandestine manner intended to deprive SRL of the Grazing Lands, for the personal benefit of Sather.

Part 2: Relief Sought

1. A Declaration that Sather owes a fiduciary duty to SRL, and has breached that duty.
2. A Declaration that Sather has a trust obligation to SRL, and has breached that obligation.
3. A Declaration that Sather has been unjustly enriched by his conduct in connection with the Purchase, and that SRL has been correspondingly deprived thereby, without juristic reason.
4. An Accounting of all of Sather's income and profits in connection with the Grazing Lands subsequent to the Purchase, and an Order that Sather pay to SRL all profits derived therefrom.

5. A Declaration that Sather holds the Grazing Lands in trust for SRL, pursuant to a remedial constructive trust or a fiduciary constructive trust.
6. An interim injunction enjoining and restraining Sather from directly or indirectly disposing of, assigning, encumbering or conveying the Grazing Lands, or any portion thereof, upon such terms as to this Court may seem just and appropriate.
7. An Order that the Grazing Lands be conveyed to SRL, upon such terms and conditions as to this Court may seem just and appropriate.
8. A Certificate of Pending Litigation against the Grazing Lands, bearing Parcel Identifier 002-215-594 and having a legal description of District Lot 2514S Similkameen Division Yale District.
9. Costs, assessed as Special Costs, or upon such Scale as to this Court may seem just and appropriate.
10. Such further or other relief as to this Court may seem just and appropriate.

Part 3: Legal basis

1. As an officer and director of SRL, Sather owes a fiduciary duty and a duty of loyalty to SRL, and must at all times act in good faith in SRL's best interests and place SRL's interests above his own: *Giles v. Westminster Savings Credit Union*, 2007 BCCA 411 (CanLII).
2. As an officer and director of SRL, Sather must disclose to SRL all business dealings in which he is personally involved and which may affect the interests of SRL.
3. The acquisition of the Grazing Lands was in the best interests of SRL.
4. Sather's purchase of the Grazing Lands:
 - (a) was undertaken without any or proper disclosure to SRL

- (b) was contrary to the best interests of SRL;
 - (c) improperly benefitted Sather's own interests over those of SRL;
 - (d) placed Sather in a conflict of interest; and
 - (e) in all the circumstances, constitutes a breach of the fiduciary, loyalty, disclosure, good faith and/or trust duties Sather owes to SRL.
5. Sather was unjustly enriched by his purchase of the Grazing Lands, and SRL was correspondingly deprived thereby, all without juristic reason.
 6. The equitable principle of "good conscience" addresses the concern of the courts to maintain the integrity of fiduciary relationships: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 453.
 7. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, including where there has been a breach of a fiduciary or loyalty duty, equity converts him into a trustee on behalf of the wronged party: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.
 8. The constructive trust imposed for the breach of a fiduciary relationship serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries to the high standards of trust and probity that commercial institutions require if they are to function effectively: *Soulos*, supra, at para. 33.
 9. There are no factors which would make the imposition of a constructive trust unjust in the circumstances of this case.
 10. Sections 4 and 7 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 confer equitable jurisdiction upon this Court.
 11. Section 39 of the *Law and Equity Act* authorizes this Court to grant an injunction in all cases in which it appears to be just or convenient, and the preservation of SRL's interest in the Grazing Lands requires the granting of an injunction upon such terms as to this Court seem just and appropriate.

12. SRL has a *prima facie* claim against Sather, would suffer irreparable harm if the requested injunction is not granted, and the balance of convenience favours the granting of the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
13. Pursuant to s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250, the Plaintiff is a person claiming an estate or interest in land, and is therefore entitled to claim and register a certificate of pending litigation against the title to the Grazing Lands.

Plaintiff's address for service: 241 Columbia Avenue, Castlegar, British Columbia, V1N 1G3

Fax number address for service: (250) 365-6066

E-mail address for service: N/A

Place of trial: Kelowna, B.C.

The address of the registry is: Kelowna Law Courts
1355 Water Street
Kelowna, British Columbia
V1Y 9R3

Dated: 11 February 2019

"G. Moroso & Associates Inc."
Signature of
[x] Plaintiff [] lawyer for Plaintiff

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

A claim for a beneficial interest in land, resulting from the breach of a fiduciary duty giving rise to a constructive trust in favour of the Plaintiff, together with a claim for ancillary relief.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☒ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☒ real property (real estate)
- ☐ personal property
- ☐ the provision of goods and services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☐ a matter not listed here

Part 3: THIS CLAIM INVOLVES

- ☐ a class action
- ☐ maritime law

- ☐ [] aboriginal law
- ☐ [] constitutional law
- ☐ [] conflict of laws
- ☒ [x] none of the above
- ☐ [] do not know

Part 4: Enactments Relied Upon

1. *Law and Equity Act*, R.S.B.C. 1996, c. 253

2. *Land Title Act*, R.S.B.C. 1996, c. 250

Form 11

(Rule 4-5(2))

Endorsement on Originating Pleading for Service Outside British Columbia.

The Plaintiff, Sather Ranch Ltd., claims the right to serve this Pleading on the Defendant, Joseph Wayne Palmer Sather, outside British Columbia on the following grounds enumerated in Section 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "**Act**"):

1. Pursuant to s. 10(a) of the *Act*, the proceeding is brought to enforce, assert, declare or determine a proprietary or possessory right to property in British Columbia that is immovable property.
2. Pursuant to s. 10(f) of the *Act*, the proceeding concerns restitutionary obligations that, to a substantial extent, arose in British Columbia.
3. Pursuant to s. 10(h) of the *Act*, the proceeding concerns a business carried on in British Columbia.
4. Pursuant to s. 10(i)(ii) of the *Act*, the proceeding includes a claim for an injunction ordering a party to do or refrain from doing anything in relation to property in British Columbia that is immovable property.



**NO. KEL-S-S-122417
KELOWNA REGISTRY**

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SATHER RANCH LTD.

PLAINTIFF

AND:

JOSEPH WAYNE PALMER SATHER

DEFENDANT

RESPONSE TO CIVIL CLAIM

Filed by: Joseph Sather, Directory of Sather Ranch Ltd., the Defendant

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants' Response to Facts

1. The facts alleged in paragraph(s) 1, 3, and 4 of Part 1 of the Notice of Civil Claim are admitted.
2. The facts alleged in paragraph(s) 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of Part 1 of the Notice of Civil Claim are denied.
3. The facts alleged in paragraph(s) NIL of Part 1 of the Notice of Civil Claim are outside the knowledge of the Defendant(s).

Division 2 – Defendants' Version of Facts

1. The Defendant, Joseph Sather denies the allegations of fact in the Notice of Civil Claim except as expressly admitted herein and holds the Plaintiff to the strict proof thereof.

2. Unless otherwise defined herein, defined terms used herein shall have the meaning ascribed to them as in the Notice of Civil Claim for convenience only.
3. In response to paragraph 2 of the Notice of Civil Claim, by Order of this Supreme Court of British Columbia, G. Moroso & Associates Inc. was appointed as Receiver of the Plaintiff, however such appointment contravened the *Alberta Business Corporations Act*, RSA 2000 c B-9 and is *void ab initio*.
4. Further in response to paragraph 2 of the Notice of Civil Claim, by Order of the Supreme Court of British Columbia, Cecil Cheveldave was appointed as Receiver pursuant to security documents assigned to Michael Street (“Street”) and Marielle Brule, such assignment came from the Bank of Montreal.
5. In response to paragraph 6 of the Notice of Civil Claim, the business of Sather Ranch Ltd. (“SRL”) was operated on real property located at 1313 Greyback Mountain Road, Penticton, British Columbia, legally described as:

PID: 011-781-441
SUB LOT 8 DISTRICT LOT 2711 SIMILKAMEEN DIVISION YALE DISTRICT PLAN
1190
(the “Property”).
6. Further in response to paragraph 6 of the Notice of Civil Claim, the defined Grazing Lands were property of Palmer Sather in his personal capacity and had always been so prior to the sale.
7. In response to paragraph 7 of the Notice of Civil Claim, the defined Grazing Lands were not and never were an integral part to the business of SRL.
8. In response to paragraph 8 of the Notice of Civil Claim, the Defendant did not agree that it would be in the best interest of SRL to purchase lands owned by Palmer Sather.
9. In response to paragraph 9 of the Notice of Civil Claim, the affairs of Palmer Sather were managed by Carol Arleen Sather-Byman.
10. In response to paragraph 10 of the Notice of Civil Claim, the Defendant did not receive any offer as alleged or at all. Any such offer would have been received by Carol Arleen Sather-Byman on behalf of Palmer Sather.

11. In response to paragraph 11 of the Notice of Civil Claim, any offer from SRL was made without due authority granted by both directors, and any appraisal that was obtained was done by Street in his personal capacity.
12. In response to paragraph 13 of the Notice of Civil Claim, the Defendant did not advise Street as alleged or at all.
13. In response to paragraph 14 of the Notice of Civil Claim, the Defendant denies that the Grazing Lands would be sold to SRL if any grandchildren of Palmer Sather declined to purchase the Grazing Lands as alleged or at all.
14. In response to paragraph 15 of the Notice of Civil Claim, if there was any agreement to sell the Grazing Lands to SRL, which is not admitted but specifically denied, Street attempted to dissuade the family members of Palmer Sather from buying the Grazing Lands for his own benefit.
15. In response to paragraph 17 of the Notice of Civil Claim, the Defendant purchased the Grazing Lands in September 2017 from his father Palmer Sather via Carol Arleen Sather-Byman and pursuant to the wishes of Palmer Sather.
16. Further in response to paragraph 17 of the Notice of Civil Claim, Palmer Sather advised the Defendant and Carol Arleen Sather-Byman that he wished for the Grazing Lands to remain in the family only, and that they would not be sold to Street or any entity that Street had an interest in.
17. In response to paragraph 18 the Grazing Lands would not have been sold to SRL, Street or any entity that Street had an interest in.

Division 3 – Additional Facts

18. At no time did the Defendant manage the financial affairs of Palmer Sather during his lifetime.
19. The Defendant did not breach any duties to SRL as alleged or at all.
20. The original receiver Mr. Greg Moroso on behalf of G. Moroso & Associates Inc. brought an application in bankruptcy to declare SRL bankrupt and accordingly, SRL does not have funds to purchase the Grazing Lands, conduct this litigation, nor to provide costs in the event of dismissal.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The Defendant consents to the granting of the relief sought in NONE of the paragraphs of Part 2 of the Notice of Civil Claim.
2. The Defendant opposes the granting of the relief sought in 1, 2, 3, 4, 5, 6, 7, 8, and 9 of Part 2 of the Notice of Civil Claim.
3. The Defendant takes no position on the granting of the relief sought in paragraph 10 of Part 2 of the Notice of Civil Claim.

