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Litigation - Canada

Ontario declines jurisdiction over BP cross-border securities class action

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Authors

Norm Emblem

Matthew Fleming

Amer Pasalic

Summary

The Ontario Court of Appeal recently released a unanimous decision regarding multi-jurisdictional securities class actions that will be of considerable interest to public issuers in Canada and elsewhere. In *Kaynes v BP, PLC*,(1) an Ontario shareholder alleged that BP, PLC had made misrepresentations to its shareholders regarding, among other things, the extent of the 2010 Deepwater Horizon oil spill, which negatively affected the price of its shares. The Ontario plaintiff had purchased his shares on a foreign exchange, but received BP's financial disclosure in Ontario.

The court agreed that Ontario had jurisdiction over the claims of class members who had purchased their shares on foreign exchanges, but nevertheless held that the claims ought to be stayed on the basis that the United States or the United Kingdom would be a more appropriate forum. The court held that the prevailing international standard tying jurisdiction to the place where the securities are traded should be respected, and a multiplicity of proceedings involving the same claims or class of claims should be avoided.

Background

The plaintiff's claim alleged that BP had made public misstatements related to its operations, safety programmes and the oil spill which affected the price of its shares.

The plaintiff owned American depository shares (ADS)(2) in BP that had been purchased over the New York Stock Exchange (NYSE). The ADS had been listed on the Toronto Stock Exchange (TSX), but were delisted in 2008. While BP's common shares were listed for trading on the London Stock Exchange and the Frankfurt Stock Exchange, they had never been listed on the TSX.

The proposed class in the action consisted of all Canadian residents who owned BP equity securities, whether common shares or ADS, during the proposed class period. It specifically excluded those shareholders who had purchased shares on the NYSE and who did not opt out of the parallel US proceedings (based on the same alleged misrepresentations) in the US District Court for the Southern District of Texas.

Securities Act

The plaintiff's claim was based on the secondary market liability provisions of the Ontario Securities Act,(3) which permit a claim against a responsible issuer and its directors, officers and others for misrepresentations in public filings. A 'responsible issuer' is defined as a "reporting issuer" in Ontario or "any other responsible issuer with a real and substantial connection to Ontario, any securities of which are publicly traded".

Issues

Two issues were raised in the court of appeal:

- Did Ontario have jurisdiction over the claims of class members who purchased their shares on foreign exchanges?
- If Ontario did have jurisdiction, should the claims be stayed on the basis of fo*rum non conveniens*?

Ontario had jurisdiction over claims

In determining whether the court could assume jurisdiction over the dispute, the Ontario Court of Appeal referred to the leading decision of the Supreme Court of Canada in *Club Resorts Ltd v Van Breda.*(4) To determine whether a real and substantial connection exists between Ontario and the defendant or the plaintiff's claim, the plaintiff must establish one of four "presumptive factors" that, on first appearance, entitle a court to assume jurisdiction over a dispute.

The four presumptive factors are as follows:

- The defendant is domiciled or resident in the province;
- The defendant carries on business in the province;
- The tort was committed in the province; or
- A contract connected with the dispute was made in the province.

It was undisputed that, on the first two factors, BP lacked a sufficient presence in Ontario to meet the test. Similarly, the plaintiff did not argue that the purchase of shares on the foreign exchanges could be said to have arisen from a contract connected with a dispute that was made in Ontario. Therefore, the only presumptive connecting factor capable of supporting jurisdiction in this case was whether the claim was for a tort committed in Ontario.

In this respect – and notwithstanding the fact that BP was not a reporting issuer in Ontario and its shares were no longer listed on the TSX – the court of appeal held that by releasing a document outside Ontario that BP knew it was legally required to send to Ontario shareholders, BP had committed an act with sufficient connection to Ontario to qualify as the commission of a tort in the province. The court also held that the legislature could not have intended that a foreign corporation such as BP could avoid the reach of Ontario's securities regime simply because the initial point of release of the document was outside Ontario.

