HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, CALLINAN, HEYDON AND CRENNAN JJ

FARAH CONSTRUCTIONS PTY LTD & ORS APPELLANTS

AND

SAY-DEE PTY LTD RESPONDENT

Farah Constructions Pty Ltd v Say-Dee Pty Ltd
[2007] HCA 22
24 May 2007
S347/2006 & S461/2006

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 21 December 2005 and varied on 28 November 2006 and in their place order that the appeal to that Court from the judgment and orders of the Supreme Court of New South Wales dated 19 August 2004 and 22 November 2004 be dismissed with costs.*

3. *Respondent to pay the appellants' costs of the proceedings in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

F M Douglas QC with V R W Gray and R J Hardcastle for the appellants (instructed by Strathfield Law)

A J Sullivan QC with J K Kirk and J S Emmett for the respondent (instructed by Esplins)

CATCHWORDS

Farah ConstructIons Pty Ltd v Say-Dee Pty Ltd

Equity – Fiduciary duties – Joint venture to redevelop property between first appellant and respondent – Second appellant learnt that redevelopment would gain Council approval only if the property was amalgamated with adjoining properties – Adjoining properties purchased by the second appellant, his wife and children and another company controlled by the second appellant – Whether first appellant had an obligation to disclose to the respondent opportunities to purchase adjoining properties and information concerning the Council's attitude to redevelopment – Whether first appellant fulfilled any such obligation of disclosure.

Equity – Recipient Liability – Whether property acquired through misuse of information by a fiduciary should be treated as trust property – Whether second appellant's wife and children were liable under the first limb of *Barnes v Addy* – Whether wife and children had notice of any breach of duty by the second appellant –Whether second appellant's knowledge could be imputed to wife and children – Whether second appellant was the agent of wife and children and, if so, whether information acquired outside scope of agency – Duty of principal to investigate conduct by agent.

Equity – Assistance-based liability – Whether second appellant's wife and children were liable under the second limb of *Barnes v Addy* – Whether second appellant's wife and children were liable as knowing participants in a dishonest and fraudulent design – Knowledge requirement in the second limb of *Barnes v Addy*.

Equity – Tracing – Whether property was the traceable proceeds of second appellant's breach of fiduciary duty – Whether wife and children of second appellant were volunteers.

Equity – Remedies – Account of profits – Whether wife and children of second appellant were liable to account for profits made through their acquisition of the properties.

Unjust enrichment – Restitutionary liability – Whether wife and children held their properties on constructive trust for the joint venture by reason of liability to make restitution based on unjust enrichment – Whether the notice test in the first

limb of *Barnes v Addy* should be abandoned – Application of concept of unjust enrichment to recipient liability for breach of trust or fiduciary duty – Whether unjust enrichment at the expense of the respondent.

Real Property – Indefeasibility – Second appellant's wife and children were registered proprietors – Whether their title was indefeasible pursuant to s 42 of the *Real Property Act* 1900 (NSW) – Whether registered title subject to an in personam claim – Whether registered title subject to a constructive trust – Whether title obtained by fraud within the meaning of s 42(1).

Courts – Evidence – Appellate intervention – Whether Court of Appeal erred in reversing findings of fact made at trial – Weight to be given to trial judge's assessment of witness credibility by an intermediate court of appeal.

Courts – Practice and procedure – Whether Court of Appeal erred in deciding the appeal on a ground not argued in that court – Whether Court of Appeal erred in deciding the appeal on a matter not pleaded by the respondent at trial.

Words and Phrases – "dishonest and fraudulent design", "fraud", "in personam", "knowing receipt", "knowledge", "stock-in-trade", "unjust enrichment".

Real Property Act 1900 (NSW), s 42.

1 GLEESON CJ, GUMMOW, CALLINAN, HEYDON AND CRENNAN JJ. These somewhat complex appeals concern fiduciary duties in relation to land development. The reasons for judgment are organised under the following headings:

The land

2 Burwood is an inner suburb of Sydney. The five plots of land with which these appeals are directly or indirectly concerned are situated near Burwood Railway Station, in a busy commercial area. Three are in Deane Street and two are in George Street. Standing in Deane Street looking north, the observer sees 11 Deane Street ("No 11"). To the west of it is 13 Deane Street ("No 13"). To the west of No 13 is 15 Deane Street ("No 15"), which is on the corner of Deane Street and Mary Street. On each of No 11, No 13 and No 15 is a block of four units. Behind No 11, No 13 and No 15 are two adjoining properties, 18 George Street ("No 18") and 20 George Street ("No 20"). The rear of No 20, which is on the corner of Mary Street and George Street, adjoins the rear of No 15, and the rear of No 18 adjoins the rear of No 11 and No 13. All these parcels comprise land under the provisions of the *Real Property Act* 1900 (NSW) ("the Real Property Act").

The nature of the proceedings in outline

3 These are appeals against orders of the New South Wales Court of Appeal (Mason P, Giles and Tobias JJA) setting aside orders of Palmer J in the Supreme Court of New South Wales. The contentious aspect of the proceedings before Palmer J was a cross-claim, which he dismissed. By that cross-claim Say-Dee Pty Ltd ("Say-Dee") claimed various forms of equitable relief in relation to No 11, No 13, No 15 and No 20 against Farah Constructions Pty Ltd ("Farah") and five other cross-defendants. In this Court Say-Dee is the respondent and the six cross-defendants are the appellants. Palmer J also made orders sought in a summons filed by Farah seeking an order for the sale of No 11 upon the statutory trusts for sale under the *Conveyancing Act* 1919 (NSW), Pt IV, Div 6[1]. The Court of Appeal substituted for the orders of the trial judge a declaration that there be constructive trusts over No 13 and No 15 in favour of a partnership between Farah and Say-Dee to develop No 11, and related relief[2]. The appeal to this Court against the orders of the New South Wales Court of Appeal should be allowed and the trial judge's orders restored for the reasons given below.

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1 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 at [79].

2 For the reasons for this outcome, see *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309. Two judgments have also been delivered in relation to the orders of the New South Wales Court of Appeal: *Say-Dee Pty Ltd v Farah Constructions Pty Ltd (No 2)* [2005] NSWCA 469 and *Say-Dee Pty Ltd v Farah Constructions Pty Ltd (No 3)* [2006] NSWCA 329.

The parties

4 Farah, the first appellant, is controlled by Mr Farah Elias, who is the second appellant. He is also called "George". He gave his occupation as developer of real estate. Lesmint Pty Ltd ("Lesmint"), the third appellant, is another company controlled by Mr Elias. Mrs Margaret Elias, the fourth appellant, is married to Mr Elias. Sarah Elias, the fifth appellant, and Jade Elias, the sixth appellant, are the daughters of Mr and Mrs Elias.

5 Say-Dee is a company controlled by Dalida Dagher and Sadie Elias, and they are its directors. Although the trial judge found that they had no experience in real estate development, they had considerable business experience and ambitions.

6 At the time of the relevant events, Ms Dagher owned two properties in her own name. They were mortgaged. One was her residence. She was a 50 per cent shareholder in a company named Pacific Islands Express Pty Ltd which owned two valuable blocks of land worth over $5 million, and there was evidence that she was a director of that company. On one of them a pub was being built, funded by large borrowings, which she had guaranteed. A petrol station stood on the other block. She was also a director and a 50 per cent shareholder in another company, Teilwar Pty Ltd, which was carrying on the business of running two service stations involving franchises with Caltex. She claimed to have an "interest", although she was not a shareholder, in a third company, Dagher A Family Company Pty Ltd, which ran a service station, in which she had been involved for 18 years. She had seen many sets of business accounts over the years and understood what those accounts showed.

7 Ms Elias described herself as Operations General Manager of a multi-million dollar company called "Go Lo", being responsible for five area managers.

8 Say-Dee itself had purchased a house in Campsie with a view to buying the adjoining property for redevelopment. Say-Dee also conducted two coffee shops in Chatswood and Miranda.

The primary events

9 *The principals of Farah and Say-Dee meet.* In 1998, Ms Dagher and Ms Elias decided to become involved in real estate development. Through a mutual friend, Mr Elie Becherra, they contacted Mr Elias. He was the brother-in-law of Ms Elias's uncle and had known her socially since childhood, but he did not know Ms Dagher.

10 Mr Elias proposed that No 11, which comprised four rather run-down units, be bought using capital contributed by Say-Dee and borrowed monies; that No 11 be redeveloped for partly commercial and partly residential purposes; that while the development application was being prepared and approved by Burwood Council the units should be refurbished and rented out; that the rent be applied to pay the interest on the monies borrowed; and that on completion of the project No 11 be sold and the profits shared equally between Farah and Say-Dee. To this proposal Ms Dagher and Ms Elias agreed.

11 *The agreement of the parties.* The terms of the parties' agreement, or some of them, were recorded in a letter from Say-Dee's solicitors dated 20 April 1998 to Farah's solicitors headed in part "Property: DEANE STREET, BURWOOD" thus:

> "*1. Both parties are the purchasers in equal shares.*
>
> *2. Say-Dee is to advance to the joint venture $225,000.00.*
>
> *3. Balance of funds to be borrowed by the joint venture and secured by way of mortgage over the subject property.*
>
> *4. Upon completion of the project the profits are to be allocated as follows:*
>
> *a) 1st priority – repay Say-Dee $225,000.00.*
>
> *b) 2nd priority – pay all agents commission and legal expenses.*
>
> *c) 3rd priority – distribute balance 50/50 to joint ventures.*"

In addition, it was agreed that Farah would be responsible for managing the progress of the development application, constructing the development and selling the land.

12 *Performance of the agreement begins.* For a time matters proceeded smoothly. On 2 April 1998 contracts were exchanged for the purchase of No 11 by Farah and Say-Dee as tenants in common in equal shares for $630,000. On 17 September 1998 completion took place. Say-Dee provided $230,000 towards the purchase price and stamp duty. The balance of the purchase price came from a loan from the National Australia Bank. The units were refurbished and let. Farah prepared a development application for an eight storey building and on 5 January 2000 lodged it with Burwood Council. Although the applicant was

described as "Deane Trust", and was so addressed in later correspondence, there was in fact no express trust of that name, but no party submitted that anything turns on that. On 26 April 2000 the Council's Building and Development Committee deferred consideration of the development application to enable consultation to take place. However, none did take place; instead Mr Elias submitted amended plans on 27 April 2000, reducing the height by one storey.

13 *Difficulties with the Council.* The Council's Group Manager, Environmental and Community Services, prepared a report on the development application dated 20 June 2000. A copy was given to Mr Elias before 26 June 2000 and it was discussed at the Council's Building and Development Committee meeting on that day in his presence. The Group Manager recommended against approving the development application. This report stated:

> "The amendments proposed [on 27 April 2000] do not satisfy the Draft Town Centre Commercial LEP and DCP for a maximum of 4/5 storeys and a maximum FSR of 3:1. Even if the building did conform with such standards, it is considered that the site is too narrow to maximise its development potential.
>
> ...
>
> The proposed development is considered an over-development of a narrow 11m wide site as evidenced by the inability to provide for car parking due to the lack of manoeuvring space available. The site should be amalgamated with the adjoining properties to achieve its maximum development potential and a more appropriate development permissible under the Draft Town Centre Commercial LEP No 46 and DCP No 10."

Mr Elias contended to the meeting that relaxation of the planning requirements might be made after discussion with the Department of Urban Affairs and Planning. The Committee resolved to defer consideration of the application to enable the issues to be discussed with the Department.

14 On 11 July 2000 Mr Elias met two Council officers (the Group Manager, Environmental and Community Services and the Manager of Building and Development). On 12 July 2000 he wrote to the Chairman of the Council's Building and Development Committee making further submissions advocating approval for the development application.

15 On 8 March 2001 the Department of Urban Affairs and Planning informed the Council that its Urban Design Advisory Service had prepared an urban design

assessment. It suggested that No 11 was too small to achieve its full development potential, and that it needed to be amalgamated with other sites "to maximise its development potential". On 3 April 2001 the Council's Group Manager, Environmental and Community Services, provided a further report to the Council's Building and Development Committee. It referred to the urban design assessment and recommended refusing the application "as there is no scope for a redesign of the proposal". That Report was considered by the Committee on 3 April 2001, and Mr Elias addressed the meeting. However, the Committee unanimously adopted the Group Manager's recommendation, and this became the decision of the Council. Mr Elias was advised of that decision by a Notice of Determination dated 4 April 2001. The sixth of the stated reasons for refusal was:

> "The subject site is considered too small to achieve its full development potential and return a positive urban design outcome."

16 *Purchases by the Elias interests.* On 30 June 2001 Mr Elias, Mrs Elias and their two daughters each entered a contract to buy one of the four units in the building on No 15, and one of the four units in the building on No 20. The total purchase price was $1,080,000 for No 15 and $980,000 for No 20. The trial judge found that this was after Say-Dee had declined an invitation by Mr Elias in May to participate in the acquisition of these properties, but that finding was reversed by the Court of Appeal. On 20 November 2001 those contracts were completed.

17 On 7 December 2001 Farah lodged a second development application for No 11. On 12 March 2002 a Council officer advised Mr Elias (amongst other things) that No 11 was too narrow to maximise its development potential without amalgamation with neighbouring sites.

18 On 15 August 2002 Lesmint entered into a contract to buy No 13 for $1,680,800, and that contract was completed on 6 November 2002. The trial judge found that this was after Say-Dee had declined an invitation by Mr Elias in August to participate in the development of No 13 with No 11, but that finding was reversed by the Court of Appeal.

19 On 27 August 2002 Mr Elias withdrew the second development application.

20 *Mr Elias's concealed offer to buy No 11.* The trial judge found that in late 2002 or early 2003 Mr Elias made an offer to Ms Dagher and Ms Elias to buy No 11. He falsely represented that he was a consultant to the offeror when in

fact he solely controlled the offeror, and in that way he concealed his identity. This concealed offer weighed heavily in influencing the Court of Appeal to reverse the trial judge on a key question of what disclosures Mr Elias made to Say-Dee before the acquisitions of No 13, No 15 and No 20.

Procedural history

21 In late 2002 or early 2003 Say-Dee declined to sell its interest in No 11 to Farah. Thereafter relations deteriorated.

22 The proceedings began on 19 March 2003 when Farah filed a summons against Say-Dee seeking an order that a trustee be appointed over No 11 and that it be sold pursuant to the statutory trusts for sale for which provision is made in the *Conveyancing Act* 1919 (NSW), Pt IV, Div 6.

23 Say-Dee then filed a cross-claim, claiming that the present appellants held their interests in No 11, No 13, No 15 and No 20 on constructive trust for the partnership between Say-Dee and Farah. The claim in relation to No 20 was abandoned at the start of the trial. This may have been because Say-Dee, like the Court of Appeal, took the view that while "No 15 was an adjoining or adjacent property to No 11 for the purpose of site amalgamation as contemplated by the Council, No 20 ... was not."

24 After amendments to the cross-claim were made on 25 June 2004, the trial began on 16 August 2004 and continued until 18 August 2004. The trial judge delivered judgment on the following day. He gave judgment for the cross-defendants on the amended cross-claim. He ordered that two trustees be appointed to No 11 on the statutory trusts for sale.

25 The Court of Appeal heard an appeal by Say-Dee on 7 July 2005 and gave judgment on 15 September 2005 allowing the appeal. The Court of Appeal rejected the trial judge's finding that Mr Elias had invited Ms Dagher and Ms Elias to participate in the acquisition of No 13 and No 15. It found that Farah's fiduciary duties to Say-Dee were wider than the trial judge had found them to be. It found that Farah had breached its fiduciary duty by failing to tell Say-Dee that the Council regarded the acquisition of No 13 and No 15 and their amalgamation with No 11 as essential if No 11 were to be redeveloped to its maximum potential. It concluded that Mrs Elias and her daughters were liable in relation to their three units in No 15 under the so-called "first limb" of *Barnes v Addy*[3], and

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3 (1874) LR 9 Ch App 244 at 251-252.

hence held them in constructive trust. It also concluded that Mrs Elias and her daughters held their three units in No 15 on constructive trust for Say-Dee on a restitutionary basis turning on unjust enrichment. The Court of Appeal further held that the outcome was not affected by the fact that Mrs Elias and her daughters had acquired a registered title to their units in accordance with the provisions of the Real Property Act. It concluded by indicating that it favoured the relief claimed by Say-Dee, which centred on declaring constructive trusts over No 13 and No 15 in favour of the partnership between Farah and Say-Dee to develop No 11, and appointing receivers to obtain a development consent and sell No 11, No 13 and No 15 in one line. The Court of Appeal directed the parties to bring in draft short minutes of order reflecting that expression of opinion within 14 days.

26 On 21 December 2005 the Court of Appeal delivered a further judgment[4] resolving disputes between the parties about the orders.

27 On 28 November 2006, after this Court had granted special leave to the appellants to appeal on 19 September 2006, and a fortnight before that appeal was listed for hearing on 12 December 2006, the Court of Appeal delivered a third judgment[5]. That judgment was occasioned by an application brought by Say-Dee seeking orders conferring power on the receivers to delay sale, and to engage experts to advise on how to deal with the Council in relation to obtaining a rezoning before sale. The Court of Appeal made orders to that effect.

28 There are before this Court two appeals. One relates to the Court of Appeal's orders of 21 December 2005. The merits of the first appeal depend on the reasons for judgment given on that day and earlier on 15 September 2005. The other appeal is against the orders made on 28 November 2006. The respondent has filed a notice of contention in relation to the first appeal.

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4 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd (No 2)* [2005] NSWCA 469.

5 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd (No 3)* [2006] NSWCA 329.

Issues before this Court

29 The appeals and the notice of contention raise the following issues for determination.

(a) Did Farah disclose to Say-Dee the Council's view of the need to amalgamate the development of No 11 with other properties if any development application was to succeed?

(b) Did the Court of Appeal err in reversing the trial judge's finding that Farah had disclosed to the directors of Say-Dee opportunities to buy No 15 and No 20 in 2001 and No 13 in 2002?

(c) Did Mrs Elias and her daughters have actual knowledge of Say-Dee's rights?

(d) Did the scope of the joint venture create a duty on Farah to disclose the Council's view of the need for amalgamation and to disclose the opportunities to buy No 15 and No 13, and to abstain from proceeding with those purchases in the absence of Say-Dee's informed consent?

(e) If so, did Farah comply with that duty?

(f) Did the Court of Appeal err in finding that Mrs Elias and her daughters were liable under the first limb in *Barnes v Addy*?

(g) Did the Court of Appeal err in finding that Mrs Elias and her daughters were liable as recipients of trust property on the basis of unjust enrichment?

(h) Were Mrs Elias and her daughters liable under the second limb of *Barnes v Addy*?

(i) Did Say-Dee have a tracing remedy against Mrs Elias and her daughters?

(j) Did Mrs Elias and her daughters have a duty in equity to account for profits?

(k) Was there an adequate causal link between any breach of duty by Farah and harm to Say-Dee?

(l) Did the Court of Appeal err in failing to find that the second to sixth appellants had acquired an indefeasible title to the respective properties in their names pursuant to s 42 of the Real Property Act?

(m) Were the remedies ordered by the Court of Appeal satisfactory?

The need to amalgamate: disclosure of the Council's view

30 *The Court of Appeal's conclusions.* The trial judge found that Mr Elias had not "in terms" conveyed to Say-Dee the view of the Council that No 11 was too narrow to maximise its development potential and that it should be amalgamated with the adjoining properties. Below this will be referred to as "the Council's view of the need for amalgamation". The Court of Appeal agreed with this finding, and went further. It held that not only had that information not been conveyed "in terms", it had not been conveyed "in effect or in substance". The Court of Appeal found two relevant deficiencies in Mr Elias's conduct.

31 The first deficiency was that Farah had not sent to Say-Dee, or alerted it to the contents of, a copy of the Notice of Determination in which the Council said: "The subject site is considered too small to achieve its full development potential and return a positive urban design outcome." The second deficiency was that even if Say-Dee had been aware of those words, and even if a commonsense inference from the Council's view that the site was too small was that a larger site should be acquired, there had been no communication of an "additional dimension" – "a particular piece of information with respect to the Council's future attitude to any proposed development if No 11 was amalgamated with the adjoining properties, namely, that subject to achieving a positive urban design outcome, it would most likely be approved or, at least, recommended for approval."

