

COMMON LAW DIVISION

No. 7763 of 2000

JOSEPH GUTNICK

Plaintiff

v

DOW JONES & COMPANY INC.

Defendant

JUDGE: HEDIGAN J
WHERE HELD: Melbourne
DATE OF HEARING: 4-7 June 2001
DATE OF JUDGMENT: 28 August 2001
CASE MAY BE CITED AS: Gutnick v. Dow Jones
MEDIUM NEUTRAL CITATION: [2001] VSC 305

DEFAMATION – Publication of arguably defamatory matter on the Internet – Web server in U.S.A. – Subscription Website – Downloaded by subscribers in Victoria – Whether published in Victoria – Where publication manifested – Whether published in both Victoria and New Jersey simultaneously.

SERVICE OUT OF JURISDICTION – Rule 7.01 of Supreme Court Rules – Long arm jurisdiction – Subsequent amendment as of right and by leave – Supreme Court having jurisdiction and Rule complied with.

FORUM NON CONVENIENS – Whether Victoria inappropriate or inconvenient forum – Relevant principles – Matters to be considered – Victoria appropriate forum – Application refused.

APPEARANCES

Counsel

Solicitors

For the Plaintiff

Mr J. Sher, Q.C.
Mr M. Wheelahan

Clayton Utz

For the Defendant

Mr G. Robertson, Q.C.
Mr T. Robertson

Gilbert & Tobin

HIS HONOUR:

1 The defendant Dow Jones & Co. Inc. (hereinafter called “the defendant” or “Dow Jones” or “the applicant/defendant”) is the publisher of the Wall Street Journal, an internationally known and respected financial daily newspaper, much concerned with information concerning United States stocks and shares and other events that might affect their prices on the American market. The defendant is also the publisher of *Barrons Magazine* which, according to Mr G. Robertson, Q.C. who with Mr T. Robertson appeared on behalf of the defendant, is even more obsessively concerned with those matters. Mr Robertson also claimed that the plaintiff, Mr Joseph Gutnick, was a prominent business identity with a reputation in philanthropic, sporting and religious circles and that he was an international entrepreneur with substantial connections in the United States. The edition of *Barrons* of Monday, 30th October 2000 (which appears likely to have come out on Saturday, 28th October) contained an article written by a journalist working for the defendant, one William Alpert, headed “*Unholy Gains*” and sub-headed “When stock promoters cross paths with religious charities, investors had better be on guard.” The first page of the article also contained a large photograph of Mr Gutnick. The article of some 7,000 words contained a number of different photographs of different persons including one of Nachum Goldberg. *Barrons* is a weekly with a substantial circulation in the United States primarily among investors and those interested in money matters. It was claimed without objection in the hearing before me that this relevant copy of *Barrons Magazine* sold 305,563 copies. A very small number of the actual print copy of *Barrons* came to Australia, but a number of them were sold in Victoria. *Barrons*, however, is customarily put OnLine and this article went on the defendant’s Website on Sunday 29th October. The defendant Dow Jones operates from its so-called corporate campus in New Jersey where its Website is located. There is, as I understood it, no Website in *Barrons*’ name and the Website is in the name “wsj.com”. This is, however, a subscriber Website with some 550,000 subscribers. It was claimed in the opening by Mr Robertson that the defendant could not identify where they all were but it was conceded that 1700 of them paid by way of credit cards from Australia.

2 Ultimately (T139) the defendant made a formal admission that several hundred subscribers to wsj.com were from Victoria and that they included significant persons from finance, business and stockbroking some of whom the Court might infer, for the purposes of these interlocutory proceedings, downloaded the article. This submission was to be seen in conjunction with the admission effectively made in the opening that there were 1700 subscribers from Australia. Notwithstanding this submission, it did not obviate the necessity to call the only witness who was called on the application, Mr Robert Sichler, a Dow Jones executive to parts of whose evidence I will briefly refer.

3 The plaintiff commenced his proceeding in the Supreme Court of Victoria by writ on 27th November 2000. By the statement of claim endorsed on the writ, the plaintiff asserted that the defendant Dow Jones was at all times the publisher of an Internet business and financial journal and news service entitled "*Barrons Online*" and that it caused to be published in Victoria by means of the Internet in permanent form an article entitled "*Unholy Gains*" which was published on the Internet and available to all persons in Victoria connected to the Internet who could and/or did on or after 28th October 2000 obtain access to the article, including brokers, financial advisers and such persons. The claim was that the defendant published words and pictures, including a photograph of Mr Gutnick and Mr Goldberg set out in the article which was annexed to the statement of claim, as a schedule. However the words and pictures relied on and set out in that schedule are not the whole of the article entitled "*Unholy Gains*" but were substantially confined to that part of the article by which an allegation was made that the plaintiff was the biggest customer of the gaoled money-lauderer and tax evader Nachum Goldberg and that the words relied on imputed that Gutnick was masquerading as a reputable citizen when he was a tax evader who had laundered large amounts of money through Goldberg, and bought his silence. There was also a claim for aggravated and punitive damages.

4 It will be necessary for me to describe the substance and subject matter of the whole of the article published in *Barrons* which travels considerably beyond those parts of it

relied on by the plaintiff in this proceeding because there are, as will appear, issues raised as to whether or not the plaintiff may sue on part of the article only or whether the balance of the article may be used by the applicant defendant in other ways as part of the so-called *Polly Peck* defence, if raised, and as part of an argument relating to the appropriate forum.

5 The original statement of claim endorsed on the writ relied only, as my recitation of its terms indicates, the Internet publication of the relevant article in *Barrons Magazine*. The statement of claim was subsequently amended as of right and then by leave to add an additional claim for defamation based on the sale of the paper edition of the magazine in Victoria. There was filed on behalf of the plaintiff a number of affidavits of persons who downloaded the article from the Internet, using the entry password and being thereby responsible for the cost of the OnLine copy of the magazine to Dow Jones.

6 The defendant was served in the United States with the original proceeding and has made application to this Court to stay or dismiss the proceeding on a number of bases. My description now of the bases of the applications will in effect identify the issues that were the subject of argument before me and they will also identify some other submissions subsidiary to the main themes. The first issue was the issue of jurisdiction, that is the argument advanced on behalf of the applicant/defendant that the OnLine article was not published in Victoria but in New Jersey, the location of the defendant's Web server. I will develop the arguments as presented to me at a later stage but it is sufficient to say that the argument advanced by the defendant with respect to the OnLine publication of *Barrons* would have no effect on the legal consequences of the sale of the hard copies, minimal as they were, in this State. However, it is likely that my decision on this aspect would, as a matter of practicality, dispose of this dispute concerning the paper sales of *Barrons*.

7 The second issue is connected with the first but it is also likely to be affected by the decision on the jurisdiction question. The second issue is the so-called "gateway" argument advanced on behalf of the applicant/defendant founded upon its

argument in relation to the proper construction and application of Order 7 of the Rules of this Court which found the basis upon which “long-arm” jurisdiction is effected in relation to defendants outside the jurisdiction, without leave in some cases (as here) or upon the grant of leave in others.

8 The third principal issue is the issue of *forum non conveniens*, that is an application made on behalf of Dow Jones (on the assumption that its first two submissions were not successful) that this Court should decline jurisdiction and order a stay of the proceeding to permit the transfer of it to New Jersey in the United States, on the basis that that place is the appropriate forum to try the dispute, and that the State of Victoria is a clearly inappropriate forum for it.

9 Within the broad range and parameters of this dispute, there are drawn in on the following issues: whether or not the plaintiff may lawfully sue for damages for libel in respect of part only of the article (and in the defendant’s argument a minimal part of it), without having the balance of the article having to be considered as lying at the forefront of many of the questions which *Barrons* would wish to raise. These include whether or not the defendant is entitled to rely upon the balance of the article in order to throw light and meaning, as part of its defence, on those parts of the article relied on by the plaintiff; questions whether those parts of it chosen to be sued on by the plaintiff are part of or within the same dimension as all of the other matters concerning Mr Gutnick addressed in the article, so that they might be seen as mere variants of them, of no greater seriousness than the other matters alleged but not sued on; questions of whether or not other defences claimed as being open to the Dow Jones in the United States but not open here (if that be the case) amount to significant reason to conclude that the proceeding should be heard in the United States; issues of whether or not what was printed was reasonable, that being raised as part of an arguable defence of qualified privilege in the *Lange*¹ sense of reasonableness, one of the defendant’s contentions being that the reasonableness of the author of the article having regard to the U.S. journalistic standards is relevant;

¹ *Lang v. A.B.C.* (1997) 189 C.L.R. 520.

finally, other matters which I will address, if it becomes necessary to do so, in the context of *forum non conveniens*.

10 Before embarking upon a summary, both of the article and some of the material relied on, I note certain matters which were left, in my judgment, in a state of some uncertainty. The defendant's submissions make it clear that the copy in the print article was transferred to the wsj.com computer system at the New York headquarters where it was made into Web pages for *Barrons OnLine* and then sent to a computer at the Dow Jones corporate campus in New Jersey. The evidence of Mr Sichler to which I will refer does not make clear enough to me where all of the relevant Web servers are located. It was said at one point of time in the submissions that there were six Web servers in New Jersey, each of which have the function of making all of the wsj.com publications, including *Barrons OnLine*, available to subscribers or would-be subscribers who have previously obtained a user name and password which enables them to log on to the wsj.com Website. At some point of time later in the case however, when the issue of the convenient forum was being debated, I noted Mr Robertson referred to the proceeding being heard in New Jersey or the State of New York.

11 I turn to the article itself. The Dow Jones submissions were that its flavour and focus concerned the alleged misuse of U.S. religious charities and stock promotions on the U.S. market. This summation, (which appeared in paragraph 3 of the applicant/defendant's outline of original submissions) correctly identified the substance of the article's subject matter. No sooner was it put that that was its focus when that description was abandoned for the following as the meaning of the article (for *Polly Peck* purposes):

“That the plaintiff is a devious businessman who should be investigated by U.S. regulators; in any event American investors should beware of Gutnick-promoted shares in American depository receipts and his new hedge fund held by Chase Manhattan Bank. This is because the plaintiff has stated that he intends to increase his business in the U.S. and there is reason to suspect that U.S.-based religious charities have been used to manipulate the price of the stocks he has promoted in the U.S., arranging for the charities to make profits

but leaving other investors to suffer losses.”²

12 It went on to allege that the reasonableness of the suspicion that religious charities had been misused in order to manipulate stock prices derived from seven matters dealt with in the article. These included (a) irrational predictions of wealth made by religious leaders promoting the sale of shares in the plaintiff’s company; (b) profits taken by a U.S.-based charity as a result of selling its shares in a Gutnick company shortly before the price collapsed; (c) trading record of ADRs in five companies promoted by the plaintiff; (d) evidence of the plaintiff’s influence over trading in plaintiff-related stocks by Colel Chabard and another U.S. charity; (e) the plaintiff’s business association with Judah Wernick, a broker who used religious charities in stock frauds; (f) involvement of close-knit religious communities in Brooklyn (Whiting Inc.) in supporting stocks promoted by the plaintiff and manipulating the share prices of those stocks; and (g) a claim that several cheques made out to the plaintiff turned up in the account of a bogus religious charity run as a front by Nachum Goldberg who was convicted of tax evasion and the claim that in an intercepted telephone call “Goldberg referred to the plaintiff in words that were taken to mean that the plaintiff was a big customer”.. I will later refer to this exposition when dealing with the issue of *Polly Peck* raised by the applicant/defendant and also with yet another formulation of the claimed sting and substance of the article. Thus the above is the summation of the multiple themes embraced by the article as formulated by the defendant in this case, although their place in the submission to which I have referred might be seen as by way of giving particulars of the common sting referred to. Mr Robertson was undoubtedly right when he said that those parts of the article upon which the Victorian proceeding are founded as being libellous are a relatively small part of the article as a whole. This is one of the reasons why the connection of the part of the article sued on with the balance of the article, other than to make damaging statements about Gutnick’s conduct unrelated to stock market schemes and manipulation, is doubtful. The were

² Submissions, para 41.

nearly four full pages of the article (including photographs and side bars) of a six-page examination of the plaintiff's activities before the Goldberg connection was arrived at.

(A) Jurisdiction

13 I move to consideration of the jurisdiction issue. On this application, that means the question of the place of Internet publication. The physical means by which words are placed on the defendant's Website were addressed in the affidavit of Howard Gold, the editor of *Barrons OnLine*, and in the affidavit and oral evidence of Mr Robert Sichler, the systems project supervisor employed by the defendant. Mr Gold's evidence is essentially non-contentious merely describing how stories which were written and edited in New York are transmitted by a dedicated computer to the defendant's corporate campus in New Jersey. Mr Sichler purported to explain in his affidavit how the electronic data thus transmitted was transferred from the defendant's two computers in New Jersey on to six further computers which hold the stories or articles, known as servers. He clearly stated in the affidavit that all six servers were physically located in New Jersey.

14 The affidavits of Dr Clark and Mr Hammond attempted to trespass on to the area of the legal conclusion as to how and when, for the purposes of the law of defamation in relation to the Internet, publication took place or occurred. Objection was raised and the offending parts withdrawn. Their affidavits are illuminating and helpful in addressing the technical process whereby a document finds its way from one computer to another via the World Wide Web. It would appear that there are three Internet services: one the so-called push service, for example, email; secondly, Usenet method whereby a person may access the service on meeting the conditions of the provider (the I.S.P., that is, the Internet Service Provider) of the information, e.g. payment coupled with a password or other matters, and, three, the World Wide Web whereby the technical process of a document finding its way is considerably expanded. The affidavits establish that the Web does comprise computers which

hold and send information (using “Web server” software) and other computers which request and receive information by using “Web browser” software. Thus, according to Clark, the originator of the Web document uploads into the storage area managed by the Web server, the person who wants the document must issue a request and, in order to make a request, the requestor uses a Web browser specifying the Website address. The server then delivers the document, so that it may be finally downloaded. Thus it was put that the delivery of electronic documents will only occur if the person searching for the document sends an electronic message to locate it on the relevant Web server. This is contrasted, for example, with other Internet features such as e-mail which is not dependent upon a prior request having been made. This led to the use in those affidavits and, one may say with no offence, heavy reliance by counsel for the plaintiff on the pull-push technology differences as being critical. The purpose of all this was to provide a technical basis for alleging that the process of extracting the particular article from the Dow Jones Web server involves requests for actions by persons “over whom Dow Jones has no control”.. This is by no means wholly accurate as Dow Jones has programmed its computers (see the reference to the Accrue system in Sichler’s evidence) to decline requests e.g. for *Barrons* in the absence of a provided password and also to decline even with a password if the requestor is delinquent in the payment of his or her outstanding account at that time. This is a subscription Website. The information on the New Jersey Web servers handling *Barrons OnLine* does not go on to the World Wide Web from that server. It is not necessary for me to refer to some of the technical explanation of the use of search engines to aid in searching out for information.

- 15 The key part of this material was to emphasize (and it was so used by Mr Robertson) that the information was obtained by the searchers’ own deliberate actions, by clicking on to request the defendant’s Web server to provide access to the relevant document. It was sought to be contrasted with persons listening to a radio or seeing and hearing a television broadcast. However, the appreciation of the contrast between push and pull technologies, claimed by the defendant to be crucial, cannot dominate the question of publication for the law of defamation. It would be

otherwise just as relevant to say that a radio station has not done anything to facilitate the broadcast in the publishing sense because the listener turns the selection control to that station. The affidavits and counsel's submissions sought to assimilate the process to taking a book out of a library in New Jersey and taking it home to Victoria to read, claiming that no action would lie in Victoria against the New Jersey library because it would not have caused any publication in Victoria. This involved, of course, counsel insisting that there was no causing by Dow Jones of publication in Victoria, merely putting *Barrons* on an Internet site accessible to Victoria. It was clearly stated that the article lying silent and uncalled for in the defendant's Web server in New Jersey, did not amount to publication.