Part 3: LEGAL BASIS

Receiver Jurisdiction

1. The Alberta Court of Queen's Bench has exclusive jurisdiction over the management of SRL, including but not limited to the appointment of a Receiver (*Wheatland Industrial Park Inc. (Re)*, 2013 BCSC 27).

Duties to SRL

2. At no point did the Defendant breach any fiduciary or otherwise owed to SRL as alleged or at all. This action has been brought as directed by Street and Marielle Brule.
3. At no point did the Defendant act in a conflict of interest as alleged or at all.
4. Any offer for the Grazing Lands from SRL was done without requisite authority and is a nullity. In any event any such offer was rejected by the representative of Palmer Sather to honour the intentions of Palmer Sather prior to any offer from the Defendant.
5. Palmer Sather, through his representative or otherwise, would not have sold the Grazing Lands to SRL, Street or any entity that Street had an interest in.

Unjust Enrichment

6. The Defendant was not unjustly enriched at the deprivation of SRL.
7. A Contract of Purchase and Sale was entered between the Defendant and Palmer Sather providing the juristic reason for the acquisition of the Grazing Lands done so at fair market value.
8. The action purported herein is an attempt to enrich SRL which is financially incapable of acquiring the Grazing Lands from the Defendant.

Good Conscience and Constructive Trust

9. The doctrine of good conscience does not apply to the case at bar.
10. There are no grounds to impose a constructive trust.

Law and Equity Act and Injunction

11. There are no grounds for the Plaintiff to seek equitable remedies.
12. In the alternative, which is not admitted but specifically denied, if the Plaintiff could make an equitable claim against the Grazing Lands the Plaintiff is barred from seeking equitable relief.
13. An injunction is not appropriate in the circumstances.
14. SRL is incapable of carrying on business and at no time, was the Grazing Lands integral to the business of SRL.
15. The Grazing Lands would not have been sold to SRL, Street or any entity that Street had an interest in.

Certificate of Pending Litigation

16. The Certificate of Pending Litigation should be cancelled and amounts to an abuse of process as this proceeding was brought for an improper or collateral purpose at the behest of Street and Marielle Brule.

Costs

17. SRL is unable to pay a costs award in this proceeding.
18. The Defendant seeks special costs against the Receiver.

Defendant's address for service:

FH&P Lawyers LLP
400 – 275 Lawrence Avenue
Kelowna, BC V1Y 6L2

Fax number address for service (if any):

(250) 762-8616

Email address for service (if any):

N/A

Date: February 10, 2020



Signature of COLIN FLANNIGAN
☐ Defendant ☒ lawyer for the Defendant, Joseph Sather

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 - (i) all documents that are or have been in the party 's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (a) serve the list on all parties of record.



NO. KEL-S-S-122417
KELOWNA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SATHER RANCH LTD.

PLAINTIFF

AND:

JOSEPH WAYNE PALMER SATHER

DEFENDANT

NOTICE OF APPLICATION

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

To: Defendant and to his Counsel

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

The applicant provides the following contact details for the hearing:

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

Phone No.: (250) 979-8546

Email: scott.andersen@lawsonlundell.com

PART 1: ORDERS AND DECLARATIONS SOUGHT

1. A declaration that the Defendant:

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

PART 2: FACTUAL BASIS

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

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

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

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

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

PART 3: LEGAL BASIS

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

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

PART 4: MATERIAL TO BE RELIED ON

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

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

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

This matter is not within the jurisdiction of a Master.

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

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

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



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

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

To be completed by the court only:

Order made

- ☐ in the terms requested in paragraphs _____ of Part 1 of this Notice of Application
- ☐ with the following variations and additional terms:

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

APPENDIX

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

THIS APPLICATION INVOLVES THE FOLLOWING:



Other –●

NO. KEL-S-S-122417
KELOWNA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SATHER RANCH LTD.

PLAINTIFF

AND:

JOSEPH WAYNE PALMER SATHER

DEFENDANT

NOTICE OF APPLICATION



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



No. 122417
KELOWNA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SATHER RANCH LTD.

PLAINTIFF

AND:

JOSEPH WAYNE PALMER SATHER

DEFENDANT

APPLICATION RESPONSE

Application response of: Joseph Wayne Palmer Sather (the “application respondent”)

THIS IS A RESPONSE TO the notice of application of C. Cheveldave & Associates Ltd.
filed January 17, 2022.

Part 1: ORDER CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: **[NIL]**

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in paragraphs **[ALL]** of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in **[NONE]** of the paragraphs of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

Background

1. Sather Ranch Ltd. (the "**Company**") was incorporated by Joe Sather in March of 2013 in the Province of Alberta. The purpose of the Company was to manage and take over the cattle operations of Palmer E. Sather, Operating As Sather Ranch, a sole proprietorship, including the following:
 - a. Arranging for the acquisition of hay, mostly from Alberta, and other supplements such as mineral and salt blocks, medication supplies, ear tags, etc.
 - b. Feeding hay to the cattle from late November to the end of April each year.
 - c. Hauling cattle from winter pasture to the leased Range Lands at Carmi Range, Greyback Range and Arawana Range in early May of each year.
 - d. Assisting with Calving spring calves from February to the end of April each year.
 - e. Branding: around the last week of April each year. Sorting calves, applying ear tags, administering medical shots (Black Leg, etc.), branding calves, de-horning calves, etc. Assisted by several volunteers.
 - f. Roundup: usually commences around the 3rd weekend in October every year. Cattle are rounded up and hauled to winter pasture. Calves are sorted and the bulk are shipped to Okanagan Falls cattle sale in mid November.
 - g. Proceeds from the sale of calves and older cows and bulls are used to purchase hay and cattle supplies.
2. The Shareholders of the Company were and are as follows: 50% of the shares to Michael Street's company 0882126 BC Ltd. ("**088**"), 50% of the shares to AMX Real Estate Inc. ("**AMX**"), a company owned and controlled by Joe Sather.
3. The Directors of the Company at incorporation and continuously to now are Michael Street ("**Mike Street**") and Joe Sather ("**Joe Sather**").
4. On September 17, 2018, the Receiver Order of Mr. Justice Walker was pronounced appointing G. Moroso & Associates Inc. as Receiver of the Company ("**the First Receiver**") and is based on an invalid receivership.
5. On November 21, 2019, the Receiver Order of Mr. Justice Walker was pronounced appointing C. Cheveldave & Associates Ltd. as Receiver of the Company ("**the Receiver**") without notice to the Application Respondent.

History of Sather Ranch

6. The assets of Palmer Sather's ranch, Sather Ranch, included an 80 acre parcel of land with a street address of 1313 Greyback Road, Penticton, BC, (the "**Ranch Lands**") which, until the winter of 2016, was only used in the fall of the year for rounding up cattle, loading them in trucks and trailers, hauling them to a winter pasture, rented from the Penticton Indian Band, located on the east side of the Penticton Airport or hauled to the BC Livestock Association sale at Okanagan Falls, BC. Other assets included several hundred head of cattle, including Cows, Heifers and Bulls, and farm equipment and tools.
7. Since 1955, Joe Sather has attended regularly at the Ranch Lands to assist with various aspects of the cattle ranching operation - first assisting Palmer Sather, and subsequently helping out at the ranch while it was being operated by the Company.
8. In or around 1995 or 1996, Mike Street approached Palmer Sather asking him if he could volunteer, on an unpaid basis, to help on the ranch so he could learn about raising cattle. This was to be part-time help as Mike Street was involved in a machine shop business on a full-time basis. As time went on, Palmer taught Mike Street how to care for and handle cattle and operate a cattle ranch. Over time, Mike Street learned from Palmer how to manage a cattle ranch and how to operate the cattle business on a "break even" or marginal profit basis.
9. Prior to the incorporation of the Company, in or around 2009, Mike Street sought permission from Palmer Sather to begin living on the Ranch Lands in a modular home. In consideration for parking his modular home on this property, Street would pay \$1.00 per annum rent and perform part-time help with Palmer Sather's cattle. At first, Palmer Sather refused to allow Mike Street to park his modular home on the property. Mike Street then asked Joe Sather if he would speak to Palmer Sather and try to get permission for him to park his modular home on the Ranch Lands. Joe Sather agreed to help Mike Street with his request and negotiated a Lease Agreement, dated August 28, 2009 (the "Lease Agreement") between Mike Street, as Tenant, and Palmer and Ralph (Rolf) Sather, then co-owners of the Ranch Lands and brothers, as majority Landlords.
10. In or about 1990, an Engineer from the City of Penticton, who was very knowledgeable about the 160 acres (the "**160 Acres**") which was adjoined at the south boundary of the property to land owned by the City of Penticton, told Palmer Sather there was a large gravel deposit on the 160 acres, estimated to be between 5 and 10 million cubic yards. The City of Penticton and with permission from Palmer Sather, had drilled several small test holes on the property in order to estimate the volume of gravel. In or about 1990, the royalty paid for unmined gravel was about three dollars (\$3) per cubic yard, making the unmined gravel on the 160 acres valued at between \$15 million and \$30 million dollars. This information was shared with Mike Street.

11. In or about 2009 to 2014, the City of Penticton, the Province of BC and the Penticton Bike Club were in discussions concerning making Campbell Mountain, a larger area that includes the 160 acres, into a natural Park for hikers and non-motorized bikes. Mike Street attended these meeting, representing the Ranch Lands, without authorization or permission. According to Mike Street, the City of Penticton and the Province of BC discussed making an Offer to Purchase the 160 acres at a price between \$1.0 million dollars and \$1.2 million dollars.
12. In or around March 31, 2013, at the request of Palmer Sather, Joe Sather and Carol Sather-Byman, daughter, as Powers of Attorney for Palmer Sather, gave written notice to Mike Street that the Lease Agreement between Mike Street, as Tenant, and Palmer Sather and Rolf Sather, as Landlords, for the Ranch Lands and the 160 acre parcel, was terminated effective March 31, 2014. The Notice gave Mike Street one year to move his modular home off the property.
13. In early 2013, as a result of Palmer Sather's diagnosis of Dementia, Joe Sather, son and Power of Attorney for Palmer Sather, and Carol Sather-Byman, daughter and Power of Attorney for Palmer Sather, took control of Palmer Sather's ranch, known as Sather Ranch, making decisions for Palmer Sather including all ranch business.
14. Up to that point in time, Sather Ranch essentially operated on a "break even" basis, as the annual sale of calves, older cows and bulls, paid for ranch operating costs. The primary assets of the Company consisted of the Ranch Lands, Leases for crown owned Range Land (Carmi, Greyback and Arawana Ranges), a herd of more than 200 head of cattle (including Bulls, Cows and replacement Heifers) and various farm equipment and supplies including six (6) Tractors), a Windrow Hay Cutter-Conditioner, a hay Rake, two (2) Balers, Calf Squeeze, Cow Squeeze, Cattle Truck, two (2) 4x4 pickup trucks, Water Troughs, several (10+) steel panel gates, 2 or more cattle guards (for roads), flatbed Trailer, Cattle/Calf Medical Equipment, Branding Equipment (Brands, Propane Brand Heater, etc.) and miscellaneous tools for handling cattle and fencing tools and supplies.

