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

dismissal of Hicks's claim on the ground that it disclosed no reasonable prospects of success. This application hinged on the submissions that allowing the matter to proceed to hearing would:

- contravene the 'act of state' doctrine by requiring the Federal Court to pass judgment on the legality of acts of the United States, a foreign government; and
- result in the court hearing a proceeding impacting on foreign relations giving rise to non-justiciable questions over which it has no jurisdiction.

The practical argument behind these submissions was that Hicks's continuing internment was a political question concerning the foreign relations between Australia and the United States involving the application of non-justiciable standards.

In analysing the principles of 'act of state' and justiciability, Tamberlin J referred to the key decisions of the House of Lords in *Buttes Gas & Oil Co v Hammer* [1982] AC 888 and *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 AC 883. *Buttes Gas* concerned questions of the boundary of the continental shelf between two former sovereign states and whether Buttes had fraudulently conspired with one of those states to defraud the other. Lord Wilberforce held (at 938) that these issues only had to be stated for their non-jusitciable nature to be evident and that there were 'no judicial or manageable standards' to judge them by. The principles stated in *Buttes Gas* were qualified in *Kuwait Airways*, involving the seizure of a Kuwait Airlines aircraft by Iraq. After referring to the statement of Lord Wilberforce, Lord Nicholls stated (at 1080-1081):

> *In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law...* Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another *when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the Buttes litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome is not in doubt. That is the present case.'* (Emphasis added)

Tamberlin J referred to *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 in which Gummow J (at 369-370), although observing that a breach of Australia's international obligations would not of itself 'be a matter justiciable at the suit of a private citizen' was careful not to foreclose argument on the question of justiciability in 'exceptional circumstances'. The argument that Hicks had no reasonable prospects of establishing the existence of such exceptional circumstances was rejected by Tamberlin J in the following passage (para. 91):

> In *Kuwait Airways*, a clear acknowledged breach of international law standards was considered sufficient for the court to lawfully exercise jurisdiction over the sovereign act of the Iraq state. In that case, the clear breach of international law was the wrongful seizure of property. It is clear in the case before me that the deprivation of liberty for over five years without valid charge is an even more fundamental contravention of a fundamental principle, and is such an exceptional case as to justify proceeding to hearing by this court.

By Chris O'Donnell

Tully v The Queen (2006) 81 ALJR 391, 231 ALR 712

The question of whether or not a *Longman* warning should be given by a trial judge has been considered once again by the High Court in *Tully v The Queen*.

In *Tully* the accused faced a series of charges relating to alleged serious sexual misconduct with the daughter of his then partner. The complainant was no older than 10 years of age when the alleged offences ended.

No independent evidence confirmed the allegations made by the complainant except for some photographs that showed some intimate physical features, which could only reasonably have been seen if the offences had occurred.

The alleged offences occurred in 1999 and 2000. The complainant first made a complaint to her mother in April 2002. She said she did not tell her mother earlier because she was afraid of the appellant, threats he had made to her and the fact that he possessed guns and ammunition. There was evidence at the trial that the accused possessed many handguns and rifles and at the relevant time slept with a handgun under his pillow.

By a majority (Hayne, Callinan and Crennan JJ) the High Court decided that a warning as discussed in *Longman v The Queen* (1989) 168 CLR 79 was not required.

Crennan J made reference to a *Longman* warning in these terms:

> In *Longman* the majority, Brennan, Dawson and Toohey JJ, said it was imperative for a trial judge to warn a jury of the danger of convicting on uncorroborated evidence when an accused lost the means of adequately testing a complainant's allegations by reason of a long delay 'of more than 20 years' in prosecution.

Her Honour was of the view that there was nothing in the circumstances of this case which made it imperative for the trial judge to give such a warning. Her Honour considered the question of forensic disadvantage and said:

> The critical issue in relation to the need for a warning in accordance with *Longman* is whether any delay in complaint (and/or prosecution), be it 20 years, or two or three years, creates a forensic disadvantage to an accused in respect of adequately testing allegations or adequately marshalling a defence, compared with the position if the complaint were of 'reasonable contemporaneity'.

By Keith Chapple SC