CITATION: Goldhar v. Haaretz.com et al., 2015 ONSC 1128
COURT FILE NO.: CV-11-00443086
DATE: 20150813
CORRECTED DECISION RELEASED: 20150813

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
MITCHELL GOLDHAR	)	William C. McDowell, Julian Porter, Q.C. and Ren Bucholz for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	Paul Schabas and Emily Bala for the Defendants
	)	
HAARETZ.COM, HAARETZ DAILY NEWSPAPER LTD., HAARETZ GROUP,	)	
	)	
HAARETZ.CO.IL, SHLOMI BARZEL and DAVID MAROUNI	)	
	)	
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** February 18, 2015

CORRECTED REASONS FOR DECISION

Corrected decision: The text of the original judgment was corrected on August 13, 2015 and a description of the correction is appended

M. D. FAIETA, J

[1] The defendants bring this motion pursuant to Rules 17.06, 21.01(3)(a) and 21.03(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*"), and section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), for an order: (1) setting aside service *ex juris* of the amended statement of claim in this action on the defendants; (2) an order staying this action on the basis that this court lacks jurisdiction *simpliciter* or, in the alternative, that this court is not the convenient forum for the action; (3) an order staying this action on the basis that it is an abuse of process.

[2] On November 29, 2011 the corporate defendants published alleged defamatory statements regarding the plaintiff in its print and online newspapers (the "Article"). At least several people in Ontario, and 200-300 people in Canada, read those defamatory statements on the newspaper's English language website. This motion raises the questions of whether: (1) Ontario is the proper forum for the plaintiff's defamation action, and (2) this action is an abuse of process.

[3] For the reasons described below I have dismissed this motion. I find that Ontario is the proper forum for the plaintiff's defamation action and that the action is not an abuse of process.

[4] The parties filed a great deal of evidence on this motion. See Schedule "A" for a list of the materials filed by the parties.

The Parties

[5] The plaintiff lives in Toronto. He is a billionaire who owns and operates the SmartCentres Inc. shopping centre business in Ontario. The plaintiff also owns the Maccabi Tel Aviv Soccer Club ("Maccabi Soccer Club"). The plaintiff visits Israel about five or six times per year.

[6] The defendant Haaretz Daily Newspaper Ltd. publishes Haaretz. It carries on business in Israel and it publishes Israel's oldest daily newspaper. Haaretz is the smallest of Israel's five daily Hebrew-language newspapers by circulation with a market share of about 7%. It also publishes an English language print edition. The defendants Haaretz.com and Haaretz.co.il publish the Haaretz newspaper online in both English and Hebrew. The defendants Haaretz Daily Newspaper Ltd., Haaretz.com and Haaretz.co.il form part of the Haaretz Group (collectively referred to as the "Haaretz Companies")

[7] The defendants David Marouni ("Marouni") and Shlomi Barzel ("Barzel") were employed by the Haaretz Companies on November 29, 2011. Marouni was a reporter and Barzel was the Sports Editor. Although both Marouni and Barzel have moved to other employment they continue to reside in Israel.

The Newspaper Article

[8] On or about November 29, 2011 the Haaretz Companies published an article written by Marouni and edited by Barzel regarding the plaintiff and the Maccabi club.

[9] The headline of the Article was "Soccer/Profile/Long-distance operator" and went on to state, in part, that:

> Though he spends most of his time in Canada, Maccabi Tel Aviv owner Mitch Goldhar runs his club down to every detail. But could his penny pinching and lack of long term planning doom the team.

> Crises are par for the course at Maccabi Tel Aviv, even when the club appears to be on an even keel. Most of the crises don't make it onto the public's radar, but they have one thing in common: their connection to way that Canadian owner Mitch Goldhar runs the club.
>
> …
>
> "Mitch's game plan is to wear down anybody who he wants to get rid of, until they've had enough and decide to leave of their own accord", one club insider told Haaretz this week.
>
> …
>
> Goldhar's management model was imported directly from his main business interest – a partnership with Wal-Mart to operate shopping centers in Canada. He even spelled out his managerial vision in a leaflet distributed to fans ahead of Sunday night's derby against Hapoel Tel Aviv.
>
> "By dealing with disciplinary matters, commitment and the right approach," he wrote, "we are now at the dawn of a cultural revolution – a process of building a new sporting culture."
>
> Within the club, however, there are those who believe that Goldhar's managerial culture is based on overconcentration bordering on megalomania, penny-pinching and a lack of long-term planning.

