

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sather v. Sather Ranch Ltd.*,
2025 BCCA 464

Date: 20251223
Docket: CA49175

Between:

Joseph Wayne Palmer Sather

Appellant/
Respondent on Cross Appeal
(Defendant)

And

Sather Ranch Ltd.

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Mr. Justice Abrioux
The Honourable Justice Fleming
The Honourable Justice Gomery

On appeal from: Orders of the Supreme Court of British Columbia, dated
June 1, 2023 and April 11, 2024 (*Sather Ranch Ltd. v. Sather*, 2023 BCSC 926
and 2024 BCSC 598, Kelowna Docket S122417).

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Place and Date of Hearing:

Vancouver, British Columbia
June 2, 2025

Place and Date of Judgment:

Vancouver, British Columbia
December 23, 2025

Written Reasons by:

The Honourable Justice Fleming

Concurred in by:

The Honourable Mr. Justice Abrioux
The Honourable Justice Gomery

Summary:

This appeal and cross appeal arise out of the appellant taking personal advantage of a corporate opportunity to acquire a parcel of land in breach of his fiduciary duty to the respondent. The summary trial resulted in two sets of reasons for judgment: 2023 BCSC 926, dealing with liability and 2024 BCSC 598, dealing with the appropriate equitable remedy. In challenging the liability finding, the appellant argues the judge erred in concluding that the respondent's opportunity was to purchase, rather than use the parcel of land. The respondent challenges the remedy decision on the cross appeal, arguing the judge made a number of errors in refusing to impose a constructive trust and in awarding equitable compensation instead.

Held: Appeal and cross appeal dismissed. On the appeal, the judge did not err in characterizing the respondent's opportunity as one to purchase rather than use the lands in question. On the cross appeal, he was not bound to impose a gains-based remedy because the appellant obtained a gain from his breach. Instead, the decision about choice of remedy is discretionary. The judge did not err in exercising his discretion by awarding equitable compensation in the amount he did.

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Reasons for Judgment of the Honourable Justice Fleming:

Introduction

[1] The appellant Joseph Sather (“Joe”) was one of two directors and shareholders of the respondent Sather Ranch Ltd. (“SRL”), now in receivership. The other was Mike Street. Joe and Mr. Street incorporated SRL to carry on Sather Ranch, a commercial cattle ranch established by Joe’s father, Palmer Sather (“Palmer”). For clarity, I refer to Joe and Palmer Sather by their first names.

[2] The ranching operations involved two parcels of land, the “Home Ranch”, owned by Palmer and one of his brothers, and the “Grazing Lands”, that Palmer solely owned, as well as Crown range lands, over which Palmer held a grazing license.

[3] In reasons for judgment indexed at 2023 BCSC 926, the summary trial judge found Joe breached his fiduciary duty to SRL by taking advantage of its opportunity to purchase the Grazing Lands. Instead of pursuing that opportunity for SRL, he purchased the property for himself (“Breach Reasons”). SRL sought a constructive trust to remedy the breach. In separate reasons indexed at 2024 BCSC 598, the judge determined equitable compensation was the appropriate remedy and considered negative contingencies related to the loss of opportunity in assessing the amount of the award (“Remedy Reasons”).

[4] Joe appeals the breach finding on a single, narrow ground, arguing the judge erred in concluding SRL’s opportunity was to purchase rather than use the Grazing Lands.

[5] In its cross appeal, SRL contends the judge made a number of errors in refusing to impose a constructive trust and in awarding equitable compensation instead. SRL’s core argument is the judge did not have the discretion to order equitable compensation, as a loss-based remedy, because Joe obtained a gain from his breach. Instead, SRL submits, the judge was bound to impose a gains-based remedy that stripped Joe of his gain.

[6] For the reasons that follow, I would dismiss the appeal and the cross appeal.

Background

[7] Palmer operated Sather Ranch as a sole proprietorship for over seven decades. It also functioned as a family business: Palmer's two brothers were involved early on and Joe and his sister Carol, who grew up on the ranch, worked there at times.

[8] The ranching operations followed an annual cycle. Starting in May, the cattle were put out to graze on the Crown range lands. In October and November, they grazed on the Grazing Lands. From the end of November to May, they were fed and cared for on the Home Ranch.

[9] Interested in ranching, Mr. Street began working at Sather Ranch in 1995. Unpaid, he learned the business in exchange for his work.

[10] Palmer granted powers of attorney to Joe and Carol in 2000, due to health issues that later included early onset dementia.

[11] In 2009, Palmer added Mr. Street and Joe to the Crown range lands grazing license. Mr. Street became primarily responsible for the day-to-day operations of Sather Ranch and Joe became responsible for financial matters and important decisions.

[12] Joe and Mr. Street incorporated SRL in 2013. SRL acquired the cattle and non-land assets of Sather Ranch from Palmer. Joe and Carol transferred the land leases used by the ranch from Palmer to SRL as they came due. SRL purchased the Home Ranch in early 2017 and Joe agreed to Mr. Street's proposal that SRL also purchase the Grazing Lands.

[13] In April 2017, Mr. Street obtained an appraisal of the property for SRL, with Joe's agreement. The appraiser valued the property at \$115,000 based on its highest and best use as grazing lands by a person that owned the grazing rights to

the adjacent Crown range land. The Grazing Lands have no legal access. Accessing them involves crossing the Crown range land and the Home Ranch.

[14] The plan, which Joe supported, was to present the appraisal to Carol and seek her agreement to sell the Grazing Lands to SRL “at a fair value”: Breach Reasons at para. 47.

[15] On April 17, 2017, Mr. Street completed and signed an offer from SRL to purchase the Grazing Lands for \$120,000. Joe agreed to present the offer to Carol and negotiate with her on behalf of SRL.

[16] On April 20, 2017, Joe advised Mr. Street that he had spoken with Carol and “we are not in a rush to sell”. He said some of the grandchildren were interested in purchasing the Grazing Lands and any of them would get the first chance to buy. But there was only one grandchild who could potentially buy the property and three days later, Joe told Mr. Street that was not going to happen.

[17] Mr. Street spoke to Carol on June 30, 2017, and sent her a copy of the offer upon learning that she had not received the offer from Joe. On July 1, 2017, Joe told Mr. Street he was still in discussions with Carol and expected a decision soon.

[18] On July 8, 2017, Joe informed Mr. Street that he intended to purchase the Grazing Lands in his own name. This led to a heated argument. Within a short time, SRL ceased operating as a viable business, the dispute over the Grazing Lands having irreparably damaged the relationship between Joe and Mr. Street.

[19] On August 25, 2017, Carol executed the transfer of the Grazing Lands to Joe for \$120,000.

