COURT OF APPEAL FOR ONTARIO

CITATION: Kaynes v. BP, PLC, 2014 ONCA 580
DATE: 20140814
DOCKET: C57876

Sharpe, Simmons and Benotto JJ.A.

BETWEEN

Peter Kaynes

Plaintiff (Respondent)

and

BP, PLC

Defendant (Appellant)

Larry P. Lowenstein, Laura K. Fric and Kevin O'Brien, for the appellant

Joseph Groia, Andrew Morganti and Matthew Stroh, for the respondent

Heard: June 24, 2014

On appeal from the judgment of Justice B.A. Conway of the Superior Court of Justice, dated October 9, 2013.

Sharpe J.A.:

[1] In this proposed class action, the respondent plaintiff alleges that the appellant, BP, PLC ("BP"), made misrepresentations in documents it sent to shareholders. The plaintiff asserts the statutory cause of action for secondary market misrepresentation conferred by Part XXIII.1 of the *Securities Act,* R.S.O. 1990, c. S.5.

[2] The plaintiff purchased his shares over the New York Stock Exchange ("NYSE"). The proposed class definition includes all residents of Canada who acquired BP securities between May 9, 2007 and May 28, 2010 wherever those securities were purchased. The issue raised on this appeal is whether Ontario has or should assert jurisdiction over the plaintiff's claim and the claims of proposed class members who purchased BP shares on foreign exchanges.

[3] BP concedes that Ontario has jurisdiction to entertain the claims of those members of the proposed class who purchased their shares on the Toronto Stock Exchange (TSX"), but contends that there is no real and substantial connection between Ontario and the claims of Canadian residents who, like the plaintiff, purchased their shares on foreign exchanges. Alternatively, BP argues that even if there is jurisdiction *simpliciter*, Ontario should decline to exercise that jurisdiction on grounds of *forum non conveniens*.

[4] The motion judge dismissed BP's jurisdictional challenge. For the following reasons, I agree with the motion judge that Ontario does have jurisdiction *simpliciter*, but I respectfully conclude that she erred in principle in failing to decline jurisdiction on grounds of *forum non conveniens*.

FACTS

[5] The plaintiffs claim relates to the April 2010 Deep Water Horizon oil spill that occurred in the Gulf of Mexico. The plaintiff alleges that BP made certain misrepresentations in its public disclosures, before and after the spill, related to

its operations, safety programs, and the accident that impacted the price of BP shares.

[6] The plaintiff owns 1404 BP American Depository Shares ("ADS"), a form of equity security currently listed for trading only on the NYSE. The plaintiff purchased all his shares over the NYSE. ADS were formerly listed on the TSX but were delisted on August 15, 2008 due to low trading volume. BP's common shares are listed for trading on the London Stock exchange ("LSE") and the Frankfurt Stock Exchange (collectively, the "European Exchanges") but they have never been listed on the TSX.

[7] BP, a UK Corporation headquartered in London, England, does not own any real or personal property in Canada, nor does it carry on business in Canada. However, BP was a "reporting issuer" under Ontario's securities regulatory regime during the period when ADS were traded on the TSX. In January 2009, after ADS were delisted from the TSX, BP ceased to be a reporting issuer in Ontario and other Canadian provinces on the following condition that it undertake to continue to send relevant investor documents to its shareholders in Canada:

> [BP] undertakes to continue to send or provide to its security holders in Canada all disclosure material that it is required to send or provide to U.S. resident holders of [BP's] securities of the same class or series, in the same manner and at the same time that such material is required to be sent or provided to US resident security

> holders under applicable US federal securities laws or exchange requirements.

[8] While there is some dispute as to what documents the plaintiff actually received, BP does not dispute that it was required by the undertaking to send him the documents specified in the undertaking.

[9] The proposed class consists of all residents of Canada who acquired BP equity securities, whether common shares or ADS, between May 9 2007 and May 28, 2010 and who held some or all of those securities through the end of the proposed class period.

