

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dolatshah v. Moghari*,  
2025 BCSC 1859

Date: 20250925  
Docket: S248005  
Registry: New Westminster

Between:

**Ali Dolatshah**

Plaintiff

And

**Tirdad Moghari, Ali Khoshkhar, MTM World Construction Ltd., Moghari Trading  
and Marketing World Inc., Michelle Cecelia Graham and Levy Yu Graham**

Defendants

Before: The Honourable Justice Hamilton

## Reasons for Judgment

Counsel for the Plaintiff:

G. Morrison  
B. Matheson

Counsel for the Defendants:

J.P. Scouten

Place and Dates of Trial:

New Westminster, B.C.  
July 7-11, 14-16 and 18, 2025

Place and Date of Judgment:

New Westminster, B.C.  
September 25, 2025

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**Overview**

[1] This case involves property on Mathers Avenue in West Vancouver, B.C. (the “Mathers Property”). The Plaintiff, Mr. Dolatshah, is a businessman in Iran. In 2017, he met the Defendant, Mr. Moghari, a businessman in West Vancouver, through a mutual friend, Dr. Khoshkar. Dr. Khoshkar was a defendant but the action was discontinued against him. The remaining Defendants are: (1) two of Mr. Moghari’s companies; (2) Mr. Moghari’s wife, Michelle Graham, who is the registered owner of the Mathers Property; and (3) Michelle Graham’s mother, Levy Graham, who was previously on title to the Mathers Property.

[2] The main issue is whether Mr. Dolatshah paid \$5.58 million to the Defendants pursuant to: (1) an agreement for Mr. Dolatshah to purchase the Mathers Property as Mr. Dolatshah alleges; or (2) a loan to the Defendants as the Defendants allege. If the \$5.58 million was a loan, the Plaintiff’s claims would be statute-barred.

[3] For the reasons that follow, I find that Mr. Dolatshah paid the moneys pursuant to an agreement to purchase the Mathers Property. I find that Mr. Moghari and Michelle Graham were unjustly enriched and that Michelle Graham holds the Mathers Property in trust for Mr. Dolatshah.

**Background**

[4] Mr. Dolatshah is a successful businessman in Iran. In 2017, he hoped to immigrate to Canada with his family and do business in Canada.

[5] Mr. Dolatshah’s friend and former doctor, Dr. Khoshkar, had already immigrated to Canada. Dr. Khoshkar knew the Defendant, Mr. Moghari, because their sons were friends. Dr. Khoshkar knew that Mr. Moghari was a businessman in West Vancouver with a background in construction. Dr. Khoshkar introduced Mr. Dolatshah to Mr. Moghari because he hoped that Mr. Moghari could help Mr. Dolatshah immigrate to Canada and the two businessmen could do business together.

[6] Mr. Moghari met Mr. Dolatshah in 2017 via email and telephone. Mr. Moghari was excited about potential business opportunities with Mr. Dolatshah. Mr. Moghari wanted to help Mr. Dolatshah immigrate to Canada and referred him to an immigration consultant.

[7] Mr. Moghari sold Mr. Dolatshah a 7% interest in Mr. Moghari's company, the defendant MTM World, for \$300,000 USD, hoping that it would facilitate Mr. Dolatshah's immigration. It did not.

[8] Mr. Dolatshah was also interested in purchasing real estate in Canada and learned that Mr. Moghari was finishing building a home at the Mathers Property in West Vancouver. In June 2017, Mr. Dolatshah told Mr. Moghari he wanted to purchase the Mathers Property.

[9] In 2015, two years before meeting Mr. Dolatshah, Mr. Moghari and his wife, Michelle Graham, had purchased the Mathers Property for \$1.5 million. The Mathers Property was registered in Michelle and Levy Graham's names at purchase, though it belonged to Mr. Moghari and Michelle Graham. Levy Graham was on title to help her daughter and son-in-law qualify for the mortgage. Mr. Moghari was not on title because he was self-employed in the construction industry and wanted to protect the Mathers Property from potential creditors.

[10] It is common ground that Mr. Moghari and Michelle Graham make unified financial decisions. Mr. Moghari was the only Defendant to testify at trial. Michelle and Levy Graham relied on Mr. Moghari's testimony.

[11] Mr. Moghari constructed a new home on the Mathers Property between 2015 and August 2017. Mr. Moghari and Michelle Graham did not intend to live at the Mathers Property. They listed the Mathers Property for sale on and off from the time it was purchased.

[12] In June 2017, Mr. Moghari agreed to sell the Mathers Property to Mr. Dolatshah. Mr. Moghari initially asked for \$6 million but they settled on a purchase price of \$5.58 million. There was no written agreement for purchase and sale.

However, between June and October 2017, Mr. Dolatshah sent \$5.58 million to Mr. Moghari.

[13] By August 2017, Mr. Dolatshah had sent Mr. Moghari more than \$3 million. The Defendants took the Mathers Property off the market as of August 1, 2017, and did not list the Mathers Property for sale since.

[14] In August 2017, Mr. Moghari contacted his long-time lawyer, Joseph Schwartz, regarding his agreement with Mr. Dolatshah. At trial, Mr. Schwartz and Mr. Moghari each gave conflicting accounts of their conversation and the events that occurred subsequently.

[15] Mr. Schwartz testified that Mr. Moghari had agreed to sell the Mathers Property to Mr. Dolatshah for \$5.58 million and Mr. Dolatshah was sending Mr. Moghari payments for the purchase price. Mr. Schwartz says that Mr. Moghari asked him how to protect Mr. Dolatshah's interest in the Mathers Property from the Defendants' potential creditors pending the transfer of title, which would not occur until later. Mr. Schwartz said he responded to Mr. Moghari's question by suggesting they register a mortgage against the Mathers Property in Mr. Dolatshah's favour for the full purchase price of \$5.58 million. Mr. Schwartz said that Moghari agreed, so Mr. Schwartz prepared the mortgage, had Michelle and Levy Graham sign it in front of a notary and registered it against the Mathers Property on September 27, 2017. Mr. Schwartz testified that although Mr. Dolatshah was technically his client for the transaction, Mr. Dolatshah did not instruct him to prepare the mortgage nor did he sign the mortgage.