16 It is to be observed that this material, and the way it was used, focussed on publication in a generic way and not too much upon publication for the purposes of the law of defamation. One of the submissions was the proposition that the imposition of liability on the basis of the place of publication occurring in the place of downloading would have a serious "chilling effect" on free speech, leading to an increase in the number of actions (in itself a concession that the defendant's proposition would limit the balancing right to sue for arguably defamatory statements). It was also put that information providers would become more cautious if this occurred thus reducing the uninhibited communication and circulation of information to an exceptionally low level. This was asserted but not established by evidence, nor, one ventures, could it be. It was also contended that the logical considerations in respect of the characterization of the place of publication, choice of forum and choice of law questions concerning the Internet all favoured the country where the Website was physically located (that is, the country where the article was written and uploaded and where the publisher conducts its business).

17 Mr Robertson argued that such a narrow rule was appropriate for the age of globalization. It was, of course, also appropriate for his client. I note that his submissions claimed that the choice of forum rule within the European community as adopted is to regulate cross border television communications on the basis of the

jurisdiction where the broadcaster is established. However, as I will later indicate, it would appear likely that with respect to the Internet a different proposition has been embraced. It was also argued that any solution other than that the place of publication should be the place of uploading, and not downloading, would be contrary to the public interest in all countries, because Internet publishers would have to pay regard to the different defamation laws in numerous countries, with the likely effect of diminishing the amount of information made available on the Internet.

18 These may be matters capable of bearing on my decision. However, in respect of each one of them, there are just as sound arguments to the contrary. The submission lacked nothing on the score of boldness, it being claimed that the Internet offered Australians the greatest hope of overcoming the tyranny of distance and that it would be contrary to the national interest for a State court in Australia (he later specifically advanced an argument attacking the “parish pump” approach) to assume to exercise jurisdiction over material placed on Websites overseas by foreign publishers, in circumstances where effective and appropriate redress is available in the place where the information is up-linked. This he claimed might lead to major international publishers of informational Websites to deny subscriptions to Australians out of commercial concern that they would be dragged into this jurisdiction to fight expensive defamation actions. The suggestion that I had a national duty to decide that there was no jurisdiction in Australia even if I had a legal view to the contrary, and that it is my duty publicly to declare that Mr Gutnick’s action against Dow Jones take place in New Jersey, might be thought by some to be remarkable for its ambition. It can be said that this revolutionary technology at least notably modifies territorial boundaries. But it would seem likely that restricted material obtained on downloading could not be republished on to the World Wide Web without breaching copyright.

19 It also lies at the heart of the defendant’s submissions (and was so stated) that the person searching for the relevant article or information through a Web browser or

search engine and on its discovery clicking on its download is really self-publishing, a phrase which was specifically used. Counsel referred to the statement in *Dicey-Morris*³:

“It has to be admitted that the place of publication approach gives rise to practical difficulties in cases where defamatory material is disseminated through the Internet, not least because of the potential number of countries in which access may be had to that material.”

The breadth of this statement fits uneasily with the facts in this case where Dow Jones charges fees and will permit access to the information in the Web server only upon compliance with its conditions. It can select who in what country will be able to get a response to the request, that is the pull technology itself is influenced by the Web server.. The single defamation approach in the United States has not been accepted in this country in the case of television broadcasts, the publication in each State and Territory being a separate tort subject to local law. It has also been denied by the House of Lords in *Berezovsky*⁴. See *Gorton v. A.B.C.*⁵.. It is this rule that, one surmises, led to the statements of the High Court in *John Pfeiffer v. Rogerson*⁶.. The solution in a federation in an intra-Australian context that the law of the place where the tort was committed will be the only relevant law was a view expressed by the Supreme Court of this State even earlier.⁷

20 For the present purpose, not yet referring to any specific authorities that bear upon the issue of jurisdiction and the place of publication, a number of suggestions were made by the defendant as to the appropriate place. The first was the place of uploading the information being the place of publication. Not surprisingly, this view was supported by the defendant on the basis that there was a single connecting factor and not hundreds of potential ones. It was also said to offer certainty, a prized quality. It certainly suits the publisher, rather than the place of residence of the

³ 13th ed. at 1568.

⁴ (2000) 2 All.E. 986.

⁵ (1973) 2 F.L.R. 181.

⁶ [2000] A.L.J.R. 1109.

⁷ *Meckiff v. Simpson* [1968] V.R. 2.

downloading plaintiff, said to be very often unfair against the information supplier and lacking certainty in relation to the Internet. As to another possibility, the place where the damage was suffered, it was said that also suffered defects. As to another possible suggestion (all raised by defendant's counsel) namely the country in which substantially the circumstances giving rise to the claim have occurred. Reference was made to *Distillers* case.⁸ This, however, leaves the question of what the substantial event was. In this case Mr Gutnick would say the publication in the State of Victoria, the false allegation about him as a money launderer, the only remark about which he cared; or, as the defendant argues, the place of uploading, it being stored there as an article written in America for Americans "the events constituting a tort having an indelibly American complexion." It is to be noted that none of these suggestions denoted the place of down-loading information, one which reference to the authorities might have permitted a place in the range of options. I add that Mr Robertson briefly flirted with the proposition that cyberspace was a defamation-free zone, but did not develop it. Nor shall I.

21 It is not to be doubted that the core submission of the defendant is that the Internet publication of "*Unholy Gains*" occurred when and where the material was uploaded in New Jersey, that is, when it was pulled from the server in New Jersey. The argument was that downloading is a result of an independent action for which the defendant cannot be held "properly responsible". The issue here was whether "properly responsible" is used in a technical and scientific sense or as a matter of law. Mr Robertson's case is that the publication occurs when the material which is defamatory is delivered to a third party. The plaintiff's case is that it is only published when it is made intelligible or manifest to a third party by showing it or making it comprehensible. The plaintiff argues that that has been the law for 400 years in other contexts, claimed by the defendant to be not truly analagous to the Internet. This is, of course, why the defendant's counsel accepted there was no publication whilst it sat in the Web server, that is, not delivered. Once Mr Robertson

⁸ [1971] A.C. 458 at 468.

moved from the direct assimilation of the technical evidence to the tort of defamation he was driven to consider the elements of that tort and relate them to the steps comprising publication. His argument, and I will return to it, was that there was no publication because there was no delivery, that is, the browser knocked on the library door and having locked in the correct code, the book is sent to him. He reads it when it is downloaded but it has already been published, just like buying a book and reading it later in his contention.

22 Mr Sher, Q.C., for the plaintiff, in effect said, well, if one requests a book written in English and is given it wrapped up but written in a foreign language which one does not read or speak, it is absurd to contend that it is published to one by delivery, he claiming that all of the cases ran to the contrary to this proposition. It is important to keep in mind that there is a difference between “publishing” in a publishing sense and publication in the sense of actual communication, that is, that the document, in the case of a document, is in a form which is capable of being understood.

23 When counsel for Dow Jones finally turned to authority to support his argument that delivery constituted sufficient publication for the tort of defamation, he relied essentially on two authorities. One of them he saved up for the reply. The first case on which he relied was *Duke of Brunswick and Luneberg v. Harmer*⁹; the second was *R. v. Burdett*¹⁰. The irony can hardly have escaped the mind of senior counsel for the applicant/defendant in that, with respect to the unique and revolutionary Internet, he sought support for his submissions in the legal sense on two cases decided in the first half of the 19th century.

24 The defendant argued that *Burdett* was authority to the contrary of the proposition, espoused by the plaintiff, that publication means actual manifestation to a third party (although it may not mean necessarily that it is read so long as it is capable of being read without any other intervention). *Burdett* was a case of seditious libel, that

⁹ [1849] 14 Q.B. 184.

¹⁰ (1820) 4 B. & Ald. 115.

is, not defamatory or civil libel. Sir Francis Burdett was charged with being a seditious person, that he unlawfully and maliciously intending to raise and excite discontent, disaffection, sedition among the King's subjects, to that end maliciously composed, wrote and published and caused the same of a seditious libel concerning the government of the realm and the troops of the King. The libel in that case was to be found in a document containing an address to the Electors of Westminster. The evidence was that the document containing the seditious libel was delivered in an unsealed letter without seal or postmark by a person other than the accused in Middlesex. The accused at about this time was in Leicester and one of the issues at the trial was whether it was published in the County of Leicester. Seditious libel was capable of being established, as was criminal libel, without proof of publication.¹¹ Of the four judges, Abbott, C.J., Best, Holyrood and Bailey, JJ. two of them held that there was sufficient evidence to give rise to an inference of publication in Leicester to enable the case to be left to the jury, another, Best, J., held that if the envelope had been sealed when delivered in Leicester it was published there and another, Holyrood, J., said that the only necessary proof of publication was publication somewhere.

25 There were statements made in some of the judgments that the publication of a libel does not mean actual communication of the contents of the paper or manifestation of the content. More significantly, however, if *Burdett* is capable of being applied to case of defamatory civil libel rather than being confined to seditious libel, then it runs contrary to a long line of authorities upon which the plaintiff relies and to which I will shortly refer. *Gatley* treats *Burdett* as a case concerning criminal libel, stating¹²:

“The crime must be committed within the jurisdiction which means that the communication of the libel must be made to persons in England or Wales, no matter where the author or publisher is located.” (My emphasis.)

¹¹ See *R. v. Paine* (1695) 5 *Modif.* 163; *R. v. Williams* (1810) 2 *Camp.* 506.

¹² Paragraph 22(1) (9th edition).

26 The 1985 Royal Commission on Criminal Libel supported the view of *Gatley* stating that:

“The essence of the harm caused by communication of false defamatory information concerning third parties is the dissemination of that information in England or Wales. ... that damage cannot be done until dissemination is effected, that is, when communication is complete; and where that communication is completed in another country the damage with which the offence is concerned must generally take place in that country.”¹³

27 Counsel for the plaintiff argued that the judges in *Burdett* confused the issue of what was sufficient evidence to prove publication and what actually constituted the publication. In that way, it was argued that the sale of books or newspapers, or the delivery of a letter, constituted only prima facie evidence of publication. This was so because a sale or delivery gave rise to an inference that the matter is or would be read by the recipient and therefore communicated. Thus the contention was that the majority of the judges in *Burdett* fell into error in failing to appreciate that delivery of a document does not constitute publication but is merely evidence of it. It may be that this is a way of reconciling *Burdett* with strong authority to the contrary, that is that it is manifestation or communication which constitutes the publication, not difficult to infer from evidence of delivery. When *Burdett* has been cited in texts, it is for the proposition that in the case of seditious libel it is uncertain whether composition of the material with the intention that it be published, but without publication, can constitute the offence.¹⁴

28 Counsel for the defendant relied upon the *Duke of Brunswick* case. That case involved a case of libel in respect of a newspaper published more than 17 years before the action was brought. The statute of limitations defence was met by the argument that it was negated by proof that a single copy had been purchased from the defendant for the plaintiff by the plaintiff’s agent within the period of six years.

¹³ Paragraph 7.31.

¹⁴ See *Halsbury* 4th ed. Volume 11.1 paragraph 90, *Russell on Crime* 9th ed. 88, *Archbold* 27th ed. 1113, *Smith and Hogan: Criminal Law* 8th edition 760.

The relevant newspaper was the *Weekly Dispatch*... The report sets out the substance of the libel that supported the first count and indicates that two copies of the newspaper containing the libel set out in the first count were produced. It appeared to have been published in 1930. One copy had been obtained for the British Museum, the other had been purchased in 1848 from the newspaper office of the defendant by the plaintiff's agent, that is, a person sent by the plaintiff to make the purchase and who had handed on the paper to the plaintiff. It had been put that those facts did not constitute a publication. Denman, C.J. did not agree and left the matter to the jury. In a motion for a new trial, the argument was advanced that the publication relied on was the sale of a copy of the paper to a person sent by the plaintiff to procure it who would have carried it to the plaintiff, this being argued to be a sale to the plaintiff himself and not a sufficient publication as to sustain a civil action for damages. The court stated:

“The defendant, who on the application of a stranger, delivers to him the writing which libels the third person publishes the libellous matter to him, although he may have been sent to procure the work by that person.”

This is the passage relied on by the defendant here. However, the Court went on to say:

“So far as in him lies he lowers the reputation of the principal in the mind of the agent, although that of an agent is as capable of being affected by the assertions as if he were a stranger.”

29 It seems to me that the language there used is concerned with delivery affecting the mind, that is, the inference was drawn that it was read. Having regard to the language used, and to say the least unusual the circumstances of the case, it is not a commencing authority for the proposition.

30 An examination of the leading texts shows that no major texts on defamation cite *Burdett* (or for that matter *Duke of Brunswick*) as authorities for the proposition advanced by the defendant with respect to publication. See *Gatley*¹⁵, *Tobin and*

¹⁵ 9th edition.

Sexton: Australian Defamation Law and Practice; Duncan and Neill on Defamation; Brown: Law of Defamation, Canada; and Gillooly: The Law of Defamation in Australia and New Zealand. The last does not cite *Burdett* at all.

31 The plaintiff claims that their researches have failed to reveal any case in which *Burdett* or *Duke of Brunswick* are cited for the proposition advanced by the defendant and I note that counsel for Dow Jones did not cite any other supporting authority for the proposition. Instead he focussed more upon the effort to distinguish the long line of authority relied on by the plaintiff. *Duke of Brunswick* seems only to have been cited as authority for the proposition that each separate publication is a separate wrong. Moreover, the House of Lords in *Browne v. Dunn*¹⁶ (a well known case concerning the obligation to put allegations forming part of the opposite case to witnesses when being cross-examined), with respect to the evidence of one Mrs Cook who had signed a document instructing her solicitor to appear in court to seek to bind over Mr Browne to keep the peace, (Mrs Cook gave evidence she had not read the document), Lord Herschell took the view that there was no publication to her of its contents if she did not read it, but if she did read it she was in the same position as that of the other clients of the defendant who had read it and signed it.

32 In this case the plaintiff complains of publication of part of the “*Unholy Gains*” article in Victoria only, to those of the defendant subscribers in Victoria who viewed the article on computer screens after downloading it from the Internet and also those who received and read the hard copy edition of *Barrons Journal*... It would not be in dispute that the number who are likely to have viewed the article on computer screens in Victoria, including persons significant in business and commerce, is probably in excess of 300 and with respect to the hard copy edition of *Barrons Journal*, probably about 14. The primary publication in Victoria may be relevant to the question of damages if the case proceeds. The plaintiff has confined his case of publication to the Victorian jurisdiction. Senior counsel for the plaintiff, relied on

¹⁶ (1894) (H.L.) 6 R. 67.

this fact to distinguish this case from *Diamond v. Sutton*¹⁷ and *Eyre v. Nationwide News*¹⁸.

33 The defendant has not advanced any argument to the proposition that printed copies of the article were published in Victoria, concentrating his reference to that on aspects of the “gateway” argument.

34 The plaintiff’s argument is that actionable publication does not occur unless and until a defamatory meaning is conveyed to a hearer or a reader. Counsel’s submission commenced its citation of authority with a reference to the statements made by Isaacs, J. in the High Court in *Webb v. Bloch*¹⁹, “To publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle.” See also Williams, J. in *Amann v. Damn*²⁰, citing Lord Hobart. Similar language was used in *Boorman v. Hill & Co.*²¹ (also a libel case, as was *Webb v. Bloch*). I cite from the reasons for judgment of the Master of the Rolls, Lord Esher:

“The first question is, whether assuming the letter to contain defamatory matter, there has been publication of it. ‘What is the meaning of publication’? The making known of the defamatory matter after it has been written to some person other than the person to whom it is written. If the statement is sent straight to the person to whom it is written then there is no publication of it; one cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter was not communicated to anyone but the person to whom it is written, then there is no publication of it.”²²

In the same case, Lopes, L.J. stated, “What is meant by publication? Communication of the defamatory matter to a third person.” In that case the letter was directed to the plaintiff’s firm but opened and read by a clerk.

17 (1866) L.R. IX 130 at 131

18 (1967) N.Z.L.R. 851.

19 (1928) 41 C.L.R. 331 at 363.

20 (1868) C.B.(N.S.) 597.

21 (1891) 1 Q.B. 524 at 527

22 At 529.

35 Reliance was placed upon the decision of this Court in *Beitzel v. Crabb*²³. This was a case concerning publication by the defendant by adoption and repetition outside Parliament of words spoken by him in the Parliament and published in the media. In that case, the court relied upon statements in *Gatley*²⁴ to the effect that by publication is meant the making known of the defamatory matters to some person other than the person of whom it is written and stated (this was a case of slander):

“Publication may be effected by any act on the part of the defendant which conveys the defamatory meaning of the matter to the person to whom it is communicated. The slander and damages lie on the perception of the hearer’s of such communication.”

