COURT OF APPEAL FOR ONTARIO

CITATION: Goldhar v. Haaretz.com, 2016 ONCA 515
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Simmons, Cronk and Pepall JJ.A.

BETWEEN

Mitchell Goldhar

Plaintiff (Respondent)

and

Haaretz.com, Haaretz Daily Newspaper Ltd., Haaretz Group, Haaretz.Co.Il, Shlomi Barzel and David Marouani

Defendants (Appellants)

Paul Schabas and Emily Bala, for the appellants

William McDowell, Ren Bucholz and Julian Porter, Q.C., for the respondent

Heard: November 10, 2015

On appeal from the order of Justice Mario D. Faieta of the Superior Court of Justice, dated March 6, 2015, with reasons reported at 2015 ONSC 1128, 125 O.R. (3d) 619.

Simmons J.A.:

I. INTRODUCTION

[1] The issues on appeal concern whether an internet libel action, based on a newspaper article uploaded in Israel, can and should proceed in Ontario.

[2] In November 2011, an Israeli newspaper, Haaretz, published an article criticizing the management practices of Mitchell Goldhar, the owner of the Maccabi Tel Aviv Football Club, a soccer team based in Tel Aviv, that plays in the Israeli Premier League.

[3] Goldhar is a prominent Canadian businessman and lives in Toronto.

[4] In addition to being published in print, the article was available on the newspaper's Hebrew and English-language websites. It came to the attention of some Canadian readers through the English-language website.

[5] The article asserted that Goldhar imported his management model from his main business interest – a partnership with Walmart to operate shopping centers in Canada – and that he "runs his club down to every detail." It also included a suggestion that his "managerial culture is based on overconcentration bordering on megalomania" and questioned whether "his penny pinching and lack of long term planning [could] doom the [soccer] team."

[6] In December 2011, Goldhar launched an action in Ontario, claiming damages for libel against Haaretz, its sports editor and the reporter who wrote the article (collectively "Haaretz").

[7] Haaretz moved to stay the action, arguing that Ontario courts lack jurisdiction *simpliciter* or, alternatively, that Israel is a clearly more appropriate

forum. In the further alternative, Haaretz sought to stay the action as an abuse of process.

[8] When Haaretz's motion was heard, Goldhar's counsel claimed he wishes a jury trial, a mode of trial not available in Israel. They also provided oral undertakings not to seek damages at the trial of this action for reputational harm suffered in Israel or anywhere else outside of Canada and to pay for Haaretz's witnesses to travel to Ontario for purposes of the action.

[9] The motion judge dismissed Haaretz's motion. He found that the article came to the attention of many of the 200 people in Goldhar's Toronto office and that it is likely that 200-300 people in Canada read the article online.

[10] Haaretz did not dispute that Ontario readership established a tort committed in Ontario – one of the presumptive connecting factors under the "real and substantial connection" test for determining jurisdiction *simpliciter* set out in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572. However, Haaretz argued that, under the second step of the *Van Breda* test, the presumption of jurisdiction was rebutted. The motion judge rejected this argument.

[11] Further, the motion judge held that Israel was not a clearly more appropriate forum. He weighed the factors raised by Haaretz and concluded that convenience and expense to the parties favours Israel, and that convenience and

expense to witnesses slightly favours Israel. However, he found that choice of law, loss of juridical advantage, and fairness to the parties favour Ontario.

[12] Finally, the motion judge rejected Haaretz's claim that the action is an abuse of process.

[13] In the result, the motion judge dismissed Haaretz's motion but directed that, if the action proceeds in Ontario, Goldhar's claim is limited to damages for reputational harm suffered in Canada and that Goldhar shall pay for the travel and accommodation expenses for Haaretz's witnesses at the rates provided in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[14] Haaretz raises three main issues on appeal:

i) Did the motion judge err in failing to find that, under the *Van Breda* test, Haaretz had rebutted the presumption of jurisdiction?

ii) In the alternative, if Ontario has jurisdiction, did the motion judge err in failing to find that Israel is a clearly more appropriate forum and, in particular, did he err in his findings concerning convenience and expense to witnesses, applicable law, loss of juridical advantage and fairness to the parties?

iii) In the further alternative, did the motion judge err in failing to stay the action as an abuse of process?

[15] For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

(1) The Article

[16] Haaretz is Israel's oldest daily newspaper – but also has the smallest circulation of the five daily Hebrew-language newspapers in Israel, with a market share of about seven per cent.

[17] The article was published in print in Israel, with a distribution of about 70,000 copies. While print copies were also distributed outside of Israel, no print copies were distributed in Canada. However, the article was posted online – in Hebrew on Haaretz.co.il and in English on Haaretz.com – and thus was available via the internet in Canada.

[18] The article is reproduced in full in Appendix 'A' of these reasons. I set out below the portions of the article the motion judge reproduced in the body of his reasons:

> 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 the 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.

(2) The Action

[19] In his amended statement of claim, Goldhar claims both general and punitive damages against Haaretz for libel. He alleges that the article was published in Hebrew and in English on the internet and distributed throughout Ontario and Canada, as well as internationally.

[20] Among other things, Goldhar pleads that the natural and ordinary meaning of the article is that he:

- displays behavioural characteristics of megalomania, a personality disorder or mental illness;

- is compelled to involve himself in all daily activities of the soccer club;
- makes irrational business decisions;
- treats employees in an offensive and irrationally thrifty manner; and
- when reached for comment, declined the opportunity to refute the allegations in the article.

[21] Goldhar also pleads that the article includes significant factual errors and fabrications, and that by reason of the publication of the article, he has suffered damage to his reputation in his business and personal life.

III. DISCUSSION

(1) Did the motion judge err in failing to find that, under the *Van Breda* test, Haaretz had rebutted the presumption of jurisdiction?

[22] In *Van Breda*, the Supreme Court set out the "real and substantial connection" test for determining whether a court can assume jurisdiction over an action. The test has two stages.

[23] At the first stage, the plaintiff must establish that one of the listed presumptive connecting factors, or a new factor which should be given presumptive effect, exists: *Van Breda*, at para. 80. If such a factor exists, "the court should assume that it is properly seized of the subject matter of the litigation and that the defendant has been properly brought before it": *Van Breda*, at para. 94.

[24] At the second stage, a defendant may rebut the presumption of jurisdiction by "establish[ing] 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": *Van Breda*, at para. 95.

[25] Concerning the second stage, the Supreme Court cautioned that rebutting the presumption of jurisdiction will be difficult where the presumptive connecting factor is that of a tort committed in the forum. However, it may be possible to rebut the presumption in the case of a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the chosen forum: *Van Breda*, at para. 96. In such a case the presumptive connecting factor would point only "to a weak relationship between the forum and the subject matter of the litigation". Thus, it would "not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction": *Van Breda*, at para. 97.

(a) The motion judge's reasons

[26] Before the motion judge, Haaretz argued that only a minor element of the tort was committed in Ontario because far more people read the article in Israel than in Ontario. Haaretz also relied on the fact that Goldhar led no evidence of harm to his reputation in Ontario.

[27] The motion judge rejected Haaretz's arguments that it had rebutted the presumption of jurisdiction arising from a tort committed in the forum.

[28] The motion judge observed, at para. 24, that in *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, "the absence of the substantial publication … 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." In that case, the Supreme Court "found that even a small number of publications in the forum would be sufficient to ground jurisdiction."

[29] As for Haaretz's argument that there was no evidence of harm to Goldhar's reputation in Ontario, the motion judge said, at para. 25, that "proof of harm to reputation is not an element of the tort of defamation" and thus "is an irrelevant consideration for purposes of determining whether a minor element of the tort occurred in Ontario." The motion judge added that even if proof of harm to reputation was relevant to determining whether a minor element of the tort occurred in Ontario, Haaretz had not adduced evidence to rebut the presumption of harm to Goldhar's reputation arising from publication of the article in Ontario.

(b) Haaretz's arguments on appeal

[30] On appeal, Haaretz argues that the motion judge erred by failing to recognize that the connection between this action and Ontario is extremely weak

and by effectively treating the presumptive connecting factor of a tort committed in the province as irrebuttable.

[31] Haaretz submits that a real and substantial connection between the subject matter of the litigation and Ontario is not established merely because a "few people" in Ontario read the article.

[32] According to Haaretz, the article – and therefore the litigation – is solely about the way Goldhar runs Maccabi Tel Aviv. They say the only factor connecting the litigation to Ontario is a small number of readers. Far more people read the article in Israel. Significantly, the subject matter of the article – the soccer team – is located in Israel. And, the people involved in and affected by the article are located in Israel. Moreover, Goldhar is a prominent figure in Israel – and that is where he would have suffered reputational harm.

[33] Haaretz says this case is distinguishable from *Banro*, which was about a book, not internet postings. It says that, in *Banro*, the subject matter of the litigation was connected to Ontario because the book criticized the plaintiff's business, which was located at least partially in Ontario. Moreover, the Quebec publisher specifically sought to sell the book in Ontario.