[16] Mr. Schwartz testified that although he sent Mr. Dolatshah a copy of the registered mortgage by email, he knew that Mr. Dolatshah did not read or speak English. Mr. Schwartz said that he did not explain the documents to Mr. Dolatshah because the mortgage was not meant to be real – its sole purpose was to protect Mr. Dolatshah's interests in the Mathers Property from potential third-party creditors. Mr. Schwartz testified that the real agreement between Mr. Dolatshah and Mr.

Moghari was the purchase and sale of the Mathers Property, not a loan. Mr. Dolatshah's evidence is consistent with Mr. Schwartz' evidence.

[17] Mr. Moghari's version of events is diametrically opposed to Mr. Schwartz'. Mr. Moghari maintains that Mr. Dolatshah lent the Defendants \$5.58 million and that the mortgage Mr. Schwartz registered on title to the Mathers Property properly reflects the agreement with Mr. Dolatshah. Mr. Moghari testified that while Mr. Dolatshah had expressed interest in purchasing the Mathers Property many times over the years, Mr. Dolatshah never followed through with his intention.

[18] Between the spring of 2017 and the spring of 2020, Mr. Dolatshah pursued an application to immigrate to Canada. By the spring of 2020, it became clear that his attempts were unsuccessful.

[19] From 2017 through 2021, Mr. Dolatshah and Mr. Moghari continued to correspond regarding transferring the Mathers Property, sometimes through third parties including Dr. Khoshkar or Mr. Schwartz. The focus of much of the correspondence was the substantial taxes that Mr. Dolatshah would have to pay upon transferring the Mathers Property to his name.

[20] At least twice, in 2018 and 2020, Mr. Dolatshah and Mr. Moghari had Mr. Schwartz estimate the taxes. Mr. Schwartz estimated that Mr. Dolatshah would have to pay: (1) GST of approximately \$90,000; (2) property transfer tax of approximately \$200,000; and, most significantly, (3) more than \$1 million for the foreign buyers' tax because Mr. Dolatshah was not a Canadian permanent resident. Over the years, Mr. Dolatshah and Mr. Moghari corresponded with Mr. Schwartz about options to reduce or eliminate the foreign buyers' tax. Mr. Schwartz made several suggestions, such as transferring ownership of the Mathers Property to a corporation or a trusted friend, or selling the Mathers Property. Mr. Moghari consistently indicated he was open to whichever option Mr. Dolatshah chose.

[21] It is unclear from the correspondence which option Mr. Dolatshah chose. However, in August 2021, Mr. Moghari requested that Mr. Dolatshah pay \$430,000

toward transfer taxes including the GST and property transfer tax and Mr. Dolatshah paid the \$430,000 as requested.

[22] Following receipt of the \$430,000, Mr. Moghari then requested that Mr. Dolatshah pay him \$89,000 more to reimburse him for expenses he paid for the Mathers Property since 2017. At that point, Mr. Dolatshah had already paid Mr. Moghari over \$6 million. The Mathers Property had not been transferred and Mr. Dolatshah thought Mr. Moghari had swindled him.

[23] Mr. Dolatshah refused to pay Mr. Moghari the \$89,000 and demanded that Mr. Moghari account for the rental income he had received since 2017. Mr. Dolatshah's position was that the rental income should offset the expenses. Mr. Moghari refused to account for rental income. His position is that Mr. Dolatshah previously told him to keep the rent.

[24] Mr. Dolatshah and Mr. Moghari were unable to resolve the issue of the rental income and the \$89,000 expenses. The Mathers Property was never transferred and remains in Michelle Graham's name.

[25] Mr. Dolatshah hired a lawyer who initially commenced a foreclosure petition to sue on the mortgage. However, Mr. Dolatshah changed lawyers and started these proceedings.

[26] The Defendants say that this action should be struck as an abuse of process because Mr. Dolatshah initially pursued enforcement of the mortgage and then later started this action claiming the mortgage is a sham.

**Issues**

[27] The issues are therefore:

1. Should the action be struck as an abuse of process because Mr. Dolatshah initially sued on the mortgage but now claims the mortgage is invalid?

2. If not, has Mr. Dolatshah proven his constructive trust claim to the Mathers Property? Specifically, is the mortgage contract a juristic reason for the Defendants to retain the \$5.58 million and rental income?

[28] The Defendants agree that they must repay Mr. Dolatshah the additional \$430,000 he paid in 2021.

### **Abuse of Process – Law**

[29] Rule 9-5(1)(d) of the *Supreme Court Civil Rules*, BC Reg 168/2009, permits the court to strike pleadings in whole or in part where they are an abuse of process.

[30] Abuse of process is broad and flexible doctrine which is available to prevent egregiously oppressive or unfair conduct. The doctrine is not invoked unless the proceedings are so unfair that they would bring the administration of justice into disrepute: *Rossner v. Nystrom*, 2019 BCSC 583 at para. 43; *Hare v. Lit*, 2013 BCSC 33 at para. 24.

[31] “A party seeking to invoke the doctrine of abuse of process bears a heavy onus and must show that abuse of process is plain and obvious”: *Rossner* at para. 47.

[32] Inconsistent prior pleadings alone do not bring the administration of justice into disrepute – there must be more: *Glover v. Leakey*, 2018 BCCA 56 at para. 32.