The Claim

[10] The plaintiff commenced this action on December 29, 2011. Amongst other things, the claim contains the following allegations:

- The plaintiff is a business owner and operator, an instructor at the University of Toronto, a member of the board of several entities, including a member (emeritus) of the Board of Directors of Sick Children's Hospital in Toronto, a philanthropist and an active member of the community, who resides in the City of Toronto;
- One of the plaintiff's businesses is the Maccabi Soccer Club;
- The plaintiff will rely on the Article as being libelous of him personally and in the way of his occupation as an active business owner and operator;
- The plaintiff pleads that the Article indicates that the plaintiff displays behavioural characteristics of megalomania; the plaintiff displays behavioural characteristics of a form of personality disorder or mental illness; as a result of the above the plaintiff is compelled to involve himself in all daily activities of the Maccabi Soccer Club; the

plaintiff treats employees in an offensive manner; the plaintiff is irrationally thrifty concerning benefits to employees;

- The plaintiff pleads that the Article contains factual errors;
- The plaintiff pleads that as a result of the publication of the Article he has suffered damages to his reputation in his business and personal life;
- The plaintiff will continue to suffer damage, and in particular financial loss, having regard to the permanent availability of the Article on Google News and other worldwide search engines;
- The plaintiff conducts business in Israel, Canada and the United States and will continue to suffer damages in these countries and elsewhere.

How Many People in Ontario read the Article?

[11] Haaretz was not distributed in Canada in print form, in either Hebrew or English.

[12] However, Haaretz was made available internationally on its website in Israel in both Hebrew and English. At the time of publication, access to the website was unrestricted. As a result, the Article could be accessed from anywhere in the world using the internet. Information provided by the corporate defendants reveals that there were 216 unique visits to the Article in its online form in Canada. This does not mean that 216 people viewed the Article online. A unique visit means a visit to the Haaretz website from a unique IP address on a particular day. Accordingly, there could have been a single visit to view the Article online by the same person each day for several days. As a result there could have been far fewer than 216 people who viewed the Article online. Similarly, the data provided by the corporate defendants cannot be dissected to determine how many of the views of the Article occurred in Ontario, rather than across Canada. On the other hand, since more than one computer may share an IP address, one unique visit might have represented many people viewing the Article from one or more computers that share a single IP address.

[13] In any event, the evidence of Lior Kodner, the Head of Digital Group at the Haaretz Companies (whose duties include serving as editor in chief for all of Haartez's websites) was that, based on his assessment of the internet traffic to the Haaretz website, it is likely that 200 to 300 people in Canada read the Article online.

[14] Nadia Di Cesare is the Director, Cash Management, at SmartCentres and works at its office in Toronto. She stated that:

- She read the Article at the office after having receiving a Google Alert for the term "Goldhar";

- Google Alert is a service that Google provides whereby a person can request to be notified when a certain term appears in a newspaper;
- She forwarded the Google Alert for the Article to two senior executives in her office;
- The Article came to the attention of most of the approximately 200 people that work at SmartCentre's office.

[15] Joseph Amato is a lawyer who works for the plaintiff's company. Mr. Amato stated that:

- He is one of 8 lawyers that work at the SmartCentre office;
- He read the Article at the company's offices in Toronto;
- He discussed the Article with at least three other employees at the office;
- The Article was read and discussed by multiple individuals in Ontario as it became "the talk in the office";
- The Article was discussed widely at the SmartCentre's office in Toronto;
- Individuals outside the organization contacted him about the Article after its publication. Several of them were former employees of SmartCentres who remain interested in the company and the plaintiff;
- The Article would have "gotten around" to most of the 200 people in the office.

Issues

[16] The defendants ask this court to stay or dismiss this action on the grounds that:

(a) this court lacks jurisdiction;

(b) Israel is clearly a more convenient forum; or

(c) this action is an abuse of process.

The Law

[17] The Supreme Court of Canada's decision in *Club Resorts Ltd. v. Van Breda*[1] governs whether a court in Ontario should assume jurisdiction over a foreign defendant. The two main issues in making this determination are as follows:

1. Does the court in Ontario have jurisdiction *simpliciter* over the defendant?

   This question turns on the following two-part test:

   (A) Do any one of the four following presumptive connecting factors between the subject-matter of the litigation and the Ontario forum exist?