History of Sather Ranch Ltd.

15. The Company was incorporated in 2013 for the purpose of managing the cattle ranching business formerly owned by Palmer E. Sather. For decades previous, Palmer Sather had operated his cattle ranch with the help of his younger brother, Rolf Sather, his son Joseph W.P. Sather and his daughter, Carol Sather-Byman and several other unpaid volunteers.
16. As Joe Sather was operating a Real Estate company in Calgary, Alberta, he did not have time or inclination to manage or fund the Company from a distance. Joe Sather told Mike Street that he had two choices to make: either sell all the cattle and equipment, and perhaps the 80 acres of land and Range Leases, or enter into an arrangement for Mike Street to manage the Company operations and over time allow Mike Street to eventually acquire the ranch from Palmer Sather, or his estate. Carol Sather-Byman was in agreement with that idea.

17. In March of 2013, an agreement was reached between Joe Sather and Mike Street in 2013 on the following terms:
- (a) The Company would be incorporated in the Province of Alberta and registered as an Extra-Provincial corporation in BC, for the purpose of managing the cattle ranch belonging to Palmer Sather. The newly incorporated Sather Ranch Ltd. would issue 50% of the issued shares to Mike Street's holding company 088 and 50% of the issued shares to Joe Sather's holding company AMX.
 - (b) In consideration for his holding company receiving 50% of the issued shares, Mike Street would attend to looking after the cattle owned by Palmer Sather;
 - (c) Joe Sather agreed to personally guarantee a Line of Credit for the purpose of purchasing hay in September and October, required for winter feeding of cattle. The Line of Credit would be repaid immediately upon the sale of calves in November of each year. Joe Sather would not be required to contribute to the funding of ranch operations on the understanding and expectation that the ranch would continue to operate on a "break even or marginally profitable basis". No expenditures in excess of \$1,000.00 would be made by Joe Sather or Mike Street without the written consent of both parties, with the exception of the purchase of hay.
 - (d) Joe Sather and Mike Street would each be appointed a Director and Officer of Sather Ranch;
 - (e) Mike Street would buy AMX's 50% share in the Company at fair market value, within a few years, or when Street was financially capable of making the purchase. Joe Sather had offered to finance Mike Street for up to 75% of the agreed upon price, at a very low interest rate, amortized over 10 years;
 - (f) Until such time as AMX's 50% interest in the Company was purchased, no major improvements or expenditures would be undertaken unless:
 - (i) would be done at Mike Street's or 088's cost, in which case they would be for benefit and account of Mike Street; or
 - (ii) they were undertaken with the prior, express and informed written consent of Joe Sather and AMX.
 - (iii) No major improvements or alterations to the Ranch Lands could be undertaken without the express written consent of Palmer Sather, or his Powers of Attorney, and the Estate of Oscar Sather (owner of 1/3 of the Ranch Lands).
18. Subsequently, the Company purchased assets from Palmer Sather and Oscar Sather's Estate, Palmer's other brother who was also a co-owner of the Ranch Lands. At all material times, the Company has owned a herd of cattle, the size of which continually varies.

19. Palmer Sather owned his home and the 160 Acres, in his personal name, as a family investment. Both properties are in the City of Penticton, BC.
20. The 160 Acres was never integral to the operations of the Company, as it lacked water, fencing, and power, and is accessible only by crossing crown land.
21. For the cost of annual property taxes on the 160 acres Palmer Sather allowed Sather Ranch to graze cattle on the 160 Acres for the following time periods:
 - a. October 16, 2013 to November 15, 2013;
 - b. October 16, 2014 to November 15, 2014;
 - c. October 16, 2015 to November 15, 2015; and
 - d. October 16, 2016 to November 15, 2016.
22. Joe Sather entered into a Lease Agreement for the 160 acres commencing on October 1, 2017 to September 30, 2018 and the Lease Agreement was renewed each year until September 30, 2022. The rental fee for the Lease Agreement was equal to the annual property tax amount.
23. Mike Street commissioned an appraisal of the 160 Acres. Mike Street made an offer to the Power of Attorney for Palmer Sather on the 160 Acres without corporate authorization to do so.
24. Mike Street's offer was not accepted and lapsed for effluxion of time in April of 2017.
25. Palmer Sather expressed to his family, his desire that the 160 acres remain in his immediate family, preferably in the name of his children, grandchildren or great grandchildren, and was not to be sold to Mike Street or any person or corporation related to Mike Street. Palmer Sather also stated that this land be sold to a family member for a nominal price, not given free to that family member.
26. At all material times, Joe Sather signed the Farm Classification Lease Forms for the 160 Acres on behalf of the Company annually from October 1, 2017 to September 30, 2022.
27. In or around June of 2017, an opportunity for the grandchildren of Palmer Sather arose making it possible for any of them to purchase the 160 acres at a nominal price. Unfortunately, only one of his grandchildren was financially capable of purchasing the property at that time. The grandchild was Daniel P.R. Sather ("**Daniel**").
28. Daniel had previously expressed an interest in purchasing the 160 Acres to Mike Street. Daniel hadn't seen the 160 Acres for several years so drove his quad to view the property. After viewing the 160 Acres, Daniel contacted Mike Street to get his opinion of the 160 Acres. Mike Street told Daniel that the 160 Acres was basically useless because it lacked legal access, it had no water on the 160 Acres, no power available and was not fenced. With that, Daniel decided not to purchase the 160 Acres at any price.

29. After learning that none of Palmer's grandchildren were able or willing to purchase the 160 Acres, Carol Sather-Byman, as Power of Attorney, offered the 160 Acres to Joe Sather at a nominal price. Joe Sather agreed to purchase the 160 Acres for the benefit of his children. The property would remain in Joe Sather's name but the 160 Acres would belong to Family Trust for his immediate family.
30. On or about July 9th 2017, Mike Street and his then girlfriend Marielle Brule, the Accountant for the Company, were in Calgary, competing in Cattle Penning at the Calgary Stampede. They came to Joe Sather's home for a planned BBQ. Upon arriving, they immediately asked Carol Sather-Byman, and Joe Sather what they were going to do with the 160 Acres in Penticton.
31. In September 2017 or November 2017, Joe Sather purchased the 160 Acres from Palmer Sather via the Power of Attorney for Palmer Sather for the benefit of his children and pursuant to the wishes of Palmer Sather.
32. Palmer Sather died on October 20, 2017.
33. In or around November 2017, after Palmer Sather died, Joe Sather signed a Family Trust Agreement, whereby he gave ownership of the 160 Acres to the following family members: Joseph E.P. Sather (son), Daniel P.R. Sather (son), Julia A.P. Sather (daughter) and Patricia D. Sather (daughter-in-law) (the "**Children**").
34. Joe Sather was advised not to register the 160 Acres in the Children's names because the Children did not want to incur the Property Transfer Tax at the time the Family Trust Agreement was signed.
35. The 160 acres purchased from Palmer Sather by Joe Sather for the Family Trust, at a family price, was not open to the public market for non-family persons.

Part 5: LEGAL BASIS

Suitability for Summary Trial

1. The factors for determining whether a matter is appropriate for summary trial go back to the seminal decision of *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, (1989) 36 B.C.L.R. (2d) 202 (C.A.), 1989 CarswellBC 69 wherein the Honourable Chief Justice McEachern set out a number of factors to be considered:

"[48] In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question."

Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd., 1989 CanLII 229 (BC CA)

2. In the decision of *Ahlwat v. Green*, 2014 BCSC 1865 this court reviewed the jurisprudence and provided an updated summary of the factors to be considered on a 9-7 application including:
- a. the amount involved;
 - b. the complexity of the matter;
 - c. its urgency;
 - d. any prejudice likely to arise by reasons of delay;
 - e. the cost of taking the case forward to a conventional trial in relation to the amount involved;
 - f. the course of the proceedings;
 - g. the cost of the litigation and the time of the summary trial;
 - h. whether credibility is a critical factor in the determination of the dispute;
 - i. whether the summary trial may create an unnecessary complexity in the resolution of the dispute; and
 - j. whether the application would result in litigating in slices.

Ahlwat v. Green 2014 BCSC 1865, at paragraph 8 citing *Gichuru v. Pallai*, 2013 BCCA 60 (B.C. C.A.), paras. 30 and 31; and *Dahl v. Royal Bank*, 2005 BCSC 1263 (B.C. S.C.), at 12 ,(upheld on appeal 2006 BCCA 369 (B.C. C.A.))

Examinations for Discovery or Cross-Examination on Affidavits

3. The only direct evidence provided by the Plaintiff in this matter is that contained in the Affidavits of Michael Street and the Receiver. These Affidavits contain evidence which conflicts the evidence given by the Defendant thus raising credibility issues. Once credibility issues arise it is unjust to proceed without permitting the Defendant to develop his case through discovery and cross-examination on the affidavits or through a conventional trial.

Mayer v. Mayer , 2012 BCCA 77 at paragraph 70 and 83.

4. Rule 9-7(12)(b) and (c) of the Rules provides that on or before the hearing of a summary trial application, the court may order that the person who swore or affirmed an Affidavit attend for cross-examination, either before the court or before another person as the court directs and may order that it be completed within a fixed time.

Corporate Authority

5. The Company is an Alberta corporation and incorporated pursuant to the laws of Alberta, specifically the *Alberta Business Corporations Act* and is subject to the internal constating and operating documents.
6. When Michael Street commissioned the appraisal of the 160 Acres and made the offer he did so without the appropriate corporate authority to do so.
7. No directors resolution or shareholders resolution authorized the actions of Mike Street. No directors meetings or shareholders meetings were convened regarding these actions.

No Agreement or Opportunity

8. The actions of Mike Street were not authorized nor ratified by the Company. The most charitable characterization of Mike Street's actions was that it amounted to a potentially unenforceable offer. In any event, that offer was not accepted and lapsed in April of 2017.
9. The seminal decision on the doctrine corporate opportunity is set out in *Canadian Aero Service Ltd. v. O'Malley*, 1973 CanLII 23 (SCC), [1974] S.C.R. 592. However, that doctrine only applies mature business opportunities that can be said to belong to the corporation.

"In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. 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 specificity 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."

10. What constitutes a mature opportunity was noted in *Consbec Inc. v. Walker*, 2014 BCSC 2070 (CanLII):

"[140] At the time Peter left his employment with Consbec, the general contractor was unknown. Brilliant Dam was not the mature opportunity as that in *Canadian Aero Service Ltd. v. O'Malley*, 1973 CanLII 23 (SCC), [1974] S.C.R. 592,

discussed below. A mature business opportunity is described in *Pizza Pizza Ltd. v. Gillespie*, 1990 CanLII 4023 (ON SC), [1990] O.J. No. 2011 (QL) at paras. 81-82, 75 O.R. (2d) 225 (Gen. Div.) as follows:

By "ripe" I understand the case law to mean that the opportunity available to the corporation is a prize ready for immediate grasping -- not a general course of future conduct which is merely being explored as Overs was doing. Moreover, all the evidence indicates that a substantial amount of initiative was taken by Gillespie in preparation and development of the chicken business. He retained Luke Sklar to do market research; he retained Robert Gorrie to design his marketing; he raised money through private placement (the partners herein). The evidence demonstrates that the Chicken Chicken business is a result of Gillespie's initiative and planning, not the result of appropriation of a corporate opportunity from Pizza Pizza.

