IN THE SUPREME COURT OF NEW ZEALAND SC 72/2009

BETWEEN **RED EAGLE CORPORATION LIMITED**

Appellant

AND **RICHARD JOHN OTLEY ELLIS**

Respondent

Hearing:	10 February 2010
Court:	Elias CJ Blanchard J McGrath J Wilson J Anderson J
Appearances:	L Herzog for the Appellant P J Dale for the Respondent

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CIVIL APPEAL

MR HERZOG:

If it please the Court, counsel's name is Herzog and I appear on behalf of the appellant.

ELIAS CJ:

Thank you Mr Herzog.

MR DALE:

Dale for the respondent.

ELIAS CJ:

Yes, thank you Mr Dale. Yes Mr Herzog.

MR HERZOG:

A very brief summary of the case before Your Honours can be succinctly stated as follows. For approximately 71 of the 72 hours that the events surrounding this case took place, the respondent's statement was the sole inducement to the formation of the relevant contract. The appellant's case is that the appellant relied on the respondent and the respondent's relevant statement for the entire 72 hours. The respondent's case is that between the 71st hour and 72nd hour, Mr Falkenstein no longer relied on the impugned conduct of the relevant statement. It is submitted that there is no evidence that supports the respondent's position.

The approved ground of appeal is whether the Court of Appeal correctly applied *AMP Finance NZ Limited v Heaven*. The appellant submits the Court of Appeal failed to correctly apply *AMP Finance NZ Limited v Heaven* by failing to focus on the relevant conduct impugned when addressing the three-step process set out in *AMP Finance NZ Limited v Heaven*. The relevant conduct impugned found by the High Court was a representation made by Mr Ellis to Mr Falkenstein that his business partner, Ms Annette Black, had net property assets of $2 million which were available to support her personal guarantee of a short term loan requested by Mr Ellis. I've referred to this as the Ellis statement.

It is submitted that the Ellis statement was on the first step of *AMP Finance NZ Limited v Heaven* objectively capable of being misleading. It misrepresented a statement of present fact that was credible. The trial Judge's finding that Mr Falkenstein was misled by Mr Ellis was open to the evidence. It was open on the evidence that was presented in the Court below. The assessment was one of fact and in my submission, it should not be disturbed. On the second leg of *AMP Finance NZ Limited v Heaven* it is submitted that in the circumstances of the case it was objectively reasonable for Mr Falkenstein to have been misled by Mr Ellis' statement. Mr Ellis' statement was a credible, unambiguous and unqualified representation of present fact.

On the issue of causation, it is submitted that there is a clear nexus or causal link between the misleading and deceptive conduct of Mr Ellis and the loss suffered by Mr Falkenstein. Mr Falkenstein was influenced by and/or induced to make the advance in reliance on the Ellis statement. Mr Falkenstein has accepted that in addition to the Ellis statement his decision to make the loan advance was influenced by the receipt of Ms Black's personal statement of financial position. This is referred to in my submissions as the Black document. There is no evidence, in my submission, that the causal potency of the Black document supplanted the original representation by Mr Ellis. The Black document confirmed the veracity and reliability of the Ellis statement and combined with it to mislead Mr Falkenstein. The trial Judge's finding that reliance on the Black document did not supplant Mr Falkenstein's reliance on the Ellis statement, it is submitted that that was open to the trial Judge on the evidence and should not be disturbed.

It is further submitted that the trial Judge's assessment of contributory fault by Mr Falkenstein was principled and the conclusion reached on the evidence should not be disturbed.

Now, what I wish to do at this stage is simply provide a brief analysis under the two heads of which referring to my, the respondent's submissions in relation to reliance and causation. The authorities I believe are clear, that the impugned conduct need not be the sole inducement and it is sufficient if it contributed materially to the formation of the contract. Under this test of causation, the authorities conclude that the impugned conduct also need not be the sole or principal or dominant cause of the loss. It too, it is sufficient if it contributed materially to a loss and was an effective cause of the loss. In my submission the evidence is clear that the applicant relied at all material times on the material statement, the impugned conduct, the Ellis statement. That the Ellis statement was causative of the loss in conjunction with the Black statement which merely supported and confirmed what Mr Ellis had originally said and there is no evidence that supports the respondent's position that within – upon receiving the Black document, Mr Falkenstein no

longer relied on what he had already been told and acted upon by Mr Ellis. Those are my submissions.

ELIAS CJ:

How do you say that he had acted on Mr Ellis' remarks?

MR HERZOG:

The emails, there was a series of emails sent from Mr Ellis to Mr Falkenstein.

ELIAS CJ:

What action did he take as a result?

MR HERZOG:

Initially he agreed to make the advance which was the advance of $150,000 and then subsequently, approximately an hour before the loan was actually advanced, Mr Ellis contacted Mr Falkenstein and requested the loan to be increased from $150,000 to $250,000. At that point in time Mr Falkenstein said to Mr Ellis that there would be no problem in increasing the loan based upon his advice on the availability of the assets being the $2 million in property assets in Australia. Hence, at that point in time and initially and throughout the course of the transaction, Mr Falkenstein acted on Mr Ellis' advice.

ELIAS CJ:

So the action was agreeing to make the advance?

MR HERZOG:

That's correct.

WILSON J:

Mr Herzog, on my reading of the record Mr Ellis acknowledged in cross-examination that he probably would not have made the advance if he hadn't received the Black statement but he was not asked by either counsel

whether he would have made the statement, made the advance if he hadn't received the Ellis statement. Is my understanding of the record correct?

MR HERZOG:

The position, Sir, is that at the time of the Ellis statement, the initial Ellis statement was made, Mr Falkenstein requested from Mr Ellis to provide him with details of the property assets. That's all he requested in addition to this statement itself, he wanted details of the property assets. That, those details were not requested - Mr Falkenstein did not request to receive those details from Ms Black. It was requested to be provided by Mr Ellis so the only additional issue outside of the statement was that he wanted details of the property assets which were ultimately supplied by way of that facsimile received from Ms Black.

WILSON J:

I'll put the question again. I may not have made myself clear. As I read the record, and I'm not being critical of counsel in asking this question, there is no direct evidence as to whether or not Mr Falkenstein would have made the advance simply on the basis of the Black statement without also having received the Ellis statement. Is that the position?

MR HERZOG:

There is a – if I refer Your Honour to – there's a case on appeal at page 50, paragraph 28 whereby Mr Falkenstein states, he feels that he has been misled and deceived by Rick into making the loan. He appears to have taken advantage of our professional relationship and his knowledge of a person that I am, a person who invests in people based on their word and trust. At page 48 of the case on appeal at paragraph 15 Mr Falkenstein says, that's where he refers to the increase in the loan, it would be fine as the security offered more than covered the loan request, hence his reliance and the misleading conduct based upon that original representation. Then at page 73 of the notes of evidence, lines 1 through 10, Mr Falkenstein was asked, "And how did you come to know about those assets?" He says, "Because I'd been told in the first email by Rick where he wrote..." and that's the point in relation

to the property assets "...and made that statement has net of approximately $2 million. That was the one bullet point that gave me confidence that I could give this $150,000 bridging advance." So those, those in conjunction and further down, Sir, when the Court asked the question, "To constitute a security...", this is further down on page 73 of the notes of evidence, "...to constitute a security in a conventional sense you would need to have some charge over the borrowed assets. Did you turn your mind to the absence of any security in respect of the Sydney properties in your favour?" Mr Falkenstein responded, "No, I relied on Rick Ellis' statement that the assets were there. So in my non-legal mind it was a guarantee based on those assets." So in my submission those matters in conjunction show that Mr Falkenstein made the loan advance simply on the basis and reliance on Mr Ellis' statement.

McGRATH J:

Mr Herzog, you nailed your colours firmly to the mast of the High Court judgment, understandably. Were you going to give us a critical analysis of the Court of Appeal judgment in relation to those same three heads because I think I would find that helpful. That's the judgment we've got to decide whether it was correct or not.

MR HERZOG:

Indeed, Sir. The Court of Appeal's judgment in its discussion of the case, in its decision, seems to have started out in terms of an analysis of *AMP v Heaven* without addressing, in my submission, the relevant conduct. It didn't turn its mind to the relevant impugned conduct and that's where, in my submission, the Court of Appeal went wrong insofar as its analysis under *AMP v Heaven*. It went through each of the steps in *AMP v Heaven* but didn't come to any conclusion in relation to those steps.

McGRATH J:

When you say it did not focus on the impugned conduct, are you saying it focused on other conduct, other of the pleaded misrepresentations but not, I think, paragraph (g)?

MR HERZOG:

Well it appears Sir, that the – what it and probably at best I can put it that the conduct that it turned its mind to is what it referred to as "puffery".

McGRATH J:

Yes.

MR HERZOG:

It was unspecified in the Court of Appeal's judgment and I really can't take that any further because it would be only pure speculation and conjecture as to what the Court of Appeal was referring to when it set out in one of the – in its analysis under one of the steps in *AMP Finance NZ Limited v Heaven,* puffery in the emails or puffery and unfortunately I can't take that any further because the Court of Appeal didn't specify what it was referring to but in a broad sense, my submission is that it failed to address the critical issue as to the finding in the High Court of what the impugned conduct was, which was simply the representation regarding the availability of the assets, Ms Black's assets in Australia, as security for the loan.

McGRATH J:

Is it your case that whatever puffery might have been referring to in the Court of Appeal's mind, it could not rationally be referring to that statement of asset value in Sydney?

MR HERZOG:

That's correct, Sir.

McGRATH J:

The other aspect of the Court of Appeal's judgment that seemed important was the relative sophistication, in business terms, of the three parties and in particular of Mr Falkenstein. They seemed to think that that was important in deciding whether or not he was misled, or was reasonably misled.

MR HERZOG:

The reasonableness of him being misled, in my submission, in relation to his sophistication, in my submission was covered by way of the High Court's judgment in terms of an analysis of the contributory negligence, to cause contributory negligence, under section 43(2). It was dealt with in the High Court under that head. The issue may have been different, I would accept, if Mr Falkenstein was in the business of making loans. If Mr Falkenstein was a financier in the business of making loans, my submission would be that – and there is ample authority for that, my submission would be it would be quite a different situation in respect of the reasonableness aspect of the case.

In this case Sir, the reasonableness aspect, standing back and looking at it objectively: was it reasonable for Mr Falkenstein to be misled by the relevant impugned conduct, the statement that Ms Black had $2 million worth of assets in Australia? Now, on a plain analysis there's no reason to suggest that that statement was incredible on its face.

It wasn't a type of statement that Ms Black owns the Sydney Harbour Bridge or, possible Ms Black has $200 million worth of assets, but he knows Ms – he had dealt with Ms Black in the past, he knew that Mr Ellis and Ms Black were investment bankers of some substance and, on the face of it, it was not, in my submission, it's not unreasonable for Mr Falkenstein to have accepted that statement on its face value as Mr Ellis himself accepted the statement on its face value. Mr Ellis obviously didn't think it was unreasonable. How could it be argued, in my submission, for Mr Ellis to suggest that it was unreasonable for Mr Falkenstein to have been misled?

McGRATH J:

Well, I think we have to be quite precise here, don't we? I mean, the Court of Appeal's position, as I understand it, was that certainly Mr Falkenstein was misled but he was misled by Ms Black, he was not misled by Mr Ellis and I think, if I understand their finding, it was simply that he was

not misled by Mr Ellis because, in part, the situation was one of he being a sophisticated investor.

MR HERZOG:

Yes, the way in which the Court of Appeal approached that he was misled, Mr Falkenstein was misled by Ms Black, was on an analysis of a, an innocent conduit analysis, a point which neither counsel argued in the Court of Appeal, and a point which I believe, at this stage, is accepted by the respondent as being a position which is unsustainable, on the evidence. There was simply no evidence whatsoever of Mr Ellis being an innocent conduit, in purporting to be acting solely on behalf of Ms Black. That point was argued in the High Court, it was abandoned in the Court of Appeal, and to both counsel it came as a bit of a surprise of how it re-emerged without any argument in the Court of Appeal, nor was it a point on appeal and nor was it argued there.

McGRATH J:

What's the key factor in the High Court Judge's findings that you say rules out the mere conduit aspect? Is there a particular passage we should be looking at in the High Court judgment?

MR HERZOG:

The High Court –

McGRATH J:

It might be at paragraph 36.

MR HERZOG:

I think 36 Sir, is the operative paragraph. There is at – yes, 36 is the key paragraph in relation to Mr Ellis, the efforts that Mr Ellis went to, to ensure that the statement which he made to Mr Falkenstein was accurate and could be relied upon.

McGRATH J:

Now, does the Court of Appeal come to grips with that part of the High Court's reasoning when it finds this was a mere conduit situation?

