number of criteria for voluntary or involuntary retirement. Separate criteria had to be met for an 'invalidity benefit'. Where there was no entitlement to any of these benefits, an employee who ceased to be such otherwise than by reason of death was entitled to accumulated contributions he or she had made to the fund.

In light of this regime, Mr Cornwell's loss was an unusual one. Even if Mr Cornwell had joined the 1922 Fund in 1965, his entitlements would have been contingent on meeting the statutory criteria in the 1976 Act. In 1976, when the opportunity to join the 1922 Fund was lost, it was sheer speculation whether Mr Cornwell would be better or worse off if he had taken the opportunity which was lost to him.

Many lost opportunities, especially in a commercial context, are recoverable as losses, but a contingent loss or liability is not itself a category of loss. In the majority's view, Mr Cornwell could not be said, in the relevant sense, to have sustained a loss of a commercial opportunity that had some value in 1976. It was only ascertainable that Mr Cornwell would have been better off after Mr Cornwell had retired.

The case provides no neat test for when or whether a lost opportunity becomes relevant loss or damage (there probably isn't one). Nevertheless, it shows the importance of a question of law – what was the legal interest infringed – and of a related question of fact – what would have happened in the absence of the wrongful conduct. They can both be relatively detailed inquiries. Mr Cornwell lost an opportunity in 1976, but the court could not assess that opportunity, or conclude he would have been better off, until the court knew the circumstances of his retirement.

By James Emmett

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22

This case concerned four adjoining plots of land, referred to as no.11, no.13, no.15, and no.20, each of which had erected upon it a two storey block of home units. In 1998 the respondent (Say-Dee) and the first appellant (Farah) entered into a joint venture to purchase and develop no.11. The purchase proceeded, but the development foundered after an application for development approval to build an eight storey (later amended to seven storey) unit block was rejected by the council. The development application was made on behalf of the joint venture by the second appellant, Mr Elias, who was regarded in all courts as the alter ego of Farah and of the third appellant (Lesmint). The fourth appellant (Mrs Elias) was Mr Elias' wife, and the fifth and sixth appellants were their daughters.

In the course of refusing the development application, the council suggested, in effect, that no.11 should be amalgamated with adjoining properties to maximise the development potential of the land. After the application was refused, Mr and Mrs Elias and their daughters purchased one unit in each of no.15 and no#20, and Lesmint purchased no.13.

Say-Dee sought various forms of equitable relief against all of the appellants, including declarations that they held their interests in nos 11, 13, 15 and 20 on constructive trust for a partnership between Say-Dee and Farah. The claim in relation to no.20 was abandoned at the start of the trial.

Two important factual issues at trial were, first, how much of the information conveyed to him by the council in relation to the development application was disclosed by Mr Elias to Say-Dee and, secondly, whether Mr Elias offered Say-Dee the opportunity to purchase no.13 and units in nos 15 and 20 before the appellants proceeded with those purchases. Palmer J found for the appellants on both of these issues, and dismissed Say-Dee's claim on that basis.

The Court of Appeal overturned both of these findings, and proceeded to uphold Say-Dee's claim on the basis that the appellants held the properties as constructive trustees under the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244 by reason of their having received those properties with the requisite degree of knowledge of a breach of fiduciary obligation. As an independent ground of the decision, the Court of Appeal also decided that the appellants held the properties as constructive trustees on the basis that they had been unjustly enriched at Say-Dee's expense. In addition, the Court of Appeal rejected the appellants' contention that the indefeasibility provisions in s42(1) of the *Real Property Act 1900* (NSW) precluded Say-Dee from obtaining relief by way of the imposition of constructive trusts.

The High Court, in a joint judgment, restored the factual findings made by Palmer J. That disposed of the appeal. However, the court proceeded to deal with the balance of the reasoning of the Court of Appeal. In relation to liability under the first limb of *Barnes v Addy*, the court held:

1. The court assumed, without deciding, that this limb was capable of applying to persons dealing with fiduciaries, as distinct from trustees.
2. Mrs Elias and her daughters could not be liable under this limb because they never received property to which a fiduciary obligation attached. Information regarding the council's view that the lots should be amalgamated to maximise their development potential was not confidential and so not property in any sense. In addition, the court expressed the view that even if the information were confidential it would not amount to property which could be held under a constructive trust imposed by application of the first limb.
3. Mrs Elias and her daughters could not in any event be said to have received the information because they did not actually receive it and Mr Elias, who did receive it, was not their agent in any relevant sense.
4. The court declined the respondent's invitation to alter the law so as to extend liability under the first limb to persons who received no property, but merely a benefit of some kind as a result of a breach of trust or fiduciary obligation.

