COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aura Ventures Corp. v. Vancouver (City),* 2023 BCCA 209

Date: 20230523
Docket: CA48251

Between:

Aura Ventures Corp.

Appellant
(Plaintiff)

And

City of Vancouver

Respondent
(Defendant)

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated March 30, 2022 (*Aura Ventures Corp. v. City of Vancouver*, 2022 BCSC 508, Vancouver Docket S1912177).

Counsel for the Appellant:	W.J. McMillan S. Lin J. Trueman
Counsel for the Respondent:	B.W. Dixon M.S. Kerwin J.S. Twa J. Michaud
Place and Date of Hearing:	Vancouver, British Columbia March 10, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 23, 2023

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

Summary:

The appellant owns a number of properties in the Hastings–Sunrise neighbourhood of Vancouver. The City of Vancouver is the registered owner of the lands at issue, being a "collective parking lot" created, paid for and maintained under Part XXIV of the Vancouver Charter, S.B.C. 1953, c. 55. The appellant claimed that it, and the owners of other nearby properties, hold a beneficial interest in the parking lot. Specifically, it alleged that the City held title to the lands in trust for the benefit of Aura and the other owners. Following a summary trial the judge dismissed the action finding that the lands were not held in trust for the appellant and the other owners. Held: Appeal dismissed. The appellant has failed to establish any reviewable error by the judge. Key elements which are required to prove an express, resulting or constructive trust had not been established.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I. Introduction

[1] This is an appeal from an order in which the judge, following a summary trial, dismissed a proposed class action brought against the City of Vancouver (the "City"). The appellant, Aura Ventures Corp. ("Aura"), owns properties in the Hastings–Sunrise neighborhood of Vancouver. On its own behalf and on behalf of the owners (the "Benefited Owners") of other nearby properties, Aura asserts that the Benefited Owners hold a beneficial interest in a public parking lot which is comprised of 15 parcels of land owned by the City and registered in its name (the "Lands").

[2] Aura claims that the City holds title to the Lands in trust for the benefit of the Benefited Owners. The City's position is that it has never been a trustee of the Lands for the Benefited Owners.

[3] This appeal concerns whether the City acquired the Lands in a manner that subjects it to private law of trust duties. At the trial, the City's position was that the nature of its title depended on the statutory power it was exercising when it acquired the Lands. Since it was adhering to a process prescribed by the Legislature, the issue was one of statutory interpretation.

[4] The primary submissions advanced by the parties at the summary trial related to the question of whether a statutory or an express trust in favor of the Benefited Owners was established as of the time the City acquired the Lands. In reasons for judgment indexed as 2022 BCSC 508, Justice Milman agreed with the City that no such trust existed. Accordingly, he dismissed the action.

[5] In this Court, Aura focuses on its alternative argument that a trust arose by operation of law. It argues that a resulting, or in the alternative, a constructive trust arose in favor of the Benefited Owners. It says the judge erred in excluding all evidence of the subsequent views of City officials on the existence of a trust. It also argues that the judge erred in principle in finding that the question of whether the City held the Lands in trust was suitable for summary trial and dismissing the entire action without considering its remaining claims for a lesser interest.

[6] For the reasons that follow, I am of the view that the judge was correct in his analysis and conclusion that no trust was established in this case, and I would dismiss the appeal.

II. Background

[7] The City is a municipal corporation created and continued under the *Vancouver Charter*, S.B.C. 1953, c. 55 [the "*Charter*"].

[8] In October 2019 the Aura commenced an action against the City under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], alleging that the City holds the Lands in trust for the proposed class members, who are the current Benefited Owners of real properties on Hastings Street between Nanaimo and Slocan Street and on the east side of Kamloops Street, between Hastings Street and the lane immediately to the north (the "Benefited Properties").

[9] In 1963, a group of merchants in the Hastings–Sunrise neighborhood petitioned the City to acquire the Lands to develop a local improvement project, which I will refer to as the Hastings Sunrise Collective Parking Project ("HSCPP"). The Petition was brought pursuant to Part XXIV of the *Charter* which enables the

City to initiate a local improvement project in response to a petition signed by a sufficient number of owners of the properties that will benefit from it. A local improvement is a work, improvement or service that a municipality may provide, usually in the form of a capital project, that confers a special benefit on specified properties in a limited area.

[10] The project was approved by the City Council in 1964. As part of the local improvement project approval process, a special assessment roll was prepared listing the commercial properties in the relevant area (the Benefited Properties).

