IN THE SUPREME COURT OF NEW ZEALAND

SC 72/2009
[2010] NZSC 20

	BETWEEN	RED EAGLE CORPORATION LTD Appellant
	AND	RICHARD JOHN OTLEY ELLIS Respondent

Hearing: 10 February 2010

Court: Elias CJ, Blanchard, McGrath, Wilson and Anderson JJ

Counsel: L Herzog for Appellant
P J Dale for Respondent

Judgment: 12 March 2010

JUDGMENT OF THE COURT

A The appeal is allowed and the judgment of the High Court is restored.

B The appellant is awarded costs of $15,000 in this Court together with its reasonable disbursements to be fixed by the Registrar.

C The order for costs in the Court of Appeal is reversed. The High Court should fix costs in that Court if that has not already been done.

REASONS

(Given by Blanchard J)

Introduction

[1] Mr Tony Falkenstein is an experienced businessman and a company director. The appellant, Red Eagle Corporation Limited, is a vehicle through which his family interests make investments. The respondent, Mr Rick Ellis, is an investment banker who has known Mr Falkenstein for many years. In 2005 his business partner, through a company called Ellis Black Ltd, was Ms Annette Black.

[2] In connection with an Ellis Black project primarily being promoted by Ms Black, Mr Ellis approached Mr Falkenstein seeking a short-term loan. He advised Mr Falkenstein that Ms Black had net property assets in Sydney of approximately $2 million. After Ms Black supplied Mr Falkenstein with a statement of assets and liabilities appearing to confirm details and values of such properties, but without making any further inquiries, Mr Falkenstein caused Red Eagle to make her an unsecured loan of $250,000 for a period of three months at an interest rate of 25 per cent per annum. That loan was to be used, at least in part, to meet expenses connected with the project.

[3] It transpired that Ms Black was fraudulent. She did not own the properties. No part of the loan moneys was able to be recovered from her. She is now bankrupt.

[4] Red Eagle sued Mr Ellis claiming that his advice to it, through Mr Falkenstein, was misleading or deceptive conduct, in breach of s 9 of the Fair Trading Act 1986, which reads:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Red Eagle sought an order under s 43 of that Act for payment of the amount of its loss plus interest. Section 43 in relevant part reads:

43 Other orders

(1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute—

(a) A contravention of any of the provisions of Parts 1 to 4 of this Act;

...

the Court may (whether or not it grants an injunction or makes any other order under this Part of this Act) make all or any of the orders referred to in subsection (2) of this section.

(2) For the purposes of subsection (1) of this section, the Court may make the following orders—

...

(d) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to pay to the person who suffered the loss or damage the amount of the loss or damage:

[5] In the High Court,[1] Dobson J gave judgment in favour of Red Eagle. He considered that Mr Falkenstein had been misled by the advice from Mr Ellis concerning the properties, but, because of Mr Falkenstein's own carelessness, Red Eagle should be treated as equally responsible for the loss of the principal amount of the loan. The Judge therefore fixed the liability of Mr Ellis under s 43(2)(d) at $125,000 with interest at the Judicature Act 1908 rate.

[6] The Court of Appeal disagreed.[2] It allowed Mr Ellis's appeal and set aside the judgment. In this Court, Red Eagle seeks to have it restored. It does not challenge the 50 per cent reduction for contributory fault, nor has it sought to have the interest rate increased.

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1 HC Auckland CIV–2008–404–187, 30 July 2008.

2 [2009] NZCA 320, (2009) 12 TCLR 449 per Baragwanath, Hugh Williams and Winkelmann JJ.

Facts

[7] Mr Falkenstein and Mr Ellis first met in about 1978. Later, when Mr Ellis worked as a sharebroker and investment adviser, he acted for Mr Falkenstein in buying and selling shares. Over the years they would meet every six months or so for coffee and would discuss business and investment matters and, as Mr Ellis put it, "generally swap ideas".

