

**IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY**

**CIV 2009-409-002797**

BETWEEN                      BORIS EDVARDOVICH TROCHINE  
    Appellant

AND                                ROBYN MARGARET BASCAND  
    Respondent

Hearing:            9 December 2009

Counsel:            A V Foote and H Holderness for Appellant  
                            No appearance for Respondent

Judgment:        9 December 2009

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**JUDGMENT OF FOGARTY J**

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[1]     This is an appeal against part of a decision of Judge B P Callaghan delivered in the District Court at Christchurch on 29 October last. That was a judgment arising out of a contractual relationship between the appellant as plaintiff and the respondent as defendant. Mr Trochine had acquired a new home. He was refurbishing it and he had retained Ms Bascand as an interior designer.

[2]     The plaintiff's case was that Ms Bascand was entitled to be remunerated on an hourly rate. The defendant claimed this was only part of the arrangement and she was also entitled to charge a one-off design fee of \$8,000 and mark-ups on items the plaintiff purchased via herself as supplier.

[3]     The plaintiff largely succeeded in his claim. At a late stage in the proceedings his solicitors applied to add a cause of action that the defendant was in a fiduciary relationship with the plaintiff. The reason for this is that the plaintiff had

paid large sums of money in the course of the relationship to the defendant on account and prior to receiving proper invoices from Ms Bascand.

[4] The Judge refused to amend the statement of claim. He did not consider that such a refusal would be particularly prejudicial to the plaintiff. His reasoning in that regard is contained in paragraphs [37] and [38]:

[37] The amendment to add an additional cause of action of a Fiduciary Claim is more perplexing in this case given the way the case has developed. This is a completely new cause of action. I accept that the plaintiff only came into possession of some of the information which forms the basis of the fiduciary claim very close to the hearing, and after it had been set down.

[38] If Ms Bascand had continued to defend the proceedings, preferably with counsel, then I would have likely granted the amendment. However given the turn of events I do not think it can be now said it is in the interests of justice that such amendment be made. With respect to Ms Bascand I do not think she can be expected to understand the complexities and nuances of a fiduciary cause of action, and although she did not call evidence she has still opposed the plaintiff's claim. In any event, as will become obvious this ruling is not fatal to the plaintiff.

[5] In the course of his reasoning he did have occasion to find that Ms Bascand was in a fiduciary relationship with the plaintiff and had been the plaintiff's agent. Those findings were made in paragraph's [54] and[58]:

[54] Mr Trochine, who I understand to be a successful businessman on the commodities market showed some naivety in entrusting the defendant with large sums of money on account without insisting on proper statements being given to him as to specifically how the money was being used. I note in his evidence he said he was otherwise too busy and that he trusted the defendant. The defendant for her part was ill equipped from an accountancy or book-keeping point of view to deal with this type of project. I am totally alarmed at the "hap hazard" and careless way she accounted to Mr Trochine for the substantial sum of money he handed over to her. Although I have not allowed the plaintiff to allege a fiduciary claim, she was indeed in a fiduciary relationship with the plaintiff.

[58] The finding I make means that I conclude that the defendant was the plaintiff's agent here rather than an independent contractor as to the supply of goods.

[6] The trial before Judge Callaghan had commenced in May and was adjourned part heard as it had gone beyond its allocated three days. By the time it resumed the defendant had been adjudicated bankrupt on her own petition. This Court, by Associate Judge Osborne, granted leave pursuant to s 76 of the Insolvency Act 2006

to continue the proceedings. That order was made on 7 September. There is some doubt now as to whether or not that leave endures to apply to this appeal. For these reasons I essentially treat the hearing before me today as both an application for leave to continue the proceedings by way of appeal and any subsequent orders, as well as being an appeal against the refusal of Judge Callaghan to consider a fiduciary cause of action.

[7] I see no reason to disturb the findings of fact that Judge Callaghan made in paragraphs [54] and [58].

[8] At my invitation from the bar, Ms Foote said that the plaintiff's solicitors have some documentation indicating that there were significant payments withdrawn from the defendant's bank account reasonably close to deposits into that account from Mr Trochine; that the solicitors for the appellant think that there is a reasonable prospect that they may be able to trace some of the monies taken without authority by Ms Bascand into other accounts and/or trusts.

[9] It is not easy to tell from the judgment of Judge Callaghan the precise sum taken without authority. Ms Foote advises me it is in the order of \$123,000. That is a significant sum, sufficient for me to leave it to the appellant's solicitors to form a judgment with their client as to whether it is worth spending more money to try to follow. It is possible that they may be able to recover some of that money from entities other than the estate of the bankrupt.

[10] For these reasons I think there is now, if not before, some good reasons for adding a fiduciary cause of action. As appears from paragraph [38] one of the reasons why the Judge did not allow it at the trial was that Ms Bascand was acting for herself and had received only short notice.

[11] Given the findings that the Judge has now made in paragraphs [54] and [58] and in the light of the information I have received from the bar I think there are practical reasons justifying this matter being remitted to Judge Callaghan to hear argument on the evidence already received and further evidence as he may allow in support of a fiduciary claim.

[12] Accordingly, leave to continue these proceedings in both this Court and the District Court is granted. The appeal is allowed. The judgment of the District Court of 29 October is set aside in part, that part being the refusal to hear a fiduciary cause of action.

[13] I have considered whether or not it would be practicable for this Court to hear that cause of action. I do not think so. This is for a number of reasons. Firstly, it requires further evidence. It is not a cause of action that could be mounted simply on the evidence already heard and the findings of fact made. As a consequence of that Judge Callaghan is in a far better position than this Court to judge the merit of the claim.

[14] I am proceeding on the basis that the District Court has jurisdiction to adjudicate fiduciary causes of action. In case I am wrong, leave is reserved to apply for a different remedy as a result of the appeal being allowed in part. With that qualification the matter is remitted back to the District Court.

[15] Costs on a 2B basis to be settled with the Registrar with leave for Ms Foote or the Registrar to refer the matter back to me if there are any difficulties.

Solicitors:  
Duncan Cotterill, Christchurch, for Appellant