32 *The evidence.* The trial judge did not make a positive finding accepting Mr Elias's evidence, advanced specifically only in cross-examination, that he told Say-Dee about the Council's view of the need for amalgamation. Nor did he make a positive finding that Mr Elias always left a copy of the Council's reports with Ms Dagher and Ms Elias. His finding that the Council's view of the need for amalgamation was not "in terms" conveyed to Say-Dee suggests a reluctance – perhaps a refusal – to make these positive findings. It is therefore necessary to leave out of account Mr Elias's evidence of disclosure save where Say-Dee did not put it in issue or it is otherwise confirmed. The following matters of evidence are relevant.

33 First, Say-Dee admitted and the trial judge found that Mr Elias told Ms Dagher and Ms Elias that the Council had rejected the first development application because it had too many units for No 11.

34 Secondly, there is positive evidence that by October 2002 Say-Dee understood that one way of overcoming the Council problem was to develop No 11 with adjoining land. In her first affidavit, Ms Dagher deposed that in a meeting in late October 2002, discussed more fully below[6], she said to Mr Elias in the presence of Ms Elias: "Why don't we do a development that is a bit smaller so the Council won't reject the development application?" She deposed that he replied: "It's not worth it." She deposed that she then said: "Then why don't we do a development with the building next door which you own?" – that is, with No 13. In her first affidavit, Ms Elias, apparently giving evidence about the same meeting, attributed to Ms Dagher the words: "Why don't we get together and do a big development with your other properties?" While in later affidavits each deponent retreated from parts of their evidence about this conversation, Ms Dagher continued to offer a version of the conversation consistent with an understanding that the development of adjoining properties with No 11 was a possibility. It should be inferred that Say-Dee knew of at least the real possibility that the Council would approve a development of No 11 in conjunction with No 13 and No 15. How could Say-Dee have got this knowledge unless Farah had made it available? Say-Dee offered no answer to that question.

35 Thirdly, Farah tendered a letter of 16 July 2001 which Mr Elias sent on its behalf to Say-Dee. The letter said:

> "Over the past year or so we have regularly kept you informed of the current status of [No 11] ...
>
> The management of the trust has now requiring [sic] critical attention due to the culmination of the following events:
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> • After several months of submissions to the Burwood Council and the State government the council has refused the current development application and *we enclose copies of that correspondence*. This process incurred a great deal of time and expense on our part with no foreseeable returns.

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6 At [50]-[62].

...

> The situation is now more than urgent and we must come to some decision and arrangement in relation to the trust and the property without any further delays." (emphasis added)

There is no evidence of any contemporary protest by Say-Dee that it was untrue for Mr Elias to have said that for the past year he had regularly kept it informed. In his main affidavit Mr Elias gave evidence that at a meeting at his office in late August 2001 the following took place:

> "I used the letter as an agenda for the meeting and ticked off each item as we discussed it ... We discussed the refusal of the Application from Council and agreed to resubmit a new plan with more commercial component."

There is a tick against the item in the 16 July 2001 letter referring to the enclosure of copies of correspondence with the Council. Had the full correspondence been enclosed, one of the enclosures would have been the Notice of Determination of 4 April 2001, for that was the operative document rejecting the first development application. It referred explicitly in par 6 to the Council's view of the need for amalgamation in the words "[t]he subject site is considered too small to achieve its full development potential".

36 Counsel for Say-Dee in this Court accepted that the Notice of Determination would have been an obvious thing to enclose. The enclosures referred to were not tendered and were not identified in evidence. Say-Dee did not object to the tender of the letter of 16 July 2001 on the ground that the enclosures were incomplete. Say-Dee did not cross-examine Mr Elias to suggest that he had failed to include the enclosures when he sent the letter. Neither Ms Dagher nor Ms Elias gave evidence to the effect that they protested about the correspondence not being enclosed, either after Say-Dee received the 16 July 2001 letter or at the meeting in late August 2001. Ms Dagher made a general denial of having received any indication before March 2003 that the Council had recommended that No 11 be amalgamated with adjoining properties for redevelopment. Ms Elias made a general denial of having received any indication before March 2003 that the Council had recommended that No 11 be amalgamated with adjoining properties for achievement of its maximum development potential. But neither Ms Dagher nor Ms Elias in terms denied receipt of either the Notice of Determination or the 16 July 2001 letter. They did not deny Mr Elias's account of the late August 2001 meeting at which the 16 July 2001 letter was used as an agenda.

37 Leaving aside questions of onus – whether Say-Dee, endeavouring to prove a breach of fiduciary duty, had to prove non-receipt of the Notice of Determination, or whether Farah, endeavouring to prove a proper disclosure, had to prove receipt – it is to be inferred that the Notice of Determination was sent to Say-Dee. When the contents of par 6 of the Notice of Determination are taken with the first and second factors mentioned above, they support an inference that Say-Dee understood par 6 to be a statement that No 11 had to be amalgamated with adjoining properties if it were to achieve its full development potential. Counsel for Say-Dee in this Court rightly agreed that a statement that the site of No 11 was too small to achieve its full development potential meant that there were only five possibilities: first, reduction of the planned development; secondly, acquisition of more land; thirdly, termination of the joint venture as unprofitable; fourthly, variation of the joint venture so as to use No 11 for income-making purposes such as rental; and, fifthly, sale of the land. In short, if the development were to proceed unchanged (ie leaving aside possibilities 1 and 3-5), it was necessary to acquire more land. It follows that Say-Dee's contention that par 6 of the Notice of Determination did not disclose the Council's view of the need to amalgamate properties must be rejected, because to anyone of any business experience – and the principals of Say-Dee had plenty of business experience – par 6 must have suggested that the development could only proceed unchanged if more land were acquired.

38 Fourthly, from Mr Elias's uncontradicted evidence that he "discussed the refusal" of the first development application by the Council with Ms Dagher and Ms Elias it is to be inferred that Say-Dee was aware not only of the fact that the Council had refused it, but also of why. It is difficult to believe, unless it went without saying, that in late August 2001, after the project had been on foot for three and a half years, but stalled for much of that time, with the interest paid out exceeding the rent received, and Say-Dee's other activities in financial difficulties[7], the representatives of Say-Dee would not have discussed with Mr Elias why the Council had refused the first development application and how the Council's attitude could be changed. The absence of evidence about any explicit conversation to this effect at the late August 2001 meeting suggests that the nature of the Council's attitude to amalgamation did go without saying. It went without saying because it was already known to the three people present. This is a further reason for inferring that the appreciation of the Say-Dee directors in late October 2002 of the desirability of amalgamation derives from their receipt of the Notice of Determination with the letter of 16 July 2001.

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7 See below at [78]-[83].

39 *Did the Notice of Determination convey enough?* It is necessary now to turn to the Court of Appeal's second point – that even if Mr Elias had caused Say-Dee to become aware of the Notice of Determination, that disclosure was insufficient. The Court of Appeal considered that Mr Elias should have told Say-Dee that the senior officers of the Council "were conveying or telegraphing" what it called "valuable information" and "vital intelligence" – that if No 11 were amalgamated with adjoining properties a development application in relation to No 11 "would most likely be approved or, at least, recommended for approval", or "would likely bear fruit".

40 There are several difficulties in this conclusion. The language of the Court of Appeal's judgment in many places relies on assumptions about planning law and dealings with Councils, of varying degrees of validity, if any. Mr Elias was certainly a property developer, but it is far from clear that he made, or indeed would have even thought of making, the assumptions which the Court of Appeal considered itself entitled to make and to attribute to him. Those assumptions, no doubt because they were mere assumptions on the part of the Court of Appeal, were little explored in cross-examination. The Court of Appeal said that the means by which the Council officers "were conveying or telegraphing" the "valuable information" and "vital intelligence" was the Council reports. But those documents, far from telegraphing that amalgamation would "most likely" bring success, were calculated only to create pessimism in the reader, for the Council officers conveyed a range of criticisms they had of the first development application. Further, what they were saying was imprecise. What did "maximise" mean? What did "development potential" mean? These deficiencies might have been overcome if Mr Elias had made some relevant admissions. But there was no evidence that Mr Elias perceived that Council officers "were conveying or telegraphing" any message of "most likely" success. The fact that no answer in cross-examination indicating that perception was given is not surprising, for the point on which the Court of Appeal relied was a point taken for the first time by that Court. It attributed the idea to the trial judge, but his was a different point, namely that the Council saw an amalgamation of sites as necessary for a development of the proposal – not sufficient. In any event, the trial judge only raised the point in two interventions during counsel for Farah's final address, by which time the evidence had closed.

41 It follows that Council officers were not communicating to Mr Elias any information about what conditions had to be satisfied to make success likely. All the Council officers were communicating was that one reason why the first development application had to be rejected was that No 11 was too narrow to maximise its development potential and that it should be amalgamated with the adjoining properties if that reason were to be nullified.

42 Even if Mr Elias did not convey that information "in terms", he did convey it "in substance and in effect" by enclosing the Notice of Determination with the letter of 16 July 2001 from Farah to Say-Dee.

Disclosure to Say-Dee about the possible development of No 13, No 15 or No 20: preliminary points

43 *The problem for the courts below.* It must be acknowledged that the mode in which the parties presented their evidentiary cases, both testimonial and documentary, created considerable difficulties for both the trial judge and the Court of Appeal. This was so on the last issue. It was particularly so on this one. These difficulties were compounded by the fact that it was in various respects probable that there would be disputes between the parties – once partners, now bitter opponents – about their oral dealings. The difficulties were compounded further by the fact that in some respects all three key witnesses were of questionable veracity and of questionable reliability. A reading of the evidence leaves an impression that the full story has not been told. For example, Say-Dee had put about $230,000 into the joint venture in 1998, generating opportunity costs but not income, the rents received from No 11 were not even matching mortgage interest repayments owing to the bank, and that $230,000 had uses elsewhere to assist those of Say-Dee's businesses which were not doing well[8], yet the evidence does not suggest any protests on the part of Say-Dee about the slow pace at which No 11 was being developed.

44 The Court of Appeal correctly reminded itself that it was not sufficient for it to conclude that had it been conducting the trial it would have come to a different conclusion from that to which the trial judge came. The Court of Appeal differed from the trial judge because it said it found his findings glaringly improbable and contrary to compelling inferences. The parties did not contend before this Court that that test was wrong. Hence there is no need to examine whether it is incorrect. The appellants' invitation to this Court to correct errors by the Court of Appeal thus calls for an examination of whether the findings were in truth glaringly improbable and contrary to compelling inferences. That in turn calls for an understanding of how the trial judge arrived at them.

45 *The trial judge's reasoning.* The trial judge accepted Mr Elias's evidence about his offers to Ms Dagher and Ms Elias. In outline, that evidence was that in May 2001 he met Ms Dagher, he told her he had been negotiating with the

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8 See below at [78]-[83].

owners of No 15 and No 20, he asked whether she and Ms Elias were interested in those properties, and she said they were not. Further, Mr Elias's evidence was that in August 2002 he told Ms Dagher that No 13 was on the market and that No 13 was a good proposition for redevelopment with No 11, but that Ms Dagher declined participation on behalf of herself and Ms Elias. Consistently with his acceptance of Mr Elias's evidence, the trial judge made positive findings that Mr Elias had disclosed to Say-Dee the proposed acquisitions of No 13 and No 15, that he had invited Say-Dee to participate, and that his invitation was declined.

46 The trial judge's reasons for his findings were that he considered the evidence of Ms Dagher and Ms Elias about how and when they learned of the acquisitions of No 13 and No 15 to be unsatisfactory; that Mr Elias found great difficulty in raising money to acquire No 13 and No 15; that it was inherently probable that he would seek funds from Say-Dee for that purpose; that it was inherently probable that Say-Dee would have declined because of financial inability to participate; and that despite Mr Elias's offer to Say-Dee to buy No 11 on the false representation that he was a consultant to a would-be purchaser of No 11 when in fact he controlled that would-be purchaser, which was "certainly not excusable", he was "an essentially truthful witness".

47 The Court of Appeal accepted that, had Say-Dee been asked to participate, it would have declined because of financial incapacity. It also accepted that the evidence of Ms Dagher and Ms Elias was unsatisfactory, although the Court of Appeal gave this much less significance than the trial judge had. However, the Court of Appeal rejected or discounted every other aspect of the trial judge's reasoning. It is convenient to proceed by setting out various errors in the Court of Appeal's approach and then examining what force its reasoning has when those errors are taken into account.

Disclosure to Say-Dee about the possible development of No 13, No 15 or No 20: errors by the Court of Appeal

48 *Demeanour-based findings.* The trial judge gave several reasons for describing Mr Elias as "an essentially truthful witness". One of the reasons was the "impression" gained by the trial judge that under cross-examination Mr Elias "was making an honest endeavour to give his answers truthfully and carefully". Another was that he "remained unshaken in the essentials of his evidence although he was not very assertive in manner". Another was that some apparent contradictions were to be explained by "ambiguity and confusion" in Mr Elias's answers, arising from the fact that English is not his first language "and he sometimes expresses himself in a way that is not idiomatic, particularly in his use of tenses and moods". Decisions as to credibility are often based upon matters of

impression[9], and in this case rightly so. The impressions which the trial judge formed and the judgments he made about Mr Elias's manner are matters in respect of which the trial judge was in a position of distinct advantage over the Court of Appeal. The same is true to some extent of the trial judge's assessments of Mr Elias's English skills, although his abilities in that regard can be detected up to a point from the transcript. These impressions, judgments and assessments were recorded in a judgment delivered one working day after the trial judge had seen and heard Mr Elias in the witness box for nearly a day. They must be accorded due weight. This the Court of Appeal did not do. It uttered the truism that its reversal of the trial judge's finding was "not demeanour based", but failed to grapple with the fact that, in contrast, his finding was demeanour based.

49 The Court of Appeal to some extent, and the respondent to a greater extent, relied on inconsistencies in Mr Elias's evidence. The trial judge said that counsel for the respondent had pointed to apparent contradictions in Mr Elias's evidence, and these were no doubt the same as those relied on in the Court of Appeal and this Court. The trial judge said he had not overlooked the submission. There is thus no reason to suppose that the trial judge was not aware of the contradictions or that he did not take them into account in reaching his generally favourable conclusion about Mr Elias's credibility. To the extent that they exist they do not justify a reversal of that generally favourable conclusion. Furthermore, the matters earlier referred to in this judgment, the parties' business experience, the opportunity and likelihood of the respondent making its own informed inquiries and judgment about the possibilities and economies of the proposed and other possible developments, give objective support to Mr Elias's evidence.

50 *Contradictions in the Say-Dee affidavits.* In the amended cross-claim, Say-Dee alleged that No 13 and No 15 were transferred on the dates on which they were transferred, but did not allege that Say-Dee was ignorant of those transfers. In the defence to cross-claim, Farah admitted these transfers, but did not allege that Say-Dee had been made aware of those transfers before they were made. The first affidavit to be filed after the cross-claim had been filed was Ms Dagher's first affidavit, dated 18 June 2003. In par 26 of that affidavit she admitted that in mid-to late 2002, Mr Elias said to Ms Elias and to her: "I'm buying some other property in the area"; however, she also said: "Mr Elias never told me or [Ms Elias] in my presence which properties he was purchasing or any

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9 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 88-89 [4] per Gleeson CJ.

details of the purchase. He never offered myself [sic] to become involved in the purchase." Ms Dagher's evidence that Mr Elias never told her what properties he purchased was contradicted by her evidence in the same affidavit, pars 30-33, that in late October 2002 the following conversation took place. Mr Elias said: "What we have been waiting for has finally come through. I've been approached by a group of people wanting to buy the Property." Ms Dagher said: "Why would we want to sell the Property rather than develop it ourselves?" Mr Elias responded: "We have already submitted two development applications to the Council and they have both been rejected." Ms Dagher said: "Why don't we do a development that is a bit smaller so the Council won't reject the development application?" Mr Elias said: "It's not worth it." Ms Dagher said: "Then why don't we do a development with the building next door which you own?"

51 The attribution by Ms Dagher to herself of the last statement involves an assertion of knowledge by Ms Dagher in late October 2002 that Mr Elias by then owned No 13 – the only relevant building next door to No 11, since No 9 was a large and modern building not for sale, and Mr Elias did not own No 18. There is no evidentiary basis on which it can be inferred that Ms Dagher obtained the knowledge that Mr Elias owned No 13 from any source other than Mr Elias. The proposition deposed to by Ms Dagher in this affidavit that Mr Elias had never told her what properties he was purchasing is thus inconsistent with what she deposed to later in the affidavit – that she had reminded Mr Elias that he owned No 13. As the trial judge said, "there is no suggestion in this affidavit that it was at this meeting that Mr Elias had disclosed for the first time that his interests had acquired No 13".

52 In an affidavit dated 19 February 2004, Mr Elias denied parts of these paragraphs of Ms Dagher's affidavit, but not the statement implying that he owned No 13. Mr Elias deposed to the fact that he told Ms Dagher of his impending purchase of No 15 in 2001 and No 13 in 2002 and that he offered Say-Dee participation, but Ms Dagher refused.

53 In her affidavit of 17 June 2004, Ms Dagher gave another version of what appears to be the same conversation as the late October 2002 conversation set out above. On this version, Mr Elias said: "There is a buyer for Deane Street." Ms Dagher said: "Why are we selling, I thought the plan was to develop the site?" Mr Elias said: "No, I want to sell out. I'm going to sell all my other properties in the area as well." Ms Elias said to Mr Elias: "What other properties do you own in the area?" Mr Elias said: "Next door to 11 and next door to that." Ms Elias said: "Well, why aren't we building together?" Mr Elias replied: "It's to [sic] big even for me, I'm also selling all my properties." Ms Elias said: "If

you are a developer and you own them all why don't you develop?" Mr Elias replied: "It's to [sic] big and I don't want to build."

54 The trial judge said[10]:

> "It will be seen that in the first version of this conversation Ms Dagher suggests a joint development with Nos 11 and 13 and Mr Elias counters with the statement that he is selling his properties. In the second version, Mr Elias says that he is selling his properties and Ms Elias asks what those properties are, to be told that they are Nos 13 and 15.
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> The inconsistency is a significant one. If the first version is correct, Ms Dagher knew of the acquisition of Nos 13 and 15 before October 2002 and found out about the acquisition in circumstances which she did not explain in her first affidavit, which would leave unchallenged the evidence of Mr Elias in his affidavit that he had told her before the proposed acquisitions were made. In Ms Dagher's second version of the conversation, she seeks to explain that she found out about the acquisition of the properties after they had already been acquired by Mr Elias' interests, by an enquiry made during the course of the October conversation."

55 The contradiction in Ms Dagher's first affidavit, and her change of evidence in the second affidavit, created potential difficulties in the path of accepting her evidence so far as it was adverse to Farah, unless the contradiction and the change were explained. It is possible to imagine various ways in which the problem might have been explained, but no attempt to do so was ever made by the witness. In the Court of Appeal counsel for Say-Dee attempted an explanation by contending that the account of the conversation in Ms Dagher's first affidavit was expanded in her second affidavit, but the Court of Appeal rightly rejected that explanation as lacking any basis.

56 The difficulties were increased by the course which Ms Elias's affidavit evidence took. In her first affidavit, dated 19 June 2003, the day after the date of Ms Dagher's first affidavit, she said in par 29, in words closely corresponding with those in par 26 of Ms Dagher's first affidavit, that Mr Elias said to her and Ms Dagher: "I'm buying some other property in the area." She then deposed: "Mr Elias never told me or Dagher in my presence which properties he was

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10 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 at [41]-[42].

purchasing or any details of the purchase. He never offered Dagher or myself to become involved in the purchase." In par 30 she contradicted this in the version she gave of the conversation dealt with in par 33 of Ms Dagher's first affidavit. After describing how Mr Elias rejected an offer to buy No 11 for $1.5 million, the affidavit continued as follows: Ms Dagher said: "We have told you several times that we want to develop the property rather than sell it." Mr Elias said: "I've tried to get the development application through the council but we can't get anywhere and I think we are wasting our time." Ms Dagher said: "Maybe you are aiming to [sic] high and we need to cut down on the number of units on the property." Mr Elias said: "I think we are wasting our time and I am going to sell my other properties as well." Ms Dagher said: "We don't want to sell, we really want to develop this property and think it would be a really great site. Why don't we get together and do a big development with your other properties?"