In *Jenner v. Sun Oil Company Ltd.*²⁵ the court considered a claim for damages by a plaintiff resulting from defamatory words spoken on a broadcast originating in the United States of America and alleged to have been heard in Toronto. In allowing service out of Ontario of the relevant writ on the basis that the action (a) was for a tort committed within Ontario, the court concluded that the essential feature of the tort of defamation was the publication of the defamatory words to a person other than the plaintiff. I note that McRuer, C.J. H.C. stated that “the tort consists in making a third person understand actionable defamatory matter.” I observe that for the purposes of the *forum non conveniens* argument in that case and in carrying out its duty of balancing various features of the case in order to do justice, the Court concluded that the inconvenience of the defendants in coming to Ontario to defend the action could not be so great as the inconvenience of the plaintiff if he was compelled to go to the United States of America to assert his rights.

36 Reliance was placed on a number of other cases to which I do not propose to make extended reference. See *Toomey v. Mirror Newspapers Ltd.*²⁶ (a decision of Hunt, J., a

²³ (1992) 2 V.R. 121 at 127.

²⁴ 8th ed. at paragraph 222.

²⁵ (1952) Ontario Reports 240.

²⁶ (1985) 1 N.S.W.L.R. 173 at 177(f).

greatly experienced defamation judge), following by *Webb v. Bloch*²⁷; *Jones v. Amalgamated Television Services*²⁸ (the same judge stating “Publication takes place where an imputation defamatory of the plaintiff has been communicated to some person other than the plaintiff himself”, not founding any part of his reason upon delivery simpliciter but upon communication); *Fleetwood v. Curley*²⁹; *Amman v. Damm*³⁰; *Jones v. Davers*³¹ (slander spoken in a language unintelligible to the auditor is not actionable); *Sadgrove v. Hole*³² (with respect to a postcard sent by post, it was stated by the A.L. Smith, M.R., “It is clear that he did not prove any publication of a libel on him until the postcard got into the hands of the builder, because then for the first time could any knowledge arise as to the person to whom the postcard referred.); *Bata v. Bata*³³ (a case of a defamatory circular letter posted abroad was addressed and published to third parties resident in London in which it was stated by Scott, L.J., citing from Lord Esher in *Hebditch v. MacIlwane*³⁴: “The material part of the cause of action in libel is not the writing, but the publication of the libel”); *Lee v. Wilson & Ors*³⁵ per Dixon, J: “It is the publication, not the composition of a libel, which is the actionable wrong. Often the person receiving the publicity is not the writer. Injury done by libel arises from the effect produced upon its readers.”; *Gambrill v. Schooley*³⁶ (a case concerned with the dictation of a defamatory matter to a confidential stenographer where Pearson, J. relied upon statements made in the then current edition of *Odgers on Libel and Slander* to the effect that publication was the communication of the defamatory words to some third person going on to state that

²⁷ Above.

²⁸ (1991) 23 N.S.W.L.R. 364.

²⁹ (1619) Hob. 267 at 268 (cited by Williams, J. in *Amman v. Dunn* (1860) 8 C.B. (New Series) 5497 at 600.

³⁰ Above at 600.

³¹ (1597) Cro.Eliz. 496.

³² (1901) 2 K.B. 1 at 5.

³³ (1948) W.N. 366.

³⁴ (1984) 2 Q.B. 54 at 61.

³⁵ (1934) 51 C.L.R. 276.

³⁶ Court of Appeals of Maryland 1901 and 48 Atlantic Reporter 730.

the writing of a defamatory letter coming into the hand of a third person to be read who does not understand and cannot read the language, does not constitute publication of the libel. After referring to the statements of Lopes, L.J. in *Pullman v. Walter Hill*³⁷ Pearson, J. went on to say

“Appellants' counsel, in his brief, says with equal clearness and accuracy ‘Publication, in the law of libel and slander, means the transmission of ideas and thoughts to the perception of a person other than the parties to this suit.’”

These authorities (and others not necessary for me to revisit) were relied upon by senior counsel for the plaintiff who contended, perhaps non-contentiously, that it was not the writing but the publication of the article which is actionable. He argued that merely placing the article on the defendant’s Web server and making it available for downloading did not constitute “publication” because until the article is downloaded and the defamatory meanings were conveyed to some person, the defendant was in the same position as the person “who shouts aloud defamatory words on a desert or moor when no one hears them”³⁸. In the same way, he argued that no publication occurred at the point of time where the subscribers’ Web browser requested the article because at that point no defamatory meaning was conveyed to the subscriber. Thus he put it that publication only occurred once the article was displayed on the subscribers’ computer screens and it was only then that the publication was in a form which conveyed the defamatory meanings to the subscribers in Australia who downloaded the article. Other authorities referred to in respect of this proposition were *Gorton v. ABC*³⁹; *Pindling v. National Broadcasting Corporation*⁴⁰; *State ex rel Advance Dictating Supply Inc. v. Dale*⁴¹.

³⁷ Supra.

³⁸ Citing from *Odgers: Libel and Slander* referred to in *Gambrill v. Schooley* (above).

³⁹ (1973) 22 F.L.R. 181.

⁴⁰ (1984) 49 O.R. 58 (authorities for the proposition that television broadcast is published in any place where the signals are received).

⁴¹ (1974) 524 P(2d) 1404 (a case in which a defamatory statement was made over the telephone by a person in the State of Florida and was held to be published in the State of Oregon where the other party was situated).

37 Causes of action involving conduct in contravention of the *Trade Practices Act 1974* constituted by representations made by telephone to a person outside Australia which were heard by the recipient within Australia are representations made within the jurisdiction. See *Paper Products v. Tomlinson (Rochdale) Ltd. (No. 2)*⁴².

38 Counsel for the defendant dismissed these authorities as being inapplicable to the technology and wonders of the modern Internet for the reasons already adverted to by me. However the case of *Digital Equipment Corporation v. Alta Vista Technology Inc.*⁴³ is not so easily diverted, a case dealing with Internet use in which it was stated:

“Using the Internet under the circumstances of this case is as much knowingly ‘sending’ into Massachusetts the allegedly infringing and therefore tortious uses of Digital’s trademark as it is a *telex, mail or telephonic transmission*; the only difference is the transmission is not singularly directed at Massachusetts, in the way that a letter addressed to this State, or telephone or fax number with a Massachusetts area code would be. But ATI ‘knows’ that its Website reaches residents of Massachusetts who choose to access it, just as surely as it ‘knows’ any lateral telephone call is likely to reach its destination. And it presumably ‘knows’ the context of its Website. ATI’s is a corporation whose primary business is providing Internet software; it is charged with the knowledge that its Website is accessible through the Internet in Massachusetts. It not only took no steps to prevent the alleged infringement for reaching this State’s residents – assuming there were steps to take – it plainly intended to market its wares here.”

39 Not surprisingly, Mr Sher relied upon *Digital Equipment* case on the basis that Dow Jones’s position was no different to Alta Vista technology in that, like that defendant, it (a) procured subscribers to its Website; (b) in relation to paying subscribers within Victoria who viewed the article, the defendant deliberately entered into contracts with them for consideration to provide them with access to the defendant’s Website; (c) in relation to trial subscribers in Victoria, the defendant voluntarily chose to give them access to its Website; (d) the defendant therefore knew its Website would reach Victoria just as much as a telex or fax would; (e) the defendant placed the

⁴² (1993) 44 F.C.R. 485.

⁴³ 960F Supp. 456 (D.Mass. 1997).

words on the Web server when part of the words were intrinsically concerned with a Victorian matter, namely the Goldberg allocations.

40 There were also admissions made concerning any steps capable of being taken to cut off the words from reaching Victoria, the so-called “firewall”.

41 Mr Robertson relied on the unreported decision of Simpson, J. of the Supreme Court of New South Wales in *Macquarie Bank v. Berg*⁴⁴, her Honour there expressing the view that it was plain that once published on the Internet, material might be transmitted anywhere in the world as an Internet connection. It must be said there was no evidence about this before Simpson, J. and, having regard to the evidence I have heard and read, the accuracy of the statement may be doubted, although it would seem that her Honour was using the word “published” in a general way without having in mind at all the Internet subscription service here involved. As I have earlier indicated, this case is not concerned with the World Wide Web because Dow Jones only puts it on for subscribers or trial subscribers. It limits access and thereby limits it from the world. Moreover, if any contractee to Dow Jones downloads, that reader could not put the material on his, her or its Website on the World Wide Web without breach of copyright; at least it must be said that that appears to be the better view.⁴⁵ Moreover, that case was an application of an injunction, a discretionary remedy her Honour declined to grant in the circumstances prevailing. The refusal to grant an injunction which directly stifles free speech is unremarkable in the law of defamation. The claimed stifling of it by the virtue of the risk of awards for damages for defamatory statements, which is a feature, in my judgment, of the defendant’s arguments, is a very different matter. It is seems to be true that her Honour did address the undesirability by way of injunction superimposing the law of New South Wales in a case of an Internet publication in every State, Territory and country of the World. This view was

44 [1999] N.S.W.S.C. 526

45 See the discussion of this aspect in the helpful and well-researched article by the Melbourne Law School academic Richard Garnett in an article published in 23 University of New South Wales Law Journal, (2000) 105: “Are foreign Internet infringements beyond the reach of the law?”

warmly embraced by Mr Robertson for the defendant because it accords with the defendant's policy imperative to have its rights determined in a United States in court and in no other place. The opinions of her Honour were not, however, necessary for her decision, which was based upon sound principles in relation to the caution with which injunctive relief should be given, particularly at an interlocutory stage. Although it is not absolutely clear, it also appears that the application for injunctive relief was made *ex parte*.

42 Mr Sher strongly attacked the submission of the defendant/applicant (paragraph 10) that any downloading of the article which occurred in Victoria was the result of independent actions for which Dow Jones should not be held responsible. He argued that the downloading was a calculated and intended consequence of the defendant procuring subscribers to its Website from Victoria and placing the article on its Web server. In that context, he put it, it was irrelevant whether the article was pushed or pulled because it was published to existing or new subscribers to the defendant's Website and the defendant had the capacity to prevent publication of the matter to them.

43 Mr Sher appeared to agree that the position of the defendant was similar to the operator of a library, which publishes a book when it allows a member of the library to borrow the book from the library. See *Vizetelly v. Moody Select Library*⁴⁶, a case relied on in a related respect by the defendant. He also appeared to accept that the position of the library is an accurate analogue to the placement of files on a Website served by the defendant and making them available for downloading by its subscribers. I question, however, the potency of the library analogy. Mr Robertson had, in effect, argued that in the Internet context a customer was like a customer with a library card who went to New Jersey to borrow the book, borrowed it in New Jersey but took it home unread and read it in Victoria. This was a key element in his argument. To my mind, however, it is just as persuasive to say that in the case of the

⁴⁶ [1902] Q.B. 170.

Internet the library subscriber has entered into an arrangement with the library that upon the request being made by the subscriber for the relevant book, the library agrees to send it to him in Victoria, rather like the delivery by a mobile library based in Sydney to a New South Wales country town. Within this context the plaintiff was seeking to establish that there could not be any question of innocent dissemination arising, because the Dow Jones controlled the whole process of publication from the procurement of subscribers in the composition of the article and its placement on the server. It was Dow Jones, he argued, which was responsible for composing the article, using it and making it available . The real point of this part of the plaintiff's case was that the publication of the article to persons in Victoria who read it was the intended natural and probable consequence of all of the acts of the defendant alleged in paragraph 3AA of the further amended statement of claim and that the defendant was therefore liable for the publications which occurred in Victoria. He said it was entirely foreseeable and to be expected that the article about the plaintiff, a prominent Victorian resident, would be published in Victoria and that in publishing the article the defendant was author, editor, printer, publisher and librarian. He dismissed the attempts in the Hammond and Clarke affidavits to assert that there was no publication in Australia but publication in New Jersey (I have already indicated that those witnesses are not in a position to express opinions of that kind) as completely wrong and unsustainable because no defamatory meaning was conveyed to the minds of anyone in New Jersey and no damage occurred in New Jersey. It was also submitted by the plaintiff that the Court could infer that with respect to the print editions that they were read by the subscribers. This seems to me to be reasonable as it seems to be unlikely that anyone purchasing such a large magazine at such cost would not bother to read it. There is sufficient evidence for the present purpose of the supply of print copies to five or more subscribers.

44 Mr Robertson's submission was that the question of jurisdiction here raised has not been the subject of previous decision. It was this belief that presumably led him to remind me more than once that I held the fate of freedom of dissemination of information on the Internet in my hands. Mr Robertson was, however, incorrect in

believing that this matter had not been addressed by other courts. In *Lee Teck Chee & Anor v. Merrill Lynch International Bank Ltd.*⁴⁷, in a case of a claim arising out of material placed on a newspaper Website in Singapore. The plaintiffs had obtained an ex parte order for an injunction against the defendant which the plaintiffs alleged had spoken and published in the presence of reporters of various newspapers and journals in Singapore words and statements that were defamatory of the plaintiffs. The defendant moved to have the process set aside claiming the court did not have jurisdiction over the subject matter of the plaintiff's claim within the meaning of the relevant local *Judicature Act* and other grounds.. Nathan, J. held that the alleged defamatory words had been spoken in Singapore and publication, being an essential ingredient of the tort of defamation, had not taken place within the jurisdiction of the Court. The alleged libel had been published in the Straits Times and Business Times and printed for publication and sale in Singapore. In the case before the Court there was no evidence that those newspapers were permitted to be imported, sold, circulated and distributed within Malaysia within the meaning of the relevant *Publications Act* and there was accordingly no publication in Malaysia of the impugned articles in the newspapers.

45 The publications had, however, been put on the Internet and it was held that there was no evidence that any person within the jurisdiction had accessed and read those publications on the Internet. Moreover, because of the inhibitions of the *Printing Presses and Publications Act 1984* there was a statutory inhibition on accessing them from the Internet as they were publishing newspapers embargoed under the Act. However, setting aside of the statutory inhibition, it appears from the Court's reasons that it viewed cases such as *Gorton v. A.B.C. & Anor*⁴⁸, *Jenner v. Sun Oil Co. Ltd.*⁴⁹ and *Bata v. Bata*⁵⁰ (cases referred to and relied on by the plaintiff in this proceeding) as being applicable had the facts been established, on the basis that

47 [1998] C.L.J. 188, High Court of Malaya (Nathan, J.

48 [1973] 2 F.L.R. 181.

49 [1952] D.L.R. 526.

50 See above.

specifically someone noted that in *Bata* publication was held to have taken place where the letter was read, namely in London. On the facts in this case there was no evidence of accessing the Internet in Malaysia and the words with respect to the slander allegation were not spoken to any person situated in Malaysia. Even so construed, that is drawing an inference that, had there been evidence that someone had accessed the material on the Internet there would be publication, the view, so expressed, would only have been obiter and, moreover, was controlled at the end of the day by his Honour's construction of the statute.

46 However, in the next case *Kitakufe v. Oloya Ltd*⁵¹, the Court assumed jurisdiction in a defamation suit arising out of publication in a newspaper "The New Vision", published in Uganda and which was republished on the Internet. The plaintiff was of African-Canadian descent having been born in Uganda, and the defendant was also African-Canadian born in Uganda. He worked as a reporter for "The New Vision" and wrote the article which was entitled "Uganda Doctor Arrested in Toronto"... It was later claimed in the proceeding that the article imputed he was fraudulent, dishonest and of bad moral character, unfit to practise medicine and not worthy of respect in his community and among his professional colleagues. There was considerable dispute between the parties about some of the substantive matters but the judge did not comment on the merits of the case when considering the motion for an order staying the proceeding which was brought on the basis that the action should have been brought in Uganda, that is, there was a *forum non conveniens* application made. The defendant argued that Uganda was a more convenient and natural forum, and that the proceeding had a real and substantial connection to Uganda. The judgment of Hume, J. sets out the various submissions made as to the facts said to support the proposition that the Uganda Court was better fitted to deal with the allegations, raising as they did issues of malice, ethnic rivalry, defence credibility and the expense and inconvenience involved for the defence credibility witnesses to travel to Canada. Reliance was also placed on the fact that the

⁵¹ Unreported, Ontario Court of Justice.

defendant was based in Uganda and had its assets there.

