

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Standard Group Projects Inc. v. 0972672  
B.C. Ltd.*,  
2023 BCCA 205

Date: 20230517  
Docket: CA48645

Between:

**Standard Group Projects Inc.**

Appellant  
(Respondent)

And

**0972672 B.C. Ltd.**

Respondent  
(Petitioner)

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  
October 17, 2022 (*0972672 B.C. Ltd. v. Standard Group Projects Inc.*,  
2022 BCSC 1995, Vancouver Docket S211564).

Counsel for the Appellant:

C. Dennis, K.C.  
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Counsel for the Respondent:

R.R. Lee  
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Place and Date of Hearing:

Vancouver, British Columbia  
March 7, 2023

Place and Date of Judgment:

Vancouver, British Columbia  
May 17, 2023

**Written Reasons by:**

The Honourable Justice Skolrood

**Concurred in by:**

The Honourable Mr. Justice Abrioux  
The Honourable Mr. Justice Voith

**Summary:**

*The appellant and respondent entered into a joint venture agreement (“JVA”) requiring both parties to make shareholder loans to a third company (“Owner”) by February 7, 2022. The JVA stipulated that if the appellant failed to make its shareholder loan in time, the respondent would have the right to acquire the appellant’s entire interest in Owner. On February 7, 2022, the respondent advised the appellant that its shareholder loan had been paid in trust to its solicitors (also the registered and records office of Owner). The appellant did not make its shareholder loan by that date and took the position that the funds placed in trust were contrary to the requirements of the JVA. On February 8, 2022, the respondent’s lawyer took the position that it had complied with the JVA and asserted its right to purchase the appellant’s interest, arguing that the purchase price was zero dollars. The respondent filed a petition to commence this proceeding. The chambers judge found that the petition did not need to be converted into an action and concluded that the respondent was entitled to purchase the appellant’s shares for a purchase price of zero dollars.*

*Held: Appeal dismissed. The proceeding was properly brought by way of petition, as the principal question in issue was one of contractual interpretation, and the parties were largely in agreement with respect to the underlying factual matrix. The judge’s decision to continue the proceeding as a petition is entitled to deference.*

*The judge did not err in his finding that the respondent made its shareholder loan in accordance with the JVA, as the funds were placed into trust which were accessed shortly thereafter by Owner. The judge did not err in finding that the purchase price was zero dollars, taking a common sense approach to the interpretation of the JVA provisions.*

**Reasons for Judgment of the Honourable Justice Skolrood:**

**Introduction**

[1] Standard Group Projects Inc. (“Standard”) and 0972672 B.C. Ltd. (“Investor”) were parties to a joint venture agreement dated June 29, 2021 (the “JVA”) that was created for the intended purpose of developing a retail and residential project on property located in the City of Surrey, British Columbia. (the “Property”). The other party to the JVA was 1064762 B.C. Ltd. (“Owner”) who, at the time the JVA was entered into, was the sole owner of the Property.

[2] Disputes arose between the parties about their respective obligations under the JVA. To address those disputes, Investor brought a petition in the Supreme Court of British Columbia that resulted in an order dated October 17, 2022, entitling Investor to purchase Standard’s interest in Owner, thereby effectively terminating Standard’s involvement in the development project.

[3] The reasons of the chambers judge are indexed at 2022 BCSC 1995. Standard now appeals to this Court.

[4] For the reasons that follow, I would dismiss the appeal.

**Background**

**The Parties**

[5] Owner purchased the Property in April 2016. At that time, Owner’s sole shareholder and director was Cho-Yeup Yoo. However, the purchase was facilitated by Myung Soo (James) Jung, a business associate of Ms. Yoo.

[6] Following the purchase of the Property, Mr. Jung took steps to advance the proposed development, including submitting a development permit application on behalf of Owner to the City. A number of design changes were required by the City, which resulted in several amendments to the development permit application. In November 2019, the City gave preliminary layout approval for the project.

[7] Prior to that time, Ms. Yoo had transferred her single Class “A” share in Owner (the only issued and outstanding share at the time) to Standard, a real estate development company in which Ms. Yoo owns 70% of the shares and Mr. Jung owns 20%. The remaining 10% are owned by a third party. Mr. Jung is the sole director and officer of Standard.

[8] By early 2021, Owner was experiencing financial difficulties, including making necessary payments against loans that were secured by mortgages registered against the Property. Mr. Jung therefore entered into discussions with Ricky Chu and his business partner, Kush Bhatia, about investing in the project. Mr. Chu is the sole director and officer of Investor.

[9] Those discussions resulted in the JVA.

