

BETWEEN: Jive Holdings Limited
Appellant

AND: Maria Reid
First Respondent

AND: Xtreme Holdings Corp.
Second Respondent

Date of Hearing: 11 May 2021

Before: Chief Justice Vincent Lunabek
Justice R. Asher
Justice R. White
Justice O. Saksak
Justice D. Aru
Justice G.A. Andrée Wiltens

Counsel: Mr S. Kalsakau for the Appellant
Mr M. Hurley for the Respondent

Date of Decision: 14 May 2021

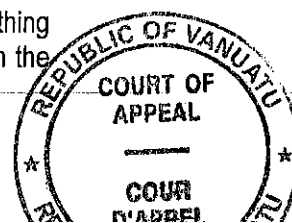
JUDGMENT

A. Introduction

1. This was an application for leave to appeal.

B. Background

2. On 31 January 2020, a Claim was filed by Ms M. Reid against Jive Holdings Limited seeking repayment of a loan and the payment of agreed interest. That was followed by a Response filed on 14 May 2020 and then a Defence filed on 14 June 2020. A reply to the Defence was filed on 23 September 2020.
3. As a result of further and better particulars of the defence being sought and provided, there then followed an application to amend the Claim, which was filed on 16 October 2020 and heard on 2 December 2020. The application was granted and the Amended Claim was filed that same day.
4. The Amended Claim did little more than add in Xtreme Holdings Corp as an alternative Second Claimant. This was done to address the defence position that the loan had not been advanced to Jive Holdings Limited by Ms Reid but by Xtreme Holdings Corp – something unknown at the commencement of the litigation or indeed since February 2008 when the



loan was made. Jive Holdings Limited was ordered to pay Ms Reid's costs on an indemnity basis, as the primary judge considered that it had deliberately prolonged the proceeding.

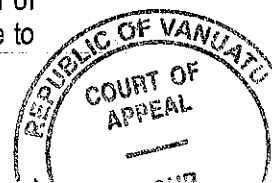
5. On 22 December 2020, an application was made to the primary judge by counsel for Jive Holdings Limited for leave to appeal the granting of the application to amend the Claim. On 2 March 2021, the primary Judge dismissed that application, with costs on a standard basis.
6. The application for leave to appeal was then re-agitated before this Court.

C. The Decision to Amend the Claim

7. The principal matter raised by Jive Holdings Limited in opposition to the application for leave to amend was that it was not open to Ms Reid to advance an allegation in the alternative that the lender had been Xtreme Holdings Corp, as that was inconsistent with the primary claim and Ms Reid must know that her alternative assertion was false.
8. The primary judge accepted as trite that alternative and inconsistent allegations may be pleaded without being an abuse of process. The judge also accepted that it was appropriate for Ms Reid to seek to address the alternative characterisation of the position which Jive Holdings Limited had raised.
9. The judge went on to record that adding Xtreme Holdings Corp as an alternative Claimant had the advantage of ensuring that all the relevant parties were before the Court. The suggestion that separate proceedings should be commenced which could later be consolidated was rejected outright. There was no challenge to that conclusion before this Court.
10. The primary judge considered that a number of other objections advanced in opposition to the application to amend not to be relevant, as they concerned triable issues. There was no challenge to these conclusions this before this Court.
11. Finally, the primary judge considered that the proposed amended Claim better identified the issues between the parties. This too was not challenged before this Court.

D. The Judge's Decision as to Application for Leave to Appeal

12. The first ground submitted in support of the application for Leave was that adding Xtreme Holdings Corp as an alternative Claimant was an abuse of process. The argument was that Ms Reid believed herself to be the lender, and to subsequently claim Xtreme Holdings Corp as the lender was inconsistent and mutually exclusive. One of the assertions had to be false.
13. The primary judge did not find favour with this submission as she considered the question of who had lent the funds initially to be a triable issue. The way the Amended Claim was framed would result in either Ms Reid or Xtreme Holdings Corp being found to be the lender, on the basis of the evidence produced at trial.
14. The primary judge also considered that the decision to allow the application to amend the Claim was a discretionary exercise. It was determined that there was no suggestion of irrelevant matters being taken into account in the exercise of discretion, nor any failure to



take relevant matters into account. Accordingly, the prospects of the appeal succeeding were low. That counted against leave being granted.

