

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2020APP00061

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE HARRIS JA (AG)**

**BETWEEN FREE FORM FACTORY LIMITED APPLICANT
AND POLYAMER CORPORATION RESPONDENT**

Mrs Martina Shelton instructed by Shelards for the applicant

**Ms Kashina Moore and Ms Rykel Chong instructed by Nigel Jones & Company
for the respondent**

27 and 31 July 2020

BROOKS JA

[1] In this application for leave to appeal, the applicant, Free From Factory Limited (Free Form), argues that it should be allowed to appeal from the decision of Laing J handed down in the Commercial Court on 6 March 2020. In his judgment, Laing J refused Free Form's application to strike out a claim that had been filed against it by Polyamer Corporation (Polyamer).

[2] The issue before Laing J and that which Free Form wishes to argue in this court centres on the name and status of Polyamer Corporation as a proper claimant.

[3] Polyamer, in its claim form, asserts that it is incorporated in Panama. Its claim against Free Form, as amended, is for money due and owing and/or for breach of contract.

[4] Free Form filed an amended defence in which it recognised Polyamer, having done business with it, but denied owing it any monies. Free Form asserted that any business that it did with Polyamer was strictly on a cash basis, where each transaction was a separate contract. Free Form insisted that it paid, in full, for all goods that Polyamer had supplied. Free Form further fulminated in its defence that any sums claimed by Polyamer for money due from transactions prior to January 2010 were statute-barred.

[5] Free Form, in a second application to strike out Polyamer's claim, asserted that Polyamer had no standing on which to commence or continue the claim as it was not a legal entity. A legal entity existed in Panama, Free Form revealed, by the name of Polyamer Corporation SA, and the person who purported to verify the claim, Mr Thorsten Andress, is not a registered officer of Polyamer Corporation SA, but merely a shareholder.

[6] Polyamer sought to correct the name issue by applying to amend its claim to allow the name "Polyamer Corporation SA" to be substituted as the name of the claimant. "SA" is the abbreviation for *Societe Anonyme*, which is the equivalent of the

term “Limited”, in this jurisdiction. Polyamer’s application was not before Laing J at the time that he dealt with Free Form’s application to strike out.

[7] Laing J not only held that the change of name would be permissible, but that Polyamer had an arguable case against Free Form on the basis of a legal or equitable assignment of a debt that Polyamer claimed Free Form owed to Polyamer Corporation, which was a company incorporated in Florida (Polyamer Florida). Laing J awarded Polyamer with half of the costs of the application that was before him, and he refused leave to appeal.

[8] Free Form’s present application is a renewal of the application for leave to appeal, which Laing J refused.

[9] Prior to filing this application on 20 March 2020, Free Form secured an order for Polyamer to pay security for costs into court. Polyamer asserts that it complied with the order but that it failed to notify Free Form that it had complied.

[10] Free Form proceeded on the basis that there had been no compliance. It therefore applied for, and secured, a formal final judgment in its favour, with costs against Polyamer.

[11] Free Form only later discovered Polyamer’s claimed compliance, when Polyamer served it with an application to set aside the final judgment. Accordingly, Free Form is pursuing its application for leave to appeal, in the event that Polyamer is successful in having the judgment set aside. Free Form has asked that the hearing of this application

be treated as the hearing of the appeal. It has filed written submissions and a voluminous amount of authorities in support of the application.

[12] Polyamer has responded in kind.

[13] Although the application was filed in time, Free Form has to demonstrate that the proposed appeal will have a real prospect of success (see rule 1.8(7) of the Court of Appeal Rules (CAR)).

[14] Learned counsel for Free Form, Mrs Shelton, conveniently and helpfully narrowed down the numerous grounds of appeal by contending that three issues were involved, namely:

- a. Polyamer's standing to initiate a claim;
- b. the validity of Polyamer's claim; and
- c. the legality of the name of the claimant.

Mrs Shelton argued issue b. first.