[34] Haaretz also says the motion judge erred in relying on the fact that the presumption of harm to Goldhar's reputation in Ontario had not been rebutted, because damage sustained in the jurisdiction is not a presumptive connecting

factor that must be rebutted. In any event, Haaretz argues that it was unreasonable to require it to demonstrate that Goldhar had not suffered *any* damages when Goldhar led no evidence of damages and when Ontario readership was so small.

[35] Finally, Haaretz argues that it is inconsistent with the principles of order, fairness and jurisdictional restraint to expect them to answer proceedings in Ontario where:

- they have no connections to Ontario;
- the article was written, published in print, and read primarily, in Israel;
- the article concerned Goldhar's management of an Israeli soccer team; and
- almost no one in Ontario read the article.

Haaretz contends that, particularly in cases involving allegations of internet libel, the failure of the courts to exercise appropriate restraint may lead to both a chill on freedom of speech and libel tourism.

(c) Analysis

[36] I would not accept Haaretz's submissions that the motion judge erred in failing to find that it had rebutted the presumption of jurisdiction.

[37] I would not accept Haaretz's claim that the connection between the subject matter of this action and Ontario is limited to the fact that a relatively small

number of people in Ontario read the article. In my view, the subject matter of both the article and the action has a significant connection to Ontario.

[38] Contrary to Haaretz's submissions, the subject matter of the article is not confined to a discussion of Goldhar's business dealings in Israel or of the operation of Maccabi Tel Aviv. Rather, the article puts Goldhar's Canadian connection front and center by acknowledging that he is a long distance operator and spends most of his time in Canada and by asserting that he imported his management model for Maccabi Tel Aviv from his *main* business interest, his Canadian shopping center partnership.

[39] As I have said, in his amended statement of claim, Goldhar pleads that the natural and ordinary meaning of the article is that he displays characteristics of a mental disorder, makes irrational business decisions, treats employees in an offensive manner, and is irrationally thrifty concerning benefits to employees.

[40] Whether the words of the article are capable of bearing these defamatory meanings is not at issue at this stage of the litigation.

[41] What is important is that the alleged sting of the article is very much related to how Goldhar conducts business in Canada because the article draws a link between Goldhar's management model and his Canadian business. Although the main subject of the article may be the management of an Israeli

soccer team, the article makes Goldhar's management model – and its Canadian origins – an integral part of that subject.

[42] This is not a case of libel tourism. On the motion judge's findings, Goldhar lives in Ontario and has operated a business here for at least 17 years. Moreover, the subject matter of the litigation is connected to Ontario largely because of the link drawn between the article and Goldhar's Canadian business. As the motion judge observed when addressing *forum non conveniens*, it should not have come as a surprise to Haaretz that Goldhar would seek to vindicate his reputation here.

[43] Further, I do not accept Haaretz's claim that the connection between the tort and Ontario is weak because the article was published more extensively in Israel. At the rebuttal stage of the jurisdiction *simpliciter* analysis, the question is whether, objectively speaking, Ontario has a real and substantial connection to the subject matter of the action, not whether there is another forum that could also take jurisdiction over the action. See, for example, *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), at p. 36, where Sharpe J.A. observed, "the real and substantial connection test requires only a real and substantial connection, not the most real and substantial connection."

[44] Finally, I see no error in the motion judge's statements that, in a defamation action, damage is presumed and that Haaretz did not adduce

evidence to rebut that presumption. In making these statements, the motion judge was not suggesting that damage is a presumptive connecting factor. Rather, he was responding to Haaretz's argument that the fact that Goldhar had adduced no evidence of harm in Ontario supported its position that only a minor element of the tort was committed in Ontario.

[45] The motion judge rejected this argument. In effect, he concluded that, in the absence of evidence demonstrating *no* reputational harm, Goldhar need not lead evidence of reputational harm to establish jurisdiction *simpliciter*. I agree with this conclusion.

[46] In the end, I am not satisfied that Haaretz rebutted the presumption of jurisdiction created by the presumptive connecting factor of a tort committed within the jurisdiction.

(2) Did the motion judge err in failing to find that Israel is a clearly more appropriate forum?

[47] After concluding that Ontario had jurisdiction *simpliciter*, the motion judge turned to the question whether the court should decline to exercise its jurisdiction on the basis that Israel is the clearly more appropriate forum. He reviewed the "clearly more appropriate" standard set out in *Van Breda*, at para. 109, and the factors Haaretz relied on to claim that Israel is the clearly more appropriate forum. He found that Haaretz had not discharged its burden of demonstrating that Israel is the clearly more appropriate forum.

[48] Haaretz argues that the motion judge's decision to not exercise his discretion to stay the proceedings at the *forum non conveniens* stage of the analysis was unreasonable. It submits that virtually every factor identified in *Van Breda* favours a trial in Israel, and that the motion judge committed several errors in his analysis that, individually or collectively, render his conclusion unreasonable. In particular, Haaretz claims that the motion judge erred in his analysis of the following factors: convenience and expense to witnesses, applicable law, loss of juridical advantage and fairness to the parties.

[49] I will analyze these alleged errors in turn. However, I would reiterate that the party seeking to displace Ontario's jurisdiction bears the burden, in the *forum non conveniens* analysis, "to demonstrate that the court of the alternative jurisdiction is a clearly more appropriate forum": *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at para. 23 (emphasis added).

[50] Further, the motion judge's decision not to stay the proceedings on the basis of *forum non conveniens* is a discretionary one, and accordingly entitled to a high degree of deference on appeal. This court will intervene only "if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision": *Banro*, at para. 41.

(i) Convenience and Expense to Witnesses

(a) The motion judge's reasons

[51] After finding that the comparative convenience and expense for the parties favours a trial in Israel, the motion judge concluded that the comparative convenience and expense to witnesses slightly favours a trial in Israel.

[52] In his reasons concerning convenience and expense to witnesses, the motion judge acknowledged that Goldhar had not filed any evidence regarding witnesses that he would call at trial.

[53] On the other hand, Haaretz had filed evidence – in the form of an affidavit from the sports editor, Mr. Barzel – indicating that if the action proceeds to trial Haaretz would rely on the defences of truth, fair comment, qualified privilege and responsible communication in the public interest. Haaretz claimed this would mean that the evidence at trial would deal with events that occurred in Israel and whether the article is a matter of public interest in Israel.

[54] In his affidavit, Mr. Barzel named 21 individuals, including the personal defendants, who he "anticipate[d] … could be called to testify" (emphasis in the motion judge's reasons). Of these witnesses, three were or had been associated with Haaretz, three were former Maccabi Tel Aviv players, six were former Maccabi Tel Aviv staff, six were current Maccabi Tel Aviv staff, one was a former

Goldhar representative and one was a former Goldhar spokesperson. And of the 21 proposed witnesses, 18 live in Israel.

[55] The motion judge also noted that Goldhar filed an affidavit from an Israeli lawyer, Moran Meiri, who had represented Maccabi Tel Aviv in the past and who had interviewed eight of Haaretz's proposed witnesses by telephone. In his affidavit Mr. Meiri was skeptical about the relevance of Haaretz's proposed witnesses' evidence. However, he acknowledged on cross-examination that two of the witnesses had relevant evidence. In response, Mr. Barzel filed a supplemental affidavit briefly describing the evidence that the eight could give to assist Haaretz at trial.

[56] Mr. Meiri's notes revealed that the eight witnesses he interviewed told him that they did not intend to testify for Haaretz.

[57] In response to Haaretz's argument that it would therefore be unable to lead necessary evidence if the trial proceeded in Ontario, the motion judge observed that, in light of the witnesses' statements, "this concern will exist even if the trial is held in Israel." He also said, "compelling the attendance of these witnesses to a court in Ontario can be accomplished through the use of letters rogatory."

[58] Finally, the motion judge noted that Goldhar had offered two responses to Haaretz's argument that, because most of the witnesses reside in Israel and

none live in North America, a trial in Israel would be substantially less expensive and far more convenient.

[59] First, the foreign witnesses could testify via videoconference under r. 1.08. Second, Goldhar had offered to fund their travel and accommodation costs at the rates provided by the rules. The motion judge observed that, while the latter factor addressed the additional expense of a trial in Ontario, it did not address the additional inconvenience.

[60] In the end, the motion judge found that the factor of comparative convenience and expense to witnesses slightly favours Israel.

(b) Haaretz's arguments on appeal

[61] On appeal, Haaretz asserts that the factor of comparative convenience and expense to witnesses overwhelmingly favours Israel and that the motion judge's conclusion that this factor only slightly favours a trial in Israel is unreasonable.

[62] As a starting point, Haaretz submits that the motion judge erred in law in holding that witnesses outside of Canada can be compelled to testify in Ontario by means of letters rogatory. Letters of request, as they are now called under r. 34, can only be used to compel a foreign witness to submit to an examination in the witness's own jurisdiction.

