Secondly, the court considered the continuing relevance of its earlier decision in *Webb Distributors (Aus) Pty Ltd v Victoria* (1993) 179 CLR 15. In that case, the court held that claims brought by shareholders against a company for misrepresentations regarding shares subscribed for by them concerned sums due to the claimants in their capacity as members of the company under s360(1)(k) of the *Companies (Victoria) Code*. Gleeson CJ, Kirby and Hayne JJ distinguished *Webb* on the basis that: (a) the sub-section considered in the earlier case differed from the terms of s563A; and (b) the shares at issue in *Webb* had been obtained by subscription, not by purchase from third parties, with the result that considerations regarding the need to maintain a company's capital underlay the court's decision. Gummow J was more forthright and questioned both the accuracy of the principles relied upon by the majority in *Webb* and the result reached.

The decision in *Gwalia* has been much criticised by elements of the finance industry. One effect of the decision is that the pool of assets to be shared by ordinary creditors will, in certain circumstances, be significantly smaller than otherwise expected. Lenders will have no real way of forecasting the likelihood of future claims by shareholders and up-front lending costs may increase to take the possibility of such claims into account. Moreover, an administrator faced with a number of claims from allegedly misled shareholders will be required to consider the merits of each claim individually, with the result that the complexity (and cost) of an administration will increase. At the time of writing, there is no firm indication as to whether the Australian Government will seek to amend s563A to reverse the High Court's decision. Several issues arising from the decision have been referred to the Corporations and Markets Advisory Committee (CAMAC) for further consideration. If the government does decide that an amendment is appropriate, one possible source of inspiration will be §510(b) of the United States Bankruptcy Code, which subordinates all claims for damages arising from the purchase or sale of a company's securities.

By David Thomas

Commonwealth of Australia v Cornwell (2007) 234 ALR 148; [2007] HCA 16

The High Court's decision in *Commonwealth of Australia v Cornwell* highlights the importance of characterising damage when dealing with the legal consequences of an asserted loss.

From May 1967, Mr Cornwell was employed by the Commonwealth to work as a spray painter in a bus depot. He worked full time, but was classified as a 'temporary employee'.

In July 1965, Mr Cornwell asked his superior officer whether he could join a superannuation fund (1922 Fund) established under the *Superannuation Act 1922*. Although the fund was for permanent rather than temporary employees, Mr Cornwell had a right to apply to the treasurer to be deemed an employee to whom the Act applied. The trial judge found that if Mr Cornwell had applied, his application would almost certainly have been approved. However, on the basis of advice from his superior officer, found to be negligent, Mr Cornwell took no action.

The 1922 Fund was closed to new entrants in 1976. The *Superannuation Act 1976* created a new fund (1976 Fund), to which members of the 1922 Fund were transferred. Like the 1922 Act, the 1976 Act excluded temporary employees, subject to a special power for temporary employees to be deemed eligible.

On 24 March 1987, Mr Cornwell was reclassified as a permanent public service position. At the same time, he became a member of the 1976 Fund. Mr Cornwell retired on 31 December 1994 and was paid in accordance with his entitlements under the 1976 Fund.

Mr Cornwell commenced proceedings on 16 November 1999 for the difference between what he received when he retired and what he would have received if he had joined the 1922 Fund in 1965.

The Commonwealth sought to rely on s11 of the *Limitation Act 1985*, which fixed the relevant limitation period at six years from the date on which the cause of action first accrued. The Commonwealth's primary argument was that the cause of action accrued in 1976, when the opportunity to join the 1922 Fund was lost.

That argument failed. The majority (Gleeson CJ, Gummow, Kirby, Hayne, Heydon & Crennan JJ, Callinan J dissenting) held that the cause of action did not accrue until Mr Cornwell retired.

Generally, a cause of action for negligence accrues when damage is sustained. The time when economic loss is first sustained depends on the nature of the interest infringed: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527. The economic loss in this case depended on Mr Cornwell's rights under federal statutes. The interest infringed here was the entitlement conferred by those statutes. Attention to the statutory regime creating Mr Cornwell's interest is crucial.

Under the 1922 Act, a member made contributions for 'units of pension'. The entitlement on retirement depended on the number of units being contributed at retirement. If Mr Cornwell had joined the 1922 Fund any time before 1976, Mr Cornwell may have been able to place himself in the same position he would have been in if he had joined the scheme in 1965, by paying more for each unit.

This changed in 1976. Under the 1976 Act, a member received a certain portion of his or her final salary, calculated by reference to the number of years as an eligible employee. The calculation included time spent as a member of the 1922 Fund.

This was the point on which the Commonwealth relied. When the 1976 Act commenced, Mr Cornwell lost forever the opportunity to count the 11 years from 1965 to 1976 towards his entitlement. Even if he had joined the 1976 Fund at once, Mr Cornwell could not have made up the quantum of his benefits to allow for those 11 years of service. The Commonwealth argued that Mr Cornwell's loss was irretrievably sustained at this time.

The argument failed because it is an incomplete characterisation of Mr Cornwell's entitlement and of his loss. The accrual of benefits under the 1976 Act depended on satisfying one or more statutory contingencies. To be entitled to the 'standard age retirement pension', a member needed to reach certain ages (depending on other criteria) before retiring. Entitlement to an 'early retirement benefit' depended on a

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

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

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

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

By James Emmett

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

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

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

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

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

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

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

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

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

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