MR HERZOG:

It doesn't mention it, Sir.

McGRATH J:

Are you able to point us to the passage of the Court of Appeal judgment we should be focusing on?

MR HERZOG:

In relation to innocent conduit, Sir?

McGRATH J:

In relation to the reasons for its conclusion that this was a mere conduit situation as far as Mr Ellis was concerned.

MR HERZOG:

Sir, I can't point you to that.

McGRATH J:

No, well, that –

MR HERZOG:

It seems –

McGRATH J:

It's perhaps not surprising, because I'm not sure that Mr Dale, as you say, is fighting the case on this ground. But I just like to see where it's –

MR HERZOG:

Well –

McGRATH J:

– where the Court of Appeal comes closest to addressing it.

MR HERZOG:

The Court of Appeal's discussion, decision is at page 42 of the case on appeal. It commences at paragraph 33.

McGRATH J:

Yes.

MR HERZOG:

Paragraphs 33 through 39, 40, appear to be an analysis of *AMP v Heaven.* Then it appears that in paragraph 42, paragraph 42 commences with the phrase, "For these reasons we take a different view from the trial Judge on whether Mr Ellis was passing on the information, meant he was not a mere conduit of the data." Now, Sir, the reasons which are set out in paragraphs 34 through 40 relate to an analysis of *AMP* and don't relate to an analysis of the question of whether you can get a conduit in the *Goldsbro* sense. But I'm not sure what reasons they're being, it's being referred to but, nevertheless, it says, "For these reasons," they take a different view.

Now, it then states that even putting aside Mr Ellis's hyperbole about ASL, the information central to Mr Falkenstein's decision to lend, now, Ms Black's financial information, Sir, that's the point, the information's central to Mr Falkenstein's decision to lend. Now, it's unclear whether what that's meant to mean, other than the fact its Ms Black's financial information. It could mean one of two things. It could mean Mr Ellis's original statement or it could mean the provision of Ms Black's financial information, the facsimile which came through an hour before the loan was made.

BLANCHARD J:

But that came from Ms Black.

MR HERZOG:

That's correct.

BLANCHARD J:

So this couldn't be referring to that, because Mr Ellis didn't pass it on.

MR HERZOG:

That's correct, Sir. I think Your Honour is correct, that it's more likely referring to that. And then it states, "Was clearly information Mr Ellis was only passing on." Now, how that can be inferred from the facsimile, that Mr Ellis was passing it on, it doesn't follow, in fact Mr Ellis wasn't passing on that information at all, it had arrived from Ms Black. So, it was not his information. Well, it's clear the information that Ms Black sent to him was not his information and it's clear that the information that Ms Black had $2 million in financial assets in Australia was not his information, but it's information which he passed on initially to Mr Falkenstein without qualification. He gave that information to Mr Falkenstein without advising Mr Falkenstein that it had come from Ms Black.

ANDERSON J:

He asserts it as a fact, doesn't he?

MR HERZOG:

He says it as a fact, Sir.

ANDERSON J:

He doesn't say, "I can't say for my own self but I am told that she has..."

MR HERZOG:

Absolutely, Sir, and if he had said that, Sir, we would not be here today, we more likely would not be – in fact, probably the proceedings would never have ensued. It would clearly be a case of an innocent conduit.

Then it goes, Sir, "He was the author of the emails only because of his rather longer association with Mr Falkenstein and perhaps because Mr Falkenstein's previous history with Ms Black may otherwise have made the advances less likely." So, Sir, that is the total analysis on innocent conduit and I'm not sure I'm answering the question directly, Sir –

McGRATH J:

No, I think –

MR HERZOG:

– but unfortunately I can't take it any further.

McGRATH J:

– it may not be central anyway, given the approach that Mr Dale is taking but that's helpful. What is clear to me at the moment is that the High Court Judge thought that this was a situation in which Mr Ellis was trading on his reputation for reliability with experienced investors and it was that that took him out of the conduit class but it also seems to – that's where really the basis on which the Court of Appeal appears to have found that Mr Ellis did not mislead Mr Falkenstein, it was Ms Black alone who did it.

MR HERZOG:

Yes, whereby, without referring or putting any weight on Mr Ellis' original statement.

McGRATH J:

Yes.

MR HERZOG:

Thank you, Sir.

ELIAS CJ:

Isn't the real difference between the High Court and the Court of Appeal is that the High Court seems to have had accepted your contention that the loss

was suffered by reason of the agreement to make the advance and the Court of Appeal seems to be taking a much more narrow approach, that the loss was suffered only when the advance was made?

MR HERZOG:

That is a proper characterisation I'd submit, Your Honour. It makes, it's a proper characterisation of the distinction between the Court of Appeal's decision and the High Court. However, no mention is made of the fact that the impugned conduct, the representation, it need not be the sole principle or dominant cause of the loss. In many cases, if not almost all cases, there are a number of reasons, a number of causes which contribute and are effective causes of the loss. Now surely, one of the reasons here that the loss was occasioned was as a result of the assets simply not being there, but it's the combination and the inextricable linkage and it's almost the identical representation made by Mr Ellis initially and subsequently confirmed by Ms Black which as the trial Judge correctly states that it's these, Ms Black's statement was provided as confirmation of the assurances that Mr Ellis previously gave.

ANDERSON J:

That the weight or value that the appellant placed on Ms Black's conduct would obviously be affected by his reliance on what Mr Ellis had said, they would interact and the evaluation would be affected accordingly. So, it's a bit artificial to try and parse out separate causes when you have a combination of events that are potent in their totality.

MR HERZOG:

And that is my primary submission, that there's simply no evidence that the causal potency of the original Ellis statement ceased upon receiving the Black statement over the email, over the facsimile. The question was never asked, the very important question which would support the respondent's case, the question was never asked by the respondent, "Mr Falkenstein when you received the Black statement you no longer relied on what Mr Ellis had told you, isn't that correct?" It was never asked of him. Understandably so, as the

answer would surely, in my submission, have come out, the answer would be and in the passages that I referred to earlier, Mr Falkenstein was at all material times reliant upon Mr Ellis' original statement.

ANDERSON J:

Not totally reliant on it when Ms Black's statement came through but that didn't expunge the reliance that he had.

MR HERZOG:

Unquestionably, Sir.

ANDERSON J:

Well that's what happens in these cases, it's much more subtle than appears at first glance.

WILSON J:

Perhaps illustrated through the proposition that if Mr Ellis had not asserted that Ms Black had this equity of $2 million, Ms Black would not even have been asked for a statement of her position.

MR HERZOG:

It couldn't be put any clearer. The loan would never have come about, or the request for the loan, Mr Falkenstein would never even have known, purely speculation at this stage but on the facts, Mr Falkenstein would never have even known about the loan, the initial request for the loan. Mr Falkenstein would never have even known about the request for an increase, from $150,000 to $250,000 that Mr Ellis made. Every step along the chain of causation was reliant on Mr Ellis' representation. At the 71st hour, there was a further representation made which confirmed Mr Ellis' representation and in conjunction, the representation, both representations in my submission, came together and the loan was made based upon both of them and Mr Falkenstein's confirmation belief that that security was available.

McGRATH J:

The real issue is – I accept everything that you're saying as a matter of fact - but isn't the real issue, the real issue in the case comes down, doesn't it, to the extent to which Mr Ellis and his own terms "raised his flag" with Mr Falkenstein, in other words, put himself behind the basic facts that obviously were originating at least in part from Ms Black and in part this goes to his assertions of his own involvement in the wider venture that Ms Black was exploring?

MR HERZOG:

Indeed and it was referred to by the trial Judge insofar as the trial Judge said, "The statement has..." and I don't, I can refer to it very shortly but from my recollection of the High Court judgment it's referred to that Mr Ellis had some independent knowledge. By him making that statement, there's an inference that he had some independent knowledge of the actual property assets itself. It's simply an inference but it's, I believe, a reasonable inference to be made.

McGRATH J:

Probably fairly crucial it's made for your case too, isn't it, that Mr Ellis personally was behind the reliability of those statements that were in Ms Black's piece of paper?

MR HERZOG:

Mr Ellis' evidence couldn't be any clearer about the steps that he undertook, the numerous times that he questioned Ms Black about the veracity of the statement of her assets, he checked with her numerous times he said, even the day before making the request and making the, shall I put it, taking ownership over the statement, even before he made that statement to Mr Falkenstein and to many others I may add, evidence of Mr Ellis was that he made this, sent this email as a circular email to many investors.

So effectively he took ownership of that statement, to both Mr Falkenstein and many others, an unspecified number of investors, that it was a prudent investment to make, the assets were there, he stood behind them, his

evidence was that he made significant checks on Mr Ellis to determine whether the, the veracity of that statement and he took those checks, he did that to ensure that he wasn't going to make the statement to senior businessmen like Mr Falkenstein and hoist his flag before he was confident that he could make that statement and take ownership of it.

McGRATH J:

Thank you.

MR HERZOG:

Thank you, Sir.

ELIAS CJ:

Are there two matters of complaint effectively? The first being that the Court of Appeal was wrong on the facts in concluding that the evidence showed that Mr Ellis was simply a conduit and secondly, an assumption in the Court of Appeal judgment that Mr Falkenstein had not suffered loss or damage by reason of the conduct of another person pursuant to section 43 because the loss caused by the advance was caused not by the contingent agreement to advance the money, "Contingent against some assurance or guarantee," as he puts it in his correspondence, but by that fact alone?

MR HERZOG:

I agree, on both of those heads.

ELIAS CJ:

Yes. I think no one has any other questions. Thank you Mr Herzog. Yes Mr Dale.

MR DALE:

If Your Honours please. I feel a little like an appellant, not a respondent –

ELIAS CJ:

Well, the case is quite simple really, Mr Dale, so it can I think, Mr Herzog's argument could be simply put.

MR DALE:

Sure, and there's no doubt that the case derailed, if you like, in the Court of Appeal, because I did not argue innocent conduit. I made a deliberate decision because I looked carefully at the judgment in the Court below and concluded that there was a finding that Mr Ellis had made a statement, "she has assets of $2 million", that seemed to me to fall outside the test in *Goldsbro v Walker,* and so I didn't argue that point and it didn't even get discussed. The word "puffery" wasn't used in the appeal, although I think, in fairness to the Court of Appeal, the "puffery" expression relates to the representations. If Your Honours would be kind enough to look at the statement of claim which is at tab 3 of the bundle, the amended statement of claim. The case, there were eight pleaded representations and most of them were puffery. The only one that concerns the Court now is the statement that she had assets of $2 million.

McGRATH J:

Well, that was the only finding –

MR DALE:

Yes.

McGRATH J:

– against you, was it not, in the High Court?

MR DALE:

It was.

McGRATH J:

Yes.

MR DALE:

What actually happened in the Court of Appeal was that there was an extensive oral debate between myself and His Honour Justice Baragwanath on what I think is the focus that Your Honours have picked up on, is this question of reliance, causation, there was a statement made that was misleading and deceptive in terms of the Act, that's the $2 million, I'd conceded that and there was a finding to that effect. The question was, had there been a break in the chain of causation because of the concessions that had been extracted from Mr Falkenstein in cross-examination and which I want to explore and His Honour was making the point, correctly, that causation is not something that necessarily needs to be overly refined because, as the cases show, there are frequently a number of causative factors and it's not possible, generally, to isolate one from the other.

I'm going to, with Your Honours' leave, take you to some cases to illustrate how difficult this issue can become, but I have in mind the stricture that His Honour Justice Tipping said in the *Cox & Coxon Limited v Leipst* case, which is not in the bundle but if Your Honours would be kind enough to just look at the bundle of authorities, at tab 5 which is a text on the Act. The very last paragraph has a neat statement of the law, paragraph 12.5, Your Honour Justice Blanchard also sat on that Court, "Questions of causation can become over-refined. The policy of the Act suggests a broad, pragmatic approach to whether the required nexus has been shown." In short, there must be a sufficient relationship between the impugned conduct and the loss or damage to make it reasonable to say that the loss or damage is in consequence of the conduct.

Has the loss been caused by the conduct, has the loss resulted from the conduct, has the loss been brought about by reason of the conduct? All these are possible formulations capturing the same essential idea. Just while we're on that page, the footnote in the bottom of that same page, on the bottom left-hand side, is a reference to the *Des Forges v Wright* case, which Your Honour Chief Justice Elias sat on, where you made a finding

there that the obtaining of legal advice had revealed the true situation, thereby breaking causation.