[33] Policy grounds for the doctrine of abuse of process include:

- (1) avoiding parties being vexed twice by the same cause;
- (2) preserving the courts’ and litigants’ resources;
- (3) upholding the integrity of the legal system by avoiding inconsistent results;  
and
- (4) protecting the principle of finality, which is essential to the proper administration of justice.

*Glover* at para. 34.

[34] “The focus on the doctrine of abuse of process is on the integrity of the adjudicative process, not the motive or status of the parties”: *Rossner* at para. 46.

[35] The court must consider the unique circumstances of the case in exercising its discretion to determine whether permitting the action to proceed enhances or detracts from the overall effectiveness of the adjudicative process: *Glover* at para. 36.

### **Abuse of Process – Analysis**

[36] The Defendants have not demonstrated that this action is an abuse of process.

[37] After his falling out with Mr. Moghari, Mr. Dolatshah initially retained Mr. Pokrajac, who is a lawyer at the same firm as his counsel at trial. Mr. Pokrajac started a foreclosure petition against Michelle and Levy Graham.

[38] In addition to starting a foreclosure petition, Mr. Dolatshah also swore an affidavit in that proceeding stating that the facts contained in the petition were true. The petition stated that Mr. Dolatshah had lent the \$5.58 million to the Defendants. There is no mention in Mr. Dolatshah’s foreclosure petition or affidavit that he paid the \$5.58 million to purchase the Mathers Property.

[39] Mr. Dolatshah’s counsel at trial stated that their colleague Mr. Pokrajac saw the mortgage on title and started a standard foreclosure proceeding. Mr. Dolatshah’s counsel concedes that Mr. Dolatshah’s swearing that the mortgage was real in the first proceeding and now stating that the mortgage is invalid harms his credibility. However, Mr. Dolatshah’s counsel submits that neither the commencement of inconsistent proceedings nor the credibility issues bring the administration of justice into disrepute in the circumstances of this case. Plaintiff’s counsel say the issue of whether or not there was a valid purchase or mortgage was not addressed in the previous proceeding. They state that the issue needs to be resolved on the merits,

based on a full consideration of the credibility and reliability of Mr. Dolatshah, Mr. Moghari, and Mr. Schwartz, and all of the other evidence.

[40] I agree. Mr. Dolatshah offered diametrically opposed evidence on a key issue in two different proceedings, so I must approach his evidence with significant caution. However, in the unique circumstances of this case, neither the inconsistent pleadings nor Mr. Dolatshah's credibility issues are enough to invoke the doctrine of abuse of process.

[41] It makes sense that at some point after filing the foreclosure petition, Mr. Dolatshah's counsel became aware that it was not a standard mortgage foreclosure.

[42] Mr. Dolatshah did not proceed with a hearing on the petition. Instead, he switched counsel and started this proceeding, claiming that the true deal was the purchase and sale of the Mathers Property, not a mortgage. Mr. Dolatshah did not actively pursue both proceedings simultaneously. The Defendants were not forced to defend two proceedings at the same time. Mr. Dolatshah has not asked for two different judges to rule on the same issues.

[43] After filing the petition and his affidavit, Mr. Dolatshah took no further steps in the foreclosure proceeding. He did not set a hearing. No orders were made. Mr. Dolatshah must not have pressed Michelle and Levy Graham to respond to the earlier proceeding because they only filed a response recently in April 2025, in which they raised the limitation defence. By then, this action was almost at trial so the response seems strategic as opposed to necessary.

[44] The Defendants bear a heavy onus to invoke the doctrine of abuse of process. They must demonstrate that Mr. Dolatshah's conduct is so egregious, oppressive or unfair that it brings the administration of justice into disrepute. Inconsistent pleadings are not enough.

[45] There are important policy reasons at the root of the principle of abuse of process. The court and litigants do not have unlimited resources to spend relitigating matters or over-litigating matters by having multiple proceedings for the same

issues. Re-litigating and over-litigating must be discouraged; otherwise, the justice system would be overburdened and eventually grind to a halt. It is unfair to defendants to be forced to defend multiple proceedings for the same issue. It is also unfair to other unrelated litigants trying to have their own day in court. Further, it is contrary to the interests of justice to permit those unhappy with interim or final outcomes in one proceeding to get second tries before other judges. That would waste precious judicial resources, encourage potentially inconsistent results and not promote finality.

[46] In this case, none of these policy grounds are engaged. After filing the petition and his affidavit, Mr. Dolatshah did not take any further steps in the proceedings. He did not set a hearing for the petition or seek any orders. He did not press the Defendants to file a response. Finally, while the petition has not yet been formally withdrawn or discontinued, Mr. Dolatshah's counsel confirmed that this is an oversight and the action will be discontinued.

[47] The case before me is distinguishable from *Woodward & Company Lawyers LLP v. The Tsilhqot'in National Government*, 2021 BCSC 16, where the plaintiff forced the Defendants to simultaneously defend two actions regarding the same issues. There is no evidence that Mr. Dolatshah was asking Mr. Moghari and his wife to move forward and spend moneys defending the foreclosure proceeding at the same time they were defending this claim. There is also no risk of inconsistent results.

[48] Further, even if I had found this action to be an abuse of process, which I do not, I would decline to strike the action. Mr. Moghari himself has taken one position in his previous written correspondence with Mr. Dolatshah and others that the mortgage is a sham and now testifies that the mortgage is real. The court needs to grapple with the credibility and reliability issues and determine the substantive issues on the merits once and for all.

**Trust Claim – Law**

[49] Section 23 (2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, provides that indefeasible title is conclusive evidence that the person named in the title as the registered owner is indefeasibly entitled to ownership of the land described in the title. That is, Michelle Graham is the owner of the Mathers Property unless Mr. Dolatshah rebuts this presumption: *Freeland v. Farrell*, 2022 BCCA 99 at para. 42.

