CITATION: Kaynes v. BP, 2013 ONSC 5802
COURT FILE NO.: CV-12-00467836-00CP
DATE: 20131009

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Peter Kaynes**, Plaintiff

AND:

BP, plc ("BP"), Defendant

BEFORE: Conway J.

COUNSEL: *Larry Lowenstein, Laura K. Fric* and *Kevin O'Brien*, for BP, moving party

Andrew Morganti and *Arie Gaertner*, for the Plaintiff, responding party

HEARD: September 23 and 24, 2013

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION
(re: Jurisdiction Motion)

Conway J.

[1] Mr. Kaynes, the plaintiff, brings this proposed class action against BP. He alleges that BP made various misrepresentations in its investor documents before and after the Deepwater Horizon oil spill in the Gulf of Mexico in April 2010 (the "**Oil Spill**"). He seeks leave to bring a statutory action for secondary market misrepresentation under Part XXIII.I of the *Securities Act*, R.S.O. 1990, c. S.5 (the "**Act**"). He makes a further claim for common law negligent misrepresentation.

[2] BP brings this jurisdiction motion in advance of the leave and certification motions. It seeks an order staying this proceeding (in part) on the basis that this court does not have jurisdiction over the dispute or, alternatively, on the basis of *forum non conveniens*.

Overview

[3] BP is a U.K. incorporated company. Its principal offices are located in London, England. It owns no real or personal property in Canada and has no offices or employees here. BP has several indirect Canadian subsidiaries that conduct exploration and development of energy properties in Canada.

[4] BP's equity securities consist of common shares and American Depositary Shares ("**ADS**"). The common shares are listed on the London Stock Exchange and the Frankfurt Stock Exchange (the "**European exchanges**").

[5] The ADS were listed on the Toronto Stock Exchange (the "**TSX**") until August 2008, at which time BP voluntarily de-listed them. The ADS are now listed only on the New York Stock Exchange (the "**NYSE**").

[6] BP was a reporting issuer in Ontario and other Canadian provinces until January 12, 2009. When BP applied to cease being a reporting issuer, it undertook with the Ontario and Alberta securities commissions to continue sending its Canadian shareholders all disclosure material that it was required to send to its U.S. investors.

[7] Mr. Kaynes, the plaintiff, is an Ontario resident. He owns over 1400 ADS. He purchased the ADS through his brokerage accounts in Alberta and Ontario. All of his purchases during the proposed class period were over the NYSE.

[8] The plaintiff claims that BP made various misrepresentations and omissions about its operational and safety programs prior to the Oil Spill and about its cleanup efforts after the Oil Spill. He claims that these misrepresentations were contained in BP investor documents including sustainability reviews, annual reports and press releases. The plaintiff alleges that these misrepresentations had the effect of artificially inflating BP's share prices. He claims that once the truth came out about BP's ability to respond to the Oil Spill, the share prices dropped.

[9] This is not the only proposed class action against BP. A class action is underway in the United States (the "**U.S. Proceeding**"),[1] brought on behalf of a proposed class consisting of all purchasers of ADS over the NYSE between November 8, 2007 and May 28, 2010.

[10] The plaintiff seeks to represent a class of Canadian residents who purchased BP shares between May 9, 2007 and May 28, 2010.[2] The proposed class includes all Canadians who purchased common shares and ADS, whether on the TSX, NYSE or European exchanges; however, the plaintiff has excluded from the proposed class any Canadian residents who purchased BP shares over the NYSE and who do not opt-out of the U.S. Proceeding.[3]

<u>Legal Principles – Jurisdiction</u>

[11] When a foreign defendant is sued in a tort claim in Ontario and challenges the court's jurisdiction to adjudicate the dispute, the court must determine whether there is a "real and

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[1] The case is entitled *In BP plc Securities Litigation* and is currently before the United States District Court for the Southern District of Texas, Case No. 4:10-md-02185.

[2] The proposed class definition is "all residents of Canada, other than Excluded Persons, who acquired equity securities of BP during the period from (a) May 9, 2007 to and including January 12, 2009 and who held some or all of those securities at the close of trading on May 28, 2010; and (b) January 13, 2009 to and including May 28, 2010."