[63] Haaretz asserts this is a significant error. Apart from the three personal defendants, most of Haaretz's proposed witnesses are current or former Maccabi Tel Aviv staff or former players, one is a former Goldhar representative and one is a former Goldhar spokesperson. It is undisputed that many of these witnesses will not come to Ontario voluntarily to testify for Haaretz. Haaretz submits that the lack of a mechanism to compel them to come to Ontario will make it impossible for Haaretz to fairly defend itself in Ontario.

[64] Further, Haaretz claims that the motion judge was unreasonably skeptical about Haaretz's proposed witnesses and their evidence – and that he largely ignored the cross-examinations of Mr. Meiri and Mr. Barzel, which it says demonstrated that virtually all Haaretz's proposed witnesses had relevant evidence to give.

[65] As for Goldhar's proposed solutions, Haaretz says Goldhar failed to lead evidence to establish that Israel would respond to Ontario letters of request to compel reluctant witnesses to testify via videoconferencing. In any event, requiring many of Haaretz's witnesses to testify via videoconferencing, and possibly through interpreters, could undermine the fairness of the trial.

[66] Finally, Haaretz says that Goldhar's undertaking to pay accommodation and travel expenses is nothing more than an attempt by a wealthy plaintiff to purchase a forum.

(c) Analysis

[67] I acknowledge that the motion judge erred in law by suggesting that letters rogatory could be used to compel the attendance of Haaretz's witnesses in Ontario.[1] Nonetheless, I am not persuaded that this error makes his overall assessment of this factor unreasonable.

[68] Based on my review of the record and the motion judge's reasons, three factors drove his analysis: first, the availability of videoconferencing to obtain the testimony of witnesses unwilling or unable to come to Ontario; second, Goldhar's undertaking to fund travel and accommodation expenses for Haaretz's witnesses; and third, the lack of evidence concerning the likely testimony of Haaretz's proposed witnesses.

[69] Contrary to Haaretz's arguments, in my view, the motion judge was entitled to accept that reluctant foreign witnesses could be compelled to provide evidence in Israel through the use of letters of request and that videoconferencing was a potential means of obtaining the evidence of any witnesses unwilling to come to Ontario.

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[1] Rule 34.07(2)(b) provides that, where an examination is to take place outside of Ontario, a court in Ontario may issue a letter of request "directed to the judicial authorities of the jurisdiction in which the person is to be found, requesting the issuing of such process as is necessary to compel the person to attend and be examined…." Letters of request are not, however, a means by which a foreign witness can be compelled to come to Ontario to testify in an Ontario court: see *Moore v. Bertuzzi*, 2014 ONSC 1318, 53 C.P.C. (7th) 237 (Master), at para. 62.

[70] These are available methods, under the *Rules of Civil Procedure*, for dealing with witnesses outside the jurisdiction.[2] Haaretz led no evidence to undermine Goldhar's submissions that these methods would be available in this case. Haaretz bore the burden of demonstrating that Israel is the clearly more appropriate forum. On this record, it was not unreasonable for the motion judge to accept that Ontario letters of request would be honoured by Israel and that videoconferencing would be available in that jurisdiction.

[71] Further, in the absence of evidence or adverse judicial commentary, the use of technology and interpreters cannot be viewed as undermining the fairness of a civil trial. We live in an age of international communication and commerce. Multi-jurisdictional parties – and witnesses who do not speak either of Canada's official languages – are to be expected. Courtroom procedures must accommodate testimony by videoconferencing. Interpreters have long been a common feature of the Canadian judicial system. The motion judge's implicit conclusion that using these procedures would not undermine the fairness of the trial was not unreasonable.

[72] In my view, the motion judge carefully qualified the effect of Goldhar's offer to fund the travel and accommodation expenses of the foreign witnesses when

[22] See, for example, *Moore v. Bertuzzi*, at para. 77.

he noted that the offer did not address the inconvenience of proceeding in Ontario.

[73] Finally, I reject Haaretz's submissions that the motion judge was unreasonably skeptical about Haaretz's proposed witnesses and their evidence. The Israeli lawyer and Mr. Barzel made conflicting claims about whether various of the proposed witnesses had been contacted by Haaretz. In both instances, their information was second hand. While many of Haaretz's proposed witnesses could have information about relevant matters, the record contains scant information about what particular witnesses are actually likely to say. Importantly, Mr. Marouani, the reporter who wrote the article, did not provide an affidavit on the motion. Nor did Haaretz produce any witness statements or even any notes of conversations with the proposed witnesses. In these circumstances, the motion judge was entitled to treat Haaretz's proposed witness list with caution.

[74] The motion judge did not conclude that the factor of convenience and expense for witnesses was neutral or that it favoured a trial in Ontario. Rather, he found that it *slightly* favoured a trial in Israel. I am not persuaded his conclusion was unreasonable.

(ii) Applicable Law

(a) The motion judge's reasons

[75] The motion judge found that whether the *lex loci delicti* choice of law rule or a "most substantial harm to reputation" choice of law rule is applied, Ontario law applies to this case. He therefore concluded that this factor favours a trial in Ontario.

[76] The motion judge began his analysis by noting that in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, which involved a motor vehicle accident that occurred in another province, the Supreme Court of Canada determined that the *lex loci delicti* choice of law rule, rather than *lex fori*, should apply. However, the motion judge also observed, at para. 47, that in both *Tolofson*, at p. 1042, and *Banro*, at para. 51, the Supreme Court "had left open room for the creation of exceptions to the general rule of *lex loci delicti* for torts such as defamation."

[77] The motion judge observed that in *Banro*, a defamation case, the Supreme Court left for another day the question whether a rule other than *lex loci delicti* should be adopted in such cases. He noted however, that LeBel J., speaking for the court, also considered another approach that had been gathering favour – the place of most substantial harm to reputation – and found that that test would result in the same choice of law in that case as the *lex loci delicti* test.

[78] Turning to this case, the motion judge found that, because the article was read here, the *lex loci delicti* is Ontario. He further noted, at para. 49, that there was "no comparative evidence of reputational harm to the plaintiff in Israel and Ontario as a result of the publication of the Article," and that there was limited evidence of Goldhar's reputation other than evidence that:

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

[79] Taking account of the Supreme Court's approach in *Breeden* to a similar undertaking, the motion judge found, at para. 50, Goldhar's undertaking not to seek damages for reputational harm outside of Canada "a very significant factor." In the light of that factor and the evidence he had referred to, the motion judge concluded that the most substantial harm to the plaintiff's reputation is in Ontario.

(b) Haaretz's arguments on appeal

[80] Haaretz submits that the motion judge erred in law by applying the *lex loci delicti* choice of law rule and by relying on Goldhar's undertaking not to seek damages for reputational harm sustained outside of Canada to hold that Ontario law applies to this action.

[81] Haaretz submits that a proper application of the alternative choice of law rule of "most substantial harm to reputation" identified by the Supreme Court in *Banro* leads inevitably to the conclusion that Israeli law should apply in this case.

[82] Haaretz argues that, particularly in cases of internet libel, the "most substantial harm to reputation" test is the more appropriate choice of law rule because the *lex loci delicti* rule leads to forum shopping and libel tourism. Moreover, an undertaking such as that offered by Goldhar is simply a means of facilitating forum shopping and should not be countenanced.

(c) Analysis

[83] I would not accept Haaretz's arguments. In reaching the conclusion that the applicable law favours a trial in Ontario, the motion judge did not rely solely on the *lex loci delicti* choice of law rule. Rather, he also considered the "most substantial harm to reputation" test posited in *Banro* and concluded that it too pointed to applying Ontario law.

[84] Contrary to Haaretz's submissions, I see no error in the motion judge's approach to the "most substantial harm to reputation" test on the facts of this case.

[85] Haaretz relies significantly on the evidence of broad publication in Israel to argue there was no evidence in the record of loss of reputation in Ontario. Given that the article was published much more widely in Israel, Haaretz argues the motion judge should have inferred that Goldhar would have suffered greater harm to his reputation there. Haaretz also points to articles published in Israel about Goldhar's personal life as evidence that he is a public figure in Israel and accordingly that he has a significant reputation to protect there.

[86] In my view, Haaretz's reliance on the extensive publication in Israel as evidencing harm to Goldhar's reputation there is misplaced. Relying on the extent of publication as a decisive factor in assessing where a plaintiff has suffered the most substantial harm to his or her reputation does little more than turn the "most substantial harm" approach into a proxy for the "substantial publication" rule, which the Supreme Court rejected in *Banro*, at para. 55. In any event, even assuming that Goldhar has some form of celebrity status in Israel, as the motion judge recognized, that does not address the nature of his reputation in Israel. Nor does it automatically follow that he would suffer more substantial reputational harm in Israel as compared to Ontario, where he lives and initially

established both his business and his business reputation – and where he continues to carry on his main business.