Claims should be stayed on the basis of *forum non conveniens*

However, even if a plaintiff succeeds in demonstrating that Ontario has jurisdiction, the courts retain a residual discretion to decline to exercise that jurisdiction under the *forum non conveniens* doctrine. This doctrine requires the defendant to establish "why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff".(5) The doctrine is a flexible concept, which requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. The principle of comity and an attitude of respect for foreign legal systems underlie the *forum non conveniens* analysis.

In order for the defendant to displace the forum chosen by the plaintiff and succeed in discharging this burden, it "must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action",(6) and "must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate".(7) Although the list of factors that ought to be considered when deciding whether to exercise the *forum non conveniens* doctrine is not exhaustive, Van Breda highlighted the following factors:

- the law to be applied to issues in the proceeding;
- the desirability of avoiding multiplicity of legal proceedings;
- fairness to the parties and the efficient resolution of claims; and
- the desirability of avoiding conflicting decisions in different courts.(8)

In support of its *forum non conveniens* argument that the Ontario courts should decline jurisdiction in favour of other jurisdictions, including the United States and the United Kingdom, BP led uncontradicted expert evidence regarding the securities law regimes in those jurisdictions, and also led evidence as to the reported trade volume of BP shares in the three jurisdictions during the proposed class period.

The court of appeal agreed with BP that the plaintiff's claim must be considered "in the full international context of the securities law regimes in Ontario, the United States and the United Kingdom, and the trading of BP securities in those jurisdictions".(9) The court observed that both the United States and the United Kingdom regimes assert jurisdiction, by statute, on the basis of the exchange where the securities are traded, and further stated:

> "*Asserting Ontario jurisdiction over the plaintiff's claim would be inconsistent with the approach taken under both US and UK law with respect to jurisdiction over claims for secondary market representation… In these circumstances, the principle of comity strongly favours declining jurisdiction. Ontario is not, of course, obliged to follow slavishly the jurisdictional standards of other countries. However, the principle of comity requires the court to consider to implications of departing from the prevailing international norm or practice, particularly in an area such as the securities market where cross-border transactions are routine and the maintenance of an orderly and predictable regime for the resolution of claims is imperative. Moreover, where, as here, the plaintiff's claim rests to a significant degree on foreign law, the case for assuming jurisdiction is considerably weakened.*"

In arriving at its conclusion that Ontario was not the appropriate forum, the court also considered the fact that purchasers who use foreign exchanges should not be surprised that they ought to look to the foreign court to litigate their claims, and that "order and fairness will be achieved by adhering to the

prevailing international standard tying jurisdiction to the place where the securities were traded and a multiplicity of proceedings involving the same claims…will be avoided".(10)

Comment

Following the US Supreme Court's decision in *Morrison v National Australia Bank*,(11) which barred federal securities fraud claims in respect of securities traded on non-US stock exchanges, Ontario was seen as a receptive jurisdiction to securities class actions brought on behalf of global classes of security holders who purchased their securities in Ontario and/or on foreign exchanges.

However, the Ontario Court of Appeal's decision in *Kaynes* highlights a developing approach by Ontario courts to analyse proposed securities class actions in an international context where similar claims are concurrently being litigated in other jurisdictions. The court's decision establishes that where the securities of public issuers that have little connection to Ontario are purchased by Ontario residents on foreign exchanges and where the securities do not trade on a Canadian exchange, the appropriate forum for pursuing claims against the public issuer is in the jurisdiction where the securities are traded.

For further information on this topic please contact Norm Emblem, Matthew Fleming or Amer Pasalic at Dentons Canada LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (norm.emblem@dentons.com, matthew.fleming@dentons.com or amer.pasalic@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2014 Ontario Not-for-Profit Corporations Act 580.

(2) American depository shares are a form of equity security currently listed for trading only on the NYSE.

(3) Regional Security Officer 1990, c S5.

(4) 2012 Supreme Court of Canada 17 [*Van Breda*].

(5) *Supra* note 1 at Paragraph 35.

(6) *Ibid.*

(7) *Ibid.*

(8) *Supra* note 4 at Paragraph 105.

(9) *Supra* note 1 at Paragraph 46.

(10) *Supra* note 1 at Paragraph 52.

(11) 561 US 247.