Now, I haven't overlooked what His Honour Justice Tipping had to say in *Cox & Coxon.* I have in my synopsis rather developed in more detail this question of reliance and causation but you'll find the nub of my argument at paragraph 12 of my synopsis, paragraph 12(a) is a concession. Mr Ellis now, I've said, "Mr Ellis' statements..." If Your Honours would be kind enough to strike the "s", it is "the statement". "...to Mr Falkenstein was capable of constituting misleading and deceptive conduct. Mr Falkenstein was misled by the initial statement of Mr Ellis but..." and these are the two parts of the case which I am going to develop, "...the reliance by Mr Falkenstein on Mr Ellis' statement was not causative of loss, that is because of his own admission that he would not have lent the money but for the information and representations made by Ms Black, there was a break in the chain of causation, and second –

WILSON J:

Well, this seems to me to be a key point and at first sight I can't see how it follows from that acknowledgement that you got from Mr Falkenstein in cross-examination, that Mr Ellis' statement was no longer of any causative force.

MR DALE:

Well, I'd like to take Your Honour through that evidence because I don't think my friend really took you to all of the good bits, as it were, but I will come back to that because – and I'll take you to a case which is, I think, helpful, it's the *National Australia Bank v Cunningham & Ors* case, which is an illustration of how questions like this can cause problems and how they can be dealt with in a common sense way.

The second contentious part of the case, which is sub paragraph (d), is that, "It was not reasonable in the circumstances for Mr Falkenstein to have been misled by the information provided by Mr Ellis because of the commercial nature of the transaction, the experience and expertise of the parties, the

opportunity to verify the ownership of the assets and the opportunity to take legal advice."

ELIAS CJ:

I know that *Heaven* does talk about this sort of concept but why, applying the Act, is it necessary to go beyond whether the person receiving the representation was misled?

MR DALE:

Well, this is where my analysis of the case law took me to – there were two choices, it seemed to me, on the law. One is to say you just look, you find if there's been misleading and deceptive conduct and then you stand back and you look at it globally under section 43, as His Honour did at first instance, or you take the test in *AMP v Heaven* but you have to find, there has to be a causative effect of the statement. It's all very well to make a statement that's untrue but if it's not relied upon it doesn't give rise to the loss.

ELIAS CJ:

Well the statute says as much and maybe, notwithstanding the fact that I seemed to have used it in that case you drew our attention to, it may be really that we should try and avoid using the word causation which Judges get terrifically excited about in quite disparate contexts but here, the only question is whether the person has suffered loss or damage by conduct which contravenes section 9?

MR DALE:

Well, there's a couple of points that I'm going to need to make. I should say, by the way, while I think of it, that my learned friend said that Mr Falkenstein had committed on the basis of the statement made by Mr Ellis. That's not correct. If Your Honours would be kind enough to look at tab 14, page 90 of the bundle which is the first response from Mr Falkenstein.

ELIAS CJ:

Sorry, tab 14?

MR DALE:

Tab 14 of the case, sorry. This is what Mr Falkenstein said, "Hi Rick. Sorry I was away yesterday. I don't think there is a problem with the bridging finance at that rate!!! Personal guarantee letter format would be sufficient to avoid legal costs with interest being paid weekly in advance. If all okay and you want the cheque on Monday, then we'll need details of property assets. I could draw up personal guarantee. Is Annette coming to lunch on Monday as well?" Now, I'm going to have to develop the facts and the issues about the contact between the two and so forth because there's a great deal to this case which is one of the reasons why, on the facts, I've been submitting from day one that this isn't a case for relief to be granted under the Act, but I'll come back to that. The point I'm making –

ELIAS CJ:

What's the two page snapshot?

BLANCHARD J:

It's for ASL.

ELIAS CJ:

Right, okay, thank you.

MR DALE:

Pardon, Sir?

BLANCHARD J:

It's about ASL.

MR DALE:

Yes and all that fell away of course because Mr Falkenstein said he hadn't done due diligence and so forth. Now, I just, also while we've got the tab, if Your Honours could look at tab 16 which is the statement of personal financial position. It's quite interesting really, as a document. It's prepared by

Ms Black. It looks like it's a complete fiction. There was a suggestion that these assets might have been owned by a trust, but even that doesn't look to be true.

ELIAS CJ:

He had indicated – I'm sorry, I haven't read the evidence on this. He had indicated that he could draw up a draft but this wasn't a form that was supplied by Mr Falkenstein, was it?

MR DALE:

No, no –

ELIAS CJ:

No.

MR DALE:

– this is the form –

ELIAS CJ:

That she supplied?

MR DALE:

Mr Falkenstein says he wants the details of the assets, as you've seen from that document.

ELIAS CJ:

Yes.

MR DALE:

This is provided by Ms Black. Mr Herzog in his argument has said that Mr Falkenstein didn't ask Ms Black for it and that may be so, but the point I'm making here is that he needs the form, he needs the details and this is what he gets. I'd just like Your Honours to just pause and have a look at this. In a case which is heavily fact-intensive and I'm grateful for Your Honour for

pointing out that you haven't looked at all of the evidence, because although it's short some of it is important.

The first point I want to make is that this is a very detailed and sophisticated statement. You can see that it identifies the properties which are in Sydney. This is not a case where you can drive by. I mean, if I said I owned a house in Remuera, it would be quite possible to expect that a business colleague would have been there but I'm just making the point that these are overseas assets. Refers to an arts collection, you'll see there's reference to bank accounts, details of numbers to be advised, an art collection, various assets. On the liabilities side, a substantial mortgage, hire purchase obligations. It shows at the bottom line that there are net assets but it's an extraordinarily detailed statement. It's light years different from the bald statement, I've got $2 million worth of assets. I think it's fair to say, if someone received this you would expect that it was accurate. You've got to remember and Your Honours may not know this but Mr Falkenstein, who had introduced Ms Black to Mr Ellis and had previous business dealings with her, he had lost $700,000 at the hands of Ms Black, prior to this –

McGRATH J:
It wasn't really at the hands of Ms Black, was it, it was at the hands, an investment that she introduced –

MR DALE:
It was, the –

McGRATH J:
– there's some evidence on this.

MR DALE:
– the evidence was – that's a fair point. The evidence was it may not have been entirely her fault but there'd been a loss, there had been an investment, there had been a loss, it was a big one. I think perhaps more telling is that you've got to remember that Mr Ellis is saying, at page 88 of the bundle, "Rick

and Annette's resources are very tight currently." If you looked at that statement, well perhaps so but it's not a case where Mr Falkenstein is not on guard and I'll come back, when I take you through the evidence, to those issues in more detail. There you have some very precise, comprehensive information that when Mr Falkenstein says I want the detail, he's got it. One of the features about the case that I'll come to later of course, is the fact that it would have be so easy to have asked for security, taken a title search, got legal advice at Ms Black's expense –

ANDERSON J:

Just remind me Mr Dale, was Mr Falkenstein asked about the impact on his mind of all these other assets, half a million dollars in equity in ASL, debtors of quarter of a million more or less, $80,000 waiting to be collected from a judgment?

MR DALE:

No, no, he wasn't. When one looks at –

BLANCHARD J:

Clearly the reliance would have been on the apparent existence of the two properties because the values and the amount of the mortgage on them, over top all the other assets and he wouldn't have been placing any reliance on Aqua Systems because we know he hadn't done due diligence on it.

MR DALE:

When someone says of course, I've got assets of $2 million, we all know that nothing improves the value of an asset like owning it, what sort of assets, I mean, are we talking assets of a speculative nature, stocks and shares, a debt, there's any number, common sense, any number of ways that there could –

BLANCHARD J:

The crucial factor about this statement of financial position is that it appears to back up what Ellis has told him about the net value of the Sydney properties owned by Ms Black.

MR DALE:

Mmm.

BLANCHARD J:

While I'm speaking, I can say that your point about how there had been trouble with an investment with Ms Black, whether it was her fault or not in the past, it rather suggests that it was the assurance by Mr Ellis about these properties which would have been the predominant factor?

MR DALE:

Well, that's with respect, perhaps a little tough. I say that because, for several reasons, one and I'd have to take you through the evidence and the background and the dealings between the parties because Mr Falkenstein wasn't a man who said yes readily, but it's also, I think, a matter of looking at the actual exchange of emails, which is perhaps a starting point in understanding the facts. If we go to page 87, for a start. He talks there about the company mostly. This is where he's offering 25% for a short-term, high-risk loan and he, that sets the scene of what he asks for. The next email at page 88, is again all about the business and this is material, although it's intended to be persuasive, it's pretty much puffery and has no causative potency so far as the case is concerned. Nothing in either of these two emails to suggest that there's any specific information about the knowledge of the assets but there is the statement that resources are tight. The next email at page 89 is, again what I'll call puffery, about Aqua Systems Limited and how –

ELIAS CJ:

Are you sure you need to use the word puffery and –

MR DALE:

Well I didn't need to Ma'am because there was no suggestion that these allegations were –

ELIAS CJ:

Were operative.

MR DALE:

– part of the case. I was only having to worry about the $2 million. I'm only mentioning it now because what I'm trying to do is put in context all that was said. It's always a little difficult standing back to take out of context one statement particularly in the slightly artificial environment of a courtroom and it's why when I come to my cross-examination I'll explain to you how I developed it and why I thought I had gone far enough, but this is again all the material about the business and how fabulous that it is. It doesn't follow, by the way, that the assets couldn't have been referring to ASL at this stage because if you read that you would have thought ASL was about to take off and money would fly.

So we've, we get to the stage where there is the, I think we've got out of sequence, I've missed a, there's a document missing. Yes when, the next document is page 90 where I've taken you to already, where Mr Falkenstein responds. When he refers to property assets he's referring back to page 87 because that refers to his net property assets so that's where it's specific and where Your Honour Justice Blanchard is right. He can't be referring to the ASL assets, he's referring to the property. So that's the sequence of events so far as the correspondence is concerned. What happens is he's given the detailed statement. They meet on the Monday, and I'm going to take you to the evidence now if I can, and he makes the advance. So with that if we perhaps start with the –

BLANCHARD J:

And in the interim Mr Ellis, not Ms Black, has gone back and said, oops, we need $250,000 not $150,000.

MR DALE:

Yes.

BLANCHARD J:

It seems to me there might be some significance in the fact that it's Mr Ellis, not Ms Black, who makes that approach.

MR DALE:

Um, I don't know that it changed the causation or reasonable issue perhaps, but there is quite a lot of discussion about who was in charge of funding, which again I'll take you to when we go through the evidence. Can I just, then, with that, and just set the scene if you like, go through the brief of evidence of Mr Falkenstein. He sets out his knowledge, his dealings with Mr Ellis, him being a sharebroker and an investment advisor. He had been offered investment opportunities, paragraph 4, but did not participate. 2002, he was receiving investment proposals and this is where he talks about an investment through Annette Black. He talks about his own involvement in business school. 2003, a further approach by Mr Ellis and again he declines and at this point he introduces Ms Black to Mr Ellis. So you can see from this that Mr Falkenstein has known Ms Black since 2002, that's a point not without significance, and you can also see from this that this is a very experienced investor.

He's a financial controller and I'll take you to his – I asked him about his experience and background. He is about as sophisticated an investor as has come before this Court, I should have thought, and I'll expand on that shortly. Interestingly, by the way, and again it's a point I'll develop later, I have drawn Your Honours' attention to remarks of Judges about the Fair Trading Act not being used in commercial cases and indeed Your Honour Justice Elias said as much in the *Des Forges* case as well, but this is very much a case of a commercial high-risk loan being made by an experienced investor. So, back to the brief. He refers to a discussion in –

ELIAS CJ:

Doesn't all of that really just go to whether he was misled?

MR DALE:

It goes to, it goes to whether he was misled, and the evidence is very specific on that. It goes to reasonableness and it goes to –

ELIAS CJ:

Well, if reasonableness matters?

MR DALE:

Well the cases say you've got to consider objectively whether it was reasonable to rely on the statement, and that seems to me on the cases is a matter of taking into account a combination of circumstances and it's also relevant, of course, to contributory negligence which is an issue here.

ELIAS CJ:

It's relevant to remedy because that's a broad discretionary enquiry.

MR DALE:

Mmm. Well this is where this issue about distinguishing between remedy and the, if we call it the causative principles, you can approach it either way. You can approach it on the basis that there has to be causation and reliance, which is what I've argued for in my synopsis or you can look at it under section 43. But either way, it seems to me, you have to look at all of the circumstances in the round and make that assessment, was it reasonable? The Court of Appeal were trying to say I think in this case it wasn't reasonable for these reasons which made up a significant part of my argument.

ANDERSON J:

What might be the received jurisprudence of the question might be is it right?

MR DALE:

Is the Court of Appeal judgment right?

ANDERSON J:

Or is it a much more, a test that's much more subjective in some elements and much more liberal in terms of discretion when it comes to the justice because it's dealing with fairness. But anyway I accept your point certainly about contributory negligence. That's very relevant.

