COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Iris Legal Law Corporation v. Purcell,* 2024 BCCA 90

Date: 20240307
Docket: CA48954

Between:

Iris Legal Law Corporation and Jana McLean

Appellants
(Respondents)

And

Robert Douglas Purcell and Virginia Anne Edgington Purcell

Respondents
(Applicants)

SEALED (IN PART)

Before: The Honourable Madam Justice Bennett
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated March 13, 2023 (*Purcell v. McLean*, 2023 BCSC 365, Cranbrook Docket 30152).

Counsel for the Appellant:	M. Fox
Counsel for the Respondent:	A.L. Colpitts C. Fox, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia September 13, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 7, 2024

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Voith

Summary:

This appeal arises from a fee dispute between a lawyer and clients. The parties were governed by a retainer agreement which the clients alleged had been amended to permit payment of invoices to be deferred until the conclusion of the trial. The clients stopped paying monthly fees and the law firm withdrew. On an examination of the agreement and a review of the fees, a master sitting as the registrar concluded that the agreement had not been amended and that the fees were reasonable. On appeal to the Supreme Court, a chambers judge concluded that the master had committed a procedural error by requiring the clients to present their case first, and that the master had erred by failing to first establish that the retainer agreement executed by the parties was the governing agreement. The chambers judge remitted the matter back to the master. The law firm appeals. Held: Appeal allowed. The order of proceedings fell within the discretion of the master. No procedural error was made. The retainer agreement was adequately established.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] This appeal concerns the procedure to be adopted when a client of a law firm requests a review of the retainer agreement and the fees charged under that agreement.

[2] The appellants (the “Law Firm”) were engaged by the respondents (the “Clients”) to advise them in relation to a dispute and to conduct litigation concerning that dispute (the “Horst Litigation”). A retainer agreement was drawn up and the Law Firm sent interim monthly invoices pursuant to that agreement. The Clients paid several of these invoices but stopped paying at a point while the litigation was in progress. After some months of discussions, the Law Firm withdrew and sued for the unpaid invoices.

[3] The Clients then set down an appointment to examine the retainer agreement and review the fees charged under that agreement. The review took place before a Master sitting as the Registrar.

[4] At the review, the Master concluded that the principal issue was the Clients’ assertion that the retainer agreement had been amended to a modified contingency agreement whereby invoices from the Law Firm would not be due and payable until

the conclusion of the trial of the Horst Dispute. The Law Firm denied that such an amendment had been made.

[5] The Master reviewed the dealings between the parties and concluded that the retainer agreement had not been amended. She found that the retainer agreement governed the parties' relationship and that the fees and disbursements charged were reasonable and necessary. At a separate hearing to determine costs, the Master heard submissions from both parties as to whether special circumstances within the meaning of s. 72(2) of the *Legal Professions Act,* S.B.C. 1998, c. 9 ("*LPA*") existed, concluded that they did not, and awarded costs of the hearing to the Law Firm in accordance with s. 72(1) of the *LPA*.

[6] The Clients appealed both of the Master's judgments to the British Columbia Supreme Court.

[7] On appeal, the chambers judge held that the Master had made two reversible errors in her conduct of the appeal and her reasons for judgment. The chambers judge held that by requiring the Clients to proceed with their opening and evidence first, the Master had committed a procedural error, on the basis that on review hearings under the *LPA*, the lawyer always goes first. She also held that the Master had erred in giving effect to the retainer agreement because the Law Firm had failed to prove the existence and terms of the retainer agreement.

[8] The judge set aside the Master's judgment and remitted the review back to the Supreme Court for rehearing.

[9] I am unable to agree with either basis on which the chambers judge set aside the Master's judgment. In my opinion, for the reasons I will explain, there is no absolute requirement that the lawyer go first on a review of a retainer agreement and fees charged under it, although that will frequently be the most appropriate procedure. The order of proceeding is fundamentally a matter of trial management, and will depend on the issues raised and the onus of proof on those issues.

