Litigation - Canada

Jurisdiction over dispute where defendant has no connection to province

Contributed by **Dentons**

April 08 2014

Authors

Michael D Schafler

Rebecca Studin

In the recent decision in *Kaynes v BP plc*,(1) the Ontario Superior Court of Justice considered whether it had jurisdiction over a claim against a foreign defendant. The court assumed jurisdiction notwithstanding that there was no connection between the defendant and Ontario other than the plaintiff's statutory cause of action for secondary market misrepresentation under Ontario's Securities Act.(2)

Facts

The plaintiff, Kaynes, had commenced a proposed class action against BP plc, alleging that BP had made various misrepresentations in its investor documents before and after the Deepwater Horizon oil spill in the Gulf of Mexico in April 2010. Kaynes further sought leave to bring a statutory action for secondary market misrepresentation against BP under Part XXIII.1 of the act. In advance of the certification and leave motions, BP brought a motion to stay part of the proceeding on the ground that the Ontario court lacked jurisdiction over the dispute or, alternatively, on the basis of *forum non conveniens*.

BP – a UK corporation with principal offices in London, England – owned no personal property and had no employees in Canada. BP's equity securities consisted of common shares and American depositary shares, which were listed on the Toronto Stock Exchange (TSX) until August 2008. Kaynes, an Ontario resident, owned over 1,400 American depositary shares, which he purchased through brokerage accounts in Ontario and Alberta over the New York Stock Exchange (NYSE). Kaynes sought to represent a class of Canadian residents that purchased BP shares between May 9 2007 and May 28 2010. The class action included all Canadians that had purchased common shares and American depositary shares, but excluded any Canadian resident that purchased BP shares over the NYSE and did not opt out of a related US class action against BP.

Analysis

In considering BP's motion to stay the proceeding, the court applied the analysis set out in the Supreme Court of Canada decision in *Club Resorts Ltd v Van Breda*(3) to determine whether there was a real and substantial connection between Kaynes' claim and the province of Ontario. Pursuant to the *Van Breda* analysis, the plaintiff bears the onus of establishing one of four presumptive connecting factors which *prima facie* permit a court to assume jurisdiction:

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

This list is not exhaustive and the court may identify new factors over time. One such factor is the treatment of the connecting factor in statute law. In this case, the alleged "statutory tort" or "new connecting factor" was the cause of action created by Section 138.3(1) of the act for secondary market misrepresentation, which provides:

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

Section 138.1 defines a 'responsible issuer' 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 conceded that the Ontario court could assume jurisdiction over the action, but only to the extent of the claim of proposed class members that had purchased BP shares on the TSX. BP argued that the court had no jurisdiction over the claims of proposed class members that had purchased BP shares on the NYSE or European exchanges. Because BP was not an Ontario resident and did not carry on business in the province, and the claim did not relate to a contract made in Ontario, the only basis for the court to assume jurisdiction was under the presumptive connecting factor of a tort committed in Ontario. The statutory claim asserted pursuant to Section 138.3 could have been committed in Ontario only in respect of the TSX purchasers.

Jurisdiction

The court's analysis was restricted to an Ontario court's jurisdiction over the claim as brought by Ontario residents such as Kaynes. The court dismissed BP's argument, holding that Kaynes' statutory claim under Section138.3 was tantamount to "a tort committed in Ontario" or sufficiently analogous to one that it qualified as a "new connecting factor". Section 138.3 gives a share purchaser a cause of action for secondary market misrepresentation made by a responsible issuer and can be viewed as a "statutory tort". In terms of jurisdiction, if the claim relates to a statutory tort committed in Ontario, the connection to Ontario is presumed, and unless the presumption is rebutted, the Ontario court may assume jurisdiction.