57 The words attributed by Ms Elias to Ms Dagher: "do a big development with your other properties" can only be a reference to No 13, No 15 and perhaps No 20. They were the only properties "owned" by Mr Elias which were capable of forming part of a "big development" with No 11. As the trial judge said, Ms Elias's affidavit does not suggest that she heard at the meeting for the first time that Mr Elias had acquired No 13 and No 15. Ms Elias did not record herself as denying any prior knowledge of Mr Elias's ownership of No 13 and No 15. Indeed she recorded the conclusion of the conversation as follows. Mr Elias said: "That sort of development would be out of my league. I think the best option is just to sell up." Ms Elias said: "We really want to develop this. We didn't buy the property and wait around for so many years just to sell it again, we are really keen to do this development."

58 Ms Elias returned to the subject of this conversation in her third affidavit dated 16 August 2004. Her version was as follows. Mr Elias said: "I have a buyer for 11 Deane St. I've got a great price of $1.5 million." Ms Elias said: "We don't want to sell out, I thought we were supposed to be developing the site." Mr Elias said: "I'm selling out all my properties too, the development in the area is too big for me to handle on my own." Ms Elias said: "What other properties do you mean? What else do you own?" Mr Elias said: "13 and 15 Deane Street."

59 The position thus is that in Ms Elias's first affidavit, as in Ms Dagher's, there is a contradiction; as between Ms Elias's first and third affidavits, as with Ms Dagher's first and second affidavits, there is a similar contradiction; and Ms Elias did not explain these contradictions any more than Ms Dagher did. As counsel for the appellant said: "[T]hey seemed to be somewhat consistent in their inconsistencies." The problems having emerged on the face of the

affidavits, it was for the witnesses to take the initiative in explaining them. There was no duty on Farah to elicit explanations in cross-examination, and it did not seek to do so.

60 The Court of Appeal pointed out – and it seems to have thought the error to be important since it referred to it twice – that the trial judge erred in suggesting that in Ms Dagher's first version of the relevant conversation she revealed knowledge that Mr Elias had bought No 15, and that in truth she only revealed knowledge that he had bought No 13. This is an unimportant error, since Ms Elias's first version of the conversation attributes to Ms Dagher knowledge that Mr Elias had bought both No 15 and No 13 and implicitly accepts that she possessed that knowledge herself. The Court of Appeal said of Ms Elias's evidence[11]:

> "His Honour's conclusion ... was that by October 2002, [Ms Elias] already knew that Mr Elias and his interests owned Nos 13 and 15. But even if that finding applied to both [Ms Elias] and [Ms Dagher], it did not warrant a finding that, on or prior to 30 June 2001 and, in particular, in May 2001, they had been made aware by Mr Elias that he was negotiating to purchase No 15."

It is plain from the terms of Ms Elias's evidence that her knowledge that Mr Elias's interests owned both No 13 and No 15 was shared by Ms Dagher. And while the evidence standing alone might not warrant the trial judge's conclusion that Say-Dee was aware of the purchase of No 15 in May 2001, it tends to support that conclusion – for Say-Dee never suggested any means by which its principals learned of the purchase of No 15 other than by being told by Mr Elias, and they never suggested any time at which they learned it other than May 2001.

61 A related error of the Court of Appeal is that while it accepted that Ms Dagher's versions of the October 2002 conversation were "inconsistent in a relevant respect", they thought this only left her evidence in an unsatisfactory state. This overlooks the equivalent inconsistency in Ms Elias's evidence. It overlooks the fact that the first versions in each case were advanced at the same time, and that the second versions in each case were advanced only about two months apart. It overlooks the fact that the inconsistencies support Mr Elias's claim that he told the Say-Dee principals about his acquisition of No 13 and

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11 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [89].

No 15 at some time before the October 2002 conversation, and the fact that Say-Dee never excluded May 2001 for No 15 and August 2002 for No 13 as the times when he told them.

62 For Ms Dagher to contradict herself in an unexplained way is a circumstance to which suspicion could attach. For Ms Elias to have done so in evidence which is the same in substance as that of Ms Dagher, though varying in details, is highly suspicious. The trial judge was entitled to give preference to the admissions they made in their affidavits over the self-serving statements in them. The Court of Appeal never explained why it could be said that the trial judge had erred in this process. It failed to integrate into its reasoning an explanation for the damaging statements in Ms Dagher's and Ms Elias's first affidavits. Whether convincingly or not, it narrowed the inconsistency by excluding No 15 from its ambit, but it never dealt with the continuing inconsistency in relation to No 13.

63 *Acquisition of No 15 and No 20.* The Court of Appeal also made numerous suggestions that there was something sinister about the acquisition of No 15 "in one line or as a package" with No 20, instead of by itself.

64 Thus the Court of Appeal asserted that No 15 was an "adjoining or adjacent property to No 11 for the purpose of site amalgamation as contemplated by the Council", but that No 20 was not. Both limbs of this proposition must be rejected. For so long a time as No 13 was not in the hands of anyone connected with the joint venture, it was in no sense "adjoining or adjacent": the only properties answering that description were No 9 or No 18. And if No 15 was adjoining or adjacent to No 11, No 20 was as well, because it adjoined No 15.

65 Then the Court of Appeal appeared to question whether No 20 had to be bought with No 15. It also criticised Mr Elias's failure to suggest to Say-Dee that it consider "joining in the acquisition of No 15 alone, there being no suggestion by Mr Elias that there was any necessity for them also to be involved in the purchase of No 20". This was coupled with criticisms of Mr Elias for failing to explain why the acquisition of No 15 was desirable, namely Council's requirement for an amalgamated development. As to the last point, once it is accepted that Say-Dee was informed of the Council's attitude by receipt of the Notice of Determination, it was unnecessary for Mr Elias to repeat that information. As to the other points, the acquisition of No 15 by interests associated with Mr Elias owes its origin to an approach by Mr Elias in early 2001 to a real estate agent who controlled the company owning it. Number 15 was not then listed for sale. It was only available for purchase as a package, the owners being companies in common control. To criticise Mr Elias for not explaining the

possibility of making an offer on No 15 alone is thus to criticise him for failing to suggest a futility.

66 *Acquisition of No 13.* The Court of Appeal criticised Mr Elias for failing to tell Say-Dee that the real reason for why No 13 was, as on his evidence he said it was, "a good proposition for redevelopment in conjunction with" No 11 was the Council's requirement that No 11 be amalgamated with No 13 or No 13 and No 15 together. But the Notice of Determination had already conveyed that information to Say-Dee. A curious feature of the Court of Appeal's reasoning emerges at this point: while it later overturned the trial judge's finding that Mr Elias had offered No 13 to Say-Dee, in this part of the reasoning it treats it as correct, saying rather that Mr Elias chose the words just quoted "carefully".

67 Another illustration of this approach to the trial judge's findings – seemingly accepting them at one point to reach a conclusion adverse to Mr Elias but rejecting them at another point to reach a different conclusion adverse to Mr Elias – exists. The Court of Appeal said: "[I]t is difficult to accept that Mr Elias acquired Nos 13 and 15 otherwise than for the purpose of their ultimate amalgamation with No 11 in order to maximise the development potential of the latter...". It then said that the trial judge made an implicit finding to this effect[12]:

> "[I]nherent in his Honour's acceptance that Mr Elias disclosed to [Ms Dagher] and [Ms Elias] his proposed acquisition of Nos 13 and 15 and invited their participation in the acquisition of those properties, and his finding ... that the properties were obviously suitable for an amalgamated development with No 11 so that it was inherently probable that Mr Elias would have asked [Ms Dagher] and [Ms Elias] if they were interested in acquiring them, is an implicit finding that No 15, and later No 13, were in fact acquired by Mr Elias to facilitate the redevelopment of No 11."

The starting point in this reasoning is a finding by the trial judge, evidently accepted by the Court of Appeal, that Mr Elias disclosed his proposed acquisitions; that is a finding elsewhere overturned by the Court of Appeal.

68 Apart from these criticisms, the Court of Appeal also relied on what it saw as inconsistencies in Mr Elias's cross-examination. However, the Court of Appeal overlooked the significance of the following facts. In 1998-1999

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12 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [144].

Mr Elias made several approaches to the owner of No 13 to sell. The response was: "Don't contact me. When I'm ready to sell I will sell." Nothing more happened until August 2002, when Mr Becherra, who was a real estate agent, told Mr Elias that No 13 had been offered for sale. There is no evidence that at the time Mr Elias approached the owner of No 15 he was aware of any possibility of acquiring No 13 either then or in the future, whatever he hoped.

69 *Mr Elias's financial difficulties.* Another group of criticisms made by the Court of Appeal relates to the following finding of the trial judge[13]:

> "I find it inherently probable that Mr Elias would have asked Ms Dagher and Ms Elias if they were interested in acquiring Nos 13 and 15. His unchallenged evidence was that he found great difficulty in raising the money for these acquisitions."

In relation to the acquisition of No 13 in 2002, the Court of Appeal dealt with that finding principally by contending that "in neither his affidavit nor oral evidence is there a reference to any suggestion that he was seeking [Say-Dee's] interest in [No 15 and No 20] because he was finding difficulty in raising the purchase price." The Court of Appeal contended that the trial judge's proposition about Mr Elias's financial difficulties was based on only one piece of evidence; that that piece of evidence did not in fact support the proposition, because the trial judge misunderstood it; and hence that there was no evidence to support the trial judge's finding. In this there are three difficulties. One difficulty is that it is not the trial judge who misunderstood the evidence to which the Court of Appeal referred. The second difficulty is that the trial judge did not base his proposition only on that piece of evidence. The third difficulty is that the Court of Appeal overlooked two other pieces of evidence.

70 The evidence which the Court of Appeal said the trial judge misunderstood consists of the following part of one of Mr Elias's affidavits, which appears after he described how Ms Dagher told him, on his inviting Say-Dee's participation in buying No 13, that it could not do so because of the financial difficulties she and Ms Elias were experiencing. Mr Elias deposed that he said: "Dalida, it will be difficult for me to do it on my own. We should do it together. We must ...". Ms Dagher replied: "We can't do anything now George." Mr Elias said: "That's OK. I'll have to make other arrangements on my own then."

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13 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 at [54].

71 The Court of Appeal said that the trial judge's proposition about Mr Elias's financial difficulties was based, and only based, on the words he used to Ms Dagher in 2002 in relation to buying No 13: "[I]t will be difficult for me to do it on my own." The Court of Appeal then said that the words "It will be difficult for me to do it on my own" did not refer to Mr Elias's financial difficulties but to the difficulties of developing No 13 otherwise than in conjunction with No 11. They said[14]:

> "This follows from the immediately preceding statement ... of his affidavit where he attributed to [Ms Dagher's] lack of interest in more investment, a statement by her that Mr Elias should buy No 13 and that, if it was later developed with No 11, she and [Ms Elias] '*can take a space equivalent to our space in 11 Deane Street*'." (emphasis in original judgment)

That "immediately preceding statement" appears in the middle of a detailed account by Ms Dagher of Say-Dee's financial difficulties. Farah submitted that: "It takes quite a feat ... of mental gymnastics to get oneself into a situation of disagreeing with the trial judge on that particular aspect of the evidence." It is not necessary to go so far. It is sufficient to say that the Court of Appeal's reading of the evidence is not the better reading, and that the passage does in truth support the trial judge's proposition.

72 The Court of Appeal also erred in saying that the trial judge's proposition about Mr Elias's financial difficulties was only based on the words "It will be difficult for me to do it on my own." The trial judge did not say that that was his only source, and there are two other categories of evidence that support it. One relates to the acquisition of No 15 and No 20. In cross-examination it was put to Mr Elias that the children made no contribution to the purchase price of their units. He said:

> "As the little contribution they've made from their little savings they've got but the most emphasis was on that, that was my wife's decision. When we purchased these properties we had to mortgage the house, withdraw every single cent possible on the house in my wife's name. We had to save – get all the saving from our accounts, from my wife's account. We had to borrow money from my brother. We had to borrow any dollar we could possibly get to really secure these properties and my wife had – I had a discussion with her and she made it quite clear if you ever want to

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14 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [95].

> use this sort of money, my house, I want to make sure it would be for the benefit of my daughters and I had a lot of discussion with her. Most time I try to convince her and that was the discussion I had, me and her."

That is, the sources of the funds with which No 15 and No 20 were acquired were his children's savings, his wife's savings, a bank mortgage and a loan from his brother. Say-Dee accepted that the evidence showed that Mr Elias gave a mortgage on the family home which was either in Mrs Elias's name or joint names. Say-Dee said that the evidence was objectionable because it gave secondary evidence of documents and was not responsive to the question. The fact is that it was not objected to, it was received as evidence, and it invalidates the Court of Appeal's statement that there was no evidence of Mr Elias's financial difficulties. Mr Elias was not cross-examined on that evidence, and at a later stage the cross-examiner referred him to it as though it was not controversial. Although the Court of Appeal overlooked this evidence on the present point, it dealt with it on another issue, and although it found the evidence vague, it did not reject it[15]. Indeed the Court of Appeal held that it was reasonable to assume that Mrs Elias gave a personal guarantee for the repayment of the sum loaned by the bank in relation to No 15. Say-Dee accepted in this Court that the mortgage would have contained a personal covenant by Mrs Elias to repay the debt.

73 Say-Dee submitted that it was implicit in the evidence that the financial contribution of the daughters was de minimis, and that there was no positive evidence that it was any more. There is no reason to suppose that it was de minimis.

74 At a very late stage in the course of oral argument, Say-Dee challenged the evidence of Mr Elias set out above by reference to evidence which had only been tendered in late 2006, in connection with the variation of orders made by the Court of Appeal on 28 November 2006. The challenge made in oral argument turned on inconsequential points, such as which bank was the lender, and whether the loan was to Mr Elias's group of companies or not. However, a much more detailed challenge was made by Say-Dee in written submissions filed on 22 December 2006. Say-Dee contended that the material filed in relation to the variation of orders "raises real doubt about the reliability of the evidence given by Mr Elias ... It further fortifies the correctness of the [Court of Appeal's] decision to overturn relevant factual findings of the trial judge." Say-Dee contended that while Mrs Elias contributed to the acquisition of No 15, the

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15 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [203].

children did not, and the Elias family home was not mortgaged. The appellants have had no opportunity to deal with Say-Dee's submissions about this evidentiary material. It is accordingly difficult to accept them without question. In particular, it cannot be concluded that the sum of $241,794, which came from a joint account in the names of Mr and Mrs Elias and was used to pay some of the purchase price, did not include contributions from the daughters. What is more, because this evidentiary material was only tendered in order to obtain the amendments to the orders made on 28 November 2006, it was not before the Court of Appeal at the time of its first judgment on 15 September 2005. The position thus remains that the Court of Appeal's account of the evidence before it on the question of whether Mr Elias was in financial difficulty is incorrect. In addition, the new evidence was not before the trial judge. No more can be expected of factual findings by a trial judge than that they conform to the evidence tendered before that judge, as distinct from other evidence never tendered before him.

75 There is a further difficulty with the new evidence. In oral argument, when counsel for the respondent indicated reluctance to rely on the new material unless counsel for the appellants did not object, there was no objection. However, the respondent's written submissions of 22 December 2006 were of a different kind from the oral submissions. It cannot be inferred from the appellants' failure to object to the use of the new evidence to support inconsequential oral submissions that the appellants have waived objection to its use to support much more detailed and radical written submissions. The leave which this Court granted to the respondent to file the written submissions of 22 December 2006 related to the second appeal heard by this Court (which is against the orders of 28 November 2006). It did not relate to the first appeal (which is against the orders resulting from the reasoning in the Court of Appeal's first judgment). The leave granted was leave to file and exchange submissions on "the merits of that most recent order [that of 28 November 2006] as distinct from the consequences for that order of any success [the appellants] might enjoy in the [first] appeal." The smaller part of the respondent's submissions of 22 December 2006 is directed to the second appeal. The larger part of them is directed to the first appeal and, in particular, to the question of how the acquisition of No 15 was funded. So far as the written submissions of 22 December 2006 dealt with the question of how the purchase of No 15 was funded in relation to the correctness of the Court of Appeal's first judgment, they go beyond the leave granted.

76 In these circumstances the respondent's submissions of 22 December 2006 on how the purchase of No 15 was funded will not be considered further, for four reasons. They depart radically from the conduct of the case at trial. They go far

beyond what was canvassed in oral argument. No leave to file them was granted. The appellants have not had any opportunity to deal with them either by objection or rebuttal, since their submissions filed pursuant to leave by this Court were filed on 21 December 2006, one day before those of the respondent.

77 The other category of evidence supporting the trial judge's proposition that Mr Elias had difficulty in funding the acquisitions on his own relates to No 13. The price for No 13 was $1,680,800. As the respondent accepted, Mr Elias borrowed the money from St George Bank, giving personal and company guarantees. The need to have resort to these borrowings reveals Mr Elias's incapacity to fund the purchase by himself. Indeed if he had difficulties in funding the purchase of No 15 in 2001, there is no reason to suppose that they would not have existed in relation to No 13 in 2002.

78 *Say-Dee's financial difficulties.* A further criticism by the Court of Appeal relates to the trial judge's opinion that Say-Dee's financial difficulties made it probable that had Ms Dagher and Ms Elias been invited to participate in the acquisitions of No 13 and No 15 they would have declined. It was put thus by Tobias JA[16]:

> "I can accept [the trial judge's] conclusion that if [Ms Dagher] and/or [Ms Elias] had been asked to participate in those acquisitions, they would have declined for financial reasons. But it does not necessarily follow that his Honour was correct in finding that they were so asked: their financial difficulties may have been imparted by them to Mr Elias at different times and in different contexts. After all, it was common ground that they met up for coffee at Burwood on numerous occasions during the relevant period."

79 The relevant affidavit of Mr Elias deposed that his invitation to participate in the acquisition of No 13 was extended in a meeting in August 2002, and that it was declined by Ms Dagher in the following words:

> "George, we are not in a position to purchase any thing at this time. We currently have financial difficulties. We are having problems with Westfield our business landlord at the Miranda centre. It looks as though we could loose [sic] $350,000.00. Our business is in a lot of trouble. I am not interested in more investment. You buy it and if we can later develop

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16 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [101].

> it with 11 Deane Street, we can take a space equivalent to our space in 11 Deane Street. Otherwise if we get a good price for our property we will consider selling it. It is too much pressure on us at this point of time."

Miss Dagher responded to this part of Mr Elias's affidavit thus:

> "I ... say that the meeting referred to by Mr Elias ... never took place. I further say that the reason that Sadie Elias and I gave up our business in Miranda was that the lease on the premises had expired and we did not wish to renew it."

In cross-examination Ms Dagher made concessions which the trial judge said, very mildly, revealed her affidavit to have been "less than frank and forthcoming". He summarised them as follows[17]:

> "Say-Dee had purchased a café business at Miranda in April 1999 for $285,000, $245,000 of which was apportioned to goodwill. The rent for the premises was $193,500 and the lease was to expire on 2 August 2000.
>
> Ms Dagher conceded that the Miranda café business proved very uneconomic and that it would have been very difficult to make the business profitable if the lease had been renewed. She conceded that Say-Dee was not able to sell the goodwill of the business and that by August 2002 it had lost its investment of $285,000 in the business."

In cross-examination she said the rent was to increase "dramatically"; in re-examination she said it was close to a 10 per cent increase. The trial judge added the following further findings[18]:

> "Further, in March 2000 Ms Dagher had sold her interest in a restaurant business called 'Italian Flavour'. Ms Dagher conceded that that business had not been doing well. As at the date of sale, there were arrears of rent and interest amounting to just over $31,000.
>
> The income tax returns of Ms Dagher and Ms Elias for the years ended 30 June 2000, 2001 and 2002 disclose that neither received a substantial income in those years."

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17 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 at [49]-[50].

18 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 at [51]-[52].

The trial judge said that the evidence on which these findings were based was consistent with Mr Elias's account of the August 2002 conversation.