   - Is the defendant domiciled or resident in Ontario?
   - Does the defendant carry on business in Ontario?
   - Was a tort committed in Ontario?
   - Was a contract connected with the dispute made in Ontario?

   (B) If a presumptive connecting factor exists, then has the defendant rebutted the presumption by showing that the presumptive connecting factor does not point to any real relationship between the subject-matter of the litigation and the forum or points only to a weak relationship between them?

2. If a court in Ontario has jurisdiction *simpliciter* over the defendant, then should the court nevertheless exercise its authority under section 106 of the *CJA* to stay the action "on such terms as are considered just" if it determines that another jurisdiction is a more appropriate forum for this action? The determination of *forum conveniens* is a matter of discretion. See *Prince v. ACE Aviation Holdings Inc*.[2]

Issue #1: Jurisdiction *Simpliciter*?

(1) Is there a Presumptive Connecting Factor?

[18] In a defamation action the following elements must be proven in order for a plaintiff to obtain judgment and an award of damages:

(1) the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

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[1] 2012 SCC 17, [2012] 1 S.C.R. 572.
[2] 2014 ONCA 285, 120 O.R. (3d) 140, at paras. 56, 57.

(2) the words in fact referred to the plaintiff; and

(3) the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[19] If these elements are established on a balance of probabilities, falsity and damage are presumed. If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability. See *Grant v. Torstar Corp*.[3]

[20] Two witnesses provided sworn evidence that they read the Article. These same witnesses testified that many more people, perhaps as many as 200, whether employees or former employees, had also read the Article. Further, according to the sworn evidence of Mr. Kodner, it is likely that 200-300 people in Canada read the Article online. As a result, the defendants acknowledge that a tort was committed in Ontario and thus a presumptive connecting factor exists.

(2) Have the defendants rebutted the presumption by showing that the presumptive connecting factor does not point to any real relationship between the subject-matter of the litigation and the forum or points only to a weak relationship between them?

[21] In *Van Breda* the court, at paras. 95-97, stated that:

> The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.
>
> Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. … On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.
>
> In each of the above examples, it is arguable that the presumptive connecting factors points to a weak relationship between the forum and the subject matter of the litigation and that it would accordingly not be reasonable to expect that the

[3] 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 28-29.

> defendant would be called to answer proceedings in that jurisdiction. In such circumstances, the real and substantial connection test would not be satisfied and the court would lack jurisdiction to hear the dispute. [emphasis added]

[22] In *Ėditions Ėcosociété Inc. v. Banro Corp*.[4] the Supreme Court of Canada found that the presumption of jurisdiction had not been rebutted event though very few copies of the impugned book, both in absolute and relative terms, were published in Ontario. The court stated at paras. 38-39:

> Here, the alleged tort of defamation occurred in Ontario. Noir Canada was distributed in Ontario. At this stage of the proceedings, the plaintiff need not show evidence of harm or that the book was read. The plaintiff need only allege publication and its allegations should be accepted as pleaded unless contradicted by evidence adduced by the defendants. For the purposes of providing defamation, publication may be inferred when the libellous material is contained in a book that is circulated in a library; the new evidence adduced by Banro on consent establishes that 15 copies of Noir Canada were circulated in Ontario libraries and one copy was checked out. In addition, Banro adduced evidence establishing that its reputation in Ontario is vital to conducting business, attracting investors and maintaining good relations with regulators such as the Ontario Securities Commission.
>
> As discussed in *Club Resorts*, the commission of a tort in Ontario is a recognized presumptive connecting factor that prima facie entitles the Ontario court to assume jurisdiction over this dispute. For the reasons discussed above, the defendants have not shown that only a minor element of the tort of defamation occurred in Ontario. As a result, they have not displaced the presumption of jurisdiction that arises in this case.

[23] The defendants assert that far more people read the Article in Israel than in Ontario and thus only a minor element of the tort occurred in Ontario.

[24] However, in *Banro* the absence of the substantial publication of the defamatory material in Ontario was not viewed as rebutting the presumption that the chosen forum has a real and substantial connection with the subject matter of the litigation. Specifically, in *Banro* the court found that even a small number of publications in the forum would be sufficient to ground jurisdiction. In that case, only 15 of the 5,000 published copies of a book containing libellous material (including 93 copies that had been sent to stores in Ontario) were in public libraries in Ontario and only one copy of the book had been checked out.