In summary, the evidence of Mr. Gillespie and other evidence tendered by him establishes that the distinctive marketing characteristics of Pizza Pizza and the terms of its franchise system are in the public domain and are of a generic nature. This is not rebutted by specific facts adduced by Pizza Pizza which show the use of confidential information by Gillespie in the development of Chicken Chicken's marketing methods, its franchise agreement or in the selection of its franchise locations."

11. The "opportunity" in question was far from "ripe", an offer was made by Mike Street without authority that would not have been accepted. Nor can it be said to be "special" or "private", the intentions of Palmer Sather to keep the 160 Acres in the family and have it offered to the family was clear. A third difference is the circumstances under which the so-called opportunity was pursued. In *Canadian Aero Service Ltd. v. O'Malley*, the defendants left the corporation to pursue the opportunity that they were negotiating on behalf of that corporation, Joe Sather did not leave the Company to pursue a competitive opportunity, the 160 Acres was purchased pursuant to the wishes of Palmer Sather. It was a family opportunity and not a maturing business opportunity.
12. It should also be noted that the Company simply did not have the financial ability to purchase the 160 Acres. There was no financing condition precedent nor any evidence that SRL had pursued financing options. The Financial Statements prepared by Marielle Brule, a CPA and a Partner in the Accounting firm Grant

Thornton, and Common Law wife of Mike Street, indicated a bleak financial status of the Company.

13. The 160 Acres would not have been sold to Mike Street or the Company by Palmer Sather, by his Power of Attorney or by his Estate. Furthermore, there was no need to own the property.
14. The desire to grow the number of cattle maintained by the Company on an informal "business plan" does not support the claim. A mere offer, whether authorized or not, was made that was not accepted and lapsed in April of 2017, the facts of the case show that this was not a prize ready for immediate grasping. The 160 Acres was a Sather family asset and remained a Sather family asset, it was not a corporate opportunity of the Company.

The 160 Acres

15. Is not now and never was integral to the operations of the Company.
16. The Ranch Lands and assets of the Company have now been sold and the Company is no longer operating as a going concern.
17. The original pretense on which this action was brought was the allegation as plead in the Notice of Civil Claim that the 160 Acres was integral to the operations of the Company.
18. Yet the replacement Receiver continues to pursue this claim solely on evidence of Mike Street who stands in a position of indirect personal profit and who has an acrimonious relationship with Joe Sather.
19. The 160 Acres was sold by Palmer Sather, by way of his Power of Attorney who is also his daughter.
20. Palmer Sather did not trust Mike Street and made clear to his family that he wanted the 160 Acres to stay in the family and was not to be sold to Mike Street, directly or indirectly.
21. The 160 Acres was sold to Joe Sather by Palmer Sather by way of his Power of Attorney, to hold the 160 Acres in trust for the Grandchildren of Palmer Sather pursuant to the wishes and directions of Palmer Sather.

Unjust Enrichment

22. Joe Sather was not unjustly enriched at the deprivation of the Company.

23. A Contract of Purchase and Sale was entered between Joe Sather and Palmer Sather providing the juristic reason for the acquisition of the Grazing Lands done so at a family related value, *MacDonald v. Taubner*, 2010 ABQB 60.
24. The action purported herein is an attempt to enrich the Company and specifically Mike Street which was financially incapable of acquiring the 160 Acres from Palmer Sather. The offer from Mike Street was not acceptable to Palmer Sather and Mike Street stands to potentially benefit personally by way of disputed debts that he alleges are owed to him, 088 and his common law spouse from the Company in excess of \$800,000.00.

Good Conscience and Constructive Trust

25. The doctrine of good conscience does not apply to the case at bar.
26. There are no grounds to impose a constructive trust.

Law and Equity Act and Injunction

27. There are no grounds for the Company to seek equitable remedies.
28. In the alternative, which is not admitted but specifically denied, if the Company could make an equitable claim against the 160 Acres, the Company should be barred from seeking equitable relief as an equitable relief would have the prospect of benefitting Mike Street and his disputed and unauthorized claimed debts owing to him.
29. An injunction is not appropriate in the circumstances.
30. The Company is incapable of carrying on business and at no time, was the 160 Acres integral to the business of the Company.
31. The 160 Acres would not have been sold to the Company, Street or any entity that Mike Street had an interest in.

Certificate of Pending Litigation

32. The Certificate of Pending Litigation should be cancelled and amounts to an abuse of process as this proceeding was brought for an improper or collateral purpose at the behest of Mike Street and Marielle Brule.

Costs

33. Joe Sather seeks special costs against the Receiver.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Daniel Sather filed August 5, 2020.
2. Affidavit #1 of Carol Sather-Byman, filed February 18, 2022.
3. Affidavit #1 of Gil Szabo, filed February 18, 2022.
4. Affidavit #1 of Joseph Sather to be filed.
5. Other materials as counsel may advise.

The application respondents estimate that the application will take **1 day**.

☒ [X] The application respondent has an address for service:

Attention: Colin Flannigan
FH&P Lawyers LLP
400 – 275 Lawrence Avenue
Kelowna BC V1Y 6L2
Tel: 250-762-4222
Fax: 250-762-8616

Date: 12/APR/2022



Signature of **COLIN FLANNIGAN**

☐ [] application respondent

☒ [x] lawyer for Application Respondent

Email: cflannigan@fhplawyers.com

ORDER WILL BE SUBMITTED WHEN AVAILABLE

ORDER WILL BE SUBMITTED WHEN AVAILABLE

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Date: 20230601
Docket: S-122417
Registry: Kelowna

Between:

Sather Ranch Ltd.

Plaintiff

And

Joseph Wayne Palmer Sather

Defendant

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff:

S.R. Andersen

Counsel for the Defendant:

C. Flannigan

Place and Dates of Hearing:

Kelowna, B.C.
September 21-23, 2022
November 24-25, 2022

Place and Date of Judgment:

Kelowna, B.C.
June 1, 2023

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I. INTRODUCTION

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

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

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

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

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

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

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

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

II. BACKGROUND

A. History of Sather Ranch

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

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

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

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

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

- a) an 80-acre parcel of land known as the home ranch, which Palmer owned with his brother Oscar (the “Home Ranch”);
- b) a 160-acre parcel of land known as the grazing lands, which Palmer owned in his own name (the “Grazing Lands”); and
- c) approximately 150-acres of Crown range lands over which Palmer held a grazing license (the “Crown Range Lands”).

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

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

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

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

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

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

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

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

B. Incorporation of SRL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Grazing Lands

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

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

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

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

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

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

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

D. Steps by SRL to Acquire the Grazing Lands

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

E. The Family’s Interest in the Grazing Lands

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

Hi Mike

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

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

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

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

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

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

F. Joe’s Acquisition of the Grazing Lands

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

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

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

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

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

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

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

[66] Palmer died on October 20, 2017.

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

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

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

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

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

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

The use of the land has not changed; use for cattle grazing in October and November each year. This property is unfenced which enables my cattle and anybody else's cattle to graze on this land.

Sather Ranch Ltd., effectively owned 50% by Joe Sather and 50% by Mike Street is no longer operating a cattle business. It is currently in receivership and being dissolved.

It is my intention to continue grazing my own cattle on this property and I intend to fence the property in 2019 or sell the property to the province of British Columbia, and/or the city of Penticton for development of a park, in which case, it will not be used for farming or pasture grazing.

[Emphasis added.]

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

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

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

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

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

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

III. ANALYSIS

A. Palmer's Intentions - Hearsay Objection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

B. The Law of Corporate Opportunity

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

- a) a fiduciary owes the duties of loyalty, good faith and avoidance of a conflict of duty and self-interest to the beneficiary of the fiduciary duty (at 606);
- b) corporate directors are precluded from obtaining for themselves, either secretly or without the approval of the company on full disclosure of the facts, any property or business advantage either belonging to the company or for which it has been negotiating (at 606-07);
- c) this is especially so where the director is a participant in the negotiations on behalf of the company (at 607);
- d) there is a strict ethic in this area of law which disqualifies directors from usurping for themselves maturing business opportunities which the company is actively pursuing (at 607); and
- e) there may be situations where a profit gained must be disgorged even where it was not gained at the expense of the company, on the ground that a director must not be allowed to use their position to make a profit even if it was not open to the company to participate in the transaction (at 609).

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

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

[324] *Canaero* held that a corporate fiduciary was forbidden to usurp for personal use or divert to another with whom the fiduciary was associated, a maturing business opportunity that the company was actively pursuing. Speaking for the Court, Laskin J. cautioned that attempting to lay down a rigid test of the doctrine would be reckless and repugnant to the fluid and expansive nature of the fiduciary concept. Instead, his Lordship preferred, as a starting point, consideration of a non-exhaustive list of factors, stating at 620:

... Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

[325] Thus, the question of whether a fiduciary has appropriated a corporate opportunity to self or diverted it to another in breach of the no conflict and no profit rules is evaluated on a case-by-case basis taking into account the *Canaero* factors and others pertinent to the particular case at hand.

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

C. Application of the *Canaero* Factors

i. Nature of the Opportunity

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

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

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

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

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

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

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

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

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

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

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

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

...

[235] The next factor for consideration suggested in Miller is whether the bleaching product business was essential to Nature-Control's current activities, or whether it was merely desirable.

...

[238] I next turn to consider whether the bleaching product business embraced areas adaptable to Nature-Control's business and into which it might easily, naturally, or logically have expanded. It makes sense, at this stage, to also consider whether the bleaching product business included activities as to which the Nature-Control had knowledge, practical experience, facilities, equipment, personnel, and the ability to pursue.

[Emphasis added.]

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

[128] Key to the analysis is the determination of whether the opportunity "belonged" to the corporation. This requires a contextual analysis and various overlapping tests have been referred to in the case law and academic authority. In Dr. Leonard I Rotman, Professor, *Fiduciary Law* (Toronto: Thomson Carswell, 2005), the author refers to American jurisprudence and describes three primary formulations which assist in determining when corporate opportunities exist (at p 435):

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

[Emphasis added].

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

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

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

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

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

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

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

ii. Ripeness/Maturity of the Opportunity

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

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

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

By “ripe” I understand the case law to mean that the opportunity available to the corporation is a prize ready for immediate grasping -- not a general course of future conduct which is merely being explored...

[Emphasis added.]

