2016 ONCA 601
Ontario Court of Appeal

Kaynes v. BP, P.L.C.

2016 CarswellOnt 12120, 2016 ONCA 601, 133 O.R. (3d) 29, 269 A.C.W.S. (3d) 264, 3 C.P.C. (8th) 290

Peter Kaynes (Respondent / Moving Party) and BP, P.L.C. (Applicant / Responding Party)

Robert J. Sharpe, Janet Simmons, M.L. Benotto JJ.A.

Heard: June 22, 2016
Judgment: July 29, 2016
Docket: CA M46202 (C57876)

Counsel: Joseph Groia, Martin Mendelzon, Matthew Stroh, for Moving Party
Laura K. Fric, Kevin O'Brien, Karin Sachar, for Responding Party

***Per curiam*:**

1 The moving party, Peter Kaynes, seeks an order lifting the stay of proceedings granted by this court on August 14, 2014: see *Kaynes v. BP plc*, 2014 ONCA 580, 122 O.R. (3d) 162 (Ont. C.A.), leave to appeal to SCC dismissed, 2015 CanLII 14728 [(March 26, 2015), Doc. 36127 (S.C.C.)]. That stay was based upon our conclusion that Ontario should decline to exercise jurisdiction over a claim relating to securities purchased on foreign stock exchanges on the ground of *forum non conveniens*. The moving party submits that new circumstances have arisen that make it unjust to maintain the stay and that accordingly, it should be lifted.

Background facts

2 The moving party is the named plaintiff in a proposed Ontario class action, claiming damages for alleged misrepresentations made to shareholders by the respondent BP, P.L.C. ("BP"). These alleged misrepresentations were made both before and after the April 2010 Deep Water Horizon explosion and oil spill that occurred in the Gulf of Mexico. The moving party purchased his BP securities on the New York Stock Exchange ("NYSE") and the proposed Ontario class includes world-wide purchasers of BP securities.

3 BP's motion to stay the action for want of jurisdiction or on grounds of *forum non conveniens* was dismissed: 2013 ONSC 5802 (Ont. S.C.J.). On appeal from that decision to this court, BP conceded that Ontario could entertain claims relating to securities purchased on the Toronto Stock Exchange but resisted Ontario jurisdiction over claims relating to securities purchased on non-Canadian exchanges. In our August 14, 2014 [2014 CarswellOnt 10971 (Ont. C.A.)] decision, we allowed BP's appeal, having concluded that Ontario did have jurisdiction to entertain claims arising from securities purchased on non-Canadian exchanges, but that BP had shown that Ontario was not a convenient forum.

U. S. proceedings before the stay was granted

4 There is a pending class action in the U.S. District Court, Southern District of Texas ("U.S. District Court"). The class in that proceeding includes the moving party and other Canadian investors who purchased BP securities on the NYSE. Pursuant to an order made under the U.S. *Private Securities Litigation Reform Act of 1995*, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), all litigation arising from the BP — Gulf of Mexico oil spill has been directed to the same judge in the U.S. District Court.

5 The U.S. class action claim, as originally framed, included both pre- and post-explosion claims. Claims for the period before November 8, 2007 were substantively dismissed. Prior to our stay decision, the U.S. class action judge had certified claims relating to post-explosion misrepresentations but refused to certify claims relating to pre-explosion misrepresentations. After we granted the stay, an appeal from the decision refusing to certify the pre-explosion claims was dismissed as was a *certiorari* application to the Supreme Court of the United States.

Post-stay order proceedings in the U.S. District Court

6 The moving party asks us to lift the stay to permit him to proceed with his proposed class action relating to "pre-explosion" claims on behalf of all Canadian investors. The moving party argues that we should lift the stay on account of the following post-stay developments.

7 After our stay decision, the moving party commenced a class proceeding in the U.S. District Court asserting a claim for pre-explosion representations based upon the *Ontario Securities Act*, R.S.O. 1990, c. S.5. BP successfully moved to have that proceeding dismissed on two grounds. First, the U.S. District Court judge ruled that pursuant to an order made in December 2010, the Court had appointed lead plaintiffs to represent the class, thereby vesting "the lead plaintiff[s] with authority to exercise control over the litigation as a whole" and granting them "sole authority to determine what claims to pursue on behalf of the class". The lead plaintiffs had not brought a pre-explosion claim based upon Ontario securities law. The U.S. District Court judge ruled that as the moving party and his proposed Canadian class were members of the class represented by the lead plaintiffs, he was not entitled to now assert a separate class action based upon a claim that the lead plaintiffs had not pursued. Second, the U.S. District Court judge ruled that the moving party's claim was time-barred under the *Ontario Securities Act*.