[25] The defendants also assert that there was no evidence of harm to the plaintiff's reputation in Ontario as a result of the publication of the Article. However, proof of harm to reputation is

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[4] 2012 SC 18, [2012] 1 S.C.R. 636.

not an element of the tort of defamation and, accordingly, is an irrelevant consideration for purposes of determining whether a minor element of the tort occurred in Ontario. In any event, even if it was relevant, harm to the plaintiff's reputation is presumed. The defendants have not adduced evidence to rebut the presumption that that there was harm to the plaintiff's reputation in Ontario as result of the publication of the Article.

[26] In my view the defendants have not rebutted the presumption of jurisdiction.

Issue #2: Is Israel a more appropriate forum for this action?

[27] Even if this court has jurisdiction *simpliciter* over the defendants, this court may decline to exercise its jurisdiction if a court in another jurisdiction is a "clearly more appropriate" forum for the hearing of an action. [emphasis added]

[28] In *Van Breda*, the court explained the "clearly more appropriate" standard, at para 109, as follows:

> The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgement that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.
>
> As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the location of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties. [emphasis added]

[29] In *Breeden v. Black*[5] the Supreme Court of Canada applied *Van Breda* in the context of a defamation action. It considered the following factors in determining whether there was clearly a more appropriate forum: (1) Comparative Convenience and Expense for Parties and Witnesses; (2) Applicable Law; (3) Avoidance of a Multiplicity of Proceedings and Conflicting Decisions; (4) Enforcement of Judgement; and (5) Fairness to the Parties.

[30] The Defendants have raised the factors discussed below.

Comparative Convenience and Expense for the Parties

[31] The corporate defendants are based in Israel and have no assets in Ontario. The individual defendants are Israeli citizens that have spent a combined one day in Canada and have no assets in Canada.

[32] The evidence of the defendant Barzel is that it would be "inconvenient, unfair and prejudicial" to require the defendants to defend this action in Ontario.

[33] The defendants submit that a lengthy libel trial thousands of miles from Israel would place a huge strain on the defendants who could not reasonably expect to be sued over the Article in Canada. The defendants also stated that a trial would be a massive commitment of time taking staff away from their function of gathering news.

[34] In addition the defendants submit that the trial may need to be conducted in Hebrew with interpreters. The plaintiff submits that interpreters may not be required as the cross-examinations of the three affiants from Israel on this motion were conducted in English.

[35] On the other hand, the plaintiff resides in Toronto and visits Tel Aviv about five times per year. The plaintiff has an apartment in Tel Aviv. The plaintiff did not file affidavit evidence. There is no evidence that a trial in Israel would cause inconvenience or expense to the plaintiff.

[36] This factor favours a trial in Israel.

Comparative Convenience and Expense for the Witnesses

[37] The plaintiff did not file any evidence regarding the witnesses that he would call at trial.

[38] The affidavit evidence of the defendant Barzel is that if this action proceeds to trial the defendants intend to rely on the defences of truth, fair comment, qualified privilege, and responsible communication in the public interest. This will mean that the evidence at trial will

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[5] 2012 SCC 19, [2012] 1 S.C.R. 666.

deal with justifying the words and explaining the conduct of the defendants – both issues relating primarily to events that took place in Israel – as well as whether this is a matter of public interest in Israel.

[39] The defendant Barzel anticipates that the following persons could be called to testify:

a) The defendant Shlomi Barzel, former Sports Editor, lives in Israel

b) The defendant David Marouani, Reporter, lives in Israel

c) Eyal Gil – editor at Haaretz, lives in Israel

d) Former Maccabi Club players

   a. Tom Mansharov, lives in Israel

   b. Albert Baning, lives in France

   c. Musa Kunta, whereabouts unknown

e) Former Maccabi Club staff

   a. Gadi Carmeli, a former assistant coach, lives in Israel

   b. Avner Twito*^, a former employee, lives in Israel

   c. Uzi Shaya*^, former Chief Executive Officer, lives in Israel

   d. Hanan Azoulai, a former assistant coach, lives in Israel

   e. Zahi Liber, a former spokesperson, lives in Israel

   f. Yossi Kakun, a former trainer, lives in Israel

f) Current Maccabi Club staff

   a. David Zachi^, equipment manager, lives in Israel

   b. Yossi Zigon*^, a trainer, lives in Israel

   c. Tal Brickman*^, an employee, lives in Israel

   d. Ofer Ronen-Ables*^, a spokesperson, lives in Israel

   e. Meir Amos*^, a security officer, lives in Israel

f. Clarice Zadikov, an accountant, lives in Israel

g) Other

a. Tom Yonai*^, plaintiff's assistant, lives in Israel

b. Jack Angelidis, plaintiff's representative, lives in Greece

c. Nir Horovitz, former Chief Executive Officer, Pacific car leasing, lives in Israel