80 During the hearing of the appeal to this Court, counsel for Say-Dee handed up a large schedule of evidence about the supposed financial ability of Say-Dee to have acquired No 13 and No 15 had Mr Elias offered them, and its willingness to do so. That "ability" depended on the employment of the personal assets of Ms Dagher, which included two blocks of land, a 50 per cent shareholding in Pacific Islands Express Pty Ltd, a 50 per cent shareholding in Teilwar Pty Ltd and an undefined non-shareholding interest in Dagher A Family Company Pty Ltd. The purchase price of No 15 and No 20 was $2,060,000 and the purchase price of No 13 was $1,680,800. Half of that total of $3,740,800 is $1,870,400. Half the purchase price of No 13 ($1,680,800) and No 15 ($1,080,000) is $1,380,400. Ms Dagher gave evidence that she "would ... have put forward [her] own personal assets in order to fund the purchase of half the equity in" No 13 and No 15. One of the blocks of land Ms Dagher owned was valued at $485,000 in 2001 and the other one was valued at $500,000 in 2003. In November 2001 the amount owing on the loans secured by mortgage on those properties was about $172,000. There was thus some equity to support further borrowings although Ms Dagher's capacity to service them was not clear. Ms Dagher also said in evidence that so far as she was a director of companies she would have voted to utilise their resources to assist in purchasing No 13 and No 15. Mr Dagher, who was Ms Dagher's business partner and former husband, said:

> "At all times since 1998 to the present I have been prepared to exercise my rights as a director of and shareholder in each of the Companies to assist Dalida Dagher and Say-Dee Pty Limited in purchasing 50% of each of [No 13 and No 15] and would have exercised my rights to have the Companies assist in the purchase of the Properties had they been offered to Ms Dagher or Say-Dee Pty Limited."

This is a rather contrived piece of evidence, since No 15 was not for sale in the period 1998 to early 2001, and No 13 was not for sale in the period 1998 to mid 2002. The "Companies" to which he referred are the three just mentioned. There was conflicting evidence about whether Ms Dagher was a director of Pacific Islands Express Pty Ltd[19], but in 2002 it had a net worth of $52,767, while in 2001 it had a net deficiency of assets of $155,774. Mr Dagher explained this by

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19 See below at [85].

saying that the assets were recorded at book value, not market value. But the assets were certainly heavily encumbered. While in 2002 it made $208,541 after income tax, in 2001 it lost $79,327. Ms Dagher was a director of Teilwar Pty Ltd. It had substantial assets. In 2001 it made a post tax profit of $19,363 and in 2002 $264,652. Ms Dagher was not a director of Dagher A Family Company Pty Ltd. In 2001 it had assets of $10,881 and in 2002 assets of $43,758. In 2001 its post tax profit was $25,221 and in 2002 $32,877.

81 Neither Ms Dagher nor Mr Dagher explained how it was thought bona fide to be in the best interests of each of the three companies as a whole to fund Say-Dee's purchase of a half share in No 13 or No 15. Nor did they explain which assets would be realised for that purpose, or how loans were to be raised for that purpose against company assets.

82 The claim that Say-Dee was able and willing to have funded purchases of half shares of No 13 and No 15 had they been offered flies in the face of the trial judge's finding that had Say-Dee been asked to participate, it would have declined for financial reasons. The trial judge's finding involved a rejection of the evidence by Ms Dagher and Mr Dagher that they would have employed assets they controlled to acquire No 13 and No 15. The Court of Appeal accepted that finding. To challenge the Court of Appeal's acceptance of that finding would call for the point to be raised in the notice of contention, and it has not been. Further, the concurrent findings of the courts below on this point accord with the probabilities. To undertake a development involving three properties is a much bigger thing than undertaking a development involving one of them. The chance of profits might be greater, but so are the costs, the time involved, and the risks. What is more, in 2001 Ms Elias had been diagnosed with cancer, and this no doubt affected Say-Dee's financial capacity as well as its capacity to participate in a widened joint venture.

83 The position, then, is this. Ms Dagher denied a meeting, and chose to invite acceptance of her denial by an implicit claim that Say-Dee was financially healthy. In fact that claim was quite untrue. It is not made true by the fact that Ms Dagher had some equity in her plots of land or interests in three companies of varying degrees of financial strength. Neither Ms Dagher nor Ms Elias pointed to any of the "numerous occasions" on which the parties met at which they disclosed their financial difficulties, nor to any "different" context in which this disclosure might have been made. And Mr Elias was not asked to accept that the disclosure was made "at different times and in different contexts" from the time and context of the meeting he described as having taken place in August 2002.

84 *The concealed offer*. Another feature of the Court of Appeal's reasoning is a heavy reliance on the concealed offer which Mr Elias made in October 2002 to buy No 11, by representing that he was a consultant to the purchaser rather than the actual purchaser. In the admittedly lengthy part of the Court of Appeal's reasons for judgment which dealt with the extent of Say-Dee's knowledge of Mr Elias's acquisition of No 13 and No 15, this incident is mentioned in no fewer than 11 paragraphs. In particular this incident is used to support the conclusion that it was glaringly improbable that Mr Elias disclosed to Ms Dagher or Ms Elias his proposed acquisitions of No 13 and No 15.

85 The Court of Appeal made too much of the concealed offer incident. It is true that the incident did not reflect well on Mr Elias as a person, and his evidence about it did not reflect well on his credibility as a witness. His counsel said that his conduct contravened his duty as principal of Farah, the manager of the joint venture; that he did not seek to suggest there was anything about the incident which he should be proud of; and that any profit he made by buying at an undervalue would have been recoverable by Say-Dee. But, quite apart from the difficulties the parties placed themselves under by an inefficient approach to document retention, a failure to make records of vital conversations, and a somewhat sloppy approach to the terms of their affidavits, the fact is that the conduct of each side conveys a chiaroscuro impression. Mr Elias made his concealed offer and gave untrue evidence about it; there are also other difficulties and inconsistencies in his evidence. On the other hand, both the principals of Say-Dee swore inconsistent affidavits. Ms Dagher was found by the trial judge to have been "less than frank and forthcoming" about why the lease of the Miranda coffee shop was not renewed[20]. Ms Dagher in cross-examination said she had never seen the development applications which Mr Elias had made to the Council, and in her next breath, on being shown the second one, admitted that she had signed it. Ms Dagher in an affidavit said she was a director of Pacific Islands Express Pty Ltd, a statement supported by Mr Dagher in an affidavit, but in oral evidence he said she was not and she said she was not sure. Neither side could be described as wholly reliable or wholly honest, and none of the judges below did so.

86 Further, the significance of the concealed offer incident depends on the time at which it took place. By late October 2002, the parties were not on good terms. The Court of Appeal appeared to criticise the trial judge for finding that Mr Elias's motivation for making the concealed offer "was to avoid the

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20 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 at [48].

disputation which was likely to arise if he himself made an offer directly". The Court of Appeal said that this motivation was not based on any submission made at the trial or on any evidence by Mr Elias. But this did not preclude the trial judge from making the finding he made. It is obvious that disputation was likely to arise, and the Court of Appeal did not actually reverse the trial judge's finding; in any event, it was plainly correct.

87 If the Say-Dee principals are to be believed – and the Court of Appeal, who had not seen them, accepted them – much had been concealed from them, and this accounted for their distrust. If Mr Elias is to be believed – and the trial judge, who had seen him, believed him – he was in the following position: he had worked for four and a half years to bring the redevelopment of No 11 to fruition, his joint venture partner had twice refused to assist in the redevelopment of No 13 and No 15 which the Council saw as necessary, and he had no alternative but to attempt to get No 11 for himself, for their refusal to participate in a joint development meant that No 11 might not be developed at all. That is why the trial judge said that while his conduct in making the concealed offer was "certainly not excusable", it "may be understandable in the circumstances". But the state of affairs that existed in late October 2002 was not the same as that which existed on 30 June 2001, just before exchange took place on No 15, or 15 August 2002, just before exchange took place on No 13. The Court of Appeal's reasoning seems to treat the buying out of Say-Dee from No 11 as the goal of all Mr Elias's manoeuvrings over the years. It is fanciful, however, to attribute to Mr Elias, as the Court of Appeal's reasoning seems to, a long-devised grand plan to acquire No 15 and No 13 for himself and then to buy Say-Dee out of No 11.

88 The reality is that the concealed offer incident is not an intrinsically decisive or even significant event. If, as the trial judge did, it is taken into account as going to credit but it is concluded for other reasons that Mr Elias disclosed the prospective purchases and invited Say-Dee's participation, the incident is not fatal to that conclusion. If, as the Court of Appeal did, that conclusion is rejected, the incident is a factor adverse to Mr Elias among other factors, but it is scarcely decisive: the Court of Appeal's view could stand without it, depending on the merits of the other considerations which the Court of Appeal took into account.

89 *The probability that Mr Elias would ask Say-Dee to join in acquiring No 13 and No 15.* The trial judge said he found "it inherently probable that Mr Elias would have asked Ms Dagher and Ms Elias if they were interested in acquiring Nos 13 and 15." He also said that it "would have made obvious commercial sense for Mr Elias to endeavour to raise funds for the proposed

acquisition of Nos 13 and 15 from his co-investors in No 11." The Court of Appeal in effect rejected this finding on the ground that Mr Elias had strong motives of self-interest not to invite Say-Dee in. It justified that view by reference, apart from the suitability of the sites for combined development, to three matters: the failure of Mr Elias to convey to Say-Dee the view of Council that amalgamation was essential if any development application was to be approved; the rejection of the trial judge's finding that Mr Elias had difficulty in raising money; and the concealed offer. It has already been concluded that Mr Elias did convey the Council's attitude[21]; that Mr Elias did have financial difficulties[22]; and that the significance of the concealed offer has been greatly exaggerated[23]. Since the premises for the Court of Appeal's conclusion as to the improbability of Mr Elias asking Say-Dee to join in developing No 13 and No 15 fail, the conclusion itself becomes unsupported.

90 *The Court of Appeal's reasoning considered.* The Court of Appeal concluded that the trial judge's findings should be set aside as "both glaringly improbable and contrary to compelling inferences"[24]. The justifications given by the Court of Appeal for that conclusion were expounded over more than 20 pages of its reasons for judgment. Many of the matters referred to have been dealt with above: Mr Elias's failure to disclose why the acquisition of No 15 might be advantageous, subject to acquiring No 13, given the Council's attitude to the redevelopment of No 11[25]; Mr Elias's offer of an interest only in No 15 with No 20, not No 15 alone[26]; Mr Elias's failure to disclose why the acquisition of No 13 might be advantageous given the Council's attitude to the redevelopment of No 11[27]; exaggeration by the trial judge of the extent to which the evidence of Ms Dagher and Ms Elias was unsatisfactory[28]; misconstruction by the trial judge

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21 See above at [30]-[42].

22 See above at [69]-[77].

23 See above at [84]-[88].

24 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [131].

25 See above at [63]-[65].

26 See above at [65].

27 See above at [66]-[68].

28 See above at [50]-[62].

of evidence taken by the trial judge to suggest that Mr Elias was finding difficulty in raising money to buy No 13 and No 15 and in consequence the absence of any evidence to support that conclusion[29]; and the acceptance by the trial judge of Mr Elias's essential truthfulness as a witness being contradicted by the inconsistency of some of his findings with that evidence[30].

91 Then the Court of Appeal said that it was to the financial advantage of Mr Elias to keep secret from Say-Dee the fact that he or his interests had acquired No 13 and No 15 to enable them to be amalgamated with No 11 in order to meet the Council's requirement for a joint amalgamation designed to achieve the maximum development potential of No 11. It may be conceded that, depending on Mr Elias's perception of interest rates, other development costs, the extent to which a development application was opposed, future property values and other matters, it is possible that he perceived it as potentially advantageous to Farah for him to keep secret from Say-Dee the acquisition of No 13 and No 15. To conclude that the acquisition of No 13 and No 15 had been effected "to enable them to be amalgamated with No 11" is to beg the question.

92 The Court of Appeal then set out eight factual matters by way of support for the conclusion just stated about the purpose of acquiring No 13 and No 15[31].

93 The first two were put thus[32]:

> "Such a conclusion is supported firstly, by the critical finding of the primary judge that the Council's consistent attitude that No 11 was too narrow to maximise its development potential and that it should be amalgamated with adjoining properties was not, in terms, conveyed to Say-Dee. Secondly, there was no finding by his Honour that such

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29 See above at [69]-[77].

30 See above at [48]-[49].

31 Counsel for the appellants attacked these findings in part by reference to Mr Elias's evidence about what he said in disclosing the possible acquisition of No 13 and No 15. This is not a very useful course, since the very question under consideration is whether the trial judge's finding of disclosure based on that evidence should be restored.

32 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [122].

> information was conveyed either in effect or in substance: nor should there have been."

However, it was concluded above that in effect or in substance the attitude of the Council was conveyed by the Notice of Determination enclosed with the 16 July 2001 letter.

94 The third factual matter was that the principals of Say-Dee "were completely inexperienced in the development of real estate whereas Mr Elias was highly experienced"[33]. This exaggerates the position, both in relation to Ms Dagher and Ms Elias and in relation to Mr Elias. One of Ms Dagher's companies was developing real estate by building a hotel. She herself had bought real estate for development. So had Say-Dee. And both Ms Dagher and Ms Elias were highly experienced in business. Further, their own affidavits reveal an appreciation of the idea that the larger the site the more likely it was that a large development would be approved[34]. As for Mr Elias, while he was certainly an experienced property developer, and some general problems in relation to property development were explored in his cross-examination, the precise quality of his experience is unclear. By itself his experience in property development does not justify the conclusion that the trial judge's findings on disclosure of the acquisitions should be reversed.

95 The fourth factual matter was[35]:

> "[I]n cross-examination Mr Elias accepted that the whole purpose of redevelopment was to maximise the potential development of property ..., that his own view accorded with that of the Council that No 11 was too narrow to maximise its development potential ... and that that potential could only be realised if it was amalgamated with the adjoining properties."

These are neutral factors.

96 The fifth factual matter was[36]: "Mr Elias withdrew the second development application with respect to No 11 12 days after he had caused

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33 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [122].

34 See above at [34].

35 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [122].

Lesmint to enter into a contract to purchase No 13." This is not significant: as the Court of Appeal said at a later point, "it was likely that [the second development application] would have been rejected if it had been pressed"[37]. Indeed the Council had already revealed its unsympathetic attitude on 12 March 2002.

97 The sixth and seventh factual matters were put thus[38]:

> "Sixthly, the purpose of [withdrawing the second development application] was that it was '*a lot better*' (and made commonsense as [Mr Elias] already owned No 15) to purchase No 13 and amalgamate the three sites ... Seventhly, at the time of the Council's first report referring to the necessity to amalgamate No 11 with the adjoining properties, he accepted that to minimise complications he should explore the possibility of acquiring the adjoining properties in order to get the development of No 11 through Council with the least resistance." (emphasis in original judgment)

There is nothing sinister or determinative in the evidence summarised in relation to the sixth and seventh factors: they are neutral on the question of whether Mr Elias decided to develop the three sites together without advising Say-Dee, or whether he only decided to do so after offering Say-Dee a chance to participate and receiving a rejection.

98 The eighth factual matter concerns the concealed offer. The exaggerated significance attached by the Court of Appeal to that incident has been considered already[39].

99 No doubt it is possible to take a different view from that taken by the trial judge in relation to the question whether Farah offered Say-Dee participation in a development involving No 13 and No 15. The Court of Appeal's view is a view which a trier of fact might have taken. However, the question is whether the Court of Appeal was right to reverse the different view which the trial judge

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36 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [122].

37 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [123].

38 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [122].

39 See above at [84]-[88].

took. The reasoning of the Court of Appeal – erroneous in parts, exaggerated in other parts, flawed in other ways – does not demonstrate that the trial judge's view, which was, in significant part, demeanour-based, was either glaringly improbable or contrary to compelling inferences. Accordingly the Court of Appeal's finding must be rejected and the trial judge's finding restored.

Did Mrs Elias and her daughters have actual knowledge of Say-Dee's rights?

100 Say-Dee contended that the Court of Appeal should have inferred that Mrs Elias and her daughters had actual knowledge of Farah's breach of fiduciary duty. Say-Dee argued that any inference available on the evidence suggesting that Mrs Elias and her daughters had actual knowledge could be drawn the more strongly because of their failure to give evidence denying it[40]. The difficulty in the reasoning is that there is no evidence supporting an inference that Mrs Elias and her daughters had actual knowledge. The respondent also submitted that the daughters, aged 15 and 17, were old enough to discuss their father's conduct, and this supported a presumption that what he knew they knew. This reasoning is invalid.

Scope of Farah's fiduciary duty

101 The trial judge decided that Farah was under no fiduciary duty to disclose to Say-Dee the opportunity to acquire No 13 and No 15, and under no fiduciary inhibition from acquiring them for itself. The trial judge's reasoning proceeded in three stages:

(a) The scope of Farah's fiduciary duty to Say-Dee was defined by the obligations it assumed in its contract with Say-Dee, the terms of which are recorded in the letter of 20 April 1998[41].

(b) Those contractual obligations were limited to the acquisition and development of No 11.

(c) Those contractual obligations, and hence Farah's fiduciary obligations, did not extend to any duty to make available to Say-Dee an opportunity to invest in development projects other than developing No 11, such as "a

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40 *Jones v Dunkel* (1959) 101 CLR 298.

41 See above at [11].

possible development of No 13, or a possible development of No 15, or a possible amalgamated development of Nos 13 and 15, or a possible amalgamated development of Nos 11, 13 and 15"[42].

102 The Court of Appeal appeared to accept proposition (a). However, the Court of Appeal disagreed with propositions (b) and (c). It said that the agreement recorded in the letter of 20 April 1998 was "very bare in its terms and certainly did not set out in any detail or at all the fiduciary obligations which the parties ... undertook"[43]. That is true. But the Court of Appeal's conclusion was that the purpose of the joint venture was to redevelop No 11 "in such a manner and to such an extent as would, with the Council's approval, maximise the profit which might be generated therefrom"[44]. The difficulty in this conclusion is that a purpose of that kind is unsupported by anything in the letter of 20 April 1998 or the negotiations preceding it. The letter mentions sums of money sufficient to buy "the above property", ie No 11; it mentions the borrowing of money on the security of "the subject property", ie No 11; but it says nothing about the much larger sums of money which would be needed to buy and develop land adjacent to No 11. For that reason the conclusion of the trial judge in relation to proposition (b) is to be preferred.

103 Contrary to proposition (c) in the trial judge's reasoning, Farah had a duty to disclose to Say-Dee the information that the Council saw amalgamation of the redevelopment of No 11 with adjoining properties as necessary in order to maximise its development potential, and the information that No 15 and No 20, and later No 13, were available for purchase. The information about the Council's attitude came to Farah in its fiduciary capacity; and while the other items of information did not, they represented opportunities which it was not open to Farah to exploit, consistently with its fiduciary duty, unless Say-Dee gave its informed consent to a contrary course. That is because to exploit those opportunities without informed consent would be to place Farah in a position of conflict between its self-interest and its duty to Say-Dee in relation to No 11.

104 On occasion the appellants pressed an argument that even if there was an obligation of disclosure in relation to the opportunity to buy No 13, there was no such obligation in relation to No 15 on the basis that when the opportunity to buy

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42 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 at [76].

43 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [157].

44 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [140].

it arose in 2001, No 13 was not available for redevelopment at that time or any foreseeable time. That argument is not sound. In 2001 the chance of a redevelopment of No 11 and No 15 together was lower than it became when No 13 came onto the market in 2002, but there was at least a theoretical possibility of the latter event, and the opportunity was still one which Farah had a duty to disclose to Say-Dee. Indeed the appellants, who supported the trial judge's conclusion that the joint venture was narrow in scope, conceded that Farah was obliged to disclose information which came into its possession in its capacity as manager of the joint venture (for example, the information about the Council's attitude), and also to disclose "information which affects the viability of development in respect of" No 11 (for example, the information about the opportunities to buy No 13 and No 15). If that concession were not correct, Farah would be in a position of conflict of interest and duty in negotiating with Say-Dee about how No 11 and No 13 could be developed together.

105 Hence, even on the narrower approach of the trial judge, Farah had an obligation to disclose information about the Council's view and the opportunities to buy. The same obligation, of course, would exist on the wider approach of the Court of Appeal.

Did Farah fulfil its obligations of disclosure?

106 The Court of Appeal's factual findings led it to the conclusion that Farah breached its fiduciary duties because it used "valuable information" acquired from the Council about a method of exploiting the development potential of No 11: this led it into, and resulted in it obtaining a benefit by, acquiring No 13 and No 15, and this placed it in a position of conflict between its self-interest as purchaser of No 13 and No 15 and its duty to Say-Dee. But it was concluded above that the Court of Appeal's factual findings must be reversed[45]. The reversal of those findings means that Farah fulfilled its obligation of disclosure about the Council's attitude. On those findings, there is also no doubt that Say-Dee gave consent to what Mr Elias did. The question is whether the consent which Say-Dee gave to Farah pursuing the opportunities to buy No 13 and No 15 on behalf of Mr Elias's interests was sufficiently informed. Say-Dee submitted that it had not been given an opportunity to give informed consent to a development of aggregated plots of land including No 11.

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45 See above at [30]-[99].