[20] On October 1, 2017, without telling Mr. Street, Joe leased the Grazing Lands to SRL through a leasing agreement until September 30, 2018, in exchange for rent equivalent to the annual property taxes. Palmer died later that month. Joe and Carol were equal beneficiaries of the residue of the estate under Palmer’s will.

[21] The Court appointed a receiver and manager over SRL's assets on July 17, 2018.

Breach Reasons

[22] The primary issue at the summary trial was whether Joe breached his fiduciary duty to SRL by taking advantage of a corporate opportunity to acquire the Grazing Lands.

[23] Joe denied committing a breach, arguing the opportunity to acquire the property was a family opportunity rather than a corporate opportunity; SRL was not in a position to purchase it; and Carol was unwilling to sell it to SRL in her role as power of attorney.

[24] Ultimately, the judge found there was a real possibility that SRL could have financed the purchase of the Grazing Lands and Carol would have sold the property to SRL but "it is difficult to say whether or when that agreement would have been forthcoming": at paras. 95–96.

[25] In deciding the primary issue, the judge considered the principles governing the law of corporate opportunity established in *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 1973 CanLII 23 [*Canaero*]. His analysis focused on three of the *Canaero* factors: the nature of the opportunity and whether it was a corporate opportunity; the ripeness or maturity of the opportunity; and knowledge about the opportunity: at para. 100.

[26] Only his discussion of the first factor bears on the appeal. The judge found the nature of the opportunity was to acquire the Grazing Lands for \$120,000 using the appraisal obtained by SRL. He identified SRL's objective in pursuing this opportunity as 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: at para. 104.

[27] The judge also recognized three “unique” circumstances, which he returned to in the Remedy Reasons. Again, only the first is relevant to this appeal: the corporate opportunity was not to acquire the Grazing Lands to develop the property or resell it at a profit: at para. 137.

[28] Ultimately, the judge concluded Joe breached his fiduciary duty by taking advantage of the opportunity that belonged to SRL, or for which it was negotiating, thereby putting his personal interest in conflict with his duty to SRL when he purchased the Grazing Lands without SRL’s approval.

Issue on Appeal: The Nature of the Corporate Opportunity

[29] In challenging the liability finding, Joe argues the judge erred by concluding the corporate opportunity was to purchase rather than use the Grazing Lands.

[30] Alleging the judge made factual findings that fundamentally conflict with this conclusion, Joe asserts that characterizing SRL’s opportunity as one to purchase the Grazing Lands for \$120,000 was a palpable and overriding error.

[31] Joe’s factum identifies the following findings as demonstrating the error:

- 1) The opportunity was “to acquire the Grazing Lands from Carol ... 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”: Breach Reasons at para. 103.
- 2) The opportunity at issue was not an opportunity for SRL to benefit financially from a resale of the Grazing Lands: at para. 137. SRL was formed to carry on the operations of Sather Ranch, not to develop or sell the ranch properties: at para. 105.
- 3) SRL’s purpose in pursuing this specific opportunity was to ensure the long-term viability of the ranching operations and provide a sustainable base from which to expand the size of the herd: at para. 104.

- 4) Operations could be maintained with a leasehold interest because “the cows could be grazed and the grazing license could be maintained with a leasehold interest in the Grazing Lands”: at para. 110. Ownership was desirable, it was not essential.

[32] Joe suggests that concluding the opportunity was to purchase the property for a specific price, while also stating it was not an opportunity to obtain the financial benefits of legal ownership is logically incoherent; and incongruent with the imposed remedy of equitable damages which “does exactly that”. He also suggests the judge gave no credence to his own finding that SRL’s purpose in pursuing the opportunity was to maintain the ranch and the herd, which could be fulfilled with a leasehold interest over the Grazing Lands.

[33] In oral submissions, Joe emphasized the opportunity must be understood based on SRL’s purpose, or more to the point, what its purpose was not—to develop the properties or benefit financially.

[34] Respectfully, I see no merit in this argument.

[35] First, the judge’s conclusion that the opportunity was to purchase the Grazing Lands is amply supported by a number of other findings about the corporate plan and SRL’s business. He found, for example, that owning the Grazing Lands was desirable to SRL; “by its nature fell into the line of SRL’s business and would have been of practical advantage to SRL”; and the opportunity to purchase the property was “intimately or closely associated with the existing and prospective activities of SRL”: Breach Reasons at paras. 111, 135. Purchasing the Grazing Lands also aligned with SRL’s plan when it was incorporated: to acquire Sather Ranch’s assets, keep the existing ranch together, increase the size of the herd, *acquire* additional properties with grazing licenses, and generally build a more profitable, sustainable operation: Remedy Reasons at para. 18. Further, that corporate plan was being implemented. After SRL acquired the ranch’s cattle and other non-land assets and Palmer transferred land leases used by the ranch to SRL, it purchased the Home Ranch from Palmer and his late brother’s estate.

[36] All of this, in my view, is more than sufficient to defeat the suggestion of any error, but so is the unchallenged finding that SRL's plan specific to the Grazing Lands was a plan to *purchase* them. Proposed by Mr. Street, Joe agreed to the plan, which included obtaining the appraisal. Joe approved SRL's offer to purchase, drafted by Mr. Street, and agreed to present it to Carol and negotiate on behalf of SRL.

[37] Whether or not owning the Grazing Lands was desirable or necessary for SRL, and regardless of how it did or did not intend to benefit from all the incidents of ownership, the only plan and opportunity being pursued was to purchase them. The other findings Joe relies on cannot change that.

[38] I would not accede to the appeal.

Remedy Reasons

[39] At the summary trial, SRL's receiver sought an order that the Grazing Lands vest in SRL, a form of constructive trust, so the property could be sold and the net proceeds used for the benefit of SRL's stakeholders.

[40] The Remedy Reasons, at para. 33, identified a number of findings from the Breach Reasons as key to the question of crafting an appropriate remedy:

- 1) The corporate opportunity being pursued was acquiring the Grazing Lands for \$120,000, using an appraisal that was based on their use as grazing land.
- 2) SRL's objective was not to resell the land at a profit.
- 3) There was a "real possibility" that SRL would have acquired the Grazing Lands if Joe had not breached his fiduciary duty, but it was not a "sure thing."
- 4) Joe would have inherited an interest in the Grazing Lands.

- 5) The lease that Joe entered into with SRL maintained the status quo and satisfied the conditions of the grazing license.
- 6) SRL ceased operations shortly after Joe acquired the Grazing Lands.

[41] The judge also identified two other considerations: the claims of creditors, and the receiver's intentions with respect to the Grazing Lands. There were four related party creditors who were owed an aggregate of \$703,072 and favoured a constructive trust. Only Joe and his holding company did not support a constructive trust.

[42] The Grazing Lands did not have legal access but if a vesting order was made, the receiver said he intended to improve the access and sell the property, estimating its value would almost double with legal access, based on an appraisal.