The court rejected BP's argument that the statutory tort under Section 138.3 could have been committed in Ontario only for the TSX purchasers because there was nothing in the language of the act which restricted the cause of action to investors that had purchased their shares on the TSX. In addition, unlike the common law tort of negligent misrepresentation – in which the place or *situs* of the tort is the place where the misrepresentation is received and relied on – under Section 138.3, if a responsible issuer made a misrepresentation, the Ontario investor is deemed to have relied on the misrepresentation in purchasing the shares, and the statutory tort must be considered to have been committed in Ontario. Finally, the court held that BP's position was inconsistent with the Court of Appeal for Ontario's decision in *Abdula v Canadian Solar*. (4) In that case, an Ontario resident brought a proposed securities class action against Canadian Solar, which was not a reporting issuer in Ontario and did not fall within the definition of a 'responsible issuer' under Section 138.1(a). The motion judge held that Canadian Solar had a real and substantial connection to Ontario, and so could be considered a responsible issuer within the definition of Section 138.1(b), and that Canadian Solar's shares did not have to be publicly traded on a Canadian exchange for it to come within that definition. The ruling was upheld on appeal. The result of *Abdula v Canadian Solar* was that an Ontario resident that had purchased shares of a non-reporting issuer was entitled, with leave, to bring a secondary market claim against a company in an Ontario court, despite having purchased the shares on a foreign exchange.

The court was therefore satisfied that there was a real and substantial connection between Kaynes' claim under Section 138.3 and the province of Ontario, and permitted the Ontario court to assume jurisdiction over the claim.

Forum non conveniens

BP argued that the court should decline to exercise its jurisdiction on the basis of *forum non conveniens* for the non-TSX purchasers. In order to satisfy its burden in that regard, BP had to show that another forum was more appropriate, based on a non-exhaustive list of factors from *Van Breda,* such as:

- the comparative convenience and expense for the parties to the proceeding and for their witnesses in litigation in the court or in any alternative forum;
- the applicable law to the proceedings;
- the desirability of avoiding a multiplicity of proceedings;
- the desirability of avoiding conflicting decisions in different courts;
- the enforcement of an eventual judgment; and
- the fair and efficient working of the Canadian legal system as a whole.

The court held that BP sought to restrict and fragment the proposed class at an early stage in the proceeding, which would have resulted in the potential claim against the allegedly responsible issuer being litigated in three different jurisdictions, which would be neither convenient, cost-effective nor efficient. As BP conceded that the Ontario court had jurisdiction over the claims of the TSX purchasers, they would issue an Ontario

action in any event. It was also premature to stay the action on the basis that the NYSE purchasers were already part of the US proceeding, as the US proceeding was still at the pre-certification stage and was not certified. If that proceeding were not to be certified, the NYSE purchasers which had opted out of the proceeding would be unable to participate in the Ontario proceeding if it were stayed. For the European exchange purchasers which were required to commence individual actions in the United Kingdom and then seek to have them consolidated or adjudicated together, that was not a more appropriate forum for their claims.

BP therefore failed to meet its burden in establishing that the US and UK courts were clearly more appropriate forums in which to litigate the claims of the non-TSX purchasers.

Therefore, BP's motion was dismissed.

Comment

Kaynes v BP indicates that where an Ontario resident purchases shares from a responsible issuer, regardless of where the shares were purchased, the Ontario court is entitled to assume jurisdiction over an action for the statutory tort of secondary market misrepresentation under Section 138.3, even where the issuer has no connection to the jurisdiction. If a responsible issuer makes a representation and the act deems the Ontario investor to have relied on the misrepresentation when the investor purchased shares of that issuer, the statutory tort must be considered to have been committed in Ontario. Unless the defendant can rebut the presumed jurisdiction through the *forum non conveniens* analysis, the Ontario court will have jurisdiction over the dispute.

For further information on this topic please contact Michael D Schafler or Rebecca Studin at Dentons by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (michael.schafler@dentons.com or rebecca.studin@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2013 ONSC 5802 (SCJ).

(2) RSO 1990, cS5.

(3) [2012] 1 SCR 572.

(4) 2012 ONCA 211, leave to appeal to the Supreme Court of Canada refused [2012] SCCA 246.