

[2013–14 Gib LR 154]

**SCHINOCCA v. DE MESSI, SOVEREIGN TRUST  
GIBRALTAR LIMITED, VICTORIA INVESTMENTS  
LIMITED and LIMA INVESTMENTS LIMITED**COURT OF APPEAL (Kennedy, P., Aldous and Parker, JJ.A.): March  
18th, 2013

*Contract—misrepresentation—fraudulent misrepresentation—professional agent misleading unsophisticated owner of footballer’s image rights—lack of intention on part of owner to transfer controlling interest in company owning rights, because unversed in commercial matters, unfamiliar with the names of companies involved, and not acting at arm’s length with independent advice usually available, strong evidence of fraudulent misrepresentation by agent*

The second, third and fourth respondents applied to the Supreme Court for an order allowing them to disregard the instructions of the appellant and first respondent, pending resolution of a dispute in Belize.

The Supreme Court concluded that it had to determine who, as between the appellant and first respondent, was to be treated as the beneficial owner of a Belize company, Sports Consultants Ltd. (“SCL”), of which the second, third and fourth respondents were trustees. When incorporated in 2004, SCL was beneficially owned by the first respondent, who was an Argentinian national and the mother of the footballer Lionel Messi. She also beneficially owned 50% of another company, Sport Enterprises Ltd. The other 50% of Sport Enterprises was beneficially owned by the appellant, Lionel Messi’s agent. SCL engaged Sport Enterprises to exploit Lionel Messi’s image rights, which had been assigned to SCL in March 2005.

The first respondent did not speak English, was unfamiliar with the names of the companies involved, and generally signed any documents her husband—who lived in Spain with their son—advised her to. Her husband, in turn, was generally guided by the appellant as to what to sign. In August 2005, documents purporting to transfer 25,100 of the 50,000 shares in SCL to the appellant were signed by Mrs. Messi. Commercial relations between the parties then deteriorated, culminating in proceedings in Belize in March 2007.

The Supreme Court (Dudley, C.J.) found that Mrs. Messi was to be treated as the legal and beneficial owner of SCL; she had not knowingly transferred the shares to the appellant and her signature on the documents

had been obtained by fraudulent misrepresentation. There was no substantive commercial explanation for the purported increase of the appellant's interest in Lionel's image rights from 5% to 62.65%, and the lack of evidence and the vagueness of the purported terms were insufficient to establish an oral contract between the appellant and the Messis as alleged by the appellant.

On appeal, the appellant submitted that the shares had been transferred to him under an oral contract concluded in 2005 between him and the Messis. The consideration for the shares was his investment of time, money and expertise in developing Lionel's image rights and income from them. Whilst it was true that in 2005 Lionel was not as famous (and his image rights not so valuable) as now, he was clearly a potential star and, absent injury, would be a world-class player. His image rights were clearly set to increase in value. The appellant submitted that the Supreme Court had failed to realize that the burden of proof in establishing fraudulent misrepresentation was on Mrs. Messi; and that it had failed to apply the law of fraudulent misrepresentation properly in that it did not identify any misrepresentation made by or on behalf of the appellant, let alone a fraudulent one.

The first respondent submitted in reply that there was no oral contract to transfer a controlling interest in SCL to the appellant. The transfer was obtained by fraudulent misrepresentation on the part of the appellant; Mrs. Messi at all times sought advice from her husband as to what to sign, and he never advised her to sign a share transfer.

**Held**, dismissing the appeal:

(1) The Supreme Court had been correct to hold that there was no contract to increase the appellant's share in SCL. The lack of any recorded reference to the purported oral contract was surprising, the fact the documents were sent straight to Mrs. Messi and not shown to her husband first was not the usual way documents were dealt with in their business relationship, and the purported consideration was so vague as to be unenforceable (paras. 24–31).

(2) The Supreme Court had been correct in not finding that Mrs. Messi had failed to discharge the burden of proof to establish fraudulent misrepresentation. The issue to be decided had been agreed, and the Supreme Court had found, on the evidence relating to those issues, that Mrs. Messi's signature had been obtained fraudulently (para. 31).