[43] The judge started his analysis with the proposition that a breach of fiduciary duty gives rise to a choice between a gains-based or a loss-based approach to equitable remedies.

[44] He rejected SRL's assertion that a plaintiff is entitled to elect between a gains-based remedy (constructive trust or disgorgement of profits) and loss-based remedy (equitable compensation), as irreconcilable with the court's discretion to fashion an appropriate equitable remedy, also referring to remedies for breach of fiduciary duty as inherently discretionary and fact dependent: at para. 44.

[45] Turning to the principles governing constructive trusts, the judge observed the remedy should only be granted if there is a reason to grant the plaintiff the additional rights that flow from recognition of a right to property, citing *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 678, 1989 CanLII 34. He also recited the four conditions articulated in *Soulos v. Korkontzilas*, [1997]

2 S.C.R. 217, at para. 45, 1997 CanLII 346, that must “generally be satisfied” before a constructive trust *may* be imposed for 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.

[46] The judge found the first two *Soulos* conditions were made out on the findings in the Breach Reasons, but following his analysis, conditions three and four were not.

Condition Three: Legitimate Reason

[47] SRL advanced two reasons for seeking a constructive trust under condition three: (1) to achieve the prophylactic purpose of equitable remedies—to deter faithless fiduciaries and preserve the integrity of the fiduciary relationship; and (2) to “return” the Grazing Lands and avoid potential problems associated with valuing an award of damages.

[48] The judge considered the prophylactic purpose as discussed in *Soulos* and *Strother v. 3464920 Canada Inc.*, 2007 SCC 24. *Strother* involved a lawyer who profited from breaching his fiduciary duty and the remedy of a disgorgement order. In *Strother*, as the judge recognized, the majority held that disgorgement may be directed at either or both of the prophylactic purpose and the restitutionary purpose, which aims to restore the profit or the lost opportunity that properly belongs to the beneficiary, but was wrongly appropriated by the fiduciary: at para. 75.

[49] From there, the judge identified the importance of context and what he saw as two constraints on the prophylactic purpose. First, it must not be disproportionate to the breach and the plaintiff's interest in the specific asset, citing *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 239. Second, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff: at para. 55, citing *Strother* at para. 89.

[50] Exploring the question of SRL's interest in the Grazing Lands under condition three, the judge reviewed authorities including *Lac Minerals* and *Soulos*, where the unique value of the property to the plaintiff was a reason for imposing a constructive trust. But here, the property had lost its unique value to SRL given that it ceased to operate the ranch, was no longer in business, and the receiver planned to sell the land: at para. 62.

[51] Addressing the nature and seriousness of the breach, the judge identified SRL's objective in acquiring the Grazing Lands as relevant and reiterated that SRL intended to acquire the Grazing Lands for use in the ranching operations. The judge highlighted that although Joe breached his fiduciary duty in acquiring the property by persuading Carol to sell it to him instead of SRL for the same price, using SRL's appraisal, Joe did not conceal his intention from Mr. Street (at least not after the argument on July 8, 2017); prevent SRL from using the property as grazing lands; or "flip" it at a profit: at para. 61.

[52] Given his view of the breach and SRL's interest in the property, the judge concluded that a constructive trust would be disproportionately punitive: at para. 64.

[53] The judge went on to distinguish *Lac Minerals* and other authorities that indicate a constructive trust is the preferred remedy where the fiduciary acquires property that would have been acquired by the plaintiff but for the breach, as there was only a real possibility that SRL would have acquired the Grazing Lands, absent Joe's breach: at para. 67.

[54] Returning to the prophylactic purpose, the judge opined that equitable compensation also deters wrongful conduct and enforces the fiduciary relationship by restoring the value of the lost opportunity at the date of trial with the benefit of hindsight, relying on *Southwind v. Canada*, 2021 SCC 28 at paras. 72 and 74: at para. 64.

[55] Along with concluding the prophylactic purpose would be adequately served in this case by equitable compensation, the judge rejected the receiver's argument that a constructive trust should be imposed because damages would be inadequate, difficult to assess or difficult to enforce against Joe.

[56] In dismissing the argument, among other things, the judge considered the contingent nature of SRL's opportunity to acquire the Grazing Lands and the absence of a finding that but for Joe's breach, the attempt would have succeeded.

[57] The judge also found SRL's concern about enforceability incorrectly presumed it would be entitled to the maximum realizable value of the land, failing to appreciate that an equitable compensation award would be based on the fair market value of the land at the date of trial, discounted by applying negative contingencies: at para. 86.

Condition Four: Whether an Injustice Would Arise

[58] Not persuaded there was a legitimate reason to award SRL a proprietary remedy under condition three, the judge engaged in a similar analysis under condition four. He concluded a constructive trust would be unfair both to Joe and his family, specifying that the remedy would ignore the contingencies that marked SRL's opportunity to purchase the Grazing Lands, and would be disproportionate to Joe's breach, as well as SRL's interest in the property: at para. 91.

[59] The judge identified equitable compensation as offering the flexibility necessary for a remedy that was responsive to the nature of Joe's breach and the "unique familial context" in which the opportunity arose, again referring to *Southwind*: at para. 93.

Equitable Compensation

[60] After outlining the approach to assessing equitable compensation, the judge engaged in the two-stage assessment process for lost opportunity compensation articulated in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2019 BCSC 802 at paras. 80–82. At the second stage, the negative contingencies that might have prevented the opportunity from being realized are assessed according to the relative likelihood of each scenario. The judge described the relative likelihood that: (1) Carol would have agreed to sell the Grazing Lands to SRL absent Joe’s breach; and (2) SRL could have financed the purchase (by Carol agreeing to vendor take-back financing, or the private financing Mr. Street said he had arranged), as more than an even chance but “materially less than a sure thing”: at paras. 105, 107. The judge discounted the opportunity by 33%, based on his assessment of both negative contingencies, and valued the lost opportunity at 66% of the fair market value of the Grazing Lands.

[61] Ultimately, he ordered Joe to pay an award equal to 66% of the fair market value of the Grazing Lands determined by appraisal, less the price he would have paid and expenses.

Issues on the Cross Appeal

[62] In its factum, SRL alleges the judge made a combination of errors in his approach to the question of remedy framed as follows:

- 1) Not requiring the faithless fiduciary to disgorge and deliver up the property and benefit obtained as a result of his breach of fiduciary duty;
- 2) Failing to give sufficient weight to the exemplary purpose of the remedy for breach of fiduciary duty;
- 3) Finding that the requirements for a constructive trust were not met;
- 4) Giving weight to irrelevant considerations; and

- 5) Not granting an *in specie* proprietary remedy that was available and sought by the plaintiff.