[10] Similarly, I am unable to agree that the Master erred in accepting that the existence and terms of the retainer agreement that the Clients sought to have examined had been adequately established at the review hearing. The issue on the hearing was not what the retainer agreement was, but whether it had been amended to a modified contingency agreement.

[11] The Master made a number of factual findings in concluding that the parties' relationship was governed by the retainer agreement the Clients sought to have examined, and that this retainer agreement had not been amended. Those factual findings command deference.

[12] For the reasons that follow, I would allow the appeal, set aside the chambers judgment and restore the judgment of the Master on review. As the appeal of the Master's decision on costs was not addressed by the chambers judge in light of her central conclusions, I would remit that appeal back to the Supreme Court for its determination.

Background

[13] The proceedings before the Master arose from a breakdown in the solicitor-client relationship that had begun in 2014 and continued through to July of 2020, when the solicitors withdrew from representation of the respondents.

[14] The Clients initially retained the appellant Ms. McLean to assist with the Horst Litigation. When Ms. McLean changed firms, the Clients elected to move their file to her new firm. In January 2019, Ms. McLean opened her own law firm, Iris Legal Law Corporation, and the Clients moved with her.

[15] At the time Ms. McLean opened the Law Firm, the trial of the Horst Litigation was scheduled for September 23, 2019. The trial was ultimately adjourned due to a lack of court time. It was rescheduled for November 2020 and subsequently adjourned to November 2021.

[16] During 2019, the Law Firm sent monthly accounts to the Clients. The Clients paid the first four of these accounts, but have made only nominal payments on the last five accounts. This led to a number of conversations and communications between the Clients and Ms. McLean concerning payment of the outstanding accounts. Eventually, in June of 2020, the Law Firm advised the Clients that they were withdrawing from the file. In September 2020, the Law Firm commenced a Supreme Court action against the Clients for payment of their outstanding invoices.

[17] On October 2, 2020, the Clients delivered an appointment pursuant to Rule 14-1(21) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 for an examination of an agreement and a review of the nine invoices sent by the Law Firm in 2019. The appointment served by the Clients followed the format in Form 49 and specifically sought "review of the bill of Jana McLean of Iris Legal Law Corporation" and "examination of the agreement between Jana McLean of Iris Legal Law Corporation and Robert Douglas Purcell & Virginia Anne Edgington Purcell". Attached to the appointment was a form of retainer agreement and copies of the nine invoices.

[18] The agreement attached to the appointment is a four-page letter dated February 25, 2019 in the form of a retainer agreement (the "Retainer Agreement"). It is signed by Ms. McLean but not the Clients (although Ms. Purcell agreed that she had signed the agreement). It is said to be "Re: Horst Litigation — Water and Land Advice". It begins, "Thank you for retaining our firm to provide you with the above-described services to you."

[19] The letter goes on to confirm how instructions would be received from the Clients, and states that "fees are typically based on time spent by lawyers and other professional staff who work on a matter." Under the heading "Invoices", the letter states, "[o]ur invoices typically are sent monthly and are due and payable within 30 days."

[20] The letter contains the following provision concerning termination:

> **Termination**
>
> We may each terminate this service agreement upon written notice to that effect. You will continue to be responsible for any outstanding fees, disbursements, other charges and applicable taxes incurred up until the date of termination.

[21] After the appointment was served, a series of pre-hearing conferences took place, including three by Master Keim (now Associate Judge Keim) who ultimately conducted the review hearing. The Clients were directed to provide Particulars of their claim. In their Particulars, the Clients stated the following:

> Jana Mclean was retained by the Purcells for resolution of the matter of Horst v. Purcells in 2015 and has remained continuously as counsel representing the Purcells in this matter from 2015 to June 2020. … In the spring of 2019 the Purcells expressed concern over keeping up with ongoing legal costs in the matter. Jana McLean and/or Iris Legal extended various and several successive assurances of financial flexibility, which the Purcells relied upon, including offers of contingency and paying after the trial. … On June 30, 2020 Jana McLean and/or Iris Legal withdrew as counsel prior to completion of the contract without good cause and in doing so breached the Retainer.
>
> All invoices issued by Jana Mclean and /or Iris Legal to the Purcells should be set aside as no result has been obtained. … Jana McLean and/ or Iris Legal withdrew without good cause on June 30, 2020, prior to completion of the entire contract … The retainer was an entire contract for resolution of the matter Horst v. Purcells, either by settlement or through trial, and all parties acted in accordance with this at all times.
>
> Jana McLean and/ or Iris Legal breached the retainer when they withdrew, without good cause, as counsel representing the Purcells in the matter of Horst v. Purcells, prior to the scheduled trial.