47 It is not necessary for me to examine in detail the arguments to and fro as to the forum, which suit had the most real and substantial connection and which was the most convenient forum, matters referred to by the judge. The Court rejected the defendant's argument that the forum of convenience was Uganda and concluded that it was not satisfied that the plaintiff would not be deprived of a legitimate personal and juridical advantage.

48 My reference to this case is not to merely add yet another case concerning *forum non conveniens* case, which turns on its own facts to the corpus of authority, but to identify it as a case which a superior court assumed jurisdiction over a defamation suit on the basis of access to the Website and its reception (that is, downloading) in Ontario, Canada.

49 The third authority is one which both counsel addressed, namely the decision of Moreland, J. in *Godfrey v. Demon Internet Ltd.*⁵². Mr Robertson described Sir Michael Moreland as a judge of vast experience in defamation matters. This was not a case involving international Internet matters. The plaintiff was a science lecturer resident in England and the defendant was an Internet service provider carrying on business in England and Wales. His Honour identified three of the principal facilities of the Internet as e-mail, the World Wide Web and Usenet. The case was primarily concerned with Usenet. Usenet (sometimes called Newsnet) is a facility connected with submissions by authors to readers around the world. The author submits his article to the Usenet and news server based at his local Internet Service Provider (ISP) who disseminates that posting via the Internet. Ultimately, it is distributed and stored on the news services of ISPs throughout the world who offer Usenet facilities to its customers. Internet use is worldwide and therefore can read and download the posting by connecting into their local ISP news services. According to the findings of Moreland, J. a posting is readable anywhere in the world by an Internet user whose

⁵² [1999] 4 All E.R. 343.

own ISP offers access to the news group in question. If one was a customer of a particular ISP, one may be able to access the posting on news groups by accessing that ISP's News server. Internet user requests the posting from the ISP's News server and copies are then transmitted by the News server to the user's computer where it can be held and downloaded. Thus a posting may originate from anywhere in the world entering the Internet through the author's own ISP through a succession of news servers, in some cases before arriving at a particular reader.

50 In this case the defendant carried a particular news group which stored postings for about a fortnight. An unknown person made a posting in that news group on an American service provider which came to Demon Internet Server in England. The posting which purported to be written by the plaintiff Godfrey, was a forgery and defamatory of him. Shortly after the posting, the plaintiff informed the defendant that the posting was a forgery and requested its removal within ten days. The defendant did not and it remained on the server until its expiry about two weeks later.

51 Godfrey brought proceedings for libel with respect to the period subsequent to his notification to the defendant of the fact of the forgery. The defendant relied upon a provision in the *Defamation Act 1996* that it was not the publisher of the statement and it had taken reasonable care in relation to the publication, and that it had not known or had reason to believe that its action had caused or contributed to the publication of the defamatory statement. Godfrey applied to strike out that part of the defence and the defendant contended it had not published the defamatory posting and there had been no publication within the meaning of the Act.

52 Moreland J. held that the transmission of a defamatory posting from the storage of a news server constituted a publication of that posting to any subscriber who accessed the news group containing that posting. It was here that the library analogy found voice. His Honour concluded that the defendant was not only the owner of the device through which the postings had been transmitted, but rather had published the posting whenever one of its subscribers accessed the news group and saw that

posting.

53 Mr Robertson was aware of this case because he addressed on it but claimed it was of no assistance because it did not involve the Internet but the Usenet. Moreland, J., stated that once publication was established the publisher was guilty of establishing the libel unless he could establish that he was an innocent disseminator. He noted that the statements of Lord Greene, L.J. in *Byrne v. Dean*⁵³ (a case relied on in a related context here by the plaintiff) that publication would depend upon the circumstances but that, by not removing the defamatory matter, the defendant made himself responsible for its continued presence in the place where it was put (in *Byrne v. Dean* on the notice board of a golf club). Moreland, J. (who was well aware of a number of the authorities relied on by Mr Robertson because he referred to them) stated:

54 “In my judgment the defendant, whenever it transmits and whenever there is transmitted from the storage of its news server a defamatory posting, publishes that posting to any subscriber to its ISP who accesses the news group containing the posting. Thus every time one of the defendant’s customers accesses ‘stock.culture.thai’ and sees that posting defamatory of the plaintiff there is publication to that customer.”

55 I note that his Honour specifically said “sees that posting defamatory of the plaintiff” which I deem to be equivalent to downloading in the analogous case.

56 Mr Robertson argues that the only point of issue is when, and therefore where publication occurs, he arguing that it occurs only when it is pulled off. Notwithstanding that, it seems to me that Moreland, J., even given the circumstances there prevailing, specifically found that publication occurred when the posting defamatory of the plaintiff was seen after posting.

57 Moreover, there have been a number of decisions in the United States which support

⁵³ [1937] 2 All E.R. 204 at 212.

the conclusion that jurisdiction is to be found at the place of downloading applying the Internet decision of the Supreme Court of the United States in *Calder v. Jones*⁵⁴ where it was concluded that jurisdiction may be exercised over a foreign defendant who directs his or her defamatory message at the forum and the plaintiff suffers harm there. Subsequently, personal jurisdiction over a defendant was exercised based on the defendant's operation of a Website accessible in the forum where harm was caused to the plaintiff in the forum. See *Edias Software v. Basis International*⁵⁵, *Telco Communications v. An Apple A Day*⁵⁶; *Blumenthal v. Drudge*⁵⁷; *Brochan v. La Fontaine*^{58, 59}

58 There appear to have been some cases to the contrary of this proposition where jurisdiction was declined because it could not be demonstrated that the defendant intended residents of the forum to be able to access the material claimed to be defamatory. However, it is be noted that if the correct view of decisions that preceded the establishment of the Internet is that the place of defamation is the jurisdiction where the defamatory material was published and received by the plaintiff, rather than where it was spoken or written, (which the reference to authorities which I have made on balance establishes), the U.S. cases to which I have referred are consistent with them, as are the three particular decisions I have specified.

59 I move to attempt to draw together this mass of material, voluminous authority (to a relatively modest proportion of which I have found it necessary to refer) and elaborate argument into a meaningful conclusion. The first matter to address is whether or not the pre-Internet law was that with respect to defamatory material, it was published at the time and in the place where it was made manifest in a form

54 (1984) 465 U.S. 783.

55 [1996] F. Supp. 413 Arizona.

56 (1997) 977 F. Supp. 404 Virginia.

57 (1998) 992 F. Supp. 44.

58 [1999] U.S. Dist. Lexis 8253.

59 I am indebted for these references to the article of Mr Richard Garnett previously referred to.

capable of being comprehended by a third party, or whether it was published when it was delivered “whether its contents were understood, comprehended or known notwithstanding”... I emphasize that the question is in this case not simply where was it published but was it published in the State of Victoria? Imbedded in either or both of those questions is the critical issue which is where and by whom it was published for the purposes of the law of defamation. It is not a question of where a scientist believes it was published for scientific purposes, or an executive of the defendant, nor for that matter the plaintiff himself. I have already referred to the attempt in the defendant’s experts’ affidavits to hijack the answer to the question by claiming it was published in New Jersey and not Victoria for legal purposes.

60 I have concluded that the law in defamation cases has been for centuries that publication takes place where and when the contents of the publication, oral or spoken, are seen and heard, (i.e. made manifest to) and comprehended by the reader or hearer. I reject the defendant’s submissions that the *Duke of Brunswick* case or *Burdett* established then or now any different rule for publication for the purposes of civil defamation. My preference is for the long and steady line of authority referred to over these errant authorities, asked by Mr Robertson to bear a greater burden than they can support alongside the mainstream of long applied and respected cases. I therefore conclude that delivery without comprehension is insufficient and has not been the law. On this basis, then, I uphold the plaintiff’s contention that the article “*Unholy Gains*” was published in the State of Victoria when downloaded by Dow Jones subscribers who had met Dow Jones’s payment and performance conditions and by the use of their passwords. It is also absolutely clear that Dow Jones intended that only those subscribers in various States of Australia who met their requirements would be able to access them, and they intended that they should.

61 With respect to the print copy sold, the same proposition must apply although none of the Internet features are relevant. Not only, in my judgment, is that the law, but I am also of the view that it is a correct and just law, and that the arguments advanced against it are primarily policy-driven, by which I mean policies which are in the

interests of the defendant and, in a less business-centric vein, perhaps, by a belief in the superiority of the United States concept of the freedom of speech over the management of freedom of speech in other places and lands. It is, of all concepts, a simple and just one that no-one could be heard to complain of a publication that diminishes reputation unless its contents, the very features that lead to the arguable diminution in reputation and standing, are known and understood by readers. Publication in this context is neither a scientific proposition nor a narrow philosophical debate. It is dealing with on the ground realities or, perhaps in this case, in cyberspace realities as well.

62 But even if I were not of the view that publication only occurred upon the contents of *Barrons Online* being downloaded by readers, I believe I would be of no different opinion that there has been publication in Victoria, basing that conclusion as being one reasonably open, having regard to the way in which the defendant formulated its case.

63 The key submission of the defendant is that the Internet publication of “*Unholy Gains*” occurred when and where the material was uploaded in New Jersey, that is, when it was pulled from the server in New Jersey by the request emanating from the Victorian Web browser. I ignore for the present purposes what appears to me to be a fallacious statement that the downloading was the result of an independent action for which Dow Jones cannot, to use counsel for the defendant’s language, be “properly responsible”. The denial of the plaintiff’s case that it is only published when it is made intelligible to a third party, by showing it and making it comprehensible is managed by an analysis of the manner of function of the unique and revolutionary Internet.

64 I have, in the course of dealing with the arguments, made some observations about some misleading aspects of the “buying the book and taking it home analogies”, doubtless, to some extent drawn from statements which at least made an appearance in the reasons of Moreland, J. in *Godfrey*, that were doubtless employed to assist the mind of any judge to understand the proposition. I will not re-visit the substance of

the way in which the technical steps of the operation of the Internet in this context operate. Much of it is dominated by the contrast between pull and push technology which may highlight differences between some of the features of the Internet such as e-mail and the World Wide Web but does not provide an answer to the legal inquiry as to when and where the words are published.

65 Mr Robertson's argument was that the act of delivery, on which he relied, was completed without the necessity for understanding as soon as the material was uplifted as a consequence of the Web server request. He did not contend that it was published or delivered whilst quietly sitting in the Web server. Of course, neither at that time nor on the instance of uplifting was it capable of being understood, but his argument was that at that time of uplifting it was delivered. One accepts that delivery of an electronic document onto the plaintiff's Website will only occur if the electronic request is met and the electronic message is sent. It may be that the Web server cannot distinguish between the location of the Web browser seeking to access the Web page or the search engines which were used in conjunction with the hyperlinks necessary because of the quantity of material.

66 I have referred to counsel's assertion that those seeking to access the Website were "publishing it to themselves".. In one way this is always so even when one buys a book. The question is still, however, where and when is it published? The contrast between e-mail and the Web aspect of the Internet was defined as being a contrast between the absence of choice about the reception of e-mail and the situation in the case of accessing the Website in which case the choice is made not by the sender but by the one seeking the access. The claim that those pulling the Web browser publish it for themselves by seeking it out and ordering it confuses acquisition and publication. There is only publication, as I have indicated, when it is published to a third party. Moreover, I do not accept the proposition that the Web server is totally passive, as was pressed strongly by Mr Robertson. The Web server's technology is a participant in the process. Two activities are required. The browser request and the server's response. Moreover, in the case of Dow Jones *Barrons Online* site, the

server's response will be to knock you back if you use the wrong password or you have a delinquent account. It is not, as he suggested, just a repository and is not just a "pull" method. Dow Jones sets conditions specifically applicable to each client and its Web browser. The "pull" technology only operates on the defendant's terms. When the so-called knock on the door comes it is a Web server that opens.

67 Without their Web servers and electronic co-operation, nothing will occur. If the computers were down or turned off nothing will occur. But assuming the request is decoded and accepted, the response in the form of electronic bursts is made. In the same nanosecond it enters into cyberspace in New Jersey and arrives in Victoria. In my view, for the law's purposes, the operation of this phenomenon is not a divisible operation. If understanding or comprehension of the message is not a feature of publication, as the defendant claims, and that the act of delivery is the essential characteristic of publication, the better view would appear to be that the information is published in both places at the same time. Not perhaps at the same time for a scientist counting in milli-seconds but, for the law's purposes, no distinction can be sensibly drawn. If this is correct, even setting aside the view I have expressed that publication requires manifestation and comprehension, then, on the defendant's concept of publication, it is as much published and delivered in Victoria as it is sent for delivery from New Jersey. However, I decide this case on the basis that publication takes place on downloading.

68 Mr Robertson claims that the place of publication was in New Jersey and no other place, as I understood his argument, claiming that that follows from the unchallenged expert evidence. I reject this proposition. He claimed that the World Wide Web was an information repository and delivery system unlike any other and which defies traditional analysis. That may be so, but the law must nevertheless cope with it and one of the things about this is that this is an Internet publication, not a World Wide Web publication.

69 In my judgment, undue concentration was placed upon "the force of the searcher's own action", the fact that it is his click that rests on the server and brings back a copy to the screen located in Victoria, that is, that he pulls the information off the server in New Jersey. It may be that these are meaningful descriptions of what occurs but none of them produce the consequence contended for.

70 As I have indicated the claims of the scientific experts do not control the legal context nor the proper conclusions. Bold assertions that the Internet is unlike other systems

do not lead to the abandonment of the analysis that the law has traditionally and reasonably followed to reach just conclusions. The trumpeting of cyber-space miracles does not add much to the sphere of debate here and occasionally degenerated into sloganeering, which decides nothing. Dr Clarke and Mr Hammond's affidavits merely describe the process and do not, challenged or unchallenged, dominate the legal conclusions which must accommodate much more than the employed scientists' assertions.

71 Mr Robertson's arguments, attractively presented as they were, became enmeshed in the pop science language of "get" messages, "pulling off", "firewalls" and were also disfigured by the statement that the Dow Jones had no capacity to control the pulling off of the information by the get message. It clearly had. The suggestion is, because the recovery of the article awaiting the knock of the Web server's door depends on the independently exercised will of the user, that the sending of the message and the obtaining of the information all occur in New Jersey. In my judgment, the information is released and received virtually instantaneously and the attempt to separate them for the law's purpose is a fallacy. The fact that the relevant web-server responds to a request simply does not produce the result that publication takes place only in the place where the request is received. Reliance upon the Clarke and Hammond affidavits does not produce the legal consequence argued for although both, as I have already said, attempted to travel beyond their field of scientific expertise and into the realm of proper legal conclusions without success. At one point, Dr Clarke purported to give expert evidence as to what would be the effect of my decision on the world, if it did not establish the State of New Jersey as the place of publication.

72 The defendant's argument really is that liability for cyber-space defamation must be determined by the jurisdiction of the Website. It was virtually admitted that the reason for this is the claimed policy of the law to assist free speech, apparently including defamatory free speech resorting to some statements by Lord Keith in

*Derbyshire County Court v. Times Newspapers*⁶⁰.. Counsel also prayed in aid the decision in *Ballina*⁶¹ to little effect since the reason for the decision in *Ballina* was because of the possible inhibition upon the key electoral process by the spectre of being sued for what was said in the course of the electoral democratic process that decided it. It is a case about freedom of speech in elections, the core democratic process.

73 It has never been suggested that that the professional publisher of a magazine like *Barrons* was exempt from the law of defamation and the defendant did not suggest so here. The cases do not support the elusive policy considerations articulated by counsel for the defendant as proper to dominate the forum issue. To say that the country where the article is written, edited and uploaded and where the publisher does its business, must be the forum is an invitation to entrench the United States, the primary home of much of Internet publishing, as the forum. The applicant's argument that it would be unfair for the publisher to have to litigate in the multitude of jurisdictions in which its statements are downloaded and read, must be balanced against the world-wide inconvenience caused to litigants, from Outer Mongolia to the Outer Barcoo, frequently not of notable means, who would at enormous expense and inconvenience have to embark upon the formidable task of suing in the USA, with its different fee and costs structures and where the libel laws are, in many respects, tilted in favour of defendants, or, if you will, in favour of the constitutional free speech concepts and rights developed in the USA which originated in the liberal construction by the courts of the First Amendment. Dow Jones controls access to its material by reason of the imposition of charges, passwords and the like, and the conditions of supply of material on the Internet. It can, if it chooses to do so, restrict the dissemination of its publication of *Barrons* on the Internet in a number of respects. For that matter, the freedom to learn from the Internet of the statements of Mr Alpert in "*Unholy Gains*" is restricted to those who pay for it.