[63] During the appeal hearing, SRL identified the first alleged error and its corollary—the court has no discretion to refuse a gains-based remedy when the fiduciary obtains a gain from their breach, as the foundation of its cross appeal. The other alleged errors attack the judge’s exercise of discretion in refusing to order the constructive trust. SRL did not address the fifth ground during the hearing.

[64] SRL also advances an alternative and “additional” ground, that the judge erred in his assessment of equitable compensation.

Standard of Review

[65] It is well established that equitable remedies generally, and for breach of fiduciary duty specifically, are *always* subject to the discretion of the court: *Strother* at para. 74; *Soulos* at para. 54, Justice Sopinka dissenting, but not on this point.

[66] A deferential standard of review applies to discretionary decisions on appeal, absent an error of law, erroneous principles, irrelevant considerations, or a manifestly unjust decision: *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26 at para. 62, Justice Côté dissenting, but not on this point.

Issue One: The Approach to Equitable Remedies Where a Gain is Obtained in Breach of Fiduciary Duty

Positions of the Parties

[67] Acknowledging that deference is generally owed to a decision regarding an equitable remedy, SRL argues the judge made a fundamental legal error by not selecting a gains-based remedy that would have required Joe to disgorge the Grazing Lands. The argument rests on what SRL identifies as a foundational, inviolable principle—that a faithless fiduciary must always be stripped of the gain or benefit obtained from their breach to meet the prophylactic purpose.

[68] Based on this principle, SRL asserts the first question to be asked in selecting an appropriate remedy is whether the fiduciary obtained a gain or benefit from their breach. If yes, then the court must inquire into how the unlawful gain should be taken away and is limited to determining the manner of disgorgement: either *in specie* (constructive trust) or an equitable money judgment (disgorgement order). In other words, whenever the breach results in a gain, SRL contends, the court's remedial discretion is limited to determining the manner or form of disgorgement. Where the plaintiff also has distinct losses, those too must be recovered, but the court does not have the discretion to limit the remedy to those losses. According to SRL then, because Joe acquired the Grazing Lands from his breach, the judge had no choice but to order this gain disgorged through a constructive trust or a disgorgement order. Equitable compensation was not legally available.

[69] Characterizing the Remedy Decision as a marked departure from long established law, SRL argues the jurisprudence is clear that the exemplary or prophylactic purpose is only advanced by gains-based remedies that "insist" on the faithless fiduciary not retaining any benefit from their breach. SRL also points to the absence of authority that provides a money judgment, "without regard to the defendant's gain"; and submits that equitable compensation, measured by the plaintiff's loss, is only awarded in cases where the plaintiff sought the remedy, such as *First Majestic Silver Corp. v. Davila*, 2013 BCSC 717, or where the defendant had no gain to strip, as in *Southwind*.

[70] Joe makes the same argument in reverse, telling us there is no caselaw that supports imposing a constructive trust where the breach involves an uncertain corporate opportunity. Substantively, he argues the judge's discretion was not constrained to a gains-based remedy. Instead, the judge enjoyed a broad discretion to craft an appropriate remedy that was responsive to the facts of the case and facilitated the deterrence "necessary to further the fiduciary concept's foundational purpose". Joe also asserts that equitable remedies are required to be proportionate, citing as the judge did, *Sun Indalex* and *Strother* for this point. For Joe, equitable compensation, which seeks to restore the plaintiff's loss, is analytically consistent

with an uncertain lost corporate opportunity and well supported by the case law. Further, Joe contends the compensation awarded did not permit him to retain any of his ill-gotten gain, given the uncertainty of SRL's opportunity to acquire the Grazing Lands for a particular price. Joe submits, then, that determining an appropriate remedy is not limited to focusing on the gain, but even so, the award stripped him of what was tainted by the breach.

Discussion

SRL's Authorities

[71] In support of the assertion that stripping the faithless fiduciary of their gain is an inviolable principle, SRL relies on *Baillie v. Charman*, 70 B.C.L.R. (2d) 388 (C.A.), 1992 CanLII 5972, and *Canaero*. In *Baillie*, this Court observed the principle that a fiduciary must account for profits was first recognized in *Keech v. Sandford* (1726) 25 E.R. 223, Sel. Cas. Ch. 61, considered again in *Boardman v. Phipps* [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.) and adopted with approval in *Canaero*, before concluding "the principle is clear that if a fiduciary profits, such profits must be accounted for and paid over": *Baillie* at para. 25.

[72] *Canaero* dealt mostly with the approach to establishing the liability of directors for usurping a corporate opportunity in breach of their fiduciary duty. The brief remedy discussion aligns with SRL's argument. The Supreme Court of Canada restored the trial judge's award of damages based on valuing the loss of the particular contract being pursued by the company. Likening the damages to an accounting for profits, the Court held the company was not required to establish what its profits would have been, or what it lost by failing to realize the corporate opportunity. Instead, the company was entitled to compel the faithless fiduciaries to answer for their default according to their gain: *Canaero* at 622.

[73] SRL also relies on *Indutech Canada Limited v. Gibbs Pipe Distributors Ltd.*, 2013 ABCA 111 at para. 45, where the trial judge ordered disgorgement of profits for the some of the appellant's breaches of fiduciary duty and compensatory damages for other purely contractual breaches. The Alberta Court of Appeal found the

disgorgement order was consistent with *Canaero's* requirement that a fiduciary give up the profit made in an impermissible manner and was the correct remedy when the fiduciary's gain is greater than the beneficiary's loss, citing the concurring reasons of then Justice McLachlin, in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 1991 CanLII 52. But the analysis in *Indutech* began with the oft-cited discussion of Justice Abella, as she then was, regarding the discretionary nature of remedies for breach of fiduciary duty in *McBride Metal Fabricating Corp. v. H & W. Sales Company Inc.*, 59 O.R. (3d) 97, 2002 CanLII 41899 (O.N.C.A.):

[30] The remedies for breach of fiduciary duty are discretionary, dependent on all the facts before the court, and designed to address not only fairness between the parties, but also the public concern about the maintenance of the integrity of fiduciary relationships.

[74] Probing *Indutech's* reference to *Canson*, that case concerned the proper approach to damages or compensation for breach of fiduciary duty. Disgorgement was not at issue. Justice McLachlin disagreed with the majority's view that damages should be measured by analogy to tort and contract (except when the trustee controls the property of the *cestui que trust*): at para. 2. Part of her reasoning was that tort law is incompatible with the "well developed doctrine" that a fiduciary must disgorge profits gained through a breach of duty, even where such profits are not made at the expense of the person to whom the duty is owed. She also identified equitable compensation as available when the equitable remedies of "restitution" and account are not appropriate.