[50] The presumption of indefeasibility in the *Land Title Act* can be rebutted by demonstrating one of the following:

- (1) the existence of a resulting trust, which may be inferred if the registered owner paid no value for her interest in the property;
- (2) an agreement between the parties that is contrary to the legal title; or
- (3) underlying equitable interests between the parties including claims for unjust enrichment.

*Suen v. Suen*, 2013 BCCA 313 at para. 34.

[51] As mentioned above, it is common ground that Mr. Moghari and Michelle Graham bought the Mathers Property together and were both equal beneficial owners of the Mathers Property in June 2017, even though Mr. Moghari's name was not on title. The parties also agree that while Levy Graham was temporarily on title to the Mathers Property, she was never a beneficial owner.

[52] Mr. Dolatshah claims that as of 2017 when he paid \$5.58 million to purchase the Mathers Property, he became the sole beneficial owner of the Mathers Property. He claims that Michelle Graham holds the Mathers Property in trust for him pursuant to either a resulting trust or constructive trust. In closing submissions, counsel focused primarily on Mr. Dolatshah's claim for constructive trust based on unjust enrichment, so I will do the same.

[53] To establish a constructive trust, Mr. Dolatshah must prove that:

- (1) he has enriched the Defendants;
- (2) he has been correspondingly deprived; and
- (3) there is no juristic reason for the enrichment.

*Freeland* at para. 73.

**Analysis – Constructive Trust Claim**

[54] The Defendants concede that Mr. Dolatshah has enriched them and that Mr. Dolatshah was correspondingly deprived. Therefore, my analysis will focus primarily on the third branch of the test – whether there is a juristic reason for the Defendants’ enrichment. I will, however, briefly address the first two branches of the test to outline the extent of the enrichment and deprivation on the evidence.

**The Extent to Which the Defendants Were Enriched**

[55] In terms of enrichment, the Defendants were enriched in three tranches. First, Mr. Dolatshah paid Mr. Moghari \$5.58 million in 2017, which funds Mr. Moghari and Michelle Graham used for their own purposes, including paying off their mortgages used to acquire the Mathers Property and construct the new home.

[56] In addition, Mr. Moghari admitted that the Defendants received \$494,000 rental income for renting the Mathers Property to third parties from 2017 to trial (and continuing). At the same time, the Defendants paid \$89,000 of expenses including a portion of the property taxes. The Defendants have therefore received approximately \$405,000 net rental income.

[57] As mentioned above, the Defendants concede that they owe Mr. Dolatshah \$430,000 for the funds paid in 2021, which were earmarked for transfer taxes but kept by Mr. Moghari. The Defendants have therefore been enriched by Mr. Dolatshah by a total of \$6.415 million (\$5.58 million, \$405,000 and \$430,000).

### **The Corresponding Deprivation**

[58] The second branch of the test for unjust enrichment requires a corresponding deprivation. Mr. Dolatshah has been deprived, as he has not had access to the \$5.58 million in funds since 2017. Further, he has not received any investment income or rental income generated on the \$5.58 million since 2017. Mr. Dolatshah has also not had access to the additional \$430,000 he paid in 2021. I find Mr. Dolatshah has suffered a deprivation that corresponds directly to the Defendants' enrichment.

### **Is There a Juristic Reason for the Defendants' Enrichment?**

[59] As mentioned, the third branch of the test for constructive trust is the focus – whether there is a juristic reason for the Defendants' enrichment. In this regard, as mentioned above, the Defendants concede that there is no juristic reason for them to retain the additional \$430,000 that Mr. Dolatshah paid in 2021. The issue is whether there is a juristic reason for the Defendants to be enriched by the \$5.58 million they received from Mr. Dolatshah in 2017 and the \$405,000 in net rental income.

### **Juristic Reason – Plaintiff's Position**

[60] Mr. Dolatshah says that there is no juristic reason for the Defendants' enrichment. He maintains that he paid the Defendants \$5.58 million in 2017 to purchase the Mathers Property, but they kept the money and did not transfer the Mathers Property to him. He submits that since 2017, when he paid the funds, he was the sole beneficial owner of the Mathers Property, even though the legal transfer of title had not taken place. Mr. Dolatshah claims that as the beneficial owner of the Mathers Property, it follows that the net rental income belongs to him. He denies agreeing to letting Mr. Moghari retain the rental income.

### **Juristic Reason – Defendants' Position**

[61] The Defendants claim that the mortgage reflects the agreement between the parties and is the juristic reason for them being enriched by \$5.58 million. They state that the \$5.58 million was a loan, which was properly documented by the mortgage

contract prepared by Mr. Schwartz on Mr. Dolatshah’s behalf. The Defendants say that the parties were bound by the terms of the mortgage contract, including the mortgage’s one-year term.

[62] The Defendants submit that if Mr. Dolatshah sought return of the \$5.58 million, he was required by the mortgage contract to enforce the mortgage before his claims were statute-barred. The Defendants maintain that it is unfair to now allow Mr. Dolatshah a second “kick at the can” using unjust enrichment claims when he missed the limitation date for enforcing the mortgage. They argue that if I grant Mr. Dolatshah this second chance, then all mortgagors would pursue a second kick at the can after their mortgages were statute-barred. The Defendants submit that this would render limitation periods for mortgages meaningless.

[63] The Defendants submit that there are juristic reasons for them to retain the rental income: (1) the \$5.58 million was a loan to the Defendants, documented by the mortgage, and therefore the Mathers Property and any rental income belongs to the Defendants; or, alternatively, (2) Mr. Dolatshah told Mr. Moghari that he could retain the rental income.