107 It is true that Farah's disclosures were at different times and in different ways[46]. There was no single occasion on which Mr Elias explained all he knew about the Council's attitudes and why the acquisition of adjoining properties was advantageous in the light of that attitude. But the sufficiency of disclosure can depend on the sophistication and intelligence of the persons to whom disclosure must be made. In their joint judgment in *Maguire v Makaronis*[47], Brennan CJ, Gaudron, McHugh and Gummow JJ said:

> "What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given."

108 The principals of Say-Dee had much business experience and intelligence. The remarks they made in conversations with Mr Elias, both as recorded by themselves and as recorded by him, showed them to be shrewd and astute. As counsel for the appellants said, they were not "babes in the woods". The glaring improbability in this case is that the officers of the respondent would not readily have deduced, from their own experience, what they accepted Mr Elias did tell them, and the prolonged course of the dealings with the Council, that the acquisition and amalgamation of adjoining parcels of land would be the best way to find favour with the Council for a development of the kind which the officers of the respondent claimed they wished to pursue. In those circumstances the disclosure of the Council's attitude by sending the Notice of Determination and the disclosure of the opportunities to buy No 15 and No 20 in 2001, and also No 13 in 2002, were sufficient disclosures, and the consent which Say-Dee expressed was informed consent. Say-Dee's indication of unwillingness to participate jointly with Farah in a larger redevelopment is thus not a barrier to Farah proceeding on its own behalf. In argument the question arose whether, if

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46 While Farah's disclosure of the intended acquisition of No 15 took place before the exchange of contracts on 30 June 2001, its disclosure of the Council's attitude to an amalgamated development took place after that date, when the letter of 16 July 2001 was received. Say-Dee did not submit that this diminished the efficacy of disclosure, and it does not, because the named purchasers on the contracts for the sale of the units in No 15 were the members of the Elias family "or nominee": had Say-Dee accepted Mr Elias's invitation, or informed him after receipt of the 16 July 2001 letter that it wished to accept the invitation, the family members could have nominated the Say-Dee/Farah partnership as transferees.

47 (1997) 188 CLR 449 at 466 (footnote omitted).

the only profitable way of redeveloping No 11 was as part of a joint redevelopment with adjoining land, Farah was debarred from proceeding even if Say-Dee gave its informed consent. The question does not arise, because it was not established that the redevelopment of No 11 by itself would not be profitable. Another possible question is whether, if Say-Dee, after being given full information, refused consent, Farah was debarred from proceeding. That question too does not arise, because it did give informed consent.

109 Having reached the conclusion that Farah was under no fiduciary duty to disclose to Say-Dee the opportunity to acquire No 13 and No 15 and under no fiduciary inhibition against acquiring them for itself, the trial judge did not find it necessary to go further. It was, however, necessary for the Court of Appeal to go further. Since the further steps in its reasoning were, with respect, flawed, it is desirable to examine that reasoning, on the assumption (contrary to the conclusions just reached) that by reason of Mr Elias's conduct Farah was in breach of fiduciary duty to Say-Dee.

Liability of Mrs Elias and her daughters under the first limb of *Barnes v Addy*

110 There was no dispute about the fact that, subject to the operation of the Real Property Act, s 42[48], if Farah was in breach of its fiduciary duty to Say-Dee, Mr Elias was liable, being in the same position, and that Lesmint was also liable, since it was Mr Elias's alter ego. Hence the imposition of constructive trusts over the items of property in the names of Mr Elias and Lesmint was an available remedy. The position was much more controversial in relation to the three units in No 15 in the names of Mrs Elias and her two daughters. The Court of Appeal found them liable under the "first limb" of *Barnes v Addy*, and also on a restitutionary basis. The respondent also argued for other bases of liability.

111 *The "rule in Barnes v Addy" stated.* In *Barnes v Addy*[49] Lord Selborne LC said:

> "Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees

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48 Discussed below at [190]-[198].

49 (1874) LR 9 Ch App 244 at 251-252.

> *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

The form of liability referred to in the first part of the last sentence is often called the "first limb" of *Barnes v Addy*, and the form of liability referred to in the second part of the last sentence is often called the "second limb". In *Barnes v Addy* itself, the Court of Appeal in Chancery (Lord Selborne LC, James and Mellish LJJ) upheld the decision of Wickens VC[50] that two solicitors, Mr Preston and Mr Duffield, had not received any trust property and had no knowledge of any dishonest and fraudulent design to make them parties to the breach of trust by the sole trustee. It was insufficient that Mr Preston had been alive to the danger of the course of appointing a sole trustee and that Mr Duffield had prepared the appointment of that trustee.

112 It has become common to describe the first limb as involving "knowing receipt" and the second limb as involving "knowing assistance". Lord Selborne LC did not use the expression "knowing receipt". It seems to have been employed first in 1966 by the editors of Snell's *Principles of Equity*[51]. Even then, it was only introduced by inserting under the pre-existing heading "Receipt of Trust Property by Stranger to Trust" a new sub-heading "Knowing Receipt or Dealing". However, in 1972 Brightman J adopted the expression in *Karak Rubber Co Ltd v Burden (No 2)*[52]. He said that the labels "knowing receipt or dealing" and "knowing assistance" employed by Snell were "an admirable shorthand description of their different natures". Those labels have been commonly used since then. In contrast, Lord Selborne LC's expression was "receive and become chargeable"[53]. Persons who receive trust property become chargeable if it is established that they received it with notice of the trust.

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50 *Barnes v Addy* (1873) 28 LT (NS) 398.

51 Megarry and Baker (eds), *Snell's Principles of Equity*, 26th ed (1966) at 202; cf 25th ed (same editors) (1960) at 173.

52 [1972] 1 WLR 602 at 632-633; [1972] 1 All ER 1210 at 1234-1235.

53 *Barnes v Addy* (1874) LR 9 Ch App 244 at 251.

113 In recent times it has been assumed, but rarely if at all decided, that the first limb applies not only to persons dealing with trustees, but also to persons dealing with at least some other types of fiduciary[54]. Since the appellants did not contend that the first limb was incapable of applying on the ground that neither Farah nor Mr Elias was a trustee, the correctness of this assumption need not be examined.

114 *The Court of Appeal's reasoning on the first limb.* The Court of Appeal made the following finding[55]:

> "[T]he Elias family members and Lesmint were ... complicit in the acquisition of Nos 15 and 13 respectively in that they were not bona fide purchasers without notice and for value of the fruits of the valuable intelligence obtained by Mr Elias with respect to the Council's intransigent attitude to the redevelopment of No 11 of which, through Mr Elias as their agent, they took advantage by purchasing those properties."

The Court of Appeal, which attributed this conclusion to a submission by Say-Dee, held that this meant that the first limb of *Barnes v Addy* applied. The Court of Appeal found that "neither the daughters (certainly) nor Mrs Elias (probably) were purchasers of their units in No 15 for value"[56]. At the time when contracts were exchanged on the units in No 15, one daughter was aged 15 and the other 17. The Court of Appeal said that Mrs Elias and her daughters "may have been unaware" of the breach of fiduciary duty it found had been committed, and that there was "no evidence" that they had "actual knowledge that their respective interests in No 15 had been acquired on their behalf by Mr Elias in breach of his fiduciary duties to Say-Dee"[57]. However, the Court of Appeal found[58]:

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54 For example, in *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 at 459-460, Jacobs P assumed that if property were received by a stranger from a fiduciary in breach of fiduciary duty, the first limb applied. See also *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700 per Hoffmann LJ.

55 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [175].

56 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [213]. That conclusion is examined and rejected elsewhere at [72]-[75] and [157].

57 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [210].

58 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [215].

> "[I]n arranging for three of the units in No 15 to be purchased in the names of each of Mrs Elias and their two daughters, Mr Elias was acting as their agent. It follows that his knowledge of the breaches of his and/or Farah's fiduciary duties to Say-Dee is thus imputed to the family members for whom he was transacting those purchases. Each therefore had constructive knowledge of their husband's/father's wrongful conduct. The first or recipient liability limb of *Barnes v Addy* was therefore satisfied."

The Court of Appeal went on to state an alternative basis for granting relief against Mrs Elias and her daughters based on unjust enrichment. But it made no finding that the second limb of *Barnes v Addy* was satisfied.

115 It is necessary to reject the Court of Appeal's conclusion that the first limb of *Barnes v Addy* applied for two reasons: there was no relevant receipt of property, and there was no relevant notice.

116 *Non-application of the first limb: no receipt of property to which a fiduciary obligation attached.* Did the Court of Appeal establish that Mrs Elias and her daughters received property to which a fiduciary obligation attached? The breach of fiduciary duty by Farah found by the Court of Appeal lay in Farah's procurement of the acquisition by Mrs Elias and her daughters of their units in No 15 while not disclosing to Say-Dee why the acquisition of No 15 was advantageous in view of Council's refusal to permit the redevelopment of No 11 without adjoining properties being involved, and hence failing to get Say-Dee's informed consent to the acquisition. On the Court of Appeal's earlier findings, the fiduciary duty related to an item of information which Mr Elias learned from the Council reports. The relevance of the information was that[59]:

> "[T]he Council reports were conveying or telegraphing a particular piece of information with respect to the Council's future attitude to any proposed development if No 11 was amalgamated with the adjoining properties, namely, that subject to achieving a positive urban design outcome, it would most likely be approved or, at least, recommended for approval."

The Court of Appeal called this an "additional dimension", "valuable information", vital intelligence" and "part of the intellectual stock-in-trade of the original joint venture if it needed to be wound up". The expression "vital intelligence" suggests, inaptly, the mystery and secrecy of a clandestine world far

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59 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [60].

removed from the day to day dealings and easily ascertainable attitudes of planning bureaucrats. The accuracy of the expression "intellectual stock-in-trade" was specifically advocated by Say-Dee, but in truth it is misleading. The expression "stock-in-trade" usually refers to the goods kept on sale by a dealer, shopkeeper or peddler. It can also refer to a workman's tools, appliances or apparatus. A more figurative meaning is the abilities or resources characteristic of or belonging to a particular group. The information which the Court of Appeal considered Mr Elias had learned falls into none of these categories.

117 For the following reasons there was no receipt of property within the meaning of the first limb of *Barnes v Addy*. The information which the Court of Appeal thought that Mr Elias ought to have disclosed was not confidential. So far as that information was in the Notice of Determination, that document was available for public inspection. The Notice of Determination was a document which had to be notified to the applicant and various other persons pursuant to s 81(1) of the *Environmental Planning and Assessment Act* 1979 (NSW). Clause 266 of the *Environmental Planning and Assessment Regulation* 2000 (NSW) created an obligation on the Council to retain the Notice of Determination. Clause 268(1)(b) imposed an obligation on the Council to make the Notice of Determination available for inspection by the public. So far as the relevant information was in the report of 3 April 2001 by the Council's Group Manager, Environmental and Community Services, to the Building and Development Committee, which, inter alia, summarised the letter of 8 March 2001 from the Department of Urban Affairs and Planning, it was reported and discussed at the meeting of that Committee on 3 April 2001. That meeting was open to the public, and the minutes were available for inspection at the Council's Public Library[60]. The same applies to the Group Manager's report of 20 June 2000 and the Building and Development Committee meeting on 26 June 2000[61]. An inquirer at the Council about the development potential of No 11 would be informed of the planning instruments affecting the development potential of No 11. A persistent inquirer, particularly one with a genuine commercial interest, would no doubt be able to obtain an interview with an informed Council officer. In *Consul Development Pty Ltd v DPC Estates Pty Ltd*[62] Stephen J denied that knowledge of property development applications, "the

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60 The documents referred to are described at [15].

61 See above at [13].

62 (1975) 132 CLR 373 at 414.

essence of which was wholly in the public domain", was property capable of being owned by anyone.

118 Even if the information were confidential, that would not make it property for the purposes of the first limb of *Barnes v Addy*. The protection given by equitable doctrines and remedies causes confidential information sometimes to be described as having a proprietary character, "not because property is the basis upon which that protection is given, but because of the effect of that protection"[63]. Certain types of confidential information share characteristics with standard instances of property. Thus trade secrets may be transferred, held in trust and charged[64]. However, the information involved in this case is not a trade secret.

119 Further, the evidence does not show that any attempt was made to transfer the relevant information to Mrs Elias and her daughters. It shows only that what they got was property the availability of which was ascertained by Mr Elias. It is erroneous to speak of the acquisition of the three units in No 15 by Mr Elias's family as receipt of trust property, because the three units cannot be described as trust property. Nor are they the traceable proceeds of trust property, because the "information cannot be traced into" the units[65].

120 Counsel for the respondent accepted that under received doctrine, the expression "trust property" does not include information, whether confidential or not[66]. He relied on a brief passage in *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd*[67] tentatively suggesting that "the position of a third party obtaining from a fiduciary advantages in the form of information and assistance should be analogous to that of a third party obtaining property from a fiduciary."

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63 *Smith Kline & French Laboratories (Aust) Ltd v Secretary to Department of Community Services and Health* (1990) 22 FCR 73 at 121 per Gummow J; see also *Breen v Williams* (1996) 186 CLR 71 at 129 per Gummow J.

64 *Smith Kline & French Laboratories (Aust) Ltd v Secretary to Department of Community Services and Health* (1990) 22 FCR 73 at 121 per Gummow J.

65 *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652 at 671.

66 In this respect the view of Jacobs P in *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 at 460 stands in isolation.

67 [1974] 1 NSWLR 443 at 470 per Hutley JA.

However, Hutley JA proceeded to quote Lord Selborne LC's speech in *Barnes v Addy* and to conclude that there was liability under the second limb of *Barnes v Addy*. Counsel for the respondent was not able to point to any case specifically decided on the first limb of *Barnes v Addy* which had involved a breach of fiduciary duty as distinct from a breach of trust in relation to property other than trust property. Counsel for the respondent frankly acknowledged that the respondent could not bring the case within the first limb of *Barnes v Addy* unless the law were changed. He submitted that if it were not changed to render the members of Mr Elias's family liable, it would be easy for persons who had misappropriated trust property or wrongly exploited opportunities in breach of fiduciary duty to evade equitable relief by the "device" of placing the gains in the names of "close family members or other third parties (including corporations)." He cited *Attorney-General for Hong Kong v Reid* where the Privy Council said[68]: "[P]roperty which a trustee obtains by use of knowledge acquired as trustee becomes trust property." But it does not follow under the law as it stands that the information which third parties obtain from a fiduciary is trust property, or that land bought by using that information is trust property, and indeed counsel only relied on the passage as "an indication of the possible extension of the first limb" to treat property acquired as the fruit of information misused by a fiduciary as trust property.

121 The change in the law in Australia for which the respondent contended was part of a more comprehensive submission that the law conform to the following three propositions.

> "(i) A third party who has directly received a financial benefit as a result of a non-trivial breach of trust or fiduciary duty should be accountable for that benefit to the fiduciary of the trust/duty if he/she knew or had reason to know of the essential facts which constituted the breach.
>
> (ii) A third party who receives such a benefit without knowledge of the essential facts constituting the breach should still be accountable unless, and to the extent that, a relevant defence can be established by them – such as bona fide purchaser for value without notice, or change of position.

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68 [1994] 1 AC 324 at 332.

(iii) A third party who has not received such a benefit but has participated in a significant way in a significant breach of duty/trust with actual knowledge of the essential facts which constituted the breach should be liable to the beneficiary of the duty/trust for the consequences of the breach."

Paragraph (i) is a modification of the first limb of *Barnes v Addy*, par (ii) reflects a theory of recovery based on unjust enrichment adopted by the Court of Appeal[69] and par (iii) is a modification of the second limb of *Barnes v Addy*[70]. Here it is only necessary to discuss par (i). Paragraph (i) has some similarities with the first of the Court of Appeal's findings[71] about the first limb of *Barnes v Addy*. However, to substitute par (i) for the first limb of *Barnes v Addy* would be a radical change: it abandons the requirement for receipt of property, and it alters the notice test. To introduce a change of that kind would call for very careful examination of the possible consequences. That examination was not conducted in argument. In any event, in view of the availability of relief under the second limb of *Barnes v Addy*, and the protection of confidential information under the general law, no sufficient reason was demonstrated for any change to legal doctrine in the manner advocated by the respondent.

122 Even if such changes were made, they would not assist the respondent: Mrs Elias and her daughters would fall outside par (i) of the respondent's proposal. This is because even if Farah is assumed to have been in breach of fiduciary duty, Mrs Elias and her daughters have not been shown to have known, or to have had reason to know, the essential facts which constituted that breach by Farah.

123 *Non-application of the first limb: no agency and no notice.* The Court of Appeal did not find that Mrs Elias and her daughters had express notice of any breach of duty by Farah or Mr Elias. Above a contention advanced by the respondent that the Court of Appeal ought to have found express notice was rejected[72]. But the Court of Appeal did find that because Mr Elias was acting as agent for Mrs Elias and her daughters, they had "constructive knowledge" of his

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69 Discussed below at [130]-[158].

70 Discussed below at [159]-[186].

71 Quoted above at [114].

72 See above at [100].

breach. The respondent preferred to describe the relevant notice as "imputed actual knowledge". The Court of Appeal's conclusion was wrong, and this is an additional reason why the first limb of *Barnes v Addy* does not apply.

124 The proposition that Mr Elias was acting as the agent for his wife and daughters is highly questionable. The respondent submitted:

> "The Appellants do not dispute that Mr Elias was relevantly acting as the agent of Mrs Elias and her daughters in their acquisition of the units at No 15 ... They implicitly concede as much in ground 6 of the Notice of Appeal[73]. This concession is correctly made in light of the cross-examination of Mr Elias, in which he accepted that he had done all the negotiations with the vendor, whom he had sought out of his own initiative, and none of the 4th-6th Appellants dealt with the vendor at all. Further, neither Mrs Elias nor either of the daughters gave evidence."

The second sentence is wrong. It does not follow from the proposition stated in the third sentence that Mr Elias was an agent for Mrs Elias and her daughters. In relation to the fourth sentence, the respondent submitted that it could be inferred from Mr Elias's testimony that he had "a lot of discussion" with his wife about the purchase of the units in No 15 that his conduct was discussed; in fact there was no cross-examination of Mr Elias about the discussion, this inference does not arise, and hence the failure of Mrs Elias to give evidence does not cause it to strengthen pursuant to the doctrine associated with *Jones v Dunkel*[74].

125 However, the submissions of the appellants did accept that to some extent Mr Elias was acting as an agent for his wife and daughters. The appellants argued that Mr Elias obtained the relevant information outside the scope of his agency and before it arose. It was not gained in the course of any transaction on

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73 Ground 6 was as follows:

> "The Court of Appeal was in error ... in concluding that because the Second Appellant acted as agent for the Fourth, Fifth and Sixth Appellants in negotiating the contracts under which they severally purchased units in 15 Deane Street, therefore they were bound by his own knowledge of his own breaches of fiduciary duty to the Respondent arising under an entirely different legal relationship, ie the Say-Dee-Farah Constructions partnership."

74 (1959) 101 CLR 298.

which he was employed on behalf of his wife and daughters[75]. Certainly there is no evidence that the information which Mr Elias knew about what is assumed to be his breach of duty came into existence after any agency he entered for Mrs Elias and her daughters. The respondent did not dispute this. For all the evidence shows, Mr Elias conducted negotiations with the vendors of No 15 and No 20 and settled the terms of the purchase before seeking the cooperation of his wife to mortgage the family home. The respondent did submit that it was "that very knowledge which led to the acquisition of units by Mr Elias on behalf of Mrs Elias and her daughters", and that to treat it as arising outside the agency

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75 The appellants relied on s 164(1)(b) of the *Conveyancing Act* 1919 (NSW), which provides:

> "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless:
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> ...
>
> (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser's counsel as such, or of the purchaser's solicitor or other agent as such, or would have come to the knowledge of the purchaser's solicitor or other agent as such, if such searches, inquiries, and inspections had been made as ought reasonably to have been made by the solicitor or other agent."

However, this provision does not apply in relation to Torrens land. There is an assumption to the contrary in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73 at 92-93 per Windeyer J, but the point was not argued.

Section 6(1) provides:

> "Except as hereinafter provided, this Act, so far as inconsistent with the *Real Property Act 1900*, shall not apply to lands, whether freehold or leasehold, which are under the provisions of that Act."