[40] The defendants state the two confidential sources contacted for the Article who live in Canada will not be called by the defendants to testify. An email from counsel to the plaintiff advises that the only part of the Article that comes from confidential sources in Canada is the statement that the plaintiff plays soccer once a week in Toronto with a friend. The email goes on to state that a significant part of the Article was based on information from Israeli-based confidential sources.

[41] The affidavit of Moran Mieri, sworn September 9, 2013, indicates that he interviewed eight of the people on the above list of witnesses (identified with an asterisk on the above list) by telephone. Mr. Mieri is a lawyer in Israel and he has represented the Maccabi Soccer Club. His view is that many of the witnesses do not have relevant evidence. However, on cross-examination he acknowledged that two of these witnesses had evidence that is relevant to this action. The plaintiff submits that the relevance of the potential 19 witnesses should be viewed with skepticism as the defendant's factum only describes what each of the witnesses "may speak to."

[42] Each of those eight witnesses signed a statement that, amongst other things, indicated that they do not intend to testify should this matter proceed to trial in Israel. As a result, the defendants are concerned that none of the prospective witnesses (other than the two individual defendants and Eyan Gil, Editor at Haaretz) will testify for the defendants voluntarily, and thus the defendants will be unable to adduce evidence necessary for its defence if the trial is held in Ontario. This concern will exist even if the trial is held in Israel given that their statements referenced a trial in Israel rather than in Ontario. Moreover, compelling the attendance of these witnesses to a court in Ontario can be accomplished through the use of letters rogatory.

[43] The defendants submitted a supplemental affidavit of Barzel which briefly describes the evidence that eight witnesses (noted in the above list with a ^ symbol) "… could assist the defendants at trial".

[44] The defendants submitted that it will be substantially less expensive and far more convenient for the parties to try this case in Israel than in Ontario primarily because most of the prospective witnesses reside in Israel and none of the witnesses reside in North America. In response, the plaintiff offered two solutions. First, arrangements could be made to have these foreign witnesses testify by videoconferencing pursuant to Rule 1.08 of the *Rules*. Second,

counsel advised that if these foreign witnesses are required to testify in a court in Ontario, the plaintiff is prepared to fund the travel accommodation costs of these foreign witnesses in accordance with the rates provided in the *Rules*. Nevertheless, this undertaking addresses the additional expense but not the additional inconvenience of the Ontario forum.

[45] In my view this factor slightly favours a trial in Israel.

Applicable Law

[46] In *Tolofson v. Jensen*[6] the court was confronted with the question of whether the law of the forum ("*lex fori*") or the law of the place where the tort occurred ("*lex loci delicti*") should apply in the context of an action brought by plaintiffs who had been involved in a motor vehicle accident in another province. The court decided to apply the *lex loci delicti* and at para. 27 provided the following comments regarding the case of *Machado v. Fontes*,[7] which involved an action in England for libel alleged to have been published in Portuguese in Brazil:

> For my part, I would have thought that the question whether a wrong committed in Brazil by a Brazilian against another Brazilian gave rise to an action for damages should be within the purview of Brazil… . I could understand the approach if the parties were both English nationals or domiciled in England… . I add parenthetically that it could be well argued (though the facts were not conducive to that possibility) that, unlike a motor vehicle accident, the tort of libel should be held to take place where its effects are felt, but the court simply assumed that the place of the tort was Brazil. …
>
> … it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e. the lex loci delicti. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. [emphasis added]

[47] In *Banro* the court noted at para 51 that the court in *Tolofson* had left open room for the creation of exceptions to the general rule of *lex loci delicti* for torts such as defamation. In order to deter forum shopping by plaintiffs, one commentator had suggested that, for choice of law purposes, the tort of defamation should be deemed to be committed where the plaintiff suffered the most injury to his or her reputation ("the most substantial harm to reputation test").[8] However, the court left the issue of which test should apply to determine the choice of law for the tort of defamation as the outcomes of each of those two tests were the same in that case.

