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LITIGATION - CANADA

Court of appeal affirms jurisdiction over Israeli publisher

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Introduction

In the wake of a recent decision of the Ontario Court of Appeal,(1) non-Canadian publishers of online content may be required to defend defamation proceedings in Canadian courts, even if the bulk of their audiences are located outside Canada. Although a majority of the court of appeal in *Goldhar v Haaretz.com* upheld the motion judge's decision to allow the action at issue to proceed in Ontario,(2) the dissenting judge proposed the adoption of a 'most substantial harm' test to determine the applicable law in cases of multi-jurisdictional defamation. The split court sheds light on the complex and divisive jurisdictional issues that often accompany internet defamation proceedings.

Facts

In 2011 *Haaretz*, an Israeli newspaper, published an article criticising Mitchell Goldhar, a successful Canadian businessman and owner of the most decorated football club in Israel. A print version of the article was widely disseminated in Israel and an online version, published in both Hebrew and English, attracted approximately 200 unique views from users in Canada.

Goldhar brought an action in the Ontario Superior Court of Justice against *Haaretz*, alleging that the article was libellous. In response, *Haaretz* brought a motion to stay or dismiss the action on three grounds:

- The Ontario court lacked jurisdiction (*jurisdiction simpliciter*);
- Israel was clearly the more convenient forum to hear the action (*forum non conveniens*); and
- The action was an abuse of process.

The motion judge ruled that Ontario had jurisdiction and was an appropriate forum for the hearing of the action. *Haaretz* appealed these findings to a three-judge panel of the Ontario Court of Appeal.

Decision

While finding that the motion judge had made errors in law, a majority of the appeal court nonetheless upheld the lower court's decision.

Jurisdiction *simpliciter*

On the issue of jurisdiction *simpliciter*, the majority held that the fact that the article had been read by a relatively small number of people (approximately 200) in Ontario was not determinative of whether there was a real and substantial connection to Ontario sufficient to ground jurisdiction.(3) Drawing attention to Goldhar's personal and business ties to Ontario, and the fact that the article's subject matter was connected to Ontario, the majority held that Ontario courts had jurisdiction and

agreed with the motion judge that "it should not have come as a surprise to Haaretz that Goldhar would seek to vindicate his reputation" in Ontario.(4)

Forum non conveniens

The majority identified several errors in the motion judge's *forum non conveniens* analysis, but held that these errors did not render the lower court's decision not to stay the Ontario action in favour of a proceeding in Israel unreasonable. Emphasising the discretionary nature of a stay of proceedings on the basis of *forum non conveniens*, the majority indicated that it would intervene only if the motion judge had erred in principle, misapprehended or failed to take material evidence into account, or reached an unreasonable decision.(5) In its analysis, the majority considered four *forum non conveniens* factors brought into issue by *Haaretz*.

Convenience and expense to witnesses

At first instance, the motion judge found that comparative convenience and expense to witnesses slightly favoured a trial in Israel. *Haaretz* proposed calling numerous witnesses, at least 18 of whom resided outside of North America, while Goldhar filed no evidence regarding the witnesses he would call at trial.(6) On appeal, the majority found that the lower court's assessment was reasonable, even though the motion judge had erred in law by suggesting that the attendance of Israeli witnesses in Ontario could be compelled by way of letters rogatory.(7) The majority concluded that three elements underpinned the motion judge's reasoning on this factor:

- the availability of video-conferencing to obtain testimony from witnesses outside of Ontario;
- Goldhar's personal undertaking to pay the travel and accommodation expenses of *Haaretz*'s witnesses; and
- the lack of evidence concerning the likely testimony of *Haaretz*'s proposed witnesses.(8)

Applicable law

Applying the *lex loci delicti* (the law of the place where the tort occurred), the motion judge determined that the applicable law favoured an action being brought in Ontario.(9) On appeal, *Haaretz* submitted that in internet libel cases, the 'most substantial harm to reputation' test ought to replace the *lex loci delicti* which, it submitted, permits forum shopping and libel tourism on the basis that an internet publication can be read in numerous jurisdictions.(10) The majority rejected *Haaretz*'s submission, finding that the proposed 'most substantial harm to reputation' test was merely a proxy for the substantial publication rule, previously rejected by the Supreme Court of Canada in *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18.(11)