Where the *Conveyancing Act* makes a contrary provision, it does so explicitly, for example ss 19(3), 19A(3), 52, 69, 90, 116, 134(9), 147(2), 175(3), 177(10), 181(2), 181A(4), 181B(3), 184(4), 191 and 215. There is no contrary provision relating to s 164. Accordingly, s 164(1)(b) does not assist the appellants.

would be artificial and inequitable. This submission is consistent with the respondent's submission that the inquiry is "simply to ask whether the circumstances are such that equity should impute the knowledge of Mr Elias" to his family. One problem with this suggested inquiry in relation to the first limb of *Barnes v Addy* is that to say that Mr Elias acquired the units "on behalf of Mrs Elias and her daughters" is to assume something neither proved nor found by the courts below – for Mr Elias did not acquire those three units, his family did. Another problem is that the suggested inquiry in relation to the first limb of *Barnes v Addy* is not necessarily likely to prevent inequitable results.

126 The respondent relied on cases holding that where the task assigned to an agent is the task of making appropriate disclosures, for example, the task assigned by a person seeking insurance to an insurance broker, it is not necessary or appropriate to distinguish between information "which the agent has acquired in the course of executing the agency and information acquired otherwise"[76]. These cases have nothing to do with the present problem, because even if Mr Elias was an agent, his principals did not assign to him any task of making appropriate disclosures[77].

127 The respondent also relied on statements in a case in which one question was whether the failure by one party to object to a judge hearing a case amounted to waiver where the party did not, but its counsel did, know of possible grounds to object, even though counsel gained that knowledge in another capacity[78]. That case turned on the special nature of counsel's role in the conduct of litigation: "[W]hen a characterisation of the legal nature and quality of counsel's acts and omissions depends upon knowledge of some fact or circumstance, then counsel's clients are affected by that knowledge." Those circumstances are very remote from the present. Hoffmann LJ said in *El Ajou v Dollar Land Holdings plc*[79] that

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76 *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (In Liq)* (2003) 214 CLR 514 at 548 [87] per Gummow and Hayne JJ, approving *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679 at 697 [89] per Handley JA.

77 See *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 702-703 per Hoffmann LJ.

78 *Smits v Roach* (2006) 80 ALJR 1309 at 1320 [47] per Gleeson CJ, Heydon and Crennan JJ; 228 ALR 262 at 276.

79 [1994] 2 All ER 685 at 703-704.

he knew of "no authority for the proposition that in the absence of any duty on the part of the principal to investigate, information which was received by an agent otherwise than as agent can be imputed to the principal simply on the ground that the agent owed to his principal a duty to disclose it." Even if Mr Elias owed a duty to his family to disclose his conduct, they had no duty to investigate it.

128 The respondent also argued that there was no doubt that Lesmint was fixed with Mr Elias's knowledge, and it would be anomalous if the family were not fixed with it as well. But they are not in the same position. Lesmint is liable as the alter ego of Mr Elias: his mind is its mind[80]. The members of the family are separate individuals. It has not been shown that they are mere ciphers for Mr Elias. The respondent submitted that the family had "entrusted [Mr Elias] with effectively the same control over their affairs" as he had over the affairs of Lesmint or any other company he controlled, but there is no evidence that this is so. The respondent submitted that the wife and daughters had put Mr Elias "in the position of sole control over their affairs in respect of all of [these] matters." In fact that submission has not been established. Each case will depend on its own facts. Here, if Lesmint were employed as a device, the device would have failed had other obstacles to the respondent's success not existed. In each case it remains necessary for plaintiffs claiming against third parties dealing with errant fiduciaries to establish the elements of whatever cause of action is relied on. It is not the law that a universal regime of absolute liability applies.

129 The consequence is that Mrs Elias and her daughters had no notice of any breach of duty by Mr Elias.

Restitutionary liability

130 *The Court of Appeal's decision.* The Court of Appeal held that even if Mrs Elias and her daughters had no notice of the breach of fiduciary duty, a constructive trust should be imposed on the units in No 15 by reason of liability "for restitution based on the unjust enrichment of Mrs Elias and the daughters at the expense of Say-Dee"[81]. It said that they had no defence because they were not purchasers for value and had not changed their position. The Court of Appeal considered that that type of liability, which did not depend on the

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80 See *Hamilton v Whitehead* (1988) 166 CLR 121 at 127.

81 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [217].

plaintiff proving that the defendant had any notice, was "advocated by Professor Birks"[82] and favoured by Hansen J[83]. The Court of Appeal said that "in the absence of any High Court authority to the contrary", it saw "no reason why the proverbial bullet should not be bitten by this Court in favour of the Birks/Hansen approach"[84]. Hence the Court of Appeal held that Mrs Elias and her children held their units on constructive trust for the joint venture[85].

131 It was a grave error for the Court of Appeal to have taken this step. That is so for two reasons: it was very unjust and it has caused great confusion.

132 *Injustice to the parties.* Although the matter is not wholly clear, and although the Court of Appeal found Mrs Elias and her daughters liable on another ground, so that the restitutionary basis was not essential to the outcome, the reasoning appears to be offered not as supposedly helpful obiter dicta but as an independent ground of decision. It was unjust to the appellants to decide the respondent's appeal to the Court of Appeal on an independent ground which was never pleaded by the respondent, never argued by the respondent before the trial judge, and never argued by the respondent in the Court of Appeal. The authorities and writings relied on by the Court of Appeal were not put to the Court of Appeal for that purpose. The relevant part of the Court of Appeal's judgment would have come as a complete surprise to all parties. The Court of Appeal said that the question of restitution-based liability "was not specifically exposed in any detail by the parties but nevertheless warrants consideration as it bears upon the true foundation of the first limb of *Barnes v Addy* upon which Say-Dee did clearly rely"[86]. The true position, as counsel for the respondent accepted with commendable candour and straightforwardness during argument on the special leave application, is that the question was not discussed at all – specifically or non-specifically, in detail or not in detail. It is conceivable that the appellants might have wished to defeat restitution-based liability, not merely

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82 No particular book, chapter or article by that author was referred to.

83 A reference to *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16 at 78-105.

84 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [232].

85 The approach taken by the Court is similar to that stated in par (ii) of the respondent's proposed modification of *Barnes v Addy*, quoted above at [121].

86 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [216].

by advancing argument about its want of intellectual merit and its inconsistency with Australian authority, but also by calling evidence to show, for example, a change of position.

133 And the relevant part of the Court of Appeal's judgment was also unjust to the respondent, which might have wished to say something against deciding the case on that basis, or in that particular way. The judgment, which states no reason why restitutionary liability should be recognised, conveys the impression that the result was so foreordained and so inevitably correct that it was not necessary to seek any assistance, however modest, from the respondent. For its part, the respondent, which has its own good reasons for being aggrieved about the step which the Court of Appeal took, offered only the most lukewarm of support for the reasoning in this Court, and then only "very much as a subsidiary argument". The Court of Appeal's conduct contrasts with that of Hansen J in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*[87]: although he said he favoured strict liability based on restitution, he declined to decide the point in issue in view of the fact that the plaintiff in that case had not conducted its case on that basis.

134 *Resultant confusion.* The second reason why the Court of Appeal's treatment of this subject was a grave error is the confusion it is causing. Either the Court of Appeal is to be treated as abandoning the notice test for the first limb of *Barnes v Addy*, or it is to be treated rather as recognising a new avenue of recovery, which exists alongside the first limb. Although Say-Dee submitted that the law should develop by recognising a new but additional avenue of recovery, the Court of Appeal's approach was to abandon the notice test for the first limb. In doing so, it was flying in the face not only of the received view of the first limb of *Barnes v Addy*, but also of statements by members of this Court in *Consul Development Pty Ltd v DPC Estates Pty Ltd*[88]. It is true that those statements were dicta in the sense that the case was decided on the second limb of *Barnes v Addy*. But, contrary to the Court of Appeal's perception, the statements did not bear only "indirectly" on the matter: they were seriously considered. And, also contrary to the Court of Appeal's perception, they were not uttered only by two members of the Court, that is Stephen J, with whom

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87 [1998] 3 VR 16.

88 (1975) 132 CLR 373.

Barwick CJ concurred[89]. Gibbs J took the same view[90], so that it was shared by the entire majority. Gibbs J cited with approval *Soar v Ashwell*[91] which approved the extension of *Barnes v Addy* to the case "where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant". That language is also employed in another case Gibbs J cited, *Lee v Sankey*[92]. In a third case cited by Gibbs J, *In re Blundell; Blundell v Blundell*[93], Stirling J said a stranger who received trust property was not liable unless "to his knowledge the money is being applied in a manner which is inconsistent with the trust"[94]. Leaving aside any technical question about whether the doctrine of stare decisis strictly applied, abandonment of the rule that the plaintiff must prove notice on the part of the defendant is not an appropriate step for an intermediate court of appeal to take in relation to so long-established an equitable rule – for other illustrations of it both before[95] and after[96] *Barnes v Addy* can be found, its

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89 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 410. Stephen J's dicta approved a statement of Jacobs P in the court below, which strengthens their weight: *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 at 459.

90 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 396.

91 [1893] 2 QB 390 at 396-397 per Bowen LJ.

92 (1872) LR 15 Eq 204 at 211 per Sir James Bacon VC.

93 (1888) 40 Ch D 370 at 381.

94 That passage was quoted by Stephen J: (1975) 132 CLR 373 at 408-409.

95 *Morgan v Stephens* (1861) 3 Giff 225 at 237 per Sir John Stuart VC [66 ER 392 at 397].

96 *In re Dixon; Heynes v Dixon* [1900] 2 Ch 561 at 574 per Sir Richard Webster MR; *In re Eyre-Williams; Williams v Williams* [1923] 2 Ch 533 at 539-540 per Romer J; *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491 at 507 per Gummow J. For modern English statements to the same effect, see *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602 at 632 per Brightman J; [1972] 1 All ER 1210 at 1234; *Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405 per Buckley LJ, 410 and 412 per Goff LJ; *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 at 306-307 per Browne-Wilkinson LJ; *Agip (Africa) Ltd v Jackson*

(Footnote continues on next page)

existence had been acknowledged in the Court of Appeal itself the previous year[97], and its correctness has been assumed in this Court[98]. If, on the other hand, the Court of Appeal is to be treated not as abandoning the notice test for the first limb of *Barnes v Addy*, but rather as recognising a new and additional avenue of relief, it is an avenue which tends to render the first limb otiose. That too is not a step which an intermediate court of appeal should take in the face of long-established authority and seriously considered dicta of a majority of this Court.

135 The result of the statements by the Court of Appeal about restitution-based liability has been confusion among trial judges of a type likely to continue unless now corrected. As Hamilton J remarked and Barrett J agreed, a trial judge of the Supreme Court of New South Wales now "faces the difficult situation of obiter dicta in the High Court some 30 years ago conflicting with recent dicta in the Court of Appeal, which have met with substantial criticism"[99]. The confusion is not likely to be limited to New South Wales judges. Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong[100]. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law. There has already been an example of a single judge feeling obliged to follow the Court of Appeal despite counsel's submission that he was obliged not to do so[101].

[1990] Ch 265 at 291 per Millett J; and *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 at 700 per Hoffmann LJ.

97 *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75 at 109 [178] per Spigelman CJ, Handley and Santow JJA concurring.

98 *Mayne v Public Trustee* (1945) 70 CLR 395 at 402-404 per Williams J (Latham CJ and Dixon J concurring).

99 *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2006) 58 ACSR 63 at 78 [47] per Hamilton J, quoted in *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council; Hillig v Darkinjung Pty Ltd* [2006] NSWSC 1217 at [30] per Barrett J.

100 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

101 *Multan Pty Ltd v Ippoliti* [2006] WASC 130 at [45] per Simmonds J.

136 *The structure of the Court of Appeal's reasoning.* The appellants strongly attacked the Court of Appeal's reasoning, and it is therefore necessary to describe it. For the moment the fact that Mrs Elias and her daughters became registered proprietors of Torrens system land, as did Mr Elias and Lesmint, may be put on one side[102].

137 First, according to the Court of Appeal, the restitution based approach has some support in authority.

138 Secondly, the Court of Appeal said that the only contrary statements in this Court were the dicta of two judges in *Consul Development Pty Ltd v DPC Estates Pty Ltd*[103], a case on the second limb of *Barnes v Addy*, and a case in which those justices were not called upon to consider restitutionary principles as the foundation underpinning the first limb of *Barnes v Addy*.

139 Thirdly, to favour the restitutionary approach over the traditional approach would make it unnecessary for the plaintiff to prove that the defendant received the property knowing of breach of the fiduciary's duties: that is left to the defendant to negate by way of defence. The plaintiff would only have to prove enrichment at the expense of the plaintiff which is unjust on the ground of some "recognised factor". This is said to be "a better-tailored response"[104].

140 *The Court of Appeal's reasoning: authorities in favour?* The first case relied on by the Court of Appeal is *In Re Montagu's Settlement Trusts*[105]. Sir Robert Megarry VC said:

> "The core of the question ... is what suffices to constitute a recipient of trust property a constructive trustee of it. I can leave on one side the equitable doctrine of tracing: if the recipient of trust property still has the

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102 See below at [190]-[198].

103 (1975) 132 CLR 373.

104 This is an expression quoted with approval by the Court of Appeal from Lord Nicholls, "Knowing Receipt: The Need for a New Landmark" in Cornish, Nolan, O'Sullivan and Virgo (eds), *Restitution, Past Present and Future* (1998) at 238-239: *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [221].

105 [1987] Ch 264 at 276.

> property or its traceable proceeds in his possession, he is liable to restore it unless he is a purchaser without notice."

Hansen J in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*[106] said:

> "That passage indicates that in some cases (namely, those in which the recipient still holds the property transferred to him in breach of trust), even Sir Robert Megarry VC would hold that the liability of the recipient is strict – that is, not dependent upon the establishment of any particular state of knowledge on his part – subject only to the bona fide purchaser defence."

The Court of Appeal in the present case said[107]:

> "The restoration of trust property still in the possession of the party said to be unjustly enriched by its receipt was hinted at by Vice-Chancellor Megarry ... His Lordship made it clear that restoration in these circumstances was required unless the recipient was a purchaser (assumingly for value) without notice."

With respect, there is nothing to suggest that the Vice-Chancellor "would hold" or "hinted" at any of the things attributed to him. He was merely stating the orthodox view in relation to tracing. The Vice-Chancellor cannot have been intending, by using the word "unless" in a passage dealing with an aspect of the law not germane to the decision of the case before him, to suggest that the burden of proof was reversed and increased in the way it would be if restitution-based liability became the law.

141 The next case relied on by the Court of Appeal is *Lipkin Gorman (A Firm) v Karpnale Ltd*[108]. That was not a case in which a breach of fiduciary duty or the first limb of *Barnes v Addy* arose, or was argued, or was mentioned by the House of Lords.

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106 [1998] 3 VR 16 at 88.

107 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [217].

108 [1991] 2 AC 548 at 578-579.

142 The third case relied on by the Court of Appeal is *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*, where Hansen J discussed the first limb of *Barnes v Addy* at length[109]. That discussion was apparently occasioned by a submission that in order to avoid a difference between the notice test in the two limbs of *Barnes v Addy*, another submission that constructive notice sufficed under the first limb should be rejected. Hansen J said that in order to evaluate whether there should be that difference between the two limbs, the underlying rationale of the two forms of liability had to be examined. He said he found "considerable persuasion" in the view that the first limb was based not on a concern for the protection of equitable estates or interest, or on the avoidance of unconscientious conduct, but on the avoidance of unjust enrichment.[110] He then noted various writings by Birks and others supporting that view, various writings by others opposing it, and a few cases. He said "the strongest support of all" for the unjust enrichment avoidance view is Lord Nicholls's statement in *Royal Brunei Airlines Sdn Bhd v Tan*[111] that "[r]ecipient liability is restitution-based". Hansen J said he favoured that view and continued[112]: "If so, there is a strong argument that liability is strict but subject to defences of bona fide purchase and change of position". As indicated earlier, Hansen J concluded by leaving the question open because the point had not been argued. With respect, Hansen J did not identify any compelling reason why the law should be changed.

143 The fourth case relied on by the Court of Appeal was *National Australia Bank Ltd v Rusu*[113]. Bryson J there noted Lord Nicholls's statement that "[r]ecipient liability is restitution-based", and said[114]:

> "The principles which deeply underlie equity suggest that a restitution-based remedy must have some basis in the position in conscience of the person against whom it is awarded so that it must be shown that a

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109 [1998] 3 VR 16 at 78-105.

110 [1998] 3 VR 16 at 100.

111 [1995] 2 AC 378 at 386.

112 [1998] 3 VR 16 at 105.

113 [2001] NSWSC 32.

114 [2001] NSWSC 32 at [43]-[44].

> recipient did not receive the payment for value or had notice of another person's equitable interest in the money; or at the very least, it should be open to him to show that he did give value and had no notice."

These observations were only dicta, since Bryson J decided the case on the basis that the relevant defendants were not recipients at all.

144 The fifth case referred to by the Court of Appeal as containing "dicta which seem to favour the restitutionary approach advocated by Professor Birks and favoured by Hansen J"[115] is *Tara Shire Council v Garner*[116]. All Atkinson J said was: "A possible explanation for the absence of a dishonesty requirement under the first limb is that it is a restitution-based principle aimed at avoiding unjust enrichment." She said nothing about abandoning notice requirements or otherwise supporting the restitutionary approach.

145 The last case is *NIML Ltd v MAN Financial Australia Ltd*[117]. That case turned on the fact that the defendant was not a recipient of property. Harper J referred to the decision by Hansen J but expressed no view on whether the unjust enrichment basis was sound. The Court of Appeal quoted the following words[118]:

> "[I]t is an essential ingredient in the cause of action pleaded by [the plaintiff] against [the defendant] that the latter either had constructive knowledge of the general nature of [the defaulting fiduciary's] dishonesty or was unjustly enriched by its receipt."

This appears to reflect a view different from that of the Court of Appeal: it states not that the first limb of *Barnes v Addy* is wrong, but that it is right, and operates alongside restitution-based liability.

146 The statements referred to by the Court of Appeal in these cases either do not support the restitutionary approach, or were uttered in circumstances where

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115 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [226].

116 [2003] 1 Qd R 556 at 576 [61].

117 [2004] VSC 449.

118 [2004] VSC 449 at [53]: see *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [227].

no appropriate issue was presented or relevant argument advanced, or were otherwise entirely unnecessary for the decision of the cases in which they were uttered.

147 *The Court of Appeal's reasoning: authorities against.* It is not necessary to go beyond the considered dicta of the three members of the majority in *Consul Development Pty Ltd v DPC Estates Pty Ltd*[119]. Those dicta are based on the numerous cases in the past, and conform with the numerous later authorities, in which the traditional understanding of the first limb of *Barnes v Addy* has been affirmed[120]. The Court of Appeal's conclusion is completely inconsistent with these authorities.

148 *The Court of Appeal's reasoning: principle.* Except for a point made by Lord Nicholls in a passage which the Court of Appeal quoted and which is discussed below[121] the Court of Appeal's reasoning did not allege, let alone demonstrate, any inconsistency of principle, any point of practical inconvenience, or any other reason which would justify changing the law in the manner it purported to. It did not state, for example, why its approach was a "better-tailored response", in Lord Nicholls's phrase[122]. The nearest it came to indicating where a statement of a reason for the change might be found was to refer to an article by one of its members. That article said[123]:

> "The call to abandon the fault-based idea of knowing receipt in favour of strict liability, subject to a change of position defence, originated with the restitution scholars' concerns over coherence. They argue that it is irrational for law and equity to occupy these near parallel fields on different terms."

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119 (1975) 132 CLR 373.

120 See above at [134]-[135].

121 See below at [153].

122 "Knowing Receipt: The Need for a New Landmark" in Cornish, Nolan, O'Sullivan and Virgo (eds), *Restitution, Past Present and Future* (1998) at 238.

123 Mason, "Where has Australian restitution law got to and where is it going?" (2003) 77 *Australian Law Journal* 358 at 368.

This is not a satisfactory reason for an intermediate appellate court to effect a radical change in the law. The article also said that in the article by Lord Nicholls just referred to, he "offered a compelling critique of fault-based liability". It is not proposed to examine that critique in view of the fact that neither the Court of Appeal nor the respondent described or explicitly adopted the reasoning. Nor, for the same reason, is it proposed to examine other legal writing which might offer support for the Court of Appeal.

149 There are, however, several matters of principle pointing against the course taken by the Court of Appeal, none of which it dealt with, which is a state of affairs more likely to arise when courts make pronouncements without hearing argument than when they do so after argument.