⁶⁰ (1993) A.C. 534.

⁶¹ (1994) 3 NSWLR 681.

74 As I have stated, it contended that in the age of globalization the rule for which the defendant argues is appropriate. I observe that Mr Robertson referred⁶² to the European Community Rules but there are matters in that respect which escaped his attention. Under the draft Hague Convention, a plaintiff will be able to recover the whole of the damages suffered by reason of defamatory Internet publication by suing in the courts of the State in which either the defendant (Article 3) or the plaintiff (Article 10.14) is habitually resident⁶³. Counsel for the defendant admitted his argument was “a business convenient” approach. This is not surprising since his instructions come from Dow Jones, whose interest in having any unpleasant litigation take place in New Jersey is too self-evident to require elaboration.

Mr Robertson advanced an argument which he called “the parish pump argument” critical of a statement made by Mr Sher that the article was written about a Melburnian, a citizen of another country and that the defendant did not bother to check up on the local laws of defamation before embarking upon publication. He attacked this relatively passing remark of counsel for the plaintiff saying that

“As a policy argument for the development of the common law, the heritage of many advanced nations, this invited an unacceptable degree of insularity ... To suggest that U.S. publications must not critically examine Australians except by reference to the defamation law in the State of origin or else erect a firewall to block that critical coverage – so that fellow Australians will not know what is being said about their compatriots elsewhere in the world, is not a proposition that a common law court should accept.”

75 This latter observation was directed presumably more to me than to Mr Sher. However, in my judgment, this submission misses the point because it is concerned to articulate high-minded concepts rather than address the critical legal issues. Counsel was free to say what he chose when deploring the possibility that the Court should reach a conclusion which threw a “cordon sanitaire” around the country to

⁶² T185

⁶³ *The Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, proposed by the Hague Conference on Private International Law, adopted by the special commission on 30 October 1999. See *Law of Defamation and the Internet* (doctoral dissertation by Dr Matt Collins of the Victorian Bar to be published by OUP in October 2001 Chapter 24.

prevent its citizens receiving information available everywhere else. But the claim reeks of overstatement. About these relatively self-indulgent submissions, the court says nothing, having neither the power or inclination to censor anything. The point simply is that if you do publish a libel justiciable in another country with its own laws (not mere copies of the U.S. law as the defendant's submissions appear to favour, perhaps because they are tilted in favour of the defendant), then you may be liable to pay damages for indulging that freedom.

76 Counsel for the defendant's submissions as to the horrors of the so-called "parish-pump" insular approach, strongly warned against, lacked the conviction and quality of his other contentions. Paradoxically, his submission, if accepted, produces the greatest insularity of all, namely that every hit on a U.S. Web-site that unearthed a defamatory statement simultaneously created the U.S. forum to decide the issue, if it arose. This was, I estimate, not so much driven by his argument that my decision ought to be informed by devotion to securing unchecked freedom of speech as his client's interest in securing the comfort of the U.S. forum in the event of any affronted foreigner, the subject of a Dow Jones publication, going to law.

77 The United States courts would generally exercise jurisdiction in defamation actions over defendants domiciled outside the jurisdiction of the court only where the defendant's conduct targeted the forum⁶⁴. Moreover, most American States have a single publication rule so that only one cause of action arises out of any single publication⁶⁵.

78 Many of the matters which were prayed in aid to support the policy imperatives urged on the Court also have a substantial role to play in Mr Robertson's submissions on the *forum non conveniens* issue. His claim that it is an attraction to litigation to be able to get global damages in New Jersey may or may not be true, depending on the circumstances. If it is, then plaintiffs can sue in the U.S.A. and

⁶⁴ See *Calder v. Jones*, supra.

⁶⁵ See *Collins*, paragraph 24.10 (Fns 30 and 31).

presumably are welcome to do so. It is quite another thing to say that everyone libelled on the Internet by a U.S.-based publication must sue in the publicist's domain and not in the place where the victim believes that his reputation lay and was damaged. Moreover, in this case the plaintiff is not interested in global damages. He confined his claim to publication in Victoria and has undertaken to the Court not to sue in the U.S.A., Israel or anywhere other than in the State of Victoria. This will also be a matter to which I will refer when dealing with the issue of *forum non conveniens*.

79 I see no purpose in elaborating my reasons on this aspect further. I conclude that the State of Victoria has jurisdiction to entertain this proceeding.

(B) The "gateway" argument

80 It may well be that the gateway argument advanced by the defendant would be treated by the defendant as having been substantially disposed of by my ruling that this Court has jurisdiction in this proceeding. I was not told so in the course of argument, however, and I therefore proceed to consider it. It is useful to set out the relevant provisions of Order 7 of the Supreme Court Rules. Part I of O.7 makes provision for when service out is allowed. Relevantly, it provides as follows:

"Part I – When Service Out is Allowed

7.01 *For what claims*

- (1) Originating process may served out of Australia without order of the court where –

...

- (i) the proceeding is founded on a tort committed within Victoria;
- (j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring;

...

7.02 *Indorsement on originating process*

- (1) Originating process served on any defendant out of Australia in accordance with this order shall, at the time of service on that defendant, contain an indorsement stating the facts and the particular paragraph of Rule 7.01 relied upon in support of such service.
- (2) If the originating process does not contain the indorsement referred to in paragraph (1) at the time it is filed, the plaintiff may, in accordance with paragraph (3), amend the originating process to include the indorsement.
- (3) The originating process shall be taken to be amended upon the filing by the plaintiff of a copy of the originating process with the indorsement included.
- (4) Upon the filing of an amended copy of originating process under paragraph (3) or at any later time, the Prothonotary on the request of the plaintiff shall seal a sufficient number of copies of the originating process as amended for service and proof of service.

...

7.05 *Stay, setting aside service, etc.*

- (1) The Court may make an order of a kind referred to in Rule 8.09 on application by a party served with originating process out of Australia.
- (2) Without limiting paragraph (1), the Court may make an order under this Rule on the ground –
 - (a) that service out of Australia is not authorised by these Rules; or
 - (b) that Victoria is not a convenient forum for the trial of the proceeding.
- (3) The Court may make an order under this Rule before an application is made under Rule 7.04 or before an order of the Court is made on such an application.

Rule 8.09 provides as follows that the Court may exercise its jurisdiction to

“(c) stay a proceeding –

on application made by the defendant before filing an appearance, whether conditional or not.”

claim could not be based on 701(1)(i) (that is because the tort was not committed in Victoria) but also because there was no evidence of damage within the jurisdiction caused by the defendant's publication in New Jersey. However, the statement of claim alleged damage founded upon the defamatory statements. It strikes me as an untenable proposition to say that damage within the jurisdiction cannot be presumed in the ordinary way from defamatory words even if they are published only outside the jurisdiction. Putting aside the fact that I have concluded that they were published within the jurisdiction for the relevant purpose, since it is not contested that downloading of the Internet publication did occur, the presumption of some damage to reputation from that part of the publication relied upon is a reasonable presumption. The submissions, however, focus more upon the fact that there had been a later amendment by which a claim for damages for publication in Victoria of the print copies of *Barrons* introduced a new and different cause of action which had not been notified to the defendant at the time of service.

82 The plaintiff contended that the defendant's submissions were founded upon the erroneous assumption that the plaintiff relied for jurisdiction only on the cause of action arising from the print publication, which was added by the first amendment of statement of claim after the proceedings had already been served. The defendant in effect relied upon the decision of Beach, J. in *Whinnen v. Cussons International Ltd.*⁶⁶ as applying to the present case as the amendment to the indorsement made after service produced a failure to comply with Order 7. There can be no doubt that the print publications comprise torts committed within the jurisdiction and it was never argued that they were not. But the plaintiff relies, as I understand the argument, upon the causes of action constituted by publication on the Internet and serving of the originating process containing an appropriate indorsement. If the plaintiff has complied with Order 7 in relation to one cause of action (which I conclude it has), it seems an irrelevant, indeed superfluous, argument to contend that he did not comply with Order 7 in relation to another cause of action added after service had

⁶⁶ Supreme Court of Victoria, unreported, 24th February 1998.

been effected. There is no doubt that Order 7 is concerned with service out providing (as in most jurisdictions) for the right to do so, without the need for recourse to the Court, an administrative mechanism to enable service out of Australia on foreign defendants in certain circumstances. Once the requirements of the Rule are met, the plaintiff can proceed against that defendant as it could against any other defendant.

83 The plaintiff did not have to comply with Order 7 in relation to amendments to the statement of claim, so long as they were made in accordance with the rules when each amendment was made. The subsequent amendments to add the cause of action founded upon the print publications does not, in my judgment, impugn the validity of the service in respect of the Internet publication. The argument seemed to be that service was invalid because it did not include the claim in relation to the print publications added later and that as a consequence the technicalities of the Rule were not complied with, and the technicalities were important. This was underpinned by the suggestion, as I understood the submission, that the rationale for the argument for the requirement that all causes of action, ultimately sought to be relied on, had to be included in the original long-arm jurisdiction cause of action to enable the defendant to decide whether it would submit to the jurisdiction, or ignore it, or make an application perhaps of a kind here now being made. I regard this argument as wholly without merit. The defendant has barely addressed argument in relation to the print publication the opposition to which will be founded on all of the standard defamation defences and some arguments about damages. 7.02 requires the originating process “to contain an indorsement stating the facts and the particular paragraph of Rule 7.01 relied upon in support of such service”... The indorsement is not intended to be a full statement of claim and its purpose is to give the defendant an appropriate opportunity to determine whether to object that the Court ought not to hear and determine the proceeding on the ground that the ground of the claim is not one within Rule 7.01(1). I view the indorsement on the writ in this case as containing all the relevant material facts. It made reference to the appropriate subparagraphs of Rule 7.01. It could hardly be doubted by the defendant that it was

being sued for defamation in respect of publication and damage in Victoria arising from the article “*Unholy Gains*”. The indorsement referred to the two relevant provisions of Rule 7.01(1), that is (i) and (j). On either basis, as I find, the proceeding was founded on a tort committed within Victoria and alternatively the proceeding is brought in respect of damage suffered wholly or partly in Victoria caused by a tortious act and omission occurring in New Jersey. The whole of the submissions made by counsel for the defendant make it clear that the basis upon which the suit was founded was well understood. It was seized on in order to obtain a ruling from a superior court as to the issue of the place in which publication takes place on the Internet. Mr Robertson’s benign references as to the thwarting of his objective in that respect in *Berezovsky v. Michaels*⁶⁷ (because of the want of any technical back-up evidence) makes it clear how well it was understood in this case what the nature of the plaintiff’s claim was. Once the writ was served on the defendant, not in dispute, the plaintiff was entitled under the Rules to amend the statement of claim and add other causes of action. He did this without leave pursuant to Rule 36.03 on 21st February 2001.

84 The plaintiff gave notice of that amendment. The defendant could have objected to it and made application under Rule 36.04 within 21 days to do so. It did not do this. The plaintiff also was entitled to amend the statement of claim with leave pursuant to Rule 36.01. Notice of that intention was given, the application which came before me was not opposed, and I made an order granting leave to amend the statement of claim on 20th April 2001 and the further amended statement of claim was filed on 24th April. That amendment was the one that clarified the details for the two causes of action already pleaded. In those circumstances, the decision of Beach, J. in *Whinnen v. Cussons*⁶⁸ was irrelevant. In that case, there was but a single indorsement, it was erroneous and did not comply with Rule 7.02 and there was only one cause of action. When the indorsement in *Whinnen* was amended, the plaintiff failed to serve

⁶⁷ (200) 2 All E. 986.

⁶⁸ *Supra*.

the amended indorsement on the defendant. Here, there has been no amendment of the indorsement, because none was necessary. The originating process when served complied with Order 7 and there was no embargo upon amendments, which were made in any event on notice. Furthermore, the “print” causes of action which seem to be covered by the general terms of the indorsement and thereby fall within Rule 7.01(1)(i).

85 Reliance was placed upon some statements in *Agar v. Hyde*⁶⁹, concerned with Criminal Order 7 of N.S.W. A fair reading of the observations of the court⁷⁰ would suggest that not everything need be contained in the originating process. Such a requirement is not in the Order. What is necessary is to include enough information to enable the defendant to make an informed decision. This is not a case where any further evidence was required.

86 At this point, nothing much has to be proved and it is the plaintiff’s allegations that must found compliance with Order 7. The trial about these matters does not take place at this stage. Accordingly, in my view there is no substance in the so-called gateway argument.

87 Before dealing with the substantial *forum not conveniens* argument, I propose to deal with, as a separate issue, the question of the plaintiff suing on part of the article only. It is true that there are some aspects of that which fall for consideration within the defendant’s formulation of its reasons why the State of New Jersey should be regarded as the convenient forum for the hearing of this action. But the matter was raised both in conjunction with the forum aspect and generally by the defendant and I propose to give it some brief attention.

88 It is self-evident that the plaintiff does not allege the whole article is defamatory of him but alleges that part of the publication “the words” are defamatory of him. The defendant contends the plaintiff “cannot pick and choose parts of the publication

⁶⁹ (2000) 173 A.L.R. 655 at 679.

⁷⁰ Paragraphs 50 to 54.

which, standing alone, would be defamatory". It is claimed that the defendant is entitled to have read and relied on as part of the case the whole of the article from which the alleged passages are extracted. However, the legal propositions so stated are neither the law of the State of Victoria nor, arguably, the law of the United States in all cases. Beyond doubt, the Court may access, and the plaintiff may in some cases be required to plead, parts of an article which, if they are omitted to be relied on, or pleaded, might leave the understanding of the words sued on to be erroneous.

89 The defendant's submissions derive from *Gatley*⁷¹, but were themselves selective, the very vice about which it complains in relation to the part of the article sued on by he plaintiff. The full text of paragraph 3.28 of *Gatley* is as follows:

"Publication must be taken as a whole. It follows from the fact that the context and circumstances of the publication must be taken into account that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away their sting. If 'in one part of the publication something disreputable to the plaintiff is stated, but that is removed by the conclusion, the bane and the antidote must be taken together'.. If that were not so it would be impossible to refute charges made against another person, since the refutation must, in practice, refer to the charges. In the case of a newspaper article or television or radio broadcast the defendant is entitled to have read as part of the plaintiff's case the whole of the piece from which the alleged libel is extracted. In *Charleston v. News Group Newspapers Ltd* the defendants published in their newspaper a photograph in which the heads of the plaintiffs, actors in a well-known soap opera, had been superimposed on the bodies of two persons engaged in sexual intercourse and which was accompanied by large headlines referring to the series in which they played and the characters portrayed by them. The article as a whole made it plain that the plaintiffs were in fact the victims of persons in Australia who had marketed a pornographic computer game from which the photograph had been taken. It was held that the article as a whole was incapable of conveying to the hypothetical reasonable reader the meaning that the plaintiffs had engaged in the conduct portrayed, or had cooperated in the creation of the photograph, despite the facts that many readers of a tabloid newspaper might have drawn such a conclusion by failing to read the article as a whole and that the House of Lords expressed sympathy

⁷¹ 9th ed. at 328.

with the plaintiff's position. Where the alleged defamation takes place in a broadcast it is perhaps even more likely that viewers or listeners may have missed the antidote, but the rule is the same and the defendant is entitled to have the programme taken as a whole.

90 This passage sets out what is commonly understood to be the position in relation to published articles, and the plaintiff will only be obliged to plead the whole article if the passages selected by him, standing alone, would lead to a misreading and misunderstanding of the meaning of the words that are relied on. A familiar situation, of course, is that the bane and the antidote must be taken together, the matter referred to by *Gatley*, and see my own examination of the relevant authorities in *Warne v. Herald & Weekly Times*⁷². If the surrounding material is irrelevant to understanding of the meaning of the plaintiff's complaint it may be omitted.