**Juristic Reason – The Law**

[64] To determine whether there is a juristic reason for the enrichment, the case law sets out two steps:

- (1) **Step One:** The court must consider whether any of the established categories of juristic reasons exist:
  - a. a contract;
  - b. a disposition of law; or
  - c. a donative intent.

If one of these categories exist, there is a juristic reason. Where none of these established categories exist, there is *prima facie* no juristic reason

for the enrichment and the court must then consider **Step Two** of the analysis.

(2) **Step Two**: The defendant may rebut the *prima facie* case by identifying another reason why the enrichment should be retained. In this step, the court must consider two factors:

- a. the parties' reasonable expectations; and
- b. moral and policy-based arguments about whether particular enrichments are unjust.

*Freeland* at para. 75; *Kerr* at paras. 43-44.

### **Juristic Reason - Analysis**

[65] Under **Step One**, the Defendants submit that the mortgage was a legally enforceable contract and the juristic reason for them to retain the \$5.58 million.

[66] Counsel agree that a mortgage is a contract. Mr. Dolatshah's counsel agrees that if I find that the mortgage represented the real agreement between Mr. Dolatshah and the Defendants, it can provide a juristic reason for the Defendants to retain the \$5.58 million. The issue is whether the mortgage reflected an agreement between the parties.

[67] The principles of contract law apply in determining whether a mortgage is valid. I must consider whether the parties reached a consensus or had a meeting of the minds in creating the mortgage.

[68] The test for whether the parties had a meeting of the minds is objective and requires considering the outward expressions of the intent of the parties: *Wang v. Liu*, 2023 BCSC 972 at para. 85.

[69] Here, I find that there was no meeting of the minds between the parties in relation to the mortgage. For the reasons that follow, I find that the mortgage did not reflect the contract between the parties.

[70] The credibility and reliability of the parties are important in considering whether or not the parties intended to enter a mortgage contract. The testimony of Mr. Dolatshah and Mr. Moghari conflicts.

[71] As mentioned, Mr. Dolatshah commenced a foreclosure proceeding in which he swore an affidavit that stated that the mortgage was a valid contract. Yet before me he testified that he did not intend to lend the \$5.58 million. Mr. Dolatshah says that his affidavit in the foreclosure proceeding was wrong because he could not read English. However, both the affidavit and the petition were translated for Mr. Dolatshah in advance, so his explanation lacks credibility. Because of this, I have significant concerns regarding Mr. Dolatshah's credibility.

[72] I have significant concerns about both Mr. Dolatshah's and Mr. Moghari's credibility generally. During portions of their cross-examinations, both Mr. Dolatshah and Mr. Moghari were evasive and argumentative and objected to answer certain questions even when their counsel did not object. Throughout Mr. Dolatshah's testimony, he repeated the phrase 'it was a purchase not a loan', even when being asked an entirely different question. Not to be outdone, during cross-examination, Mr. Moghari repeated words to the effect of 'it was a loan not a purchase', regardless of the question. Both Mr. Dolatshah and Mr. Moghari appeared more focused on winning the lawsuit than relaying the actual facts. Both Mr. Dolatshah and Mr. Moghari's evidence at trial regarding the nature of their agreement contradicts what they have said in their previous written correspondence to each other and third parties. I approach each of their evidence with significant caution, except where their evidence is corroborated by other plausible evidence.

[73] By contrast, Mr. Schwartz' testimony was refreshingly balanced and candid. His memory of his conversations and correspondence was excellent. His answers were detailed and thoughtful and not shaken by cross-examination. Mr. Schwartz was Mr. Moghari's lawyer of some 20 years but acted for Mr. Dolatshah in preparing the mortgage. Both Mr. Dolatshah and Mr. Moghari kept Mr. Schwartz involved in their communications between 2017 and 2021. They asked Mr. Schwartz for his

advice on transfer taxes and later asked him for assistance to resolve the issue of the rental income versus expenses. Mr. Schwartz was in a good position to know the nature of Mr. Dolatshah and Mr. Moghari's agreement with each other.

[74] As well, Mr. Schwartz' evidence did not appear to be affected by loyalties to either party. He had nothing to gain from his testimony. Quite the opposite, he was in the obviously awkward position of having to explain that the mortgage he prepared was essentially a sham.

[75] I found Mr. Schwartz to be a credible and reliable witness throughout. I much prefer Mr. Schwartz' evidence where it differs from Mr. Moghari's or Mr. Dolatshah's evidence. This is important, for example, in determining what Mr. Moghari told Mr. Schwartz in August 2017 which caused Mr. Schwartz to prepare the mortgage. Mr. Schwartz and Mr. Moghari were the only parties to the August conversation and each gave contradictory accounts. I accept Mr. Schwartz' version of events. Mr. Schwartz' version of the August 2017 conversation is that Mr. Moghari advised that Mr. Dolatshah was immigrating to Canada, where he planned to do business. Mr. Moghari told Mr. Schwartz that he hoped to do business with Mr. Dolatshah in Canada.

[76] Mr. Moghari told Mr. Schwartz that he and Mr. Dolatshah had agreed that Mr. Dolatshah would purchase the Mathers Property for \$5.58 million and Mr. Dolatshah was already sending the purchase price in instalments. Mr. Moghari asked Mr. Schwartz if he could deposit Mr. Dolatshah's payments in his trust account and issue Mr. Dolatshah formal receipts for the funds. Mr. Moghari said that this would help Mr. Dolatshah build trust in Mr. Moghari.