In relation to liability on a restitutionary analysis, the court held:

1. In the absence of argument on this issue in the courts below, or any relevant pleadings, the Court of Appeal ought not to have decided the case on this basis.

2. The Court of Appeal's reasoning was in any event wrong, for the following reasons:

   a. No recognised basis for imposing restitutionary liability was identified. Asserting the existence of 'unjust enrichment' was not sufficient, and nor was identifying (albeit incorrectly) a breach of fiduciary duty.

   b. Restitution is not in any event the basis on which liability under the first limb of *Barnes v Addy* is imposed.

3. Even if the Court of Appeal's reasoning was right, it would not avail Say-Dee on the facts because Mrs Elias and her daughters were bona fide purchasers for value without notice of any relevant wrongdoing.

In relation to the indefeasibility provisions in the Real Property Act, the High Court upheld the appellants' contention and accepted that a claim under the first limb of *Barnes v Addy* is not a 'personal equity' which would defeat the operation of s42(1) of the *Real Property Act 1900* (NSW).

> *The court indicated that, until it decided otherwise, Australian courts should continue to apply the formulation in the second limb of* ***Barnes v Addy****, which requires in addition that the trustee or fiduciary act with an improper purpose.*

In the High Court Say-Dee sought to hold the appellants liable on two bases not advanced in the courts below: first, as having knowingly assisted in a breach of fiduciary duty and so liable under the second limb of *Barnes v Addy*; and secondly by asserting that the unit in no.15 represented profits from a breach of fiduciary duty into which it was entitled to trace. As to liability under the second limb of *Barnes v Addy*, the High Court held:

1. Liability under this limb attaches to those who knowingly assist in breaches of fiduciary obligations, in addition to breaches of trust.

2. The requisite degree of knowledge required for liability under the second limb is knowledge of the first four categories referred to in *Baden Delvaux & Lecuit v Societe Generale pour Favoriser le Development du Commerce* [1993] 1 WLR 509. That is, (i) actual knowledge; (ii) willfully shutting ones eyes to the obvious; (iii) willfully and recklessly failing to make such inquiries as an honest and reasonable man would make and (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man. Mere knowledge of circumstances which would put an honest and reasonable man on inquiry is insufficient.

3. Mrs Elias and her daughters did not have the requisite knowledge to fix them with liability on the above basis.

4. The court declined to decide the correctness of the proposition, advanced by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, to the effect that there is a general principle of accessory liability attaching to persons who dishonestly procure or assist in a breach of trust or fiduciary obligation. The court indicated that, until it decided otherwise, Australian courts should continue to apply the formulation in the second limb of *Barnes v Addy*, which requires in addition that the trustee or fiduciary act with an improper purpose.

As to tracing, the court rejected any such entitlement on the basis that Mrs Elias and her daughters were not volunteers. Both provided money that went towards the purchase, and Mrs Elias mortgaged property she owned and provided a personal covenant to repay the debt.

By Richard Scruby

Hicks v Ruddock (2007) 156 FCR 574

David Hicks, an Australian citizen, was captured by the Northern Alliance in Afghanistan in November 2001 and transferred to United States custody in December 2001. At the time of the application leading to this decision he had been in the power and custody of the United States at Guantanamo Bay for over five years without being validly charged or tried. After this decision, on 26 March 2007, Hicks pleaded guilty to providing material support for terrorism. He was sentenced to seven years imprisonment, of which all but nine months were suspended. He has since returned to Australia where he is serving the balance of his sentence.

Major Michael Mori, David Hicks's counsel in the US Military Commission hearing, on the steps of the Law Courts Building, Queens Square.
Photo: Alan Pryke / Newspix

At the time of this application the impasse over Hicks's continuing detention without valid charge or trial had not been resolved and Hicks sought declarations and relief in the nature of habeas corpus, in effect requiring the Commonwealth and two of its ministers to seek and request his release and repatriation by the United States. The respondents – the Commonwealth attorney-general, the minister for foreign affairs and the Commonwealth of Australia – sought summary