**Relevant Provisions of the JVA**

[10] The central elements of the JVA for the purposes of this appeal include:

- (1) Investor was to make an initial loan of up to \$3.5 million to Owner, to be applied against debts and encumbrances incurred by Owner in connection with the Property. The loan was secured by a mortgage registered against the Property (Articles 1.1, 1.3, 1.4, and 1.6);
- (2) As of the effective date of the JVA (June 29, 2021), Investor had the right to nominate two of the three directors of Owner and Standard had the right to nominate one of the three directors of Owner. Mr. Chu and Mr. Bhatia were designated as Investor’s nominees and Ms. Yoo was designated as Standard’s nominee (Article 2.1);
- (3) On February 7, 2022, defined in the JVA as the “Subscription Date”, Investor was entitled to subscribe for seven Class “A” shares in Owner and Standard was entitled to subscribe to two Class “A” shares in Owner, in addition to its existing one Class “A” share (resulting in a total of three

Class “A” shares for Standard), all at a subscription price of \$100 per share (Article 3.1);

- (4) Also on the Subscription Date, Standard was to contribute a shareholder loan to Owner equal to \$5.55 million and Investor was to contribute a shareholder loan to owner equal to \$12.95 million, minus the principal amount of its initial loan (Article 3.3);
- (5) In the event that Standard failed to make its shareholder loan to Owner, Standard would forfeit its right to subscribe for additional shares in Owner pursuant to Article 3.1, and Investor would have the right to acquire Standard’s entire interest in Owner within three months of the Subscription Date for a purchase price equal to the equity in the Property, calculated as \$18.5 million minus the total amount payable to discharge all mortgages and other encumbrances registered against title to the Property (Article 3.4);
- (6) In the event that Investor failed to make its shareholder loan to Owner, Investor would forfeit its right to subscribe for shares in Owner pursuant to Article 3.1 (Article 3.5.1);
- (7) Owner was to use the shareholder loans from Standard and Investor to pay out and discharge two existing mortgages registered against the Property (Article 4.2);
- (8) Any money to be paid by one party to another under the JVA was to be paid or advanced by bank draft, certified cheque, or wire transfer of “immediately available funds payable to the person to whom the amount is due” (Article 6.4).

**The Parties’ Dispute**

[11] After the execution of the JVA and before the Subscription Date, various steps were taken in accordance with the JVA.

[12] Investor made its initial loan to Owner as contemplated by Article 1.1 of the JVA. The loan was in the form of payments directly to Owner's creditors. By February 1, 2022, Investor had loaned a total of \$3,752,956.16.

[13] Effective June 21, 2021, Mr. Chu and Mr. Bhatia were appointed as directors of Owner in accordance with Article 2.1. While Ms. Yoo was initially a director of Owner, she resigned on January 24, 2022 and was replaced by Mr. Jung.

[14] Prior to her resignation, in November 2021, Ms. Yoo signed a contract of purchase and sale on behalf of Owner to sell the Property to a third party for \$24.5 million. It is alleged that Ms. Yoo did so without the knowledge or consent of the other directors of Owner.

[15] On the Subscription Date, February 7, 2022, Investor's lawyer, a lawyer at the law firm Watson Goepel LLP, advised Standard's lawyer that Investor had paid \$9.45 million to Watson Goepel LLP in trust as a loan to Owner. As of late January 2022, Watson Goepel LLP's office was also the registered and records office for Owner.

[16] Standard's lawyer responded and took the position that placing the funds in trust with Watson Goepel LLP was contrary to the requirements of the JVA. Standard's lawyer indicated that Investor's loan funds should be paid into Owner's bank account. That bank account was indicated on a nameless blank cheque provided by Standard's lawyer. Investor refused to do so.

[17] Standard did not make its shareholder loan of \$5.5 million on February 7, 2022, as required by the JVA.

[18] On February 8, 2022, Investor's lawyer took the position that Investor had complied with the JVA by making its shareholder loan and that Standard had breached its obligation to do the same. Accordingly, Investor asserted its right to purchase Standard's interest in Owner pursuant to Article 3.4.2 of the JVA. Again, Standard's interest comprised one Class "A" share.

[19] Investor took the position that the purchase price for Standard's interest was zero dollars because the existing mortgages and other financial encumbrances on the Property exceeded the \$18.5 million figure set out in Article 3.4.2.

[20] On February 11, 2022, an extraordinary meeting of Owner's directors was held, with each of Mr. Chu, Mr. Bhatia, and Mr. Jung attending. The directors, with Mr. Jung dissenting, approved the following resolutions:

- (1) Owner would acknowledge receipt of Investor's shareholder loan and would instruct Watson Goepel LLP to continue to hold the money on behalf of Owner;
- (2) Owner would issue seven Class "A" shares to Investor;
- (3) The entire \$9.45 million shareholder loan from Investor that was being held in Watson Goepel LLP's trust account was to go towards paying off mortgages registered against the Property. Payments to that effect were made on February 22, 2022.