[11] On March 19, 1964, the City enacted By-law No. 4100, which authorized the acquisition of the Lands and the construction of the HSCPP. By-law No. 4100 authorized acquisition of the Lands "for the use of the public for the parking of vehicles" (emphasis added). It authorized incidental work alongside the acquisition of the real property, and provided that this work "shall conform as much as possible to the project as proposed" in the petition.

[12] The *Charter* empowers the City to borrow money on the general credit of the City by issuing debentures. The City funded the acquisition and construction of the HSCPP in that manner, under By-law No. 4207, which was passed on October 26, 1965. By-law No. 4207 authorized the City to issue debentures with a term of 25 years. It provided that the proceeds of the debentures were to be used by the City to pay off any loans incurred with respect to the project. The City paid off the debentures with special assessments collected against the Benefited Properties, which were listed in a schedule to By-law No. 4207. The City has also enacted annual by-laws to collect the maintenance and repair, insurance, electricity costs, and forgone real property taxes for the Parking Lot from the owners of the Benefited Properties.

[13] The actual costs of acquisition and construction of the HSCPP were determined after the project was completed. The completed cost of the HSCPP was determined in 1965 to be $259,516.06, broken down as follows:

a) Total cost: $236,091.37;

b) City's share: NIL;

c) Property Owners' share: $236,091.37;

d) Engineering cost (5%): $11,804.57; and

e) Interest: $11,620.12.

[14] Over the years, unsuccessful attempts to re-develop the HSCPP were made with City officials expressing the opinion that the Lands were held in trust and could not be re-developed.

[15] The City remains the registered owner of the Lands. Since its inception, the HSCPP has been maintained as a "collective parking project", that is a species of "local improvement project" under Part XXIV of the *Charter*.

[16] In June 2019, the City publicly announced its plan to locate a social housing project on the Lands. The City's title is clear, save for the certificate of pending litigation that the appellant registered on October 29, 2019 after commencing this action. The current assessed value of the Lands is approximately $21 million and its estimated market value is approximately $40 million.

III. Procedural History

[17] Aura commenced the proceeding on October 28, 2019, advancing three causes of action: breach of trust, unjust enrichment, and injurious affection. On those grounds, it sought certification of the action as a class proceeding under the *CPA*; a certificate of pending litigation over the Lands; a declaration that the Benefited Owners are the beneficial owners of the Lands; and an order rectifying the land title register with an "in trust" endorsement on title to the Lands.

[18] In June and July of 2021, Justice Choi heard an application brought by the City for an order that a summary trial application under R. 9–7 of the *Supreme Court Civil Rules* be scheduled ahead of Aura's application for certification. Aura opposed

the application. The judge granted the order, finding that hearing the summary trial before certification would promote the fair and efficient determination of the matter: 2021 BCSC 1568. Aurora did not seek leave to appeal this decision.

IV. Summary Trial Judgment

[19] The judge held that in determining the nature of the City's title, the Court must look to the statutory power that the City was exercising when it acquired the Lands. He held that it did not acquire title to the Lands in a manner that gave rise to private law duties, but rather followed a process prescribed for it by the Legislature. Specifically, he determined:

> [73] Turning then to the substance of the matter, the analysis must begin by identifying the legal principles that properly apply in answering the question posed. Here too, the parties disagree. Aura brings this action relying primarily on the private law of trusts. The City responds that the issue raised is one of public law exclusively.
>
> [74] On this point I agree with the City. In determining the nature of the City's title, one must look to the statutory power that the City was exercising when it acquired the Lands. There was in this case no agreement, will, deed or other constituting instrument setting out the parties' respective rights and duties, as in many of the cases that the parties have cited. Here, the City did not acquire title to the Lands in a manner that gave rise to private law duties, but rather by following a process prescribed for it by the Legislature. That process, by its nature, either gave rise to a trust or it did not. The issue raised is therefore solely one of statutory interpretation. It follows that the stated beliefs of City officials or individual owners at the material time, let alone years later, are simply not relevant.

[20] The judge characterized the process in question in this way:

> [86] … This scheme empowers the City to acquire and hold specific property on behalf of a small group of property owners for a specific purpose. The purchase occurs at the instigation of a subset of those owners, who petition the City to carry it out on behalf of the entire group. The City may elect, as it did here, to allocate the entire cost of the project to the benefited owners through annual levies that are paid by them alone. Moreover, in exercising that power in this case, the City enacted By-law 4100, which stated on its face that the Lands were to be acquired "for the use of the public for the parking of vehicles".