150 First, whether enrichment is unjust is not determined by reference to a subjective evaluation of what is unfair or unconscionable: recovery rather depends on the existence of a qualifying or vitiating factor falling into some particular category[124]. In *David Securities Pty Ltd v Commonwealth Bank of Australia*[125], Mason CJ, Deane, Toohey, Gaudron and McHugh JJ gave as instances of a qualifying or vitiating factor mistake, duress or illegality. No such factor was identified in the present case by the Court of Appeal beyond what was identified as the breach of fiduciary duty by Mr Elias and by Farah[126]. But Mrs Elias and her daughters owed no fiduciary duty to Say-Dee. Further, principles respecting fiduciary duty have been said to be foreign to unjust enrichment notions because the unjust factors are commonly concerned with vitiation or qualification of the intention of a claimant[127].

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124 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

125 (1992) 175 CLR 353 at 379.

126 [2005] NSWCA 309 at [217].

127 Edelman, "A Principled Approach to Unauthorised Receipt of Trust Property", (2006) 122 *Law Quarterly Review* 174 at 177-178.

151 Unjust enrichment is not a "definitive legal principle according to its own terms"[128]. If it were not so, as Gummow J pointed out in *Roxborough v Rothmans of Pall Mall Australia Ltd*[129]:

> "[S]ubstance and dynamism may be restricted by dogma. In turn, the dogma will tend to generate new fictions in order to retain support for its thesis. It also may distort well settled principles in other fields, including those respecting equitable doctrines and remedies, so that they answer the newly mandated order of things. Then various theories will compete, each to deny the others. There is support in Australasian legal scholarship for considerable scepticism respecting any all-embracing theory in this field, with the treatment of the disparate as no more than species of the one newly discovered genus."

This prediction about the consequences of unjust enrichment for the distortion of equitable doctrines is illustrated by the Court of Appeal's approach in this case. The areas in which the concept of unjust enrichment applies are specific and usually long-established. Recipient liability for breach of trust or fiduciary duty has not been one of them.

152 Secondly, if any principle justifying the basing of recipient liability on unjust enrichment could be stated, one would expect it to be found in the writings of Birks, on whose opinion supporting that course both Hansen J and Lord Nicholls relied. Although the Court of Appeal did not cite any writings in which it was stated, it is notable that in 2002, well before the Court of Appeal's decision, Birks retracted his opinion that in lieu of the first limb of *Barnes v Addy* unjust enrichment should be recognised as a basis for recipient liability[130]. He said:

> "It now seems right to abandon that analysis once and for all. It was a mistake to insist that 'knowing receipt' was simply a species of unjust enrichment which had been slow to understand itself and, in particular, slow to understand that liability in unjust enrichment is strict though subject to defences."

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128 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378-379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

129 (2001) 208 CLR 516 at 545 [74].

130 "Receipt" in Birks and Pretto (eds), *Breach of Trust*, (2002) 213 at 223.

He did so because Nourse LJ criticised Lord Nicholls's advocacy of restitution-based recovery on the ground that it was "commercially unworkable"[131]. Birks' change of mind is a rather striking event, but it is not discussed by the Court of Appeal. Birks expressed a preference for the first limb to continue, but for a liability in unjust enrichment to exist alongside it[132]. He claimed that Lord Nicholls supported that approach; that may be questioned, for Lord Nicholls appeared rather to favour a more general restructuring, which he described as "a radical step" to be carried out by "bold spirits"[133]. But whether or not Lord Nicholls supported that approach, the position finally adopted by Birks is not the position he took in earlier times, and it is not the position adopted by the Court of Appeal.

153 Thirdly, in a passage quoted by the Court of Appeal[134] Lord Nicholls stated that he favoured a restitution basis for the first limb of *Barnes v Addy*. The only ground assigned for that position in that passage was that "equity should now follow the law"[135]. The problem is that in this field equity devised protections for the holders of equitable interests and those to whom fiduciary duties are owed which the common law had not: if it had, equitable intervention would have been unnecessary. For equity now to follow the law is to cut down on traditional equitable protection. Say-Dee submitted that the established doctrine under the first limb of *Barnes v Addy* should continue, but that the Court of Appeal's reformulation of it should also operate alongside it. Superficially this does less violence to authority, and does not cut down traditional equitable protection, but in practice it does erode the existing law, because it would tend to nullify the first limb: for what plaintiff would wish to take on the burden of showing that the defendant had notice under the "old" first limb if, by reliance on the new doctrine, that burden could be escaped and a contrary and even more onerous burden placed on the defendant?

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131 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 456 (Ward LJ and Sedley LJ agreed).

132 "Receipt" in Birks and Pretto (eds), *Breach of Trust*, (2002) 213 at 224-225.

133 "Knowing Receipt: The Need for a New Landmark" in Cornish, Nolan, O'Sullivan and Virgo (eds), *Restitution, Past Present and Future* (1998) at 245.

134 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [221].

135 "Knowing Receipt: The Need for a New Landmark" in Cornish, Nolan, O'Sullivan and Virgo (eds), *Restitution, Past Present and Future* (1998) at 238.

154 Fourthly, the restitution basis is unhistorical. There is no sign of it in clear terms in any but the most recent authorities. It is inherent in the Court of Appeal's conclusion that for many decades the courts have misunderstood the tests for satisfying the first limb of *Barnes v Addy*: that is improbable. It is inherent in the conclusion advocated by Say-Dee that for many decades the courts have failed to notice the existence of a form of liability co-existing with the first limb: that is equally improbable. The restitution basis reflects a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development. As Gummow J said[136]:

> "To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writings of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around."

The restitution basis was imposed as a supposedly inevitable offshoot of an all-embracing theory. To do that was to bring about an abrupt and violent collision with received principles without any assigned justification.

155 Fifthly, Say-Dee defended the Court of Appeal's stand by contending that it avoided an unjust result. Where is the injustice? On the Court of Appeal's application of the first limb of *Barnes v Addy* as traditionally understood, Say-Dee won, and it would only fail if either no property were received or there were no notice. But why is failure in those circumstances unjust? Assuming in its favour certain factual conclusions rejected above, Say-Dee would retain a right to personal and proprietary remedies against the first three appellants. Say-Dee did not explain how there was any justice in permitting restitution against a defendant who received trust property without notice of that fact.

156 Even if the first limb of *Barnes v Addy* is to be reinterpreted as restitution-based, the question of whether it would avail Say-Dee remains. The Court of Appeal said that the plaintiff must prove that there has been enrichment which is "unjust on the ground of some recognised factor". The Court of Appeal said that that requirement "is satisfied by the fact that Mr Elias caused Mrs Elias and their two daughters to acquire their respective interests in No 15 in breach of Farah's

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136 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544 [72].

fiduciary duty to Say-Dee"[137]. However, Mrs Elias and her daughters owed no fiduciary duty to Say-Dee. Nor did they know of Farah's fiduciary duty to Say-Dee: and if that knowledge is crucial, the analysis returns to a theory of fault-based liability which the restitution theory supposedly rejects. Say-Dee went even further than the Court of Appeal by submitting: "It is not necessary here to identify some separate 'unjust factor'." This creates a form of liability which is potentially extraordinarily wide. In the alternative, Say-Dee submitted that the enrichment was unjust because it was without Say-Dee's knowledge or fully informed consent. No case, even in England, has treated ignorance as a "reason for restitution"[138].

157 Finally, restitution-based liability allows a defence to bona fide purchasers for value without notice. Mrs Elias and her children were within that category. They had no notice[139] and they were not volunteers[140].

158 The changes by the Court of Appeal with respect to the first limb, then, were arrived at without notice to the parties, were unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this Court. They must be rejected.

Second limb of *Barnes v Addy*

159 In this Court, Say-Dee proposed various paths to relief other than those discussed by the Court of Appeal. The first of these was what has become known as the second limb of *Barnes v Addy*.

160 As conventionally understood in Australia, the second limb makes a defendant liable if that defendant assists a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary.

161 Several points of a general nature should be made here. The first concerns the scope of the second limb. This was not expressed by Lord Selborne LC as an

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137 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [222].

138 Smith, "Tracing" in Burrows and Rodger (eds), *Mapping the Law* (2006) 119 at 138.

139 See above at [100] and [123]-[129].

140 See below at [187]-[188].

exhaustive statement of the circumstances in which a third party who has not received trust property and who has not acted as a trustee *de son tort* nevertheless may be accountable as a constructive trustee. Before *Barnes v Addy*[141], there was a line of cases in which it was accepted that a third party might be treated as a participant in a breach of trust where the third party had knowingly induced or immediately procured breaches of duty by a trustee where the trustee had acted with no improper purpose; these were not cases of a third party assisting the trustee in any dishonest and fraudulent design on the part of the trustee[142].

162 Secondly, the distinction has been recognised in the Australian case law[143] but, on one reading of *Royal Brunei Airlines Sdn Bhd v Tan*[144], may have been displaced by the Privy Council in favour of a general principle of "accessory liability" expressed as follows[145]:

> "A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly. 'Knowingly' is better avoided as a defining ingredient of the principle".

163 Thirdly, whilst the different formulations of principle may lead to the same result in particular circumstances, there is a distinction between rendering liable a defendant participating with knowledge in a dishonest and fraudulent design, and rendering liable a defendant who dishonestly procures or assists in a

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141 (1874) LR 9 Ch App 244 at 254.

142 Examples include the decisions of Lord Langdale MR in *Fyler v Fyler* (1841) 3 Beav 550 at 561-562, 567-568 [49 ER 216 at 221, 223-224], of the Irish Court of Chancery in *Alleyne v Darcy* (1854) 4 Ir Ch Rep 199 at 209, and of Sir John Romilly MR in *Eaves v Hickson* (1861) 30 Beav 136 [54 ER 840]. See, generally, Harpum, "The Stranger as Constructive Trustee", (1986) 102 *Law Quarterly Review* 114 at 141-144.

143 For example, *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 238-239.

144 [1995] 2 AC 378.

145 [1995] 2 AC 378 at 392.

breach of trust or fiduciary obligation where the trustee or fiduciary need not have engaged in a dishonest or fraudulent design. The decision in *Royal Brunei* has been referred to in this Court several times[146] but not in terms foreclosing further consideration of the subject in this Court, in particular, further consideration of the apparent necessity to displace the acceptance in *Consul Development Pty Ltd v DPC Estates Pty Ltd*[147] of the formulation of the second limb of *Barnes v Addy* were *Royal Brunei* to be adopted in this country. Until such an occasion arises in this Court, Australian courts should continue to observe the distinction mentioned above and, in particular, apply the formulation in the second limb of *Barnes v Addy*.

164 On the present appeal, specific reliance was not placed by Say-Dee upon *Royal Brunei*, although there was a suggestion, not soundly based, discounting any difference between what might be called the traditional approach and that adopted in *Royal Brunei*. The changes to the law in Australia which were sought by Say-Dee did not include any adoption of a cause of action of the kind expressed in the passage in *Royal Brunei* set out above. Accordingly, it is unnecessary to decide now how far *Royal Brunei*, and subsequent decisions in the House of Lords and Privy Council[148], have modified the second limb of *Barnes v Addy* or, rather, restated the form of liability operating antecedently to and independently of *Barnes v Addy*, and if so, whether these changes should be adopted in Australia.

165 However, for the sake of completeness, we should add that whatever view be taken of *Royal Brunei*, whether it be an independent doctrine or a replacement of the second limb of *Barnes v Addy*, its requirements are not satisfied in the present case. To apply the most recent formulation, by Lord Hoffmann in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd*[149], on the evidence there is nothing to show that Mrs Elias and her daughters had

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146 *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154 at 165; *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [4]; *Pilmer v The Duke Group Ltd (In Liq)* (2001) 207 CLR 165 at 174 [3].

147 (1975) 132 CLR 373.

148 *Twinsectra Ltd v Yardley* [2002] 2 AC 164; *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 WLR 1476; [2006] 1 All ER 333.

149 [2006] 1 WLR 1476 at 1481; [2006] 1 All ER 333 at 338.

"consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour".

166 Although the Court of Appeal did not attach liability to Mrs Elias and her daughters on the ground provided by the second limb of *Barnes v Addy*, Say-Dee contended that it ought to have done so. The appellants objected that neither the dishonest and fraudulent design by Farah nor the knowledge of it by Mrs Elias and her daughters had been pleaded in the amended cross-claim. This is true, but Say-Dee contended that, on well-established principles, this did not prevent reliance now being placed on the point[150].

167 Say-Dee submitted the trial had been conducted on the basis that second limb liability was an issue. Say-Dee referred to various passages in the written submissions presented by it and by the appellants to the trial judge and in the final address of counsel for the appellants on 18 August 2004. Those passages are as follows.

168 In the written submissions of Say-Dee dated 18 August 2004, there appears:

> "It seems from the plaintiff's opening that [the] wife and children wish to resist any relief in relation to the units in their name in 15 Deane Street on the basis that they lack the requisite knowledge of their husband/father's breach of fiduciary duty as required in *Royal Brunei*.
>
> The answer to this proposition is that in relation to the children they are mere volunteers who cannot resist the cross-claimant's equity."

This does not appear to be dealing with the second limb issue, for the question of whether a defendant is given value or is a volunteer is irrelevant in applying that limb. On 18 August 2004, nothing was said in oral address on this point on behalf of Say-Dee. In the written submissions presented by the appellants, dated 18 August 2004, the following appears:

> "Margaret, Sara and Jade Elias are accountable to Say-Dee if:
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> ...

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150 *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ.

(c) Margaret, Sara and Jade Elias were guilty of commercial dishonesty in taking advantage of [the] opportunity [to acquire No 15] without verifying the status of Farah Constructions to make the opportunity to do so available to them."

The submissions then referred to *Royal Brunei*. Accordingly, the submission is alluding, not to the second limb of *Barnes v Addy* as understood in Australia in the light of *Consul*[151], but to the formulation found in *Royal Brunei*. In oral submissions to the trial judge, counsel for the appellants said:

"The facts do not justify any imputation of commercial dishonesty."

169 While these passages do not suggest that the second limb of *Barnes v Addy* was in fact put at trial, the trial judge may have thought that it was. The last issue he listed was "whether the Cross Defendants are knowing participants in Farah's breach of fiduciary duty". So far as *Royal Brunei* was relied on and is applicable, counsel for the appellants was correct to submit that there was no evidence of commercial dishonesty against any of Mrs Elias and her daughters.

170 Had the Court of Appeal turned its mind to whether Mrs Elias and her daughters were liable as knowing participants in a dishonest and fraudulent design – an allegation the seriousness of which means that it ought to have been pleaded and particularised, and the assessment required by *Briginshaw v Briginshaw*[152] kept in mind – it ought to have rejected the allegation. That rejection would follow from consideration of what was said in *Consul* respecting the second limb of *Barnes v Addy*, both in relation to "knowledge" and to "dishonest and fraudulent design".

171 What is required by the requirement of "knowledge" expressed in the second limb?

172 In the passage in which Lord Selborne formulated the second limb in terms of assisting with knowledge in a dishonest and fraudulent design on the part of the trustees, he contrasted those "actually participating in any fraudulent conduct of the trustee" and those "dealing honestly as agents"[153].

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151 (1975) 132 CLR 373.

152 (1938) 60 CLR 336.

153 (1874) 9 Ch App 244 at 251-252.

173 As a matter of ordinary understanding, and as reflected in the criminal law in Australia[154], a person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards. Further, as early as 1801, Sir William Grant MR stigmatised those who "shut their eyes" against the receipt of unwelcome information[155].

174 Against this background, it has been customary to analyse the requirement of knowledge in the second limb of *Barnes v Addy* by reference to the five categories agreed between counsel in *Baden v Société Générale pour Favoriser le Dévelopment du Commerce et de l'Industrie en France SA*[156]:

> "(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry."

In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele ("BCCI")*[157], Nourse LJ observed that the first three categories have generally been taken to involve "actual knowledge", as understood both at common law and in equity, and the last two as instances of "constructive knowledge" as developed in equity, particularly in disputes respecting old system conveyancing. After noting that in *Royal Brunei*[158] the Privy Council had discounted the utility

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154 *Macleod v The Queen* (2003) 214 CLR 230 at 242 [36]-[37].

155 *Hill v Simpson* (1801) 7 Ves Jun 153 at 170 [32 ER 63 at 69]. See further *May v Chapman and Gurney* (1847) 16 M & W 355 at 361 [153 ER 1225 at 1228]; *Jones v Gordon* (1877) 2 App Cas 616 at 625, 628-629, 635; *English and Scottish Mercantile Investment Company v Brunton* [1892] 2 QB 700 at 707-708.

156 Note [1993] 1 WLR 509 at 575-576, 582; [1992] 4 All ER 161 at 235, 242-243. The case was decided in 1983.

157 [2001] Ch 437 at 454.

158 [1995] 2 AC 378 at 392.

of the *Baden* categorisation, Nourse LJ in *BCCI*[159] went on to express his own view that the categorisation was often helpful in identifying the different states of knowledge for the purposes of a knowing assistance case.

175 Although *Baden* post-dated the decision in *Consul*, the five categories found in *Baden* assist in an analysis of that for which *Consul* provides authoritative guidance on the question of knowledge for the second limb of *Barnes v Addy*.

176 Thus, support in *Consul* can be found for categories (i), (ii) and (iii)[160]. Further, *Consul* also indicates that category (iv) suffices[161]. However, in *Consul*, Stephen J held that knowledge of circumstances which would put an honest and reasonable man on inquiry, later identified as the fifth category in *Baden*, would not suffice. Gibbs J left open the possibility that constructive notice of this description would suffice[162]. Barwick CJ agreed with Stephen J.

177 The result is that *Consul* supports the proposition that circumstances falling within any of the first four categories of *Baden* are sufficient to answer the requirement of knowledge in the second limb of *Barnes v Addy*, but does not travel fully into the field of constructive notice by accepting the fifth category. In this way, there is accommodated, through acceptance of the fourth category, the proposition that the morally obtuse cannot escape by failure to recognise an impropriety that would have been apparent to an ordinary person applying the standards of such persons.

178 These conclusions in *Consul* as to what is involved in "knowledge" for the second limb represent the law in Australia. They should be followed by Australian courts, unless and until departed from by decision of this Court.

179 What then of the phrase "dishonest and fraudulent design"? Since the widening of the second limb of *Barnes v Addy* beyond breaches of express trust,

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159 [2001] Ch 437 at 455.

160 (1975) 132 CLR 373 at 398 per Gibbs J, 412 per Stephen J; Barwick CJ concurring at 376-377.

161 (1975) 132 CLR 373 at 398 per Gibbs J, 412 per Stephen J; Barwick CJ concurring at 376-377.

162 (1975) 132 CLR 373 at 398.

attempts commonly are made in corporate insolvencies to render liable on this footing directors, advisers and bankers of the insolvent company. This makes a proper understanding of the second limb important, lest its application prove unjust. As Lord Selborne LC said in *Barnes v Addy*[163]:

> "There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them."

The relevant passages in *Consul* establish for Australia that "dishonest and fraudulent designs" can include not only breaches of trust but also breaches of fiduciary duty; but any breach of trust or breach of fiduciary duty relied on must be dishonest and fraudulent.

180 The reformulation proposed by the respondent, with its abandonment of the "dishonest and fraudulent design" integer and its stiffening of the notice requirements in a way adverse to plaintiffs, should not be adopted. No sufficient difficulty in the current rules has been demonstrated to justify the taking of any such step. In any event, Mrs Elias and her daughters would not be liable even under the reformulated test. They did not participate "in a significant way" in Farah's breach and they had no "actual knowledge of the essential facts which constituted the breach".

181 Say-Dee relied upon the statement by Gibbs J in *Consul*[164]:

> "[A] person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit he has received as a result of such participation."

His Honour also said that the words "dishonest and fraudulent" included "a breach of trust or of fiduciary duty"[165]. However, Gibbs J did not categorise all breaches of trust or fiduciary duty as "dishonest and fraudulent" because he said that the expression was to be understood by reference to equitable principles"[166].

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163 (1874) LR 9 Ch App 244 at 251.

164 (1975) 132 CLR 373 at 397.

165 (1975) 132 CLR 373 at 398.

166 (1975) 132 CLR 373 at 398.

182 Say-Dee relied on the former passage and on passages in the judgment of Stephen J[167] to support the submission that in Australian law the "dishonest and fraudulent design" requirement had been superseded and that it was sufficient to plead and prove any knowing participation in a breach of trust or fiduciary duty, save for "a *de minimis* breach". However, Say-Dee accepted that this qualification had not been stated in *Consul*.