### **Procedural History**

[21] Investor filed its petition commencing this proceeding on February 25, 2022. Investor sought the following declaratory relief and orders in its petition:

- (1) Investor complied with Article 3.3 of the JVA by contributing its prescribed shareholder loan to Owner on or by February 7, 2022;
- (2) As a result of doing so, Investor was entitled to subscribe to seven Class "A" shares of Owner;
- (3) On February 11, 2022, Owner validly issued seven Class "A" shares to Investor;
- (4) Standard failed to comply with Article 3.3 of the JVA by failing to make its prescribed shareholder loan on or by February 7, 2022;

- (5) As a result of Standard's failure to comply, Standard forfeited its right to subscribe for additional shares of Owner, and Investor has the option to acquire Standard's entire interest in Owner in accordance with Article 3.4.2 of the JVA;
- (6) The purchase price for Standard's interest in Owner is zero dollars;
- (7) Investor validly exercised its option to purchase Standard's interest in Owner on February 8, 2022;
- (8) Standard shall immediately take all steps necessary to transfer to Investor its one Class "A" share in Owner.

[22] Standard filed its response to petition on March 23, 2022 opposing the relief sought by Investor. The principal position advanced by Standard was that Investor had failed to make its shareholder loan to Owner as required by the JVA. Standard also stated in its response that it would be filing its own petition seeking various orders relating to the same matters and that the two petitions should be heard together.

[23] Of note, Standard did not assert in its response that the relief sought by Investor was not available in a proceeding commenced by petition.

[24] On May 3, 2022, Standard changed counsel. Standard did not in fact bring its own petition after this occurred. Rather, on May 9, 2022, it commenced an action against Investor, Owner, Mr. Chu, and Mr. Bhatia, in which it sought various declarations and orders in respect of the matters in dispute between the parties, including a declaration that the defendants had engaged in conduct that was oppressive and/or unfairly prejudicial to Standard pursuant to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57.

[25] Investor's petition was heard over two days on October 6–7, 2022 and the judge rendered oral reasons on October 17, 2022.

**The Judge’s Reasons**

[26] The judge framed the issues before him as follows (at para. 42):

(1) Is this petition unsuitable for determination and therefore must be converted into an action?

(2) If the answer to (1) is no, was Investor entitled under the terms of the JVA to:

(a) Obtain seven Class “A” shares in Owner?

(b) Exercise its option to acquire Standard’s interest in Owner?

(3) If the answer to (2)(b) is yes, did Investor properly calculate the price of exercising the option in accordance with the terms of the JVA?

[27] On the first issue, the judge found that the fundamental questions raised by the parties were “essentially matters of contractual interpretation” and that they were largely in agreement about the underlying facts (at para. 45). Accordingly, he was of the view that there were no triable issues raised that required converting the petition to an action. In coming to this conclusion, the judge found that the existence of Standard’s separate action was not a basis for seeking conversion of an existing petition that is otherwise suitable for summary adjudication (at para. 49).

[28] It is worth noting again with respect to this first issue that Standard was arguing that Investor’s petition should be converted to an action, not that the petition was improperly brought in the first place.

[29] The second issue identified by the judge turned largely on the question of whether Investor made its shareholder loan to Owner. On this point, Standard took the position that Investor had not done so because payment of the alleged loan amount into the trust account of its own lawyer did not satisfy the requirement in Article 6.4 of the JVA that the payment must be in “immediately available funds payable to the person to whom the amount is due”.

[30] The judge rejected this argument, holding that the money was accessible by Owner as of February 7, 2022 and that Owner in fact accessed the funds on February 11, 2022 upon adoption of the necessary directors' resolution (at para. 63).

[31] Having found that Investor made its shareholder loan in accordance with the JVA, the judge then found that Investor was entitled to acquire Standard's interest in Owner, which comprised the one Class "A" share (at para. 77).

[32] Finally, on the third issue, the judge found that Investor had properly calculated the purchase price for Standard's interest in Owner at zero dollars (at para. 88). This was based on his finding that the total encumbrances registered against the Property totalled approximately \$19.3 million, which exceeded the \$18.5 million figure set out in Article 3.4.2 of the JVA (at para. 81).

[33] The judge noted that Standard did not take issue with this calculation in its response to petition, although it filed an affidavit of Mr. Jung who asserted that Investor's pre-existing mortgage loan of approximately \$3.7 million should not be included in the calculation of encumbrances registered against the Property because that amount formed part of Investor's shareholder loan (at para. 82). According to the judge, Standard did not seriously press this argument at the hearing of the petition (at para. 83). Regardless, the judge held that on a common sense interpretation of the ordinary meaning of Article 3.4.2 of the JVA, it was the total amount of all mortgages registered against the Property, including Investor's, that was to be factored into calculating the purchase price (at para. 88).

[34] The judge therefore granted the relief sought by Investor in the petition (at para. 89).

**Issues on Appeal**

[35] Standard alleges that the judge erred:

- (1) In determining that the matter was appropriate for decision on a petition pursuant to Rule 2-1(2)(c) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*];
- (2) In misinterpreting Article 6.4 of the JVA and finding that Investor made its shareholder loan in accordance with the JVA; and
- (3) In misinterpreting Articles 3.4.2 and 4.2 and finding that Investor had properly calculated the purchase price for Standard’s interest in Owner as zero dollars.