[21] He agreed with the appellant that the scheme created rights and duties displaying many attributes of a "true" trust: at para. 87. However, he noted that the

authorities relied on by Aura (including *Arbuthnot v. Victoria (City)* (1910), 14 W.L.R. 440, 15 B.C.R. 209 (C.A.) and *Ferguson v. City of Toronto*, [1944] 3 D.L.R. 317, 1944 CanLII 109 (ONCA)) were distinguishable based on both the facts and the legislation in question. He also found that several provisions of Part XXIV of the *Charter* (ss. 523, 523A and 519) appeared to counter any implicit intention by the Legislature to create a "true" trust: at para. 98.

[22] At para. 79 the judge identified:

> [79] … three hurdles for Aura in advancing a claim such as this, based on the existence of a trust:
>
> a) the governing analytical framework falls squarely within the rubric of public law, not private law, as the claim has generally been framed;
>
> b) neither the *Charter* nor any other enactment creates a trust expressly, which means that the intent to do so would have to be found to be implicit in the legislation; and
>
> c) even if the legislation did use trust language expressly, the courts will generally favour an interpretation that assumes that what was intended was an unenforceable "political" trust, or perhaps one enforceable exclusively through administrative law remedies, rather than by way of an action such as this.

[23] He also found that even if the legislation, properly interpreted, did reveal an intention to create a "true" trust, Aura would need to demonstrate that the trust extended to the City's interest in the Lands in perpetuity, or at least many decades after the projected lifetime of the project. He found that there was no basis for such an interpretation in the legislation: at para. 100.

[24] The judge thus concluded that the City does not hold title to the Lands in trust for the appellant or the proposed class members, or owe them any fiduciary duty that would restrict the City's use of the Lands: at para. 106. He further determined that there was no viable claim against the City in unjust enrichment or injurious affection: at paras. 108–110.

[25] In this Court, Aura does not challenge the dismissal of its claim for injurious affection.

V. On Appeal—Positions of the Parties

The Appellant

[26] Aura's principal argument is that the judge erred by restricting his analysis based on the "flawed premise" that a trust could only arise out of the procedure outlined in the *Charter* without regard to the principles of equity. It observes that the Supreme Court of Canada has applied the rules of equity to claims involving a municipality and that fiduciary obligations can arise by implication from the relationship between the parties: *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24.

[27] It argues that the correct approach would be 1) to consider if a Court of Equity would have treated the parties' relationships as forming a trust; and 2) if there is a trust, consider if the *Charter* negates it, which it does not.

[28] It submits that the judge should have admitted evidence of the surrounding circumstances, in particular the opinions of past City officials that a trust had been created. It argues that this evidence bears on whether the owners of the Benefited Properties and the City intended to create an enforceable trust obligation.

[29] Relying on *Arbuthnot* and *Ferguson,* Aura submits there is an underlying trust obligation imposed on municipalities. Consequently, the parties did not need to delineate their respective rights and duties at the time the Lands were acquired. It argues that the judge erred in distinguishing *Arbuthnot* and *Ferguson* from this case.

[30] Aura argues that the *Charter* and By-law No. 4100 support the existence of a trust. If there were no underlying trust, the City could simply treat the surplus as its own money, and s. 523 of the *Charter* would be superfluous. That would also be the case with s. 523A if the City already had the power to change a local improvement project at its own discretion. It says that the City's discretion over the project was limited to the decision to initially accept the petition or not. It points to the fact that By-law No. 4100 provides that "[t]he City of Vancouver shall forthwith acquire for the use of the public for the parking of vehicles that real property situate[d] [at the

Lands]". It asserts that this language mandates that the City use the Lands for collective parking purposes, and nothing more, thereby reinforcing its trust obligations.

[31] In this Court, Aura focuses on its argument that a resulting trust, or in the alternative a constructive trust, arose by operation of law. It argues that a Court of Equity would not permit an agent or lender to maintain title to a property after having been fully reimbursed all monies, even if the agent or lender was on title as the registered owner.