[75] But emphasizing the trust-like nature of fiduciary obligations generally, McLachlin J. also concluded the ambit of damages as an equitable remedy should be determined according to the restitutionary basis of compensation for breach of trust:

[11] Proceeding in trust, we start from the traditional obligation of a defaulting trustee, which is to effect restitution to the estate. But restitution *in specie* may not always be possible. So equity awards compensation in place of restitution *in specie*, by analogy for breach of fiduciary duty with the ideal of restoring to the estate that which was lost through the breach.

[76] She determined the plaintiff's actual loss as a consequence of the breach should be assessed with the full benefit of hindsight, and unconstrained by common law limiting factors. Her approach was subsequently followed in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 1999 CanLII 705.

[77] Digressing for a moment, I would note that SRL relies on the reasons of McLachlin J. in *Canson* to advance its second ground of appeal—whether the judge erred by failing to give sufficient weight to the prophylactic purpose in refusing to impose a constructive trust. SRL interprets her emphasis on the trust concept as aimed at the importance of the prophylactic purpose in protecting fiduciary relationships, instead of what I see as the central concern with ensuring restitution.

[78] In making its insufficient weight argument, SRL also relies on the views of Professor Rotman in *Fiduciary Law*: Leonard I. Rotman, *Fiduciary Law* (Toronto: Carswell, 2005). He writes the focus of fiduciary relief “ought to be primarily upon the exemplary [prophylactic] and only secondarily on the restitutionary or compensatory means to effect justice between the parties”: at 693.

[79] Professor Rotman identifies the ultimate purpose of fiduciary relief as to uphold the fundamental purpose of the fiduciary concept: maintaining the integrity of valuable or necessary relationships of high trust and confidence: at 692–693. He also emphasizes however that equitable relief is limited by or must suit the facts of the case: at 707. On his analysis, a wronged beneficiary is “entitled only to a court’s assessment of what is appropriate given the nature of the duty owed and the circumstances surrounding its breach”, in light of the predominant function of facilitating the deterrence necessary to further the fundamental purpose: at 707.

[80] On my reading, Professor Rotman endorses a discretionary approach to selecting an equitable remedy for a breach of fiduciary duty that is tied to, but by no means captured by, the prophylactic purpose, contrary to SRL’s primary argument.

[81] Returning to that argument, SRL also points to *Jostens Canada Ltd. v. Gibsons Studio Ltd.*, 1999 BCCA 273 and *Ruwenzori Enterprises Ltd. v. Walji*, 2006 BCCA 448.

[82] In *Jostens*, this Court upheld an award of damages assessed on an equitable basis for a fiduciary's wrongful diversion of a business opportunity. The appellant had a right to relief based on the fiduciary's breach of contract, compensable under a common law damage award or an accounting in equity. Justice Lambert concluded the trial judge correctly applied the equitable rule that measures the remedy by the gain, and the principle underlying equitable relief that was described in *Lac Minerals*, where a constructive trust was imposed. Articulated as an *important consideration* in equity, and one that may not be achieved by a damage award, that principle was ensuring the wrongdoer does not profit from their wrongdoing: *Jostens* at para. 25, citing *Lac Minerals* at 17.

[83] *Ruwenzori* upheld a constructive trust over a proportionate interest in a hotel purchased partly with funds the fiduciary had misappropriated. The Court concluded the trial judge was *entitled* to and *almost obligated* to make the order on the facts, for "to refuse such an order would amount to allowing wrongdoers to profit from their wrongful conduct, a result a court of equity could not countenance": at para. 44.

[84] Each of these cases endorses the remedial principle that a fiduciary should not be permitted to profit from their wrongdoing. But, in my view, neither case stands for the proposition that the court has no discretion or can never depart from imposing a gains-based remedy when the fiduciary obtains a gain from their wrongdoing.

Current Legal Framework

[85] Weighing against SRL's assertion of a rigid principle, as indicated by the standard of review, is the Supreme Court of Canada's ongoing emphasis on the discretionary nature of equitable remedies in a range of breach of fiduciary duty contexts, and the recognition of other principles such as proportionality as well as a nuanced approach to the prophylactic purpose.

[86] I start with *Soulos*, which established that a constructive trust is an available remedy for breach of fiduciary duty. The case concerned a real estate agent who breached his fiduciary duty to his client by buying the property for himself instead of the client. Justice McLachlin underscored that equitable remedies are discretionary, flexible and awarded based on what is just in all the circumstances, in support of her conclusion that a constructive trust may be imposed where good conscience requires: at para. 34. She highlighted that equity has always been concerned with unfair or unjust effects on the defendant and third parties and opined that good conscience addresses not only fairness between the parties, but also the larger public concern of maintaining the integrity of fiduciary relationships: at para. 33.

[87] In applying the four conditions, McLachlin J. considered the “flagrant and inexcusable” nature of the realtor’s breach of his duty of loyalty: at para. 47. Other considerations included that the realtor was not enriched by his wrongful gain and the client did not suffer a financial loss because the value of the property declined, but the client had a strong personal interest in owning the property. Justice McLachlin concluded both this interest and the need to ensure realtors and other fiduciaries remain faithful to their duty of loyalty satisfied the third condition. In determining there were no factors that would make imposing a constructive trust unjust, she found that the realtor would not be treated unfairly, noting the plaintiff had agreed to indemnify him for the loss he sustained from owning the property: at para. 51. In other words, the potential for unfairness to the fiduciary included his loss, despite the seriousness of his breach.

[88] *Strother* displays the same emphasis on discretion as *Soulos* in the context of a disgorgement order. The lawyer who breached his fiduciary duty to his client by putting himself in a conflict of interest and taking shares in the client’s competitor, was ordered to disgorge the profit generated by his breach, assessed according to an open-ended accounting period. Writing for the majority, Justice Binnie concluded the disgorgement order was excessive.

[89] He started his analysis of the remedy by observing the Court’s repeated recognition that equitable remedies are discretionary: at para. 74. He also held, as the judge in this case observed, that disgorgement can be directed at *either or both* the prophylactic and restitutionary purposes: at paras. 75–76. Explaining the role of the restitutionary purpose in this context, Binnie J. wrote: “[t]his rationale is applicable, for example, to the wrongful acquisition by a fiduciary of assets that should have been acquired for the beneficiary”.

[90] Only the prophylactic purpose was engaged in *Strother*, the trial judge having rejected the plaintiff’s claim that its corporate opportunity had been usurped. Justice Binnie made the point that denying the lawyer his profit meant that a windfall to the plaintiff was unavoidable:

77. 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.]

[91] I see this part of Binnie J.’s analysis and in particular the articulation of a windfall as tolerated to meet the prophylactic purpose, in circumstances where there was no loss, as squarely at odds with SRL’s assertion of an inviolable principle.