**Discussion**

**Issue 1: Was the matter properly brought by Petition under Rule 2-1(2)(c)?**

***Legal Framework***

[36] Rule 2-1(1) provides that the default method for commencing a proceeding is by notice of civil claim. Rule 2-1(2) then establishes certain exceptions to the default rule by identifying specific matters that must be commenced by way of petition. In particular, R. 2-1(2)(c) requires a petition where “the sole, or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document”.

[37] It is common ground between the parties that in order for the present proceeding to have been properly brought by petition, it must fall within R. 2-1(2)(c).

[38] Rules 22-7(1)–(4) are also relevant:

**Non-compliance with rules**

(1) Unless the court otherwise orders, a failure to comply with these Supreme Court Civil Rules must be treated as an irregularity and does not nullify

- (a) a proceeding,

- (b) a step taken in the proceeding, or
- (c) any document or order made in the proceeding.

**Powers of court**

(2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may

- (a) set aside a proceeding, either wholly or in part,
- (b) set aside any step taken in the proceeding, or a document or order made in the proceeding,
- (c) allow an amendment to be made under Rule 6-1,
- (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
- (e) make any other order it considers will further the object of these Supreme Court Civil Rules.

**Proceeding must not be set aside for incorrect originating pleading**

(3) The court must not wholly set aside a proceeding on the ground that the proceeding was required to be started by an originating pleading other than the one employed.

**Application to set aside for irregularity**

(4) An application for an order under subrule (2) (a), (b) or (d) must not be granted unless the application is made

- (a) within a reasonable time, and
- (b) before the applicant has taken a fresh step after knowledge of the irregularity.

[39] In *0927745 B.C. Ltd. v. Charlie’s Chocolate Factory Ltd.*, 2014 BCSC 610, Justice Myers provided a useful explanation of the difference between an action and a petition:

[12] Commencing a proceeding by way of a petition versus a notice of civil claim is not a matter of mere form. A petition is heard on a summary basis without any discovery process; a party seeking those procedures must apply for them. A proceeding commenced by notice of civil claim may be heard at a summary trial, but the parties have the right to discovery, and if the discovery procedures have not been completed before the hearing of a summary trial, the court may adjourn the hearing on a motion by one of the parties. Rule 2-1 is quite specific as to when a proceeding is to be commenced by petition and cases that do not fall within the specified categories are to be commenced by way of notice of civil claim.

[40] *Three Stars Investment Ltd. v. Narod Developments Ltd.* (1981), 33 B.C.L.R. 164, 1981 CanLII 696 (S.C.) is still widely cited as a leading authority on the scope of the predecessor rule to R. 2-1(2)(c). Having canvassed various authorities, Justice Skipp concluded (at para. 10) that a petition proceeding was inappropriate where:

- (1) Serious questions of law or fact are raised;
- (2) A decision will not end the matter, but requires further proceedings to be pursued;
- (3) The application involves not the interpretation but enforcement of a contract.

[41] Justice Bauman, as he then was, subsequently considered the *Three Stars Investment* test in *Yates v. Air Canada, et al.*, 2001 BCSC 127 in light of this Court's decision in *Douglas Lake Cattle Company v. Smith* (1991), 54 B.C.L.R. (2d) 52, 1991 CanLII 3954 (C.A.). Justice Bauman (at para. 39) cited with approval the following statement of Justice Brenner (as he then was) in *Macdonald Dettwiler & Associates Ltd. v. Symbolic Sciences International Ltd.*, [1992] B.C.J. No 2503 at p. 4, 1992 CanLII 2245 (S.C.):

In my view, the test laid down in Three Stars still applies on a Rule 10 application. However, after Douglas Lake, the existence of disputed questions of fact alone will not defeat the application. If disputed questions of fact can be satisfactorily resolved by reference to the documentation between the parties such that the court can conclude that the respondent would be "bound to lose" if the matter went to trial, then the application can be allowed, provided it still meets the Three Stars test. In Douglas Lake, the issue was one solely of contractual interpretation and the decision on that point ended the matter.

[Underlining in original.]

[42] Recently, in *Cepuran v. Carlton*, 2022 BCCA 76, a five-justice division of this Court endorsed a more flexible approach to petition proceedings. In doing so, the Court departed from a line of authorities, most notably *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247, that had held that a petition must be referred to the trial list where there is a *bona fide* triable issue.

[43] Justice Griffin, for the Court, noted a number of procedural reforms that have taken place to better streamline the litigation process and the enhanced focus on proportionality reflected in cases like *Hryniak v. Mauldin*, 2014 SCC 7. She found that when confronted with disputed issues of fact on a petition, it is open to the judge to make use of hybrid procedures, for example by permitting discovery or cross-examination on affidavits, to permit a fair determination without converting the proceeding to an action (at paras. 154–160).