[77] Mr. Moghari also asked Mr. Schwartz about how to protect Mr. Dolatshah's interests in the Mathers Property against potential creditors until it was transferred to Mr. Dolatshah. Mr. Schwartz suggested registering a mortgage against the Mathers Property for the full \$5.58 million purchase price, with Mr. Dolatshah as the mortgagor and Michelle Graham (and Levy Graham, who was still on title at the time) as the mortgagees. Mr. Moghari liked this idea so Mr. Schwartz drafted the

mortgage. Mr. Schwartz chose all the terms of the mortgage. He chose the one-year term the interest rate of 2.74% and a monthly “interest only” payment schedule. Mr. Schwartz was clear that the mortgage and its terms were solely his idea, not Mr. Dolatshah’s or the Defendants’. Mr. Schwartz did not take any instructions from Mr. Dolatshah nor did he explain the mortgage or its terms to Mr. Dolatshah.

[78] Michelle Graham signed the mortgage on her behalf and as the power of attorney for her mother. Mr. Dolatshah was not required to sign the mortgage nor did he see a draft before it was registered.

[79] After Michelle Graham signed, Mr. Schwartz registered the mortgage against the Mathers Property and emailed Mr. Dolatshah a copy of the mortgage along with a standard reporting letter. The mortgage and the reporting letter were in English; however, Mr. Dolatshah only spoke and read in Farsi.

[80] Mr. Schwartz was clear that while Mr. Dolatshah was technically his client for the transaction: (1) Mr. Dolatshah did not instruct him to prepare the mortgage; (2) the mortgage was prepared solely to protect Mr. Dolatshah’s interest in the Mathers Property from third party creditors until the Mathers Property was transferred; (3) Mr. Schwartz created the mortgage and his reporting letter to Mr. Dolatshah to make the mortgage appear real to potential creditors; and (4) the real deal between Mr. Dolatshah and the Defendants was Mr. Dolatshah’s purchase of the Mathers Property for \$5.58million; and (5) the agreement between Mr. Moghari and Mr. Dolatshah for the purchase and sale of the Mathers Property did not change despite ongoing discussions about the taxes and transfer details.

[81] Consistent with Mr. Schwartz’ evidence, Mr. Dolatshah testified that he never intended to lend moneys or enter into a mortgage contract with the Defendants. I accept Mr. Dolatshah’s evidence on this point because it is corroborated by Mr. Schwartz’ testimony and makes sense in all the circumstances. Mr. Dolatshah confirmed that in June 2017, he and Mr. Moghari negotiated and agreed that he would purchase the Mathers Property for \$5.58 million. Mr. Dolatshah sent

instalments totalling the agreed purchase price of \$5.58 million to Mr. Moghari between June 12, 2017 and October 2017.

[82] Mr. Dolatshah testified that while he was interested in buying property in Canada, he was never interested in lending money in Canada because in Iran, he would have earned 35% interest annually by leaving his money in a bank account. I accept Mr. Dolatshah's evidence that it does not make sense that he would send his money to Canada to earn 2.74% per year as set out in the mortgage.

[83] I also accept Mr. Dolatshah's evidence that he was unaware of the mortgage until long after it was registered. Mr. Moghari claims that Mr. Dolatshah must have been aware of the mortgage because he received a copy of the mortgage and a reporting letter from Mr. Schwartz. However, Mr. Dolatshah does not speak or read English. Mr. Schwartz testified that he did not ever explain the mortgage to Mr. Dolatshah because Mr. Schwartz knew that the real agreement between Mr. Dolatshah and Mr. Moghari was the purchase and sale of the Mathers Property, not a mortgage. I accept that he was unaware of the mortgage at the time it was registered. He trusted Mr. Moghari at that time and had no reason to have the correspondence from Mr. Schwartz translated from English to Farsi.

[84] Although Mr. Dolatshah seemed mixed up on the exact date, I also accept his evidence that he did not know the mortgage existed until much later – around the time when he and Mr. Moghari disagreed about reimbursement of the \$89,000 in expenses versus accounting for rental income. Mr. Dolatshah's evidence is consistent with his written correspondence with Mr. Moghari and Mr. Schwartz, which does not mention the mortgage until after Mr. Moghari asked for a further \$89,000 and the men had a falling out.

[85] At that point, Mr. Dolatshah thought Mr. Moghari was not going to transfer the Mathers Property to him. Mr. Dolatshah thought he had been swindled by Mr. Moghari out of over \$6 million. It is only at that point when Mr. Dolatshah refers in correspondence to the mortgage, several years after the mortgage was registered.

[86] At that point, after Mr. Dolatshah had paid Mr. Moghari over \$6 million (including the requested \$430,000 for transfer taxes) and Mr. Moghari was still asking for more money, Mr. Dolatshah wrote to Mr. Moghari and demanded that he repay the moneys plus 2.74% interest. Clearly, Mr. Dolatshah was then aware of the mortgage. Mr. Dolatshah also left voice mail messages for Mr. Moghari's relatives in Iran. Mr. Moghari says that Mr. Dolatshah's demand for repayment of the moneys with interest is proof that the moneys were a loan not paid towards the purchase of the Mathers Property. I disagree.

[87] Having reviewed all of the correspondence in detail, I accept Mr. Dolatshah's evidence that he made the demands contained in his written correspondence and voice mail messages out of frustration and desperation. I accept Mr. Dolatshah's evidence that although he did not think the mortgage was real, he tried to use it to gain some bargaining power with Mr. Moghari to transfer the Mathers Property. Mr. Dolatshah had already paid over \$6 million, had not received title, and Mr. Moghari continued to ask for even more money. I accept that at that point, Mr. Dolatshah was upset, worried he was swindled, and out of desperation would have said almost anything to cause Mr. Moghari to transfer the Mathers Property to him.

[88] Interestingly, Mr. Moghari's own written response to Mr. Dolatshah's demand for return of the money with interest was to remind Mr. Dolatshah that the mortgage was fake and that the real agreement between them was the purchase of the Mathers Property. Mr. Moghari's written correspondence conflicts with his evidence at trial that the moneys were provided as a loan documented by the mortgage.