MR DALE:

When I said I feel like an appellant it was partly because the Court of Appeal judgment didn't really come out the way it was argued. That can't be fairer than that. I didn't put some of those arguments to the forefront. I argued that, and I have my submissions here, pretty much the way I'm arguing it today, on the basis that the case is heavily fact-intensive. It's not a case where relief should have been granted under the Fair Trading Act in my submission and the task that I have, and feel I still have, is to persuade the Court as to why both on principle, application of those principles, and the facts, and I do think that's why I'm taking Your Honours through the foundation first because what I want to do is get Your Honours to have a clear understanding of all of the elements, then I'm going to take you to some cases which I think make my point and then at the end of it I hope to persuade you on the basis set out in paragraph 12(c) and (d) as to why no relief should be granted. I'll finish with the issue of contributory negligence which really is obviously a powerful factor. The Judge made an assessment 50%. In my submission that's too hard on Mr Ellis but if you're against me on all else then we'll be expanding on that.

If I can just quickly then, go through the statement by Mr Falkenstein. He discusses the transaction at paragraphs 13 onwards. He said that he received the statement of personal financial position, paragraph 16, and he says that, that day they came to his office and signed the very odd loan agreement, which you'll see he described as a personal guarantee. So that's the very short summary and he then describes how things went wrong and finished at the end of his statement that he had felt that he had been betrayed by Mr Ellis, which is a rather surprising thing to say in a way since it's pretty

obvious they were both fraudsters. Surprisingly, by the way, the case began as one with a cause of action in deceit.

BLANCHARD J:

Sorry what did you mean by that?

ELIAS CJ:

Both.

BLANCHARD J:

They were both fraudsters?

MR DALE:

No, no both deceived by a fraudster. Ms Black –

BLANCHARD J:

I thought we should correct that since it's being taken down –

MR DALE:

Yes that's true.

BLANCHARD J:

– and may be used in evidence against you.

MR DALE:

No I think Ms Black either is related to Walter Mitty or I mean, you can see from the statement itself that it's just so detailed that it's not an accident that we might have, it's not a case where someone has been a little liberal with their assessments, it's a fraud.

ANDERSON J:

It's quite cunningly laid out, isn't it, putting in a big mortgage against high equities and things like that.

MR DALE:

And looking at Mr Ellis' position, why would he doubt it? That's one of the problems. But as I point out –

ELIAS CJ:

Why would he act on it though, in passing it on, without making clear that it was simply what he had been told?

MR DALE:

Well obviously with hindsight he should have, but the best argument that I've got on the question of reasonableness, about relying on what Mr Ellis said, was that Mr Falkenstein himself in cross-examination agreed that what Mr Ellis had said was not enough and he says that and that's why I want to take you to the cross-examination. That's the benchmark. Mr Falkenstein says, not enough. Anyway –

McGRATH J:

Or did he say it was not enough on its own?

MR DALE:

Yes and I'll take you, I don't want to misquote the evidence, I'll take you specifically to the passages. There are about four, they need to be seen in context and I didn't ask the questions quite the way His Honour Justice Wilson posed, but it'll be for Your Honours to decide whether I went far away and I'm going to, as I say, compare it with another similar line of questioning in the *National Australia Bank v Cunningham & Ors* case. So Mr Ellis' evidence is at tab 9. He describes having been met, having been introduced to Ms Black by Mr Falkenstein. He points out that Mr Falkenstein is a successful businessman. He's in a public company named Just Water which is listed in the stock exchange. They used to have coffee together and were friendly. He says he later met Ms Black. Interestingly, paragraph 6, he had a discussion which is not denied, about, he asked Mr Falkenstein what he thought about Ms Black's ethics, and he said, "I will leave that decision to you" and then

went on to describe an earlier venture in which he and Annette had been involved and this is –

BLANCHARD J:

Well that's exhibiting trust being placed in Mr Ellis and perhaps not in Ms Black.

MR DALE:

No that's Mr Ellis asking Mr Falkenstein what he thinks of her –

BLANCHARD J:

Yes, yes, and Mr Ellis is narrating what Mr Falkenstein said which indicates that he had some confidence in Mr Ellis which he didn't have in Ms Black.

MR DALE:

I wonder whether that's fair, Your Honour, with respect.

BLANCHARD J:

Well he asked him what he thought about Annette's ethics?

MR DALE:

Isn't that indicating –

BLANCHARD J:

It's like a sort of, you know, confidentially what do you think. You don't ask that of someone in whom you don't have confidence.

MR DALE:

That's - Mr Ellis says to Mr Falkenstein, "What do you think of her." That, Your Honour is right, that suggests that Mr Ellis has confidence in what Mr Falkenstein thinks. He's asking Mr Falkenstein, "Do you trust Ms Black?"

BLANCHARD J:

Fair point.

ELIAS CJ:

Usually, however, though these things are mutual, aren't they, confidence?

MR DALE:

How do you know, I mean, I thought though, without wanting to elevate this too much, it's an interesting exchange because it isn't an exchange where Mr Falkenstein says, I trust her. He says, basically I'll leave it to you which is a bit of a Pontius Pilate, isn't it really, and then he goes on to deal with a negative which is a loss and then qualifies it, "to be fair on Annette I think she was badly let down by the inventor" but it's not a statement of, it's not an endorsement by Mr Falkenstein of this woman. Anyway, obviously it was enough to persuade Mr Ellis that they could go into business together and they did so as investment bankers and property managers and they get into this Aqua Systems Limited business. Note Mr Ellis is neither a director or shareholder of the company. He's just helping her, it's essentially her project and he repeats it –

BLANCHARD J:

But he did have an anticipation that he would have a stake in it?

MR DALE:

Yes, he did.

ELIAS CJ:

But he keeps talking about how Rick and Annette are 100% committed and, you know, very excited –

MR DALE:

Yes, yes.

ELIAS CJ:

– and we –

MR DALE:

He put a lot of money –

ELIAS CJ:

– and indeed really, when the whole thing is first raised, it's that she's to provide the guarantee but it looks like a suggestion that the loan really effectively is to both of them.

MR DALE:

Yes, all of that's, it's probably, it's fair comment but we need to be careful of course, to not drift into the way the case was originally presented, that all of this material was misleading and deceptive because it just got discounted by Mr Falkenstein. He was experienced enough to see through the puffery, he said, "I'm not relying on any of that unless I do due diligence" but Your Honour's right, Mr Ellis had an incentive for getting the loan because he had committed time and resource to the project and they wanted the funding because they thought short-term funding would solve their problems. All of that was not –

BLANCHARD J:

But it was going to fall over if they didn't get the short-term funding because, –

MR DALE:

Yes.

BLANCHARD J:

– it is said, some overseas person with rather a lot of money has been unable to get it out of England or unwilling to get it out of England because of the bomb scare in England, or the, more than a scare, the bomb going off in London.

MR DALE:

And there were documents, there was quite a lot of background documents which suggested all of that had some credibility to it, but it didn't matter at the end of the day, but –

McGRATH J:

Though, Mr Dale, isn't it the case, though, that while he put a considerable amount of time into it, there's a contrast between the way in emails to investors he's representing himself as having substantial involvement, whereas in cross-examination he was saying, well, he didn't know much about the project because Ms Black kept it all close to her chest.

MR DALE:

He knew so much about the funding of the project, he always said –

McGRATH J:

He had no involvement in negotiations.

MR DALE:

Yes, no, he – and again, that's a matter of context, and he didn't say that he wasn't involved. He said she was, "The captain of the project," it was an expression he used, she was involved in the funding side, but he did say and repeated that he had been heavily committed because he was working towards raising funding, Mr Falkenstein wasn't the only investor that was approached, and he had committed time and resources and he expected a reward, no –

McGRATH J:

He did check – there was an admission by Mr Ellis that in cross-examination that she held the information close to her chest.

MR DALE:

Yes.

McGRATH J:

And that was the information generally concerning the company and its affairs, was it not?

MR DALE:

It was the funding of the company. This $8 million that was going to come from offshore was something that she'd dealt with, he didn't have hands-on involvement in that at all.

McGRATH J:

I mean, there was a contrast, and it might be this is in the area of puffery, I don't want to go down that theme, but there was a contrast in the way he was representing his involvement, was there not, to potential investors, including Mr Falkenstein?

MR DALE:

I'm not sure that that's quite so. He did specifically say, "She had assets of $2 million," no question. He did say he was involved in the business, no question of that. He didn't say, I believe, to investors, "I am involved in the specific part", but he was trying to attract investment. It's just that when he was pressed in cross-examination about the extent of his involvement – and this was because the case was being run on the footing that all those other allegations had to be met – that he needed to explain his response to the particular allegations contained in the amended statement of claim. So, he did need to address those issues in evidence because, for example, one of them was, "The London bombing has delayed the uplifting of a $US8 million funding package." Now, was that a misleading or deceptive statement? That's where the evidence that Your Honour's talking about –

McGRATH J:

Yes.

MR DALE:

– was addressed to that kind of stuff. So we were talking about different issues.

McGRATH J:

Yes.

MR DALE:

Now, if I can just pick up again on Mr Ellis's brief. He disputed the proposition that they were in a relationship of client and financial advisor, and that argument fell away. He did acknowledge that he regarded Mr Falkenstein as a source of potential loan funds, paragraph 13, but said any requests for venture capital were on an arm's length basis. He said, "I was aware," not challenged, "from my discussions with Annette that sometime in 2004 she had herself approached Mr Falkenstein for funding, but he had declined." He said he made another approach in late 2004, 2005, and at the top of page 54 he said, "I said that Annette was finding it difficult to crunch a deal. Mr Falkenstein said he thought that was my skill. I said that it was, but that this was very much Annette's pet project, I actually think I used the words, 'She was captain of the project,' it was Annette who had sourced the long term funding for the ASL venture through a company named Oram Capital," he explained the involvement there and he refers to this joint venture agreement with Oram, all of which was designed to show that it had some credibility.

He goes on in the following paragraphs to discuss the further attempts to arrangement funding, paragraph 21, "Spoken to approximately 200 potential investors," next paragraph he talks about his very substantial commitment to the project, which he assessed at about $100,000. He's received no remuneration, 2005 he talked about the need for further funding and approaching Mr Falkenstein, and he gave some evidence about why there was difficulties with the funding, paragraph 26. He did say, paragraph 27, that he had pressed Annette on problems being solved if short-term funding was required and he said, "I did not want to be approaching third parties unless I

could be sure what she was telling me was accurate," and of course she's talking there about the project. Annette repeated she was confident that funding was close at hand, she used the words on several occasions that it was, "Virtually a done deal," and that's what led him to approach Mr Falkenstein. Nothing here about the assets, and again I make the point that these assets are supposed to be, they're based in Australia, no reason you would think why he would necessarily have to press her on that.

Then he says the information he conveyed was accurate, and that's paragraph 29, and then, paragraph 30, which is important, "Annette assured me she could give security over the company or she would provide a personal guarantee, it was Annette who told me she had net assets in Sydney of approximately $2 million. I am quite sure that if Mr Falkenstein had asked for security over the company it would have been granted." He then says he provided some further detail about the business.

The next part's quite important. "I understood Mr Falkenstein and I would be having lunch the following Monday and I expected we would discuss these issues further. Because of Mr Falkenstein's previous refusals I expected that he would want further information before he would change his mind and invest or provide a line. The statement that my resources were very tight was true, and Annette had said to me she was not able to raise any further funds," 36, "or financial commitment." Paragraph 37, he requests a snapshot, which is a snapshot of the business, didn't seek any further information. The next step was he sends an email to Mr Falkenstein that confirmed that, "Annette would be joining us for lunch. I subsequently decided that I should not attend that lunch. That was so Mr Falkenstein could discuss the question of a loan directly with Annette. On Monday I asked if he could increase the loan to 250, that's because she had said she didn't think 150,000 was adequate. I do not recall Mr Falkenstein making any reference to the security," as he states in paragraph 15, "I do not recall there being any reference to any security in the correspondence. Later that morning Annette sent Mr Falkenstein a copy of her financial position," not challenged. "Annette and I went to Mr Falkenstein's office about lunchtime on 1 o'clock, Mr Falkenstein had

already prepared the loan agreement which he and Annette had signed. The meeting was, so far as I can recall, very brief, it lasted no more than 15 minutes. I do not recall there being any particular discussion about the transaction, I do not myself remember reading the term loan contract."

Just pausing there, one can imagine any number of questions one might have asked Ms Black, leaving aside the question of security, but one of them would have been, I should have thought, why can't you raise some more money, given that you've got assets of $2 million and you've got an art collection and so forth, any number of questions. And what Mr Ellis is saying is he has provided that opportunity. He's going to have lunch, he steps back from the lunch, so Mr Falkenstein can make his own enquiries.