[22] In their Response to Particulars, the Law Firm denied that the retainer was an entire contract, and asserted that they were entitled to terminate the Retainer Agreement both for lack of payment and serious loss of confidence.

The Master's Decision

[23] The hearing before Master Keim took place over four days in August and September of 2021. On September 23, 2021, the Master issued a twenty-page judgment in which she concluded that the Retainer Agreement was the agreement

governing the parties' relationship and that all of the work and charges in the disputed invoices were reasonable and necessary.

[24] Master Keim identified the principal issue as whether the Retainer Agreement had been amended to a modified contingency agreement. She explained the Clients' position this way:

> [9] The Purcells argue that they should not have to pay the accounts of ILLC as ILLC has not completed the trial. They submit that the formal retainer was amended by the parties such that no fees were payable until after the trial was completed.

[25] The Master then reviewed the factors set out in s. 71(4) of the *LPA*, pointing out that the review was somewhat unusual in that there was no dispute between the parties as to most of the factors. The only factor in dispute was the result obtained, having regard to the Law Firm's withdrawal before the trial took place.

[26] She summarized the positions of the parties in this way:

> [20] The only significant s. 71(4) factor in dispute is factor (h), the result obtained. The Purcells argue that once the retainer was amended it became an entire contract that depended on ILLC completing the trial. Since ILLC is not conducting the trial, the Purcells submit that there is in effect no result obtained and, therefore, none of the invoices should be paid. ILLC contends that the retainer agreement is binding and is not an entire contract as is meant by the Purcells. ILLC submits that obtaining a result from trial is not a requirement and that the Purcells have still received significant benefit from ILLC's work, including a successful examination for discovery of the plaintiff in the Horst litigation, a 12-page trial brief, various pleading amendments, detailed agreed facts for use at trial, which have been accepted by both parties; a lengthy common book of documents accepted by both parties; a book of photographs for use at trial; a book of authorities; an expert report; written submissions; lengthy opening submissions; a lengthy closing submission; and witness examination for 11 witnesses and significant witness preparation, as well as extensive research.
>
> [21] Therefore, the pivotal question on this review is, was the formal retainer letter amended such that the Purcells were not obligated to pay any fees to ILLC until the conclusion of the trial? To answer that question it is necessary to delve into some of the communications between the parties.

[27] The Master reviewed the evidence of conversations and communications between the parties and concluded that the Retainer Agreement had not been amended:

> [48] … I find that there was no amendment to the ILLC retainer agreement with the Purcells. The record is clear that at best ILLC was prepared to consider deferring payment of some of the fees until after the trial. That somehow morphed into the Purcells' stated belief that they did not have to pay anything until after the trial. Nothing in the evidence before me supports that stated belief.
>
> …
>
> [52] … the concept of a contingency fee for a portion of the fees was never more than that, a concept offered by a well-meaning lawyer to help her longstanding clients spread out their payments. It never coalesced into anything more. …
>
> [53] Given that I have found that the retainer letter is the only valid contract between the parties, I am dismissing the Purcells' submission that the retainer had been amended and that ILLC was working for the Purcells on the basis of an entire contract.
>
> …
>
> [55] Thus the retainer agreement governs the parties' relationship and given that the Purcells took no issue with the specifics of any of the invoices, the quality of Ms. McLean's work and expertise, I can find no basis on which to reduce any of the invoices. All of the work and charges were reasonable and necessary.

[28] Accordingly, the Master certified the Law Firm's bill pursuant to Rule 14-1 of the *Supreme Court Civil Rules*.