[92] Justice Binnie went on to address proportionality. He explained at para. 88: “equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour”, nor is it a vehicle for unjust enrichment of a plaintiff, citing the reasons of Justice LaForest in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 444, 1994 CanLII 70, and *Warman International Ltd. v. Dwyer* (1995), 128 A.L.R. 201 at 211–212.

[93] In *Hodgkinson*, Justice LaForest further held that courts should look to the harm suffered from the breach of the given duty, in applying the appropriate remedy: at para. 81. There, the fiduciary accountant recommended investing in a particular

real estate venture without disclosing that he was acting for the developer of the project. Justice LaForest found the disgorgement award inadequate in the circumstances because the beneficiary's loss was greater than the fiduciary's gain, and therefore equitable compensation was required to achieve meaningful deterrence.

[94] Continuing to emphasize the discretionary nature of equitable remedies, in *Kerr v. Baranow*, 2011 SCC 10, the Court was unanimous in rejecting a "strict remedial dichotomy" in the unjust enrichment context, finding it inconsistent with the established approach to equitable remedies generally: at para. 70. Again, the Court pointed to the frequent emphasis on the flexibility of equitable remedies and the "need to fashion remedies that respond to various situations in principled and realistic ways": at para. 71. *Kerr* cited *Lac Minerals'* broad approach to equitable remedies as one example: "the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization": at para. 71 citing, *Cadbury Schweppes Inc.* at para. 24.

[95] Two recent cases that involved fiduciaries who obtained a gain from their breach provide further guidance.

[96] In *Extreme Venture Partners Fund I LP v. Varma*, 2021 ONCA 853, a loss-based disgorgement order was overturned. Applying *Strother*, the Ontario Court of Appeal found the order was imposed to serve a prophylactic purpose and the necessary causal connection between the breach and the whole gain was established, yet the order left the fiduciaries no worse off than if they had not breached their duties. Based on these circumstances and the fiduciary's "litany of brazenly illegal acts", the Court concluded the judge was obliged to fashion a remedy that would have a deterrent impact, and distinguished other cases where disgorgement was ordered for a restitutionary purpose: at para. 12. At the same time, invoking equity's concern with fairness and flexibility, the Court also indicated

that prophylactic disgorgement orders should not automatically require the disgorgement of all profits:

[116] There may well be circumstances where it would be inequitable to order a faithless fiduciary to disgorge all profits. Equity seeks what is fair and what is fair should be determined with flexibility, not by means of hard and fast rules. For that reason, I would not endorse an inflexible rule that full disgorgement of all profits must be ordered in all cases, but nor would I speculate on the sort of reasons that may justify something less than full disgorgement.

[97] In *Garcha v. 690174 B.C. Ltd.*, 2023 BCCA 376, this Court applied both *Strother* and *Kerr*, and emphasized discretion, fairness, and flexibility in upholding the trial judge’s remedial resolution of the civil claim of the Garchas. The underlying dispute involved two civil actions, and three bankruptcy claims over dividing the proceeds from a successful subdivision project. The trial judge found the respondents breached their fiduciary duties and awarded the appellants compensation to recover the “full amount of their loss”: at para. 84. Acknowledging a faithless fiduciary must account for what it wrongfully acquired, the judge pointed to *Strother* in concluding this “rule” should not lead to harsh awards that are disproportionate to the wrongdoing: *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607 at paras. 592–593. He also determined that awarding the Garchas more would, in effect, unjustly enrich them and be unfair to other parties who contributed to the success of the project: at para. 592.

[98] On appeal, the Garchas argued the judge erred in not awarding them full disgorgement. This Court disagreed, finding it was within the judge’s discretion to select the equitable remedy that he considered “most appropriate in the context of the case, as a whole, and to limit the Garchas’ recovery” and to “flexibly and fairly” fashion a remedy responsive to the individualized circumstances: *Garcha* at paras. 85–87.

[99] This brings me to the Supreme Court of Canada’s decision in *Southwind*, which concerned equitable compensation and a loss of opportunity but no gain, flowing from the Crown’s breach of fiduciary duty in exercising control over a First Nation’s land. Flooding caused by a hydro-electric project destroyed the land,

preventing its return and development. Not surprisingly, the majority acknowledged that equitable remedies are discretionary in discussing the distinction between gains-based and loss-based equitable remedies:

[68] When it is possible to restore the plaintiff's assets in specie, accounting for profits and constructive trust are often appropriate. When, however, restoring the plaintiff's assets in specie is *not available*, equitable compensation is the *preferred remedy*.

[Citations omitted; Emphasis added.]

[100] In counterpoint to *Strother*, the majority recognized that equitable compensation is a loss-based remedy that is “discretionary and restitutionary in nature” but also serves the prophylactic purpose: at paras. 69, 72. By restoring the value of the lost opportunity at the date of trial with the benefit of hindsight and unrestrained by other common law principles, the majority held that equitable compensation deters fiduciary wrongdoing and enforces the trust at the heart of the fiduciary relationship: at paras. 66, 72.

Joe's Authorities

[101] In opposing SRL's arguments, Joe relies on *Sun Indalex* as well as *Strother* for the principle that equitable remedies must (also) be proportionate. In *Sun Indalex*, Justice Cromwell found the court below had erred in principle by imposing a constructive trust. The relevant breach involved Indalex's failure to address conflicts of interest that arose during a *Companies' Creditors Arrangement Act* process. Of the view that none of the *Soulos* conditions were met, Cromwell J. focused on the second condition—breach causation. It could not be said, he concluded, that Indalex obtained the asset as a result of its breach of fiduciary duty: at para. 227. But Cromwell J. also concluded that imposing a constructive trust was “wholly disproportionate” to the breach, noting it had no adverse impact on the beneficiaries: at para. 239.

[102] The parties disagree about the import of the conclusion regarding proportionality. SRL suggests it does not involve proportionality at large, but instead is confined to the causation inquiry under the second *Soulos* condition. Joe characterizes the conclusion as a general caution that equitable remedies must be proportionate. I would agree that it is separate from Cromwell J.'s treatment of the second condition's causation element, which, as with prophylactic disgorgement orders, requires a causal connection between the fiduciary's breach and their gain. This view of proportionality aligns with *Soulos* itself, *Strother*, and *Hodgkinson*. As I have attempted to illustrate, each considered the seriousness of the breach normatively and with respect to the resulting harm: See *Soulos* at para. 47; *Strother* at para. 85; *Hodgkinson* at paras. 81–82.

[103] Where then does the jurisprudence leave us? Based on the weight of the authorities I cannot accept SRL's argument that whenever a fiduciary gains from their breach, the court's discretion is confined to choosing between a proprietary and a monetary disgorgement remedy. In my view, the principle that a fiduciary must be stripped of their gain, tied to fulfilling the prophylactic purpose, is an important one but it does not operate to override the "large" discretion to fashion an appropriate equitable remedy: *Garcha* at para. 86, citing *Wang v. Wang*, 2020 BCCA 15 at para. 59.