[87] Further, while Haaretz takes issue with the motion judge's reliance on the undertaking given by Goldhar not to seek damages for reputational harm suffered outside of Canada, a similar undertaking was accepted in *Breeden* by the Supreme Court as an important factor in the choice of law analysis. LeBel J. noted, at para. 33, that, "Lord Black has undertaken not to bring any libel action in any other jurisdiction, and has limited his claim to damages to his reputation in Ontario. As a result, only harm resulting from publication in Ontario need be considered" (emphasis added).

[88] Contrary to Haaretz's submissions, in my view, the undertaking given by Goldhar in this case does not demonstrate that he is "forum shopping." Rather, it confirms the significance to him of his reputation in Ontario and the importance to him of vindicating his reputation here.

(iii) Loss of Legitimate Juridical Advantage

(a) The motion judge's reasons

[89] Before the motion judge, Haaretz argued that Israeli defamation law is more favourable to Goldhar than Ontario law. For his part, Goldhar argued that an Ontario trial would provide him with two juridical advantages – access to a jury

trial, and the absence of a public figure defence that would be available to Haaretz in Israel.

[90] The motion judge concluded that this factor favours a trial in Ontario because Goldhar would be deprived of access to a jury trial if the case were tried in Israel. He rejected as irrelevant Haaretz's claims about juridical advantages in Israel, holding that the proper question is whether a trial in Israel would lead to loss of legitimate juridical advantage based on the plaintiff's choice of forum. Having regard to the record before him, the motion judge was unable to resolve whether real differences exist between Ontario law and Israeli law concerning defences available to Haaretz in each jurisdiction.

(b) Haaretz's arguments on appeal

[91] Haaretz submits that the motion judge erred in concluding that the inability to have the case tried before a jury in Israel constitutes a loss of juridical advantage. In addition, Haaretz argues that the motion judge erred in holding that juridical advantages to a plaintiff in an alternative forum are irrelevant at this stage of the analysis.

(c) Analysis

[92] I agree that the motion judge erred in accepting that Goldhar would suffer a loss of juridical advantage if this action were stayed in favour of proceeding in Israel. Prior to the motion, Goldhar had not delivered a jury notice. Instead,

counsel on his behalf asserted that he intended to deliver a jury notice. Counsel for Haaretz confirmed in oral argument that, as of the date this appeal was heard, Goldhar had still not delivered a jury notice.

[93] In *Eastern Power Limited v. Azienda Communale Energia and Ambiente* (1999), 125 O.A.C. 54 (C.A.), this court held that where the plaintiff had not served a jury notice in the 20 months since serving its statement of claim it was not entitled to claim a loss of juridical advantage because a jury trial was not available in Italy.

[94] I see no reason why the same conclusion should not apply in this case.

[95] However, I am not persuaded that the motion judge erred in holding that potential juridical advantages to a plaintiff in the alternate forum are irrelevant to the *forum non conveniens* analysis.

[96] In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at p. 920, Sopinka J. observed that advantages to both the plaintiff in its chosen forum and the defendant in its proposed alternate forum (assuming that the alternate forum also has a real and substantial connection to the action) can properly be taken into account in the analysis.

[97] Haaretz has provided no authority for the proposition that possible advantages to the plaintiff in the proposed alternate forum are a relevant consideration. In my view, because the plaintiff has chosen a particular forum in

which to proceed, so long as the plaintiff has a real and substantial connection with that forum, the focus in assessing the plaintiff's loss of juridical advantage must be on its juridical advantage in the chosen forum. Although a defendant may be entitled to rely on loss of its juridical advantage in its proposed alternate forum, it is not for the defendant to suggest that the alternate forum is preferable to the plaintiff.

[98] In any event, I am not persuaded that Haaretz demonstrated that any perceived advantages to plaintiffs under Israeli defamation law were relevant in this case. Notably absent from Haaretz's evidence is any opinion on the choice of law rule that would apply to this action should it proceed in Israel. Accordingly, it is not clear that any of Haaretz's proposed "advantages" would in fact accrue to Goldhar if the action were to proceed in Israel.

[99] In the end, in my view, on the record before the motion judge, loss of legitimate juridical advantage was a neutral factor rather than a factor that favoured a trial in Ontario.

[100] However, I am not persuaded that this error was significant to the motion judge's overall conclusion on *forum non conveniens*. In both *Van Breda*, at para. 112, and *Breeden*, at para. 27, LeBel J. cautioned against placing too much emphasis on juridical advantage in the *forum non conveniens* analysis. Given the

motion judge's demonstrated familiarity with the case law, I am confident he was aware of these cautions.

(iv) Fairness to the Parties

(a) The motion judge's reasons

[101] The motion judge concluded that fairness to the parties favours a trial in Ontario. While noting Haaretz's concerns about having to defend an action in Ontario arising from an article about an Israeli soccer team that "virtually no one" in Ontario read, the motion judge accepted Goldhar's position that he should be entitled to vindicate his reputation in Ontario. In this regard, the motion judge said, at para. 65:

> The [appellants] published an article about a Canadian businessman's ownership of an Israeli soccer team that impugned his reputation. There is no surprise or injustice to the [respondent's] attempt to vindicate his reputation in Ontario, where he lives and works. [Emphasis added.]

[102] To support his conclusion, the motion pointed to para. 59 of *Banro*, where the Supreme Court emphasized the importance of being able to sue for defamation in the place where a plaintiff lives and works and enjoys his reputation:

> 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 … in *Jenner v. Sun Oil Co.*

> *Ltd.*…. 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. [Citation omitted.]

(b) Haaretz's arguments on appeal

[103] Haaretz argues that the motion judge's conclusion overlooks the evidence of the "tiny" readership in Ontario, the subject matter of the article, and Goldhar's connections to Israel. They say that the "interests of justice" favour a trial in Israel, because of the expense and inconvenience that Haaretz would face as a result of defending the action in Ontario, and because this action is a matter of public interest in Israel, not Ontario.

(c) Analysis

[104] I would reject Haaretz's arguments. Read as a whole, the motion judge's reasons demonstrate that he was well aware of the evidence concerning disparity in readership and of Haaretz's arguments concerning the subject matter of the article and Haaretz's connections to Israel. At the end of the day, what the motion judge considered important was that Goldhar lives and works in Ontario and that Haaretz chose to write an article about him impugning his management of an Israeli soccer team in a manner that implicated his Canadian business practices and integrity as a Canadian businessman. In these circumstances, the motion judge concluded it was no surprise – and not unfair – that Goldhar would

choose to vindicate his reputation in Ontario. I see no basis on which to interfere with this conclusion.

(3) Did the motion judge err in failing to stay the action as an abuse of process?

(a) The motion judge's reasons

[105] The motion judge held that the action should not be stayed as an abuse of process. He distinguished an English case relied on by Haaretz, *Jameel (Yousef) v. Dow Jones & Co*, [2005] EWCA Civ. 76, on two bases. First, in *Jameel*, only five people had accessed an internet news article, which was a "small fraction" of the readership in Canada and Ontario of the article in this case. Second, the plaintiff in *Jameel* had no connection to England, where the action was brought. The motion judge concluded, at para. 76, that this action is "far from being an abuse of process" and "it is not surprising that the plaintiff has sought to vindicate his reputation in an Ontario court."

(b) Haaretz's arguments on appeal

[106] Haaretz argues that this action amounts to a SLAPP (a "strategic lawsuit against public participation") and that it should be dismissed as an abuse of process. Haaretz claims that Goldhar has suffered no damage in Ontario and is only asserting that he wishes to vindicate his reputation to facilitate forum shopping and "to muzzle Haaretz by making it impossible to defend itself and which will impose crushing costs."

(c) Analysis

[107] I see no error in the motion judge's conclusion that the action should not be stayed as an abuse of process.

[108] The doctrine of abuse of process recognizes that "[t]he court has an inherent and broad jurisdiction to prevent the misuse of its process that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute": Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 2d ed. (Markham, ON: LexisNexis Canada, 2014), at p. 107.

[109] However, the doctrine should be exercised only in the "clearest cases": *Phillion v. Ontario (Attorney General)*, 2014 ONCA 567, 121 O.R. (3d) 289, at para. 49.

[110] At this early stage of the litigation, and in the context of a defamation action where damage is presumed, I fail to see how it can be said that it would be an abuse of the court's process to allow Goldhar to attempt to vindicate his reputation in the place where he lives and has long carried on a successful business.

IV. DISPOSITION

[111] Based on the foregoing reasons, I would dismiss the appeal. Goldhar may make written submissions on costs within 10 days of the release of these reasons. Haaretz may respond within 10 days thereafter.

Released:

"JS" "Janet Simmons J.A."
"JUN 28 2016" "I agree E.A. Cronk J.A. "

Pepall J.A. (Dissenting):

Introduction

[112] The balance between free speech and protection of reputation is an uneasy one. In his article "'Libel Tourism' and Conflict of Laws" (2010) 59 I.C.L.Q. 25 at 26, Professor Trevor C. Hartley wrote:

> We all believe in free speech. We also believe that people should be protected from defamation. There is a potential conflict between these two values and the law has to attempt some kind of balance.