[10] The proposed class excludes those who purchased shares on the NYSE and do not opt out of a parallel proceeding currently underway in the United States District Court for the Southern District of Texas. That proceeding is based upon the same alleged misrepresentations. Certification in the U.S. proceedings was denied in December 2013 on the ground that the plaintiffs had failed to demonstrate that damages could be determined on a class basis in accordance with binding authority from the United States Supreme Court: *In re: BP Plc Securities Litigation*, 4:10-md-2185 (S.D.Tex, Dec., 2013). However, the plaintiffs were given leave to make a second attempt at establishing the elements necessary for certification.

LEGISLATION

[11] The plaintiff's claim is based upon Part XXIII.1 of the *Securities Act*, the relevant portions of which are as follows:

> 138.1 In this Part,
>
> "responsible issuer" means,
>
> (a) a reporting issuer, or
>
> (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded
>
> …
>
> 138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of 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…

DECISION OF THE MOTION JUDGE

[12] The motion judge found that, for the purposes of analyzing whether there is a real and substantial connection between Ontario and the plaintiff's claim in accordance with the decision of the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, the cause of action created by the *Securities Act*, s. 138.3 should be classified as a statutory tort.

[13] She found that there was nothing in the broad language of s. 138.3 to restrict the statutory cause of action to investors who had purchased their shares on an Ontario exchange.

[14] The motions judge also reasoned that s. 138.3 is remedial legislation designed to overcome the element of reliance necessary to make out a claim of the negligent misrepresentation at common law. The location of the common law tort is the place where the misrepresentation is received and relied upon and, she reasoned, by analogy, as s. 138.3 deems the investor to rely on this misrepresentation when purchasing shares, the statutory tort must be considered to have been committed in Ontario.

[15] The motion judge also referred to the decision of this court in *Abdula v. Canadian Solar Inc*., 2012 ONCA 211, 110 O.R. (3d) 256, affirming jurisdiction over a claim involving shares not publicly traded in Canada against a non-reporting issuer.

[16] The motion judge rejected BPs argument that the court should decline to exercise jurisdiction on the basis of *forum non conveniens*. She held that accepting that that argument would result in the claim of the proposed class being litigated in three different jurisdictions. As BP conceded jurisdiction over the claims of TSX purchasers, this action will proceed in any event. Moreover it would be premature to stay the Ontario action for NYSE purchasers as the US action had not yet been certified. With respect to purchasers from European

exchanges, there was evidence that individual actions would be required and accordingly there was no other clearly more appropriate forum for the claims of the proposed class.

ISSUES

[17] Two issues are raised on this appeal:

1) Did the motion judge err in finding that Ontario has jurisdiction over the claims of those class members who purchased their shares on foreign exchanges?
2) If the answer to the first question is "no", did the motion judge err in refusing to stay those claims on the basis of *forum non conveniens*?

ANALYSIS

(1) Did the motion judge err in finding that Ontario has jurisdiction over the claims of those class members who purchased their shares on foreign exchanges?

[18] *Van Breda* holds that to establish a real and substantial connection between either the defendant or the subject matter of the claim and the forum, the plaintiff must establish one of four "presumptive connecting factors" or establish a new connecting factor.

[19] The first two presumptive connecting factors identified in *Van Breda* relate to the connection between the forum and the defendant. A presumptive connecting factor to Ontario as the forum is made out where the defendant is (i)

domiciled or resident in Ontario, or (ii) carries on business in Ontario. It is not disputed that BP lacks a sufficient presence in Ontario to establish either of these presumptive connecting factors.

[20] The second two presumptive factors relate to the connection between the forum and the plaintiff's claim. A presumptive connecting factor is made out where (iii) the claim is for a tort committed in Ontario, or (iv) a contract connected with the dispute was made in Ontario. The plaintiff does not argue that the securities he and other class members purchased on foreign exchanges can be said to arise from a contract connected with the dispute that was made in Ontario. It follows, accordingly, that the only presumptive connecting factor capable of supporting jurisdiction in this case is if the claim is for a tort committed in Ontario.

[21] BP submits that the motion judge erred in finding that, on the facts alleged by the plaintiff, it committed the statutory cause of action created by s. 138.3(1) in Ontario. For convenience, I repeat here the relevant statutory language:

> Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of 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… [Emphasis added.]