183 In its final form, the submission put by Say-Dee was that a defendant who had not received a direct financial benefit "but has participated in a significant way in a significant breach of duty/trust with actual knowledge of the essential facts which constituted the breach should be liable to the beneficiary of the duty/trust for the consequence of the breach". This submission should be rejected.

184 Breaches of trust and breaches of fiduciary duty vary greatly in their seriousness. Some breaches are well intentioned, some are trivial. In *Maguire v Makaronis*, this Court observed[168]:

> "The stringency apparent in some of the nineteenth century breach of trust cases displayed what Lord Lindley MR called 'a very hard state of the law, and one which shocked one's sense of humanity and of fairness'. The result was what his Lordship called the deliberate relaxation of the law by s 3 of the *Judicial Trustees Act* 1896 (UK). This conferred a power of curial relief in respect of breach of trust where the trustee had acted 'honestly and reasonably' and 'ought fairly to be excused'. There is no such general power of dispensation in respect of loss caused by breach of duty owed by other fiduciaries."

However, some breaches of fiduciary duty by company officers, employees, auditors, experts, receivers, and receivers and managers and liquidators may be excused on similar grounds[169].

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167 (1975) 132 CLR 373 at 408, 412.

168 (1997) 188 CLR 449 at 473-474 (footnotes omitted). See also *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 498 [33] and the Australian legislation: *Trustee Act* 1898 (Tas), s 50; *Trustee Act* 1925 (NSW), s 85; *Trustee Act* 1936 (SA), s 56; *Trustee Act* 1958 (Vic), s 67; *Trustees Act* 1962 (WA), s 75; *Trusts Act* 1973 (Q), s 76; *Trustee Act* 1925 (ACT), s 85; *Trustee Act* (NT), s 49A.

185 The submission by Say-Dee as to the reformulation of the second limb of *Barnes v Addy* having been rejected, Mrs Elias and her daughters are not liable under the second limb of *Barnes v Addy*. This is for the following reasons.

186 First, even if, contrary to the conclusion stated above, the disclosures found to have been made by Mr Elias did not constitute full disclosure sufficient to make the consent by Say-Dee to the acquisitions of Nos 13 and 15 informed consents, that dereliction of duty is insufficient to merit the description "dishonest and fraudulent". That is so particularly because a man like Mr Elias might not necessarily appreciate the difference between saying that No 13 "is a good proposition for redevelopment in conjunction with" No 11 and saying that the view of the Council was that the only way No 11 could be redeveloped so to as to achieve its full development potential was to redevelop it with No 13. There is a difference, but the failure to appreciate it is not necessarily "dishonest and fraudulent". Secondly, even if Mr Elias's conduct amounted to a dishonest and fraudulent design, there is no evidence that Mrs Elias and her daughters had any sufficient notice or knowledge of it.

Tracing

187 Another ground on which, according to Say-Dee, the Court of Appeal ought to have found in its favour depended on tracing. It submitted that the units in No 15 represented profits from a breach of fiduciary duty, and belonged in equity to Say-Dee. It submitted that Mrs Elias and her daughters were volunteers. It submitted that if they received the units knowing of the breach of duty, their consciences were affected from the moment of receipt of the units. Otherwise, their consciences were affected when they learned that the property belonged in equity to Say-Dee.

188 This argument founders on the fact that Mrs Elias and her daughters were not volunteers. It is unnecessary to consider whether there are any other difficulties with it. Mrs Elias and her daughters were not volunteers because on the evidence before the trial judge and the Court of Appeal at the time of its judgment dated 15 September 2005, Mrs Elias and her daughters were purchasers

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169 *Corporations Act* 2001 (Cth), s 1318. These statements are not to be taken as casting doubt on the possible liability of company officers, advisers or bankers, where it is established that their knowledge of circumstances would indicate to an honest and reasonable person facts which constituted a breach of trust or a breach of fiduciary duty.

of their units in the sense that Mrs Elias provided money, the children provided money, property belonging to Mrs Elias was mortgaged and Mrs Elias entered a personal covenant to repay the debt. For reasons given earlier, that evidence should be accepted[170]. The Court of Appeal, however, in a different context, said[171]: "[T]he mere acceptance of personal covenants to repay a mortgage advance in the present circumstances is not to be treated as a provision by Mr and Mrs Elias of their own monies". For that three cases were cited[172]. Those cases deal with matters quite distinct from the bona fide purchaser doctrine, and are distinguishable. In the first, *Paul A Davies (Australia) Pty Ltd (in liq) v Davies*[173], the question was whether property acquired partly by a company's money and partly by money borrowed by its directors from a bank should be held on constructive trust entirely for the company or treated as a mixed fund. The former conclusion was adopted, but the issue here is quite different: no money and no other property of the joint venture was used to acquire No 15; rather the acquisition was funded, apart from whatever Mr Elias provided, partly by cash from Mrs Elias and the children and partly by bank loans secured over distinct property not owned by the joint venture. The second, *Hagan v Waterhouse*[174], concerned the question of whether, where property in which trustees had a two-thirds interest and beneficiaries a one-third interest had been mortgaged to benefit a profitable bookmaking business, the whole profit could be retained by the business. Kearney J held that it could not, but, again, here the property over which the mortgage was given by Mrs Elias was not property of the joint venture. The third case, *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd*[175], held only that the fact that a person who had obtained a lease of a shop in breach of fiduciary duty had operated the business alone for some time did not deprive the plaintiff of any remedy, it merely merited an order for just allowances. In any event, even if Mrs Elias's personal covenant to repay a mortgage advance is not to be treated

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170 See above at [72]-[75].

171 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [250].

172 *Paul A Davies (Australia) Pty Ltd (in liq) v Davies* [1983] 1 NSWLR 440 at 455; *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 355; *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1998] 2 Qd R 1 at 12.

173 [1983] 1 NSWLR 440.

174 (1991) 34 NSWLR 308.

175 [1988] 2 Qd R 1.

as a provision of her own monies, the uncontradicted evidence before the trial judge was that, like her daughters, she provided monies of her own.

The duty of Mrs Elias and her daughters in equity to account for profits

189 A further basis on which Say-Dee contended that the Court of Appeal's conclusions could be supported lies in the submission that Mrs Elias and her daughters were liable to account for profits made as a result of their acquisition of the units. Leaving aside extreme doubts about the existence of any profits, the argument must fail, since Mrs Elias and her daughters were not mere volunteers, but provided consideration for the acquisition of their units and had no notice of any breach of fiduciary duty[176].

Indefeasibility[177]

190 *The Court of Appeal's reasoning.* The four units in the names of Mr Elias and his family in No 15 are land held under the Real Property Act. So is No 13, in the name of Lesmint. Subject to irrelevant exceptions, s 42(1) of that Act provides:

> "Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded ...".

According to the Court of Appeal, it was contended that s 42(1) enabled Mrs Elias and her daughters to take upon registration an estate free of any claim by Say-Dee to their units, and that the fraud exception did not apply. Beyond recording a submission by Say-Dee that this point had not been the subject of any

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176 See above at [100] and [123]-[129].

177 This was evidently not relied on in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, for although it is likely that the land involved was Torrens land, nothing is said about indefeasibility.

pleading or submission to the trial judge, the Court of Appeal did not deal with the fraud point. The Court of Appeal went on[178]:

> "However, the principle of immediate indefeasibility from registration is subject to any personal obligation by which the registered proprietor might be forced in personam to deal with the registered title in some particular manner."

The Court of Appeal quoted *Frazer v Walker*[179]:

> "[T]his principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam founded in law or in equity, for such relief as a court acting in personam may grant."

The Court of Appeal then said[180]:

> "A further fallacy in Farah's argument is that if it applies to Mrs Elias and the two daughters, then it must also apply to Mr Elias and Lesmint, each of whom became registered for an estate in fee simple in a unit in No 15 and the whole of No 13 respectively. It is not suggested by Farah that indefeasibility of title prevents a declaration that Mr Elias and Lesmint hold their interests in No 13 and 15 on constructive trust. If this be so, then the same principle applies to Mrs Elias and the two daughters where they have benefited from and are in receipt of an interest in the property the acquisition of which constituted a breach by their husband and/or father of his fiduciary duties. Accordingly, in my opinion, Mrs Elias and her daughters as well as Mr Elias and Lesmint hold their respective interests in Nos 13 and 15 on a constructive trust."

191 *Pleading difficulty.* Can the relevant appellants rely on s 42(1) in this Court in view of the state of the pleadings? Say-Dee itself pleaded one matter necessary to support the contentions which the appellants wished to advance in relation to s 42(1), namely that Lesmint, Mr Elias, Mrs Elias and the two daughters are registered proprietors respectively of No 13 and the units in No 15. The more difficult problem stems from the appellants' wish to negate the

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178 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [237].

179 [1967] 1 AC 569 at 585.

180 *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [238].

existence of fraud in the s 42(1) sense and personal equities in the *Frazer v Walker* sense. Fraud has been made a relevant issue in relation to Say-Dee's desire that this Court consider the second limb of *Barnes v Addy*. Further, as noted above[181], although Say-Dee did not plead that the conduct of Farah was a dishonest and fraudulent design, a question appears to have arisen before the trial judge and the Court of Appeal as to whether Mrs Elias and her daughters were dishonest, and both the trial judge and the Court of Appeal recorded that one issue was whether the cross defendants were knowing participants in Farah's breach of fiduciary duty. Say-Dee has been permitted to deploy arguments in relation to those areas in this Court. Say-Dee's whole case in all courts has rested on claimed personal equities. In these circumstances there can be no unfairness in permitting Mrs Elias and her daughters in this Court, as they did in the Court of Appeal, to rely on s 42(1) and to seek to negate fraud and personal equities, which for other purposes Say-Dee relies on. For the same reason there can be no unfairness in permitting Mr Elias and Lesmint to do the same, despite their having abstained from doing so in the Court of Appeal and at the trial.

192 *Fraud.* "Fraud" in s 42(1) means "actual fraud, moral turpitude"[182]. The findings above negate actual fraud or moral turpitude not only on the part of Mrs Elias and her daughters, but also on the part of Mr Elias; and Lesmint is in the same position as Mr Elias. Even if the Court of Appeal's factual findings about disclosure were not reversed, Mr Elias's non-disclosures cannot be described as amounting to "actual fraud", and the other parties are in no worse position.

193 *In personam exception.* An exception operating outside the language of s 42(1) can exist in relation to certain legal or equitable causes of action against the registered proprietor. So far as Say-Dee was relying on *Barnes v Addy*, it was certainly alleging a recognised equitable cause of action. In *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*[183] Tadgell JA (Winneke P concurring, Ashley AJA

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181 See above at [159]-[169].

182 *Butler v Fairclough* (1917) 23 CLR 78 at 97 per Isaacs J. See also *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 614 per Mason CJ and Dawson J, citing *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210 per Lord Lindley; *Bank of South Australia Ltd v Ferguson* (1998) 192 CLR 248 at 255 per Brennan CJ, Gaudron, McHugh and Gummow JJ.

183 [1998] 3 VR 133 at 156-157.

dissenting) held that a claim under *Barnes v Addy* was not a personal equity which defeated the equivalent of s 42(1) in Victoria, namely the *Transfer of Land Act* 1958, s 42(1). Tadgell JA said[184]:

> "[H]ere it is not possible to escape the circumstance that, if there was a 'knowing receipt' by the appellant, it was a receipt by virtue of registration under the Transfer of Land Act."

He continued[185]:

> "The argument for the respondent appears to assume that the acquisition by a mortgagee, in that capacity, of a proprietary interest following registration of a forged instrument of mortgage in respect of property that is subject to a trust amounts to a receipt by the mortgagee of trust property. If it were so, it might be possible to treat the holder of the registered proprietary interest as a constructive trustee arising from 'knowing receipt' of trust property. As it seems to me, however, there is neither room nor the need, in the Torrens system of title, to do so. If registration of the mortgagee's interest is achieved dishonestly then the registration, and with it the interest, are liable to be set aside not because, on registration, the registered holder became a constructive trustee but because s 42(1) recognises that fraud renders the interest defeasible. If, on the other hand, the registration is not achieved by fraud the Act provides, subject to its terms, for an indefeasible interest. Those terms allow, it is true, a claim in personam founded in equity against the holder of a registered interest to be invoked to defeat the interest; and a claim in personam founded in equity may no doubt include a claim to enforce what is called a constructive trust ... [T]o recognise a claim in personam against the holder of a mortgage registered under the Transfer of Land Act, dubbing the holder a constructive trustee by application of a doctrine akin to 'knowing receipt' when registration of the mortgage was honestly achieved, would introduce by the back door a means of undermining the doctrine of indefeasibility which the Torrens system establishes. It is to be distinctly understood that, until a forged instrument of mortgage is registered, the mortgagee receives nothing: before registration the

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184 [1998] 3 VR 133 at 156.

185 [1998] 3 VR 133 at 156-157.

> instrument is a nullity. As Street J pointed out in *Mayer v Coe*[186] ... the proprietary rights of a registered mortgagee of Torrens title land derive 'from the fact of registration and not from an event antecedent thereto'. In truth, I think it is not possible, consistently with the received principle of indefeasibility as it has been understood since *Frazer v Walker*[187] and *Breskvar v Wall*[188], to treat the holder of a registered mortgage over property that is subject to a trust, registration having been honestly obtained, as having received trust property. The argument that the appellant is liable as a constructive trustee because it had 'knowingly received' trust property should in my opinion fail."

194 That reasoning, with which four judges in the Full Court of the Supreme Court of Western Australia agreed in *LHK Nominees Pty Ltd v Kenworthy*[189], and with which Davies JA agreed in *Tara Shire Council v Garner*[190], applies here. In that latter case, however, Atkinson J (McMurdo P concurring), in deciding whether a claim was arguable on the pleadings, disagreed with Davies JA and with the majority in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd*. Atkinson J and McMurdo P preferred the dissenting judgment of Ashley AJA in that case, the dicta of Hansen J in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*[191], where the indefeasibility point was not argued[192], and where in any event there was dishonesty; and the dicta of

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186 [1968] 2 NSWR 747 at 754.

187 [1967] 1 AC 569.

188 (1971) 126 CLR 376.

189 (2002) 26 WAR 517 at 549 [186] per Murray J, 555 [210] per Anderson and Steytler JJ, 568-572 [273]-[299] per Pullin J. See also *White v Tomasel* [2004] 2 Qd R 438 at 455 [72] per McMurdo J.

190 [2003] 1 Qd R 566 at 568 [34].

191 [1998] 3 VR 16 at 105.

192 [1998] 3 VR 16 at 75.

de Jersey J in *Doneley v Doneley*[193], where indefeasibility was not argued either[194].

195 The essential point on which Ashley AJA differed from the majority in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* was put thus[195]:

> "The proposition that an equity may be recognised and enforced so long as it involves no conflict with the indefeasability [sic] provisions has not prevented the High Court from imposing constructive trusts so as to recognise equities in cases where the transfer of real property was effected at different stages in the course of events giving rise to the equities".

He referred to *Bahr v Nicolay (No 2)*[196], *Muschinski v Dodds*[197] and *Baumgartner v Baumgartner*[198]. Earlier, Ashley AJA had said[199] that the "necessary balance" between personal equities and indefeasibility was "disclosed by the judgment of Wilson and Toohey JJ in *Bahr v Nicolay (No 2)*"[200]. However, as Pullin J pointed out in *LHK Nominees Pty Ltd v Kenworthy*[201], in those cases "the defendant was the primary wrongdoer, attempting to ignore an obligation to share or convey the land with or to the plaintiff. In none of those cases was the defendant a party who merely had notice of an earlier interest or notice of third party fraud." There

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193 [1998] 1 Qd R 602.

194 *Tara Shire Council v Garner* [2003] 1 Qd R 566 at 568-569 [36] and 584 [88] n 94.

195 [1998] 3 VR 133 at 166.

196 (1988) 164 CLR 604.

197 (1985) 160 CLR 583.

198 (1987) 164 CLR 137.

199 [1998] 3 VR 133 at 162.

200 (1988) 164 CLR 604 at 637-638. He also referred to Mason CJ and Dawson J at 613 and Brennan J at 653-655, to *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 147-149 per Mason CJ, Wilson and Deane JJ and 151-153 per Toohey J, and to *Muschinski v Dodds* (1985) 160 CLR 583.

201 (2002) 26 WAR 517 at 571 [289].

is no analogy between the constructive trusts involved in those cases and that which can arise from application of the first limb of *Barnes v Addy*.

196 Although the Court of Appeal referred to *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* on another point, it did not refer to that case or *LHK Nominees Pty Ltd v Kenworthy* in relation to indefeasibility. It ought to have followed those cases.

197 The Court of Appeal's suggestion that if Mrs Elias and her daughters obtained indefeasible title, Mr Elias and Lesmint would also do so, and that that is absurd, is erroneous. There is no absurdity unless fraud is established against Mr Elias and Lesmint, and this was not done. Had it been done, s 42 would not have assisted them.

198 Hence the registered proprietors prevail over Say-Dee even if they are volunteers.

Causation

199 The Court of Appeal rejected an argument advanced by the appellants that since Say-Dee had financial difficulties which could have prevented it taking up the opportunities to buy No 13 and No 15, it could not be said that any breach of fiduciary duty was causative of loss. It is not necessary to examine the detail of the Court of Appeal's reasoning or the appellants' criticisms of it. Since the primary case against the second to sixth appellants rests on their supposed receipt of property, causal questions do not arise. Where a defendant has received trust property, or property in relation to which fiduciary duties existed, with notice, the cause of action is complete without having to examine causation questions.

Remedies

200 In view of the conclusions above in relation to Farah's disclosures, the relief granted to Say-Dee by the Court of Appeal cannot stand, and both appeals must be allowed. No general point of principle arises from the orders. However, they have a curious aspect. Ordinarily relief by way of constructive trust is imposed only if some other remedy is not suitable[202]. In the present circumstances, what other remedy applied would depend on an election by Say-Dee between equitable compensation (which Say-Dee requested in the amended

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202 *Giumelli v Giumelli* (1999) 196 CLR 101 at 113-114 [10], 125 [49]-[50].

cross-claim) or an account of profits (which it did not). Say-Dee has not discharged the onus of proving that there was a loss, in the sense that it has not been shown that if Say-Dee had paid half the price of No 15 and No 13 when they were acquired it would not now be worse off. Although on 7 August 2006 Say-Dee undertook to pay the receivers sufficient sums to pay off arrears under mortgages over No 13 and No 15 and maintain payments, Say-Dee did not offer to pay half the price with interest since the time when the units were acquired as a term of the relief sought, and the Court of Appeal did not impose that term.

201 The orders contemplate that the sale of No 11, No 13 and No 15, no part of which has been developed, is to be postponed for an uncertain time. If there were to be a sale, the appellants preferred an order for an immediate sale. Instead the parties, discordant as they are, are yoked together indefinitely. The premises are bringing in no rental income because they were vacated with a view to sale in mid 2006; and that sale was forestalled by an injunction obtained by Say-Dee. The properties, which cost $3.4 million in the years 1998 to 2002, are now, valued as separate sites, worth only $2.7 million. Other costs have been incurred – stamp duty, the difference between interest and rent – and yet others will have to be incurred in future. There is evidence that if the properties are sold with development consent, which can be obtained no earlier than November 2007, on various assumptions they will be worth $7.43 million. Both sides appear to be under financial pressure. Since the quantity of the appellants' capital tied up in No 13 and No 15 is much greater than the quantity of Say-Dee's capital tied up in No 11, there is force in the appellants' allegation that the practical effect of the orders is unjustly to permit Say-Dee to search for an elusive profit without bearing half the financial burdens incurred to this point, while compelling the appellants to share in any loss. All monetary accounting is postponed until eventual sale. On sale, the second to sixth appellants are to be reimbursed their costs of acquisition, retention, maintenance and improvement of No 13 and No 15. In the event of a loss, half of it is to be paid by Say-Dee, but it is not clear that Say-Dee could do so. In all the circumstances the orders made in this case furnish no satisfactory precedent.

Orders

202 The appeal by Farah and related parties should be allowed. There should be an order setting aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 21 December 2005 and varied on 28 November 2006. There should also be an order that the appeal by Say-Dee to the Court of Appeal from the judgment and orders of the Supreme Court of New South Wales dated 19 August 2004 and 22 November 2004 be dismissed, and an order that Say-Dee pay the appellants' costs of the proceedings in this Court and in the Court of Appeal.