

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
*(Civil Jurisdiction)*

**Civil**  
**Case No. 20/155 SC/CIVL**

**BETWEEN: Maria Reid**  
First Claimant

**AND: Xtreme Holdings Corp (Vanuatu  
Company No. 33947)**  
Second Claimant

**AND: Jive Holdings Limited (Vanuatu  
Company No. 31445)**  
Defendant

*Date of Hearing:* 25 February 2021  
*Before:* Justice V.M. Trief  
*Counsel:* Claimants – Mr M. Hurley  
Defendant – Mr S. Kalsakau  
*Date of Decision:* 2 March 2021

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**DECISION AS TO APPLICATION FOR LEAVE TO APPEAL**

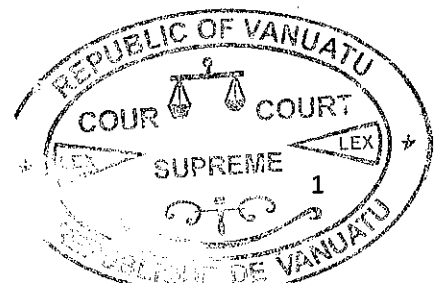
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A. Introduction

1. On 2 December 2020, I granted the First Claimant Maria Reid leave to amend her Claim to add the Second Claimant Xtreme Holdings Corp (Vanuatu Company No. 33947 ('Xtreme')) as the Second Claimant.
2. The Defendant Jive Holdings Limited (Vanuatu Company No. 31445) ('Jive') seeks leave to appeal that interlocutory decision.

B. Discussion

3. Mr Kalsakau adopted the authorities cited by Mr Hurley:



- *Hudson & Co v Greater Pacific Computers Ltd* [1997] VUCA 2: The Judge exercises a wide discretion in the formulation of procedural directions therefore leave to appeal an interlocutory decision is not granted lightly;
- *Ebbage v Ebbage* [2001] VUCA 7: "In the absence of any important issue of law that requires the consideration of the Court of Appeal, to obtain a grant of leave the applicant must at least show that there is a reasonable prospect that the appeal would succeed if leave were granted."
- *Atel v Massing* [2001] VUCA 20: The Court would need to be satisfied that there was a real issue that needed to be resolved which had a prospect of succeeding; and
- *Toara v Erakor Island Resort Ltd* [2008] VUCA 14: "Even if a question of law had been identified, the Court would normally grant leave to appeal only if the proposed appeal raised a question of law that was capable of serious argument and that involved a public or private interest of sufficient importance to outweigh the cost and delay of a further appeal."

4. My reasons for granting Ms Reid leave to amend the Claim (set out in [1] of the Minute and Orders dated 2 December 2020) included that:

- *Mr Kalsakau submitted that the proposed amendments plead inconsistent facts in circumstances where the Claimant must know that one or other set of facts pleaded is false. However, I accept the Claimant's evidence that she only became aware on 3 July 2020 and after the Claim had been filed that the Defendant alleged that she was not the lender. She seeks by the proposed amended Claim to add Xtreme Holdings Corp ('Xtreme') and to plead, in the alternative, that Xtreme and not she, was the lender to the Defendant. It is trite law that a party may plead alternative and inconsistent allegations of material facts, as long as they do so separately and distinctly. The Defendant's submissions on this score are rejected;*
- *I agree that the proposed amended Claim will add Xtreme as a party thereby ensuring that all parties are before the Court to determine the issues between the parties – I reject Mr Kalsakau's submission that Xtreme should commence separate proceedings and later have those proceedings consolidated with this matter; and*
- *I agree that the proposed amended Claim will better identify the issues between the parties and provide better facts about each issue.*

5. I discuss each of Jive's grounds for its Application for Leave to Appeal below. The Sworn statement of Robert John Herd was filed in support of the Application.

6. The Application is opposed. Mr Hurley filed submissions opposing the Application and relied on Ms Reid's sworn statements filed on 16 October 2020 and 1 December 2020.

7. The first ground of Jive's Application is that:

The learned Justice erred in law by allowing amendment of the Claim to add Xtreme as an alternative Claimant because such amendment is an abuse of process, and prone to mislead the Court in that the amendments would cause the Claim to plead inconsistent allegations of fact in the alternative, in circumstances

where: the alternative inconsistent allegations of fact are factually mutually exclusive; and Ms Reid, as a matter of logic, must have knowledge that one of those cases is false; and she has sworn to the truth of documents that can only support one of those allegations [**Ground 1**].