[89] As mentioned, I prefer Mr. Schwartz' evidence over Mr. Moghari's evidence that the real deal between Mr. Dolatshah and the Defendants was the purchase and sale of the Mathers Property which they negotiated in June 2017. I accept Mr. Schwartz' evidence that in August 2017, Mr. Moghari inquired about protecting Mr. Dolatshah's interests pending transfer. I accept Mr. Schwartz's evidence that the mortgage was only an afterthought to protect Mr. Dolatshah's interests in the Mathers Property from the Defendants' potential creditors pending transfer of title. I

accept Mr. Schwartz's evidence that he prepared all paperwork, including the reporting email to Mr. Dolatshah, to make the mortgage look real to potential third-party creditors.

[90] Mr. Schwartz was clear that the parties' agreement was for Mr. Dolatshah to purchase the Mathers Property for \$5.58 million, which Mr. Dolatshah did when he paid the purchase price in 2017. Mr. Moghari and Mr. Dolatshah later asked Mr. Schwartz to advise Mr. Dolatshah as to the amount of taxes he would pay on transfer. They also asked Mr. Schwartz to suggest options for reducing or eliminating the foreign buyer's tax and Mr. Moghari said he was agreeable to whichever option Mr. Dolatshah chose. Mr. Schwartz was also asked to help resolve the expenses versus rent issue that arose between Mr. Dolatshah and Mr. Moghari but was unable to.

[91] Mr. Moghari and Mr. Dolatshah involved Mr. Schwartz in their dealings from August 2017 through 2022. As mentioned above, Mr. Schwartz was in a good position to know what the agreement was between Mr. Dolatshah and the Defendants Mr. Moghari and Michelle Graham. Mr. Schwartz was clear that while he prepared and registered the mortgage, the mortgage did not reflect the agreement between the parties. The parties intended a purchase, not a loan.

[92] Mr. Schwartz' and Mr. Dolatshah's evidence that the agreement was really the purchase of the Mathers Property, not a mortgage, is also consistent with other evidence, including:

- (1) The mortgage contract required interest-only payments commencing November 1, 2017. However, the Defendants never made any payments.
- (2) When he was cross-examined, Mr. Moghari was unable to estimate what the monthly interest-only payments would have been under the mortgage contract.
- (3) Mr. Dolatshah had paid Mr. Moghari approximately \$3.7 million by September 27, 2017 when the mortgage was registered. However, Mr.

Moghari did not explain why, if the mortgage was to secure a loan, the Defendants would agree to register a mortgage for \$5.58 million against the Mathers Property when only \$3.7 million had been advanced.

- (4) Dr. Khoshkari introduced Mr. Dolatshah and Mr. Moghari. He was copied in correspondence between the parties from 2017 through approximately 2021. I found Dr. Khoshkar to be a credible witness. He seemed reluctant to be involved and did not appear to have any loyalties to either Mr. Dolatshah or Mr. Moghari. Dr. Khoshkar corroborated the evidence of Mr. Schwartz and Mr. Dolatshah that the agreement between Mr. Dolatshah and Mr. Moghari was the purchase of the Mathers Property, not a mortgage.
- (5) The Defendants had listed the Mathers Property for sale the majority of the time they owned the Mathers Property. However, on August 1, 2017, they took the Mathers Property off the market, consistent with them having sold the Mathers Property to Mr. Dolatshah. Had Mr. Moghari and Michelle Graham had actually borrowed \$5.58 million against the Mathers Property, presumably they would have kept the Mathers Property listed for sale, particularly since Mr. Moghari testified that at that time in 2017 the market was rising.
- (6) It appears from the written correspondence that Mr. Moghari did not claim that the mortgage was real until after he realized that the mortgage claims were statute-barred. Prior to that, Mr. Moghari stated in written correspondence acknowledging that there was no mortgage. Specifically:
- a. In October 25, 2021, Mr. Moghari wrote to Mr. Dolatshah and stated: “you know well enough that your notion since 2017 for Mather property was to purchase and there was no mortgage as such or payments or interest whatsoever...Our agreement was strictly you to purchase the house according to all your correspondence from day one....”

**Facts:** there was never a loan or mortgage...”;

and

b. In a letter of August 30, 2022, to Mr. Schwartz, Mr. Moghari referred to the mortgage as the “Faulty made up Mortgage for Mathers Property” and stated:

i. I’m sure that this lawyer Pakrajac doesn’t know that you are the witness and we have many many documents, correspondence. Texts, letters, voice mail tapes etc to prove that this mortgage is not real. This lawyer does not know that, the actual prices of the property is the same amount of the designed mortgage. Everybody know that no mortgage can be the full purchase amount without any equity.

...

You even yourself mentioned many times by the correspondence and calls that there is no mortgage document and this mortgage document does not make any sense and you will witness for me if it is necessary.”

[93] I find that the mortgage did not represent the deal between Mr. Dolatshah and Mr. Moghari. I accept Mr. Schwartz’ evidence that the mortgage was requested by Mr. Moghari to protect Mr. Dolatshah’s interests in the Mathers Property from third-party creditors. I accept the evidence of Mr. Schwartz, Mr. Khoshkar, and Mr. Dolatshah that the agreement between Mr. Moghari and Mr. Dolatshah was that Mr. Dolatshah was to purchase the Mathers Property for \$5.58 million, and that Mr. Dolatshah paid the purchase price in full by the fall of 2017.