[3] The class definition also excludes anyone related to or affiliated with BP.

substantial connection" between the province and the claim: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572 ("***Van Breda***").

[12] The plaintiff bears the onus of establishing one of four presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction: (a) the defendant is domiciled or resident in the jurisdiction; (b) the defendant carries on business in the jurisdiction; (c) the tort was committed in Ontario; or (d) a contract connected with the dispute was made in Ontario.[4] If one of these presumptive connecting factors is present and is not rebutted, the court may assume jurisdiction over the dispute: *Van Breda*, at paras. 80, 90, 100.

[13] The list of presumptive connecting factors is not closed. The Supreme Court recognized that over time new connecting factors may be identified. One of the factors for the court to consider is the treatment of the connecting factor in statute law: *Van Breda*, at para. 91.

[14] *Van Breda* dealt with a common law tort claim, not a statutory claim. In *Ontario v. Rothmans*, 2013 ONCA 353, 115 O.R. (3d) 561 ("***Rothmans***"), the Ontario Court of Appeal conducted the *Van Breda* analysis in the context of a statutory claim. In that case, the statutory claim was founded on the common law tort of conspiracy. The court held the statutory claim, while not technically a claim in respect of a tort committed in Ontario, was tantamount to such a claim or sufficiently analogous to one that it qualified as a new connecting factor: *Rothmans*, at para. 44.

[15] In reaching that conclusion, the court considered where the alleged statutory tort had been committed. It noted that the tort of conspiracy occurs in the jurisdiction where the harm is suffered and that the statutory claim (founded on the tort of conspiracy) was for alleged damage sustained in Ontario. It therefore held that the statutory claim was a claim in respect of a tort committed in Ontario and was presumptively connected to the province: *Rothmans*, at paras. 31-39.

[16] In this case, the alleged "statutory tort" or "new connecting factor" is the cause of action created by s. 138.3 of the Act for secondary market misrepresentation.

Statutory Claim for Secondary Market Misrepresentation

[17] Section 138.3 of the Act creates the cause of action for secondary market misrepresentation. It reads as follows:

> Where a responsible issuer...releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly

[4] The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor and does not have presumptive effect: *Van Breda*, at para. 86.

> corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages.

[18] A "responsible issuer" is defined in s. 138.1 of the Act as: (a) a reporting issuer, or (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded.

BP's Position

[19] BP does not challenge this court's jurisdiction over the plaintiff's proposed class action in its entirety. BP concedes that this court can assume jurisdiction over the action, but only with respect to the claims of proposed class members who purchased BP shares on the TSX (the "**TSX purchasers**").[5] It argues that this court has no jurisdiction over the claims of proposed class members who purchased BP shares on the NYSE or European exchanges (the "**non-TSX purchasers**" or the "**NYSE and European purchasers**").

[20] BP's argument is that since BP is not resident in Ontario, does not carry on business here and the claim does not relate to a contract made in the province,[6] the only basis on which this court could possibly assume jurisdiction is under the presumptive connecting factor "tort committed in the province".

[21] However, BP argues that even if the statutory claim under s. 138.3 is considered to be a statutory tort, it could only have been "committed" in Ontario in the case of the TSX purchasers. BP argues that:

- an investor no longer has to prove reliance on an alleged misrepresentation under s. 138.3 as he would for the common law tort of negligent misrepresentation;
- s. 138.3 instead focuses on the "release" of the alleged misrepresentation by the responsible issuer, which can occur anywhere;
- the purchase of shares in Ontario is therefore the only act that could connect the purchaser's claim under s. 138.3 to the province.

[22] Therefore, according to BP, the court can assume jurisdiction on the basis of a "tort committed in the province" only for the TSX purchasers, as they are the only ones who purchased their BP shares in Ontario.