(3) The Supreme Court had been correct in its finding of fraudulent misrepresentation of the part of the appellant. Once it had been found that the Messis had not intended to transfer a controlling interest in the company to the appellant, it was difficult to envisage that Mrs. Messi's signature had not been obtained through fraud. The transfer was not an arm's-length commercial transaction, and since Mrs. Messi signed on the advice of her husband, he must have been deceived by the appellant (para. 32).

*K. Azopardi, Q.C.* and *Ms. K. Power* for the appellant;  
*D.J.V. Dumas, Q.C.* and *Ms. A. Rose* for the respondents;

1 **ALDOUS J.A.:** These proceedings are concerned with the ownership of the image rights of Lionel Messi. He was born in Argentina in June 1987, and moved with his parents to Spain at the age of 13 to join the F.C. Barcelona youth academy. He played for the senior team at the age of 16, and is thought to be the best football player in the world. It follows that his image rights are of great value.

2 The case, as listed, was a Civil Procedure Rules Part 8 claim in which the applicants as trustees of shares in a Belize company, Sport Consultants Ltd. (“SCL”), sought an order allowing them to disregard the instructions of the first and second respondents pending resolution of a dispute between them in Belize. The Chief Justice concluded that the real issue to be determined was the beneficial ownership, as between the respondents, of shares in SCL. Despite misgivings, he was persuaded to proceed with the trial of that issue although it involved issues of fact and there were no pleadings.

3 Celia Maria Cuccittini De Messi is the first respondent. She and Jorge Messi are the parents of Lionel Messi. They are both Argentinian nationals.

4 The second respondent is Rodolfo Schinocca. He was a professional footballer and is now a certified accountant and a FIFA accredited agent. He was and is active in the field of sport.

### **The corporate structure**

5 The corporate structure was, I assume, designed to be tax efficient. It was set out in full by the Chief Justice. To understand the issues I will confine this part of my judgment to the basic elements looking at the beneficial ownership rather than the legal nominee owners.

6 In 2004, arrangements were made for the formation of SCL as a Belize company. Nothing turns on the fact that bearer shares were initially issued, as this was corrected at the first board meeting on February 14th, 2005. The 50,000 shares then became beneficially owned by Mrs. Messi, through a nominee company. She was appointed the sole director, but a power of attorney was issued in favour of Lionel’s uncle for the purpose of trading and acting on behalf of the company.

7 At the same time, an English company was formed: Sport Enterprises Ltd. The beneficial owners of the shares were Mr. Messi and Mr. Schinocca with each holding 50%.

8 On March 3rd, 2005, Lionel Messi’s image rights were assigned by Lionel’s attorney to SCL in consideration of \$50,000.

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9 On March 4th, 2005, an agency agreement was signed by SCL and Sport Enterprises, which engaged Sport Enterprises as sole agent to exploit the image rights in consideration of a net commission of 10% which could be increased, on a case by case basis, to a ceiling of 25%.

10 On August 4th, 2005, the board of SCL, which consisted of Mrs. Messi as sole director, purportedly approved the transfer of 25,100 shares in SCL to a nominee company, so that those shares were held by bare trustees for Mr. Schinocca. Thus Mr. Schinocca came to have 51% of the shares in SCL.

11 On January 27th, 2006, Lionel Messi, on the basis of his acquired Spanish nationality and having achieved the age of 18, appeared before a notary public in Barcelona and ratified the March 3rd, 2005 assignment of his image rights to SCL.

12 The breakdown in commercial relations started to surface in about February 2006, and came to a head with proceedings in Belize in March 2007. Mrs. Messi was purported to be removed as a director of SCL at a special meeting of SCL on June 21st, 2007.

**The issues**

13 These were agreed by the parties, and are as follows, with those parts not agreed in square brackets:

“1. Did Mr. Schinocca acquire ownership of 25,100 shares as part of a business agreement [whereby he invested in Lionel Messi when he was an unknown and his future uncertain]?