Loss of juridical advantage

The motion judge held that Goldhar would suffer a loss of juridical advantage if the action were stayed in favour of a proceeding in Israel, on the basis that a jury trial was available in Ontario, but was not available in Israel. The majority held that this finding was made in error, given that Goldhar had not actually filed a jury notice.(12) However, on balance, the majority found that loss of juridical advantage was a neutral factor and – following the Supreme Court of Canada – noted that caution should be taken before heavily emphasising this factor in a *forum non conveniens* analysis.(13)

Fairness to the parties

The majority rejected *Haaretz*'s submission that the interests of justice required a trial in Israel. In arriving at this conclusion, the court noted that the motion judge's reasons had identified that Goldhar's Canadian businesses and reputation were impugned by the article.(14)

Dissent

In her dissenting reasons, Justice Peppall wrote that, given the ease with which *jurisdiction simpliciter* can be established in internet defamation cases, a more "robust and carefully scrutinized review" of *forum non conveniens* issues is required.(15) She then characterised the motion judge's analysis as "infected with errors"(16) and disagreed with the majority's conclusion that these errors had no material bearing on the outcome of the motion.(17)

On the issue of convenience and expense to the witnesses, the judge criticised the majority for suggesting that video-conferencing would be available to overcome the fact that *Haaretz*'s witnesses were located in Israel, and emphasised that the motion judge had made no findings on this point.(18)

Furthermore, the judge viewed Goldhar's undertaking to pay the travel expenses of *Haaretz*'s witnesses as problematic, given that the tariff travel and accommodation rates in Ontario's Rules of Civil Procedure are "inadequate... by any measure".(19)

On the issue of applicable law, the judge cited *obiter dictum* from the Supreme Court of Canada's decision in *Éditions Écosociété Inc v Banro Corp*(20) that a 'most substantial harm' test might be an appropriate alternative to the *lex loci delicti* in cases of multi-jurisdictional defamation(21) – the judge agreed.(22)

Finally, on the issue of fairness to the parties, the judge criticised the motion judge for failing to take note of Goldhar's extreme wealth and the financial pressures facing *Haaretz*, which acted as a barrier to its full participation at trial in Ontario.(23) Similarly, the judge held that the motion judge's reasons had failed to consider Goldhar's ability to disseminate the outcome of a trial in Israel online, in order to vindicate his reputation in Ontario.(24)

Comment

Goldhar v Haaretz.com warns international publishers of online content that they may be required to defend actions brought in Canada where an alleged libellous publication has some connection to a Canadian jurisdiction. Perhaps most significantly, the decision shines light on a court struggling to address the difficult policy and jurisdictional questions that arise as defamation fully enters the internet age. *Haaretz* has sought leave from the Supreme Court to appeal the court of appeal's decision.

For further information on this topic please contact Michael D Schafler or Thomas Wilson at Dentons Canada LLP by telephone (+1 416 863 4511) or email (michael.schafler@dentons.com or thomas.wilson@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) *Goldhar v Haaretz.com*, 2016 ONCA 515.

(2) *Goldhar v Haaretz.com*, 2015 ONSC 1128.

(3) *Goldhar*, *supra* note 1, at paragraph 37.

(4) *Ibid* at paras 37 and 42.

(5) *Ibid* at para 50.

(6) *Goldhar*, *supra* note 2, at paragraphs 37 and 39.

(7) *Goldhar*, *supra* note 1, at paragraphs 67 and 74.

(8) *Ibid* at para 68.

(9) *Goldhar*, *supra* note 2, at paragraphs 46 to 51.

(10) *Goldhar*, *supra* note 1, at paragraph 82.

(11) *Goldhar*, *supra* note 1, at paragraph 86.

(12) *Ibid* at paras 92 to 93.

(13) *Ibid* at para 99.

(14) *Ibid* at para 104.

(15) *Ibid* at para 132.

(16) *Ibid* at para 137.

(17) *Ibid* at para 142.

(18) *Ibid* at para 149.

(19) *Ibid* at para 151.

(20) 2012 SCC 18.

(21) *Ibid* at para 178.

(22) *Ibid* at para 179.

(23) *Ibid* at para 191.

(24) *Ibid*.

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