[22] BP's two central arguments are based on the words I have underlined in s. 138.3(1).

[23] First, BP focusses on the requirement that the responsible issuer *release* a document containing a misrepresentation. BP contends that for the statutory tort to be committed in Ontario, the document containing the alleged misrepresentation must be released in Ontario. BP does not have a presence in Ontario and the point of the initial release of the documents was outside the province. Therefore, it cannot be said BP did something in Ontario that could amount to the commission of the statutory tort.

[24] BP's second central submission is that as the effect of the statute is to do away with the element of reliance, the motion judge erred by adopting by analogy the test for the *situs* of the common law tort of negligent misrepresentation, namely, the place where the negligent misrepresentation was received and relied upon. BP submits that the net effect of the motion judge's focus on deemed reliance by Ontario investors is to base jurisdiction on nothing more that the plaintiff's place of residence, a connecting factor said in *Van Breda* to be insufficient to ground jurisdiction.

[25] In my view, accepting BP's submissions would revert to a long-rejected test for determining the place of commission of a tort, ignore the purpose of s. 138.3, and unduly restrict its ordinary meaning.

[26] BP's shares are no longer listed on a Canadian exchange and BP has ceased to be a reporting issuer but BP has undertaken to continue to make disclosure to its Ontario shareholders. When it released the documents that contain the alleged misrepresentations, BP knew by virtue of the undertaking it had given, that even if the initial point of release was outside Ontario, the document was certain to find its way to Ontario and to its Ontario shareholders.

[27] Since Dickson J.'s landmark decision in *Moran v. Pyle National (Canada) Ltd.,* [1975] 1 S.C.R. 393, Canadian courts have rejected the rigid and unduly mechanical "place of acting" test for determining the place of commission of a tort for purposes of determining jurisdiction. *Moran v. Pyle* involved a defective light bulb that was manufactured in Ontario and that caused injury in Saskatchewan. The defendant did not carry on business in Saskatchewan, all its manufacturing and assembly operations were in Ontario and it did not directly sell it products in Saskatchewan. The Supreme Court held that the tort was committed in Saskatchewan. As Dickson J. explained at p. 409:

> [W]here a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.…By tendering his products in the market place directly or through normal distributive channels, a

> manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

[28] In my view, the same line of reasoning applies here. By releasing a document outside Ontario that BP knew it was required to send to Ontario shareholders, BP committed an act with sufficient connection to Ontario to qualify as the commission of a tort in Ontario.

[29] I find the reasons of Goudge J.A. in *Central Sun Mining Inc. v. Vector Engineering Inc*. 2013 ONCA 601, 117 O.R. (3d) 313 (C.A.) instructive on this issue. That case involved a claim for negligent misrepresentation based on reports prepared in the United States and sent to the plaintiff's office in Vancouver. Decisions relying on those reports were made by senior executives of the plaintiff located in Ontario. There was some question as to whether the reports had been sent to Ontario. This court found that even if they had not, there was a sufficient connection with Ontario to establish a real and substantial connection for purposes of jurisdiction (at para. 33):

> The respondents foresaw that their studies would be received by the appellant and acted on in Toronto. They should have expected to be called to account in Ontario. In the modern world where corporations have various offices in various locations, corporate defendants should not escape liability simply because they send their studies to an office of the

> plaintiff outside Ontario with the clear understanding that it will be acted on in Ontario.

[30] While the present case does not involve a claim for negligent misrepresentation, I see no reason not to hold, by analogy, that when BP released documents that it was legally required to provide its Ontario shareholders, it committed an act that that had an immediate and direct connection with Ontario, an act that is sufficient to establish a real and substantial connection between the claim of this plaintiff and Ontario. In my view, 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.