2. Did the Messis know and understand the contents of all or any of the documents listed (i) to (iv) below including that 50.2% of the shares would be transferred by the Messis to Mr. Schinocca [and intend to do so]?

- (i) The letter dated August 2nd, 2005 disputedly signed on August 4th, 2005 by the first respondent (Mrs. Messi).
- (ii) The resolution dated August 3rd, 2005 disputedly signed on August 4th by the first respondent (Mrs. Messi).
- (iii) The resolution dated August 3rd, 2005 disputedly signed by the first respondent (Mrs. Messi).
- (iv) Share certificates No. 3, for 24,900 shares, in the name of Midland Investments Ltd. and No. 4, for 25,100 shares, in the name of Victoria Investments Ltd. both disputedly signed by the first respondent on August 4th, 2005.

3. Was Mrs. Messi's signature on all or any of the documents obtained by fraudulent misrepresentation/deception on the part of Mr. Schinocca?

4. Who shall the applicants treat as the absolute legal and beneficial owners of the 25,100 shares (now registered in the name of Lima Investments Ltd. and Jaime Perkul)?"

14 It was Mr. Schinocca's case that the shares were assigned to him pursuant to a contract between him and the Messis entered into in or about January 2005. The Messis contended that there was no such contract and that the transfer was the result of fraudulent misrepresentation/deception.

15 I shall have to deal in detail with the context in which the shares in SCL came to be assigned to Mr. Schinocca, but it is appropriate at this stage of my judgment to shortly explain how that came about.

16 Mrs. Messi, the director and shareholder of SCL, lived in Argentina. She did not speak English. She did not have any recollection of signing the documents referred to in the issues. She at first believed that her signature had been forged, but in her evidence accepted that it was her signature which appeared on the documents. She explained that normally, when she needed to sign documents, she contacted her husband, in Spain, for guidance. If he said that she could sign, she did so. Normally, Mr. Messi would seek guidance from Mr. Schinocca.

17 The preparation to transfer the shares appears to have started at the end of July 2005, when Ms. Otero, who was advising Mr. Schinocca, sought advice from Janine Santos of Sovereign Gibraltar—the legal owner of the shares in SCL—as to what documents were needed to transfer 51% of the shares. It was at this stage that it was realized that bearer shares had been wrongly issued. Ms. Otero was advised, on August 1st, 2005, that Mrs. Messi would need to sign documents which were to be prepared. On the same day, Mr. Schinocca was told, copied to Ms. Otero, that files would be sent in English for Mrs. Messi to sign. It seems that three "minutes" were sent to Mr. Schinocca on August 3rd, 2005. The first "minute" was a resolution to be signed by Mrs. Messi as the sole director of SCL cancelling the bearer shares and issuing a second share certificate for 50,000 shares. The second was a resolution of the sole director of SCL transferring 25,100 shares to a nominee company which then held the shares for Mr. Schinocca. Share certificate No. 2 was to be cancelled, and new certificates, No. 3 and No. 4, issued to reflect the new arrangement, with Mrs. Messi owning 24,900 shares and Mr. Schinocca 25,100. The third "minute" was the letter of August 2nd, 2005 referred to in the issues. It was in this form:

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“Messrs. Sovereign Trust Gibraltar Ltd.,  
Suite 2B, Mansion House,  
143 Main Street, Gibraltar.

RE: SPORT CONSULTANTS LIMITED

Dear Sir,

We herein notify you that the undersign [*sic*] have transfer 25.100 ordinary shares of \$1.00 each in favour of Rodolfo Schinocca.

Yours very truly,

Director

[signed]

Celia Maria Cuccittini De Messi  
Signed this 4th day of August 2005

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As witness  
In the presence of:  
[No signature]”

That was signed by Mrs. Messi, as were the other documents referred to in the issues.