[94] I find that there was some delay in the transfer because until 2020, Mr. Dolatshah was applying to immigrate to Canada. While no one specifically mentioned this, if Mr. Dolatshah’s immigration application had been successful and he became a Canadian resident, that may have opened more options regarding the foreign buyers’ tax payable on transfer of the Mathers Property. However, Mr. Dolatshah’s agreement to purchase the Mathers Property was not contingent on his immigration to Canada. In the spring of 2020, when it was clear that Mr. Dolatshah’s immigration application was unsuccessful, Mr. Dolatshah and Mr. Moghari continued to correspond about transferring the Mathers Property and options to reduce the taxes on transfer, such as transferring the Mathers Property to a company or to Mr. Dolatshah’s friend who lived in Ontario. Mr. Moghari was open to all such solutions.

[95] I find that the mortgage was not a binding contract between the parties. There was never a meeting of the minds with respect to the mortgage. Mr. Dolatshah was not consulted or actively involved in the mortgage terms and did not even know about the mortgage until long after it was registered. As such, it cannot provide a juristic reason for Mr. Dolatshah's enrichment of the Defendants. As a result, the first step in the analysis regarding juristic reason is not met, and there is a *prima facie* case that there is no juristic reason for the enrichment.

[96] The onus shifts to the Defendants to rebut the *prima facie* case by showing that there is another reason to deny the claimant relief.

[97] In terms of the second step, the Defendants have not demonstrated another potential juristic reason for them to retain the \$5.58 million. In terms of the parties' expectations, I find that from 2017 on, Mr. Dolatshah understood he had purchased the Mathers Property and he continued to expect that it would be transferred to his name or a nominee of his choice. The written correspondence from Mr. Moghari to Mr. Dolatshah and Mr. Schwartz from 2017 to 2022 shows that he too believed that Mr. Dolatshah had purchased the Mathers Property for \$5.58 million in 2017 and all that remained was the actual transfer of the Mathers Property. It is clear that Mr. Moghari expected Mr. Dolatshah would choose one of the options that Mr. Schwartz suggested with respect to transfer taxes and that Mr. Moghari was open to whichever option Mr. Dolatshah chose.

[98] I find there are no moral or policy reasons justifying the Defendants' enrichment. Mr. Dolatshah met Mr. Moghari through email and telephone in 2017. A short time later, he negotiated with Mr. Moghari to buy the Mathers Property. He paid the agreed price. All necessary steps for the purchaser were completed, apart from the actual transfer of title. The parties were not in a hurry to complete the transfer until 2021 when Mr. Dolatshah lost trust in Mr. Moghari and thought he had been swindled.

[99] I find that the Defendants have been unjustly enriched by Mr. Dolatshah having paid them \$5.58 million for the purchase of the Mathers Property but having

not received title. There is no juristic reason for the enrichment. I find that Ms. Graham holds title to the Mather Property pursuant to a constructive trust in Mr. Dolatshah's favour.

[100] In terms of the rental income, given my finding that the mortgage was not a real mortgage and the deal between the parties was actually a purchase and sale, the Defendants' first argument as to why they should retain the rental income fails. The rental income belongs to the owner of the Mather Property, Mr. Dolatshah.

[101] That leaves the Defendants' second reason for keeping the rental income. The Defendants allege that Mr. Dolatshah told Mr. Moghari he could keep the rental income. The evidence, however, does not support the Defendants' allegation. Mr. Dolatshah was a businessman. He sent Mr. Moghari \$5.58 million to purchase the Mathers Property in 2017. It makes no sense that a successful businessman would tell another businessman to simply keep the rental income. It makes sense that Mr. Dolatshah told Mr. Moghari to use the rental income to pay expenses for the Mather Property and to account for it later. As it turned out, Mr. Moghari only paid \$89,000 in expenses but collected approximately \$495,000 in rent. There are significant expenses for the Mathers Property that remain outstanding including \$44,000 in unpaid property taxes. Mr. Moghari did not explain why he paid some expenses for the Mathers Property but not others. I do not accept that Mr. Dolatshah agreed that Mr. Moghari could keep the rental income.

[102] There is no juristic reason for the Defendants to retain the rental income. The Defendants Mr. Moghari and Michelle Graham should have accounted to Mr. Dolatshah for the rental income for the Mathers Property, net of its expenses or \$495,000 in rental income to trial less \$89,000 in expenses or \$405,000 to trial.

### **Orders and Declarations Made**

[103] I therefore make the following orders and declarations:

- 1) a declaration that Michelle Graham holds legal title to the Mathers Property in trust for Mr. Dolatshah;

- 2) a declaration that the Defendants have no beneficial interest in the Mathers Property;
- 3) an order that Michelle Graham's name be removed from the title to the Mathers Property and that the Mathers Property be transferred to Mr. Dolatshah;
- 4) an order that Mr. Moghari and Michelle Graham pay Mr. Dolatshah \$430,000 forthwith;
- 5) an order that Mr. Dolatshah shall be responsible for paying any and all applicable transfer taxes;
- 6) an order that the Defendants, Mr. Moghari and Michelle Graham, shall forthwith pay to Mr. Dolatshah \$405,000 in net rental income to the trial date earned in relation to the Mathers Property, and shall continue to pay to Mr. Dolatshah any and all rental income earned from the Mathers Property since the trial after deducting any reasonable expenses the Defendants pay on Mr. Dolatshah's behalf. If the parties cannot agree on the post-trial accounting, they have liberty to apply to me for a brief hearing at 9:00 am by Microsoft Teams; and
- 7) Mr. Dolatshah shall forthwith discontinue or withdraw his petition for foreclosure.

**Costs**

[104] Mr. Dolatshah is the successful party. Subject to submissions, my preliminary view is that the Defendants Mr. Moghari and Michelle Graham ought to pay the costs of this proceeding to Mr. Dolatshah at Scale B. If the parties are unable to resolve

the issue of costs by consent and seek to make submissions, they may request an appearance at 9:00 am via Microsoft Teams.

“Hamilton J.”