[104] The caselaw demonstrates that enforcing the trust at the heart of fiduciary relationships can be achieved by requiring a fiduciary to disgorge ill-gotten gains, but it can also be achieved by restoring the beneficiary's lost opportunity. Both gains-based and loss-based remedies can deter the fiduciary's wrongful conduct, depending on the facts of the case. Even prophylactic disgorgement does not necessarily require the disgorgement of all profits, given equity's concern with fairness and flexibility.

[105] I say this recognizing that *Canaero* identified the principle rather emphatically in the lost opportunity context. SRL is also quite right, in so far as we have not been made aware of a case involving a gain from a breach of fiduciary duty which

deprived the plaintiff of an uncertain opportunity, where equitable compensation was awarded. The one exception is *First Majestic Silver Corp.* but in that case, the plaintiff elected equitable compensation for its lost opportunity.

[106] Recognizing also that each authority is confined to some extent by its facts, since *Canaero*, an unavoidable clarity flows from the Supreme Court of Canada's repeated emphasis on the discretionary nature of equitable remedies. This is particularly so with cases dealing with the gains-based remedies of constructive trust and disgorgement orders where the fiduciary profited or acquired property from their breach. Along with the emphasis on discretion, the Court has underscored the need for flexibility, fairness to the defendant (and others), and a fact-based inquiry in determining an appropriate remedy for breach of fiduciary duty. The concern with fairness, in my view, is reflected in the principle of proportionality to the breach that applies as well as the need for deterrence in determining an appropriate remedy. *Strother* and *Soulos* offer especially apt guidance on this point.

[107] What emerges is the firm view that equity mandates an exercise of discretion that eschews rigid rules and instead, is fully responsive to the factual circumstances that bear on deterrence, restitution, and fairness to the defendant and others.

[108] It follows that I do not accept that the judge in this case was bound to impose a gains-based or disgorgement remedy, because Joe obtained a gain from his breach. Instead, I am satisfied it was within his discretion to consider equitable compensation. Consequently, I would not accede to SRL's first ground of appeal.

Issues Two, Three and Four

[109] Issues two through four attack the judge's exercise of discretion in refusing to order the constructive trust. In summary, SRL submits the judge erred in failing to give sufficient weight to the exemplary purpose of the remedy, and in giving weight to irrelevant considerations. Because these issues focus on the judge's conclusion that a constructive trust was not an appropriate remedy and turn on similar arguments, I will consider them together.

[110] I start with SRL's fresh evidence application.

Fresh Evidence

[111] Shortly before the hearing of the appeal, on May 26, 2025, SRL applied to adduce fresh evidence and for an order permitting the application, less than 30 days before the hearing date. The proposed fresh evidence is an affidavit made on May 22, 2025, that attaches the first three pages of an appraisal obtained pursuant to the Remedy Reasons, dated February 4, 2025, that valued the Grazing Lands at \$1,100,000; an affidavit from Joe sworn March 28, 2025, attaching a promissory note dated August 24, 2017; and a consent order filed in the Supreme Court on May 13, 2025, that calculates the equitable compensation award that Joe is required to pay SRL at \$692,216.70 ("Consent Order"). In the promissory note, Joe promised to pay Palmer or his estate \$120,000 for his purchase of the Grazing Lands, on or before the settlement of Palmer's estate.

[112] On April 8, 2025, the parties appeared before the judge to seek his assistance in quantifying the equitable compensation award. Joe's affidavit was included in the chambers record. The judge directed Joe to produce any documents showing payment of the promissory note within 28 days, to receive credit for the purchase price as part of the award. No documents were produced, and the purchase price is not accounted for in the Consent Order.

[113] On May 21, 2025, before the fresh evidence application was filed, Joe agreed that the Consent Order and an explanation of how it was quantified could be provided to the Court. He opposes the balance of the application. I take that to mean that what is disputed is the application to adduce Joe's affidavit including the promissory note. Joe's main objection is that the application was brought well out of time without any explanation for the delay and to his prejudice. Alternatively, he argues the *Palmer* criteria are not satisfied.

[114] SRL argues the promissory note would have affected the judge's remedy order and it is material to its assertion the judge improperly reduced the equitable compensation award for negative contingencies, referring specifically to one of two

contingencies captured by the 33% reduction as the likelihood of the vendor, meaning Joe's sister Carol, agreeing to take-back financing. But the uncertainties underlying SRL's ability to raise the purchase price were a single contingency with two components—the likelihood that (1) Carol would agree to take-back financing and if she did not (2) through the private financing Mr. Street said he had arranged.

[115] SRL contends that if Carol accepted a promissory note from Joe, which she did, there can be little (if any) doubt that she would have agreed to takeback financing for SRL's purchase.

[116] Regarding the delay, Joe highlights that SRL has been in possession of the proposed fresh evidence for months, as his affidavit was delivered to SRL on March 31, 2025.

[117] Joe is quite right in saying that SRL has not explained its delay. Joe further asserts that he is prejudiced by the delay. I agree. Notified two days before the appeal hearing, his appeal counsel, who was not his counsel in the Supreme Court, was left with insufficient time to respond to the obvious question—why the promissory note was not disclosed as part of the discovery process and more importantly, SRL's intended use of the promissory note as fresh evidence. We do not have the benefit of responding submissions and possible evidence.

[118] I have another concern. In my view, SRL's argument about the import of the promissory note could and should have been raised with the judge by way of an application to re-open. SRL has not addressed why this option was not pursued.

[119] In these circumstances I would not entertain SRL's fresh evidence application with respect to Joe's affidavit.

[120] But if I were to apply the *Palmer* criteria, I would also not be persuaded that Joe's affidavit and the promissory note specifically could have had a meaningful effect on the remedy order. I see little logic in SRL's suggestion that because Carol agreed to accept a promissory note from Joe, her brother, she necessarily would have agreed to finance SRL's purchase. Instead, it strikes me as speculative.

[121] In the result, I would dismiss SRL’s fresh evidence application related to Joe’s affidavit and allow the unopposed part with respect to an explanation for the quantification of the Consent Order. The Consent Order itself need not be adduced because it is not evidence. But the Consent Order should be produced as a matter of course to complete the appeal record.

The *Soulos* Analysis

[122] SRL argues the judge erred in assessing whether *Soulos* conditions three and four were met, such that he should have found a constructive trust was appropriate.

[123] Joe makes the point that a constructive trust is not the presumptive remedy for breach of corporate opportunity.

[124] And the *Soulos* framework never mandates the imposition of a constructive trust. All four conditions must be satisfied before a constructive trust *may* be imposed for breach of fiduciary duty.