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[6] [1994] 3 S.C.R. 1022.
[7] [1897] 2 Q.B. 231.
[8] Para. 60.

[48] In this case, the *lex loci delicti* of the tort of defamation is Ontario.

[49] Further, no comparative evidence of reputational harm to the plaintiff in Israel and Ontario as a result of the publication of the Article has been filed. There was very limited evidence filed regarding the plaintiff's reputation which primarily consisted of evidence that:

- The plaintiff is a wealthy businessman who lives in Ontario;
- The plaintiff has operated a shopping centre business in Ontario for at least the last 17 years;
- The plaintiff rents an apartment in Israel and visits Israel about five times per year; and
- The plaintiff has owned a soccer team in Israel for a few years and there have periodically been Israeli newspaper articles about his involvement with his soccer team and his personal life.

[50] The plaintiff has undertaken not to seek at the trial of this action to recover damages for reputational harm in Israel or anywhere else outside of Canada. In *Breeden v. Black*, the Supreme Court of Canada found that a similar damages undertaking given by Lord Black was a significant factor in in the analysis of "most substantial harm to reputation." In my view, the damages undertaking provided by the plaintiff is a very significant factor which, in light of the other evidence described above, leads to the conclusion that the most substantial harm to the plaintiff's reputation is in Ontario.

[51] The choice of law factor favours a trial in Ontario.

Loss of Legitimate Juridical Advantage

[52] Relying upon the evidence of Dr. Tamar Gidron, a Professor of Law at the Haim Striks School of Law in Israel who specializes in tort law, the defendants submit that Israel's law of defamation is more favourable to the plaintiff.

[53] In her affidavit, Dr. Gidron stated that:

> Israeli defamation law is very closely based on English law. I am informed by Blake, Cassels & Graydon LLP., Canadian counsel to the defendants, that Canadian defamation law is also substantially similar to English law. In my opinion, the plaintiff in this case would not be disadvantaged by bringing a defamation action in Israel instead of Canada. In fact, Israeli defamation law is more plaintiff-friendly than English law in three important respects. First, truth is not an absolute defence in Israeli law. The defendant must prove not only that the statements at issue were substantially true, but also that the publication was in the public interest. Second, under Israeli law a successful plaintiff is entitled to statutory damages without having to prove the extent of damages, if any, suffered. This statutory damages scheme does not limit an Israeli court's power to also

> award unlimited general damages where appropriate. Third, Israeli courts have the power to order a defendant to publish a correction, retraction, or a summary of the court's decision in order to vindicate and rehabilitate the plaintiff's reputation. [emphasis added]

[54] The plaintiff asserts that there are two juridical advantages to having this action heard in Ontario.

Jury Trial

[55] In Ontario a plaintiff in a defamation action may require jury trial upon serving notice under the *Rules*. The provisions of the *Libel and Slander Act*, R.S.O. 1990, c. L.12 contemplate the availability of a jury trial. On cross-examination, Professor Gidron stated that jury trials are not held in Israel. This is not a theoretical disadvantage as Mr. Porter advised the court that the plaintiff will serve a jury notice on the defendants in this action.

Public Figure Defence

[56] Dr. Gidron acknowledged, in cross-examination, that a "public figure defence" is available in a defamation action under Israeli law. She stated that Israel's *Prohibition of Defamation Act* was based on the principles of the English law of defamation as it existed in 1965. She also that there are three statutory defences to a defamation action in Israel: (1) privilege; (2) truth; (3) good faith. Dr. Gidron stated that the good faith defence found in section 15 of the *Prohibition of Defamation Act* encompasses the Israeli equivalents to the English defences of fair comment, responsible journalism, and qualified privilege.

[57] Section 15 of Israel's *Prohibition of Defamation Act* provides various "good faith" defences. Included in section 15 of the Act is the following subsection which states that:

> In a criminal or civil action for defamation, it shall be a good defence if the accused or defendant made the publication in good faith under any of the following circumstances: …
>
> 4) the publication was an expression of opinion on the conduct of the injured party in a judicial, official or public capacity, in a public service or in connection with a public matter, or on his character, past actions or opinions as revealed by such conduct. [emphasis added]

[58] Dr. Gidron acknowledged that the "public figure defence" might be a good defence if this action were held in Israel. She stated: "I can't say definitely that he would be a public figure. He might be. He might not be." This defence would apply if a court found that the plaintiff was a "public figure" and the published opinion was in connection with a "public matter."