The City

[32] The City first identifies what it argues is a material shift in Aura's position in this Court. It says that at the summary trial Aura focused its submissions on the existence of a statutory or express trust based in particular on the acquisition of the Lands by the City and the assessments levied on the Benefited Owners for the acquisition and maintenance of the HSCPP. It submits that the Reasons, and in particular the impugned paragraphs 73 and 74, should be read in this context. It emphasizes that, on appeal, without abandoning the statutory or express trust claim, or providing clarity as to whether the alleged trust is for persons or purposes, the appellant now focuses on its argument that a trust arises by operation of law.

[33] The City's position is that the judge was correct in grounding his analysis and conclusions on the *Charter* itself and the principles of statutory interpretation. It says it can only act according to its statutory powers and through resolutions and by-laws passed by City Council in accordance with those powers.

[34] Accordingly there was no basis for finding an express or implied trust in this case since Part XXIV of the *Charter* and the related by-laws do not contain the kind of clear statutory language required to impose trust conditions on the City, nor were there any specific actions which would be required to deprive the public of municipally owned land in favour of private individuals. It observes that not all Benefited Owners consented to the HSCPP, and argues that persons cannot be compelled to be settlors of trusts.

[35] Insofar as the Benefited Owners alleged “payment” for the Lands, the City characterizes the imposition of a special assessment as a policy decision to impose a tax burden on certain properties that receive a special benefit from the local improvement project, rather than imposing a general tax on all property owners. It emphasizes that local improvement projects and special assessments are public acts undertaken within the jurisdiction of local government, not contracts between private parties.

[36] The City also argues that no resulting trust could arise in this case since there was no gratuitous transfer of property from the owners of the Benefited Properties to the City. Nor was there any legal basis for imposing a substantive constructive trust since the City has acted at all times within its statutory authority.

VI. Analysis

ISSUE #1: Was a Trust Obligation Imposed on the City in Regards to the Lands?

(a) Standard of Review

[37] The principal issue on appeal relates to whether certainty of intention should be determined solely with reference to statutory provisions, in particular the *Charter* and By-law No. 4100. The parties agree that interpretation of the *Charter* and By-law No. 4100 is a question of law, reviewable on a correctness standard.

(b) The Statutory Framework

[38] The *Charter* provides in part:

> **500. Local improvement projects**
>
> (1) When, in the exercise of any of its powers of effecting and carrying out any works, improvements, or services, the Council deems that any such works, improvements, or services will specially benefit real property in a limited and determinable area, the Council may from time to time, subject to the provisions of this Part, undertake and carry out such works, improvements, or services (in this Part referred to as "projects") and pass by-laws (herein referred to as "local improvement by-laws") for borrowing on the general credit of the city such sums as may be necessary to defray the cost of any such project and for levying and collecting taxes based on special assessments imposed, save as hereinafter provided, upon the real property so deemed to be specially benefited, for the payment of all or any part of such cost.

…

501. Property-owner's share of the cost

The amount of taxes so to be levied and collected (herein referred to as the property-owners' share of the cost") shall be apportioned against the individual parcels of real property in the area in proportion to their respective special benefits on the basis and in the manner prescribed by by-law.

…

519. Project may be reduced in scope

Notwithstanding that the Council may have undertaken a project, it may decide not to carry it out, or the Council may, if it deems that it is inadvisable or impracticable to complete in its entirety any project undertaken, reduce the scope and redefine the area and readjust the limits of such project either before or after commencement thereof, and may also provide that the portion of the cost of such project to be borne by the real property benefited thereby shall be borne proportionately in the same manner and on the same basis as originally provided for such project.

…

523. Excess, how dealt with

If the amount realized from the debentures under a local improvement by-law exceeds the cost of the project, the excess shall be taken into the general revenue of the city. If such amount is less than the cost of the project, the shortage shall be paid out of general revenue and shall be amortized over the life of the debentures.

523A. Resolution cancelling local improvement or work

Notwithstanding anything contained in this Act or in any by-law passed in pursuance thereof, in the event of any local improvement or work not being commenced within one year from the date of the sitting of the Court of Revision which was held to hear complaints with respect thereto, the Council may by resolution cancel the said local improvement or work.

[Emphasis added.]

[39] By-law No. 4100 provides in part:

1. The City of Vancouver shall forthwith acquire for the use of the public for the parking of vehicles that real property situate[d], lying and being in the said City of Vancouver, more particularly known and described as…

(c) Discussion

[40] One of the difficulties in this case is Aura's approach in both the court below and in this Court. It has been imprecise in articulating the kind of equitable obligation it seeks in order to establish a trust interest in the Lands. Before the trial judge it asserted that there was: 1) a statutory trust; 2) an express trust; 3) a resulting trust;

or 4) a constructive trust. In this Court, it argues that the analysis should focus on form rather than substance.