[113] This appeal illustrates the elusiveness of any such balance.

[114] Haaretz is Israel's oldest daily newspaper. It was founded in 1918. Based on circulation, it is also the smallest of Israel's five daily Hebrew-language newspapers. Its publisher, Haaretz Daily Newspaper Ltd. also publishes an English language print edition of the paper. Haaretz.co.il and Haaretz.com publish the newspaper online in Hebrew and in English respectively. Like other newspapers around the world, Haaretz has been subject to financial pressures, has experienced difficult economic circumstances, and has had to downsize dramatically.

[115] Soccer is an extremely popular sport in Israel and the Israeli media regularly feature articles on one of the most popular professional soccer teams in the country, the Maccabi Tel Aviv Football Club (the "Maccabi Club").

[116] The Maccabi Club is owned by the respondent, Mitch Goldhar. He is a Canadian billionaire. He has been described as a celebrity in Israel. He maintains a residence there and is in Israel every couple of months. He travels there on his private jet. Not surprisingly, the performance of the Maccabi Club is of great interest in Israel and articles on the team often include reference to its owner, Goldhar.

[117] One of the individual appellants, David Marouani, wrote an article in Hebrew about the Maccabi Club and its owner, Goldhar. The article was researched, written and edited in Israel and primarily relied on sources in Israel. The article was published in print and on the Haaretz websites in Hebrew and in English and was estimated to have been read by approximately 70,000 people in Israel. The focus of the article was Goldhar's management of the Maccabi Club. While reference is made to Canada and the respondent's Canadian business, the suggestion that the article places emphasis on this is, with respect, misplaced. At its heart, the article is about one of the most popular soccer teams in Tel Aviv and how it is being managed by its owner.

[118] Goldhar commenced a lawsuit in Ontario alleging that the article written by Marouani was defamatory. He sued Marouani and the paper's former sports editor, Shlomi Barzel, as well as Haaretz's publisher and three associated Haaretz Israeli companies.

[119] The two individual defendants are Israeli citizens who reside in Israel. They also work in Israel but are no longer employed by the Haaretz newspaper or any of the corporate defendants. All of the corporate defendants are based in Israel and none carry on business or market in Ontario. They are all appellants on this appeal. Goldhar is the lone respondent.

[120] Although he did not swear an affidavit in these proceedings, Goldhar is stated to reside in Toronto and owns and operates a shopping centre business in Ontario known as SmartCentres Inc.

[121] The appellants filed a motion for a stay of proceedings based on lack of jurisdiction, *forum non conveniens* and abuse of process. In response, the respondent filed affidavits from two people who had actually read the article in Ontario. They are Goldhar company employees: N.D. Di Cesare and Joseph Amato. Cesare reviewed the article online as a result of a Google Alert.[3] The Google Alert then contained a link to the article. Amato also got the article online from Google Alert. In addition, Amato was given the article by a co-worker.

[122] Amato estimated that the article came to the attention of most of the approximately 200 people who work at SmartCentre Inc.'s office in Toronto (Haaretz estimated that between 200 and 300 people in Canada likely read the

[3] Google, a search engine company, provides a service in which a user may sign up for a "Google Alert" based on designated search terms. Once signed up, Google Alert provides e-mail notification to the user anytime Google finds new results that match a user's search terms.

article). It is unclear how the article came to the attention of all of these readers. Based on the cross-examination and affidavit evidence, those who were identified and who did read the article did not think less of the respondent as a result.

[123] The motion judge determined that the Ontario court had jurisdiction, Israel was not a clearly more appropriate forum for the action, and the action was not an abuse of process. My colleague would dismiss the appellants' appeal of this decision. For the reasons that follow, I will explain why I disagree with her on the issue of *forum non conveniens* and would therefore allow the appeal.

Jurisdiction *Simpliciter*

[124] The motion judge commenced his discussion of jurisdiction *simpliciter* with a consideration of *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572 and the four established presumptive connecting factors. There was no suggestion that the appellants were domiciled or resident in Ontario or that they carried on business in Ontario. Nor was any contract engaged. Rather, because the article was read in Ontario, that is, communicated to at least one person other than the respondent, the tort was committed in Ontario. As such, the appellants conceded that a tort was committed in Ontario and the existence of a presumptive connecting factor.

[125] The motion judge then considered whether the appellants had rebutted the presumption and concluded that they had not. He anchored his conclusion on two bases:

> (i) In *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, the Supreme Court did not view the absence of substantial publication in Ontario as having rebutted the presumption. 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.": at paras. 22-24.
>
> (ii) Proof of harm to reputation is not an element of the tort of defamation and therefore is an irrelevant consideration. In any event, if relevant, harm to the plaintiff's reputation was presumed and that presumption had not been rebutted: at para. 25.

[126] My colleague agrees with the motion judge's conclusion that the presumption of jurisdiction had not been rebutted and that jurisdiction had been established over the foreign appellants. In doing so, she quotes with approval Sharpe J.A.'s observation in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), at para. 44:

> The real and substantial connection test requires only a real and substantial connection, not the most real and substantial connection.

[127] To succeed in an action for defamation, the plaintiff must prove on a balance of probabilities that the defamatory words were communicated to at least one person other than the plaintiff: see *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269, at para. 1. As well, at the jurisdiction stage of the proceedings, the plaintiff's pleadings are accepted as true unless contradicted by evidence adduced by the defendants: see *Banro*, at para. 38. Accordingly, all that is needed for the presumptive connecting factor to be found is for the plaintiff to plead that the alleged defamatory material was communicated to at least one person in Ontario other than the plaintiff. While this is easy to establish in any defamation case, it is virtually automatic in a case of defamation on the Internet, where online publications are readily shared and accessed by users across the world.

[128] In both *Banro* and *Van Breda*, LeBel J. acknowledged that in Internet libel cases, the jurisdiction hurdle is not a high one. In the former, at para. 3, he wrote:

> The tort of defamation presents an interesting challenge for the principles underlying the assumption of jurisdiction. At common law, the tort of defamation crystallizes upon publication of the libellous material … This also raises difficult issues when publication occurs through the Internet.

[129] In the latter, at para. 109, he wrote:

> But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules.

[130] Some commentators have questioned the ease with which jurisdiction *simpliciter* may be asserted and have suggested that the rebuttable nature of the presumptive factors, supposedly an important check on jurisdiction, may be illusory. See David Paulson "*Canada Update: A New Framework for Determining Jurisdiction, the Application of the Doctrine of Forum Non Conveniens, and Limitations of the Solicitor-Client Privilege*" (2012) 18 Law & Bus. Rev. Am. 411 at 414; and Professor Tanya J. Monestier, "*(Still) A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada*" (2013) 36 Fordham Int'l L.J. 396 at 428-31.

[131] In the light of the Supreme Court's dicta and the facts in *Van Breda*, *Banro* and *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, I am persuaded that the Ontario court has jurisdiction. But for the latter two cases, I would have held that the presumption was rebutted.

[132] Having said that, given the ease with which jurisdiction *simpliciter* may be established in a defamation case, in a motion for a stay, a motion judge must conduct a robust and carefully scrutinized review of the issue of *forum non conveniens*.

Forum Non Conveniens

[133] This brings me to the doctrine of *forum non conveniens* and the treatment of this issue by the motion judge and my colleague.

(a) *Need for Robust Review*

[134] I start with a brief reiteration of the applicable law. In both *Van Breda* and *Breeden*, when discussing *forum non conveniens*, LeBel J. wrote that a party seeking a stay must show that the alternative forum is clearly more appropriate. A party must establish that: (i) a plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules; (ii) it would be fairer to select the alternative forum; and (iii) it would be more efficient to select the alternative forum. In *Van Breda*, he wrote, at para. 109 that:

> *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 noted by Professor Joost Blom, in "*New Ground Rules for Jurisdictional Disputes: the Van Breda Quartet*"; (2012) 53:1 Can. Bus. L.J. 1 at 5, the decision in *Van Breda* drew a clear distinction between the role to be played by the jurisdiction *simpliciter* analysis and that of *forum non conveniens*:

> Another outcome of the new approach, again expressly desired by the court, is to separate jurisdiction *simpliciter*, which is now going to depend on specific rules, more clearly from the *forum non conveniens*

> discretion, which is inherently a matter of balancing both factual and policy-oriented factors.

[135] The doctrine of *forum non conveniens* "tempers the consequences of a strict application of the rules governing the assumption of jurisdiction" and "requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction": *Van Breda* at para. 104.

[136] Subject to certain caveats, deference is owed to a motion judge's exercise of discretion. In *Banro*, LeBel J. wrote at para. 41:

> The application of *forum non conveniens* is an exercise of discretion reviewable in accordance with the principle of deference to discretionary decisions: an appeal court should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision (see *Young v. Tyco International of Canada Ltd.*, at para. 27).