[59] Nevertheless, the plaintiff submits that the public figure defence will be advanced and apply if this action is heard in Israel given the evidence in the defendant Barzel's affidavit which

asserts that the plaintiff acquired the Maccabi Soccer Club for "notoriety and public status" and that the plaintiff enjoys "celebrity" status in Israel.

[60] The plaintiff submits that the "public figure defence" does not exist in Canada. The defendants submit that the "public figure defence" is synonymous with the "fair comment" defence and relies on *WIC Radio Ltd. v. Simpson*.[9] In *WIC Radio* the court identified the following elements of the "fair comment" defence at para. 28:

> (a) The comment must be on a matter of public interest;
>
> (b) The comment must be based on fact;
>
> (c) The comment, though it can include inferences of fact, must be recognisable as comment;
>
> (d) The comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?
>
> (e) Even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice.
>
> [61] I am unable to draw the conclusion sought by either party. Dr. Gidron's evidence does not offer any opinion on whether the Israeli statutory "public figure" defence is equivalent, narrower or broader than Canadian common law defence of "fair comment." Nor has any other expert on Israeli defamation law provided evidence to address this point.

[62] Finally, the plaintiff made no submissions with respect to the three juridical advantages noted by the defendants regarding Israeli defamation law. In my view, any juridical advantages to the plaintiff under Israeli defamation law are irrelevant as a comparative analysis at this stage is not required. Given that the context for this analysis is whether the plaintiff should be denied the benefits of his decision to select a forum that is appropriate under the conflicts rules, then the measure is whether there is a loss, rather than a calculation of the net loss, of legitimate juridical advantage for the plaintiff if this action were to proceed in Israel.

[63] In my view the loss of juridical advantage for the plaintiff favours a trial in Ontario.

Fairness to the Parties

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[9] 2008 SCC 40, [2008] 2 S.C.R. 420.

[64] The defendants submit that it is unreasonable for the defendants to have to defend a defamation action thousands of miles away in Ontario in relation to an article about the way a local soccer team is managed by its owner that "virtually no one" read in Ontario.

[65] On the other hand the plaintiff submits that several hundred people read the Article in Canada. The defendants' own evidence was that readers in Canada made up the majority of the Article's online English version. The defendants published an article about a Canadian's businessman's ownership of an Israeli soccer team that impugned his reputation. There is no surprise or injustice to the plaintiff's attempt to vindicate his reputation in Ontario, where he lives and works.

[66] I agree with the plaintiff's view.

[67] As the court in *Banro* noted at para. 59:

The importance of place of reputation has long been recognized in Canadian defamation law. For example, the importance of permitting plaintiffs to sue for defamation in the locality where they enjoy their reputation was recognized by the Ontario High Court in *Jenner v. Sun Oil Co. Ltd.* [1952] 2 D.L.R. 526. In that case, McRuer C.J.H.C. found that the plaintiff would not be able to satisfactorily "clear his good name of the imputation made against him" other than by suing for defamation in the locality where he enjoyed his reputation – that is, where he lived and had his place of business and vocation in life."

[68] Fairness favours a trial in Ontario.

Conclusion

[69] Having weighed the considerations described above, it is my view that the defendants have not discharged the burden, as noted above in *Van Breda*, "… to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under conflicts rules." An Israeli court is not a clearly more appropriate forum than Ontario for the trial of this defamation action.

Issue #3: Is this action an abuse of process?

[70] The defendants submit that this action should be stayed on the basis that it is an abuse of process for the plaintiff to sue in an Ontario court because the Article has received "minimal publication" in Ontario.

[71] The defendants raised Bill 52, *An Act to amend the Courts of Justice Act, the Libel and Slander Act, and the Statutory Powers Procedure Act in order to protect expression on matters of public interest*, 2014 (second reading 10 December 2014). The defendants state that Bill 52 would provide a mechanism for having lawsuits, such as this action, dismissed at an early stage.

However, Bill 52 has only received Second Reading in the Ontario Legislature and is not the law.

[72] The defendants also rely upon *Jameel (Youself) v. Dow Jones & Co*.[10] In *Jameel* the Wall Street Journal, a pay per view website, contained an article which implied that the plaintiffs were suspected of being involved in funding Al-Qaeda. Only five subscribers within England accessed the article. The plaintiff suffered little or no harm to his reputation. In dismissing the action as an abuse of process the English Court of Appeal stated at paras. 69-70:

> If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.
>
> It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. …

[73] *Jameel* is distinguishable on its facts.