[8] From about 2002, Mr Ellis introduced some investment opportunities to Mr Falkenstein but none was taken up. In that year Mr Falkenstein was dealing with a firm of investment bankers, Ward Black Ltd, and met Ms Black. He made an investment of a controlling shareholding in a company to which she introduced him but which apparently has not prospered.

[9] In 2003 Ms Black parted company with Mr Ward and sought a new business partner. She was introduced to Mr Ellis by Mr Falkenstein and went into business with him in Ellis Black Ltd.

[10] One of the projects which Ms Black brought with her was a venture to grow paua and abalone for Asian markets in the waters off Singapore using South African technology. The company formed for this purpose was Aqua Systems Ltd (ASL). Mr Ellis was not a director or shareholder in that company, but by 2005 he had spent several hundred hours assisting Ms Black with the project, meeting his own travel expenses in New Zealand and overseas to visit potential investors. Ms Black had promised him a right to take up shares in ASL. By July 2005 a Canadian company called Aurum Capital had expressed a willingness to provide substantial funding for the venture but delays were encountered and bridging finance was urgently needed.

[11] It was agreed between Mr Ellis and Ms Black that he would approach Mr Falkenstein, which he did by means of several emails sent between 12.37 pm and 12.39 pm on Friday 29 July 2005. The first of them, and for present purposes the most significant, was as follows:

Subject: Interim Funding – AquaSystems Limited ('ASL')

Bottom-line Tony – the London bombing has delayed the uplifting of a US$8mil funding package. Annette has developed a marvellous working relationship with the Fund Manager who is very committed to this investment sector i.e.: consistent land based seafood growing to 'feed the masses' as a crucial worldwide problem due to rapid reduction of seafood from mother ocean severely under pressure to cope with pollution & massive over fishing.

Key points:

- Total business plan / key personnel/ proven operating system & infrastructure needs complete
- ASL independent valuation on 'future earnings' US$20mil+ (2 page summary available)
- $150k bridging finance required – carry an annual interest rate @ 25%
- Required for between 14 – 45 days (happy to give supplier a minimum 30 day period)
- Happy to give an option formula to convert to equity if interested?
- **Security by way of either / both a GSA over ASL Parent Co shares or a PG from Annette (has net property assets in Syd approx $2mil)**

Essentially, we're caught between the rock and hard place after all the large resources we've spent on this venture which is poised to take off. We have a two page snapshot plus our website below shows our backgrounds etc anything you can do over the next few days Tony would be hugely appreciated = Regards Rick (emphasis added)

[12] A second email included the following statement:

Rick & Annette's resources are very tight currently but have funded this for several years now. Both are obviously 110% committed and totally confident that the lion [sic] share of operational building blocks are now in place to get the job done in accordance with the very thorough business plan (snapshot in email to follow).

The rest of the emails consisted of a vigorous promotion of ASL's prospects with detail about the "outstanding business opportunity" it presented.

[13] Mr Falkenstein responded the next day, Saturday:

> Hi Rick,
>
> Sorry, I was away yesterday. I don't think there is a problem with the bridging finance, at that rate!!! Personal guarantee in letter format would be sufficient, to avoid legal costs, with interest being paid weekly in advance. If all ok, and you want cheque on Monday, then will need details of property assets – I could draw up draft personal guarantee.
>
> Is Annette coming to lunch on Monday as well?
>
> Regards
>
> Tony
>
> PS Please send me the 2 page snapshot

The reference to the "property assets" is of course to those in Sydney mentioned in the first of Mr Ellis's emails.