[29] In a separate hearing, Master Keim ordered that costs should be paid by the Clients in accordance with s. 72(1) of the *LPA*, rejecting both parties' submissions that special circumstances existed to order otherwise.

[30] The Clients appealed both judgments to the British Columbia Supreme Court.

The Chambers Judgment

[31] On appeal in the Supreme Court, the issues took on a somewhat different complexion. The chambers judge summarized the issues as presented by the Clients on appeal:

> [2] The Purcells' primary ground of appeal is that the registrar reversed the burden of proof by directing that they present their case first and caused them to not be ready to prove the matters for which they had the burden. They submit that this procedural error effectively reversed the burden of proof. They also submit that the procedural error prejudiced them because they had to present their evidence first, they were caught by surprise by some

> of the evidence led by Ms. McLean, and they did not have an opportunity to respond to it.
>
> [3] In addition, the Purcells appeal on the basis that the registrar made overriding and palpable errors in assessing credibility and finding facts. They assert that the registrar erred in determining that the results obtained justified the accounts issued, especially because Ms. McLean and Iris Legal Law Corporation (collectively, "Iris Legal"), withdrew as counsel prior to trial. They assert that some erroneous findings of fact arose because they were not able to respond to the evidence that Ms. McLean gave due to the reversal of the order of the presentation of cases.

[32] Thus, the central issue raised by the Clients was whether the Master had committed a procedural error by requiring them to proceed to present their case first, such that the Master had effectively reversed the burden of proof. The additional errors alleged appear to be contingent upon the submission that the Clients were not able to respond to evidence because of what was characterized as the reversal of the order of proceeding.

[33] In reasons indexed at 2023 BCSC 365, the chambers judge agreed that the Master had committed a procedural error in requiring the Clients to present their case first. She also held that the Master had erred in not first making the necessary finding that there was a written retainer and what its terms were before considering whether the terms were amended and the bills issued pursuant to it were reasonable.

[34] The chambers judge began by observing that the issue of whether the Master made a procedural error with regard to the order of presentation and the burden of proof is subject to the correctness standard of review: para. 12. I agree with that conclusion.

[35] The chambers judge then held that on a review, the lawyer bears the burden of proving the existence of and terms of a written retainer, whereas the client bears the burden of proving the retainer was amended. Relying on the judgment in *Della Penna v. Cobb*, 2020 BCSC 635 and materials handed out by the Supreme Court registry for the benefit of litigants representing themselves on *LPA* reviews, she concluded that:

> [24] I conclude that the order of presentation of cases at *Legal Profession Act* review hearings should follow the burden of proof as described in *Della Penna* in accordance with the requirement that the lawyer first prove the existence and terms of the retainer.
>
> …
>
> [58] I conclude that the registrar erred in reversing the order of presentation. For reasons I set out below, this error goes hand in hand with an error of not first making the necessary finding that there was a written retainer and what its terms were before considering whether the terms were amended and the bills issued pursuant to it were reasonable.

[36] The chambers judge then turned to the question of proof of the retainer. She held that the Law Firm's burden "to prove a retainer agreement and its terms was a necessary precursor for the burden to shift to the [Clients] to prove an oral amendment to the retainer agreement", and that the Master had not made a finding that the letter attached to the appointment constituted the written retainer agreement: para. 63. She held further that proof of the retainer was also a necessary precursor to considering the reasonableness and necessity of the Law Firm's bills: para. 64.

[37] Thus, the chambers judge concluded that the failure of the Master to make findings as to the proof of the retainer and its terms by the lawyer was an error of law. She allowed the appeal, set aside the orders of the Master and remitted the review as well as the costs order for rehearing. The Law Firm appeals.

Issues

[38] Two separate but related issues arise from the judgment of the chambers judge:

> (i) Did the Master err in law by requiring the Clients to present their case first? and
>
> (ii) Did the Master err in law by considering whether the retainer agreement had been amended without having made a finding that the Law Firm had proven the existence and terms of the retainer agreement?

Statutory Framework

[39] The statutory provisions that govern examinations of retainer agreements and fee reviews are set out in Part 8 of the *LPA*.