The validity of Polyamer's claim

[15] Mrs Shelton pointed to the fact that Polyamer's claim form and particulars of claim, both original and amended, documents have all been signed by Mr Andress, who does not satisfy the requirements of rule 22.4(1) of the Civil Procedure Rules (CPR).

This rule provides that:

“Subject to any statutory provision to the contrary, a duly authorised director or other officer of a body corporate may conduct proceedings on it's behalf.”

[16] Learned counsel argued that a later document purporting to authorise Mr Andress to sign on behalf of Polyamer and to ratify his signing on its behalf, fails to achieve its purpose. Firstly, she argued, neither the document nor the seal on the document bears the legal name of the corporate entity. Secondly, learned counsel asserts, the document does not state that Mr Andress is either a director or an officer, as rule 22.4(1) requires.

[17] Ms Moore, on behalf of Polyamer, countered that Mr Andress has variously signed the court documents as manager and as managing director of Polyamer. She noted that section 33 of the Companies Act of Jamaica provides that a director “includes any person occupying the position of director by whatever name called”. She submitted that Polyamer, in ratifying Mr Andress’ actions, has held him out to be a director, so even if the company has not named him as an officer, he is, nonetheless, an officer of Polyamer.

[18] The court is satisfied that Polyamer has held out Mr Andress to be an authorised officer to have allowed him to file the claim against Free Form. The fact that the authorisation was verified after the filing of the claim is not fatal to the claim. **The General Legal Council (ex parte Elizabeth Hartley) v Causwell** [2019] UKPC 9, cited by Ms Moore, is authority for the subsequent ratification of a complaint filed by an agent.

[19] The decision in **GLC v Causwell** is not, contrary to Mrs Shelton’s submission, limited to disciplinary proceedings. Their Lordships, at paragraph 1 of their judgment,

stated that the question before them “turns upon the principles of the law of agency relating to ratification (which are the same in Jamaica as in England) and the true construction of the relevant provisions of the [Legal Profession Act]”. They went further, at paragraph 16 of their judgment, to cite the general principle regarding the ratification of the acts of agents:

“The editors of *Bowstead & Reynolds on Agency*, 21st Ed, (2018) describe the general principle as follows, at para 2–047:

“Where an act is done purportedly in the name or on behalf of another by a person who has no actual authority to do that act, the person in whose name or on whose behalf the act is done may, if the third party had believed the act to be authorised, by ratifying the act, make it as valid and effectual...as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all.”

Their Lordships found that the general principle cited in *Bowstead & Reynolds on Agency* applied, and nothing in the Legal Profession Act prevented that application.

[20] The aspect of whether the ratification document is effective is partly related to the issue of the name of the claimant. If Polyamer is successful in having its proper name substituted as the name of the claimant, it should not be difficult to accept its assertion that it uses the name Polyamer Corporation as a trade name.

[21] Free Form cannot succeed on this limb of its proposed appeal.

Polyamer's standing to initiate a claim

[22] Mrs Shelton submitted that that the learned judge erred when he found that Polyamer could successfully argue that it had a legal or equitable assignment from Polyamer Florida. Learned counsel submitted that Polyamer did not originally plead assignment of the debt but mentioned an assignment for the first time when it later amended its claim. Notwithstanding the amendment, Mrs Shelton contended that Polyamer did not provide documentation proving notice of the alleged assignment. She stated that Free Form conducted business with Polyamer but were not advised of an assignment.

[23] She also contended that Polyamer has not expressly pleaded an equitable assignment. It is significant, learned counsel argued, that such a pleading is absent at a time when the matter had been placed on the trial list. That absence, Mrs Shelton submitted, meant that Polyamer could not rely on an equitable assignment. Accordingly, she submitted, Polyamer needs to satisfy the three requirements for a legal assignment, which are set out in section 49(f) of the Judicature (Supreme Court) Act, 1880 (as amended). Learned counsel argued that Polyamer had failed to do so and, therefore, it could not rely on an assignment from Polyamer Florida. Mrs Shelton relied, in part, on the decision of the Court of Appeal of Belize in **Delia Andrews Hyde v RF&G Insurance Company Limited** (unreported), Court of Appeal Belize, Civil Appeal No 1 of 2016, judgment delivered 14 August 2019.