[41] I accept that the Crown can assume fiduciary or "trust-like" obligations without creating a private law "true trust": *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63 at para. 60 [*BCIMC*]. Aura, however, specifically pleaded a pre-existing category of fiduciary obligation, a private law trust which is the remedy it seeks regarding the Lands. It thus has the burden of establishing that the legal requirements for a private law trust are present.

[42] Aura's claim of a "statutory trust" must be considered within the context of its overall pursuit of a private law trust over the Lands. Even a statute which specifically references "property held…in trust" will not constitute a private law "true trust" if it does not meet the legal test for an express trust: *BCIMC* at para. 59; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, 1989 CanLII 43 (SCC) at 34–36.

[43] I will thus consider Aura's assertion that a "statutory trust" arises through the *Charter* or applicable *By Laws* as part of the analysis as to whether the requirements of an express trust are met.

Express Trust

Legal Principles

[44] It is open to a public authority to intentionally create a trust relationship in the private law sense. Determining whether a public authority has done so requires the court to evaluate whether the requisite certainties are met: *BCIMC* at paras. 64–65; Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thompson Reuters, 2021) at 2.VII.

[45] Express trusts are created when the three certainties of intention, subject and objects of the transfer have been established and the trust property has been vested in the trustee: *Suen v. Suen*, 2013 BCCA 313 at para. 45. The onus of establishing each of the certainties on a balance of probabilities lies with the party asserting the

trust's existence: *Xu v. Hu*, 2021 BCCA 2 at para. 13. An express or 'true trust' arises from the intentions of the settlor — that intention may be express or implied, and there is no requirement that specific technical language be used: *Xu* at para. 15. However, the intention must be that the other party benefit "*on trust* ": *Xu* at para. 16 (emphasis in original).

[46] Certainty of intention is a key element of the test to establish an express trust. As is generally the case, a public authority's intention to become a trustee can be based on express language, or it can be implied: P.W. Hogg et al., *Liability of the Crown*, 4th ed. (Toronto: Carswell, 2011), at 371, note 15; *Canada Central Ry. Co. v. The Queen* (1873) 20 Gr. 273 (Ont. Ch.); *Gardner v. The Queen (*1984), 45 O.R. (2d) 760, CanLII 1941 (H. Ct. J.). However, evaluating the intentions of a public authority is necessarily different than evaluating the intentions of a private entity. As Dickson J. observed in *Guerin v. The Queen*, [1984] 2 S.C.R 335, 1984 CanLII 25 (SCC) "…[p]ublic law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship.": at 385. This is because the duty of a fiduciary is one of utmost loyalty to the beneficiary, which is "inherently at odds" with the governmental responsibility to "act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups…": *Elder* at para. 44. The performance of governmental obligations and responsibilities is always a "possible explanation" for a public authority's actions, which "does not exist in the case of an ordinary individual" and "makes it necessary to scrutinise with greater care the words and circumstances which are alleged to impose a trust": *Tito v. Waddell (No. 2),* [1977] Ch. 106 (Eng. Ch. Div.) at 211–212.

[47] Furthermore, since this claim concerns real property, Aura has the additional hurdle of rebutting the statutory presumption of indefeasible title created by s. 23(2) of the *Land Title Act,* R.S.B.C. 1996, c. 250.

Analysis—Certainty of Intention

[48] As a creation of statute, the City cannot act except through agents or delegated officials whose actions have been authorized in accordance with the statute: *Canada Safeway Ltd. v. Surrey (City)*, 2004 BCCA 499 at para. 23. Consequently, the indoor management rule, which ordinarily means that a third party is entitled to rely on the apparent authority of a person held out by a corporation to exercise its usual powers and duties, does not apply to the City: *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64 at para. 68.

[49] Here, since the City is a creation of statute, its relationship with Aura, in my view, is based on the statutory provisions set out in the *Charter*. The wording of those provisions and the nature of the relationship they create determine whether a trust has been established, expressly or implicitly. Either a trust was created through the legislation or there was no trust: *Hereford Railway Company v. The Queen*, 24 S.C.R. 1, 1894 CanLII 68 (SCC) at 21.