[14] On the Monday morning, 1 August 2005, Mr Ellis rang Mr Falkenstein seeking an increase in the loan to $250,000. Mr Falkenstein agreed "as the security offered more than covered the loan request". By "security" Mr Falkenstein was referring to the "personal guarantee" from Ms Black offered by Mr Ellis in the first email. At 11.43 am on the same day, Ms Black sent Mr Falkenstein a printed form "Personal Statement of Financial Position" which she had filled in and signed. It recorded, inter alia, two properties at Sydney addresses to which she attributed aggregate values of $3.140 million and a mortgage to an Australian bank of $1.230 million, resulting in a claimed equity of approximately $2 million. Ms Black's net worth was shown as $3.052 million, which included an amount attributed to her share of ASL.

[15] Just over an hour later, Mr Ellis and Ms Black went together to Mr Falkenstein's office. Mr Falkenstein had drawn up a Term Loan Contract document to record a loan of $250,000 to Ms Black by Red Eagle repayable on 1 November 2005 but with a right of early repayment on 10 working days' notice. Interest was to be paid weekly in advance. Under the heading "Security", Mr Falkenstein, who is not a lawyer, had included an undertaking by Ms Black to "Personally Guarantee this Loan in accordance with the Personal Statement of Financial Position", a copy of which was attached.

[16] There was also in the document a clause headed "Loan Conversion to Equity" under which Mr Falkenstein was to have the right to take shares in ASL at "20% discount to any private placement capital raising terms in the future".

[17] Ms Black signed the document, her signature being witnessed by Mr Ellis. Mr Falkenstein then gave her Red Eagle's cheque for the advance and she and Mr Falkenstein (but not Mr Ellis) had lunch together.

[18] The loan was never repaid, and it emerged when Mr Falkenstein eventually obtained searches of the Sydney properties that Ms Black was not their owner. Mr Ellis had accepted Ms Black's assurances concerning those properties before approaching Mr Falkenstein about the loan. It is accepted that he acted honestly on the basis of the false information given to him by Ms Black, but he had not attempted to verify what she had told him.

Judgments below

[19] In the High Court, Dobson J accepted that "Mr Ellis's reputation for reliability insofar as Mr Falkenstein was concerned" was a material factor for Mr Falkenstein in evaluating the request for a loan and responding positively to it.[3] The Judge said that the tenor of the representations in the emails linked Mr Ellis to the ASL project as closely as it did Ms Black. Mr Ellis described both of them as being "110% committed". They were also treated equally in the comment that their resources "are very tight currently but have funded this for several years now". Mr Ellis had portrayed himself as solidly supporting the venture. He was, said the Judge, "lending his name in an unqualified way to both the project, and to the prudence of the short term advance he requested on behalf of Ms Black". It was also he who asked that the amount be increased:[4]

> The fact that the requests were made by Mr Ellis on behalf of Ms Black, rather than by Ms Black herself, tends to suggest that, of the two principals in Ellis Black Limited, he was the one with the stronger personal relationship with Mr Falkenstein.

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3 At [31].
4 At [33].

[20] Dobson J concluded that what he called the explicit reliance by Mr Falkenstein on Ms Black's statement of financial position did not deprive the representations which preceded its provision to Mr Falkenstein of materially misleading effect: "[t]he request came from Mr Ellis, and it was backed to the hilt by him".[5] A provisional commitment to the loan, and to increasing it, were both made before Mr Falkenstein had sighted the statement. In the context, it was provided as confirmation of the assurances Mr Ellis had already given.

[21] Mr Ellis had given evidence of raising with Ms Black the details of her personal statement on several occasions, including the day before he decided to approach Mr Falkenstein, to ensure he was not going to "hoist [his] flag" with a senior businessman unless there was reasonable accuracy in her statement. He had thus implicitly acknowledged that he traded on his reputation for reliability with experienced investors. It took Mr Ellis out of the category of a "mere conduit".