[23] BP submits that its position is in keeping with the U.S. Supreme Court's decision in *Morrison v. National Australia Bank*, 130 S. Ct. 2869, 2881-83 (2010). In *Morrison*, the court

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[5] The plaintiff concedes that his common law claim for negligent misrepresentation is restricted to TSX purchasers. Since BP concedes jurisdiction for the TSX purchasers, there is no jurisdictional issue with respect to the common law claim.

[6] However, BP concedes that the claims of TSX purchasers relate to a contract made in the province.

held that the statutory cause of action under s. 10(b) of the *Exchange Act* and Rule 10b-5 promulgated thereunder applies only to the purchase or sale of a security listed on an American stock exchange and the purchase or sale of any other security in the U.S. BP submits that a careful application of *Van Breda* to the statutory cause of action created by s. 138.3 of the Act would lead to the same "exchange-based" result as is now applied in the U.S.

Preliminary Comment

[24] This is a preliminary jurisdiction motion. It is not a certification hearing.

[25] The issue on this motion is whether this court can assume jurisdiction over a claim against BP, a foreign defendant. I will conduct the analysis under *Van Breda* to determine whether there is a real and substantial connection between the plaintiff's claim and the province that would entitle this court to assume jurisdiction over the claim against BP.

[26] For purposes of this analysis, I am considering the claim only as it relates to an Ontario resident such as Mr. Kaynes. Since the action has not been certified, the court has not determined whether a national class or a class including non-residents is appropriate.[7] I will therefore conduct the *Van Breda* analysis only with respect to the claim of an Ontario resident.

Analysis – Jurisdiction

[27] In my view, this motion can be disposed of on the basis that the plaintiff's statutory claim under s. 138.3 is tantamount to "a tort committed in Ontario" or sufficiently analogous to one that it qualifies as a "new connecting factor".

[28] Section 138.3 of the Act gives a purchaser of shares a cause of action with respect to secondary market misrepresentations made by a responsible issuer. This statutory cause of action is founded on misrepresentation. It can be viewed as a "statutory tort".

[29] For jurisdictional purposes, the issue then becomes – where was the statutory tort committed? According to *Rothmans* (applying *Van Breda*), if the claim relates to a statutory tort committed in Ontario, it is presumptively connected to Ontario and, unless the presumption is rebutted, this court may assume jurisdiction over the claim.

[30] As noted, BP's central argument is that the statutory tort under s. 138.3 could only have been committed in Ontario for the TSX purchasers. I reject that submission, for the following reasons.

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[7] BP did not argue this motion based on whether a proposed class member is or is not an Ontario resident (although BP appears to accept that this court has jurisdiction over the claims of non-residents, if they purchased their shares on the TSX). Its argument focused only on where (i.e. on which stock exchange) the investor purchased his shares.

Wording of s. 138.3

[31] BP's position that the statutory tort could only be committed in Ontario for the TSX purchasers is not in keeping with the broad language of s. 138.3.

[32] The Act provides that if a responsible issuer releases a document containing a misrepresentation then a "purchaser of that issuer's shares between the time when the document was released and the time the misrepresentation was publicly corrected" has a right of action.

[33] There is nothing in the wording of the Act that restricts the cause of action to investors who purchased their shares on an Ontario exchange. BP's proposed application of the real and substantial test in *Van Breda* would effectively restrict this statutory claim to those who purchased shares on an Ontario exchange. In essence, BP would be imposing a limitation in the Act where none exists.

Deemed Reliance

[34] Section 138.3 was introduced as remedial legislation to overcome the obstacles in proving claims for secondary market misrepresentation at common law: *Silver v. Imax Corp.*, 2009 CanLII 72342 (ONSC), at para. 294. The section does this by relieving the investor from having to prove reliance. Where a responsible issuer makes a misrepresentation in the secondary market, the investor is deemed to have relied on that misrepresentation: *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, at para. 159.

