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

Table of Contents

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. Instaloans 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."