[22] The Judge found that the representation made by Mr Ellis in relation to Ms Black's properties "did, or was likely to, mislead or deceive Mr Falkenstein".[6] However, he also found that Mr Falkenstein was careless in a number of material respects in neglecting to protect his position as the lender. He had treated the real-estate assets supposedly owned by Ms Black as constituting "security" without seeking any title search or enquiring as to the extent of any mortgage advances secured on the titles. Without legal qualifications, he elected to draft the loan documentation. The loan contract required the funds to be applied in accordance with an attached budget which, after payment of existing loans and interest, left less than $40,000 to service the ongoing costs of developing the project. These factors, in relation to a loan at a high interest rate reflecting risk, led the Judge to treat Mr Falkenstein as "equally responsible" for the loss, and to fix Mr Ellis's liability at 50 per cent of the principal sum, namely $125,000.[7]

[23] The reasons for the judgment of the Court of Appeal were given by Hugh Williams J. He indicated that he proposed to analyse the situation in the manner

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5 At [35].
6 At [37].
7 At [48].

suggested in *AMP Finance NZ Ltd v Heaven*.[8] The first question was whether the pleaded conduct was capable of misleading. Two factors were referred to. The first was that an objective assessor would have placed weight on the fact that the three participants in the negotiations and the advance were all experienced investors, well capable of assessing information provided and deciding whether to act upon it. The second point was that the emails were plainly replete with puffery by Mr Ellis. However, the Court found it was unnecessary to determine whether in the present circumstances the puffery was actually capable of misleading. That was because the Court's assessment differed from the Judge on what it called the answers to the second and third questions. This is a reference to the second step recommended in *Heaven*, consideration of whether the plaintiff was in fact misled by the relevant conduct, and to the third step, whether it was, in all the circumstances, reasonable for the plaintiff to have been misled. The Court said that, whilst it was not difficult to accept the finding that Mr Falkenstein was misled by the information as to Ms Black's purported financial position, that was not something which in the Court's view could be laid at the door of Mr Ellis.[9] It also took the view that it was not reasonable in all the circumstances for Mr Falkenstein to have been misled by Mr Ellis. The Court regarded the provision of the statement as the crucial factor, noting that, although Mr Falkenstein had clearly been attracted by the information given by Mr Ellis, "it was not until he actually received Ms Black's statement of her personal financial position that he authorised Red Eagle's loan – and the increase – prepared the documents, had them signed and made the advance directly to Ms Black".[10]

[24] Although, as this Court was told during argument by Mr Dale, no attempt was made by him in the Court of Appeal to argue that Mr Ellis was a "mere conduit", that Court also said that the phrasing of the emails by Mr Ellis made plain that the information he was passing on was neither generated nor confirmed by him. It "contained no hint Mr Ellis had checked or was capable of checking the

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8 (1997) 8 TCLR 144 at 152.
9 At [38].
10 At [39].

correctness of the information given him by Ms Black".[11] It was information Mr Ellis was only passing on. "He was the author of the emails only because of his rather longer association with Mr Falkenstein (and, perhaps, Mr Falkenstein's previous history with Ms Black might otherwise have made an advance less likely)."[12]

[25] For all these reasons, the Court of Appeal took the view that the Judge had fallen into error and that Red Eagle's claim should have been dismissed in the High Court.

Breach of s 9 and its consequences

[26] Section 9 enacts a prohibition on engaging in misleading or deceptive conduct "in trade".[13] Section 43 begins to operate only when a breach of s 9 (or some other provision of the Act) has been proved. It enables a court to provide a remedy for any existing or future consequence of the breach, where someone has suffered or is likely to suffer loss or damage. It is preferable to deal consecutively with the requirements of each section. We do not understand the Court of Appeal in *Heaven* to have intended that its formulation would apply in all situations to which those sections may reach. It is not desirable to attempt to formulate a methodology to be applied prescriptively by a court whenever the application of these provisions is in issue, for the circumstances are too variable. The approach to be taken in a particular case will depend upon the type of situation under scrutiny; for example, whether there is a claimant alleging an injurious consequence already suffered, whether the claimant instead fears future loss for itself or others, or whether the claim is brought by the Commerce Commission or another party which is acting in the interests of those who may be affected by the defendant's conduct.