[35] In a common law claim of negligent misrepresentation, the place or *situs* of the tort is the place where the misrepresentation is received and relied upon: *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2013 ONCA 601 ("***Central Sun***"), at paras. 30-34; *2249659 Ontario Ltd. v. Siegen*, 2013 ONCA 354, 115 O.R. (3d) 241, at para. 31; and *Silver v. Imax Corp.*, [2009] O.J. No. 5585, at para. 151. In determining where the alleged tort occurred, the court looks at where the recipient received the misrepresentation and relied on it to make a particular decision or to take a particular action. As stated in *Central Sun*, at paras. 31 and 32:

> There can be no question that the appellant acted on these studies in Ontario. That is where it relied on the studies to take the decisions about where to locate the mine and how to build and operate it...The inevitable conclusion is that the misrepresentations were received and relied on in Ontario.

[36] By analogy, if a responsible issuer makes a misrepresentation and the Act deems the Ontario investor to have relied on the misrepresentation when he purchased shares of that issuer, the statutory tort must be considered to have been committed in Ontario. I cannot agree that the *situs* of this statutory tort is to be determined, in each case, by the location of the exchange on which the actual share purchase occurred.

The Ontario Court of Appeal's Decision in *Abdula v. Canadian Solar*

[37] BP's position is inconsistent with the Ontario Court of Appeal's decision in *Abdula v. Canadian Solar Inc.*, 2012 ONCA 211, 110 O.R. (3d) 256, leave to appeal to the Supreme Court of Canada ref'd [2012] S.C.C.A. No. 246 ("***Abdula***").[8]

[38] In *Abdula*, an Ontario resident brought a proposed securities class action against Canadian Solar. Canadian Solar was not a reporting issuer in Ontario and did not fall within the definition of a responsible issuer in s. 138.1(a). In a preliminary jurisdiction motion, Canadian Solar argued that it could not be a responsible issuer under s. 138.1(b) because its shares were traded only on the NASDAQ and not on a Canadian exchange.

[39] Since Canadian Solar was not a reporting issuer, the motions judge had to consider whether the company fell within the definition in s. 138.1(b). He concluded that Canadian Solar had a real and substantial connection to Ontario.[9] He also held that Canadian Solar's shares did not have to be publicly traded on a Canadian exchange for it to come within the definition.

[40] The decision was upheld on appeal. Hoy J.A., for the court, reviewed the history and purpose of the secondary market liability sections of the Act. She rejected Canadian Solar's argument that s. 138.1(b) only applies to issuers whose shares are publicly traded in Canada.

[41] While decided in a different context,[10] the result in *Abdula* was that an Ontario resident who had purchased shares of a non-reporting issuer was entitled (subject to obtaining leave) to bring a secondary market claim against the company in an Ontario court, notwithstanding the fact that he had purchased his shares on a foreign exchange.

[42] In my view, it would be inconsistent with the result in *Abdula* to hold, on the one hand, that an Ontario investor who purchased shares of a non-reporting issuer on a foreign exchange could bring a claim against the company in an Ontario court but to hold, on the other hand, that an Ontario investor who purchased shares of a reporting issuer on a foreign exchange could not bring that claim in an Ontario court.[11]

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[8] The Supreme Court of Canada leave decision was rendered after the release of *Van Breda*.

[9] See *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105. The motions judge came to this conclusion because, among other things, the company was incorporated in Canada, held its annual meeting in Ontario, carried on business in Ontario and the alleged misrepresentations were contained in press releases issued in Ontario. This analysis was required because s. 138.1(b) states that a non-reporting issuer must have a real and substantial connection to Ontario.

[10] The issue in *Abdula* was whether Canadian Solar was a responsible issuer. In this case the issue is whether the court has jurisdiction over a claim against BP as a foreign defendant.

[11] I have focussed on the period that BP was a reporting issuer until January 2009 in concluding that this court has jurisdiction over the claim. The plaintiff alleges that BP continued to be a responsible issuer after January 2009. In light of my conclusion that this court has jurisdiction over the claim, I do not propose to restrict this jurisdiction to a specific time period.

Conclusion on Jurisdiction

[43] The plaintiff's statutory claim is presumptively connected to the province. BP's arguments to rebut this presumption for the non-TSX purchasers are the same as those I have already rejected. I am satisfied that there is a real and substantial connection between the plaintiff's claim under s. 138.3 of the Act and the province of Ontario. This court can assume jurisdiction over the claim.