91 In the course of my reasons in *Warne v. Herald and Weekly Times*, I set out (and I do not here repeat) statements of Hunt, J. in *Gordon v. Amalgamated Television Services*⁷³ and other statements from *World Host Pty. Ltd. v. Mirror Newspapers Ltd.*⁷⁴ and *Kasic v. ABC*⁷⁵ in which Gowans, J. stated:

"It is sufficient for a plaintiff to set out the defamatory passages, provided its meaning is clear and distinct. But if the complexion of the imputation conveyed by the defamatory passages is materially altered or qualified by other passages in the article letter, in this case the interview, the plaintiff must set out the whole article or letter (or interview) or at all events those other passages in his statement of claim."

92 The well-known case of *Templeton v. Jones*⁷⁶, approved by the Court of Appeal in the later case of *Broadcasting Corporation of New Zealand v. Crush*⁷⁷ is a classic example of a plaintiff suing upon one imputation only. The plaintiff in *Templeton v. Jones* was a candidate in an election in which the defendant was the sitting Member. The

⁷² [2000] VSC 210.

⁷³ [1982] N.S.W.L.R. 410 at 413.

⁷⁴ [1976] N.S.W.L.R. 712.

⁷⁵ [1972] V.R. 702 at 706.

⁷⁶ [1984] 1 N.Z.L.R. 448.

⁷⁷ [1988] 2 N.Z.L.R. 234.

defendant distributed copies of a speech he made in his branch to the parliamentary press and they were re-published on the national television news. The statement was that the defendant had described the plaintiff as a man who "despised bureaucrats, civil servants, politicians, women, Jews and professionals". The plaintiff brought proceedings claiming the allegation published that he despised Jews, was false and defamatory and claimed damages. The defendant sought to justify all of the allegations but the judge struck out all the particulars of justification other than the one which related to the allegation that the plaintiff despised Jews.

93 Cook, J. held that the particulars of justification must be limited to the matters about which the plaintiff complained, and that it was no excuse for making discreditable statements about a plaintiff which were false, that the defendant also made other discreditable statements about him which might be true. The judge took the view that, although many of the allegations were illustrations of a theme that the plaintiff had indulged in the politics of hatred, they were separate and severable allegations. Essentially it was concluded that the allegation that the plaintiff despised Jews was a distinct charge. In the Court of Appeal, Cook, J. stated:

“The judge's ruling is a straightforward application of a long-recognised principle of defamation of law. It is elementary that the defendant may not justify, that is to say prove the truth of that of which the plaintiff does not complain. If an article, speech or a broadcast makes several charges against the plaintiff, he is entitled to sue on one charge only. The defendant may then justify that charge if he can but he is not allowed to confuse the issue by bringing the evidence that the other charges are true. He is fully entitled to point out to the tribunal of fact, usually a jury in defamation cases, that the plaintiff has not complained of the other charges made at the same time. But that goes only to damages.”

94 This view of the matter was taken by Brennan, C.J. and McHugh, J. in their well-known joint judgment in *Chakravarti v. The Advertiser Newspapers Ltd.*⁷⁸. *Templeton v. Jones* preceded *Polly Peck v. L.C. Telford*⁷⁹ but O'Connor, L.J. approved of the

⁷⁸ (1998) 193 C.L.R. 519 at 528-529.

⁷⁹ [1986] 1 Q.B. 1000.

decision.⁸⁰ I will deal with the *Polly Peck* aspect when dealing with the aspect of *forum non conveniens*.

95 Further, *Gatley* states:

"The basic rule is that it is up to the plaintiff, where a number of distinct charges are made against him, to decide in respect of which he will sue. If he is accused of being a thief and adulterer, he may choose to sue only on the accusation of adultery."

96 The defendant relied upon passages from Spencer Bower's "*The Law of Actionable Defamation*" which passages appear not to deny the plaintiff's right to rely on his statement of claim on part of the matter published, even if the omitted parts were relevant and have a qualifying effect. As I stated in *Warne*, I doubt that the plaintiff is entitled not to set out in the statement of claim relevant qualifying passages and may be ordered to do so in appropriate cases. However, the broad statement in Spencer Bower that the defendant has the right to have the entire document, conversation or speech produced as part of a plaintiff's case is not a principle with which I agree. The plaintiff is not obliged to plead the other matter nor will the balance of the article or words be admissible if they are so distinct and separable that the balance of the article will or could not alter their meaning. What might be allowed depends upon the individual case. I do not regard my decision in *Warne* as being contrary to the propositions advanced here by the plaintiff, as that was a case of the antidote to the bane being arguably found in the words of the article, the plaintiff having sued on the headline, insistence upon the whole of the article being introduced there occurring.

97 The decision in *Curran v. Herald & Weekly Times Ltd.*⁸¹ would not now survive the limitations on *Polly Peck* pronounced by the majority of the Court of Appeal in *David Syme & Co. Ltd. v. Hore-Lacey*⁸². Moreover, in *Curran Gobbo, J.* specifically found that

⁸⁰ See *Polly Peck* 1020 and 1032.

⁸¹ Supreme Court of Victoria, unreported 28 September 1993.

⁸² [2000] 1 V.R. 667.

the libel about which the plaintiff claimed was not separate and distinct from the surrounding text. In my view (and I will refer to it subsequently when dealing with the *Polly Peck* issue) the allegation of money-laundering encapsulated in the section of the article sued on by the plaintiff is distinct, separate and separable from the balance of it which is concerned wholly with fraudulent manipulation of stocks and shares including ADRs and penny stocks in charities in the United States. In other words, contrary to the view I had of the article in *Warne's* case. This part of the publication is in terms of the subject matter, geographical location and conduct is divisible from the balance of the publication. The balance of the defendant's submissions will be dealt with by me later. But I do note that in his submissions the defendant claimed (1) that the flavour and focus of the article concerns some misuse of U.S. religious charity and stock promotions on the U.S. markets; (2) that the claimed defamatory sting (or stings, to which I shall return) has little relationship with the Goldberg extracts set out in the statement of claim: see paragraph 38; (3) that the focus and flavour of the article is indelibly American; (4) that the thrust of the article is to call for the plaintiff's investigation by U.S. authorities; (5) that the bulk of the article and the majority of individuals places and corporate entities are American and (6) that, in relation to the Goldberg allegations, taken alone, Victoria is the more appropriate forum.

98 These matters were advanced in support of the submission by the defendant that New Jersey is a more appropriate forum, and they will have to be taken into account and balanced against matters to the contrary on that aspect. For the present purpose, however, their obverse effect is to highlight the separate nature of the Goldberg allegations as that of a separate charge on which the plaintiff may sue. In my judgment, this could never be a bane and antidote case.

(C) *Forum non conveniens*

99 I move to consider the issue of *forum non conveniens*. As I have already indicated, by virtue of Rule 8.09, the court may exercise its jurisdiction to set aside a writ or its service or stay a proceeding on an application made by a defendant before filing an

appearance, whether conditional or not. Rule 7.05(1) provides that the Court may make such an order on application by a party served with originating process out of Australia (as here). Rule 7.05(2) provides that the Court may make an order under the Rule on the ground (b) that Victoria is not a convenient forum for the trial of the proceeding. However, it is to be noted that whilst Rule 7.05(2) specifically empowers the Court to make an order under the Rule on the ground that Victoria is not a convenient forum for the trial of the proceeding, that does not limit the power granted by Rule 7.05(1) to make an order under Rule 8.09, as under Rule 7.05(1) the Court's discretion is not limited in its exercise as to the grounds set forth in 7.05(2). This aspect was briefly commented on by Mandie, J. of this Court in *Eagle v. Delta Hayes Corporation*⁸³. His Honour went on to note that the ground stated in Rule 7.05(2)(b) that "Victoria is not a convenient forum" is phrased in "less stringent terms" than the test of "clearly inappropriate forum" enunciated in *Voth v. Minalda Flour Mills Pty. Ltd.*, the well known decision of the High Court of Australia. The ground considered by the High Court in *Voth* was derived from the New South Wales Rules where the ground was formulated on the basis of the test that New South Wales "is an inappropriate forum". This led counsel for the defendant to put to me that the Victorian Rules are therefore more consonant with the balancing approach favoured by the House of Lords in *Spiliada*⁸⁴ rather than focussing upon the inappropriate forum test that might draw in considerations that the local process would be relatively more oppressive or vexatious.

100 However, it appeared to me that in oral argument the defendant did not press that there was any significant difference. Ultimately in *Eagle v. Delta Hayes*, Mandie, J., on the facts in that case, concluded that Victoria was a clearly inappropriate forum and also that it was not a convenient forum. Notwithstanding the variety of language employed in the range of cases (virtually limitless) to bear upon this issue, the objective is to derive and apply a principle that will enable, as between common law

⁸³ {2000} VSC 513 (paragraph 9).

⁸⁴ [1987] A.C. 460.

jurisdictions, cases to be tried in the jurisdiction appropriate for their resolution. The mainstream authorities also frequently state that underpinning the specific, practical and flexible considerations that are drawn into the resolution of this question is the objective to try the case in a jurisdiction suitably for the interests of all the parties and for the ends of justice.

101 The defendant accepts that in jurisdictions where the rules of court permit service without leave, the burden lies on the defendant to persuade the Court to exercise its discretion to stay proceedings properly brought. He argues, however, that the burden shifts to the plaintiff once the defendant identifies another forum with which the case has more connecting factors including not only factors of affecting convenience and expense but other matters as well. This submission is based on statements of Lord Goff in *Spiliada*, that once a prima facie case in an alternative forum is made out, the proceeding ought to be stayed unless the plaintiff proves he cannot obtain substantial justice in the jurisdiction. However, Mr. Robertson was unable to identify any binding authority upon me to that effect and, in my judgment, a reading of *Voth* and *Henry* is that they does not support the proposition so broadly stated. In my view, *Voth* and *Henry* support the approach of balancing the connecting factors. However, with either jurisdiction, I do not support the defendant's submissions as to shifting burdens, nor of any obligation on the plaintiff to establish special circumstances.

102 The mainstream governing Australian authorities on this issue are *Oceanic Sunline SFC v. Fay*⁸⁵; *Voth v. Manildra Flour Mills Pty Ltd*⁸⁶ and *Henry v. Henry*⁸⁷. At common law, the test is whether it has been shown that the jurisdiction under attack is a clearly inappropriate forum. That test, having been clearly pronounced by the High Court in working through the authorities, from *Oceanic* through to *Voth* and *Henry* is in my judgment the governing principle. Mandie, J. did not elaborate much on the

⁸⁵ (1998) 165 C.L.R. 197.

⁸⁶ (1990) 171 C.L.R. 538.

⁸⁷ (1996) 185 C.L.R. 571 particularly at 587.

impact of the common law tests on Rule 7.05, nor did he have need to do so since he took the view that on either test (that is, apparently treating the phrase “convenient forum” in the Victorian Rule is something less stringent than clearly inappropriate. He concluded that the Victorian forum was neither appropriate nor convenient, for the reasons that he gave. The High Court in *Voth* stated:

“The principles to be applied in applications to set aside service and in applications for a stay on inappropriate forum grounds are those stated by Deane, J. in *Oceanic Sun*. In the application of those principles, the discussion by Lord Goff in *Spiliada* as to relevant ‘connecting factors’ and ‘a legitimate personal or juridical advantage’ provide valuable assistance.”

103 In *Henry v. Henry*, in the joint judgment of Dawson, Gaudron, McHugh and Gummow, JJ. it was stated:

“In *Voth*, this Court adopted for Australia the test propounded by Deane, J. in *Oceanic Sun*, namely, that a stay should be granted if the local court is a clearly inappropriate forum if it be the case if continuation of the proceedings in that court would be oppressive, in the sense of ‘seriously unfair and fairly burdensome prejudicial or damaging’, or vexatious, in a sense of productive serious and unjustified trouble and harassment.”

One accepts from other passages in the judgment that, although the main themes of the opinion of Lord Goff in *Spiliada* were treated with some reservations, that many of the matters referred to by him such as connecting factors and, I would venture, the fundamental question is where the case may be tried for the interests of all the parties and for the ends of justice were accepted.

104 In my opinion the use of the phrase in 7.05(2)(b) “that Victoria is not a convenient forum for the trial of the proceeding” does no more or less than, in an English -literal form, convey the meaning and substance of the concept of *forum non conveniens* considered by the High Court in the cases to which I have referred. Thus, notwithstanding the language used, I do not approach the decision on this issue under the Rule as being materially different in any way to the common law rule. Moreover, if the Rule were thought to be different in some way, it does not limit the unfettered power conferred in 705(1) to make an order of the kind referred to in

Rule 809 upon application. I use the phrase “unfettered” as being “not specifically restricted”, although it is beyond doubt that the ordinary legal principles to be applied in the exercise of a judicial discretion must be observed.

105 The defendant claimed that the issue in this application turned on the “prima facie appearance of New York/New Jersey (there is the unexplained dichotomy again) as the forum with which this proceeding is more substantially connected than Victoria”... This proposition, more notable for its assumption than its validity, can only have any force at all on the basis that this proceeding draws within it the whole of the article. As I have indicated, based on the plaintiff’s pleadings, it does not. I will deal with some of the detail of this aspect when examining the various counterbalancing factors but, at the moment, the plaintiff sues only upon the alleged defamatory allegation that he, in the State of Victoria, dealt financially with a money-lauderer. There was little about that allegation that would lead to a conclusion that one of the two U.S. States referred to was the forum to be preferred.

106 The range and volume of authorities referred to by both counsel in this case was such that it becomes impossible in the course of these reasons to deal with more than those bearing substantially on the main themes of argument. The majority in *Voth* stated⁸⁸:

“The ‘clearly inappropriate forum’ is similar to, and for that reason, is likely to yield the same result as the ‘more appropriate forum’ test in the majority of cases. The difference between the two tests will be of critical significance only in those cases – probably rare – in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly appropriate one. But the question which the former test presents is slightly different in that it focuses on the advantages and disadvantages arising from a continuation of the proceeding in the selected forum rather than on the need to make a comparative judgment between the two forums. That is not to deny the considerations relating to the suitability of the alternative forum are relevant to the examination of the appropriateness or inappropriateness of the selected forum. The important point is that, in those cases in which the ascertainment of the natural forum is a

⁸⁸ At 558.

complex and finely balanced question, the court may more readily conclude that it is not a clearly inappropriate forum.

The availability of relief in a foreign forum will always be a relevant factor in deciding whether or not the local forum is a clearly inappropriate one. But such a decision neither turns upon an assessment of the comparative procedural or other claims of the foreign law nor requires the formation of subjective views about either the merits of that forum's legal system or the standards and impartiality of those who administer it." (My emphasis.)

107 At this point, I refer to two other statements from courts of the United Kingdom. The first is *Berezovsky v. Michaels*⁸⁹ a case in which Mr Robertson appeared for the defendants. They published an article accusing the plaintiffs, two Russian citizens, of being involved in organized crime in Russia, that article being published in North America where the magazine had a circulation of over 795,000. In Russia only 13 copies were distributed and in England a little under 2,000. The plaintiffs claimed significant connections with England and chose to bring the libel actions against the publisher and editor of the magazine in England rather than in the U.S. or Russia. They confined their claims for damages to publication of the article within the jurisdiction. They sought leave to serve the writs on the defendants out of the jurisdiction, leading to an application to have the writ set aside and the action dismissed or stayed, the defendants contending England was not the most appropriate jurisdiction for the trial of the claims. I interpolate that the English test is not quite the same as the Australian test. The trial judge held that Russia was the more appropriate forum and granted the stay. That decision was reversed by the Court of Appeal which concluded that both plaintiffs had a substantial complaint about English torts and on other grounds.

108 The defendants appealed contending, inter alia, that in trans-national libel cases the court should treat the entire publication as if it gave rise to one cause of action and asked whether it had been clearly proved that that action was best tried in England. They further contended that the Court of Appeal had erred in relying on a line of

⁸⁹ (2000) 2 All England 986.

authority which held that the jurisdiction in which the tort had been committed was prima facie the natural forum for the determination of this dispute. The House Lords (there were two dissentients) held that the global theory advanced by Mr Robertson was contrary to the well-established principles of libel law, namely that each publication was a separate tort and was inconsistent with the principles governing the question of the appropriate forum. Nor was the invocation of the global theory underpinned by considerations of justice. It concluded that all the constituent elements of the tort had occurred in England; there was a significant distribution of the material in England and the plaintiffs had reputations in England to protect. In such a case it was not unfair that the foreign publisher should be sued in England. The House of Lords also held there was no advantage in requiring judges to embark on the complicated hypothetical inquiry suggested.