### **The judgment**

18 The Chief Justice, in his long and careful judgment, dealt first with the corporate structure and transactional history. He then set out the issues. He turned next to the witnesses, dealing in detail with their evidence. He expressed reservations as to their reliability. His conclusion is set out in the last three paragraphs, which explain why he decided the case in favour of the Messis.

“56 That there was an agreement between the Messis and Mr. Schinocca is self-evident, and underpinning all the issues falling for determination, the core dispute is whether Mr. Schinocca was to have a 5% interest or a 62.65% interest in Lionel’s image rights. Of course, in making a determination matters need to be looked at in historical context, in that evidently the Lionel of 2005 had not, by that stage, become either the highly acclaimed footballer or the household name he now is. In my view, the instructions provided by Otero & Asociados/Sovereign Uruguay to Sovereign Gibraltar provide the most reliable evidence as to the corporate structure and respective beneficial percentile interests in Lionel’s image rights in February/March 2005. The fundamental weakness in Mr. Schinocca’s case is that his interest in Lionel’s image rights thereafter

increased from 5% to 62.65% in the absence of any substantive commercial explanation. I have no doubt that Mr. Schinocca's role was not that of accountant, but rather that of a business partner, but such relationship was clearly capable of existing with either a 5% or 62.65% interest. It is highly probable that Mr. Schinocca expended his time and effort in developing Lionel's image, but for reasons previously given, on balance I am not persuaded that he invested either the \$50,000 upon assignment of the image rights, or that he financed the Messis in the sum of \$200,000. Moreover, the whole ambiguous evidence by Mr. Schinocca as to how the agreement was concluded does not remotely begin to establish that the parties reached agreement on the terms which he avers.

57 Mr. Schinocca urges the court to draw the inference that relations between him and the Messis soured after a number of image rights contracts, including the Adidas contract, were concluded, as a consequence of which the Messis realized that they had struck a bad bargain and sought to renege from the agreement. It is not an inference that I draw. The Adidas agreement was entered into on January 31st, 2006, and if the Messis had harboured misgivings as to the terms of the deal they had struck with Mr. Schinocca, Lionel would not only four days earlier, on January 27th, 2006, have ratified the March 3rd, 2005 assignment. The absence of commercial reality in the case as advanced by Mr. Schinocca is further evidenced by the amended agency agreement of March 30th, 2006. If the Messis had been dissatisfied with the terms of their agreement with Mr. Schinocca, the amended agency agreement increasing Mr. Schinocca's share in Lionel's image rights even further, would no doubt have afforded Mrs. Messi *qua* director of SCL an opportunity to voice misgivings.

58 The foregoing leads me to the inexorable conclusion that Mr. Schinocca was improperly seeking to maximize his share of the profits in Lionel's image rights, and obtain control of the corporate structure through which these were managed and controlled. For these reasons, on balance, I find that the alleged transfer of shares in SCL from Mrs. Messi to Mr. Schinocca was not an arm's-length commercial transaction, and that Mrs. Messi did not knowingly transfer her shares to Mr. Schinocca's nominee for him to hold beneficially. The corollary to that is that Mrs. Messi's signature in the documents identified in the issues was obtained by fraudulent misrepresentation/deception on the part of Mr. Schinocca. Consequently, the applicants are to treat Mrs. Messi as the absolute legal and beneficial owner of the disputed 25,100 shares in SCL."

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19 The Chief Justice analysed the evidence in detail in 28 pages of his judgment. He concluded that the evidence of Mrs. Messi was not always consistent, and that despite the terms of her witness statement—

“... she had no substantive knowledge whatsoever of any of the corporate structures involving, or agreements entered into by SCL, to the extent that the names ‘Sport Consultant Ltd.’ and ‘Sovereign’ did not mean anything to her ... What her absolute lack of knowledge does tend to support is Mr. Messi’s evidence to the effect that Mr. Schinocca would inform him of what required signature, and that thereafter he would ask his wife to sign.”

The Chief Justice held that Mrs. Messi’s case was almost entirely dependent on the evidence of her husband, who was the parent involved in managing Lionel’s commercial interests.