Forum non Conveniens

[44] BP submits that even if this court has jurisdiction *simpliciter* over the claim, it should decline to exercise that jurisdiction on the basis of *forum non conveniens* for the non-TSX purchasers.

[45] The burden is on BP to show why this court should decline to exercise jurisdiction. It must show that the alternative forum is clearly more appropriate: *Van Breda*, at paras. 101-112. The non-exhaustive list of factors that the court is to consider are: (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum; (b) the law to be applied to issues in the proceeding; (c) the desirability of avoiding multiplicity of legal proceedings; (d) the desirability of avoiding conflicting decisions in different courts; (e) the enforcement of an eventual judgment; and (f) the fair and efficient working of the Canadian legal system as a whole: *Van Breda*, at para. 105.

[46] BP argues that the trading volume of BP shares on the TSX was negligible[12] and that the plaintiff should not use this minimal trading to bring the claims of the NYSE and European purchasers before this court. It submits that the courts of the U.S. and U.K. are clearly more appropriate forums in which to litigate those shareholders' claims. It submits that the NYSE and European purchasers could reasonably expect to have their claims adjudicated in the forums in which they purchased their shares.

[47] The plaintiff submits that there are approximately 1500 Canadian holders of BP shares that (as at December 2008) beneficially owned 2% of all outstanding BP securities,[13] worth over $200 million.

[48] In my view, BP is seeking to restrict and fragment the proposed class at this early stage of the proceedings. BP's submission would result in this potential claim against an alleged Ontario responsible issuer being litigated in three different jurisdictions. That is not convenient, cost-effective or efficient.

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[12] BP's evidence is that trading of the ADS on the TSX during the proposed class period amounted to 0.001 percent of the volume of trading on the NYSE and 0.001 percent of the adjusted volume on the London Stock Exchange.

[13] The plaintiff states that there is no precise evidence on the number of Ontario and Canadian residents in the proposed class. It submits that it obtained this information from BP's disclosure to the Alberta Securities Commission in December 2008.

[49] BP's submission will not avoid a multiplicity of proceedings, as BP concedes that this court has jurisdiction over the claims of TSX purchasers. There will be an Ontario action regardless of the outcome of this motion.

[50] BP argues that the NYSE purchasers are already part of the U.S. Proceeding and that their claims should be litigated in that proceeding, rather than in the Ontario action. In my view, it would be premature to stay the Ontario action on this basis. The U.S. Proceeding is still at the pre-certification stage and may or may not be certified.[14] Even if it is certified, a NYSE purchaser who wants to opt-out of that proceeding will no longer be able to participate in the Ontario action if it has been stayed. BP effectively will have eliminated this claim.[15]

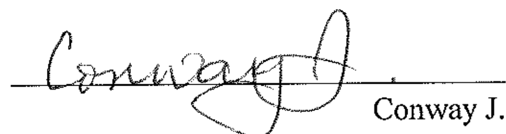
[51] With respect to purchasers on the European exchanges, BP's evidence is that those purchasers would be required to bring individual actions in the U.K. and seek an order to have them consolidated or tried together or adjudicated on a group or representative basis. I cannot see how that would be a clearly more appropriate forum for their claims.

[52] BP has failed to meet its burden of establishing that the U.S. and U.K. courts are clearly more appropriate forums in which to adjudicate the claims of the non-TSX purchasers.

Decision

[53] BP's motion is dismissed.

[54] I encourage the parties to agree on the costs of this motion. If the parties are unable to agree, brief written submissions (not exceeding 3 pages, double spaced, exclusive of bill of costs) may be made to me, by the plaintiff within 21 days and BP within 15 days thereafter.



Conway J.

Date: October 9, 2013

[14] The certification hearing for the U.S. Proceeding is scheduled for November 2013.

[15] I note that the plaintiff has already addressed BP's concerns to a large extent by excluding from the proposed class any NYSE purchaser who does not opt-out of the U.S. Proceeding.