Examination of an Agreement

[40] Section 68(2) of the *LPA* provides as follows:

> (2) A person who has entered into an agreement with a lawyer or law firm may apply to the registrar to have the agreement examined.

[41] The term “agreement” is defined in s. 64 as “a written contract respecting the fees, charges and disbursements to be paid to a lawyer or law firm for services provided or to be provided and includes a contingent fee agreement”. I will refer to such an agreement as a retainer agreement.

[42] The nature of the examination is explained in s. 68 in these terms:

> (5) On an application under subsection (2), the registrar must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into.
>
> (6) If the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into, the registrar may modify or cancel the agreement.

[43] The effect of these provisions is that a person who has entered into a retainer agreement with a law firm is entitled to apply to have that agreement examined by the Registrar to determine whether the agreement was unfair or unreasonable at the time it was entered into. If it was, the Registrar may modify or cancel the agreement.

[44] The Registrar may make a determination that a retainer agreement was unfair or unreasonable when it was entered into based on evidence of the factual circumstances in which the retainer agreement was entered into, or simply based on the terms of the agreement.

[45] In the absence of unfair or unreasonable terms in the agreement, the Registrar would require evidence that the agreement was unfair or unreasonable

when it was agreed to before modifying or cancelling the agreement. That evidence would be expected to come from the client. Thus, the onus of proof of factual unfairness or unreasonableness would lie with the client.

Review of a Lawyer's Bill

[46] Section 70(1) of the *LPA* permits a client to apply to have a lawyer's bill reviewed by the Registrar. The approach to be taken by the Registrar is set out in s. 71 in these terms:

> (2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:
>
> (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;
>
> (b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
>
> (3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:
>
> (a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided;
>
> (b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.
>
> (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including
>
> (a) the complexity, difficulty or novelty of the issues involved,
>
> (b) the skill, specialized knowledge and responsibility required of the lawyer,
>
> (c) the lawyer's character and standing in the profession,
>
> (d) the amount involved,
>
> (e) the time reasonably spent,
>
> (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
>
> (g) the importance of the matter to the client whose bill is being reviewed, and
>
> (h) the result obtained.

> (5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

[47] The *LPA* provides that the procedure under the *Supreme Court Civil Rules* for the assessment of costs, review of bills and examination of agreements applies to both the examination of an agreement and the review of a lawyer's bills: *LPA*, ss. 68(9) and 70(13).

[48] The procedure under the *Supreme Court Civil Rules* applicable to "a person who seeks a review of a bill or an examination of an agreement under the *Legal Profession Act* or who seeks to have costs assessed" is set out in Rule 14-1(21) to (28) of the *Rules*. These provisions set out the procedure for bringing an examination or review before the Registrar but do not address the two issues raised in this appeal.

Analysis

[49] The chambers judge concluded that the two grounds on which she set aside the Master's judgment were interrelated and I agree with that. I propose to begin with some general observations about order of proceeding and its relationship to hearing management, and will then address the two grounds separately and as they relate to one another.

Is There a Required Order of Presentation?

[50] Neither the *LPA* nor the *Supreme Court Civil Rules* specify an order of proceeding for applications to review fees or examine agreements under the *LPA*. For civil trials, the rule is that the party on whom the onus of proof lies may open their case before giving evidence, and the opposite party does so at the close of the case of the party who began: Rule 12-5(72) of the *Supreme Court Civil Rules*.

[51] In many cases, there is a shifting onus of proof. In *Vernon v. British Columbia (Liquor Distribution Branch),* 2010 BCSC 1688, Goepel J. (as he then was) held that where the plaintiff carries the onus on some issues and the defendant on others, considerations of trial convenience and fairness require that the plaintiff proceed first

with the presentation of the case on all issues, notwithstanding that the defendant carries the burden of proof on other issues.