[137] As mentioned, given the framework established by *Van Breda* and its progeny, the issue of *forum non conveniens* must receive a robust and carefully scrutinized review by the motion judge. In my view, such an analysis was lacking here and in any event, for reasons I will describe, the analysis that was done by the motion judge was infected by errors.

(b) ***Factors***

[138] In *Van Breda*, at para. 110, LeBel J. stated that the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context. The factors might include:

- the locations 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.

[139] In *Breeden*, a defamation case, LeBel J. identified, at para. 23, the following factors as being relevant:

- comparative convenience and expense for the parties;
- comparative convenience and expense for the witnesses;
- applicable law;
- avoidance of a multiplicity of proceedings and conflicting decisions;
- enforcement of judgment; and
- fairness to the parties.

In that case, LeBel J. concluded that the motion judge made no errors.

[140] In contrast, in this case, my colleague identified a number of errors made by the motion judge in his *forum non conveniens* analysis. First, she notes at para. 67 that the motion judge erred in law by suggesting that letters rogatory could be used to compel the attendance of the appellants' witnesses in Ontario. Second, she notes at para. 92 that the motion judge erred in accepting that the plaintiff would suffer a loss of juridical advantage if this action were stayed in favour of proceeding in Israel.

[141] I agree with her.

[142] That said, I do not agree that these errors were immaterial to the conclusion. Rather, when these errors are placed in context and analysed with the remainder of the motion judge's reasoning, his conclusion was unreasonable and a different result must ensue.

(i) Comparative Convenience and Expense for Parties

[143] The motion judge considered some of the factors identified in *Breeden*. On the first factor considered, comparative convenience and expense for the parties, the motion judge concluded that this factor favoured Israel. This was understandable given that, among other things:

- all of the appellants are based in Israel;

- none of the appellants, be they corporations or individuals, have any assets in Canada;
- the absence of any affidavit sworn by the respondent that addressed, among other things, expense, convenience, or any need to vindicate any reputation;
- the respondent is a billionaire, has a private jet and maintains a residence in Israel; and
- the submissions noted by the motion judge, at paras. 33-34, that:

> [A] lengthy libel trial thousands of miles from Israel would place a huge strain on the [appellants] who could not reasonably expect to be sued over the article in Canada. The [appellants] also stated that a trial would be a massive commitment of time taking staff away from their function of gathering news.
>
> In addition, the [appellants] submit that the trial may need to be conducted in Hebrew with interpreters. The [respondent] submits that interpreters may not be required as the

> cross-examinations of the three affiants from Israel on this motion were conducted in English.

[144] The motion judge correctly found that this first factor favoured a trial in Israel. Given the lack of evidence on any inconvenience or undue expense for the respondent associated with a trial in Israel, the first factor clearly and overwhelmingly supported a trial in Israel.

(ii) Comparative Convenience and Expense for the Witnesses

[145] On the second factor, comparative convenience and expense for the witnesses, the motion judge concluded that this factor also favoured Israel, albeit slightly. In my view, the motion judge erred in characterizing the distinction as slight. My conclusion is not based on a mere difference of opinion but on the faulty basis of his reasoning.

[146] The motion judge's analysis of the second factor rested on two bases.

[147] First, he relied on his incorrect assessment of the availability of letters rogatory, an error acknowledged by my colleague, to compel the attendance of Israeli witnesses in Ontario. It was undisputed that many of the witnesses from Israel will not testify voluntarily. Subpoenas can be issued in Israel requiring the Israeli witnesses to attend at trial in Israel. The same cannot be said with respect to a trial in Ontario.

[148] On this issue, my colleague states at para. 70 of her reasons that the appellants led no evidence to undermine the respondent's submissions on the availability of methods to deal with witnesses outside the jurisdiction. She goes on to say that it was not unreasonable for the motion judge to accept that Ontario letters of request would be honoured by Israel and that videoconferencing would be available in that jurisdiction.

[149] I have two difficulties with my colleague's argument. First, there was no such acceptance by the motion judge. He made no findings on these points. Indeed, he did not even use the words letters of request or make a finding with respect to videoconferencing. Second, with respect, typically evidence is filed in response to evidence, not to submissions. The appellants cannot be faulted for failing to provide an evidentiary response to an issue raised in oral submissions.

[150] The motion judge's second finding which grounded his analysis was that the respondent undertook to fund the travel and accommodation costs of the appellants' foreign witnesses in accordance with the rates provided in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Tariff A.

[151] I make two observations. First, a plaintiff ought not, due to his or her financial heft, be permitted to buy passage to a forum. Second, as far as expenses are concerned, the only travel and accommodation rates in the *Rules* are contained in Tariff A of the *Rules*. They bear little resemblance to the actual

cost of accommodation. For instance, $75 is allocated for overnight accommodation and meal allowance, an inadequate amount in Toronto by any measure.

[152] The motion judge ignored this reality when he accepted that Goldhar's undertaking addressed the issue of additional expense.

[153] In addition, the motion judge ignored his own finding that the respondent filed no evidence identifying any witness he would call. Indeed, there was no evidence before the motion judge that Goldhar himself would even be called as a witness. In contrast to the non-existent witness list of the respondent, the appellants filed evidence anticipating and identifying 22 people who could be called to testify, 18 of whom reside in Israel.

[154] My colleague makes much of the fact that the author of the article, Marouani, did not file an affidavit and states that this was important. However, I note that he is one of numerous appellants, is no longer employed by any of the corporate appellants, has no assets in Canada, and unlike Goldhar, who of course filed no affidavit, he does not have independent control of the proceedings.

[155] While I accept that we live in an age of international communications and commerce, on the basis of the record before him, there were potentially 22 witnesses to be called by the defence and none for the plaintiff. There was no

comparison to be made. To use sports, if not soccer parlance, the respondent was scoreless.

[156] In my view, the motion judge's error on letters rogatory, his failure to consider the purport of the Tariff, and his disregard of his finding on the absence of any witnesses identified by the respondent, in comparison to the appellants' identification, all served to cause him to incorrectly conclude that the distinction between Ontario and Israel was slight. His description, findings and conclusion were unreasonable and his decision is therefore not entitled to deference in this regard. Rather, this factor overwhelmingly favoured Israel as the clearly more appropriate forum.

(iii) Choice of Law

[157] Turning to the third factor, the motion judge concluded that choice of law favoured Ontario. He stated that the *lex loci delicti* [4] of the tort of defamation was Ontario and that the most substantial harm to the respondent's reputation was in Ontario.

[158] In his amended statement of claim, Goldhar claimed general damages of $600,000 and punitive damages of $100,000. He pleaded that he suffered damage to his reputation in his business and personal life. He pleaded that he will continue to suffer damage, and in particular, financial loss, and that he

[4] The law of the place where the activity occurred.

"conducts business in Israel, Canada and the United States, and will continue to suffer damages in these countries and elsewhere."

[159] When the stay motion was argued before the motion judge, in oral submissions made by his counsel, Goldhar undertook "not to seek at the trial of this action to recover damages for reputational harm in Israel or anywhere else outside of Canada." In reaching his decision on substantial harm, the motion judge stated, at para. 50, that "the damages undertaking provided by the [respondent] is a very significant factor". In so finding, he relied on the Supreme Court's apparent acceptance of Lord Black's undertaking in *Breeden* as being a significant factor in the analysis of the "most substantial harm to reputation".

[160] I will first address Goldhar's undertaking and then will discuss *lex loci delicti* and substantial harm to reputation.

*(1) **Undertaking***

[161] First, Goldhar's undertaking, while similar to that of Lord Black's in some respects, is materially different. Lord Black undertook "not to bring any libel action in any other jurisdiction, and has limited his claim to damages to his reputation in Ontario." This is in contrast to Goldhar's undertaking, which merely stated that he would limit his damages to those in Ontario "at the trial of this action". Goldhar's undertaking does not preclude legal proceedings in other jurisdictions, whereas Lord Black relinquished such a right.

[162] This omission in Goldhar's undertaking detracts from one of the relevant factors for *forum non conveniens* enumerated in *Breeden*: the avoidance of a multiplicity of legal proceedings and conflicting decisions. Goldhar's undertaking does not prevent him from bringing an action in Israel where, based on the evidence of the expert witness filed, the limitation period for defamation actions is seven years.

[163] Second, in relying on the Supreme Court's acceptance of Lord Black's undertaking in *Breeden*, the motion judge failed to recognize that the court did not rely on that undertaking in isolation. Rather, the court emphasized the evidence establishing Lord Black's reputation in Ontario as being significant. That evidence was detailed and extensive. Lord Black also led evidence of the importance to him of his reputation in Ontario and his desire to vindicate it here. LeBel J. wrote:

> Lord Black's undertaking and the evidence of his reputation in Ontario therefore suggests that, under the "most substantial harm to reputation" approach discussed in *Éditions Écosociété*, Ontario law should be applied to the libel actions.