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11 At [41].

12 At [42].

13 This is a broad term encompassing all kinds of commercial dealing by the party whose conduct is under examination. The section applies to transactions between large, sophisticated corporations as well as to those of persons dealing with consumers.

[27] The following approach commends itself in a relatively simple case like the present where there is no doubt about what was said or about its meaning and all of the loss arose from the same event, namely the advancing of the money. The loss did not have different components.

[28] It is, to begin with, necessary to decide whether the claimant has proved a breach of s 9. That section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances.[14] Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected. Conduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer or, to take an extreme case, towards an individual known by the defendant to have intellectual difficulties.[15] Richardson J in *Goldsboro v Walker* said that there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it.[16] The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else.[17] If the conduct objectively had the capacity

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14 It is not necessary to show that the defendant had any intention to mislead or deceive anyone: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228; *Neumegen v Neumegen & Co* [1998] 3 NZLR 310 at 317.

15 The position may be different where the conduct is directed towards a wide section of the community, as in an advertisement. In a well-known passage in *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202, Deane and Fitzgerald JJ said that in such a case the matter is to be considered by reference to all who come within the section "including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations". But in such cases the test has also been said to be *not* the effect on a person who is quite unusually stupid: *Annand Thompson Pty Ltd v TPC* (1979) 40 FLR 165 at 176.

16 [1993] 1 NZLR 394 at 401.

17 In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 per Gibbs CJ. Gibbs CJ said that the words "likely to mislead or deceive" make it clear that it is unnecessary to prove that the conduct in question actually deceived or misled anyone. See also *McWilliams Wines Pty Ltd v McDonalds System of Australia Pty Ltd* (1980) 33 ALR 394 at 413 per Fisher J.

to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.

[29] Then, with breach proved and moving to s 43, the court must look to see whether it is proved that the claimant has suffered loss or damage "by" the conduct of the defendant. The language of s 43 has been said to require a "common law practical or common-sense concept of causation".[18] The court must first ask itself whether the particular claimant was actually misled or deceived by the defendant's conduct. It does not follow from the fact that a reasonable person would have been misled or deceived (the capacity of the conduct) that the particular claimant was actually misled or deceived. If the court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. Put another way, was the defendant's breach *the* effective cause or *an* effective cause? Richardson J in *Goldsboro* spoke of the need for, or, as he put it, the sufficiency of, a "clear nexus" between the conduct and the loss or damage.[19] The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage. The claimant may, for instance, have been materially influenced exclusively by some other matter, such as advice from a third party.

[30] Another operating cause of loss or damage may perhaps have been the claimant's own conduct in failing to take reasonable care to look after his or her own interests. The court should therefore ask itself whether the claimant's carelessness, if there were any, should be regarded as the sole or a contributory operative cause of the loss. The fact that the claimant may have contributed by carelessness to his or

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18 *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ, speaking of the equivalent Australian section, s 82 of the Trade Practices Act 1974.

19 At 401. In *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 at 38 Tipping J said that "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 the consequence of the conduct."

her own downfall does not disqualify the claim. Gleeson CJ remarked in *Henville v Walker*:[20]

> The purpose of the legislation is not restricted to the protection of the careful or the astute. Negligence on the part of the victim of a contravention is not a bar to an action under [the Australian equivalent of s 43] unless the conduct of the victim is such as to destroy the causal connection between contravention and loss or damage.

As the *Goldsboro* case has established, the court has a discretion under s 43 (it "may" make an order), and the proper exercise of that discretion may lead it to decide that part only of the amount of the loss or damage should be paid by the defendant to the claimant (or, in some cases of reckless behaviour by the claimant, even that no order for payment should be made).

[31] The exercise of the power to make an order for payment under s 43 is, in the end, as Richardson J also said *Goldsboro*,[21] a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the Act.