[52] Ultimately, the order of presentation will be a matter of trial management, and if disputes arise, will be determined by considerations of trial convenience and fairness. In *Moravian Church of Newfoundland and Labrador v. Newfoundland and Labrador*, 2005 NLTD 123, 22 C.P.C. (6th) 175, Green C.J.T.D. summarizes his conclusions in a passage cited by Goepel J.:

> [51] In the end, the issue of which party should be required to present his case first boils down to considerations of trial convenience and fairness. In the vast majority of cases both convenience and fairness will dictate that the plaintiff, with the burden of proof on at least one major issue, should proceed first with the presentation of his case on all issues regardless of the incidence of the burden of proof on the other issues, unless by so doing the plaintiff can show, notwithstanding pre-trial disclosure and opportunities for discovery, he would be prejudiced in so doing, or matters of practical trial management dictate otherwise.

[53] The trial management power that allows trial judges to control the process of their court has three interrelated purposes: ensuring that trials proceed fairly, effectively, and efficiently: *R. v. Samaniego*, 2022 SCC 9 [*Samaniego*] at paras. 20–21. It includes the power to direct the order in which evidence is called: *R. v. Haevischer*, 2023 SCC 11 at para. 102. Trial management decisions engage the judge's discretion and deserve deference: *Samaniego* at para. 26.

[54] I conclude that there is no mandatory order of proceedings for an *LPA* review. It is up to the registrar hearing the matter to determine the appropriate procedure to conduct the hearing fairly, effectively and efficiently, having in mind the issues to be resolved on the review.

[55] The chambers judge was of the view that because the lawyer has the onus of proving the existence of a retainer agreement and its terms, the lawyer must always present their evidence first on an *LPA* review. The judge relied on the *Della Penna* judgment, but that judgment dealt explicitly with oral retainers that had not been reduced to writing.

[56] At paras. 130–139 in *Della Penna*, Justice MacNaughton explained the factors relating to credibility when the retainer was not in writing, but also explained that once the retainer agreement has been established, the onus shifts to the client to prove any special agreement limiting the fees. That was the situation before Master Keim.

[57] I appreciate that where the only issue is the fairness and reasonableness of a lawyer's fees, the lawyer will normally proceed first. But I do not consider this presumptive order of proceeding to displace the trial management power that would permit a registrar to call on the clients first when the only issue on review is the client's assertion—in this case the amendment of the retainer—on which the client has the clear onus of proof.

[58] In this case, the Clients' position was not that certain fees were unnecessary or unreasonable, but that because the Law Firm had withdrawn prior to the resolution of the Horst Litigation, they were not entitled to any fees at all. This position was based on the theory that the retainer either was or had become through amendment an entire contract.

[59] Thus, in my view the question arising from the order of proceedings is not whether the Master made an error of law in calling on the Clients first, but rather whether she committed an error in the exercise of her discretion, a question which engages a more deferential standard of review on appeal.

[60] The clients take the position that they were disadvantaged by being directed to proceed first, principally because they were relying on the Supreme Court Registry handout that states that the lawyer proceeds first on an *LPA* review and they had agreed with Ms. McLean that Ms. McLean would present her evidence first. Unfortunately, neither party advised the Master of this arrangement.

[61] The question then becomes whether the Clients were so prejudiced by the order of proceedings that the Master's exercise of discretion was erroneous in principle. I am unable to see any prejudice to the Clients from the manner in which

the hearing proceeded. When Ms. Purcell was called upon to open, she advised the Master that she had an opening statement and proceeded to give the statement at some length without any apparent difficulty before proceeding with her evidence.

[62] Ms. Purcell's opening statement confirmed the Master's understanding that the central issue was whether the retainer agreement had been modified to permit the Clients to defer payment of the outstanding invoices until after the trial in the Horst Litigation. The opening began in this way:

> So from our perspective, this whole case really focused on decisions and choices made by people and the consequences of those decisions. … we really will be presenting some information and our evidence that shows that Ms. McLean made a decision to allow us to pay after the trial, and she reinforces that decision many, many times and offered that to us many, many times, continuing to say she'll show us how to do it. She's since then changed her mind about that. … that's the key from our perspective is that she said and did one thing, we believed her, we relied upon it, and now she's decided she wants to do something differently.
>
> In our evidence, we will also be showing that the retainer was a complete contract with a resolution that the matter of Horst v. Purcells. …

[63] Ms. Purcell also made it clear that she and her husband were not objecting to any of the work that had been billed, but rather to the Law Firm's entitlement to fees in the circumstances in which they withdrew:

> So we also have never complained about Ms. McLean's work. We -- we -- that's not our issue at all. … The issue is a promise made and not lived up to.