[50] I agree with the judge that the key question before him was the City's intentions, namely whether the City intended to create governmental obligations, or whether it intended to assume a fiduciary obligation as a trustee to hold the Lands as a parking lot, in perpetuity, on behalf of the Benefited Owners: *Penikett v. R*., 45 D.L.R. (4th) 108, 1987 CanLII 145 (YKCA) at para. 38; *Kinloch v. Secretary of State for India* (1882), 7 App. Cas. 619 (H.L.).

[51] What matters is whether the City intended to create a trust as of the time the Lands were acquired. Accordingly, the judge was correct in finding that the opinion of City officials in the years that followed as to whether a trust had been created is irrelevant.

[52] I also agree with the judge that the principal question is whether the relationship created by statute, or the language of the statute itself, is indicative of the City's intention to create a trust in the Lands in favour of the owners of the Benefited Properties. Such an intention would necessarily have to be implicit, as Aura appears to accept that no explicit intention to create a trust is set out in the

Charter itself. For example, it asserts that the *Charter* and By-law No. 4100 "reinforce[ ] the finding of a trust" and that Part XXIV of the *Charter* "does not contain language negating the language of a trust": Appellant Factum at paras. 85–86.

[53] Aura argues that the *Charter* and By-law No. 4100 support the existence of a trust over the Lands. It says first, that the powers enumerated in the *Charter* are proof that an underlying trust must exist. Second, it says that the nature of the relationship created by legislation demonstrates implicitly the intention to create a trust. Third, it says that the language of the *Charter* reflects the City's intention to create a trust.

[54] First, Aura addresses the judge's finding that provisions in the legislation at issue, specifically ss. 523, 523A and 519 of the *Charter*, are inconsistent with an intention to create a true trust. Section 523 empowers the City to retain excess revenues raised under the scheme. Section 523A allows the City to cancel a local improvement project within one year if the contemplated work has not started by then. Section 519 provides that the City may decide to not carry out a project it has undertaken. It also provides that "…the portion of the cost of such project to be borne by the real property benefited thereby shall be borne proportionately in the same manner and on the same basis as originally provided for such project."

[55] Aura argues that ss. 523 and 523A are indicative of the fact that a trust must exist, because the City would not need these powers unless there were an underlying trust in relation to local improvement projects. Its position is that if there were no underlying trust, the City could simply treat the surplus as its own money, and s. 523 of the *Charter* would be superfluous. That would also be the case with s. 523A if the City already had the power to change a local improvement project at its own discretion. It says that the City's discretion over the project was limited to the decision to initially accept the petition or not.

[56] I do not agree. Any analysis must commence from the foundational principle that the City is a creation of statute and only has the powers provided for in the *Charter*. This does not, in my view, support the thesis that the City must have had

the inherent power to create a trust. The provisions in question, in my view, confirm the judge's conclusion that the City's enumerated powers are incompatible with a trustee-*cestui qui trust* relationship.

[57] Second, Aura focuses on the nature of the relationship created by the legislation which is set out by the trial judge at para. 86 of the Reasons. I would observe that the City, in undertaking local improvement projects, is carrying out its governmental functions and responsibilities. Doing so will not give rise to an express trust in the absence of a clear expression of intention. In any event, it is not necessary to evaluate whether or not the form of a local improvement project could implicitly create a trust, within a different legislative context. The court must consider the scheme in light of the legislative provisions at issue in this particular case, which, in my view, clearly preclude any finding that the City intended to create a trust in the Lands.

[58] Third, Aura points to the fact that By-law No. 4100 provides that "[t]he City of Vancouver shall forthwith acquire for the use of the public for the parking of vehicles that real property situate[d] [at the Lands]". It says that this language mandates that the City use the Lands for collective parking purposes, and nothing more, thereby reinforcing its trust obligations.

[59] This argument runs counter to the basic modern principles of statutory interpretation; that is, the court's obligation to consider provisions "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 1998 CanLII 837 (SCC) at para. 21, citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87.

[60] To read the provisions in question, in particular the words in s. 523 of the *Charter* ("If the amount realized from the debentures under a local improvement by-law exceeds the cost of the project, the excess shall be taken into the general revenue of the City") as giving rise to a trust interest in the "work" or "local

improvement" or "project" at issue, in this case the Lands, is, respectfully, not harmonious but tortured and I would not accede to it. It is illustrative to consider what the *Charte*r does and does not say. As Aura notes, the statutory language, is to "acquire for the use of the public for the parking of vehicles". There is no stipulation that the Lands must then be used as the HSCPP in perpetuity after they have been acquired for that purpose. It would be contrary to the modern principles of statutory interpretation to read trust obligations into legislation which, on its face, contains no such duties.