This particular case

[32] In our respectful view, the Court of Appeal was wrong to reverse the findings of the trial Judge, who made what we consider to have been a realistic appraisal of the evidence and was satisfied that Mr Ellis's conduct in representing to Mr Falkenstein that Ms Black had net property assets in Sydney worth approximately $2 million had a crucial continuing influence at the time when the loan money was advanced by Red Eagle.

[33] Mr Dale, appearing for Mr Ellis, sensibly did not deny that the representation made by his client about Ms Black's (non-existent) Sydney properties was misleading and, on the part of Ms Black, deceptive. That statement may have been surrounded by puffery, which seems to have distracted the Court of Appeal, but in

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[20] (2001) 206 CLR 459 at 468.
[21] At 404.

relation to the Sydney properties what Mr Ellis said appeared to be a representation of a concrete (perhaps the better expression is "bricks and mortar") fact. In circumstances in which the representation was contained in a communication from a long-standing acquaintance with whom Mr Falkenstein had discussed business affairs for many years, and who was known to Mr Falkenstein as an investment banker, it certainly had the capacity to mislead or deceive even such a sophisticated investor as Mr Falkenstein. There was, as Mr Dale realistically accepted, a breach of s 9 by Mr Ellis when he made the representation.

[34] Moving then to s 43, and the consequences of that breach, there is no doubt also that Mr Falkenstein was actually misled or deceived about Ms Black's financial position. The first real issue is whether, looking at the matter in a practical and commonsense way, it can fairly be said that Mr Ellis's representation was an operating or effective cause of Mr Falkenstein's loss, or whether its causal potency was displaced by the furnishing by Ms Black of her false statement of financial position.

[35] In essence, Dobson J took the view that:

- Mr Ellis had a reputation with Mr Falkenstein for reliability which would have been a material factor when Mr Falkenstein agreed to make the loan, and so it must have been significant to Mr Falkenstein that it was Mr Ellis who made the loan requests (originally $150,000 and then for an increased amount of $250,000);

- Mr Ellis had fully associated himself with Ms Black in the project for which bridging funds were sought; and

- The financial statement tendered by Ms Black was also relied on by Mr Falkenstein (who would, as he himself had acknowledged, not have made the loan without it), but the earlier misleading representation by Mr Ellis continued to have a material effect on Mr Falkenstein's decision to lend.

[36] We agree. We see it as an inescapable inference that Mr Falkenstein acted as he did in making the loan because he trusted in Mr Ellis's integrity and believed that Mr Ellis would not have said in an unqualified way that Ms Black owned the Sydney properties unless he knew that to be so. That trust no doubt is also the explanation for Mr Falkenstein's rather casual attitude to the making of the loan once he believed he had some confirmation about the properties from Ms Black. The Court of Appeal was wrong to differ from Dobson J in concluding that the financial statement was the sole motivator for Mr Falkenstein's decision to lend. This conclusion seems to have disregarded the background of the long business relationship between the two men, which, significantly, included a discussion on one occasion, instigated by Mr Ellis, about Ms Black's reliability. Against that background, it is far more likely that Mr Falkenstein would rely primarily on what he was told by Mr Ellis about the value of the properties and would treat anything from Ms Black as simply confirmatory of what he had heard from Mr Ellis.[22] Mr Falkenstein certainly did say in evidence that he would not have lent without the further detail. But he was not asked whether he would have lent on the financial statement alone. And it is notable that he provisionally committed himself to the loan, and to increasing its amount, before receiving that statement. The receipt of that document is unlikely to have displaced Mr Falkenstein's reliance on Mr Ellis's representation about the Sydney assets.[23]

[37] The Court of Appeal also took the view that it was not reasonable for Mr Falkenstein to have been misled by Mr Ellis. We have already indicated our contrary opinion, in finding that the breach had the capacity to mislead or deceive even such a sophisticated investor as Mr Falkenstein. Someone in his position could reasonably place trust in Mr Ellis to provide reliable information about properties which were available to Ms Black as a means of repaying the loan which Mr Ellis

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22 The Court of Appeal, seemingly contradicting its own conclusion, appeared to recognise this when it remarked that, "perhaps, Mr Falkenstein's previous history with Ms Black might otherwise have made an advance less likely": see [24] above.