[64] The only issue raised by Ms. Purcell concerning the fees entitlement apart from the allegation of a modified retainer was the assertion that as a result of the Law Firm's withdrawal, the Clients had received no result from the work that had been done:

> So in that sense, when we look at the results achieved, you know, we don't -- we don't -- we have a bunch of -- a bunch of paper, I guess. … So we feel that in that sense we're left with no result.

[65] Ms. Purcell concluded her opening by returning to the assertion that the Law Firm had modified the retainer:

> We believed things that she said, and so when she told us we could pay after the trial, we believed it. … So by doing that, by saying that she -- we could pay after the trial, it's our position that she modified the retainer. That's a modification -- it was for us. We thought, my gosh, this means we can continue. It was a modification of the retainer and, as a result, she is basically estopped from -- by that behaviour, by that offer, to now go back and say, no, you were supposed to pay after 45 days or 30 days or whatever.

[66] Ms. Purcell then gave her evidence and was cross-examined, following which Ms. McLean delivered her opening, gave her evidence and was cross-examined by both Clients. Following this testimony, the Master invited Ms. Purcell to provide any evidence she wished to provide concerning email correspondence introduced by Ms. McLean. The parties then gave closing submissions.

[67] I can see no prejudice to the Clients from proceeding first. They were able to present their evidence concerning their allegation that the retainer agreement had been modified to defer the time for payment.

[68] In principle, proceeding first in a trial or hearing is generally regarded as tactically advantageous. In *Brophy v. Hutchinson*, 2003 BCCA 21, Finch C.J.B.C. commented that:

> [25] The right of a plaintiff to open is a considerable advantage. It enables counsel to explain in a few minutes a case which may take days or weeks to develop in evidence, and to state her case in the way most favourable to her client's interests. The opening can give the trier of fact a framework within which to understand and evaluate the plaintiff's case as it unfolds. For the party bearing the burden of proof, this can be a most useful tool.

[69] Finally, I can see no support for the chambers judge's conclusion that the manner of proceedings, including the asserted failure of the Master to require proof of the retainer, erroneously shifted the burden of proof to the Clients to prove that the retainer had been modified. The burden of proof was always on the Clients to prove that the retainer agreement had been modified.

Did the Master Fail to Determine the Existence and Terms of the Retainer Agreement?

[70] The second basis on which the chambers judge concluded that the Master had erred was the conclusion that the Master had assumed the retainer agreement attached to the appointment was the operative retainer agreement, without making a specific finding on that matter.

[71] The chambers judge summarized her conclusion in this way:

> [58] I conclude that the registrar erred in reversing the order of presentation. For reasons I set out below, this error goes hand in hand with an error of not first making the necessary finding that there was a written retainer and what its terms were before considering whether the terms were amended and the bills issued pursuant to it were reasonable.

[72] In response, the Law Firm points to a number of passages in Master Keim's judgment in which she states that the Retainer Agreement that was attached to the appointment was the operative retainer agreement between the parties. At the outset, Master Keim summarized the terms of the retainer in this way:

> [7] In February 2019, when the Purcells executed their retainer with ILLC, the trial for the Horst matter was scheduled for September 23, 2019. The pertinent terms of the retainer letter set out:
>
> 1. that accounts will be rendered monthly and will reflect the time spent on the matter;
> 2. the hourly rates for Ms. McLean, a junior lawyer, and a paralegal;
> 3. that any account not paid within 30 days will be subject to 12% interest per annum; and
> 4. that either party may terminate the agreement upon providing written notice and, if terminated, the Purcells would be responsible to pay any outstanding fees, disbursements, other charges, and applicable taxes incurred up to the date of the termination.