[24] Ms Moore submitted that, contrary to Free Form's assertions in an affidavit by its principal, Mr Keith Edwards, that it had had no dealings with Polyamer, Polyamer

asserts that not only did it give notice to Free Form of the assignment from Polyamer Florida, but that Free Form made payments to it on the basis of that notice. Learned counsel pointed to documents, which she said evidenced the payments made by Free Form. Learned counsel argued that the learned judge was entitled to find that there was an arguable case for an equitable assignment.

[25] Mrs Shelton is not on good ground with these submissions. The documents that Ms Moore has brought to the court's attention provide sufficient material for Polyamer to attempt to convince a tribunal that it had an equitable assignment and that it notified Free Form of the assignment. This court gives no opinion as to whether Polyamer should succeed on this issue, but is convinced that, assuming that Polyamer is allowed to go to trial, the point is an arguable one.

[26] The case of **Hyde v RF&G Insurance** does not provide the assistance that Mrs Shelton seeks. Hafiz Bertram JA, at paragraph [34] of her judgment, with which the other members of the panel agreed, did say, "it was imperative for [RF&G Insurance] to plead and prove that there was a valid legal or equitable assignment of the cause of action to itself". Laing J, in his judgment did not contradict that assertion. He quoted, at paragraph [19] of his judgment, the portion of the amended particulars of claim which addressed the assignment of the debt to Polyamer:

- "7. The Claimant was incorporated in or around March 2011 and or about June 11, 2014 the assets and liabilities of Polyamer Corporation incorporated in Florida were transferred to the Claimant.
8. The Defendant was notified by the Claimant of the assignment and that payment should be made on it."

[27] The learned judge then addressed Free Form's complaint about the lack of pleading. He said, at paragraph [31], that since there was a pleading of an assignment, absence of a pleading of an equitable assignment was not fatal to Polyamer's claim:

"[31] Ms Jordan [for Free Form] complained that if the Claimant is relying on an equitable assignment, such pleading is absent from its Statement of Case. Counsel is quite correct in this regard but in my opinion if the equitable assignment arises from an assignment which although it purports to be a legal assignment has failed to satisfy the applicable statutory provisions, then the issue of whether it operates as an equitable assignment would be by virtue of the operation of equitable principles. Pleading an equitable assignment in such circumstances in the alternative would be prudent and would undoubtedly be good practice, however, I do not find that a failure to do so is fatal."

The learned judge cannot be faulted for his reasoning. It is to be noted that Polyamer still has an opportunity to address this issue in its pleadings.

The legality of the name of the claimant

[28] Mrs Shelton addressed the absence of the suffix SA from Polyamer's name, as it appears in the court documents. She submitted that the absence means that the purported claimant is not a legal entity. In oral submissions, learned counsel accepted that it would be within the discretion of the judge, before whom an application to substitute the name comes, to decide whether the application satisfies rule 20.6 (2) of the CPR.

[29] Mrs Shelton was right to accept the possibility of Polyamer being able to correct the issue with respect to its name, as it appears in the court documents. The issue of the adjustment of a party's name where there is no doubt as to the identity of the party

involved has already been addressed by this court (see **Auburn Court Limited v Jamaica Citizens Bank Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 69/1990, judgment delivered 20 December 1990 and **Grace Turner v University of Technology** [2014] JMCA Civ 24).

[30] A successful application in that regard would also have repercussions for the validity of the ratification of Mr Andress' actions in filing the claim.

Conclusion

[31] Based on the above reasoning, Free Form does not have a real prospect of successfully appealing from Laing J's decision. The application for leave to appeal should, therefore, be refused.

Order

1. The application for leave to appeal is refused.
2. Costs to the respondent to be agreed or taxed.