[44] In *Cepuran*, there was no issue that the proceeding had been properly commenced as a petition (see para. 10) and the issue for the Court was whether the petition should be referred to trial. However, the Court’s recognition of proportionality and access to justice as important foundational principles and the endorsement of hybrid-type procedures signals support for a more flexible approach to petitions and to the *Rules* more generally, and movement away from a more formulaic approach to petitions.

[45] Of course, the authority for commencing a proceeding by petition must still be found in the *Rules* or some other enactment. This brings me back to R. 2-1(2)(c), which again requires that a petition be used when the sole or principal question in issue is one of construction. In considering the scope of R. 2-1(2)(c), it is important to keep in mind the modern approach to contractual interpretation, as set out in cases like *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, where the Court held that contractual interpretation involves issues of mixed fact and law, as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix (at para 50); see also *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 47.

[46] Thus, to the extent that the construction of contracts involves a consideration of the factual matrix surrounding the contract, a petition proceeding commenced under R. 2-1(2)(c) for the purpose of interpreting a contract must permit an examination of that factual matrix, including potential factual disputes. Again,

*Cepuran* encourages courts to resolve such disputes where possible through resort to the flexible mechanisms, such as hybrid procedures, available under the *Rules*.

[47] I would add that inclusion of the word “principal” in R. 2-1(2)(c) indicates that the Rule encompasses more than pure issues of contractual or statutory construction. In my view, where relief is sought that is incidental or corollary to the principal issue of construction, such relief may be included in the petition. It would be contrary to the fundamental objective, set out in R. 1-3(1), of obtaining the “just, speedy and inexpensive determination” of proceedings to require parties to pursue separate additional proceedings in order to secure such incidental relief. The petition here provides a useful example of this principle. The first seven grounds of relief sought involve declarations of the parties’ contractual rights under the JVA. The eighth ground seeks an order that Standard take all necessary steps to give effect to those contractual rights. That order simply follows naturally and inevitably on the court’s findings on the proper interpretation of the JVA.

[48] I have set out R. 22-7 above which deals with the consequences of failing to comply with the *Rules*. Of particular note, R. 22-7(1) provides that a failure to comply must be treated as an irregularity and does not nullify a proceeding or step taken in a proceeding. This must be read in conjunction with R. 22-7(3) which provides that a proceeding is not to be set aside on the ground that it was commenced using the wrong originating pleading.

[49] Rule 22-7(4) is also significant in that it requires that any application seeking relief based upon a failure to comply with the *Rules* must be brought within a reasonable time and before the applicant has taken a fresh step after knowledge of the irregularity. This requires a party to act expeditiously to address an irregularity or breach of the *Rules* by another party rather than sitting back and waiting for a strategically advantageous time to raise the issue.

[50] Consideration of these rules leads to the next question of what options are available to the court when a proceeding has improperly been commenced by petition. Rules 22-7(1) and (3) again direct that this is to be treated as an irregularity

and that the proceeding is not to be set aside on this basis: *The Redeemed Christian Church of God v. New Westminster (City)*, 2022 BCCA 224 at para. 74.

[51] In *Redeemed Christian Church*, Justice Voith, for the Court, held that the proceeding, in which the petitioner sought various grounds of relief under the *Charter* in connection with the respondent City's decision to terminate a lease agreement, was not properly brought by petition (at para. 72). Justice Voith then went on to consider what remedy was available following that conclusion. He noted that "a trial or motions judge has significant discretion on how best to rectify such a situation" (at para. 74).

[52] Justice Voith ordered that the relief granted by the chambers judge be set aside and that the proceeding be converted to an action, with leave granted to the petitioner to file a notice of civil claim (at para. 93).

[53] In *The Owners, Strata Plan NW 2364 v. The Owners, Strata Plan NW 2301*, 2023 BCCA 55 [*Strata Plan NW 2364*], the parties were neighbouring property owners and had historically shared the use and costs of certain recreational amenities. The appellant sought to terminate that arrangement, which was challenged by way of a petition proceeding commenced by the respondent. The chambers judge found that there was a post-incorporation contract between the parties that prevented the appellant from terminating the arrangement.

[54] On appeal, one of the grounds advanced by the appellant was that the proceeding had been improperly brought by petition. Citing *Redeemed Christian Church*, the appellant argued that the judge's order should be set aside. Justice DeWitt-Van Oosten, for the Court, rejected that argument. She found that the issue raised was principally one of construction of a contract, thus the matter fell within the scope of R. 2-1(2)(c) (at para. 15). She further held that, in any event, pursuant to Rules 22-7(1)(a) and 22-7(3), employing the wrong originating process does not nullify the proceeding (at para. 16). Rather, "a hearing judge retains a discretion to allow the proceeding to continue" (at para. 17). Justice DeWitt-

Van Oosten also noted that the exercise of such discretion attracts a deferential standard of review (at para. 17).