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

fully mature opportunity - is inconsistent with *Canaero* or the law in this Province.
Notably, in *Matic*, the Manitoba Court of Appeal relied on two decisions of this Court:

[142] I agree with and adopt the view of Sigurdson J in *Pan Pacific Recycling Inc v So*, 2006 BCSC 1337 (CanLII) (at para 175):

To the extent that these terms suggest that fiduciaries are only barred from taking opportunities that the corporation is actively pursuing, they are probably misleading. The question of whether a fiduciary has breached his duty by taking a particular opportunity is a question of fact that can turn on many factors, some of which are set out by Laskin J. in *Canadian Aero* at p. 620.

[143] See also *First Majestic Silver Corp v Davila*, 2013 BCSC 717 (CanLII) at paras 150-52, aff'd on other grounds 2013 BCCA 458, 344 BCAC 262.

[144] Due to the strict ethic that is imposed on directors, a breach of fiduciary duty can occur when the diverted opportunity is a potential, rather than a mature opportunity, or one that the corporation is not actively pursuing. Again, as noted in *Canadian Aero*, there is no strict formula to apply, and the existence of a corporate opportunity will depend upon the particular facts.

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

iii. Joe's Knowledge and How He Acquired it

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

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

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

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

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

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

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

D. Conclusion on Corporate Opportunity

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

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

fact to be determined from the objective facts and surrounding circumstances.

[Emphasis added.]

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

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

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

- a) First, as discussed above, the corporate opportunity at issue was to acquire the Grazing Lands for the ranch to sustain the herd and maintain the grazing licence over the the associated Crown Range Lands; it was not an opportunity to acquire a potential gravel deposit or to resell the property at a profit.
- b) Second, Joe entered into a lease with SRL that maintained the status quo and satisfied the conditions of the grazing licence. This lease is not a complete answer to his breach of fiduciary duty because Joe did not disclose his own interest in purchasing the Grazing Lands or obtain Mike's consent. However, it is a relevant factor in this case.
- c) Third, Joe stood to inherit an interest in the Grazing Lands as a beneficiary under Palmer's will if Palmer died before a sale to SRL was concluded.

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

E. Suitability for Summary Trial

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

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

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

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

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

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

F. Remedy

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

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

“Elwood J.”

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sather Ranch Ltd. v. Sather*,
2024 BCSC 598

Date: 20240411
Docket: S-122417
Registry: Kelowna

Between:

Sather Ranch Ltd.

Plaintiff

And

Joseph Wayne Palmer Sather

Defendant

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff:

S.R. Andersen

Counsel for the Defendant:

K.F. Milinazzo

Place and Dates of Hearing:

Kelowna, B.C.
December 14, 2023 and
January 8, 2024

Place and Date of Judgment:

Kelowna, B.C.
April 11, 2024

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I. INTRODUCTION

[1] These reasons for judgment address the appropriate remedy arising from a declaration that the defendant breached a fiduciary duty to the plaintiff by taking personal advantage of a corporate opportunity to acquire a parcel of land.

[2] The plaintiff Sather Ranch Ltd. (“SRL”) was incorporated in 2013 to carry on the ranching operations of Sather Ranch. The land in question was used by Sather Ranch as part of an annual movement of its cattle herd (the “Grazing Lands”). SRL is now in receivership. The receiver brings this action on behalf of the company.

[3] The defendant Joe Sather was one of two directors and owners of SRL. He is also the son of the late owner of Sather Ranch, Palmer Sather. Joe purchased the Grazing Lands from Palmer, through Joe’s sister Carol Sather, who was acting as their father’s power of attorney.

[4] I will refer to the individuals in this matter by their first names; I mean no disrespect in doing so.

[5] The receiver applied under the summary trial rule for a declaration that Joe breached a fiduciary duty to SRL and an order that the Grazing Lands vest in SRL so that they can be sold and the net proceeds realized on for the benefit of the stakeholders in the company. The affiants for both parties were cross-examined on their affidavits in court as part of the summary trial process.

[6] In reasons for judgment indexed at 2023 BCSC 926 (the “Reasons”), I found that SRL was pursuing an opportunity to purchase the Grazing Lands such that it was a “corporate opportunity” within the meaning of *Canadian Aero Service Ltd. v. O’Malley*, [1974] S.C.R. 592, 1973 CanLII 23.

[7] I found that Joe owed a fiduciary duty to SRL which he breached when he acquired the Grazing Lands in his own name. However, I was not prepared to grant the relief sought by the receiver. I found that there were unique factors in this case which might render the imposition of a constructive trust unjust. Accordingly, I asked

the parties to make further submissions on an appropriate remedy. I also invited the parties to make submissions on costs. The parties have now made those submissions, both in writing and orally.

[8] The receiver argues that a constructive trust is the only appropriate remedy. It gives two main reasons for this: first, Joe must not be allowed to retain any benefit from his breach of duty; and second, a constructive trust is the “cleanest, easiest and fairest solution”, whereas damages will be challenging to calculate and difficult to collect. Further, the receiver seeks special costs of the action on behalf of SRL, primarily on the basis that Joe’s evidence on several points was rejected by the Court.

[9] Joe argues that the appropriate remedy is an award of equitable compensation. He argues that equitable compensation would restore what has been lost: an opportunity to acquire the Grazing Lands for use by the ranching business. He argues that this is a principled and just outcome when what has been lost is an opportunity to purchase the property, not the property itself. In addition, Joe argues that his conduct during the litigation has not been reprehensible and the high threshold for an award of special costs is not met.

[10] For the reasons that follow, I would award equitable compensation based on the fair market value of the Grazing Lands at the date of trial, discounted for negative contingencies. I would not order special costs.

II. BACKGROUND

A. Factual Background from the Reasons

[11] Sather Ranch was a cattle ranching operation located in and around Penticton, British Columbia. It was started by Palmer in about 1939 and operated for many years as a family business. Palmer’s two children, Joe and Carol, grew up on the ranch. Joe moved away in about 1964.

[12] Mike Street began working on the ranch in 1995. He began as an unpaid ranch hand. Over time, Mike acquired experience and took on more responsibilities.

In 2009, Palmer granted Mike a lease to live on the ranch. Mike became a key person in the operation and business of the ranch.

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

- a) an 80-acre parcel of land known as the home ranch, which Palmer owned with his brother Oscar (the “Home Ranch”);
- b) a 160-acre parcel of vacant land, which Palmer owned in his own name (the subject “Grazing Lands”); and
- c) approximately 150,000 acres of Crown range lands, over which Palmer held a grazing licence (the “Crown Range Lands”).

[14] Palmer acquired the Grazing Lands in the 1950s. The property was “land-locked”, without road access or connections to municipal services. However, it was integral to the ranching operation. Every year, the cattle were moved from the Crown Range Lands to the Grazing Lands, where they would graze for the months of October and November, before they were moved to the Home Ranch for the winter.

[15] The Grazing Lands also allowed Sather Ranch to fulfill the requirement in ss. 10(1)(b) and 29 of the *Range Act*, S.B.C. 2004, c. 71, that the holder of a grazing licence must own or hold under lease private lands that are sufficient to sustain their cattle for that part of each year when the cattle are not on Crown Range Lands.

[16] In 2000, Palmer granted powers of attorney to Joe and Carol. In 2009, he was diagnosed with early onset dementia. By 2013, Palmer was no longer able to manage his affairs or make any decisions relating to the ranch.

[17] Joe and Mike incorporated SRL on March 21, 2013. The shares of SRL are owned by Joe and Mike through their respective holding companies. Joe and Mike are the sole officers and directors. There is no shareholder agreement.

[18] The plan for SRL was to acquire the assets of Sather Ranch, keep the existing ranch together, increase the size of the herd, acquire additional properties with grazing licences, and generally build a more profitable, sustainable operation.

[19] Shortly after SRL was incorporated, Joe and Mike caused the company to acquire the cattle and other non-land ranch assets from Palmer.

[20] In January 2017, Joe and Mike caused SRL to purchase the Home Ranch. SRL's offer to purchase the Home Ranch was accepted by Carol in her capacity as power of attorney for Palmer, and Constance Sather in her capacity as the executor of Oscar's estate.

[21] In April 2017, Mike obtained an appraisal on behalf of SRL to purchase the Grazing Lands. The plan, which Joe supported, was to present the appraisal to Carol, as Palmer's power of attorney, and seek her agreement to sell the property to SRL at a fair value.

[22] The appraiser provided a valuation of \$115,000 based on a highest and best use of the lands as grazing lands by the individual that owned the grazing rights to the adjacent Crown Range Lands.

[23] On April 17, 2017, Mike completed and signed an offer on behalf of SRL to purchase the Grazing Lands for \$120,000. Mike delivered the offer to Joe, who agreed to present it to Carol and negotiate with her on behalf of SRL.

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

[25] The only grandchild who could potentially purchase the Grazing Lands was Joe's son Danny. Danny considered purchasing the property, but decided against it, because he had recently purchased another property. Joe informed Mike that Danny had passed on the opportunity.

[26] 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 immediately sent Carol a copy of the signed offer. On July 1, Joe sent an email to Mike indicating that Joe was in discussions with Carol to acquire the Grazing Lands for SRL and expected a decision soon.

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

[28] 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.

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

[30] The dispute over the Grazing Lands irreparably damaged the relationship between Joe and Mike. Both men stopped providing financial support to the ranching operation. Not long after the BBQ in July 2017, SRL ceased operating as a viable business. On July 17, 2018, the Court appointed a receiver and manager over all of the assets of SRL.

[31] Palmer died on October 20, 2017.

B. Key Findings from the Reasons

[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).

[33] A number of findings from the Reasons are important to a consideration of the appropriate remedy for this breach of fiduciary duty:

- a) The corporate opportunity that SRL was pursuing was an opportunity to acquire the Grazing Lands from Carol, as Palmer's power of attorney, for \$120,000, using an appraisal that was based on a use for the lands as grazing lands (para. 103).
- b) SRL's objective in pursuing this opportunity was to keep the ranch together, ensure the long-term viability of the ranching operation and provide a sustainable base from which to expand the size of the herd. SRL's objective was not to resell the Grazing Lands at a profit (paras. 104–105, 137(a)).
- c) There was a real possibility SRL would have acquired the Grazing Lands if Joe had not breached his fiduciary duty to the company; however, it was not a sure thing (para. 127):
 - i. SRL required Carol's agreement. There was a real possibility Carol would have sold the property to SRL once Danny had passed on the opportunity; however, on evidence, it was difficult to say whether and when she would have agreed to sell to SRL (paras. 96, 124).
 - ii. SRL required financing. SRL's financial statements showed a growing deficit of about \$250,000. There was a real possibility SRL could have financed the purchase price, either with vendor take-back financing from Palmer's estate or with private financing bridging to a bank loan. However, on the evidence, the availability of the financing was uncertain (paras. 114, 125).
- d) Joe stood to inherit an interest in the property, in any event of his duty to SRL, as an equal beneficiary under Palmer's will (paras. 96, 137(c)).