20 The Chief Justice also analysed the evidence of Mr. Messi, and concluded that in certain respects it was unsatisfactory. He also dealt in detail with the evidence of Mr. Schinocca, pointing out where his evidence was inconsistent. He concluded that—

“... although it is accurate to say that on the fundamental nature of the relationship between the parties I prefer the evidence of Mr. Messi over that of Mr. Schinocca, it is clear that the Messis are not beyond criticism. There are inconsistencies in the way that the Messis have advanced their case at different times; Mrs. Messi’s absolute ignorance of the commercial relationship and Mr. Messi’s inability to even identify documents central to this case are certainly strong cause for dealing with their evidence with circumspection. Mr. Messi would have it these inconsistencies arise consequent upon his reliance on his lawyers to advance the case. This affords an explanation, but also a willingness to divest himself of control over his evidence of fact, and therefore evinces a willingness to allow his evidence to be modulated so as to achieve a favourable outcome. This necessarily impacts upon his credibility and reliability ...”

21 The Chief Justice also held that the evidence of Mr. Schinocca was unsatisfactory. He held that at the heart of the dispute were the terms of the agreement for the exploitation of Lionel’s image rights. He said that the wholly ambiguous evidence by Mr. Schinocca as to how the agreement was reached did not remotely begin to establish that the parties reached agreement on the terms he averred.

### **The appeal**

22 It is apparent from the agreed issues that the crucial issue between the parties concerned the issue of 25,100 shares in SCL to Mr. Schinocca. Was there a contract between Mr. Schinocca and the Messis to transfer



those shares? If so, when was it agreed and what was the consideration? It was not suggested that there was a gift of the shares.

23 Mr. Schinocca's case in his skeleton submission was that he agreed with Mr. Messi that he would in effect, become an equal partner in SCL. The consideration for this was the moneys he had invested, the role he had played in the renegotiation of the 2005 Barca contract, the image rights contracts he had lined up for signature in the event that the contract with Barcelona was renegotiated as well as his knowledge and expertise in this field. He accepted that the initial structure agreed in December 2005 was that Mrs. Messi would own 100% of the shares in SCL and that it was after the U20 World Cup in Columbia in January/February 2005 that the agreement to transfer the shares in SCL to him was concluded. But the Chief Justice recorded how cross-examination had provided further details of his case—

“ . . . thus Mr. Schinocca testified that although in September 2004 he had been asked to look at the various options it was only by the end of January 2005 in Colombia during the 2005 South American under-20 Championships that it was agreed that he would carry on providing his services and developing the commercial aspects of the business. However, by way of further modulation, that when they got to the 2005 FIFA under-20 World Championships in the Netherlands in about July 2005, following the commercial success he had achieved, the Messis gave him instructions for the shares to be transferred to him. That evidence was subject to even further modulation in that Mr. Schinocca also said that this final agreement for the transfer of the shares was reached in Buenos Aires whilst staying at the Hilton Hotel, on their return from the Netherlands, when Lionel, Mr. and Mrs. Messi, uncles and nephews met with him. It is accurate to say that my recap of his evidence affords it an element of solidity which was less palpable when conveyed by Mr. Schinocca on oath.”

24 Mr. Azopardi, Q.C., who appeared for Mr. Schinocca on the appeal, submitted that the agreement to transfer the shares was an oral agreement between him and the Messis concluded in January 2005. The consideration was Mr. Schinocca's agreement to continue to use his expertise, time and money to develop the image rights and the income from them.

25 I accept that the decision as to whether there was an agreement has to be considered against the January 2005 background. At that time, Lionel Messi was not the famous footballer that he is now, with the result that his image rights are worth millions every year. By 2003, however, he was recognized as a potential star. He was the third youngest player to play for the Barcelona first team, and made his full league debut in October 2004, going on to play seven times for them that year. It was apparent by 2005 that he would, absent injury, become a world-class player. Thus, in 2005,

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his image rights were valuable and were likely to increase substantially over the next few years.

