

**FARAH CONSTRUCTIONS PTY LTD & ORS v SAY-DEE PTY LTD**  
**(S347/2006)**

Court appealed from: New South Wales Court of Appeal

Date of judgment: 21 December 2005

Date of grant of special leave: 19 September 2006

Say-Dee Pty Ltd ("Say-Dee") and Farah Constructions Pty Ltd ("Farah") entered into a joint-venture ("the joint-venture") to purchase and redevelop No.11 Deane Street, Burwood ("No. 11"). Ms Dalida Dagher ("Dalida") and Ms Sadie Elias ("Sadie") were the sole directors and shareholders of Say-Dee. Farah was a company controlled by Mr Farah Elias ("Mr Elias"), who was no relation to Sadie. Mr Elias was an experienced real estate developer, while Dalida and Sadie were not.

By agreement, Say-Dee was to provide the finance for the joint-venture while Mr Elias was responsible for managing the development application with Burwood Council ("the Council"). He was also responsible for the ultimate construction and sale of the development. Upon completion of the joint venture, the profits were to be distributed equally between Say-Dee and Farah.

Mr Elias lodged a development application with the Council. This was refused on the basis that the site was too narrow. The Council then advised him that the site needed to be amalgamated with an adjacent site in order to achieve its development potential. Mr Elias subsequently acquired two adjoining properties, namely, Nos.13 and 15 Deane Street, Burwood ("Nos.13 and 15"). He did this through a company ("Lesmint Pty Ltd") that he and members of his immediate family controlled.

It was common ground that Farah owed fiduciary duties to Say-Dee. The issue therefore was the scope of those duties. Say-Dee claimed that Farah had breached its fiduciary duties by Mr Elias' failure to disclose information pertinent to the joint-venture. In particular, it was his failure to disclose the Council's refusal to allow the development of No.11 unless it was amalgamated with an adjoining property. It was also Mr Elias' subsequent exploitation of that information for his own benefit by acquiring Nos.13 and 15 through parties associated with Farah.

Justice Palmer found that Mr Elias had disclosed Farah's proposed purchase of Nos.13 and 15 to Dalida and Sadie. His Honour also found that Mr Elias had invited Say-Dee to participate in those acquisitions. In relation to the scope of Farah's fiduciary duties however, Justice Palmer held that Farah did not contract with Say-Dee to provide it with opportunities beyond the boundaries of No.11. His Honour therefore found that Farah was under no fiduciary duty to disclose to Say-Dee the opportunity to acquire either Nos.13 or No.15. It was also under no fiduciary inhibition from purchasing those properties itself.

On 21 December 2005 the Court of Appeal (Mason P, Giles & Tobias JJA) allowed Say-Dee's appeal. Their Honours held that Farah, Lesmint Pty Ltd, Mr Elias and the members of his immediate family held Nos.13 and 15 on

constructive trust for the joint-venture.

The grounds of appeal include:

- The Court of Appeal was in error in ordering that the Second to Sixth Appellants held Nos.13 and 15 upon a constructive trust for the Respondent and the First Appellant and making orders for the appointment of receivers thereto and other orders.
- The Court of Appeal was in error in holding that the finding by the trial judge that Mr Elias had disclosed to Sadie and Dalida the opportunities in 2001 to purchase 15 Deane Street and 20 George Street, and in 2002 the opportunity to purchase 13 Deane Street was glaringly improbable and contrary to compelling inferences and should therefore be set aside.