23 The loan was induced by the offering of a very high rate of interest and by the opportunity to participate in ASL at a discount, but these factors do not weigh heavily. The amount to be earned, even if the loan were not repaid inside three months, was not large. Whether Mr Falkenstein would really want to participate in ASL, on which he had not yet made any decision, remained very much an open question.

was requesting be made to her for the benefit of ASL, and thereby for the indirect benefit of Mr Ellis himself, who was expecting to have an equity interest in the ASL project.

[38] Mr Dale understandably did not attempt to defend the Court of Appeal's alternative and unsustainable finding that Mr Ellis was a mere conduit. In order to be seen to be a mere conduit, the conveyor of misleading or deceptive information must have made it plain to the recipient that he or she is merely passing on information received from another, without giving it his or her own imprimatur – that is, making it appear to be information of which the conveyer has first-hand knowledge. Unless it must be obvious to the recipient that information is second-hand only (hearsay), the conveyor who does not make that clear must accept the risk that he or she will reasonably be taken by the recipient to have spoken from personal knowledge. The Court of Appeal was therefore wrong to have treated Mr Ellis as a conduit because, as that Court reasoned, his communication "contained no hint [he] had checked or was capable of checking the correctness of the information given him by Ms Black".[24] It was, rather, for Mr Ellis to tell Mr Falkenstein that he was merely passing on what she had told him. If he had done that, Mr Falkenstein may well have wanted some verification of ownership and certainly of value, and the loan would probably not have proceeded.

[39] Dobson J concluded that Mr Falkenstein's contribution to his own loss should be treated as a factor equal to the misinformation given by Mr Ellis. That was necessarily a broad-brush assessment. The Court of Appeal did not find it necessary to review this aspect of the case. Having done so, we consider that there is no reason to question the view taken by the trial Judge. Admittedly, as Dobson J appreciated, Mr Falkenstein was very neglectful of his own interests in handing over Red Eagle's cheque immediately after receiving Ms Black's financial statement and without searching the titles or making any other rudimentary check on ownership or seeking security from Ms Black or ASL. But Mr Falkenstein acted in this way because of

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[24] At [41].

the trust he put in Mr Ellis, with apparent justification. As he put it, he relied upon Mr Ellis's statement "that the assets were there". By taking the lead in approaching Mr Falkenstein and persuading him to make the loan, subject to the supply of details about the properties by Ms Black, Mr Ellis created the opportunity for Ms Black to use her dishonest statement. It seems very probable that, absent the influence on Mr Falkenstein of Mr Ellis's reputation and the request for a loan from which Mr Ellis as a promoter of ASL would benefit, Mr Falkenstein would not have made any advance of money to Ms Black without first verifying the position concerning the Sydney properties. Ms Black's dishonest conduct was certainly a contributing factor but Mr Ellis, unwittingly, assisted her. So it was not unreasonable for the Judge to disregard the part played by Ms Black, who became bankrupt, when apportioning the blame and to determine that each of the two men should bear 50 per cent of the loss of the capital of the loan, and to order also that the sum of $125,000 awarded to Red Eagle should bear interest at the Judicature Act rate.

Result

[40] We therefore allow the appeal and restore the judgment of the High Court, with costs to the appellant in this Court of $15,000 together with its reasonable disbursements to be fixed if necessary by the Registrar. We reverse the order for costs made in the Court of Appeal. If the costs in the High Court have not yet been fixed, that Court should proceed to do so.

Solicitors:
Quinn Law, Auckland for Appellant
Martelli McKegg Wells & Cormack, Auckland for Respondent