[74] First, only five people accessed the impugned article in *Jameel* which is a small fraction of the 200 to 300 people in Canada who, according to Mr. Kodner, read the Article online in this case. In addition there is the evidence of Ms. Di Cesare and Mr. Amato that they discussed the Article with several employees and that most of the 200 employees at the SmartCentre office were aware of the Article and had discussed it.

[75] Second, the plaintiff in *Jameel* did not live in England nor did he have any other connection to England. Accordingly, it was evident that the plaintiff was "forum shopping." The English Court of Appeal adopted the following statement at para.65:

> The plaintiffs are forum shoppers in the most literal sense. They have weighed upon the advantages to them of the various jurisdictions that might be available and decided that England is the best place in which to vindicate their international reputations. They want English law, English judicial integrity and the international publicity which would attend success in an English libel action. …

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[10] [2005] ECWA Civ. 76.

> My Lords, I would not deny that in some respect an English court would be admirably suited for this purpose. But that does not mean that we should always put ourselves forward as the most appropriate forum in which any foreign publisher who has distributed copies in this copy, or whose publications have been downloaded here from the Internet, can be required to answer the complaint of any public figure with an international reputation, however little the dispute has to do with England.

[76] In my view this action is far from being an abuse of process. As noted above, in the circumstances, it is not surprising that the plaintiff has sought to vindicate his reputation in an Ontario court.

Conclusion

[77] This motion is dismissed.

[78] In the event that this action proceeds to trial in Ontario: (1) the plaintiff's claim is limited to damages for reputational harm suffered within Canada; (2) the plaintiff shall pay for the travel and accommodation expenses of the defendants' witnesses named above at the rates provided in the *Rules*.

[79] The parties may provide the court with their written costs submissions, three pages maximum, within two weeks of today's date.

Mr. Justice M. Faieta

Released: August 13, 2015

Schedule "A" – Evidence

The defendant filed the following materials in support of this motion:

- Affidavit of Shlomi Barzel, sworn October 15, 2012;
- Affidavit of Tamar Gidron, sworn October 15, 2012;
- Affidavit of Lior Kodner, sworn October 16, 2012;
- Supplementary Affidavit of Shlomi Barzel, sowrn November 17, 2013;
- Supplementary Affidavit of Lior Kodner, sworn November 17, 2013
- Cross-Examination of Nadia Di Cesare, dated October 6, 2014;
- Cross-Examination of Joseph Amato, dated October 6, 2014;
- Cross-Examination of James Arlen, dated October 6, 2014;
- Email from Ren Bucholz to Paul Schabas, January 28, 2015, Notes from some witness interviews undertaken by Moran Mieri in Israel, written in Hebrew by his associate, Ms. Margalit.

In reply, the plaintiff filed the following materials:

- Affidavit of James Arlen, sworn August 17, 2013;
- Affidavit of Joseph Amato, sworn August 21, 2013;
- Affidavit of Nadia Di Cesare, sworn August 21, 2013;
- Affidavit of Moran Mieri, sworn September 9, 2013;
- Supplementary Affidavit, sworn October 3, 2014;
- Transcript of the Cross-Examination of Tamar Gidron, dated September 16, 2014;
- Transcript of the Cross-Examination of Lior Kodnor, dated September 16, 2014;
- Transcript of the Cross-Examination of Shlomi Barzel, dated September 16, 2014;
- Email from Paul Schabas to William McDowell, dated February 3, 2015.

Corrected decision: The emphasis added in paragraph 22 was deleted. Paragraph 35 deleted the additional words "the plaintiff". The new sentence reads: "There is no evidence that a trial in Israel would cause inconvenience or expense to the plaintiff."

CITATION: Goldhar v. Haaretz.com et al., 2015 ONSC 1128
COURT FILE NO.: CV-11-00443086
DATE: 20150813
CORRECTED DECISION RELEASED: 20150813

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MITCHELL GOLDHAR

Plaintiff

– and –

HAARETZ.COM, HAARETZ DAILY NEWSPAPER LTD., HAARETZ GROUP,

HAARETZ.CO.IL, SHLOMI BARZEL and DAVID MAROUNI

Defendants

CORRECTED REASONS FOR JUDGMENT

Mr. Justice M. Faieta

Released: August 13, 2015