[61] Aura relies on *Arbuthnot* and *Ferguson* in support of its arguments. In *Arbuthnot*, benefited property owners complained that the City of Victoria was not carrying out a local improvement project as planned. This Court, in two concurring judgments, held that the plaintiffs' claim had sufficient merit to go to trial. One of the two concurring judgments was to the effect that the City was a trustee of the funds raised to carry out a local improvement project, and thus was obligated to use the funds for the purposes of the local improvement project. In *Ferguson*, the question was whether the City of Toronto could properly apply a surplus realized from the sale of debentures used to fund a local improvement project to its general revenue. The Court held that there was a resulting trust over the surplus.

[62] The trial judge considered both these authorities. He noted that the only trust recognized was over the revenue raised under the local improvement schemes, rather than the land acquired with it: at para. 97. None of the plaintiffs were asserting an ownership interest in any land. Further, the beneficiaries of the trust recognized in *Ferguson* were not the current owners of the Benefited Properties, but rather those who had paid the levies over the lifetime of the project. The judge also pointed out differences between the legislation at issue in this case and the legislation before the Courts in *Arbuthnot* and *Ferguson*. In particular, as discussed above, he held that ss. 523, 523A and 519 of the *Charter* contradicted any implicit intention by the Legislature to create a trust. He noted that even if the legislation did reveal an intention to create a trust, Aura would need to establish that the intention was to extend the City's interest in the Lands in perpetuity or for at least 25 years beyond

the originally projected lifetime of the project. He found that the legislation did not support this interpretation: at para. 100. I agree with the judge's analysis on these points and would add that a question which arose in *Arbuthnot,* being whether the City of Victoria's actions were *ultra vires*, does not exist here. Furthermore, there was no claim in either case to a trust interest in the underlying asset, that is those portions of Rockland Avenue in Victoria or Yonge Street in Toronto where the improvements were constructed.

[63] There is, in my view, a fundamental difference between a claim that surplus funds may be held in trust for a particular purpose and one which asserts a trust interest in the underlying asset, in this case the work or local improvement being the Parking Lot itself. Both *Arbuthnot* and *Ferguson* can readily be distinguished on the basis outlined in the Reasons.

[64] The judge held, correctly in my view, that his analysis was bolstered by the reasoning in *Gibbons v. St. John's (City),* 2005 NLTD 124. In *Gibbons*, the plaintiffs claimed that the City of St. John's held municipal land in trust for the public, based on a provision of the applicable *Act* which provided that municipal land was "held and occupied by the city for the public and common benefit and use of the city, according to the intent of the original grant…". The deed of conveyance effecting the transfer of the land at issue to the city provided that it was to create a stadium facility for recreation, to create a memorial, and to permit the City to take on the obligations associated with completing the construction of a stadium building. Justice Faour held that upon acquiring the property, the City was obligated to hold it for those three purposes, the purposes had been carried out: at para. 52. He held that "very specific language" would be required to ground a finding that the property must be held in perpetuity: at para. 48. Otherwise, the City would not be able to dispose of property when it was no longer useful, and the provision at issue would be inconsistent with other provisions of the *Act* which empowered the City to dispose of land upon terms and for consideration it decided.

[65] Accordingly, I would agree with the judge's conclusion that there was no intention to create an express trust in the Lands. Given that all three certainties must be proven to establish an express trust, it is not necessary to determine whether Aura has established the subject and objects of the transfer and if the trust property has been vested in the trustee.

Resulting Trust

Legal Principles

[66] In *Suen v. Suen*, 2013 BCCA 313, this Court held that "[a] gratuitous transfer of property from one party to another is fundamental to the presumption of a resulting trust": at para. 36. There is no requirement of proof of intention: *Suen* at para. 37. A resulting trust may also arise where a claimant seeks recognition of their proportionate interest in an asset which another has acquired with the claimant's property: *Suen* at para. 37.

Analysis

[67] The judge referred to *Ferguson* in his analysis, but did not specifically consider whether a resulting trust could have arisen in the circumstances of this case. I suspect that may have been because Aura's pleadings and submissions focused on an alleged trust to the underlying asset, the Lands themselves, and not any "surplus" or "excess" revenue.