[164] In fairness, LeBel J. also noted that the tort of defamation was committed in Ontario under *lex loci delicti* and Ontario law would apply on that basis. In that regard, however, unlike this case, there had been massive republication of the impugned statements in three newspapers in Ontario.

[165] Lastly, in *Banro*, it would appear that LeBel J. considered the most substantial harm test at least in part so as to discourage forum shopping in defamation cases. That objective would be defeated if the mere fact of a late breaking undertaking could control the choice of law analysis. In my view, his commentary in this regard should not be interpreted as permitting a damages limitation undertaking as being enough on its own to dictate the governing law. The motion judge treated the respondent's undertaking in essence as determinative of his choice of law analysis and in my view, erred in this regard.

(2) *Lex Loci Delicti and Most Substantial Harm*

[166] The current choice of law rule for torts is derived from *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. There the Supreme Court enunciated a new rule for conflicts of laws stating at p. 1050 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*. However, La Forest J. recognized that *lex loci delicti* may not be an appropriate rule for all torts.

[167] In *Banro*, LeBel J. observed that there were arguments for changing the governing choice of law rules for cases of multi-jurisdictional defamation stating at para. 56:

> Although I need not decide the question in this case, I note that one possible alternative to the *lex loci delicti* in defamation cases, which has gained some significant

> support, may be the place of most substantial harm to reputation.

[168] It would appear from LeBel J.'s commentary on defamation that some support has been given to the place of most substantial harm to reputation as being the yardstick on which choice of law should be based.

[169] He observed that the most substantial harm test might be a way to curb forum shopping as there would be little strategic advantage to forum shopping if the conflicts rules were to require application of the same law regardless of where the matter were tried. He referred to Professor Jean-Gabriel Castel's opinion that "rules of jurisdiction and of choice of law address different concerns and … the test of place of publication should not always be used for both purposes.": J.-G. Castel, "Multi-state Defamation: Should the Place of Publication Rule be Abandoned for Jurisdiction and Choice of Law Purposes?" (1990) 28:1 Osgoode Hall L.J. 153 at 154.

[170] The principle of comity influenced the adoption of *lex loci delicti* as the choice of law rule for multi-jurisdictional torts: *Tolofson*, at 1050. Comity was described in *Spencer v. The Queen*, [1985] 2 S.C.R. 278 at p. 283:

> 'Comity' in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of

> other persons who are under the protection of its laws. [Citations omitted.]

[171] The Supreme Court reiterated this principle in *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 27: "Comity is a balancing exercise. The relevant considerations are respect for a nation's acts, international duty, convenience and protection of a nation's citizens."

[172] In *Equustek Solutions Inc. v. Jack*, 2015 BCCA 265, 75 B.C.L.R. (5th) 315, at para. 91, the British Columbia Court of Appeal noted the comity concern raised in the context of freedom of expression, quoting from the factum submitted by the Canadian Civil Liberties Association:

> A nation's treatment of freedom of expression is a core part of its self-determination, rooted in the nation's historical and social context, and the ways in which its constitutional values (whether written or unwritten), norms and legal system have evolved.

[173] The Internet makes information easily accessible across jurisdictional lines. In the newspaper world, as a matter of practical reality, it is not easy for a publisher to restrict the availability of its published materials. The application of *lex loci delicti* to Internet communication cases frequently exposes people who engage in speech or expression in one jurisdiction to civil liability in another. See Daniel Taylor, "Libel Tourism: Protecting Authors and Preserving Comity" (2010) Geo. L.J. 189 at 193. As Taylor observes, ours is a world without informational borders. The willingness of a foreign court to exercise jurisdiction for defamation

actions based on where the defamatory content is accessed rather than where it is produced exposes foreign newspapers and foreign journalists to legal actions in countries around the world.

[174] In the article "Book Reviews, the Common Law Tort of Defamation, and the Suppression of Scholarly Debate" (2010) 11:6 German L.J. 656 at 667-69, Associate Professor Kate Sutherland addressed the conundrum in the context of freedom of expression:

> Clearly then, the specifics of defamation law doctrine aside, threats of lawsuits, or even just the fear of threats of lawsuits, can suppress scholarly debate and thereby compromise academic freedom. Libel chill is further heightened by the prospect of libel tourism. Even more daunting than the idea of facing a defamation lawsuit at home is that of facing such a suit in a foreign jurisdiction that may offer less protection to academic freedom and impose more severe sanctions.
>
> …
>
> At a time when critical scholarship is increasingly disseminated electronically to a global audience, it is necessary to be attuned not just to the defamation laws of one's own jurisdiction but to those of a multitude of jurisdictions around the world. Defendants may only be able to rely on the degree of academic freedom provided by the most draconian of libel regimes.

[175] In an article entitled "Jurisdiction and Choice of Law Issues in Multistate Defamation on the Internet" (2013) 51:1 Alberta L. Rev. 153 at 162, Matthew Castel wrote:

> In order to establish *jurisdiction simpliciter*, Canadian common law courts should continue to assume jurisdiction on the basis of the place of tort. This rule would not promote libel tourism as it is kept in check by the doctrine of *forum non conveniens* and also by a choice of law rule which would apply the law of the place of most substantial harm to the plaintiff's reputation, rather than the law of the place of publication. This choice of law rule maintains a proper balance between the reputational interests of the plaintiff and the freedom of speech concerns of the defendant in addition to respecting comity as the organizing principle of the conflict of laws.

[176] The motion judge relied on both *lex loci delicti* and substantial harm to reputation in concluding that the applicable law was that of Ontario. In my view, the motion judge erred in his analysis of choice of law. I have already addressed the issue of the undertaking. In discussing choice of law, the motion judge also did not consider that, as pleaded, the tort occurred in both Ontario and in Israel. Secondly, while harm may be presumed, there was no evidence of substantial harm to Goldhar's reputation in Ontario. Thirdly, the motion judge did not consider the principle of comity. Although on a different point, in *Kaynes v. BP*, 2014 ONCA 580, 122 O.R. (3d) 162, Sharpe J.A. found that the motion judge in that case had properly concluded that Ontario had jurisdiction but had erred in her *forum non conveniens* analysis by failing to consider the principle of comity. As such, this court reversed the motion judge's decision and imposed a stay of proceedings.

[177] Given the motion judge's errors, identification of the applicable law falls to be decided by this court.

[178] As I have stated, in *Banro*, LeBel J. said that in that case, nothing turned on the question of whether *lex loci delicti* ought to be abandoned as the choice of law rule in multijurisdictional defamation cases and that therefore it was prudent to leave this issue for another day. However, he did observe that the most substantial harm test may be more appropriate than the *lex loci delicti* test in cases of multi-jurisdictional defamation. To repeat, at para. 56, he stated:

> [T]he question of whether the *lex loci delicti* represents the proper rule for choice of law in defamation remains. Although I need not decide the question in this case, I note that one possible alternative to the *lex loci delicti* in defamation cases, which has gained some significant support, may be the place of most substantial harm to reputation.

[179] As discussed, in an Internet age, in my view, *lex loci delicti* is too thin a strand on which to anchor choice of law in an Internet defamation case such as this one. Using a most substantial harm test incorporates considerations of freedom of speech, comity and reputation. Accordingly, I propose to apply such a test.

[180] As no Canadian court has formally adopted the most substantial harm rule, there is no clear guidance on how it should be applied. In *Banro* at para. 59, LeBel J. referred to factors adopted in Australia to address the most

substantial harm test. These factors provide a useful guide in this case. They are:

> a) the place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation, the place where the corporation had its principal place of business at that time;
>
> b) the extent of publication in each relevant jurisdiction;
>
> c) the extent of harm sustained by the plaintiff in each relevant jurisdiction; and
>
> d) any other matter that the court considers relevant.

[181] While I note that obviously Goldhar is engaged in the business of soccer in Israel, indeed he pleads in his statement of claim that he conducts business there, the first factor favours the law of Ontario, as the respondent is ordinarily resident in Ontario. However, the remaining three factors all favour applying the law of Israel.

[182] There is no question that the extent of publication in Ontario is dwarfed by the extent of publication in Israel. This factor favours the law of Israel.

[183] Second, the plaintiff led no evidence to establish a significant reputation in Ontario. The allegations in his pleadings do not establish a reputation. Further, the evidence led by the respondent is from two of his employees who claim that the article did not lessen their (or their colleagues') opinion of Goldhar.

[184] In contrast, there is evidence from the appellants that the respondent has "celebrity status" in Israel and is often discussed in the Israeli media. In his amended statement of claim, the respondent pleaded that he continues to suffer damages in Israel, Canada and the United States. Taken together, the facts support the conclusion that any harm suffered in Israel was much more significant than any allegedly suffered in Ontario.