[31] I do not accept BP's argument that the motion judge erred in her interpretation of *Abdula* or that *Abdula* stands as authority for the proposition that for purposes of s. 138.3(1), the point of release of the documents must be Ontario. The defendant in *Abdula* was a federally incorporated company with offices, including its principal executive office in Ontario. Its shares were publicly traded on the NASDAQ exchange in the United States but not on any Canadian exchange. The issue on appeal was whether the defendant was a "responsible issuer" as defined by s. 138.1. The defendant was not a "reporting issuer" so the question was whether the defendant fell within s. 138.1(b): "any other issuer with a real and substantial connection to Ontario, any shares of which are publicly traded". Writing for the court, Hoy J.A. reviewed the history and purpose of the

continuous disclosure regime under the *Securities Act* and the statutory cause of action created by s. 138.3. She concluded, at para. 72, that "the words 'publicly traded' in paragraph (b) of the definition of 'responsible issuer' do not mean 'publicly traded in Canada'". The real and substantial connection that brought the defendant in *Abdula* within the reach of s. 138.1 was its presence in Ontario and the fact that the documents were, in the words of Hoy J.A. at para. 89, "released *or presented"* in Ontario (emphasis added).

[32] The decision in *Abdula* does not establish the proposition that the word "releases" in s. 138.3(1) requires that the actual point of release of the document be in Ontario. *Abdula* recognizes, at para 88, that "[e]xtra-territorial application is specifically envisaged by the paragraph (b) of the definition of 'responsible issuer' with its reference to issuers with a 'real and substantial connection' to Ontario." *Abdula* also stands for the proposition that the liability created by s. 138.3 extends to securities traded on foreign exchanges. And most importantly, *Abdula* equates documents "released" with documents "presented" in Ontario.

[33] In my view, the reasoning and result in *Abdula* is entirely consistent with, and supportive of, the proposition that BP's actions in providing Ontario shareholders with information as required by US securities law pursuant to its undertaking were sufficient to establish the presumptive connecting factor of a tort committed in Ontario.

[34] For these reasons, I reject BP's submission that the motion judge erred in concluding that, based on the facts alleged by the plaintiff, the statutory tort of secondary market misrepresentation was committed in Ontario.

(2) Did the motion judge err in refusing to stay the claims of class members who purchased their shares on foreign exchanges on the basis of forum non conveniens?

[35] It is well-established that if the plaintiff succeeds in demonstrating that Ontario has jurisdiction, the court has the discretion to decline to exercise that jurisdiction under the *forum non conveniens* doctrine as was explained in *Van Breda*, at paras. 103-5. The defendant bears the burden "to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff". To succeed in discharging that burden, "[t]he defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action" and "must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate." The doctrine "tempers the consequences of a strict application of the rules governing the assumption of jurisdiction" and "requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction." The *forum non conveniens* doctrine is a "flexible concept" which "cannot be understood as a set of well-defined rules, but rather as an attitude of respect and deference to other states": *Van Breda*, at para. 74. *Forum non conveniens* recognizes that there is "a residual power to decline to exercise its

jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute": *Van Breda*, at para. 104.

[36] The Supreme Court insisted that it would be impossible to draw up an exhaustive list of factors to be considered when deciding whether to exercise the *forum non conveniens* doctrine, but referred to a non-exhaustive list of factors that includes: 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: *Van Breda,* at para. 105.

[37] *Van Breda,* at para. 74, identified the centrality of the principle of comity in the modern conflicts regime, and the goal of facilitating "exchanges and communications between people in different jurisdictions that have different legal systems". In *Prince v. ACE Aviation Holdings Inc*., 2014 ONCA 285, 120 O.R. (3d) 140, at para. 63, Strathy J.A. observed that "the principle of comity…underlies the *forum non conveniens* analysis." *Van Breda* states, at para. 112, in relation to *forum non conveniens*, that "comity and an attitude of respect for the courts and legal systems of other countries, many of which have the same basic values as us, may be in order" and that "the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction".

[38] In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at p. 1096 S.C.R., La Forest J. adopted the definition of comity expressed in *Hilton v. Guyot*, 159 U.S. 113 at pp. 163-64 (1895):

> [T]he recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws . . .

[39] In support of its *forum non conveniens* argument that Ontario decline jurisdiction in favour of the US and the UK, BP led expert evidence regarding the securities law regimes in those jurisdictions. That evidence was not contradicted.

[40] In the US, there is a well-established regime governing class actions for secondary market misrepresentation. As I have already noted, there is a pending class action in the US based upon very similar allegations, covering substantially the same period, and embracing the claims of all BP shareholders, including the plaintiff, who purchased their shares on a US exchange.