WILSON J:

Well, that's a fair point, but doesn't it apply equally to Mr Ellis as to Mr Falkenstein?

MR DALE:

The difference between the two, Your Honour, is Mr Ellis is not advancing the money. It's the risk-taker who, you would think, looks for protecting himself. I think –

WILSON J:

But in terms of having the potential to raise the money to provide the shortfall.

MR DALE:

Mr Ellis has never said he any money. He said his funding was tight, there was no reason to think otherwise. Mr Ellis wasn't asked by Mr Falkenstein, "What's your financial position?" but it's Mr Falkenstein who's parting with, for all of us it's quite a substantial sum of money, he's excited about it, because not only is he getting 25% but he's getting the chance to convert to equity, which could well have meant this return was much greater, but it's Falkenstein that wins the money. Now he – all I'm saying to Your Honours is that when you're looking at this case in the round, because of the various propositions

I'm putting forward, it has to be right that the prudent person would have asked a question, or two, or three. It's so easy to do. Mr Falkenstein concedes, as I'll show you in the cross-examination, there was no urgency on his part. Getting a title search or getting security would have taken a day or two, at the cost of the borrowers. It's just extraordinary.

So I make two points. One is Mr Falkenstein doesn't do anything, but Mr Ellis has acted entirely reasonably in stepping back from the lunch. He hasn't provided the detail, but he steps back.

BLANCHARD J:

But it had all happened before lunch, and he was there at the time. How can you say he stepped back when he was a witness?

MR DALE:

He says, just to go back, that he had arranged to have lunch with Mr Falkenstein, paragraph 39 – sorry, a little earlier, paragraph 33. He said, "We were having lunch, I expected we would discuss these issues further," and that's because Mr Falkenstein has been saying, "No," to everything he's ever asked for. On the evidence, Mr Ellis and Mr Falkenstein have done no business. They've been friends, they've had connection, Mr Ellis has asked and been turned down. It's entirely reasonable, you would think, with respect, that he would anticipate a discussion before there would be a handing over of the cheque, which is, in this kind of transaction, is the proof of the pudding, if you like. But what he does say, paragraph 39, is that, "I decided I should not attend that lunch."

ELIAS CJ:

But he shepherds the whole thing. He rings the next day and asks for the extension of the money and he attends –

MR DALE:

Sure, sure.

ELIAS CJ:

– when the money is passed over and everything. He's hardly –

MR DALE:

No, no –

ELIAS CJ:

– stepping back.

MR DALE:

Well –

BLANCHARD J:

And he witnessed Ms Black's signature.

MR DALE:

Of course. There's nothing, though, that elevates the initial statement to any greater degree. Of course he's involved, he's asked for the loan because he has a benefit in the transaction and an interest in the company. He's asked for the loan, he has facilitated the exchange of information. He's the one that it looks like asked Ms Black to get that statement of financial position. I don't suggest that he's not involved. What Your Honours are having to grapple with is how long does the causative potency of his initial statement, and there's only one remember, the $2 million, how long does it last? And we'll come to the cross-examination, because I think that that's the next stage.

All I'm saying on the facts here is that Mr Ellis has not acted unreasonably and Mr Falkenstein has had every opportunity to protect himself. I'll just finish on this part of the statement that Mr Ellis made, I think the very fair point, that, in paragraph 47, that this was a high rate of interest and there was this possibility of converting to equity. He goes on in the following paragraphs to respond to the brief, some of it amounts, if you like, to almost advocacy, in the sense that he had every – he says, 59, "Mr Falkenstein had every opportunity to speak to Annette directly. That's true, I do not why he did not canvass with

her why she could not raise 150. I do not know why he didn't take security," paragraph 61, and then he talks about the business concerns. He talks – interestingly, he had a phone call from my learned friend, paragraph 65, "Mr Herzog said she's probably conned you also," which I took to be a reference to Mr Falkenstein also having been misled. At this stage, by the way, he was intending, I was intending to call Ms Black as a witness, and you will see that, paragraph 69, he said that he was going to call her to give evidence. She didn't turn up and we were going to adjourn the trial, but instead we, at tab 5, you'll see there was an agreed statement of facts. So that completed that part of the evidence.

I think now that the appropriate thing now is to go to the cross-examination, and that's at tab 10 of the bundle, and of course there are only two witnesses, and Mr Falkenstein was first. So, starting at page 62, I expanded, got him to expand on his qualifications. He was a director of about eight companies, line 34, one of them listed. He had been a director of high-profile listed companies, Optical Holdings was one. He had started the Business School, he accepted, page 63, line 12, "He was an experienced and well-qualified businessman, he had provided venture capital for business ventures." He mentioned the 700,000 in a venture that he lost, which had been introduced by Ms Black, and he had other losses, including 300,000. He described himself, line 24, "Basically an entrepreneur. In the case of the venture that Annette Black introduced to me, I did full diligence, due diligence on that," and we then asked him about the nature of that investment and the kind of things that he looked at, page 64, business plan, budget projections and the like, and I asked him about vehicles that he used, did he, for example, have stand-alone ventures.

I mean, this is a man right at the very top of the business tree in terms of acumen and experience. He talked about, at line 29, I asked him about taking legal and financial advice. He referred to a firm of accountants and Mr Harmos, who's one of the country's most experienced commercial lawyers, and he talked about being approached by people for investments. At 65, "He had a reputation, he was prepared to invest in business ventures." He

acknowledged that he didn't accept every proposition, some of this was probably pretty obvious, he considered each of them on their merits, "Presentations are accompanied by expressions of optimism, yes," and he approached such approaches with caution. He went on to acknowledge the relationship with Mr Ellis and how he had introduced Ms Black. I asked him about the discussion about the ethics, it's at the bottom of page 65, line 34 and he acknowledged that that probably took place.

ELIAS CJ:

Mr Dale, it's time for the morning adjournment.

MR DALE:

Oh, I'm sorry.

ELIAS CJ:

No, do you want to complete this or –

MR DALE:

No, I think I'd rather wait until after the break –

ELIAS CJ:

Yes, all right, well –

MR DALE:

– because the good bits are coming.

ELIAS CJ:

We'll take the morning adjournment now then, thank you.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.49 AM

ELIAS CJ:
Yes, Mr Dale.

MR DALE:
Thank you Ma'am. I was at page 66 of the case, just going through the cross-examination of Mr Falkenstein. I asked him on this page about his assessment of Ms Black and he agreed she had presented as competent and professional and that he had no reason to doubt her integrity. He agreed that Red Eagle had not retained Ellis Black in any capacity. He agreed there had been earlier approaches for funding and they had been declined. He agreed that he hadn't made any enquiries into the status of ASL. I asked him if he'd asked Mr Ellis how they were getting on with funding, he agreed that he may have, it's at the bottom of the page. I asked him is it possible, Mr Ellis – that Mr Ellis said that Annette was finding it difficult to crunch, recall? I don't recall. He also didn't recall whether she'd said it was her pet project.

He went on to say he'd never looked at the venture because he wasn't interested in it and talked about a previous request for capital and the reasons why he had turned it down and again, bottom of page 67, talked about the due diligence process and what that involved. It was put to him, "You were offered in this letter, security over ASL either as a GSA which is of course a general security agreement or personal guarantee? Right. You know what a GSA is? Yes." He said he didn't want to have security because he hadn't done due diligence and couldn't rely on security and that he didn't know whether the assets were already incumbent. All still rather surprising given the offer of security.

I asked him about the statement that their funds were, their resources currently tight, were tight currently, line 12. "How do you reconcile that statement in your mind at the time with the statement that she had net property assets of approximately $2 million? I think it got explained to me that

the assets in Sydney, we didn't want to bring them into New Zealand operations so her cash resources were very tight and she –

BLANCHARD J:

It would be a bit tricky bringing them into New Zealand, given their nature?

MR DALE:

Well, yes. I think by that was meant the equity or even, perhaps even the art, I don't know but when people talk about transferring assets it can mean the sale of the properties and buying in New Zealand. I just want to make the point, the statement, "Her resources were very tight. She didn't want to sell the properties at that stage. She told you that? Either Rick or her." Now, appellant here carries the burden of proof and I just make the point that that's an important conversation in this context and it's something that took place. I asked him when it took place, "I can't say, I just recall being told because that's a question you would ask. So did you ask that question and got an answer?" My recollection and forgive me if I'm wrong but I don't think that it was put to Mr Ellis that he had made that statement but if I'm wrong about that I'm sure my friend will correct me and I am going to take you to his cross-examination.

I suggested though that he'd asked the question, got an answer and I suggested to him that it would have been on the Monday morning and I said to him, "By which time you've got the statement of financial position? Yes." I asked him about the outstanding business opportunity point and again, repeating what's already been said, he wasn't interested in that. I asked him about the two page snapshot. Over the page, page 69, I asked him about the initial email and his initial response. Asked him about the three exclamation marks which tended to suggest a level of excitement and he said, "That was atypical I suppose, it was bridging finance for up to 45 days I think. Is that the reason that the rate was very high? Yes and there was some risk. I got the impression that was because they needed the money urgently, it was only a short time, it still only amounted to a few hundred dollars."

Then I asked him about the personal guarantee in letter format. "Declined security. Declined, haven't you the opportunity to take any security over the company's assets? Yes. Reason? No due diligence." Then he said and he'd made reference to avoiding legal costs which is a factor you may think is important, that he didn't think that was necessary and that, "It was just as easy to do it in letter format rather than trying to get lawyers involved and avoid the legal costs which would have equated to the interest for the 45 days." I asked him about the exchange of emails and what the money was for and I said that, "While they were obviously very anxious to get funding as soon as possible, there was nothing to suggest that this was so urgent that the business would collapse, for example if there was a statutory demand about to expire? No. So while you might have inferred they were in a hurry, you had no reason for urgency yourself? No. Indeed, if you had incurred legal costs you would normally expect the borrower to pay those costs? I could have but on Monday morning obviously their, not his, their comments, were made that it was needed urgently and was only 30 to 45 days, so I knew, I mean Rick is a man of integrity which of course is unchallenged and I believed the security was there. I could have done it without anything in writing but I thought it better to do it in writing. You did go a little further because you requested details of the property assets? Yes. That's because, presumably you weren't content with the bald statement that Ms Black had net assets in Sydney of approximately $2 million?"

So they're pausing there. That's a pivotal moment where I say, stopping the clock at that point, there would be no loan advance because there wasn't enough information. Going on. "Now we know, if we go to document 6, that was sent to you by Ms Black at 11.43 on the Monday? Yes." He produced to the Court an email from some Sydney solicitors with title searches, that was later, that was just to demonstrate that she didn't ever own the property. I just asked him, "How long did it take to get them? A day or so. How much did it cost? A couple of hundred dollars. I think you'll accept, that had you undertaken that exercise on 1 August and delayed the transaction for just a day, you would have learned the true situation? I think in hindsight yes but I believed that Rick had that information." I've got a note as to why. Mr Ellis

hadn't said he had that information. All he said, remember, was she's got property assets in Sydney, $2 million.

"You must have thought when you read that document 6 that it was quite detailed, it's got details of liabilities, bank accounts, motor vehicles, addresses of properties, reference to an art collection, value of shares and even a reference to contingent liabilities. You must have seen documents like that before? Yes. It's got a signature on the bottom right-hand corner, Ms Blacks' signature? Yes. When you looked at it, was there anything caused you to be suspicious? No. Nevertheless, if you'd wanted to be careful all you had to do was get the search and wait a day? Yes. When they arrived in your office that morning you had the document? Yes. So what did you say to Ms Black about this document? Well, that was when I wrote the contract." So, there's the opportunity.

"Can His Honour assume that if you hadn't been provided with that statement of financial position and that detail, you wouldn't have made the loan advance? I probably wouldn't have, no." If I could just interpolate here. Stopping the clock, again there's a different manifestation of the same statement upon which I reply. I then asked –

WILSON J:

Mr Dale, isn't the more relevant question whether Mr Falkenstein would have made the advance on the basis of the statement of position if Mr Ellis had not previously asserted that Ms Black had the $2 million?

MR DALE:

Well, it's interesting, Your Honour. I know, from Your Honour's very considerable experience at the bar, that when you're cross-examining in this kind of situation it's a question of how far you need to go without asking for it if you like, the question –

WILSON J:

I know, it's a very difficult –

BLANCHARD J:

Not a question you would have wanted to ask, I suspect.

ANDERSON J:

It's one for re-examination Mr Dale, isn't it, really?