- e) The lease that Joe entered into with SRL maintained the status quo and satisfied the conditions of the grazing licence. This lease was not an answer to his breach of fiduciary duty because Joe did not disclose it to Mike or obtain Mike's approval. However, it appears SRL could have grazed its cattle on the land, at least until Joe changed his mind or sold the property (paras. 65, 137(b), 150).
- f) SRL ceased operations shortly after Joe acquired the Grazing Lands. It is unclear whether SRL would have remained operational if Joe had not breached his fiduciary duty. SRL was facing significant financial challenges, which may have only worsened by taking on more debt to acquire the Grazing Lands (para. 149).

C. Additional Information

[34] On January 14, 2021, Justice Walker ordered a claims process by which creditors of SRL could prove their claims. There were two processes established, one for arm's length creditors and a separate one for related party creditors. Both processes have now completed and the claims of all creditors have been determined.

[35] There are no claims owing to arm's length creditors.

[36] The determination of related party claims proceeded by way of summary trial. In reasons for judgment indexed at 2023 BCSC 1525, Justice Brongers found that the amounts owing to the related party creditors were:

- a) \$143,201.22 plus interest owed to Mike;
- b) \$515,712.83 plus interest owed to Boundary Machine Ltd.;
- c) \$8,000.00 plus interest owed to Marielle Brule;

- d) \$36,158.00 plus interest owed to Profectus Financial Inc.; and
- e) \$77,750.00 plus interest owed to Joe and his holding company, AMX Real Estate Inc. (“AMX”).

[37] The first four related party creditors (para. 36 (a)–(d), above) support the constructive trust remedy sought by the receiver in these proceedings. Those creditors are owed an aggregate of \$703,072.05, excluding interest and costs.

[38] Joe and AMX submitted a claim for approximately \$307,344.00. The other claimants conceded that SLR owed Joe and AMX \$77,750.00. Justice Brongers limited Joe’s proven claim to the agreed upon amount.

[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.

III. ANALYSIS

A. Choice of Remedy: Gains-Based or Loss-Based?

[41] A breach of fiduciary duty gives rise to equitable remedies and a choice between a gains-based or a loss-based approach. Accounting for profits and constructive trusts are gains-based remedies. They are measured by the fiduciary’s gain, rather than the plaintiff’s loss. Their purpose is to undo what the fiduciary gained. Equitable compensation, on the other hand, is a loss-based remedy; the purpose is to restore what the plaintiff lost: *Southwind v. Canada*, 2021 SCC 28 at para. 67.

[42] The primary difference between a gains-based and a loss-based remedy on the facts of this case is that a constructive trust would provide SRL with a proprietary remedy—ownership of the Grazing Lands, whereas equitable compensation would award SRL damages based on an assessment of the value of the lost opportunity to acquire the Grazing Lands.

[43] The receiver argues that a plaintiff is entitled to elect between a gains-based and a loss-based remedy, and equitable compensation is only appropriate if the plaintiff elects that remedy.

[44] I disagree with this proposition. It would remove the discretion of the court to fashion an appropriate remedy. Remedies for breach of fiduciary duty are inherently discretionary. They depend upon all the facts before the court. Equitable relief is flexible, adaptable, and intended to address fairness between the parties and the integrity of the fiduciary relationship: Leonard I. Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005) at 685.

[45] In many cases, the appropriate remedy will correspond with the plaintiff's election. For example, if the breach concerned an asset that no longer exists *in specie*, the plaintiff may elect a loss-based remedy and equitable compensation will also be the appropriate remedy. As explained by the Supreme Court of Canada in *Southwind*:

[68] ... 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).

[46] However, it does not follow that whenever the plaintiff desires a gains-based remedy and it is possible to restore the property *in specie*, the court must order a constructive trust. A constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from a proprietary remedy. As

Justice La Forest held in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 1989 CanLII 34 [*Lac Minerals*] at para. 678:

... The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, *supra*, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer.

[Emphasis added.]

[47] More recently, in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 1997 CanLII 346 at para. 45, the Court set out four conditions which should be satisfied to justify a constructive trust based on wrongful conduct:

- (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.

[48] Conditions (1) and (2) were made out on the findings in the Reasons. The receiver must still satisfy conditions (3) and (4).

B. Is There a Legitimate Reason to Seek a Proprietary Remedy?

[49] The receiver advances two reasons for seeking a constructive trust: first, the “prophylactic purpose” of equitable remedies—to deter faithless fiduciaries and

preserve the integrity of the fiduciary relationship; and second, to “return” the property and avoid the potential problems associated with an award of damages.

Prophylactic Purpose

[50] The prophylactic purpose of a constructive trust was highlighted by the Court in *Soulos*:

[50] ... I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty: see *Hodgkinson v. Simms*, *supra*, per La Forest J. If real estate agents are permitted to retain properties which they acquire for themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpin the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate agent made a profit. This will not do. Courts of equity have always been concerned to keep the person who acts on behalf of others to his ethical mark; this Court should continue in the same path.

[Emphasis added.]

[51] The Court also discussed the purposes of gain-based equitable remedies in the context of breach of fiduciary duty in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24:

[75] Monarch seeks "disgorgement" of profit earned by Strother and Davis. Such a remedy may be directed to either or both of two equitable purposes. Firstly, is a prophylactic purpose, aptly described as appropriating

for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest.

(*Chan v. Zacharia* (1984), 154 C.L.R. 178, *per* Deane J., at p. 198)

[76] The second potential purpose is *restitutionary*, i.e. to restore to the beneficiary profit which properly belongs to the beneficiary, but which has been wrongly appropriated by the fiduciary in breach of its duty. This rationale is applicable, for example, to the wrongful acquisition by a fiduciary of assets that should have been acquired for a beneficiary, or wrongful exploitation by the defendant of the plaintiff's intellectual property. The restitutionary purpose is not at issue in the case of Strother's profit. The trial judge rejected Monarch's claim that Darc usurped a corporate opportunity

belonging to Monarch (paras. 128, 179 and 187). This finding was upheld on appeal (para. 73).

[77] The concept of the *prophylactic* purpose is well summarized in the Davis factum as follows:

[W]here a conflict or significant possibility of conflict existed between the fiduciary's duty and his or her personal interest in the pursuit or receipt of such profits . . . equity requires disgorgement of any profits received even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. [Emphasis omitted; para. 152.]

Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

[Emphasis added.]

[52] Context is important. The prophylactic purpose of an equitable remedy must not be disproportionate to the breach and the plaintiff's interest in the specific asset at issue: *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 239 [*Sun Indalex*].

[53] In *Lac Minerals*, a mining company used information provided by a prospective joint venture partner to “intercept” a mining claim. Justice La Forest held: “Having specific regard to the uniqueness of the Williams property, to the fact that but for Lac's breaches of duty Corona would have acquired it, and recognizing the virtual impossibility of accurately valuing the property, I am of the view that it is appropriate to award Corona a constructive trust” (at para. 679, emphasis added). In reaching this conclusion, the Court considered favourable geological findings and the specific use that would be made of the property in question.

[54] In *Soulus*, a real estate agent bought for himself a property that he had been negotiating for on behalf of his client. The value of the property subsequently declined, but the property held special value to the client because its tenant was his banker, and being one's banker's landlord was a source of prestige in the Greek community of which he was a member.

[55] In *Strother*, a lawyer went into business in competition with a client using confidential information he had acquired while acting for the client. The Supreme Court of Canada held that the Court of Appeal erred in ordering an excessive disgorgement remedy. Instead of requiring the lawyer to pay the client all of the profits from the business, the lawyer was required to account for profits while he was acting both as a partner in the law firm and as a business competitor of the client. The Court noted, at para. 89:

. . . the stringent rule requiring a fiduciary to account for profits can be carried to extremes and . . . in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.

[Emphasis added.]

[56] A recent example of a legitimate reason to provide a plaintiff with property rights arose in *Chung v. Chung*, 2022 BCSC 1592. In that case, a trustee misappropriated trust property and used it to purchase a residential home. The defendant took steps to actively conceal the fraud and misappropriation. The court held that it was just and equitable for the beneficiary to obtain the increase in the value of the property caused by market forces, and imposed a constructive trust proportionate to the trust property.

[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.

[60] Mike expected Joe to persuade Carol to sell the land to SRL so as to keep the ranch together and continue her father's ranching legacy. The property had unique value to SRL because of its location, its use in the yearly movement of cattle and the conditions of the grazing licence. SRL's offer to pay \$120,000 for the property was to be justified to Carol using an appraisal based on a highest and best use of the lands as grazing lands.

[61] Joe breached his duty and persuaded Carol to sell the land to him at that price; however, he did not conceal his intention from Mike (at least not after the BBQ on July 8), he did not prevent SRL from using the property as grazing lands and he did not flip the land at a profit.

[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.

Adequacy of Damages

[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.

[69] In *Lac Minerals*, the constructive trust was supported by the lower court's findings that the defendant obtained a property that the plaintiff would have obtained "but for" the defendant's breach. In these circumstances, the constructive trust "simply redirect[ed] the title ... to its original course" (at para. 678).

[70] In *Murphy Oil Company Ltd. v. Predator Corporation Ltd.*, 2006 ABQB 680, a decision on which the receiver relies, the Court wrote:

[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.

[Emphasis added.]

[71] On the other hand, in *Ontex Resources Ltd. v. Metalore Resources Ltd.*, 103 D.L.R. (4th) 158 at 188, 1993 CanLII 8673 (ONCA), leave to appeal to SCC ref’d, 23727 (30 September 1993), the Ontario Court of Appeal held:

... the trial judge's decision to impose a constructive trust lacks, in our view, the necessary factual basis. In particular, he did not make the affirmative finding that, but for the actions of Metalore, Ontex would have acquired the claims in question.

[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.

[73] The receiver submits that the difficulties or frailties in assessing damages in this case militate in favour of a constructive trust. I agree that difficulties or frailties in assessing damages are relevant considerations. As expressed by Justice Gomery in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2019 BCSC 802 [*Smithies*]:

[67] ... Where there are difficulties of valuation or assessment, they may be taken into account by a court of equity as considerations supporting proprietary relief to avoid the uncertainty.

[74] Notably, however, Gomery J. refused a proprietary remedy—which he described as “exceptional”—because “[t]he necessary causal connection [was] missing” (paras. 68–69). In other words, difficulties of valuation or assessment are not determinative. Indeed, such difficulties are common in lost opportunity cases.

[75] The receiver argues that damages would be particularly difficult to assess in this case: the value of the lands is uncertain, and an appropriate valuation date would need to be established. There may be some challenges, but a damages assessment in this case is not “virtually impossible”, as it was in *Lac Minerals*.

[76] As stated, equity assesses a plaintiff’s loss at the date of trial and with the benefit of hindsight. This means that equity will compensate the plaintiff for the full

lost opportunity caused by the breach, regardless of whether that opportunity could have been foreseen at the time of breach: *Southwind* at para. 74.