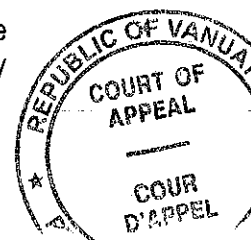
15. A second aspect of the application for leave concerned Ms Reid's sworn statement of 1 December 2020. The primary judge considered the sworn statement to be relevant as it explained when Ms Reid first became aware of the contention that Xtreme Holdings Corp was the lender. This confirmed the legitimacy of her Claim filed in January 2020 and established that she had not instituted a Claim knowing it to be false. The principle of *Brailsford v Tobie* (1888) 10 ALT 194 had accordingly not been breached.
16. The primary judge further considered that the veracity of Ms Reid was a triable issue for the trial.
17. The third aspect of the application for leave centred on the contention that Jive Holdings Limited would be prejudiced in defending a Claim which Ms Reid knew to be at least partly untrue. It was said that this would cause additional expense and prolong the trial.
18. The primary judge saw no merit in this submission, only irony. The delay and additional costs were caused by the application for leave. The primary judge re-iterated that the application for leave to amend had been granted so that all the relevant parties would be before the Court and whether or not any of the Claim was untrue would be determined at trial.

E. This Application for Leave to Appeal

19. Mr Kalsakau advanced two grounds in his written grounds of appeal. The first re-agitated the abuse of process argument, namely that it was an abuse for Ms Reid to be able to plead an alternative lender as part of the Claim. The second was that the primary judge had erred in the exercise of discretion in taking an irrelevant matter into account, namely Ms Reid's knowledge of the Defence.
20. In oral argument Mr Kalsakau focussed only on the abuse point, which it is unnecessary to repeat.
21. In response Mr Hurley pointed to the high hurdle the application for leave to appeal needed to scale as set out in the judgments of *Hudson & Co v Greater Pacific Computers Ltd* [1997] VUCA 2, *Ebbage v Ebbage* [2001] VUCA 7, *Atel v Massing & Massing* [2001] VUCA 20 and *Toara v Erakor Island Resort Ltd* [2008] VUCA 14.
22. Mr Hurley also relied on case law pointing to the difficulty in attempting to set aside the exercise of a judicial discretion, namely *Family Boetara v Molsakel* [2018] VUCA 28, *Molvatol v Molsakel* [2015] VUCA 22, *Fisher v Fisher* [1991] VUCA 2 and *Dumdum v East Malo Island Land Tribunal* [2010] VUCA 32.

F. Discussion

23. The authorities relied on by Mr Hurley are well known. They were also referred to before the primary judge. They should have alerted Mr Kalsakau and his client to the problems likely to be encountered by re-agitating the application for leave to appeal.



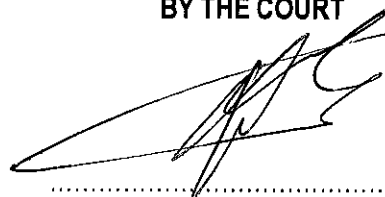
24. We respectfully endorse each of the findings by the primary judge and agree with her reasons.
25. We cannot see any abuse of process. Indeed, to the contrary, we consider the amended pleadings will enhance the Court's ability to fairly determine the issues between the parties. By adding in the second alternative Claimant, additional costs and further Court time have been spared.
26. We also endorse the irony to which the primary judge pointed.

G. Result

27. The application for leave to appeal is unmeritorious and is declined.
28. The appellant, properly advised, should have known that its application for leave to appeal had no chance of success. By pursuing the application, it caused the respondent to incur an expense which was entirely unnecessary and it has caused unnecessary delay. Accordingly, Jive Holdings Limited is to pay costs on an indemnity basis, pursuant to Rule 15.5(5)(a) and (c). Those costs, if not agreed, are to be assessed by the Master and once set to be paid within 21 days.

Dated at Port Vila this 14th day of May 2021

BY THE COURT



Chief Justice V. Lunabek