[68] Here, there has been no gratuitous transfer. The owners of the Benefited Properties contributed no funds towards the purchase of the Lands in 1964. Rather, they paid "taxes" to the City in the form of special assessments, as per. s. 501 of the *Charter* and were assessed those taxes on an annual basis. In my view, this cannot be characterized as a gratuitous transfer. Accordingly, I agree with the City that no "purchase money resulting trust" can arise. The City paid all of the acquisition costs of the Lands in 1964, and then decided to defray those costs by imposing special assessments. Even if there had been a transfer, it would not have been gratuitous, as the Benefited Owners then received the benefit of the Parking Lot for the set lifetime of the local improvement project.

[69] While Aura conceded at the summary trial that the owners of the Benefited Properties contributed no funds in 1964 for the acquisition of the Lands, they submitted that the City, as mortgagee or agent, effectively loaned the purchase funds to the owners of the Benefited Properties who then re-paid the City over time.

[70] The difficulty with this argument is that it implies an agreement that the Lands were being purchased for the Benefited Owners by the City and would then be held in trust for them. In other words, this reverts to Aura's allegation of an intentional trust.

[71] In order for such a trust to arise, the parties must have a clear agreement at the outset that one party is buying the property on behalf of the other, and agrees to hold the property as trustee: *Brown v. Storoschuk*, [1947] 1 D.L.R. 227, 1946 CanLII 259 (BCCA); *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 201–202. I agree with the judge that no such "agreement" was entered into in this case.

Constructive Trust

Legal Principles

[72] As per *Moore v. Sweet*, 2018 SCC 52:

> [32] A constructive trust is a vehicle of equity through which one person is required by operation of law – regardless of any intention – to hold certain property for the benefit of another… In Canada, it is understood primarily as a *remedy*, which may be imposed at a court's discretion where good conscience so requires.

[73] Furthermore "a proper equitable basis *must* exist" before the courts will impose a remedial constructive trust. A plaintiff seeking imposition of a remedial constructive trust must demonstrate some basis on which this remedy can be imposed, such as unjust enrichment or breach of fiduciary duty: *Moore* at para. 33.

Analysis

[74] In my view, Aura has failed to demonstrate an equitable basis upon which the remedy of a constructive trust could be imposed. First, there is no basis upon which it could be concluded that the City acted against "good conscience": *BNSF Railway*

Co. v. Teck Metals Ltd., 2016 BCCA 350 at paras. 51, 54, and 85. The City has acted at all time within the bounds of its statutory authority.

[75] Second, a claim for a remedial constructive trust is grounded on the principles of restitution and unjust enrichment: *Moore* at para. 37. The judge made no reviewable error in finding that the test for unjust enrichment was not satisfied in this case. There is a statutory scheme for local improvement projects and the imposition of taxes in furtherance of those projects. Payment of those taxes cannot constitute an enrichment and corresponding deprivation without "juristic reason": *Moore* at para. 63.

Conclusion

[76] In my view the judge was correct in holding that no trust exists in the Lands in favour of the Benefited Owners.

ISSUE #2: Did the Judge Err in Finding that the Action was Suitable for Determination by Summary Trial?

[77] This ground of appeal can be dealt with summarily.

[78] A trial judge's decision as to whether to proceed by summary trial is normally regarded as an exercise of discretion which is afforded the same measure of deference as other discretionary decisions. This Court will not interfere with a trial judge's exercise of that discretion unless it was not exercised judicially or was exercised on a wrong principle: *Hewson v. Peter Kiewit Infrastructure Co.*, 2017 BCCA 143 at para. 4.

[79] On this appeal it bears noting that Aura did not seek leave to this Court to challenge Justice Choi's decision that the City's application to have the action dismissed pursuant to the R. 9–7 of the *Supreme Court Civil Rules* be heard prior to Aura's application for certification of the proposed class action.

[80] In his reasons, the judge noted that the parties agreed that the matter lent itself to summary disposition: at para. 5. He also considered Aura's claims of unjust enrichment and injurious affection at paras. 107–110.

[81] Aura's argument that the judge erred in finding the entirety of the action suitable to be determined summarily is inextricably linked to the legal issues which arise from the question as to whether the City holds the Lands in trust.

[82] Since I would agree with the judge's conclusions on this issue, it follows that there is no reason to disturb his finding that the action was suitable for determination by way of summary trial.

[83] Accordingly I would not accede to this ground of appeal.

VII. Disposition

[84] I would conclude that the judge was correct in finding that there is no trust in favour of the Benefited Owners over the Lands.

[85] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Justice Skolrood"