Staying Proceedings, Undertakings and "Buying" a Forum

One of the points of interest in the Supreme Court of Canada's recent decision in *Haaretz.com v Goldhar* (available here) concerns the appropriateness of the plaintiff's undertaking to pay the travel and accommodation costs of the defendant's witnesses, located in Israel, to come to the trial in Ontario. The defendant had raised the issue of the residence of its witnesses as a factor pointing to Israel being the more appropriate forum. The plaintiff, one presumes, made a strategic decision to counter this factor by giving the undertaking.

The motions judge and the Court of Appeal for Ontario both considered the undertaking as effective in reducing the difficulties for the defendant in having the litigation in Ontario. However, the undertaking was viewed quite differently by at least some of the judges of the Supreme Court of Canada. Justice Cote, joined by Justices Brown and Rowe, stated that "consideration of such an undertaking would allow a wealthy plaintiff to sway the *forum non conveniens* analysis, which would be inimical to the foundational principles of fairness and efficiency underlying this doctrine" (para 66). Justice Abella, in separate reasons, stated "I think it would be tantamount to permitting parties with greater resources to tip the scales in their favour by 'buying' a forum. … it is their actual circumstances, and not artificially created ones, that should be weighed" (para 140). The other five judges (two concurring in the result reached by these four; three dissenting) did not comment on the undertaking.

Undertakings by one party in response to concerns raised by the other party on motions to stay are reasonably common. Many of these do involve some financial commitment. For example, in response to the concern that various documents will have to be translated into the language of the court, a party could undertake to cover the translation costs. Similarly, a party might undertake to cover the costs of the other party flowing from more extensive pre-trial discovery procedures in the forum. Travel and accommodation expenses are perhaps the most common subject for a financial undertaking. Is the Supreme Court of Canada now holding that these sorts of undertakings are improper?

The more general statement from Justice Abella rejecting artificially created circumstances could have an even broader scope, addressing more than just financial issues. Is it a criticism of even non-financial undertakings, such as an undertaking by the defendant not to raise a limitation period – otherwise available as a defence – in the foreign forum if the stay is granted? Is that an artificially-created circumstance?

Vaughan Black has written the leading analysis of conditional stays of proceedings in Canadian law: "Conditional *Forum Non Conveniens* in Canadian Courts" (2013) 39 Queen's Law Journal 41. Undertakings are closely related to conditions. The latter are imposed by the court as a condition of its order, while the former are offered in order to influence the decision on the motion. But both deal with very similar content, and undertakings are sometimes incorporated into the order as conditions. Black observes that in some cases courts have imposed financial conditions such as paying transportation costs and even living costs during litigation (pages 69-70). Are these conditions now inappropriate, if undertakings about those expenses are? Or it is different if imposed by the court?

My view is that the four judges who made these comments in *Haaretz.com* have put the point too strongly. *Forum non conveniens* is about balancing the interests of the parties. If one party points to a particular financial hardship imposed by proceeding in a forum, it should be generally open for the other party to ameliorate this hardship by means of a financial undertaking. Only in the most extreme cases should a court consider the undertaking inappropriate. And perhaps, though the judges do not say so expressly, *Haaretz.com* is such a case, in that there were potentially 22 witness who would need to travel from Israel to Ontario for a trial.