[73] The Master then explained the issue to be determined by reference to the Clients' position:

> [9] The Purcells … submit that the formal retainer was amended by the parties such that no fees were payable until after the trial was completed.
>
> …
>
> [20] … The Purcells argue that once the retainer was amended it became an entire contract that depended on ILLC completing the trial. …

> [21] Therefore, the pivotal question on this review is, was the formal retainer letter amended such that the Purcells were not obligated to pay any fees to ILLC until the conclusion of the trial?

[74] After assessing the evidence and rejecting the assertion of amendment, the Master stated that:

> [53] Given that I have found that the retainer letter is the only valid contract between the parties, I am dismissing the Purcells' submission that the retainer had been amended and that ILLC was working for the Purcells on the basis of an entire contract.
>
> …
>
> [55] Thus the retainer agreement governs the parties' relationship …

[75] On a fair reading of the judgment, the Master did conclude that the Retainer Agreement attached to the appointment was the retainer agreement between the parties at the time it was entered into. There was never an issue as to whether the Retainer Agreement was the operative agreement between the parties as of February 2019. The issue was whether it had been subsequently amended. That issue was carefully examined by the Master, who made clear findings of fact rejecting the allegation of amendment of the retainer.

[76] I conclude that the chambers judge erred in holding that the Master had not made a finding as to the existence and terms of the retainer agreement between the parties.

[77] I would add that in my view, the Master was entitled to approach the case on the footing that absent any issue on the question, the Retainer Agreement attached to the appointment was the initial retainer agreement between the parties.

[78] The only basis by which a person can seek the examination of an agreement under s. 68(2) of the *LPA* is if that person has entered into a written contract respecting the fees, charges and disbursements to be paid to a lawyer for services provided or to be provided. By attaching the Retainer Agreement to the appointment and requesting an examination of it, the Clients represented that this was such an agreement. Absent any dispute on that point, I can see no reason why a more formal

finding was necessary that the Retainer Agreement was what both parties understood it to be, at least in February 2019 when it was executed.

Other Issues

[79] In their notice of appeal from the Master's decision, the Clients alleged 23 errors. Most of these allegations concerned factual matters, findings of credibility and an alleged failure to assist the Clients as self-represented litigants. The chambers judge addressed the central allegation of error, the procedural decision to call on the Clients to present their case first, and also the issue of proof of the retainer agreement, but found it unnecessary to address the other allegations of error in light of her conclusions.

[80] The Clients have asked that if the appeal is to be allowed on the issues considered by the chambers judge, the matter be remitted back to the Supreme Court for consideration of the other grounds of appeal raised in their notice of appeal from the Master's decision. I am not inclined to do so.

[81] An appeal from the Supreme Court to this Court is an appeal from the order made, not the reasons for judgment: s. 13(1), *Court of Appeal Act*, S.B.C. 2021, c. 6. Where a party wishes to uphold the order on a basis other than the one that found favour in the court below, it is required to raise the argument in its response to the appeal: *AD General Partner Inc. v. Gill*, 2018 BCCA 436 at paras. 87–88.

[82] On this appeal, the Clients supported the order under appeal by reference to the judgment of the chambers judge, and did not seek to raise additional matters from their original notice of appeal. Having reviewed the notice of appeal, that approach seems to me to have been sound. But I do not consider it appropriate that the Clients now have a second opportunity to support the order under appeal by remitting this case back for yet further arguments on the Master's decision.

[83] I do agree that the Clients' appeal on costs should be remitted to the Supreme Court for consideration. On the view the chambers judge took concerning the principal issues, there was no need to address the costs award, and that award

has not been the subject of judicial review. I would remit the costs award to the Supreme Court for determination, but the fee dispute is concluded with this judgment.

Disposition

[84] For the foregoing reasons, I would make the following orders:

(i) the appeal is allowed and the order under appeal dated March 13, 2023 is set aside;

(ii) the decision of Master Keim on the respondents' review application is restored; and

(iii) the respondents' appeal of the order for costs made by Master Keim is remitted to the Supreme Court for judicial review.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Voith"