MR DALE:

If you ask it, absolutely. Now, I think – I was just about to say, it's not my job to prove the plaintiff's case. Remember, if we can just go back to the documents. Mr Falkenstein had begun by saying that he needed more. Remember, in his email he said, "If all is okay"? Now, I suspect if I'm cross-examining a smart witness and I asked him a leading question like that and throw him the lifeline which I think is what, with respect to Your Honour, you were saying, he's going to grab it. Now, I thought –

ELIAS CJ:

Mr Dale, I'm sort of a little puzzled about where we're getting to with all of this deception because surely, the fact is, the Judge considered that the plaintiff had been misled. Are you saying that he couldn't have drawn that conclusion from this evidence?

MR DALE:

I'm, I'm saying – where I say the Judge at first instance went wrong, is that it was open to him to conclude that the initial statement made by Mr Ellis constituted misleading and deceptive conduct. Assets in Sydney, $2 million, accept that. I can accept that Mr Falkenstein tentatively, emphasise tentatively, agreed to go ahead but what I say, where I say the case stops is there is a break in the chain. There is a break in the chain of causation because Mr –

ELIAS CJ:

That's a matter of fact.

MR DALE:

It's a matter of fact, it's open – because this case doesn't turn on who I believe or I don't believe, we accept that the statement has been said. I'm attacking the, I – not attacking the trial Judge's findings, I am the respondent but what I say is wrong is that it is the defendant's, sorry, the plaintiff's evidence, the appellant's evidence which is in black and white and which provides a firm foundation for arguing that there is no reliance because he says, "Without more, I won't lend," said it at least two occasions. Says it implicitly in his email, he says it twice in cross-examination now. As a matter of law, I say there must be reliance and I think Your Honour, taking the *Des Forges* case which is an example, if there's a break in the chain then the causative potency of what's being said is lost.

ELIAS CJ:

But whether there's a break in the chain is a matter of fact and really what's being put to you by Justice Wilson remains to be answered. His concession that he required that statement of financial position or he wouldn't have advanced the money, has to be assessed in the context, that he has earlier been given this advice and the question really, surely, is whether the Judge was able to draw the inference that it continued to be operative.

MR DALE:

Well, the answer to that Ma'am, is no because the witness has said so.

WILSON J:

No.

MR DALE:

I mean, this – I mean, I don't want to be quibbling here –

WILSON J:

No.

MR DALE:

– but if you provide, if a person makes a statement to somebody which is untrue, misleading, then they open up the possibility of being liable for that statement. If however, they acknowledge they did not rely upon it, then they can't sue. That's the law. This witness –

BLANCHARD J:

Where did he say he didn't rely on it?

MR DALE:

What he says – I put it slightly differently, he says he would not have lent without the further detail.

BLANCHARD J:

That's not a statement that he didn't rely on Mr Ellis.

MR DALE:

It's a – he does say he relied upon the statement of Mr Ellis, but the problem with that is that's not what caused the loss. The loss is because he wanted and got further information, and without it he wouldn't have lent.

WILSON J:

It seems to me –

ANDERSON J:

Not even common law jurisprudence adopts a test of sine qua non.

MR DALE:

There's a distinction between a case where there are a variety of factors. If you look at the, one of the cases is a good example of that, the *Henville v Walker*, that was a case where some investors, one of whom was an architect, wanted to build some flats, and Henville, who was the architect, worked out some cost estimates, and they then went to some real estate agents and said, "How much can we sell these apartments for?"

The defendants, who were real estate agents, said, “Look, this place is awash with wealthy farmers, they’ve got cheques they can’t spend, you’ll be able to get 250,000 per apartment,” and the plaintiff’s case, *Henville* case, there was that they relied upon that representation. They built the apartments and it turned out that they couldn't get anything like that, they were about 200,000 short.

At first instance the trial Judge said, “Well, there were a number of factors which caused loss. One of them was the inability to realise the represented price, but the second, His Honour found, was that the estimates to build the apartments were awry, and that was another reason why there had been a loss. A little surprisingly, the full Court in Australia overturned the trial Judge, who found for Henville, and gave them damages based on the difference between what they sold for and what they should have sold for. Not their full loss, because he said only some of the conduct caused the loss. And there’s a useful discussion in that case where, in the High Court of Australia, they reversed the full Court and reinstated the Judge’s decision and said, “Look, it’s a case where there’ll be a number of strands where they each have some causative potency. You can’t isolate any single one of them,” and that was what I think Your Honour Justice Anderson is getting at, that's the common law position when it comes to reliance and misleading behaviour. But what they did, of course, in that case, when it came to damages, was to assess the damages based just on the loss caused by the failure to realise the sale price.

ANDERSON J:

Which is what our section 43 would permit, because of the approach that it has very broad discretions in it –

MR DALE:

Yes.

ANDERSON J:

– to do what’s just in the result.

MR DALE:

Yes, it is. And one of my arguments here, while I am urging Your Honours to find for me completely on this basis of reliance, is also to look at that broad discretionary basis. As –

WILSON J:

Can I just come back to what I still regard as a crucial point and ask you whether you would accept that proposition that there's no direct evidence as to whether the advance would have been made without the Ellis statement?

MR DALE:

Well, I think I have to answer that the way perhaps I've signalled. It's for the plaintiff to prove that the loss was caused by reliance upon the misleading statement. What I extracted in cross-examination and which I –

ELIAS CJ:

I wonder whether that's right, you know. I'm just wondering about carrying over into this legislation onuses of proof. We're at the stage where there's a finding of deceptive and misleading conduct in trade, and then there's just a flat inquiry required by the statute as to whether the person suffered loss as a result.

MR DALE:

Well, when the Court granted leave –

ELIAS CJ:

You might be right, but –

MR DALE:

Sorry.

ELIAS CJ:

You might be right, it's just a query.

MR DALE:

Well, when the Court granted leave in this case, which is, let's face it, a modest case involving a small amount of money, and frankly you wouldn't have thought gave rise to nice issues of principle, the way the question was framed was pretty broadly based, and, when my friend put his argument in, it didn't look to expand or develop the horizons of the Fair Trading Act. In my submission, I have looked at the jurisprudence in a little more detail. I wasn't sure whether I should have or was expected to, but it did seem to me that this case did give rise to quite a nice issue about reliance because of the concession that I had got. I also occurred to me that if this Court were interested, it was very much a case where you could put a stamp on the extent to which this consumer legislation is available in these circumstances. Because it's not an Act which is designed to provide a warranty for those who engage in high-risk commercial transactions, an expression that I draw from Your Honour in *Des Forges* –

ELIAS CJ:

I may have been quite wrong there…

MR DALE:

Oh, I doubt that.

BLANCHARD J:

Why do you say it's consumer legislation?

MR DALE:

Well, it's been described as such. I –

BLANCHARD J:

Well, its genesis is the Australian Trade Practices Act –

MR DALE:

Mmm.

BLANCHARD J:

– which is hardly consumer legislation.

MR DALE:

Well, I also, I drew on some remarks of Justice Thomas in the *Fletcher Construction NZ & South Pacific Ltd v Cable Street Properties Ltd* case which I set out at paragraph 85 of my submission, which is at "The reach of section 9 falls short of permitting the Court to act as nursemaid to those engaged in commerce." I didn't come to this Court ready to address that issue because there are plenty of references I think, to it being consumer legislation but having said that, I –

ANDERSON J:

Goldsbro is one, isn't it?

MR DALE:

Pardon?

ANDERSON J:

I think *Goldsbro* is one, isn't it?

MR DALE:

Goldsbro is one but having said that, I recognise that in many of the cases they are commercial deals and *AMP v Heaven* is an example, where they were developing property and they relied upon the bank's representation that they would be lending further funding. The difficulty, if we don't grapple with issues of causation and reliance and just leave it in the broad basis of section 43, is that, my submission is it becomes a little loose and when counsel are tackling an issue like this, the statement made that is misleading and deceptive, the immediate question any competent lawyer will ask themselves, "Well, did it cause the loss?" and what I looked for here was the break in the chain. I have in my submissions, developed what I think are the reasons, submit the reasons are, that causation and reliance are ingredients

of a claim under this case and what Your Honours, I submit, have to do is to conclude whether or not the state of the evidence is sufficient to enable the plaintiff to get home.

By way of comparison though, if Your Honours would be kind enough to look at the *National Australia Bank v Cunningham & Ors* case which is at tab 7 of the bundle –

BLANCHARD J:

Have we finished with the evidence?

MR DALE:

Well, not quite Your Honour, I have to say I was going – I think you've got the essential parts but I did want to take you to some additional passages –

BLANCHARD J:

If they're reasonably brief it might –

MR DALE:

I can summarise –

BLANCHARD J:

– be convenient.

MR DALE:

– what followed. This case, after Mr Falkenstein had been cross-examined, he was re-examined by my learned friend which starts at page 72. He was asked, "Did you turn your mind to the absence of any security..." page 73, "...in respect of the Sydney properties?" He just says, "No, I relied upon Rick Ellis' statement that the assets were there, so in my non-legal mind it was a guarantee based on those assets", which is a rather odd thing to say. He was asked, he repeated again that, "$2 million worth of assets was a good enough security."

BLANCHARD J:

That statement, "No, I relied on Rick Ellis' statement that the assets were there," is surely significant?

MR DALE:

It is significant but against three points. One is without more – he said at the beginning he needed the detail of the property, didn't commit until he got it, acknowledged that without more he wouldn't have lent, and then there's the detail of the statement itself. So, when he says, "She had $2 million worth of properties," he's got a document which says so and of course, on the other part of the argument, the reasonableness and contributory negligence, there is his extraordinary behaviour in not making any direct enquiry.

No, Mr Ellis gave evidence and he was – I won't take you through all of the cross-examination but I want to make one point about this. He was asked, when he made statements to people, did he intend that they be relied upon? Now that's a "when did you stop beating your wife" kind of question because you can't possibly answer it in the negative because you're admitting to being deceitful. It was a good cross-examination. My learned friend chopped away at Mr Ellis and Mr Ellis, understandably, said, "Of course I investigated issues" and he said that he didn't send things out without believing that they were true –

ELIAS CJ:

Sorry, what page are you on?

MR DALE:

Start the cross-examination, this part of it starts about page 75, see for example line 29. "So is it fair to say that you took precautions and to ensure that the info you relayed to potential investors was accurate? I've always maintained that whenever possible before going out to raise flag in the market, it is very important to do the best you can do to ensure accuracy and fairness. Why do you say that, why do you think it's important? I think a

caring personality is very important in making these offerings or ensuring there's a reasonable balance."

Over the page, 76, when you told, line 17, "When you told Mr Falkenstein that Ms Black had $2 million worth of property assets in Australia, you accept that's what you advised Mr Falkenstein, do you accept that? Yes. Do you accept it wasn't true? I certainly do now of recent times but certainly at the time, there's absolutely no doubt whatsoever in my mind that the info given to me by Annette Black was truthful. I had no reason to doubt or investigate the degree of accuracy. What due care or research did you do in terms of your background to ensure the statement was correct when you made it to Mr Falkenstein? On the asset liability statement, no. On your statement dated the 29th of July to Ms Black assets of $2 million in Australia, what did you do to ensure this statement was correct? As I've said in my statement, I asked her on several occasions before that, going out to substantial people and she assured me on more than one occasion that was correct."

One of the things – that's all understandable because you've got an honest man who is being misled by a fraudster, who has asked his friend for money and lost it. Nothing unexceptional about that and he repeats throughout this that he believed what she said and he asked for the money accordingly. What doesn't occur here though, is it's not a case where Mr Ellis goes further in his evidence and said, "Now Mr Falkenstein, I've checked this on a number of occasions." He doesn't say anything about having gone the step further. All he does is say that, "When I hand out information I believe it to be true" and of course why wouldn't he? So, there's not much in this, but it was effective in the sense that it drew Mr Ellis to the point where you couldn't have argued any further that he was an innocent conduit because he was saying, "I'm not just flicking it on, I'm putting my imprimatur on it, I'm making a statement." That's why it was that exchange which led me to not argue any further that there was an innocent conduit.

So, that's the evidence in a nutshell. He was also – the cross-examination then strayed into what was happening to the money and so forth but nothing

turns on the rest of it. He did repeat, by the way, that it was Annette Black that had provided the details of the assets, that's page 84 of the bundle, and he was asked why he thought Mr Falkenstein was asking for detail of the assets and he just said, "Just in normal commercial manner." Question, this is line 22, "How does this normal commercial manner arise?", which is an odd question. "Sorry, I don't understand the gist or thrust of the question? How does the issue of the details of the property as it's being requested from you arise? I'm not sure where this is heading. Why do you think Mr Falkenstein is asking you for details of the property assets? Just a normal commercial question. I would have ensured that Annette included or demonstrated or made good her statement of financial position." So it went on a bit but the short point is that he believed what he was saying and he passed on the information.