[41] US law relating to jurisdiction over such claims is based on the principle that securities litigation should take place in the forum where the securities transaction took place. By statute, actions for secondary market misrepresentation under US securities law may only be brought by those who purchased their shares on a US exchange. In addition, the *Securities and Exchange Act of 1934,* 15 U.S.C. § 78a et seq., s. 27, provides that the US

district courts have "exclusive jurisdiction of violations of this title or the rules and regulations thereunder" including claims for secondary market misrepresentation. US law precludes US courts from entertaining private actions involving securities transactions outside the US.

[42] The US approach to jurisdiction over securities litigation is based on the principle of comity. The SEC's *Study of the Cross-Border Scope of the Private Right of Action under Section 10(b) of the Securities Exchange Act of 1934* (April 2012) recognizes that in cross-border securities transactions, each state "may have an interest in applying its legal regime" but cautions that "[i]nternational comity requires each jurisdiction to recognize the laws and interests of other jurisdictions with respect to persons and activities outside its territory" to ameliorate "potential conflicts among the jurisdictions".

[43] The law of the UK appears to be less favourable to claimants than that of Ontario or the US. UK law allows for secondary market misrepresentation claims, but the plaintiff is required to prove reliance. There is no class action procedure available in the UK, although provision is made for grouping claims, representative orders and consolidation of claims. As in the US, the statutory cause of action under UK law is only available to those who purchase securities on certain designated markets in the European Union, including the European Exchanges. There does not appear to be ongoing litigation in the UK involving

claims against BP for the alleged misrepresentations relied on by the plaintiff in this case.

[44] BP also led evidence as to the reported trade volume of BP shares in the three jurisdictions during the proposed class period. The overwhelming majority of Canadians who acquired BP equity shares made their purchases through foreign exchanges. Similarly, the volume of ADS traded in the TSX was dwarfed by the trading in ADS on foreign exchanges. On the TSX, 83,945 ADSs were traded, compared with 9 billion on the NYSE and 8.7 billion on the LSE. Of the 83,945 ADS traded on the TSX, the number held through the end of the proposed class period was somewhere between 14 and 7,477.

[45] I recognize that the motion judge's decision on *forum non conveniens* is discretionary and attracts deference on appeal absent an error of law or principle or serious factual error: *Van Breda* at para. 112. In my respectful view, however, the motion judge erred in law and in principle on two counts. First, she failed to take into account the principle of comity in assessing the effect of exercising Ontario jurisdiction over claims arising from foreign traded securities. Second, she erred in law with respect to the related issue of avoiding a multiplicity of proceedings.

[46] The plaintiff's claim must be considered in the full international context of the securities law regimes of Ontario, the United States and the United Kingdom and the trading of BP securities in those jurisdictions. It seems to me that the

inevitable conclusion is that while the minimal standard for jurisdiction *simpliciter* is made out, this is a case where the court should go beyond the strict application of that minimal standard and exercise its discretion to decline jurisdiction.

[47] By statute, both the US and the UK regimes assert jurisdiction on the basis of the exchange where the securities are traded. US law goes one step further and provides for the exclusive jurisdiction of the US district courts over claims for secondary market misrepresentation under US securities law and precludes suits relating to transactions on foreign exchanges. That claim of exclusive jurisdiction it is a factor that, in keeping with the principle of comity, the court is obliged to consider: see *Gould v Western Coal Corp.*, 2012 ONSC 5184, at para. 338. The assertion of exclusive jurisdiction under US law is particularly pertinent to the claim of the plaintiff, a NYSE purchaser. BP's status as a reporting issuer within the meaning of s. 138.3 ended in January 2009. Accordingly, the plaintiff's claim rests to a significant degree upon BP's undertaking to continue to make the disclosure to Canadian shareholders "in the same manner and at the same time that such material is required to be sent or provided to US resident security holders *under applicable US federal securities laws or exchange requirements"* (emphasis added).

[48] 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 misrepresentation. As the plaintiff's

claim rests to a significant degree upon the disclosure obligations imposed by US securities law, the assertion of Ontario jurisdiction would also fly in the face of the US claim to exclusive jurisdiction. 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.