26 Lionel Messi was subject to an agreement with Barca, which set out terms of his engagement until 2012. It was Barca that would have the majority of his image rights, and he would have a salary which increased year by year. In 2004/2005 it was about €200,000. A new agreement with Barca was likely, and was signed in September 2005, which resulted in an income of about €3m. and the right to exploit image rights.

27 It is odd that the alleged agreement to transfer 51% of the shares of SCL was not recorded in writing, or ever referred to in any correspondence between the parties or their advisors. Despite its importance, there is no note, email or letter which mentioned it. Further, the documents which Mrs. Messi signed were never sent or shown to Mr. Messi, who was the person to whom Mrs. Messi turned to for advice. They went, via Mr. Schinocca, for signature by Mrs. Messi. As the Chief Justice held, Mrs. Messi's lack of knowledge supported Mr. Messi's evidence to the effect that Mr. Schinocca would inform him of what required signature and that thereafter he would ask his wife to sign.

28 As to the suggested consideration, the alleged agreement is so vague as to be unenforceable. There is no agreement as to how much time or money would be provided, nor the period of the obligations. In any case, as found by the Chief Justice, the evidence of Mr. Schinocca as to how the agreement was concluded was wholly ambiguous.

29 I cannot envisage any reason why the Messis would agree to transfer a majority shareholding in the company holding Lionel's image rights for the suggested consideration, particularly as they had only known Mr. Schinocca for nine months. Nor can I believe that Lionel Messi would have ratified, in 2006, the transfer of his rights to SCL if he had known of the alleged agreement or the transfer of shares to Mr. Schinocca. In any case, the vehicle for exploiting the image rights was Sports Enterprises, which was jointly owned by Mr. Schinocca and Mr. Messi and was remunerated for success.

30 The Chief Justice held that there was no contract. I believe he was right. Further, he had the advantage of seeing the witnesses give their evidence. He used that advantage to decide where the truth lay. In those circumstances it would be wrong for this court to come to a different result unless he was clearly wrong, or there was some error of approach. Mr. Azopardi realized that that would be the position, and submitted that the Chief Justice had fallen into error. First, he submitted that the Chief Justice had failed to realize that the onus of proof was on the Messis. Secondly, he submitted that he had failed to apply properly the law of fraudulent misrepresentation.

31 Mr. Azopardi submitted that the Chief Justice had failed to realize that the burden of proof was on the Messis to establish the fraudulent misrepresentation. He submitted that the evidence fell short of discharging that onus. I do not believe that anything is gained by analysing where the burden of proof lay. The issues to be decided had been agreed, and the parties called evidence relating to those issues. In particular, Mrs. Messi explained that she did not understand English and never intended to transfer the shares to Mr. Schinocca. She at all times sought advice from her husband as to what to sign, and he had never advised her to sign any share transfer. Having assessed the evidence, the judge concluded that Mrs. Messi's signature was obtained fraudulently. That was the issue to be decided.

32 There was no dispute as to the test for fraudulent misrepresentation. There must be a representation which amounts to a misrepresentation. It must be fraudulent. Mr. Azopardi submitted that the judgment did not identify a representation made by Mr. Schinocca or on his behalf, let alone one made fraudulently. I disagree. Once it had been decided that there was no arrangement for transfer of a controlling interest in SCL to Mr. Schinocca, it was difficult to believe that what happened was not the result of fraud. As the Chief Justice held, the evidence led him to the inexorable conclusion that Mr. Schinocca was improperly seeking to maximize his share of the profits in Lionel's image rights. The alleged transfer was not an arm's-length commercial transaction, and Mrs. Messi's signature was obtained by fraud. She signed upon the advice of her husband, who must have been deceived by Mr. Schinocca.

33 The appeal should be dismissed. The Chief Justice came to the right decision for the right reasons.

34 **KENNEDY, P.**, and **PARKER, J.A.** concurred.

*Appeal dismissed.*