

Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. <i>Distribution List</i>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

ADVISING THE FAMILY-OWNED BUSINESS Robert M. Halpern, LL.B. Release No. 8, November 2024

This looseleaf service is expertly designed to assist the professional advising the family-owned business in legal matters. It explores the main stages in the life of the business from its start-up to its operation and any alterations in its structure and/or participants.

THOMSON REUTERS®	Customer Support 1-416-609-3800 (Toronto & International) 1-800-387-5164 (Toll Free Canada & U.S.) E-mail CustomerSupport.LegalTaxCanada@TR.com
-------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

What’s New in this Update:

This release features updates to Appendix D.50. Remedies Table—Breach of Fiduciary Duty under the heading A. Business Relationship and to Appendix F. Legislation.

Highlights:

- **Consequences of a Breach of Faithfulness—Remedies for Fiduciary Breach—Compensation for Actual Losses**—Justice Elwood was not persuaded that a monetary award would be an inadequate remedy in the circumstances. Justice Elwood noted that the fourth condition from *Soulos* states “there must be no factors which would render imposition of a constructive trust unjust in all the circumstances.” Justice Elwood was 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 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. The imposition of a constructive trust would be unjust. Justice Elwood explained that equitable compensation, provides the court with a flexible and discretionary remedial approach that appropriately recognizes the contingencies inherent in a lost corporate opportunity. 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. 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. Justice Elwood noted that there were two contingencies that must be considered: would Carol agree to sell the property to SRL; and, could SRL raise the purchase price? Selling the Grazing Lands to SRL would have been consistent with Carol’s past conduct. 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. In Justice Elwood’s 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.

Justice Elwood noted that it was 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. Justice Elwood concluded 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. Recognizing that damages are to be assessed, not calculated, Justice Elwood assessed the negative contingencies at 33%. SRL was entitled to compensation based on a resale of the property, not its original purpose as grazing lands. Justice Elwood awarded 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. 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: *Sather Ranch Ltd. v. Sather* (2024), 51 B.L.R. (6th) 305, 2024 A.C.W.S. 1708, 2024 CarswellBC 1020, 2024 BCSC 598 (B.C. S.C.), additional reasons (2024), 51 B.L.R. (6th) 305, 2024 A.C.W.S. 1708, 2024 CarswellBC 1020, 2024 BCSC 598 (B.C. S.C.).