I was going to go from there to the *National Australia Bank* case because that's, I've submitted, is almost a mirror of how these questions can cause difficulties. This was a case involving some potato growers who had on-sold their crop to a buyer who had defaulted and what they had done is they'd rung the bank for a credit check and the bank had said that in relation to a report which it had received that the report was as good a report as you could get, nice short concise important statement.

It was a case that had some procedural difficulties and turned on a strike-out application, but the short point – one of the issues, and this is the only issue that I think is of interest to Your Honours, starts at page 51624 of the judgment where counsel had cross-examined the plaintiff on the issue of the report and the cross-examination as set out in the second column starting at paragraph 8, "The cross-examination to which Mr Neville had record is recorded thus. 'Now, if you had not been told that it was as good a report as you can get but had only been told that Habdeen honours its account obligations and meets his commitments, would you have entered into the contract? If I was told that they had met their commitments and conducted a satisfactory account and it came from my bank, I would have entered into the contract. Can I put that precisely to the factual context? If you had been told

by Mr Donnellan that he, Mr Donnellan had enquired of the Westpac and had been told by the Westpac that Westpac had said, Habdeen conducts a satisfactory account and meets its obligations and if Mr Donnellan had said nothing more, would you have entered into the contract? That is not just the case, is it? No, I understand that'."

Then there was an objection to the question and His Honour concluded that, "It went to reliance and to the substance of the cause of the action." The question then at the bottom of the page, counsel, "Mr Cunningham, if Mr Donnellan had said to you no more than this, he had enquired of the Westpac and had been told by the Westpac it had then conducted a satisfactory account and met its obligations, would you or would you not have entered into the Habdeen contract? In the instance of entering into the contract, it was going on a message that was relayed by my wife to myself with the terms that is as good a report as you can get. I understand that. Now, if that report had not had that is as good a report as you can get, I may have gone and phoned Barry Donnellan myself and asked him his opinion of it. You may have? I may have. But you may also have entered into the contract? I may have."

That's a clever cross-examination and it was being used as a foundation for arguing that there was no reliance. Now, what the Court did is they carefully analysed that and took into account all of the evidence and the findings effectively are on the next column, to say that it was open to the Court to conclude there was nevertheless reliance. The passage that follows is where we get into the discussion about having just strands which cause the loss. What was argued, over the page, page 51, 66, at paragraph 10, was, based on a judgment of Justice Wilson in *Gould v Vaggelas*, "It is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances, examples commonly given of such circumstances that the plaintiff not only actually knew the true facts but knew them to be truth, or that the plaintiff either by his words or conduct disavowed any reliance on the fraudulent representations. It is entirely accurate to speak of an onus resting on a defendant to draw attention

to presence of circumstances such as those as I have described to show that the inference of the fact of inducement which would ordinarily be drawn from the fraudulent making of a false statement, calculated to induce a person to enter into a contract, followed by entry into that contract, should not in all of the circumstances be drawn but it is no more than an evidentiary onus, an obligation to point to the existence of circumstances which tend to rebut the inference that would normally be drawn from the primary facts. When all of the facts are in, the fact-finding tribunal must determine whether or not it is satisfied on the balance of probabilities that the misrepresentations in question contributed to the plaintiff's entry into the contract. The onus to show that they did is a condition precedent to relief and rests at all time on the plaintiff."

Now, perhaps I can just go forward to say that what the Court said there, that you've got to understand the testimony in context and at paragraph 13 there's a passage there to say that it's not, that exchange and I think Your Honours can recognise immediately, wasn't fatal to the plaintiffs succeeding. You can argue in many cases it would be possible to pose a question like that, might you have gone ahead anyway and to get, sometimes from a witness, either an insistence that that's not what happened or, if there's a persistence, they may well say, "I might have" because one doesn't know. In some cases though, it's possible to say, "Well, obviously I wouldn't have gone ahead without primary information" and we can think of many examples of that but what I say is that the *National Australia Bank*, that kind of cross-examination, is quite unlike what occurred here because of the specificity of the answer. That case, in my respectful submission, is good authority for the proposition that you have to show reliance, there can be a break in the chain, the onus remains upon the plaintiff and I say, in this case, that what happened here because of those key passages, was such that the chain was broken.

Now, I realise I've been on my feet a lot longer than my learned friend and I'll just go quickly if I can through my written argument, just to summarise all of these points. I've set out the issues in paragraph 3. I've suggested that the *AMP* case does leave open the proposition that there are in fact four steps to

be taken. Firstly, was the conduct misleading, was the representee in fact misled, was there reliance of cause or a contributing cause of the representee's loss and then was it reasonable in all of the circumstances? The Court of Appeal correctly concluded it wasn't reasonable in all of the circumstances and that finding, paragraph 11 of my synopsis, I obviously support. Paragraph 12 I have taken you to already, I have said to you it's the second, sorry, it's the third and fourth of those elements which needs to be addressed. I dealt, on page 5 of my synopsis, with the facts, and I have set out again the points that I have made on a number of occasions already, which is the need for reliance and the point that without that information he wouldn't have proceeded.

There isn't a great deal of difference between my learned friend and I as to what occurred on the facts, but I do point to, in paragraph 19, to factors which are of particular significance. "On any view this was a high-risk, short-term loan for a substantial return, it cannot be ignored or argued otherwise." There was an offer of security, there was no urgency, there had been prior dealings, there had been a failure to obtain title searches and legal advice. Mr Falkenstein's own experience, previous requests to client, an acknowledgement that he undertook due diligence and the opportunity to discuss the statement of assets directly with Ms Black. And then two further points, that she's a fraudster and the other allegations were not proven.

I don't think it's overstating things to say that this really is the high-water mark of a reliance case where, when you look at those factors in paragraph 19, it's almost hard to imagine a more compelling case for Mr Falkenstein to bear his own loss. He only has to ask any question of Ms Black –

ANDERSON J:

But what legal principle do you base that submission on, is it the extent of contribution being 100%?

MR DALE:

I do.

ANDERSON J:

Or is it just a fair response, in terms of whether he should get any compensation for something that influenced him, or what, what's the basis of it?

MR DALE:

Well, if – that's a good question and it's a question that I thought this case posed, and what made this case perhaps of interest to this Court was because if you do approach it on the basis that His Honour Justice Dobson – just look at it in the round, under section 43. You find there's conduct, you take a relatively broad approach to thresholds of reliance and causation as, I think, the Chief Justice has signalled might be the way to look at it. Then you have to look at issues such as reasonableness and all of the circumstances in the round, and the Court has to come up with, I suppose, what's the fair thing and I say, in this case, that those factors are so compelling that this isn't a case where relief should be granted, and I also add to it, because it seems to me to be supported by some obiter remarks, that this is a case where Mr Falkenstein is trying to turn a statement made in the commercial context into some kind of warranty, lifting it out of context. That's one way I can put it. The second way I can put it is to say –

ELIAS CJ:

Well, why is there a point of principle involved in that, you're really just putting to us a different assessment than the trial Judge made, aren't you?

MR DALE:

Well, I'd better just make one point clear, and I made this submission to the Court of Appeal, that this isn't a case where you can't interfere because there are findings of fact, because they're not issues that turn on seeing and hearing the witness. My case focuses on what Mr Falkenstein had to say. You won't gain anything from having seen and heard him, and this Court does in appropriate cases take a different view on the facts, *Premium Real Estate* is perhaps a recent example.

ELIAS CJ:

I'm talking really about the evaluative decision that the discount should be 50%, on which there's concurrence between the Court of Appeal and the High Court. I though that's what you were addressing here.

MR DALE:

No, I was responding – I think His Honour Justice Anderson asked me –

ELIAS CJ:

Oh, I'm sorry.

MR DALE:

– what's the jurisdictional foundation for relying upon the points in section 19, and I'm perhaps answering badly but trying to say that if it's a broad-based inquiry under section 43 then they're all important factors. If it's a contributory negligence issue they're important factors. On just a basis, was it reasonable to rely basis, they're important factors but I also, as I say and as I've said already, take the earlier point that if there's no reliance we don't even need to go there but they are, on the facts, quite important points and that last point I made is that this is effectively the high-water mark. I don't think there's ever been a case where a plaintiff as well equipped as Mr Falkenstein in every sense, both in terms of ability, resource and opportunity, comes before the Court and says, "Give me my money back." He also wanted interest at the rate, the contractual rate, so talk about opening one's mouth wide enough, but I argued in the Court below that he's the author of his own misfortune. He's taken a risk and this isn't legislation which should assist and these were amongst the reasons why.

ANDERSON J:

But did you argue the interest point as a discretionary issue, not as a strictly legal issue?

MR DALE:

I argued that there couldn't possibly be a foundation for contractual interest, it just couldn't work. I mean, Mr Falkenstein wanted the interest that Ms Black had agreed to pay. This was a case where if there was going to be interest it was going to be Judicature Act interest and couldn't be otherwise.

ANDERSON J:

This might be a red herring but I'm interested in the various techniques that might be available to do broad justice in a particular case and it seems that one of the important issues might be actually identifying the loss that relates to the conduct. In this case, is the loss everything that wasn't paid, or was the loss occasioned by the conduct, the risk, that was assumed?

MR DALE:

What Your Honour has suggested, with the greatest of respect, is a very good point and precisely the way it was handled in the *Henley* case. The difficulty here is that this is a bit of an all or nothing case, in terms of the loss of capital which is all that the plaintiff could ever reasonably –

ANDERSON J:

Because the risk was so great that the loss was inevitable?

MR DALE:

Yes. I mean, he was lending money to people who were venture capitalists who said they were strapped for cash. They obviously couldn't pay their creditors. He didn't put any store on the company having assets, and he wasn't content with the broad statement that there was too many losses of property.

ANDERSON J:

That's when the contributory aspect then becomes a useful technique for this case.

MR DALE:

What is quite difficult though, is to separate out, as I think Your Honour is asking me to think about, is the statement made by Mr Ellis which I have agreed was conduct under the Act, as to what part of the cause did that have on the loss. I've put my case at the highest level. I've said none, and I've said that because Mr Falkenstein agreed that if that's all he had, there wouldn't have been a loss. That's, I think, the fair inference of his evidence. So I say that what Mr Ellis did, while it might have been wrong in a broad sense, misleading, untrue, was not the cause of the loss, because Mr Falkenstein stopped the clock, is the expression they used, had said if that's all I'd got, I wouldn't have lost any money.

ANDERSON J:

There are cases like *Heaven*, where the plaintiff goes into a venture which ends up disastrously. But some of it is caused by some other conduct, not the conduct such as here, buying a neighbour's land with a jetty on it.

MR DALE:

Your Honour is quite right, and that's why this case, in some ways, it's a little unique because most of them are just as you described. You go into a venture relying upon a whole series of information that might be costings, sale price, the market, any kind of strand. One of the unique features of this case is that the statement and the intervening event relate to the same information. I haven't seen any case like this, other than the *Cunningham* case, where the very information that is the cornerstone of the plaintiff's case is the same information that the plaintiff says is not enough. That's what makes this case unusual, and that's why, it seems to me, that we have to grapple with the issue of reliance. We have to ask the question, is it necessary to establish reliance and if it is, then my submission is the plaintiff fails.

ANDERSON J:

Are you going to discuss, as you indicated earlier, why this type of case is inappropriate for Fair Trading Act intervention.

MR DALE:

I took that, really – it's a tricky one this and I want to be quite clear about this, I think His Honour Justice Blanchard picked up on this earlier. It's quite difficult to say the Fair Trading Act can't be used in a commercial context.

BLANCHARD J:

Well, particularly when it talks about in trade.

MR DALE:

Of course. I absolutely agree.

BLANCHARD J:

So if it's in trade, it's within section 9.

MR DALE:

Yes, I entirely agree with you, but what I'd picked up on, I'm just really – I don't want to be seen to putting this too high because I recognise that Your Honour is quite right and as I said already, in most of the cases or many of the cases, there is a commercial element. *Goldsbro v Walker* involved a substantial purchase of a property on the North Shore. *AMP v Heaven* involved a property development. *Premium Real Estate* involved a sale of a very substantial property. They do have a commercial flavour but if we are talking about a broad-based, discretionary statute where the Court can take into account issues such as reasonableness, then there needs to be some regard had to the commercial context and this case is at the very top.