109 In the lengthy judgment of Lord Steyn with whom Lord Nolan and Lord Hobhouse agreed, the Lords rejected the single publication proposition as contrary to the long-established principle of libel law that each publication was a separate tort and also that it was inconsistent with the policy underlying the European Community's Court of Justice principle as expressed in *Shevill v. Press Alliance SA*⁹⁰. I cite from the reasons for judgment of Lord Steyn⁹¹ with respect to the submissions made on behalf of the defendant:

“The result of such a principle, if adopted will usually be to favour a trial in the home courts of the foreign publisher because the bulk of the publication would have taken place there. Counsel argued that it is artificial for the plaintiffs to confine their claim to publication within the jurisdiction. This argument ignores the rule laid down in *Diamond v. Sutton* 1866 L.R. Ex 130 at 132 that a plaintiff who seeks leave to serve out of a jurisdiction in respect to a publication within the jurisdiction is guilty of an abuse if he seeks to include in the same action matters occurring elsewhere. See also *Eyre v. Nationwide News Pty Ltd* 1967 N.Z.L.R. 851. In any event, the new variant of the global theory runs counter to well-established principles of libel law. It does not fit into the principles so carefully enunciated in the *Spiliada*...”

⁹⁰ (1995) All England (EC) 289.

⁹¹ At 993.

His Lordship went on to say:

“The present case is a relatively simple one. It is not a multi-party case; it is, however, a multi-jurisdictional case. It is also a case in which all constituent elements of the torts occurred in England. The distribution in England of the defamatory material is significant. And the plaintiffs have reputations in England to protect. In such cases it is not unfair that a foreign publisher should be sued here.”

110 Having rejected this argument, his Lordship proceeded:

“Counsel next put forward a more orthodox argument. He acknowledged that the Court of Appeal invoked the well known principles laid down in *Spiliada* 1987 A.C. 46 at 474, 484. Hirst, L.J. correctly stated that the court must identify the jurisdiction in which the case may be tried more suitably or appropriately in the interests of all the parties in the ends of justice. Hirst, L.J. also emphasized that the burden of proof rests on the plaintiff to establish that the English jurisdiction clearly satisfies this test. Counsel submitted that Hirst, L.J. fell into error by relying upon a line of authority which holds that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute. The best example is *Cordoba Shipping Co. Ltd. v. National State Bank Elizabeth & Ors (The Albaforth)* (1984) 2 Lloyds Report where the Court of Appeal considered a claim founded on a negligent misstatement in the status report by a bank relating to the credit of a guarantor of a company’s obligations under a charter party. The statement was contained in a telex sent by the bank from New York to shipowners in London. At first instance the judge set aside leave to serve out of the jurisdiction. The Court of Appeal allowed the appeal. Ackner, L.J. observed ... the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute. England is thus the natural forum for the resolution of the dispute.”

Lord Steyn cited from the reasons of Goff, L.J. (later Lord Goff of Chieveley) to this effect:

“Now it follows from those decisions, where it is held that a court’s jurisdiction on the basis of an alleged tort had been committed within the jurisdiction of the court the test which has been satisfied in order to reach that conclusion is one founded on the basis that the court, so having jurisdiction, is the most appropriate court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must be difficult in any particular case to resist the conclusion that a court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction it is not easy to imagine what other facts could

displace the conclusion that the courts of that jurisdiction are the natural forum.”

Both parties claimed support from these pronouncements, Mr Robertson on the basis that the natural forum for the whole of the article, and for the trial of the matter was the State of New Jersey. By that, however, he meant the trial of the issues raised by the whole of the article. Mr Sher, on the other hand (who relied upon *The Albaforth*) claimed that Mr Gutnick’s proceeding was confined to the Victorian publication of a separate charge of money-laundering against him, events which were said to occur in Victoria and had confined his claim for damages wholly to the proceeding in the State of Victoria. These matters, he contended, really dominate the conclusion that not only is Victoria the appropriate forum but it could not be said that it was clearly an inappropriate forum. I note that in *Berezovsky v. Michaels* counsel for the defendant accepted that he could not object to the proposition that the place where in substance the tort arises is a weighty factor pointed to that jurisdiction being the appropriate one. If, as I conclude, the place where the court occurs is the place where it is downloaded, it would seem that counsel should accept the same proposition here. In any event, Lord Steyn concluded that *The Albaforth* line of authority was well-established, tried and tested and unobjectionable in principle.

111 Before moving to examine the features argued either way on this issue, I propose to deal with one of them discretely. That is the question that essentially the defendant claims that as a matter of justice (and it claims that it would be an abuse of process if it were not) it ought to be able to rely upon the whole of the article, and upon those meanings which it contends it is capable of bearing and which it seeks to justify. The so-called “common sting” was first evoked in *Polly Peck v. Trelford*⁹². I do not propose to re-tread well-worn paths concerning this so-called defence. It was in effect condemned as contrary to the common law by Brennan, C.J. and McHugh, J. in *Chakravarti v. Adelaide Newspaper*⁹³. The other members of the court did not find it

⁹² (1980) 6 Q.B. 1000.

⁹³ Above.

necessary to consider these aspects of *Polly Peck* directly in disposing of the appeal. Ultimately, the Court of Appeal in the State of Victoria, in *David Syme v. Hore-Lacy* a decision which binds me, articulated restrictions upon the *Polly Peck* precept, at the same time endorsing the obligation of a defendant seeking to justify to give particulars of a justification. Essentially, the Court of Appeal put a plaintiff in a defamation action and the defendant to the action in the same position, holding that a plaintiff in a defamation action who pleads a false imputation or innuendo can only succeed on that pleaded meaning or some other meaning which is a variant on, or not substantially different from the pleaded meaning which is no more injurious or serious than the pleaded meaning. The majority also held that a defendant in a defamation action who pleads justification to allegations of imputation or innuendo is confined to justifying the meanings pleaded by the plaintiff or some other meaning which is a variant or not substantially different from a pleaded meaning and which is no more injurious or serious than a pleading meaning. Moreover, the majority held that where a defendant intends to justify a meaning of an imputation or innuendo which differs in the permissible sense from the meanings pleaded by the plaintiff, the defendant must plead that meaning with the necessary particulars of the facts on which the justification is based.

112 One of the difficulties that arises on applications of this kind is, of course, that the defendant has not filed a defence as to do so would constitute submission to the jurisdiction, the very matter which it disputes. However, it is by no means uncommon for a defendant in the course of argument about these matters to exhibit or present to the Court a draft defence so that the Court will know with relative precision what it is that is intended to be pleaded. This course was not followed in this case and with respect to the present issue it has left the Court in something of a quandary, not the least because the defendant presented an alleged common sting with seven sub-paragraphs, each of which might be thought, or might ultimately in a defence, be sought to be advanced as separate common stings. Furthermore, in the course of the hearing, I called upon Mr Robertson to identify again what the principal sting of the article was and he did so. And at my request provided it in

writing, to this effect (and it was not the same as the one advanced in written submissions):

“That the plaintiff, who is a rabbi and a prominent member of a closely-knit, orthodox Jewish sect with its headquarters in Brooklyn, New York, has misused religious charities for his personal gain in a number of instances, including specifically in manipulating stocks through U.S.-based charities, and, according to Australian investigators, through the efforts of Nachum Goldberg. The plaintiff is, therefore, a hypocrite who has exploited the perception among other members of his religion that he is devoted to religious causes and to the New York based leaders of his religion to engage in transactions from which he gains even as other members of his religion suffer.”

However, later in the course of his submissions he seemed to me to venture another common sting, somewhat different in form.

113 In my view, this creates a difficulty for the Court at this point of time. I have already indicated that I have formed the view for the present purpose (although it will not necessarily bind the trial judge) that that part of the article concerning the money-laundering issue in Australia and Gutnick’s connection with it are a separate charge and capable of being sued on, as they have, separately. However, until there is there is a greater degree of clarity as to what the alternative meanings or sting sought to be relied on are, one suspects that counsel for the defendant believes that the way in which the defence will be put will not be able to fulfil the requirements of the law of the State of Victoria with respect to the *Polly Peck* defence because, to use his colourful phrase, the Court of Appeal in the State of Victoria “had strangled poor *Polly* to death”. He used the substantial modification of the *Polly Peck* defence as a basis for saying that his clients were deprived of a defence which they would have in the United States of America, a matter as to which I am by no means convinced, notwithstanding the provision of an affidavit of an American attorney Laura Handman. Even if it were right, the complaint of abuse of process and injustice must fall on deaf ears as far as I am concerned, bound as I am by the decision in *Hore-Lacy*.. In any event there is a considerable body of legal and judicial opinion that the *Polly Peck* defence frequently occasions notable injustice, permitting as it does

unrestrained recital of a range of deplorable activities laid at the plaintiff's door under the rubric of justifying the claimed sting. There has long been concern that the defendant is entitled to go beyond the meaning asserted by the plaintiff and seek to justify its own. In *Reynolds v. Nationwide News Pty Ltd.*⁹⁴ in the Supreme Court of Western Australia, Hasluck, J. appeared to support the principles articulated in *Hore-Lacy*. *Reynolds* was a case in which the plaintiff chose to proceed in respect of that part of an article concerning allegations of bribery, extortion and wrongful dismissal and went no wider. The court concluded that although the imputations pleaded by the plaintiff were confined to specific matters, those matters were found within an article where reference was made to wider issues. The court concluded that the defendants were not entitled to plead the alternative meanings sought to be relied on. Furthermore, it concluded that the imputations pleaded by the plaintiff were severable and distinct from the matters of wider concern sought to be pleaded by the defendant. Thus the court upheld the application to strike out the *Polly Peck* plea. In *Robinson v. Laws*⁹⁵ the Court of Appeal of the Supreme Court of Queensland (De Jersey, C.J., Williams, J.A. and McKenzie, J.), with reference to the statements of Brennan, C.J. and McHugh in *Chakravarti*, said to this effect:

“A plea of justification, and of qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence. It is immaterial if the defendant can justify or otherwise defend the meaning which it attributes to the publication. In our view the *Polly Peck* defence in practice contravenes the fundamental principles of common law pleadings. In general it raises a false issue which can only embarrass the fair trial of the action.”

The court considered that those observations, although strictly speaking obiter dicta, were highly persuasive. The court concluded the *Polly Peck* approach was not open in Queensland where the gist of the cause of action for damages was publication of defamatory matter and must involve the imputations.

114 The point at issue is to whether or not the matters said to comprise the sting or stings

⁹⁴ [2001] WASC 90

⁹⁵ [2001] QCA 122

for the purpose of the *Polly Peck* defence constitute only a mere variant of the matters sued on and have no greater seriousness is a critical issue, notwithstanding the difficulty, to which I have referred, of resolving it at this point of time. But I have little doubt, having regard to the variety of formulations of the common sting or stings as advanced by counsel for the plaintiff, that the key element is the claim that the plaintiff's activities in and involvement in the manipulation of the stocks and spares, and the price of them, in U.S.-based charities, to his own profit, is the core imputation of the article. It was never suggested that the thrust of it was no more than that he was a dishonest man, or a venal man, or person indulging in stock frauds for personal gain. The focus of all submissions as to the so-called sting was on the manipulation of various U.S. charity stocks to his own advantage. The reference to the alleged Australian involvement in money-laundering, to my mind, stands notably outside the principal feature of the meaning of the article. I also take note of the fact that the Goldberg "charity" was not a charity at all, but a fake; that it was not a listed company; had no shares that could be traded or manipulated and there were no shareholders who could be defrauded. In those circumstances, its link or connection to the main theme of the article, as presently identified, may be doubted. Notwithstanding that, the defendant may still plead, or seek to plead, a common sting that arguably complies with the requirements of *Hore-Lacy*.

115 The defendant raised what it called its 12 "bullet" points. I do not propose to address all of them in detail and I do identify some of the plaintiff's responses and arguments.

- (1) The first point was that the print publication here was minimal compared with the United States. The plaintiff says that it is the quality not quantity of publications that must be examined and that in any event the issue is irrelevant since the plaintiff complains only of publication in Victoria and has given an undertaking not to sue elsewhere. Nevertheless many authorities indicate that the extent of publication in the objected to forum is a relevant matter.

- (2) The same point was made in relation to the Internet publication. Of 1,700 in Australia, there were 300 or so in Victoria. The same response was given by the plaintiff. Next, that trial in Victoria is inconvenient for the defendant as (a) they are based in New York; (b) they have no operation within this jurisdiction and all of their witnesses in relation to qualified privilege are in the United States. The plaintiff's response is there is a balancing huge inconvenience and cost to him to be forced to go to New Jersey to litigate a tort committed in Victoria which damaged his Victorian reputation.
- (3) The defendant also contends that it will have no qualified privilege defence in Victoria mainly because there is no duty or common interest and the decision of the House of Lords in *Reynolds* (which expanded duty-interest qualified privilege to mass-media) has not been followed in Australia and will not be. Moreover the plaintiff says that if a qualified privilege arises, there is malice in the *Horrocks v. Lowe* sense and that Alpert would have to give evidence of his belief that the Goldberg imputations were true. There is no suggestion of this. Indeed, the plaintiff says it has never been said or stated in Court that the defendant would justify the Goldberg imputations, despite a generalized statement that everything is in issue. Moreover the plaintiff argues that there is no evidence that can be called to support the objective truth of the article and that the alleged witnesses in the first Reidy affidavit would therefore be unable to give relevant evidence.
- (4) The plaintiff contends that the only excuse proffered for Alpert not coming to Australia is that he is busy, an unacceptable excuse without weight. The defendant contends the plaintiff has substantial connections with the United States. The plaintiff responds that his connections with Victoria are greater, that he grew up in Victoria. He

lives here with his wife and children; his business is headquartered in Victoria and that is where his reputation is well known. Furthermore, the plaintiff does not complain of any publication in the United States, will not sue there but claims is entitled to have his reputation in Victoria vindicated by his peers in Victoria.

- (5) The defendant contends that it is more convenient to have one single action and to get all the material there under subpoena. The material was not identified. Nevertheless the travelling of witnesses either way and costs are matters relevant to both sides and both jurisdictions. The plaintiff contends that with respect to his claim there were no relevant documents in the United States and that the attempted *Polly Peck* should not be permitted. It was also said that there is no suggestion made that the Goldberg allegations are true and, even if that were so, all the relevant documents in relation to the Goldberg allegations are located in Victoria. The plaintiff draws attention to the fact that the issues in the case in Victoria would all be very different from those in the United States.
- (6) The defendant contends that the question of whether there was recklessness or dishonesty towards the truth can be “better tried” in New Jersey where issues of common law privileges, reasonableness and malice will be “better” tried. It is contended that is where the witnesses, editors, journalists and researchers are and where the jury can deal with whether or not the journalist followed professional standards. The plaintiff contends that no common law or *Lange* privilege arises but even if it does, it would do so in both places. In any event the only issue of reasonableness will be with Mr Alpert’s conduct and any question of the American journalistic standards could not be relevant to the reasonableness of the conduct if the statements should not have been made.

- (7) The defendant says that any judgment obtained in Victoria will be unenforceable in the United States. At the least there will be some difficulty in enforcement. The plaintiff says that the main purpose of an award of damages in a defamation case is vindication and damages are secondary in this case. Moreover, the issue is only relevant if the defendant declines to honour any judgment obtained which would be an improper course and damaging to the defendant's reputation world-wide.
- (8) The defendant submits that the New Jersey Court could manage it as a Worldwide publication and it is oppressive in the *Voth* sense to have hanging over the defendant's head the possibility of being sued in one place after another. The plaintiff says he has given an undertaking that no action will be brought elsewhere.
- (9) The defendant contends the place where the tort was committed is the forum and that that is the law that will apply. It argues that the substance of the tort is American and if the place of publication is in New Jersey, New Jersey law applies to the Internet publication. The plaintiff simply responds that the place of publication is Victoria as it is where the tort occurred and the commencing point is at the appropriate forum.
- (10) The costs and inconvenience of bringing witnesses and evidence to Australia, are identified in Mr Reidy's affidavit, and in relation to the privilege defence and the truth defence, if they are allowed the *Polly Peck*. There is some substance in this matter and I take it into account. The plaintiff says that the costs and inconvenience to the plaintiff in having to litigate in the United States must be weighed against that and it contends the *Polly Peck* issue will not be permitted. In my view this is likely but not certain.

