



Supreme Court of New Zealand

12 March 2010

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

Red Eagle Corporation Ltd v Richard John Otley Ellis
(SC 72/2009 [2010] NZSC 20)

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

Mr Ellis approached Mr Falkenstein of Red Eagle Corporation Ltd requesting a short-term loan to be advanced to a Ms Black in connection with a business project with which both Mr Ellis and Ms Black were associated. Mr Ellis was an investment banker who was well known to Mr Falkenstein. He advised Mr Falkenstein that Ms Black had net property assets in Sydney of approximately \$2 million. Mr Falkenstein provisionally agreed to make the advance but first sought details of the property assets. Ms Black sent Mr Falkenstein a statement of financial position appearing to show assets of that net worth in Sydney. The advance was then made to her on an unsecured basis. She became bankrupt. It transpired that she was not the owner of the Sydney properties. No part of the advance was repaid. Mr Ellis

had accepted Ms Black's word about the properties but had not personally checked the position. Nor had he made that plain to Mr Falkenstein.

The advance had been made in the name of Mr Falkenstein's company, Red Eagle Corporation Ltd. It sued Mr Ellis, claiming that his statement to Mr Falkenstein concerning the Sydney properties was misleading or deceptive conduct in breach of s 9 of the Fair Trading Act 1986. It sought an order under s 43 of that Act directing Mr Ellis to pay it the amount of the advance plus interest. The High Court found that Mr Ellis's statement had been misleading and that Mr Falkenstein had relied on it when making the advance. That Court found that Mr Ellis was not a mere conduit for the information. However, the Court reduced the amount of its order to 50 per cent of the advance (plus interest thereon) to allow for Mr Falkenstein's carelessness in neglecting to protect his position as lender by checking the information he had been given before making a loan on an unsecured basis.

The Court of Appeal allowed Mr Ellis's appeal. It considered that the crucial factor was the provision of the financial statement by Ms Black, for which Mr Ellis was not responsible, and that Mr Ellis had made it plain that the information he was passing on was neither generated nor confirmed by him because it contained no hint that Mr Ellis had checked or was capable of checking the correctness of the information given him by Ms Black.

The Supreme Court has unanimously reversed the decision of the Court of Appeal and restored the orders made by the High Court. The Court has found that there was an inescapable inference that Mr Falkenstein acted as he did in connection with the advance because he trusted in the integrity of Mr Ellis 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. The Court has found that the Court of Appeal was wrong to differ from the High Court Judge in concluding that the financial statement was the sole motivator for Mr Falkenstein's decision to lend. The receipt of the financial statement was unlikely to have displaced Mr Falkenstein's reliance on Mr Ellis's statement about the Sydney assets. The Court has also said that the Court of Appeal

was wrong to have treated Mr Ellis as a conduit only. It was for Mr Ellis to tell Mr Falkenstein that he was merely passing on what Ms Black had told him. The Supreme Court also agreed with the trial Judge's apportionment of blame for the loss, and the determination that each of the two men should bear 50 per cent of the loss of the capital of the loan.

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