The passage that I referred to, by the way, is in paragraph 84 of the bundle from Justice Thomas in *Fletcher Construction & South Pacific Limited v Cable Street Properties Limited*, the case is in the bundle, relief was granted. That involved a property developer named Mr Blackmore who, curiously, drives round in a Rolls Royce with a number plate SATAN. They obtained relief there in relation to a commercial transaction and what His Honour Justice Thomas said, "I do not consider that in such circumstances section 9 could ordinarily be invoked to assist experienced developers to obtain

damages under the Fair Trading Act. Ordinarily, for the Court to grant relief in such circumstances would be perceived as patronising. The reach of section 9 falls short of permitting the Court to act as a nursemaid to those engaged in commerce". Now, there isn't any case which says you simply can't grant relief. All I am putting to Your Honours is that it is a factor, and I put to you, again, that this is a far more compelling case than the *Fletcher Construction* case; far more compelling than *AMP*.

BLANCHARD J:

I am bound to point out to you that in paragraph 39 of that judgment of Thomas J, he's relying on his own dissenting judgment in another case, in which I wrote the majority judgment, and took rather a different view.

MR DALE:

I do remember His Honour did write the odd dissent. But as I pointed out already, it's not the only statement to that effect, and it's just something to be –

ANDERSON J:

But you don't picture it in relation to section 9, do you? You picture it in relation to the relief provisions.

MR DALE:

I do. I think that's the way it's to be treated. But I do think we do need to be a little careful here because of the importance of any decision of this Court, and the ramifications that it might have. Because this is what, I submit, is an unusual case, just because of those factors that I've mentioned, that some caution is required. Now, on the legal test, I've started at paragraph 30 with, of course, *AMP Finance v Heaven*, and I point out that there was reference in that judgment to issues of causation, and I've provided a passage from the judgment as to where His Honour Justice Tipping made the point that some of the evidence could not be regarded as causative of the loss, and at page 152 – I won't take Your Honours to the judgment, because I'm sure you know it off

by heart, but it's why we're here, isn't it, because it's been said the Court of Appeal didn't follow what was required there.

I made the point at paragraph 13 that, "Clear reliance on the misleading terms of the loan funding agreement was thus established." So there's the reliance issue. "Indeed, it had the effect of encouraging the Heavens to proceed with the development" and then he dealt with other causative factors and says, "Whatever test one applies for causation, it is clear in the present case that AMP's misleading conduct caused the Heavens to proceed with the subdivision". I made the point that there was no express reference to the distinction between being in fact misled and whether the claimants were misled by the conduct and whether the claimants' being misled by the conduct in question was the cause of their loss and as I've said –

ANDERSON J:

It's interesting that section 43 is expressed in passive language, not active. It doesn't say where misleading conduct, or where conduct under parts 1 to 4, causes loss or damage, it says, "Where there is loss or damage by conduct." It's an unusual form of statutory expression. So it may be, it may envisage a somewhat looser relationship between conduct and loss or damage than common law ideas of causation?

MR DALE:

Yes, that is possible but –

ANDERSON J:

"Suffered loss or damage by conduct," that constitutes a contravention of the provisions of part 6.

MR DALE:

I suspect that is probably because the draftsman had in mind that this is consumer legislation and some of these cases involve issues where a causation point can be difficult, consumers buying defective products. I mean,

you go to a shop and buy a heater and you're told that it's got a certain wattage and it doesn't. I mean, has it caused loss? Well, is it misleading –

ANDERSON J:

Yes, I see the force of it.

MR DALE:

Again, as I say, this case is different. What I said at paragraph 34 is that most of the time you don't have this conceptual difficulty, but this case illustrates these problems, that Mr Falkenstein may well have been misled by Mr Ellis' initial representation. I don't run away from that point but he acknowledged that he would not have lent on the basis of that information alone and he relied upon further and specific detail from a third party.

I've made this point already in paragraph 35, "The further important distinction is that the statement made by Mr Ellis related to precisely the same subject matter as that in the subsequent representation by Ms Black, i.e. as to the particulars of the assets. On a narrow reading of the three-stage test, it could be said the second step has been established, i.e. that there was reliance upon the respondent. Mr Falkenstein only agreed to go forward after receipt of Mr Ellis' emails. On a broad reading, however, the respondent's claim must fail because on the admission that the advance would have been made but for the further information from Ms Black." This is why I said it was necessary to look at causation and reliance and I began, of course, by setting out section 43 and there's the phrase, "Has suffered, or is likely to suffer loss or damage due to that breach." That was the way His Honour discussed, dealt, at first instance, discussed it. I've referred to the chapter in the text and many of the cases that I've referred to are drawn from that discussion.

Henville v Walker I've discussed already at paragraph 42, "All that's required is that the act or event in question should have materially contributed to the loss or injury suffered. It's logical in most cases, the test easily applied, particularly if heed is taken of the Judge's warning to avoid a mechanical application of those concepts to issues arising out the section." So I'm not

asking Your Honours to read down or adopt an overly artificial approach. That's the question, did it materially contribute to the loss or injury suffered and as I say, most cases there's no problem.

Of course *Goldsbro v Walker* has to be considered and there the test is set out in paragraph 43, halfway down, "Our section 43 is of a different structure from the Australian Act and I think the difference is significant. As to a monetary award, no right of action is conferred, it is one of a range of discretionary remedies. In that context, there is no compelling reason to hold that if the defendant's misleading conduct has contributed to cause the plaintiff's loss, the only course open to the Court where no other form of relief is appropriate is to award a payment of a sum representing the full loss. Nor is there any compelling reason to hold that the only discretion of the Court is to award all or nothing."

Importantly, the Court didn't go on to discuss the issue of causation further, but there were issues, a discussion of policy, in the following paragraph and the broad discretionary nature of relief emphasised again in the *Cox & Coxon* case and *Foseco*. It is worth noting though, at 46, that Justice Richardson had said, "It's sufficient that there is clear nexus between a conduct and the loss or damage suffered and further that the representation need not be the sole factor in influencing the person affected by the conduct." All of that in some ways is helpful to the respondent but doesn't overlook the fact that there must be that element of reliance. Then, His Honour again mentioned the issues of causation –

BLANCHARD J:

We have of course had the opportunity of reading this.

MR DALE:

Yes, I appreciate that, and you probably don't need to hear too much about *Goldsbro v Walker* again. I'm simply making the point that there still has to be a causation. Page 15 I discuss the *National Australia Bank v Cunningham* case, and I don't think I need to deal with that any further. My learned friend,

though, paragraph 59, relied upon the *Smolonogov* case. That was a case where people were buying a section and there were a whole raft of quite extravagant statements made. Some of them were made in a telephone conversation and some of them were made at a visit to the house and the argument was that you couldn't work out which one of those had the causative potency, and of course a reasonable Judge had no problem in cutting through what were pretty hopeless arguments. All I can say is if you read that case, you will see that it's got absolutely nothing to do with the present circumstance but is a good illustration of common sense being able to overcome these problems.

So, the only other points I think I'll emphasise in closing, Your Honours will be able to see the other cases to which I refer. *Gould v Vaggelas,* which I referred to earlier, is discussed in paragraph 64, there's got to be reliance. I also relied upon the *Schelde Marinebouw v Attorney-General* case, where His Honour Justice Galan at first instance discussed the need for nexus. I then go on of course to apply those principles to the facts, and I don't intend to address those issues further. I conclude, though, on the issue of contributory negligence and I won't have to say much about this.

I make the point, though, that this is not something where His Honour Justice Dobson has any advantage over the collective wisdom of this Court, this is just a matter of how you assess what is appropriate. All of the factors I've mentioned are pretty compelling because you've got one highly qualified and experienced plaintiff who's got all the expertise and background and every opportunity, and you've got Mr Ellis on the one hand who is also deceived by the fraudster. I should have thought that Mr Ellis, whatever view one takes of the reliance on the initial – Mr Falkenstein, whatever view one takes on this reliance point, was just foolish. This was a stupid thing to do because –

BLANCHARD J:

But he was doing it for his own advantage –

MR DALE:

Of course –

BLANCHARD J:

– albeit innocently. It's not as though he's somebody –

MR DALE:

Mr Falkenstein?

BLANCHARD J:

No, Mr Ellis.

MR DALE:

I'm sorry, I'm –

BLANCHARD J:

Mr Ellis is getting an advantage out of the making of the advance of the $250,000.

MR DALE:

Sir, of course. I don't deny for a moment that Mr Ellis was to gain a benefit out of this. When assessing contributory negligence, of course, we are looking at who's most at fault if you like. While Mr Ellis is getting a benefit, so too is Mr Falkenstein and I suggest perhaps that that point might be neutral. Mr Falkenstein's getting a high return for seemingly no risk and, if the position were as he believed, for no risk. $2 million worth of assets is after all a, net assets, is a lot of assets and he's only lending $250,000. So it's a pretty good deal and with the sweetening that if the company does take off as he'd been told, that he's got the opportunity to do due diligence and convert it into equity and his return is even higher. So, if it comes to who's getting the most out of it, yes, Mr Ellis was getting something but so was Mr Falkenstein.

What I'm focusing on though, Your Honour, is what steps should each of them taken. Now, we could, I suppose we could say well Mr Ellis could have flown

to Sydney, or he could have insisted upon a title search from his business partner, he could have – I don't know what else he would have done. I mean, it's a little odd when your business partner says I've got all this property in Sydney and you see the kind of detail that's provided. What Mr Ellis should do, he's not lending any money so he's not asking for any security, she says she's tight for cash, well fine. So, how foolish or foolhardy was Mr Ellis? I'm making that point that he wasn't. His position was entirely natural. I think it would be different perhaps if the assets were in New Zealand, and perhaps if we were dealing with a less sophisticated fraudster, but his diligence is almost non-existent –

ANDERSON J:

His negligence is not pointing out that he had no personal knowledge of these things –

MR DALE:

That's why we're here –

ANDERSON J:

– and he's simply passing on what this person had told him and Mr Falkenstein would have to make his own decision on it.

MR DALE:

Yes and that's what Mr Falkenstein said because it's not as though he needed to say "I don't know what the detail is" because, as we know, Mr Falkenstein insisted on seeing that detail, but if it comes to the question of what Mr Falkenstein should have done, there are loads of things. One is ask for security, one is ask for a title search, take the offer of security over the property, ask some questions. I mean, the fact that he doesn't even ask Ms Black about it, or didn't appear to, even though the opportunity has been provided over the lunch. I mean, he just has the cheque.

ANDERSON J:

The inference is that he was relying on the relationship with Mr Ellis. Mr Ellis is putting himself behind the statement.

MR DALE:

He said in evidence that he trusted Mr Ellis, and why wouldn't he? Mr Ellis is an honest man, there's no –

ANDERSON J:

It's more than trust, really, they'd had business dealings and lunch together and they were a similar sort of business –

MR DALE:

Yes, there's something in that, but it's got to be kept a little in context because he also knows Ms Black himself just as well and I don't know but if I'd lost $700,000 dealing with someone and I wasn't entirely sure as to why, I mean, he qualified it and I don't run away from that, but if I'd lost $700,000 with somebody, I'd be a little cautious –

ANDERSON J:

So, the answer is in the exclamation marks really, isn't it? I mean –

MR DALE:

It is –

ANDERSON J:

– there's a reference to hundreds but I've done the figures and it's –

MR DALE:

– it is –

ANDERSON J:

– actually $15,650 –

MR DALE:

– it is –

ANDERSON J:

– for the three month term it was envisaged.

MR DALE:

You can see those dollar signs. Also, when Your Honour mentions the business relationship between Mr Ellis and Mr Falkenstein, it hadn't actually led to any deals. It's not as though there'd been a history of Mr Ellis performing, he'd been turned down every time he'd asked for money. Every time he went to Mr Falkenstein with a deal he got a no, and remember he says in evidence that, "I expected Mr Falkenstein to ask some questions and to make some enquiries", and that's perfectly reasonable.

I mean, having cups of coffee and dreaming of good ventures and deals that might work is all very well, but it's quite another thing to start parting with a quarter of a million dollars to someone, in respect of whom you've already suffered a big loss. That's where I say the context of this case becomes quite different from a simple reliance case of a simple "well, he told me something, it wasn't true, grant relief", it's quite different. So that's why I emphasised all these issues about causation and the like, but it's why I think that, if you analyse their respective fault, that it's not equal at all. There were just so many steps, the absence of urgency, it's the borrower that pays the funds, all those factors are compelling. Whatever view Your Honours take on the issues of principle and causation and reliance, it's not a case where Mr Falkenstein and Red Eagle have any real merit. Unless I can assist Your Honours further?

ELIAS CJ:

No, thank you Mr Dale. Thank you counsel for your assistance, we'll reserve our decision –

McGRATH J:

Mr Herzog may want to reply.

ELIAS CJ:

Oh, I'm sorry. I'm so sorry Mr Herzog.

MR HERZOG:

Ma'am, you're obviously prescient. I have no reply.

ELIAS CJ:

Thank you. Right, we will reserve our decision, thank you.

COURT ADJOURNS: 12.55 PM