- (11) That if the *Polly Peck* defence is not available here, the defendant contends it is oppressive for the defendant to have to fight this case in Victoria, contrasting this to the case of justification and in respect of the whole article which would be admitted in the United States. The plaintiff responds that the law of *lex loci delicti* is Victoria. Victoria must apply Victorian law. The defendant had the capacity to block publication to Victoria and did not do it.
- (12) The plaintiff argues that, not only will the cost of litigating in New Jersey be much greater (contingent fees, witnesses from Australia, weak Australian dollar, etc.), it is probable that the delay in getting this case to trial will be much greater in New Jersey than in Victoria. I am not satisfied that that is so and discount it as one of the relevant features.

116 The defendant argued that it would be disadvantaged by trial in Victoria in respect of a defence of qualified privilege. It was not clear as to how this was finally put. Substantial argument was advanced that the decision of the High Court in *Lange*⁹⁶ took a broad view of what might fall within the rubric of discussion concerning government and political matters. This appeared to have been put to suggest that Simpson, J. in *Vilo v. Fairfax*⁹⁷ was wrong in concluding that the decision of the House of Lords in *Reynolds v. Times Newspapers*⁹⁸ was inconsistent with *Lange*... I do not find it necessary to enter into this debate. Beyond doubt, the High Court's decision has shaped the parameters of the constitutional requirement for freedom of communication, and broadened the scope of qualified privilege. Whether or not the issue here involves a discussion about government and political matters is a matter for another day. The fact that a defamatory statement may be published in the course of that discussion does not necessarily give rise to a defence of qualified

⁹⁶ Above.

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⁹⁸ (1999) 3 W.L.R. 1010.

privilege⁹⁹, but the defendant appears to claim that it does have this defence in respect of the publication here. To that extent, it concedes that it has not lost the juridical advantage. The point appears to be that it is the issue of the reasonableness of the words used that draws in the U.S. jurisdiction. I have already suggested that that issue is not likely to be resolved by evidence as to U.S. journalistic standards but, even if it is, the evidence can be called here, admittedly at greater cost. But Alpert is likely to be called in any event, wherever the trial is. The issue of the defence of substantial justification under New Jersey law was briefly debated but I do not regard this aspect of major significance at this point of time. The defendant has not stated that it will justify the money-laundering claim in Victoria, or, for that matter, in New Jersey. It has not put up a draft defence. I have already indicated that it is open to the defendant to re-vamp its *Polly Peck* approach when it actually pleads to the statement of claim.

117 The multitude of cases which exhibit the judicial process, from case to case, in determining whether or not one jurisdiction is to be preferred (having regard to the appropriate criteria) over another forbids re-visitation of them, particularly as so many were referred to me by counsel. Mr Robertson placed some reliance upon the decision of Moreland, J. in *Wyatt v Forbes Inc and Anor*, a case decided on 2nd December 1977, in which, by their summons, Mr Roberston's clients, Forbes applied to set aside a writ for defamation commenced by the plaintiff and to have it dismissed or stayed on the ground that the United Kingdom was not the appropriate forum for trial but that the appropriate forum was Texas. In that case, the court decided that Texas and not England was the appropriate forum for trial and stayed the proceeding. His Honour concluded that the onus lay on the plaintiff as to the issue of the appropriate forum notwithstanding that his cause of action arose out of the commission of the tort of libel by the defendants by publication of the defamatory article in England.. That appeared to be a strong case of connexion with Texas. That was, however, a case in which the plaintiff was obliged, it being an

⁹⁹ See *Heypsbury Holdings Pty Ltd v. City of Subiaco* (1998) 19 W.A.R. 440

Order 11 case, to persuade the Court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. The contrast to the Order 7 right to do so is obvious. Thus, this aspect is not as significant as Mr Robertson contended.

118 However, what is perhaps a more serious question is whether or not the Court ought to put a foreigner, owing no allegiance to the forum, to the inconvenience, cost and annoyance of being brought to contest his rights in the foreign forum. In *Société Generale de Paris v Dreyfus*¹⁰⁰, Pearson, J. drew attention to this and stated that the Court should be exceedingly careful before it allows a writ to be served out of a jurisdiction. Some of these issues are resolved by the Parliament of Victoria and the judges of the Court by Rules determining as to what the circumstances are in which process can be served out of the jurisdiction. Indeed, Moreland, J. clearly perceived a distinction between the cases where the plaintiff's jurisdiction was founded as a right. Moreland, J.'s analysis of the relevant aspects is beyond reproach, one might even say orthodox.

119 He commenced by asking himself the question whether England or Texas was the natural forum as being that with which the action had the most substantial connection.

120 In the case which he considered, the libel complained of had appeared in a discrete part of an article headline "*Saddam's Pal Oscar*" in the business magazine "*Forbes*". I do not stay to examine the facts in that case although I note that it was a case in which those parts of the article which would have appeared to be most defamatory were not relied upon as part of the plaintiff's cause of action (as here). His Honour declined to comment on whether the part of the article sued on (essentially it had been suggested that the plaintiff, through his company, was responsible or involved in the destruction of incriminating documents in order to thwart a relevant inquiry involving a death) was capable of having that defamatory meaning. This is hardly an issue here as it could barely be thought that to accuse Mr Gutnick of being

¹⁰⁰ (1985) 29 Ch D 239 at 242-3.

involved with the laundering of money through a convicted money-launderer was other than capable of being defamatory. However, it is important to note in that case the matters that influenced Moreland, J. and he detailed them. In the first place, the article made no reference to England, or the relevant company's English subsidiaries, or the plaintiff's business or personal activities in England. It was wholly concerned with the plaintiff's relationship with Saddam Hussein and Gadaffi. Moreover, the earliest defamatory part was concerned with arson in Texas, that is, involving the destruction of the relevant documents. Next, the libel action referred to in the article was brought in the Texas State Court by the plaintiff against the Texas newspaper, dealing with the very same subject matter dealt with in the article complained of. Third, the plaintiff was an American citizen and not a British citizen. He lived in Houston, Texas. He developed his personal business and his business reputation based in the United States. His company was a major American company and he was the chairman of it. He did not live and had never lived in the United Kingdom. On the other hand, he made frequent trips to the United Kingdom and, as the Judge found, had quite a considerable number of friends and acquaintances both personal and business in England. He specifically stated that the centre of his business and social life remained in the United States, principally in Texas. . In addition, *Forbes* was an American magazine, mainly read by Americans. It was incorporated in New York and had bureaus throughout the United States, including one in Texas. It was the one in Texas that was involved in the writing and publication. The author of the article lived and worked in Houston, Texas.

121 His Honour also noted that the plaintiff did derive juridical advantages by suing in England in that the burden of proving justification rested upon the defendants and in the United Kingdom he would not have to surmount a public figure defence. He was more likely to vindicate his reputation by the verdict of a jury. The defendants, who resisted the action, claimed the following juridical advantages which would be lost. The first was for the plaintiff to establish the falsity of the article. They claimed they could rely on a public figure defence and the plaintiff would thereby be required to prove actual malice, and they had a right to seek summary judgment in

the United States. Weighing up those matters, his Honour concluded that notwithstanding the juridical advantages given to the plaintiff, it could not be said that the true interests of justice were better served by the English law of defamation than the American law of defamation.

122 His Honour accepted the submissions made that the plaintiff did not have a separate English reputation and was a typical Texas mega-tycoon whose reputation had been built in Texas and the United States and worldwide through his international oil business interests. These matters, it was argued (and they were weighty), indicated the connecting factors established that Texas was the preferred forum. Moreover, in that case, the plaintiff was an American citizen, domiciled in Texas where the headquarters of his business empire was based. There was a relatively small range of publication of *Forbes* in the United Kingdom.

123 Given that set of facts, it is not surprising that his Honour concluded that Texas was the more suitable forum for the disposition of that proceeding, and his Honour would have reached that conclusion wherever the onus lay. He stated:

"I do not consider that this American plaintiff can legitimately complain in a result whereby it is held that Texas, where he had made his name, is the appropriate place to vindicate his reputation according to American law The plaintiff's connection with England was limited and occasional and the contents of the article were essentially American subject matter."

124 I do not stay to contrast the Victorian connections of Mr Gutnick with the UK connections of Mr Wyatt. Mr Gutnick's business headquarters is in Victoria; he is a Victorian citizen; he is a Victorian resident with his family here; the article was published in Victoria; he sues only in respect of publication in Victoria and declines suit anywhere else.

125 One accepts that the marshalling of individual decisions on the facts of each case is no conclusive aid to a decision in other cases. Nevertheless, I refer to the case of

*Schapira v Jonathan Ahronson and Ors*¹⁰¹, in which the Court of Appeal, (Gibson and Phillips L.JJ.), examined the set of facts involving the plaintiff who was an Israeli citizen but had been resident in London and was a British citizen since 1985. He had an English wife, his children went to school in England. His father had an Israeli carpet company which, after it went into liquidation, the plaintiff worked for in Israel until 1981 to 1993. Part of that business involved distribution and marketing in the United Kingdom and Europe. The plaintiff had a wide circle of friends and business associates in England. The relevant newspaper, the article which allegedly defamed the plaintiff, had a circulation of just under 59,000 but there were only 141 subscribers in the UK. The plaintiff sued the Israeli daily newspaper for defamation, claiming that an article which reported an allegation by one of the liquidators that the plaintiff had been a party to defrauding the company by purchasing an American company cheaply. There was an associated business proceeding with the libel action. The defendants applied to stay both proceedings on *forum non conveniens* grounds. The judge at first instance dismissed the application. It was on the hearing of the application for leave that the Court of Appeal dismissed the appeal, enunciating the following principles: (1) the stay would only be granted where the court was satisfied that there was some other available forum having competent jurisdiction in which the case could be more suitably tried for the interests of all the parties and the interests of justice; (2) the burden rested on the defendant to show there was another available forum which was clearly or distinctly more appropriate than the English forum; (3) in considering the question of the appropriate forum the court looked for connecting factors which pointed to some other forum as being that with which the action had the most real and substantial connection for if the court considered there was no other available forum which was clearly more appropriate it would ordinarily refuse a stay. The court acknowledged the principles in *Spiliada* and the principle concerning foreigners owing no allegiance to the alleged forum who would be put to the inconvenience of having to defend

¹⁰¹ 1999 E.M.L.R. 735 and also at 1997 E.W.C.A 1163 (21/3/97).

themselves in foreign courts. But the Court reiterated the principles that the jurisdiction in which the tort had been committed was prima facie the natural forum for the determination of the dispute, applying the *Albaforth*. In that case the court thought justification was likely to be significant in scope, and doubted the likely success of the qualified privilege defence being raised. It also thought the issue of malice would only arise if qualified privilege was permitted to be pleaded. Perhaps more significantly it was stated that:

"Where the tort of libel was allegedly committed in England against a person resident and carrying on business in England by foreigners who were aware that their publication would be sent to subscribers in England, that English resident was entitled to bring proceedings here against those foreigners and to limit his claim to publication in England even though the circulation of the article was extremely limited in England and there was a much larger publication elsewhere."

The court applied the well-known decision in *Sheville v Presse Alliance SA*¹⁰². It concluded that:

"England, where the plaintiff lived and carried on business, and where he wished his reputation to be vindicated was the appropriate forum for the actions." (My emphasis.)

This the court was not persuaded that Israel had been shown to be clearly a more appropriate forum.

126 I note that Lord Justice Gibson stressed that, until the defence was filed, it was not possible to know to what claims justifications would be addressed. Although this is but another exemplar of the required balancing process, many of its features are supportive of the view which I take that on the facts in this case the Victorian forum is the more appropriate forum.

127 In the first place, the publication of the claimed defamatory statement was in Victoria, where it was downloaded and where the print publication was also sold. Second, the plaintiff is a resident of Victoria, has his business headquarters here, his

¹⁰² (1986) A.C. 959 with its application in 1992 to 2 AC 18.

family here, his social and business life here, and seeks to have his Victorian reputation vindicated by the courts of the State in which he lives. Third, the plaintiff is indifferent to the other substantial parts of the article and desires only that the attack on his reputation in Victoria as a money-launderer should be repelled and his reputation re-established. Fourth, the plaintiff has undertaken to sue in no other place in respect of the matters which found his own proceeding. This undertaking destroys at a stroke the defendant's claim that New Jersey is to be the preferred jurisdiction because of its capacity to award worldwide global damages. Quite apart from the effect of the undertaking upon this part of the defendant's case that the USA is the preferred jurisdiction, the legal assertion that worldwide damages could be awarded and would be awarded in the United States, if the plaintiff succeeded, has not been established as a matter of the law of the country to my satisfaction. Fifth, the evaluation of the plaintiff's case must be made upon the basis of the case which has been commenced. As I have indicated, the question of whether or not the defendant might mount an arguable *Polly Peck* defence here is to be doubted, but it would be going too far to say that one could not be successfully presented. The defence has not yet been filed and it would occasion no surprise if the defendants re-vamped and re-shaped the claimed common sting to fit within the *Polly Peck* criteria pronounced by the Court of Appeal in *Hore-lacy* which binds me. Sixth, the juridical advantages which the plaintiff has by suing in Victoria and which would not prevail in the United States appear to be as follows: (a) falsity is presumed in Victoria (and indeed in all Australian jurisdictions) but has to be established by the plaintiff under United States Law and New Jersey law of defamation, and all American States; (b) if it were concluded that the plaintiff was a public figure in the United States (a matter doubted, as I understand it, in the affidavit of Laura Handman but which, if one accepts the claims made by the defendant in the article about his notoriety, is at least a significant possibility), then the plaintiff would be obliged to establish in addition that the article was written maliciously i.e. actual malice as part of his own case.¹⁰³ On the other hand, the argument is advanced that

¹⁰³ See *Prosser & Keeton on Torts* (5th ed.) (U.S.) Ch 19, pp.802-809.

the defendant would lose the advantages of those features if the proceeding is tried in Victoria. In a word, the plaintiff loses juridical advantages if he sued in the United States and the defendant would lose the United States juridical advantages if the matter were litigated here. This is not an issue as to which legal system is to be preferred, the assumption being that in both places the relevant law will be understood and applied. I note, however, that since I have determined that the article is published in Victoria, then Victorian law should apply, wherever the case is tried.

128 The defendant contends that the practical considerations of jurisdictional connection make it obvious that it would be more burdensome for the defendant to fight the case here, with the accompanying difficulties, so it is said, of calling witnesses, producing documents and accessing all of the material which might not be forthcoming by consent in a civil proceeding; whereas the plaintiff will not have that difficulty if his case is tried in the United States. It is not clear to me why the plaintiff would be free of those burdens, but I do not ignore the submission that has been made.

129 Throughout, the argument has been that the article is "indelibly American, written by Americans for Americans interested in the stock market and its affairs". The weakness in this argument is that the aspect sued on by Mr Gutnick is indelibly Victorian, connected with no other place and that any documentation or evidence concerning the matter will all be found in Victoria.

130 Weighing up and balancing all of these factors, I reach a clear conclusion that the State of Victoria is both the appropriate forum and convenient forum for the disposition of the litigation commenced by the plaintiff. Many of the defendant's claimed difficulties are more imagined than real, but, at the end of the day, the most significant of the features favouring a Victorian jurisdiction is that the proceeding has been commenced by a Victorian resident conducting his business and social affairs in this State in respect of a defamatory publication published in this State, suing only upon publication in this State and disclaiming any form of damages in

any other place.

131 In my view, it would be verging on the extraordinary to suggest that Mr Gutnick's action in respect of that part of the publication on which he sues should be removed for determination to the State of New Jersey or the State of New York. To use the words of Lord Steyn in *Berezovsky*:

“This Court having jurisdiction, it is manifestly just and reasonable that this Court should be the place where the defendant should answer for its wrongdoing.”

Accordingly, for all of these reasons, I refuse the defendant's application for a stay of this proceeding.