8. Whether or not there was a loan agreement between the parties and if so, which Claimant was the lender, are triable issues. I added Xtreme as a Claimant on Ms Reid's application. The Claimants by their actions have elected to pursue a Claim where only one of them could possibly succeed. It follows that the Claimant who is not found to be the lender forgoes all rights to sue Jive in the future for recovery of the debt allegedly owed. It is an issue between the parties as to who the lender is (if any) therefore solely for the Court to determine objectively based on what comes out at trial. Ms Reid's knowledge as to the identity of the lender is immaterial. It may go to Ms Reid's credibility as to who she thinks the lender is but that also is a matter for trial.
9. Accordingly, I accept Mr Hurley's submission that my decision to add Xtreme as the Second Claimant was simply one of enabling the proceedings in the alternative, to address alternatively possible objective inferences which may be arrived at during the trial. I have not made any findings of fact to found Mr Kalsakau's submissions as to Ms Reid's knowledge.
10. Given that the decision to add Xtreme as the Second Claimant was the exercise of a discretion, I accept Mr Hurley's submission that it would be necessary at the appeal hearing for Jive to satisfy the requirements set out by the Court of Appeal in cases including *Family Boetara v Molsakel* [2018] VUCA 28 at [9], in *Molvatol v Molsakel* [2015] VUCA 22, in *Fisher v Fisher* [1999] VUCA 2 and in *Dumdum v East Malo Island Land Tribunal* [2010] VUCA 32 (which principles derive from *House v R* [1936] HCA 40). That is, that my decision was wrong in that I took into account irrelevant matters which I ought not to have done or failed to take into account relevant matters or misdirected myself with regard to the relevant principles applicable to the exercise of the discretion or mistook the facts. Ground 1 does not seek to address any of those requirements.
11. For the foregoing reasons, I do not see any merit in Ground 1.
12. The second ground of Jive's Application is that:

The learned Justice erred in law by having regard to irrelevant considerations, being an acceptance of evidence that Ms Reid only became aware of Jive's allegation that she was not the lender on 3 July 2020, Jive's position being irrelevant to the objective question of the identity of the lender, but more particularly irrelevant to the issue of whether leave to amend the Claim should be granted, and in light of the matters to which Ms Reid has sworn the truth of in her sworn statement dated 1 December 2020 [**Ground 2**].
13. I accept Mr Hurley's submission that contrary to Jive's contention, the relevance of Ms Reid's evidence (at paras 3-9 of her affirmed statement filed on 1 December 2020 in support of her application for Xtreme to be added) was to counter the suggestion that she provided instructions to institute this proceeding knowing the allegations in them to be false; which is what animates the principle in *Brailsford v Tobie* (1888) 10 ALT 194. that is, that after she became aware on 3 July 2020 (well after the proceeding had been



commenced) that Jive took issue with her being the lender, that she then took steps to add Xtreme as a Claimant.

14. I accepted that evidence for the purpose of my decision to add Xtreme, as set out in the second bullet point of [1] of the Minute and Orders dated 2 December 2020.
15. Jive will have an opportunity at the trial to cross-examine Ms Reid as to the veracity of her evidence.
16. The identity of the lender is a triable issue. It is not one that I can determine on an interlocutory basis. Therefore, I fail to see error demonstrated by Ground 2 and that it has any prospect of success on appeal.
17. The final ground of Jive's Application is that:

Jive's substantive rights will be prejudiced if leave to appeal were not granted because Jive will be required to defend a case pleaded in circumstances where Ms Reid knows at least part of the case is untrue; Jive will therefore be put to additional expense as a consequence; and the proceeding will not be dealt with speedily and fairly **[Ground 3]**.
18. Whether or not Ms Reid knows that at least a part of the case is untrue will be known after trial, if at all. It is therefore not a valid basis for opposing an application for leave to amend the Claim, much less for opposing leave to appeal such decision.
19. As stated in my Minute and Orders dated 2 December 2020, I allowed amendment of the Claim to add Xtreme as the Second Claimant in order to ensure that all the parties are before the Court to determine the issues between the parties and to better identify those issues and provide better facts about each issue (see third and fourth bullet points of [1] of the Minute and Orders dated 2 December 2020).
20. Jive in its contention is focusing on the First Claimant's knowledge however I must weigh up if all the parties with an interest in the subject matter should be before the Court therefore have added Xtreme. By seeking to have both Claimants in this matter, they have elected that only one of them can succeed on the Claim. Jive's substantive rights are not prejudiced by this. If anything, it is assured that only one of the two Claimants could possibly succeed against it.
21. It is ironic that Jive contended that if leave to appeal were not granted that it would be put to additional expense and the proceeding will not be dealt with speedily and fairly. That is exactly what it is putting the Claimants to by applying for leave to appeal. It is in all the parties' interests that all the parties are before the Court to determine the issues between them and that this matter proceed forthwith to trial.
22. I fail to see any merit in Ground 3.
23. In the circumstances, I agree with Mr Hurley's submission that none of the grounds of the Application for Leave to Appeal show that a question of law is raised that was capable of serious argument and involves a public or private interest of sufficient importance to outweigh the cost and delay of an appeal. Further, I consider that Jive

has not shown that there is a reasonable prospect that the appeal would succeed if leave were granted. The Application must therefore be dismissed.

C. Result and Decision

24. The Defendant's Application for Leave to Appeal is declined and dismissed.
25. The Defendant is to pay the Claimants' costs of the Application as agreed or taxed by the Master. Once settled, the costs are to be paid within 21 days.

**DATED at Port Vila this 2<sup>nd</sup> day of March 2021  
BY THE COURT**

*VM Trief*  
.....  
Viran Molisa Trief  
Judge