[77] In this case, SRL is entitled to equitable compensation based on the value of the lost opportunity to sell the Grazing Lands at fair market value, even though reselling the property was not foreseen at the time of the breach.

[78] The first step, therefore, is to obtain an appraisal of the Grazing Lands on the date of the trial. The court must then estimate the value of the lost opportunity and award compensation on a proportionate basis, by discounting the value of the opportunity by applying any negative contingencies: *First Majestic Silver Corp. v. Davila*, 2013 BCSC 717 at paras. 220, 245–246, 293, aff'd 2014 BCCA 214, leave to appeal to SCC ref'd, 35962 (27 November 2014).

[79] A fair market appraisal on the date of trial is not an unusual or particularly difficult task. For the reasons discussed, the appraisal would not be limited to the value of the property as grazing lands. It would also not be based on a potential gravel deposit. There was some hearsay in Joe's affidavit suggesting there may be a valuable gravel deposit on the Grazing Lands; however, Mike testified that he had seen no evidence of any such resource. The potential for a gravel deposit is too speculative to be included in the valuation exercise.

[80] The receiver further argues that, if a constructive trust is awarded, it could then investigate whether the realizable value can be maximized by taking steps to obtain legal access for the lands before marketing them for sale.

[81] While this plan may make sense to the receiver, whose duty is to maximize recovery for the creditors, it overshoots the mark as a "legitimate reason" for a constructive trust. A proprietary remedy should not be awarded simply to maximize recovery for creditors.

[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.

[83] The Supreme Court of Canada has recognized that the probability of recovering damages is a relevant consideration in deciding whether to grant a constructive trust: *Kerr v. Baranow*, 2011 SCC 10 at para. 52. This consideration factored into the decision to award a constructive trust in *Sarzynick v. Skwarchuk*, 2021 BCSC 443 at para. 221.

[84] However, as the Court of Appeal noted in *Tracy v. Installoys Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357, “collectability” is not a stand-alone justification for a constructive trust:

[36] This is not to suggest that where a proprietary link is absent, a constructive trust can be imposed solely in order to give a claimant priority over funds or other property that would otherwise become part of the estate of an insolvent or bankrupt person.

[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.

[87] Absent a legitimate reason to award SRL a proprietary remedy—and I am not persuaded there is one—Joe is entitled to attempt to satisfy a judgment in damages and retain ownership of the property. If he is unwilling or unable to pay the judgment debt, the receiver may be required to sell the Grazing Lands; however, the likelihood of a post-judgment sale is not in-and-of-itself grounds on which to award a proprietary remedy.

[88] In short, I am not persuaded that a monetary award would be an inadequate remedy in the circumstances of this case.

C. Factors Which Would Render a Constructive Trust Unjust

[89] The fourth condition from *Soulos* states “there must be no factors which would render imposition of a constructive trust unjust in all the circumstances” (para. 45). This condition is informed by:

[34] ... the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

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

[92] In its submissions on remedy, the receiver advanced unjust enrichment as a stand-alone basis for a constructive trust. Although the receiver alleged unjust enrichment in the notice of civil claim, it did not advance SRL’s case on that basis at the summary trial. Instead, it focussed on the doctrine of corporate opportunity and breach of fiduciary duty. I did not make findings in the Reasons that would support a constructive trust as a separate remedy for unjust enrichment.

D. Equitable Compensation is the Appropriate Remedy

[93] Equitable compensation, as explained by the Supreme Court of Canada in *Southwind*, provides the court with a flexible and discretionary remedial approach that appropriately recognizes the contingencies inherent in a lost corporate opportunity and that have been shown on the facts of this case. It provides the court with the flexibility necessary to fashion a remedy that is responsive to the nature of Joe’s breach and the unique familial context in which the opportunity arose.

[94] The assessment of the quantum of equitable damages is guided by the specific nature of the opportunity lost and the nature of the breach. The court “is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy”: *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 1991 CanLII 52 [*Canson*] at para. 545.

[95] Equitable compensation is designed to restore the beneficiary to the position it would have occupied “but for” the breach of the fiduciary duty, not a better one. It allows for consideration of negative contingencies, so as to properly assess the value of what was lost: *Canson* at paras. 577 and 579.

[96] As stated, the court assesses equitable compensation at the date of trial and with the benefit of hindsight. Equity compensates the plaintiff for the lost opportunity caused by the breach, regardless of whether that opportunity could have been foreseen at the time of breach: *Southwind* at para. 74.

[97] In these ways, an award of equitable compensation recognizes the policy goals of fiduciary law, but also provides a just remedy and one that is proportionate to the breach.

E. Application of the Assessment Principles

[98] In *Smithies*, at paras. 80–82, Gomery J. explained that the assessment of compensation for a lost opportunity proceeds in two stages:

- a) First, the court must determine on a balance of probabilities a real possibility that the plaintiff would have realized the opportunity but for the defendant's conduct. Put another way, it must be established that the opportunity was not “merely fanciful”.
- b) Second, the court must assess the negative contingencies that might have prevented the opportunity from reaching fruition. Each hypothetical scenario is assessed according to its relative likelihood.

[99] Where there are alternate plausible scenarios, each constituting a real and not a fanciful possibility, each must be weighed according to its relative likelihood. Probabilistic calculations may assist in determining the range within which a damage award should fall, bearing in mind that, at the end of the day, damages are to be assessed, not calculated: *Smithies* at para. 83.

[100] In the Reasons, I found there was a real possibility SRL would have acquired the Grazing Lands if Joe had not breached his fiduciary duty. This finding satisfies the first stage of the analysis.

[101] Turning to the second stage, there are two contingencies that must be considered: would Carol agree to sell the property to SRL; and, could SRL raise the purchase price?

[102] In the Reasons, I rejected Carol's affidavit evidence she would never sell the property to SRL because Palmer did not want the Grazing Lands to be sold to Mike or any company related to Mike. This assertion was inconsistent with the objective evidence of Palmer's relationship with Mike and Carol's evidence under cross-examination, where she acknowledged that she treated and regarded Mike “like

family” and acknowledged that Mike was the logical person to own and operate the ranch business.

[103] Moreover, as power of attorney, Carol transferred the non-land ranch assets (the cattle, vehicles and equipment) to SRL in the spring of 2013. She then transferred Palmer’s interest in the Home Ranch to SRL in January 2017. Selling the Grazing Lands to SRL would have been consistent with her past conduct.

[104] Still, there was more than a fanciful possibility Carol would have refused to sell the Grazing Lands to SRL. She regarded this property as the last of Palmer’s legacy. She hoped that the grandchildren would show an interest in purchasing this property. While it may not have made logical sense for her to keep this one property “in the family”, people do not always act logically. Carol was under no obligation to SRL.

[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.

[106] It is difficult to assess the financing contingency. Joe told Mike that he hoped to get Carol to agree to vendor take-back financing on behalf of Palmer. Mike’s evidence was that, in the event Carol did not agree, he had arranged private financing until SRL could obtain bank financing. However, there was no evidence confirming the commitment to provide the necessary funds or the terms of the anticipated financing.

[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.

[109] As discussed above, the appropriate valuation of the Grazing Lands for these purposes is their fair market value at the date of trial. Had SRL acquired the Grazing Lands, it would have acquired the right to sell the property at fair market value. The court assesses equitable compensation at the date of trial and with the benefit of hindsight. This means that SRL is entitled to compensation based on a resale of the property, not its original purpose as grazing lands.

[110] For these reasons, I would award damages to SRL assessed at 66% of the fair market value of the Grazing Lands at the date of trial (September 2022), less the price Joe paid and any expenses he incurred.

F. Are Special Costs Warranted?

[111] In *Garcia v. Crestbrook Forest Industries Ltd.*, 9 B.C.L.R. (3d) 242, 1994 CanLII 2570 (BCCA) at para. 17, the Court of Appeal established that special costs are awarded only if a party has engaged in reprehensible conduct or misconduct during the litigation deserving of rebuke. Reprehensible conduct “encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke”.

[112] The authority to award special costs should be exercised with restraint to ensure that the punitive and deterrent purposes of an exceptional order of costs on this basis are maintained. The party seeking special costs must demonstrate exceptional circumstances to justify special costs: *Low v. Straiton Development Corporation*, 2023 BCSC 593 at para. 71; *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.

[113] The receiver identifies three grounds that it submits justify special costs against Joe: (a) non-production of documents; (b) inadmissible affidavits; and (c) providing evidence which sought to deceive the court, extending court time, and providing “manufactured false evidence”.

[114] There is no basis on which I could find that Joe willfully withheld relevant documents in a manner that would give rise to special costs. A large number of

documents were put before the Court on the summary trial. It is unclear what the receiver says was missing. The witnesses were cross-examined thoroughly and effectively on the documents produced. The Court ultimately had the documents it needed to find the facts necessary to decide the issues.

[115] Joe’s affidavit contained argument and statements that could not be reconciled with the email and text correspondence. However, I would not go so far as to say his affidavit constituted a “deliberate attempt to mislead [the trier of fact] through contrived, concocted, or fabricated evidence”, which would ground an order for special costs: *Webber v. Canadian Aviation Insurance Managers Ltd.*, 2003 BCSC 274 at para. 14.

[116] I rejected Joe’s evidence on a number of points because I found it was not credible. Those findings were made on the evidence as a whole, including Mike’s evidence. They do not justify special costs. Mere rejection of evidence as not credible is insufficient to justify special costs. If it were otherwise, special costs would be routine whenever credibility is in issue: *Behan v. Park*, 2014 BCSC 1982 at paras. 44–45; *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107, leave to appeal to SCC ref’d, 34725 (21 June 2012).

[117] Moreover, the cross-examinations and the documents allowed me to resolve the material disputes on the critical issues. Joe’s evidence did not impede, delay or complicate the proceeding. He did not create an impediment to a determination on the merits. With able assistance from counsel for both parties, the issues were decided in a cost-effective process.

[118] The receiver analogizes this proceeding to estate litigation, where legal expenses are ultimately borne by the estate. The receiver argues that it would be “inequitable” if Joe was able to pass on half of the cost of the litigation to Mike through the company, and, for this reason, submits that party-and-party costs would result in inadequate indemnification.

[119] In my view, this case was more akin to commercial litigation between shareholders of a closely-held company. I see no reason why the ordinary principles of costs should not apply. Absent reprehensible conduct in the litigation or other circumstances warranting special costs, “a discrepancy between actual costs and a costs award does not amount to an injustice or contravene the principle of indemnification”: *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at para. 35, leave to appeal to SCC ref’d, 38924 (20 February 2020).

[120] For these reasons, I would not award special costs against Joe.

IV. CONCLUSION

[121] There will be an order of equitable compensation assessed at 66% of the fair market value of the Grazing Lands at the date of trial, less the price Joe paid for the property and any property taxes or other expenses he incurred to maintain the property.

[122] The fair market value of the property must be determined using an appraisal by a professional to be agreed upon between the parties. The purchase price, taxes and expenses must be confirmed by Joe in an affidavit with documentation in support.