[49] The other important contextual factor is that the number of BP shareholders who acquired their shares on a Canadian exchange is dwarfed by those who used a foreign exchange. I agree with BP's submission that permitting the plaintiff to use BP's negligible relative trading on the TSX (all of which ended two years prior to the end of the proposed class period and the Deep Water Horizon incident) as a toehold for bringing foreign exchange purchasers under the jurisdiction of an Ontario court would be both opportunistic and a classic example of the "tail wagging the dog".

[50] It would surely come as no surprise to purchasers who used foreign exchanges that they should look to the foreign court to litigate their claims. *Van Breda* recognizes fairness to the parties as a relevant factor bearing upon the *forum non conveniens* analysis. As this court stated in *obiter* in *Currie v McDonald's Restaurants of Canada Ltd.* (2005), 74 OR (3d) 321, at para 18:

> an Ontario resident...who buys securities on a foreign stock exchange…has engaged in a cross-border transaction with a foreign entity. The cause of action arises at least in part in the foreign jurisdiction. It would not be unreasonable, from the perspective of the Ontario resident, to expect that legal claims arising from the transaction could be properly litigated in the foreign jurisdiction.

[51] In *Silver v. IMAX Corp.*, 2013 ONSC 1667, 36 C.P.C. (7th) 254, a class proceeding involving shares purchased on both Canadian and US exchanges, this principle was applied to exclude the class of those shareholders who had used NASDAQ to purchase their shares on the ground that they would have a reasonable expectation that their claims would be adjudicated in the United States.

[52] This brings me to the related issue of avoiding a multiplicity of proceedings. The motion judge concluded that as BP conceded jurisdiction over the claims of TSX purchasers, BP's argument that declining jurisdiction as a way to avoid a multiplicity of proceedings should be rejected. I agree that given the prevailing US and UK rules pertaining to jurisdiction over claims for secondary

market misrepresentation, litigation in more than one jurisdiction is inevitable. However, the matter of avoiding a multiplicity of proceedings does not end there. What should be avoided is litigation in more than one jurisdiction over the same claims of the same parties. I recognize that the proposed class excludes parties who have not opted out of the US proceedings but that merely serves to highlight the fact that if Ontario asserts jurisdiction, there would be more than one action pending in relation to the same class of claims. In my view, when the issue of avoiding a multiplicity of proceedings is considered in the light of the entire context of the jurisdictional standards prevailing elsewhere, it weighs heavily in favour of declining jurisdiction. 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 or class of claims will be avoided.

[53] It is not clear at this point that there would be a loss of juridical advantage if the plaintiff's action is stayed and he is forced to litigate in the US. Neither the US nor the Ontario proceedings have been certified so it would be speculative to say that Ontario offers any procedural advantage. UK law appears to be less favourable to secondary market misrepresentation claimants than Ontario law and does not afford the advantage of class proceedings. However, as the Supreme Court of Canada held in *Van Breda,* at para. 112, "comity and an attitude of respect for the courts and legal systems of other countries" will often

prevail over any perceived loss of juridical advantage. I would also point out that as the claim has yet to be certified, it would be premature to place undue emphasis on loss of juridical advantage to those potential class members who acquired their shares on the European Exchanges who are not yet before the court.

[54] In my view, when all the factors relevant to the *forum non conveniens* analysis are taken into account, the inevitable conclusion is that BP has demonstrated that there is another forum that is clearly more appropriate for the adjudication of the plaintiff's claim and the claims of foreign exchange purchasers.

DISPOSITION

[55] For these reasons, I would allow the appeal and stay the plaintiff's claim. Given BP's concession regarding Ontario jurisdiction over claims of shareholders who used the TSX, I would grant leave to amend the claim accordingly.

[56] BP is entitled to its costs of the motion and of this appeal in the amounts agreed to by the parties, namely $75,000 for the motion and $50,000 for the appeal, both amounts inclusive of disbursements and taxes.

"Robert J. Sharpe J.A."
"I agree Janet Simmons J.A."
"I agree M.L. Benotto J.A."

Released: August 14, 2014