[125] Again, under condition three, SRL was required to prove a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like Joe remain faithful to their duties; and under condition four, that there were no factors that would render imposing a constructive trust unjust in all the circumstances.

[126] The errors SRL alleges in relation to condition three include a challenge to the judge’s conclusion that a “partial” damage award fulfilled the prophylactic purpose. SRL argues the judge erred in failing to give sufficient weight to that purpose and, rather than deterring fiduciaries from breaching their duty, he rewarded Joe’s breach by permitting him to retain a third of the value of the Grazing Lands.

[127] I disagree.

[128] The judge expressly considered the role and weight to be given to the prophylactic purpose under the rubric of condition three, based on the facts of the case before reaching two conclusions. One, the purpose would be “adequately”

served by equitable compensation; two, a constructive trust would be disproportionately punitive given the nature of Joe's breach and SRL's interest in the property: Remedy Reasons at para. 64.

[129] In reaching both conclusions, the judge recognized that the prophylactic purpose is an important aim of equitable remedies, but not the only consideration. He also identified proportionality to the breach as another consideration in addressing the need for deterrence and declining to impose a constructive trust. In considering proportionality to the breach, it was open to the judge to assess the normative quality or seriousness of the breach and its impact on SRL, thus engaging in this case, the uncertainty of SRL's opportunity to purchase the Grazing Lands, based on *Soulos*, *Strother* and *Sun Indalex*.

[130] The judge also recognized that a constructive trust is not the only means of meeting the prophylactic purpose, relying on *Southwind* for the principle that equitable compensation too deters misconduct and enforces the fiduciary relationship by restoring the value of the lost opportunity at the date of trial and with the benefit of hindsight.

[131] Appreciating there was no gain to address in *Southwind* but there was here, I see the award of \$692,216.79 as meeting the need for deterrence, considered contextually. In contrast to *Soulos*, the judge assessed Joe's breach as not especially serious in terms of his intention and its consequences, and SRL's chance of realizing on its opportunity at 66%. The judge also considered that without the breach, Joe would have gained a significant interest in the property, directly through his inheritance or indirectly as one of two shareholders in SRL. Further although Joe acquired the property, as SRL hoped to, for \$120,000, neither Joe nor SRL prior to receivership, intended to profit from owning it selling it, or re-developing it and selling it.

[132] It follows that I also disagree with SRL's further argument related to conditions three and four, that the judge fell into error by relying on irrelevant circumstances that include the uncertainty of its lost opportunity, Joe's inheritance, SRL's purpose

in pursuing the purchase of the Grazing Lands, as well as the finding that by leasing the Grazing Lands to SRL, Joe maintained the status quo.

[133] SRL asserts it was wrong for the judge to inquire into whether it would have completed the purchase because all that matters is that Joe bought the property in breach of his duty, thus preventing SRL from doing so. Relying on an incorrectly narrow interpretation of condition four, SRL suggests the judge was limited to considering unfairness to third party creditors. The notion that the judge was prohibited from considering anything unrelated to Joe's breach and the resulting gain, cannot be reconciled with the broad scope of *Soulos'* condition four—all of the circumstances must be considered, relative to whether imposing a constructive trust would be unjust.

[134] Part of the argument, which I will address, is that by considering SRL's loss, the judge erred by importing a requirement to prove that but for Joe's breach, it would have acquired the Grazing Lands, given the causation element for a constructive trust is confined to condition two (the asset in the hands of the defendant resulted from the defendant's activities in breach of their duties), which the judge found was established.

[135] There is no doubt that condition two governs factual causation for the constructive trust remedy and the factual causation requirement is the same for a prophylactic disgorgement order. But rather than importing an additional causation requirement into the constructive trust framework, the judge considered the contingencies bearing on SRL's opportunity to acquire the property, and therefore its loss, as circumstances relevant to his assessment of condition four and the broader question of an appropriate remedy.

[136] Under condition four, the judge appropriately considered fairness to Joe, an important aspect of "all the circumstances" according to *Soulos*: at para. 34. SRL's loss, based on its contingent or uncertain opportunity, was a key basis for the judge's finding of unfairness.

[137] I do not accept then that by considering the contingent nature of SRL's loss of opportunity and other circumstances that bore on his finding of unfairness, the judge erred in assessing condition four of *Soulos*.

[138] Returning to the deference that is owed to his decision, I can see no reviewable error in his exercise of discretion.

Issue Five: Entitlement to Elect

[139] I have already indicated that SRL did not pursue the fifth issue in its factum, that the judge erred in disregarding its entitlement to elect whether Joe should deliver up the Grazing Lands or disgorge it by accounting for profit. I do not intend to address the issue any further, other than to note, as Joe did in his factum, that the authorities SRL relies on do not support its argument that an *in specie* remedy must be granted, where one is available. The argument is irreconcilable with *Soulos* and in particular the discretion afforded to courts in assessing whether a constructive trust would be "just in all the circumstances": *Soulos* at para. 34.

Alternative Ground

[140] In addition to or in the alternative, SRL asserts the judge erred by failing to have the appraiser assume the lands had legal access when valuing the damages, or would have legal access prior to sale, and by reducing the quantum of damages for negative contingencies.

[141] Regarding the first error concerning the appraisal, as Joe points out, SRL did not ask the judge to direct that legal access be included as an assumption in the appraisal.

[142] SRL also relies on *Southwind* for the proposition that, in assessing the plaintiff's loss, the court assumes they would have made the most favourable use of the land. But *Southwind* affirmed that the equitable presumptions, including the most favourable use presumption, must also be realistic: "[t]he trial judge must be satisfied that the assessment reflects the value the beneficiary could have actually received from the asset between breach and trial ...": at para. 83.

[143] It was for SRL to lead evidence that obtaining legal access was realistic and to establish how it would impact on the value of the Grazing Lands. SRL's evidence included the receiver deposing that legal access would roughly double the property's value, based on an attached appraisal, but first obtaining legal access to the Grazing Lands would involve or require a number of formal processes and regulatory approvals. Accessing the property involved crossing both the Crown range lands and the Home Ranch, which by the time of the Remedy Hearing, the Regional District had expropriated.

[144] The state of the evidence then supports the conclusion that presuming legal access was not realistic.

[145] In my view, there can be no suggestion of an error in these circumstances.

[146] Nor did the judge err in reducing the equitable compensation award for negative contingencies. The caselaw dealing with equitable compensation in the lost corporate opportunity context establishes the value of the loss is assessed having regard to the contingencies that bear on whether, had the opportunity not been lost, a financial advantage would actually have been realized: *Southwind* at para. 132; *Olive Hospitality Inc. v. Woo*, 2007 BCCA 355 at para. 14.

Disposition

[147] For the reasons given, I would dismiss the appeal and the cross appeal.

“The Honourable Justice Fleming”

I AGREE:

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Justice Gomery”