***Analysis***

[55] I am unable to accede to Standard’s first ground of appeal, for three reasons:

- (i) The issue of whether the proceeding was improperly commenced by petition was not raised below and is a new issue advanced by Standard on appeal;
- (ii) The proceeding was, in any event, properly commenced by petition; and
- (iii) Regardless, the judge exercised his discretion to permit the matter to proceed and there is no basis on which to interfere with that discretion.

[56] I will address each of these reasons in turn.

***(i) New issue on appeal***

[57] In his reasons, the judge noted that Standard opposed the relief sought by Investor “primarily on procedural grounds”, namely that the petition raises triable issues and that its adjudication will not resolve the full dispute between the parties (at para. 10). The judge reiterated Standard’s position later in his reasons, noting again that Standard’s “primary” argument was that the petition raises triable issues and should be converted into an action (at para. 39). He stated that he was “not persuaded that the issues raised are triable” given that the “fundamental questions are essentially matters of contractual interpretation” (at para. 45).

[58] The judge’s characterization of Standard’s position is consistent with the written submissions provided by Standard at the court below, a copy of which was handed up during the hearing of this appeal. Those submissions focus on the issue of conversion but do not assert that the petition proceeding was improperly constituted.

[59] I do note that Investor’s written submissions below did include a section entitled “Proceeding by Petition is Appropriate”, in which Investor cited a number of cases in which similar disputes had been decided in a petition proceeding. However, counsel advised during the hearing of this appeal that this issue was not addressed in oral submissions because Standard did not argue that a petition was inappropriate. Rather, the parties focussed on whether the proceeding should be converted to an action.

[60] Standard now submits on appeal that, regardless of whether the issue was raised below, the question of whether the proceeding was properly commenced by way of petition is always a live issue, as the judge has a gatekeeping obligation to ensure that a petition is authorized by R. 2-1 or another enactment.

[61] In my view, it is clear from the judge’s reasons that he turned his mind to whether the matter in dispute was properly the subject of a petition. Specifically, he stated: “...I am satisfied that the issue of contractual interpretation raised by Standard is properly the subject of this petition.” (at para. 11).

[62] It is true, as Standard submits, that the judge did not engage in a detailed analysis of the scope of R. 2-1(2)(c) or the authorities interpreting that rule. However, he was not asked to do so, as the parties proceeded on the basis that the proceeding was properly commenced.

[63] Standard now seeks, on appeal, to entirely re-cast its position. In my respectful view, this Court should not entertain Standard’s new arguments.

[64] In *Aulakh v. WIT Management Corp.*, 2023 BCCA 108, Justice Willcock reaffirmed the long-standing principle that leave to address new issues on appeal should be granted only in exceptional circumstances (at para. 44). Justice Willcock cited this Court’s decision in *Baring v. Grewal*, 2022 BCCA 42, where Voith J.A. reviewed a number of relevant authorities, and concluded that the Court will only entertain a new issue on appeal where “the issue is truly new, the court has a complete evidentiary record and the interests of justice support making an exception

to the general rule” (at para. 128, citing *Quan v. Cusson*, 2009 SCC 62 at paras. 36–42; *Bartch v. Bartch*, 2018 BCCA 271 at paras. 30–31).

[65] Here, the issue of whether the proceeding was properly commenced by petition is not truly new, in the sense that it was open to Standard to argue the point below alongside or as an alternative to its position that the petition should be converted to an action. Further, the interests of justice do not weigh in favour of permitting Standard to advance the argument now, as doing so would run afoul of R. 22-7(4)(a), which, again, directs that an application seeking relief based on an irregularity must be brought within a reasonable time. In my view, raising the issue on appeal is not acting within a “reasonable time”.

***(ii) Proceeding properly brought by petition***

[66] While my finding that this is a new issue that the Court should not entertain is sufficient to dispose of this ground of appeal, I am, in any event, satisfied that the proceeding was properly commenced by petition.

[67] The principal arguments advanced by Standard as to why a petition is not appropriate are that the relief sought is not limited to questions of construction but rather, Investor seeks enforcement of the JVA, and that determination of the petition will not end the parties’ dispute as Standard’s oppression action will still be ongoing.

[68] Standard cites a number of authorities in which it was held that enforcement of a contract is not done by way of a petition. For example, Bauman J. came to that conclusion in *Yates*. At issue in that case was entitlement to a survivor’s pension under a pension plan administered by Air Canada. The petitioner was the former spouse of the pensioner. She and the pensioner had been separated for many years as of the time of his death, but they had never divorced. After the separation, the pensioner had commenced a long-term relationship with another woman, S.D., that continued up until his death. Until the time of the pensioner’s death, one-half of his retirement pension was paid to the petitioner as maintenance pursuant to a separation agreement. Upon the pensioner’s death, the trustees of the pension plan

resolved to pay a survivor's pension to the pensioner's spouse, who they determined to be S.D.