[185] Finally, the article was written in Israel about an Israeli soccer team and aimed at an Israeli audience. While Goldhar may be habitually resident in Ontario, he has chosen to buy one of the most popular soccer clubs in Israel and to become involved in a very public and high-profile enterprise in that country.

[186] A consideration of these factors leads me to conclude that under the most substantial harm test, the law of Israel should govern the parties' dispute and is therefore the applicable law.

(iv) Juridical Advantage

[187] Although not mentioned in either *Van Breda* or *Breeden*, the fourth factor relied upon by the motion judge was juridical advantage. He concluded that this factor favoured a trial in Ontario. He divided his discussion on this issue into two categories: the appellants' submissions on Israel's law of defamation and the respondent's submissions.

[188] The respondent advanced two juridical advantages associated with having the action tried in Ontario:

i) the respondent's counsel's advice that the respondent would serve a jury notice; and

ii) the availability of a public figure defence in Israel.

[189] The motion judge stated that he could not draw the conclusion sought by either party on the issue of the availability of a public figure defence in Israel. Given his reluctance to rely on this factor and in the absence of identification of any other factor, the motion judge must be taken to have relied solely on the availability of a jury trial in Ontario to conclude that the loss of juridical advantage favoured a trial in Ontario. Again to repeat, I agree with my colleague that the motion judge erred in accepting that the respondent would suffer a loss of juridical advantage in this regard. Accordingly, there was nothing to anchor the motion judge's finding that this fourth factor favoured Ontario. Consequently, at most, this factor is neutral.

(v) Fairness

[190] The last factor considered by the motion judge was fairness.

[191] In reaching his conclusion that fairness favoured a trial in Ontario, the motion judge focused on vindication of reputation in the place where the respondent lives and works as the key determinant. No mention was made of the huge financial strain and financial pressures on the appellants and the

juxtaposition of the respondent's circumstances. No mention was made on the ability to disseminate in Ontario, through Google Alerts and otherwise, the outcome of any trial in Israel so as to achieve a vindication of reputation. No mention was made of the range of monetary awards available to the respondent if successful in Ontario and their minimal nature relative to the respondent's circumstances. No mention was made of the competing theory that this lawsuit was instituted in Ontario with a view not to protect a reputation, but to burden a foreign newspaper and individuals, no longer employed by the corporate parties, with the expense and attendant time away from work implicit with an order for trial in Ontario, or to use the appellant's terminology, to muzzle the newspaper from commentary on the respondent's actions in Israel. The 'on the fly' undertakings made at the hearing of the motion itself offer some confirmation of that theory. These omissions, coupled with my earlier comments, undermine the motion judge's conclusion on fairness. When one considers these factors, fairness clearly favours Israel.

(vi) Enforcement

[192] Lastly, I note that although the motion judge enumerated the factors considered by the Supreme Court in *Breeden*, he neglected to address all of them. Most notably, he said nothing about enforcement. The only evidence before him on that issue was that the appellants had no assets in Ontario whereas one may readily infer from the evidence that the respondent does have

assets in Israel. Based on the record before him, this factor therefore would also favour Israel.

Summary

[193] To summarize, given the low threshold that permits jurisdiction in a defamation case to be taken by an Ontario court, a robust and carefully scrutinized review must be undertaken by a motion judge on a stay motion based on *forum non conveniens*. Here, such a review was not undertaken. Furthermore, and in any event, given the errors, the decision is not entitled to deference.

[194] When the issue of *forum non conveniens* is considered anew, the relevant factors lead to the inevitable conclusion that the appellants have established that Israel is clearly the more appropriate forum. Additionally, such an outcome is in the interests of justice.

Disposition

[195] For these reasons, I would allow the appeal and stay the respondent's action.

"S.E. Pepall J.A."

Appendix ‘A’

Soccer / Profile / Long-distance operator

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.

by David Marouani

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.

Just over a year ago, Goldhar’s representative in Israel, Jack Angelides, complained about the job that Clarice Zadikov, the long-time CFO of the team, was doing. Goldhar’s immediate response was to suggest appointing someone to do an identical job, with a slightly different title – but reporting back to the owner. So Tomer Shmuel was appointed commercial manager and Zadikov’s authority was slowly eroded. Two months ago, the policy had the desired effect and Zadikov reached an agreement with Angelides over her retirement.

“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.

The departure of CEO Uzi Shaya, following the gradual erosion of his powers, is a case in point. “The dismissal of Avi Nimni is the exception that proves the rule,” the same insider said. “For the most part, [Goldhar is] supremely patient. One could even say he’s cold and calculated.”

Goldhar is also playing with time in the battle between coach Moti Ivanir and star striker Barak Yitzhaki. Goldhar landed in Israel on Friday, but he opted not to address the spat until Monday evening.

According to club sources, the owner is currently observing the situation and has not yet decided how he will handle this latest crisis.

“Whatever happens,” one source said, “he will be remembered as the knight in shining armor who came in and saved the day.”

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.

"With all due respect to 'cultural revolutions', the gap between Maccabi Tel Aviv and Maccabi Haifa is getting wider since he arrived," said one team insider.

And with all due respect to Angelides, everyone at Maccabi knows that it's a one-man show. Anything that Goldhar's Cypriot lieutenant says to the players or to the coaching staff is prefixed by the words "Mitch says…"

When Ivanir read the riot act to his players at a meeting in Caesarea last week, almost every sentenced included the phrase, "the owner told me that…"

Despite running the club from afar, decisions are only made once Goldhar has given them the green light. He was even involved in the minute details of the search for a location for the club's new souvenir shop.

"I want to invest in branding the store," he told his employees over a year ago. For months, he was presented with dozens of potential locations for the store in north Tel Aviv, but rejected them all. In the end, he decided to renovate the mobile home in the south of the city where the store is currently located.

Do as your boss says

Goldhar boasts to his business contacts in Toronto that he is not only the owner of Maccabi Tel Aviv but also its soccer director. The last time he was in Israel, he brought Ivanir into his office and tried to tell him how the team should be playing. "[Haris] Medunjanin should be playing in the same position that he plays for the [Bosnian] national team," Goldhar reportedly told his coach. In fact, it was at Goldhar's suggestion that Medunjanin was returned to the starting line-up at the expense of Gal Alberman. "Ivanir doesn't know how to respond in these

situations," says a club source. "But he believes that he really should do as his boss suggested – even if that boss knows nothing about soccer."

This week, too, in the aftermath of the defeat in Sunday's derby match, Goldhar got involved.

"You showed that you've got the ability," he told the players, "but you seem to have misplaced the character that you showed at the start of the season. I am convinced that you still have that character and now's the time that you have to show it."

Goldhar has invested hundreds of millions of shekels in Maccabi since he arrived on scene some two and a half years ago, but club sources say that he borders on the frugal when it comes to the managerial side of the club. When Angelides was first offered a job, for example, Goldhar did not see fit to offer him a company car. Angelides complained bitterly but silently about this, until he eventually persuaded one of the team's sponsors to provide him with a vehicle – without Goldhar's knowledge.

In an interview with Yedioth Ahronoth's Nahum Barnea, Goldhar spoke about how much he values the work done behind the scenes by the club's equipment manager, David Zachi, who earns a fraction of the salary of the players. What he failed to point out, however, is that he has steadfastly refused to raise Zachi's measly pay by just a few hundred shekels. To Goldhar's credit, it should be noted that, when it comes to frugality, he practices what he preaches: he rented a dingy apartment for himself in Tel Aviv and he drives nothing more fancy than a Hundai Getz.

Goldhar, according to club insiders, thrives on the media attention that Maccabi brings him. Despite the fact that he planned his latest visit to Israel well in advance, for example, and the crew aboard his private jet was briefed a week in advance, he made sure that the media were kept in the dark, in order to create an aura of expectation.

When Maccabi played against Panathinaikos earlier this season, he read everything that was written about him [*sic*] the Greek press and even cut out a cartoon of him that appeared in one [*sic*] the paper, asking all his employees whether it was flattering. He also has articles in which his name appears translated into English.

Despite his many statements, Goldhar does not have a long-term plan for the team. The only plan he has presented so far has been to upgrade the club's

training facilities, but that still hasn't happened. The only changes he has made have been to the youth team set-up, and he often boasts about that team's accomplishments.

This has become a sore point with former owner Alex Shnaider, who complained that Goldhar was taking credit for a five-year plan that was implemented before he even arrived at the club.

As for his long-term future, Goldhar says that he's here to stay. "He is so keen to prove to everybody that his business model can work that he won't leave until he's won at least a league championship," according to one of his close associates.

There are those, however, who see things differently. Goldhar plays soccer at least once a week in Toronto with Ilan Sa'adi, a former professional player and close friend. One of the people who plays with them says that, between the lines, there are clear signs that Goldhar is getting frustrated with Maccabi.

"He's very distressed at the way the team is playing," the source says. "If I understand him correctly, he will give the team until the end of this season to win the championship and then he'll start looking for someone to take Maccabi off his hands."

Goldhar declined to comment for this article.