

Exhibit 4

immaterial whether he intended him so to act in the precise way in which he did.²¹

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Representation not made to claimant directly A representation made to the claimant directly causes no problems. But a representation made to a third party with intent that it be passed on to the claimant to be acted on by him will equally suffice.²² Thus in *Swift v Winterbotham*²³ a plaintiff who gave credit on the basis of a fraudulent banker's reference successfully sued in deceit even though the reference had been sent not to him but to his own bank. All that is required for these purposes is that the representation be intended, in one way or another, to reach the claimant in order to induce him to act on it.²⁴ Nor is it even necessary that the defendant know precisely who the statement is intended for, provided he intends it to be relied on by someone in the claimant's position²⁵; thus in another banker's reference case a bank was held liable when it sent a fraudulent reference to another bank for the benefit of a customer of whose identity it was entirely unaware.²⁶ Indeed, in one case it was even held that an action for deceit could be based on a newspaper advertisement, provided the claimant showed that he was one of the class of persons at whom it was directed.²⁷

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Nevertheless, it must be shown that there was an actual intention to deceive the claimant in question, whether individually or by reference to a class to which he belongs; it will not be enough merely to show that the misstatement is reasonably

²¹ *Gosse v Wilson Sandford & Co (No.2)* [2001] Lloyd's Rep. PN 189.

²² "Every case must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is identified, provided it appears that such false representation was made with the intent that it should be acted upon by each third person in the manner that occasions the injury or loss", per Page Wood V.C. in *Barry v Crosskey* (1861) 2 J. & H. 1, 23. This case was approved by Lord Cairns in *Peek v Gurney* (1873) 6 H.L. 377, at 412. And see *Brown Jenkinson and Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Q.B. 631; *Commercial Banking Co of Sydney v R. H. Brown & Co* (1972) 126 C.L.R. 337.

²³ (1873) L.R. 8 Q.B. 244 (appealed on other grounds, L.R. 9 Q.B. 301). See also *Longridge v Levy* (1837) 2 M. & W. 519, 4 M. & W. 337 (entire statement to buyer that shotgun was second related to buyer's son, who was injured using it; son successfully recovered in deceit); *Pilmore v Hood* (1831) 5 Bing. N.C. 97 (false representations made to X regarding sale of business; P knew X passed on to F; D sold to F without correcting).

²⁴ "In order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby."

Quain J. in *Swift v Winterbotham* (1873) L.R. 8 Q.B. 244, at 253, cited with approval by Blackburn J. in *Richardson v Smeater* (1873) L.R. 9 Q.B. 34, at 36. See also *Pilmore v Hood* (1831) 5 Bing. N.C. 97 (false representations made to X regarding sale of business; P knew X passed on to F; D sold to F without correcting); *Barry v Crosskey* (1861) 2 J. & H. 1, 23; *Brown Jenkinson and Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Q.B. 631.

²⁵ See *Standard Chartered Bank v Pakistan National Shipping Corporation (No.2)* [1998] 1 Lloyd's Rep. 684, at 686; enough that claimant "within the class of persons within their contemplation as likely to be deceived".

²⁶ *Commercial Banking Co of Sydney v R. H. Brown & Co* (1972) 126 C.L.R. at 337; cf. *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Q.B. 621 (order who knowingly issued false bills of lading liable to consignees in deceit, since he intended them to be relied on by any number of consignees, bankers and indorsees).

²⁷ *Richardson v Smeater* (1873) L.R. 9 Q.B. 34 (false advertisement that farm for sale; would-be buyer can recover wasted expenses).

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calculated to deceive him. Thus the House of Lords in *Peek v Gurney*²⁸ held that promoters of a company, who issued a fraudulent prospectus as a prospectus and as nothing more, were not liable for so doing to persons who, not being original allottees of the company's shares, purchased their shares in the market; the reason being that the promoters had no object in making the false statements except to get the shares taken up; they had no intent to influence market dealings.²⁹ Again, in *Gross v Lewis Hillman Ltd*³⁰ sellers of commercial property made certain misrepresentations to the buyers about it: the buyers agreed to purchase it, but then assigned the benefit of the contract to the plaintiffs. The plaintiffs' claim in deceit failed: even if the representations had been fraudulent (which they had not) they had been made to the buyers and the plaintiffs could not sue in respect of them.

It is obviously a question of fact whether in a particular case a person was intended to rely on a false statement. In practice, however, the test is often whether it was in the defendant's interest that he should do so. So where persons spread a false rumour for the purpose of raising the price of certain stock, they were not liable in damages to those who dealt with other persons on the faith of such rumour being true,³¹ there being no intention to deceive any persons other than those who dealt with the defendants themselves, given the defendants had nothing to gain unless the investors dealt with themselves.³²

18-31

(d) Claimant must have been influenced by misrepresentation

The claimant must have been influenced by the misrepresentation. To entitle a claimant to succeed in an action in deceit, he must show that he acted in reliance on the defendant's misrepresentation.³³ If he would have done the same thing even in the absence of it, he will fail.³⁴ However, the misrepresentation need not have been the sole cause of the claimant acting as he did; provided

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²⁸ (1873) L.R. 6 H.L. 377. See too *Zackay v McBeth* [1912] A.C. 186 (entire denial of major fund by oil company made to protect company's interests generally, not to influence market; no liability to shareholder who sold on faith of it).

²⁹ Cf. *Andrews v Mackford* [1896] 1 Q.B. 372; where there was an intent to boost the shares in the market generally, and hence a purchaser in that market successfully sued.

³⁰ [1970] Ch. 443.

³¹ See per Page Wood V.C. in *Barry v Crosskey* (1861) 2 J. & H. 1, 18; also per Lord Cairns in *Peek v Gurney* (1873) L.R. 6 H.L. 377, at 412.

³² Note in *Longridge v Levy* (1837) 2 M. & W. 519; 4 M. & W. 337, the defendant having sold a gun to the plaintiff's father for the use of himself and his son and sold it as second and action when he knew it to be unsafe, was held liable in an action of deceit to the plaintiff, who was wounded by the bursting of the gun. There, the court upheld the verdict expressly upon the ground that the declaration contained an averment that the gun was sold for the use of the purchaser and his son, Lord Atkin in *Donoghue v Stevenson* [1932] A.C. 562 at 587-588 referring to this case said: "User by the plaintiff was one of the acts contemplated by the fraudulent defendant." The case can hardly be regarded as having decided any principle of general application.

³³ See, e.g. *Holmes v Jones* (1907) 4 C.L.R. 1692. The correct criterion is whether the claimant would have acted as he did had the representation not been made. If he would not, then causation is made out: the fact that he would have acted in the same way had he been told the truth is irrelevant. See *Dorris v Chappell* [1997] 1 W.L.R. 426.

³⁴ e.g. *Smith v Chadwick* (1883-84) 9 App.Cas. 187; *Nash v Colker* (1905) 2 Ch. 237 (company prospectus cases; plaintiffs failed to prove reliance).

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