[69] The petitioner challenged the trustees' decision. In her petition, she sought various forms of relief, including an interpretation of the word "spouse" in the Air Canada pension plan, a declaration that she was the pensioner's spouse for the purposes of the plan, an order for specific performance of the pension plan terms, an order that Air Canada provide her with health and other benefits, and an order, in the alternative, that S.D. hold any payments received from the pension plan in trust for the petitioner.

[70] Justice Bauman dismissed the petition on the basis that the relief sought was not simply construction of the pension plan document, and in particular the word "spouse". Rather, he held that the petitioner was effectively seeking an order quashing the decision of the pension plan trustees and directing that a survivor's pension be paid to her along with certain other benefits that are not even provided for in the pension plan (at para. 40). He noted that the primary thrust of the petition was to "enforce the terms of a trust which the petitioner asks the court to first construe" (at para. 41). As such, the case was not suitable for disposition under R. 10(1)(b) (the predecessor to R. 2-1(2)(c)).

[71] Similarly, in *Yan v. RLPS Limited Partnership*, 2018 BCSC 672, Justice Schultes held that a petition was not an appropriate proceeding where the relief sought was release of deposit funds paid on an aborted real estate transaction. While the petitioner's counsel argued that the issue was simply one of construction of the purchase contract, Schultes J. held:

[8] It seems clear that what is being sought here is not construction of the purchase contract, which Ms. Yan has submitted is clear on its terms on this point, but its enforcement. If any element of construction could be said to arise, it is certainly not "the sole or principal question at issue". Enforcement of a contract, as distinct from the issue of its construction, is not a proper objective of a petition proceeding: for example, *MacDonald Dettwiler & Associates Ltd. v. Symbolic Sciences International Ltd.*, [1992] B.C.J. No. 2503 (S.C.), citing the well-known decision of *Three Star Investments Ltd. v. Narod Developments Ltd.* (1981), 33 B.C.L.R. 164 (S.C.).

[72] Finally, Standard cites *Taj Park Convention Centre Ltd. v. Sher-A-Punjab Community Centre Corporation*, 2022 BCSC 473 in which the petitioner sought an order requiring the respondent lessor to take all reasonable steps to have the subject property rezoned to permit its use as a banquet hall as contemplated in the parties' lease.

[73] The Court in that decision held that the petition was not authorized by R. 2-1(2)(c) because construction of the lease was not the sole or principal question in issue (at para. 40). Rather, the petitioner was attempting to improperly advance a claim for breach of contract by way of a petition (at para. 42). This was apparent in part from the fact that the petitioner had originally included in the petition a claim for specific performance of the lessor's obligations, but had then amended the petition to simply seek a declaration as to those obligations (at para. 43(b)).

[74] The Court also found that the declaration sought in the petition would not resolve the parties' dispute in that it left open what steps were to be taken by the lessor and the consequences of a failure to do so (at paras. 43(a) and (b)).

[75] Standard submits that the same considerations apply here. It argues that Investor is attempting to enforce what it considers its contractual rights to be under the JVA and that determination of the petition will not resolve the parties' dispute given Standard's ongoing oppression action.

[76] In my view, *Taj Park* and the other cases cited by Standard are distinguishable from the present case on a number of grounds. For example, in *Taj Park*, the sole ground of relief sought was an order seeking to compel the respondent to take certain actions in accordance with the petitioner's interpretation of the lease in issue. The petition had originally included a claim for specific performance but was amended prior to the hearing to remove that claim. Nonetheless, the Court found that the petition was clearly directed at enforcing the respondent's obligations under the lease (at para. 45). Further, the Court noted that the relief sought was vague and left open the central question of what "reasonable steps" the respondent was required to take (at para. 43(a)). Finally, there were

significant factual disputes between the parties, which took on particular importance given the uncertain and ambiguous drafting of the lease (at paras. 49, 52). That is in contrast to the situation here where, as the judge noted, “the parties are largely in agreement with respect to the underlying factual matrix” (at para. 45).

[77] For these reasons, the authorities cited by Standard do not assist it and I am satisfied that the matter was properly commenced by petition. I would add that this conclusion is bolstered by the fact that Standard’s arguments on its two additional substantive grounds of appeal are based almost entirely on points of interpretation of the JVA.

***(iii) Exercise of the judge’s discretion***

[78] As DeWitt-Van Oosten J.A. held in *Strata Plan NW 2364*, even where a proceeding has been commenced using the wrong originating procedure, the Court has a discretion to permit the proceeding to continue and the exercise of that discretion is entitled to deference (paras. 16–17). Here, the judge did not exercise a discretion to permit an improperly commenced proceeding to continue, because the issue of whether the matter could be brought by petition was, again, not argued. However, in the context of considering whether the petition should be converted to an action, the judge exercised his discretion to decline to do so on the basis that the questions in issue were essentially matters of contractual interpretation (para. 45). He rejected Standard’s argument that the matter should be converted and heard together with its oppression action. Standard has not demonstrated any basis on which to interfere with the judge’s decision.

