Reasons for the Report of the Lords of the Judicial Committee of the Privy Council on the Appeal of Joao Pedro Santos v. *Manoel Augusto Pereira and others, from the Supreme Court of British Guiana (Privy Council Appeal No. 52 of* 1912*); delivered the 19th June* 1913.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD SHAW.
LORD MOULTON.
LORD PARKER OF WADDINGTON.
SIR SAMUEL GRIFFITH.

[DELIVERED BY SIR SAMUEL GRIFFITH.]

This was an action for damages for deceit brought by the Respondents Pereira and Gonsalves and the Respondent Fernandes (who has been dismissed from the proceedings and is only a nominal party to the Appeal) against the Appellant, the alleged deceit consisting in false representations by which the Respondents were induced to enter into an agreement dated 12th February 1910.

The Appellant and the Respondents Pereira and Gonsalves had for some years been co-partners in a mercantile business at Demerara. The interest of the Appellant in the capital of the partnership was much larger than that of the other partners, but the profits were divisible in equal shares. About January 1910 the partners were minded to form a Joint Stock Company to take over the business as a going concern.

[27.] J. 238. 80.—6/1913. E. & S.

It was proposed that the nominal capital of the Company should be 350,000 dollars, divided into 3,500 shares of 100 dollars each, of which 2,850 should be issued on the formation of the Company. Of these it was at first proposed that 840 should be allotted to each of the partners, the remaining shares being offered to certain other persons for cash. All the shares in the Company were to be allotted subject to the payment of the full amount, the partners receiving credit for the value of their respective interests in the partnership capital and making up the deficiency in cash.

After the negotiations had proceeded for some time it was suggested that Fernandes, who was an employee of the partnership, receiving as remuneration a percentage of the profits of the branch of the business managed by him, should be allowed to have what was no doubt regarded as the privilege of taking up some of the shares. The number proposed to be allotted to him seems at first to have been 50, but afterwards it was provisionally arranged that he should have the option of taking 220, but it was known that he had no money available to pay for them. About the same time it was provisionally arranged that the number of shares to be allotted to each of the Respondents Pereira and Gonsalves should be 730. It is a matter in dispute whether this reduction in the number of their shares was consequent upon the proposal to allot 220 to Fernandes or not.

The negotiations came to a head on 12th February, when, an agreement having been drawn up in writing, the parties met for the purpose of executing it. By the agreement as drawn up it was provided that the partners should sell their interests in the partnership business to a Company to be formed, and to be called J. P. Santos & Co., Ltd., as from 22nd

January 1910, in consideration of 2,300 fully paid up shares of 100 dollars each, and 55,000 dollars in cash, with a possible increase in the purchase money dependent upon a valuation of the partnership assets. Of the first issue 840 shares were to be allotted to the Appellant, and 730 to each of the Respondents, Pereira and Gonsalves. For the purpose of raising the 55,000 dollars, 550 shares were to be allotted to certain persons named, including Fernandes, who was to have 220 of them.

The alleged misrepresentation is said to have been made on this occasion. There was some conflict of evidence as to what actually took place. According to the evidence of the Respondent Pereira, Santos shortly after the parties met said, "Wait a minute," and sent for Fernandes, who was on the premises, and who then came into the room, and had some conversation with him. Thereupon Fernandes left the room, and Santos said, "I have made arrange-"ments with Fernandes." He then said, "Alter "the 220 to 50, and put the 170 to my wife." The alteration was made, and each party initialled it. Pereira says that he thought that the 170 shares were put in Mrs. Santos' name as security for the money which he supposed Santos was lending to Fernandes, and which he supposed to be 17,000 dollars. The evidence of the Respondent Gonsalves is much to the same effect. He says that Santos, while the document was being read, said "Wait a minute"; that he then saw Fernandes coming; that Santos went and spoke to him in private about 20 feet away; that returning to the table at which they were sitting he "directed alteration of 220 shares "by putting 50 for Fernandes and 170 for "Mrs. Santos." He further says: "I did not "object, knowing that Santos had previously "at our meetings agreed that he should

" lend Fernandes the money for the 220
" shares, and thinking there might be an agree-
" ment between Santos and Fernandes there and
" then to transfer as security the 170 shares
" into Mrs. Santos' name, and felt convinced it
" was done as security, Santos having never
" before mentioned his wife's name."

Santos gives a different account of the transaction, and denies that he ever promised to lend Fernandes the money to pay for the shares, or told the Respondents that he had done so. Neither Pereira nor Gonsalves asked any questions or made any remarks when Santos directed the alteration to be made in the agreement. The case of misrepresentation set up by the Respondents rests entirely on this evidence, and consists, in effect, in concealment or non-disclosure of the fact (as the fact was) that the 170 shares were to be taken by Mrs. Santos for her own benefit and not for that of Fernandes.

On these facts, it seems to their Lordships that the basis of an action for deceit is wanting, since the only misrepresentation set up is an omission to correct an erroneous impression said to have existed in the minds of the Respondents. Now, if the Appellant was aware of the alleged misapprehension, the point might require further consideration, but there is nothing in the evidence to show that he was aware of it, and the evidence to support the suggestion that he had done anything to warrant it is very unsatisfactory. The words used in the conversation between himself and Fernandes were overheard by one of the witnesses. That conversation took place in the presence of Pereira and Gonsalves, who might also, for all the Appellant knew, have been able to overhear it. If they had done so there was no room

for any misapprehension, for all the witnesses agree that the Appellant asked Fernandes how many shares he wanted and that he replied "Fifty." The suggestion of any improper concealment of fact rests, therefore, in their Lordships' opinion, on the slenderest foundation.

All the facts relative to the allotment of the 170 shares to Mrs. Santos, including the fact that she did not take them by way of security for a loan to Fernandes, came to the knowledge of the Respondents not later than the 16th of May following. The money to pay for the 50 shares was indeed borrowed by Fernandes from Pereira, who does not appear to have made any communication to Santos on the subject.

Another fatal defect in the Plaintffs' case is that there was no evidence that Pereira and Gonsalves suffered any loss from the fact that the 170 shares were allotted to Mrs. Santos instead of to Fernandes. Pereira swore, indeed, that the agreement of 12th February was pecuniarily advantageous to them. The rule that actual damage is an essential element of a case of deceit is well settled. Moreover, the question of damage is to be determined by the result of the whole transaction, and not by any difference in value that may be caused by a misrepresentation as to one detail of it.

Their Lordships cannot help thinking that the Court below confused the remedy by way of damage for fraud and that by way of recovery of profits made by one partner behind the backs of his co-partners in a matter in which a fiduciary relation exists between them. In order, however, that the Plaintiffs should be entitled to the latter remedy, it would be necessary to prove that Mrs. Santos was a trustee for her husband, of which no proof was offered. And this was not the case made by the pleadings or at the trial. Nor are their Lordships satisfied that under the circumstances any fiduciary relation existed *quoad hoc*.

Further, in order to support any such case it would have been necessary to reopen a settled account, which was settled on 8th July 1910, after the Plaintiffs were fully aware of all the material facts, and no case was made for reopening it.

For all these reasons their Lordships will humbly advise His Majesty that the Appeal be allowed and judgment entered for the Appellant with costs here and below.

In the Privy Council.

JOAO PEDRO SANTOS

v.

MANOEL AUGUSTO PEREIRA
AND OTHERS.

DELIVERED BY SIR SAMUEL GRIFFITH.

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