[123] The parties will have leave to reappear before me if there is disagreement over the instructions to the appraiser, the appraisal or the deductions, or if they require further directions to arrive at a final resolution on the quantum of damages.

[124] SRL is entitled to costs of the action, to be agreed or assessed according to the ordinary tariffs. As Joe was substantially successful on the remedy stage of the proceeding, costs related to this appearance are not to be included in SRL’s bill of costs.

“Elwood J.”

COURT OF APPEAL FOR BRITISH COLUMBIA

FORM 1

AMENDED NOTICE OF APPEAL (RULE 6(1) and 82(2))



Court of Appeal File No.
(For Registry Use Only)

CA49175

Supreme Court File No.

S-122417

The file number can be found on the upper right corner of the Supreme Court documents

Supreme Court Registry Location

Kelowna

To the respondent(s)

A court proceeding has been commenced against you in the Court of Appeal. See the final page of this form for details on how to respond.

1. PARTIES TO THE APPEAL

Appellant(s)

List the party(ies) appealing the Supreme Court or tribunal order.

Identify their roles in the proceeding below in brackets.

E.g., Jane Doe (plaintiff, petitioner, etc.)

Joseph Wayne Palmer Sather
(Defendant)

Respondent(s)

List the other party(ies) in the Supreme Court or tribunal order you are appealing who are affected by the appeal. Identify their roles in the proceeding below in brackets. E.g., Jane Doe (defendant).

Sather Ranch Ltd.
(Plaintiff)
~~C. Cheveldave & Associates Ltd.~~
(Court Appointed Receiver)

2. THE ORDER YOU ARE APPEALING

Is leave to appeal required?

Court of Appeal Rule 12 explains when you need leave to appeal. If you are unsure, check "Yes."

☒ Yes

☐ No

Who made the order?

Name the justice or other decision maker who pronounced the order you are appealing.

The Honourable Justice Elwood

What court and/or tribunal pronounced the order(s)?

☒ Supreme Court

☐ Tribunal

Supreme Court of British Columbia

Name of tribunal

Date the order was pronounced

Include the day, month and year that the order being appealed was pronounced (not the date the order was entered).

01/06/2023

DD/MM/YYYY

City where the order was pronounced

Kelowna, B.C.

Length of lower court hearing

Indicate in days or hours the length of the hearing that led to the order you are appealing from. For example, if you are appealing a judgment from a trial that took two hours, enter "two hours."

Five Days (September 21, 22, 23 and November 24, 25, 2022)

**What type of proceeding are
you appealing from?**
Check only one.

☐ Trial Judgment

☒ Summary Trial Judgment

☐ Order of a Tribunal

☐ Chambers Judgment

3. RELIEF SOUGHT

If leave to appeal is not required, fill out Part A. If you are seeking leave to appeal, fill out Part B.

PART A: LEAVE NOT REQUIRED

Part of the order being appealed

If you only want to appeal one part of an order, enter the part that is being appealed.

Order(s) you are seeking on appeal

Briefly list the order(s) you will ask this Court to make on appeal. For example: "Set aside the trial judgment and order a new trial."

~~Set aside the trial judgment and order a new trial~~

Set aside the chamber's judge's declaration that the appellant Joe Sather breached his fiduciary duty to the respondent Sather Ranch Ltd.

PART B: SEEKING LEAVE TO APPEAL

Part of the order being appealed

If you are only seeking leave to appeal one part of an order, enter the part that you are seeking leave to appeal.

Grounds for leave to appeal

Be as specific as possible. For example, if you believe the trial judge used an incorrect legal test or otherwise misapplied the law, indicate that here.

4. ADDITIONAL INFORMATION

Sealing order

Is there an order sealing any part of the trial court or tribunal file? If yes, add date(s).

☐ Yes

☒ No

Date

DD/MM/YYYY

Anonymity order/publication ban
Are there orders that protect the identity of a party or parties? If yes, add date(s).

☐ Yes

☒ No

Date

DD/MM/YYYY

Areas of law raised in the appeal

You may check more than one box if appropriate. For example, you should check "motor vehicle accidents" and "torts" for a personal injury claim involving a motor vehicle accident.

☐ Constitutional/Administrative

☒ Civil Procedure

☒ Commercial

☐ Motor Vehicle Accidents

☒ Municipal Law

☒ Real Property

☐ Torts

☒ Equity

☒ Wills and Estates

☐ Divorce Act (Canada)

☒ Family Law Act

☐ Other

Appeals involving children

Does this appeal involve the rights or interests of a child? E.g., parenting order.

☐ Yes

☒ No

5. SERVICE

Are you representing yourself?

☒ Yes

☒ No

Name(s) and address(es) within BC for service of appellant(s)

If you have a lawyer, include the law firm's address; otherwise provide your own residential address.

Joseph W.P. Sather
c/o #37-197 Dauphin Avenue,
Penticton, B.C. V2A 3S3

Fasken Martineau DuMoulin LLP
2900 – 550 Burrard Street
Vancouver, BC V6C 0A3

Phone number(s) of appellant(s)

~~403 836 8887~~

604 631 4859

Email address(es) for service of the appellant(s)

If you provide an email address, you consent to have documents served on you by email.

~~joesather_realtor@yahoo.ca~~

kmilinazzo@fasken.com

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Date form completed

~~26/06/2023~~

17/01/2025

DD/MM/YYYY

Name of lawyer or party
authorizing filing of this form

~~Joseph W.P. Sather~~

KALEIGH MILINAZZO

To the appellant(s):

You must file and serve this form on each respondent named in this document within the timelines required by the *Court of Appeal Act* and Court of Appeal Rules. You must file a Notice of Hearing **not more than one year** after filing this Form 1 or your appeal will be placed on the inactive list (Rule 50(1)(a)).

To the respondent(s)

If you intend to participate in this proceeding, **you must give notice** of your intention by doing the following **not more than 10 days** after receiving this Notice of Appeal: (1) file a “Notice of Appearance” (Form 2 of the *Court of Appeal Rules*) in a Court of Appeal registry and; (2) serve the Notice of Appearance on the appellant.

If you fail to file and serve a Notice of Appearance:

- (a) You are presumed to take no position on the appeal, or the application for leave to appeal (if leave is required).
- (b) The parties are not obliged to serve you with any further documents related to the appeal, including an order granting leave to appeal (if leave is required).

You are presumed to take no position if you fail to file and serve a Notice of Appearance within the time described above. The filing registries for the British Columbia Court of Appeal are as follows.

Central Registry:

B.C. Court of Appeal
Suite 400, 800 Hornby St.
Vancouver BC V6Z 2C5

Other Registries:

B.C. Court of Appeal
The Law Courts
P.O. Box 9248
STN PROV GOVT
850 Burdett Ave.
Victoria BC V8W 1B4

B.C. Court of Appeal
223 - 455 Columbia St.
Kamloops BC V2C 6K4

Inquiries should be addressed to (604) 660-2468.

COURT OF APPEAL FOR BRITISH COLUMBIA

FORM 3

NOTICE OF CROSS APPEAL (RULE 9(a))



Court of Appeal File No. CA49175

The file number can be found on the upper right corner of the Notice of Appeal.

PARTIES TO THE APPEAL

Appellant(s)

List the name(s) of the appellant(s) named on Form 1: Notice of Appeal

JOSEPH WAYNE PALMER SATHER (Defendant)

Respondent(s)

List the name(s) of the respondent(s) named on Form 1: Notice of Appeal

SATHER RANCH LTD. (Plaintiff)

To the appellant(s) and any respondent(s) not cross appealing the order under appeal:

A court proceeding has been commenced against you in the Court of Appeal. See the final page of this form for details on how to respond.

Name(s) of party(ies) who wish(es) to cross appeal the order under appeal.

Sather Ranch Ltd., by its Court Appointed Receiver, C. Cheveldave & Associates Ltd.

1. THE ORDER IN THE APPEAL YOU ARE CROSS APPEALING

Is leave to cross appeal required?

Court of Appeal Rule 12 explains when you need leave to cross appeal. If you are unsure, check "Yes".

☐

Yes

☒

No

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Who made the order?

Name the justice or decision maker who pronounced the order in the appeal you are cross appealing.

The Honourable Justice Elwood

Date the order was pronounced

Include the day, month and year that the order in the appeal that you are cross appealing was pronounced.

11/04/2024

DD/MM/YYYY

2. RELIEF SOUGHT

If leave to cross appeal is not required, fill out Part A. If you are seeking leave to cross appeal, fill out Part B.

PART A: LEAVE NOT REQUIRED

Part of the order being cross appealed

If you only want to cross appeal one part of an order, enter the part that is being cross appealed.

Order(s) you are seeking on cross appeal

Briefly list the order(s) you will ask this court to make on cross appeal. For example: "Set aside the trial judgment and order a new trial." Include any order as to costs.

1. A declaration that Joe Sather holds the subject lands as constructive trustee for the Plaintiff.
2. An order that title to the lands vest in the Plaintiff, on such terms and conditions as the Court deems appropriate. In the alternative, an order that Joe Sather account to the Plaintiff for all benefits received arising from his breach of fiduciary duty.
3. In the further alternative, an order that the equitable compensation granted be assessed at 100% of the fair market value of the subject lands at the date of trial, less the price paid for the lands by Joe Sather and any property taxes or other expenses incurred to maintain the property up to the date of trial.
4. An order that Joe Sather pay special costs to the Plaintiff.

PART B: SEEKING LEAVE TO APPEAL

Part of the order being cross appealed

If you are only seeking leave to cross appeal one part of an order, enter the part that you are seeking leave to cross appeal.

Grounds for leave to cross appeal

Be as specific as possible. For example, if you believe the trial judge used an incorrect legal test or otherwise misapplied the law, indicate that here.

3. SERVICE**Are you representing yourself?**
☐ Yes ☒ No
Name(s) and address(es) within BC for service of party(ies) filing cross appeal.

If you have a lawyer, include the law firm's address; otherwise provide your own residential address.

Sather Ranch Ltd.
c/o Scott Andersen
Lawson Lundell LLP
1800 - 1631 Dickson Avenue
Kelowna, B.C. V1Y 0B5

Phone number(s) of party(ies) filing cross appeal

604-631-9220

Email address(es) for service of party(ies) filing cross appeal

If you provide an email address, you consent to have documents served on you by email.

scott.andersen@lawsonlundell.com

Date form completed

Date

03/12/2024

Name of lawyer or party
authorizing filing of this form

Scott R. Andersen

DD/MM/YYYY

If you intend to participate in this cross appeal and you have not already filed a Notice of Appearance in this matter in a Court of Appeal registry, **you must give notice** of your intention to participate by filing a form entitled "Notice of Appearance" (Form 2 of the Court of Appeal Rules) in a Court of Appeal registry and serve the Notice of Appearance on the other parties to the appeal and cross appeal **not more than 10 days** after receiving this Notice of Cross Appeal.