**Issue 2: Did Investor make its shareholder loan in accordance with Article 6.4 of the JVA?**

[79] As set out above in para. 15, on February 7, 2022, Investor purported to advance its shareholder loan by placing \$9.45 million into trust with Watson Goepel LLP, in an account in the name of Owner. Watson Goepel LLP was Investor’s counsel and also the registered and records office of Owner.

[80] Standard submits that this payment did not comply with Article 6.4 of the JVA because:

- a) The funds were not “advanced, paid or tendered” to Owner; and
- b) The funds were not “immediately available” to Owner.

[81] I note at the outset that the judge’s finding that Investor made its shareholder loan in accordance with the term of the JVA is a finding of fact that is entitled to deference.

[82] I am not persuaded that the judge erred in coming to that finding. As the judge found at para. 61, the funds were placed into trust in the name of Owner, which then accessed the funds four days later upon the directors of Owner passing the appropriate resolution. As Investor submits, like all corporate entities, Owner acts through its directors who could just as well have met and passed the resolution on February 7, 2022 to access the funds. Thus, there is no merit to Standard’s submission that the funds were not “immediately available” to Owner.

[83] I also do not accept Standard’s submission that payment of the funds into trust meant that they were not advanced, paid, or tendered to Owner. Payment of funds into trust in the name of a designated beneficiary is a commonly used mechanism in real estate and other commercial transactions and, as the judge found at para. 64, the payment here was the effective equivalent of making a payment directly to Owner. I also agree with the judge’s observation at para. 66 that it was not unreasonable for Investor to balk at paying the funds to a bank account number listed on a nameless blank cheque.

[84] It follows that I agree with the judge’s finding that Investor made its shareholder loan and was therefore entitled to exercise its rights under the JVA to subscribe for seven Class A shares in Owner and to purchase Standard’s interest in Owner. This latter right resulted from Standard’s failure to make its shareholder loan, a fact that is not in dispute between the parties.

**Issue 3: Did Investor properly calculate the purchase price for Standard's interest?**

[85] Standard's principal submission in support of its position that the judge erred in calculating the purchase price for its interest in Owner is that if Investor did make its shareholder loan by providing funds that were immediately available to Owner, then those funds were to be used to pay down the encumbrances registered against the Property, thereby increasing the equity in the Property, which in turn would have increased the purchase price payable by Investor to approximately \$8.5 million. Standard submits that the judge interpreted Article 3.4.2 of the JVA, the provision under which the purchase price was calculated, without reference to Article 4.2 which directs that Owner shall use the shareholder loan to pay out any encumbrances on the Property.

[86] Standard did not advance this argument below. Indeed, as the judge noted, Standard did not take issue with the calculation of the purchase price whatsoever in its response to petition. However, it did file an affidavit from Mr. Jung in which he asserted that Investor's mortgage of approximately \$3.7 million should not be included in the calculation of the total encumbrances registered against the Property because this was part of Investor's shareholder loan. The judge also noted at para. 83 that counsel for Standard did not seriously press this argument at the hearing and that Standard's written submissions simply alleged that Investor had miscalculated the purchase price.

[87] As discussed above at para. 64 this Court will not lightly entertain new issues on appeal. However, I agree with Standard that this is not, strictly speaking, a new issue, given that the question of how to calculate the purchase price was squarely before the judge. I also do not accept Investor's submission that it would be prejudiced if the Court considers Standard's new argument because it has been deprived of the opportunity to adduce evidence from the parties and the drafter of the JVA as to their intentions respecting the relevant provisions of the JVA.

[88] While we do not have the benefit of the judge's reasons on this specific argument now advanced by Standard, I accept Investor's submission that the judge properly construed the JVA and did not err in his calculation of the purchase price. I reach this conclusion for a number of reasons.

[89] First, I agree with Investor's submission that Article 4.2 contemplated both Standard and Investor providing their shareholder loans in order to pay out existing encumbrances. Unless both parties complied with their shareholder loan obligations, which Standard did not, this provision was inoperable.

[90] Second, as submitted by Investor, Standard's interpretation would effectively require Investor to pay its loan twice: once to Owner in the form of the shareholder loan and a second time to Standard as part of the purchase price. This makes no commercial sense.

[91] Third, on Standard's interpretation, its one share in Owner (out of a total of eight shares) would have a value of approximately \$8.5 million, which would result in Owner being valued at \$68 million. This is inconsistent with the provision in Article 3.4.2 which sets a nominal value for Owner of \$18.5 million.

[92] Standard has not demonstrated that the judge erred in his calculation of the purchase price.

**Disposition**

[93] I would therefore dismiss the appeal.

“The Honourable Justice Skolrood”

I AGREE:

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Mr. Justice Voith”