8 The U.S. District Court judge made it clear that the moving party and other members of his proposed class are free to pursue individual claims in the U.S. District Court based on Ontario securities law, subject to any defences BP may advance, including the limitations defence.

9 The moving party did not appeal the decision dismissing the class action.

Issue

10 The central issue on this motion is whether the facts surrounding the moving party's unsuccessful attempt to pursue a class action for pre-explosion misrepresentations in the U.S. District Court constitute facts arising after our stay decision that justify or require us to set it aside to avoid an injustice.

Analysis

11 It is common ground that the court has jurisdiction to set aside or vary an order on the basis of "facts arising or discovered after" the order was made: see Rule 59.06(2)(a). A stay granted on grounds of *forum non conveniens* is not necessarily permanent and the court has inherent jurisdiction to lift the stay where circumstances later develop that make it unjust to continue the stay: *Quadrangle Holdings Ltd. v. Coady*, 2013 NSSC 416, 1073 A.P.R. 85 (N.S. S.C.), at para. 49, aff'd 2015 NSCA 13, 1123 A.P.R. 324 (N.S. C.A.); Vaughan Black, "*Conditional Forum Non Conveniens in Canadian Courts*" (2013), 39 Queen's L.J. 41; Perell and Morden, *The Law of Civil Procedure in Ontario*, 2nd ed. (Toronto: Lexis Nexis, 2014), at para. 2.381.

12 It is now clear that the moving party cannot proceed with a class action claim in the U.S. District Court based upon alleged pre-explosion misrepresentations.

13 When the appeal was argued before us, BP took the position that the claim the moving party sought to advance was governed by U.S. law. BP argued that the tort was not committed in Ontario and that we should decline jurisdiction in order to have the claim adjudicated in a U.S. court under U.S. law.

14 BP also emphasized that U.S. law asserted exclusive jurisdiction over the moving party's claim. See BP's factum on the appeal, at para 101:

> In addition, Ontario is not a convenient forum to try claims of NYSE purchasers, because if U.S. law is ultimately held to apply to those claims, an Ontario court would refuse to apply it. The relevant statutory cause of action in the U.S. is contained in Section 10b (and Rule 10b-5 promulgated thereunder) of the *Securities and Exchange Act of 1934* (the "U.S. Act"). The U.S. Act provides that U.S. federal courts have "exclusive jurisdiction" over claims under that legislation. Where legislation provides that a court of another province or country has exclusive jurisdiction to adjudicate claims arising under that legislation, an Ontario court will not take jurisdiction over those claims. [Footnote omitted.]

15 However, before the U.S. District Court on the motion to dismiss the moving party's proposed class action, BP accepted the moving party's position that the moving party's pre-explosion claim was based upon Ontario law. BP's position before the U.S. District Court was that as the claim was based on foreign law, it was not one over which U.S. law claimed exclusive jurisdiction.

16 In our view, these developments, taken as a whole, are sufficient to justify lifting the stay. It was certainly not brought to our attention or in our contemplation that the moving party's claim would be dismissed in the U.S. District Court simply because it had not been advanced by the lead plaintiffs in the U.S. class action. That is a purely procedural barrier that prevents the moving party from having his claim heard on the merits.

17 It is also significant that BP now accepts that the moving party's claim is governed by Ontario law and therefore does not assert that it falls within the exclusive jurisdiction of the U.S. courts. As is apparent from paras 41, 42, 47 and 48 of our reasons, the claim of exclusive jurisdiction was a significant factor in our assessment of comity and *forum non conveniens*.

18 These developments leave the moving party in the following position. If the stay is not lifted, he is deprived of the right to have his claim asserted as part of a class action in the U.S. District Court and can only proceed with an individual claim in that court because of choices made by U.S. lead plaintiffs.

19 If, as BP argued before the U.S. District Court, the moving party's claim is based upon Ontario law, is not a claim that is or can be advanced in the U.S. class action, and does not fall within the exclusive jurisdiction of the U.S. courts, we have a very different situation than was presented to us on the stay motion. On the facts as presented by BP before the U.S. District Court, it is difficult to see why the stay should not be lifted to allow the moving party to proceed in Ontario.

20 We do not wish to be taken as suggesting in these reasons that BP's counsel misled the court. As we see it, any shift in position or inconsistency in approach was the result of litigation strategies being pursued by different counsel in different jurisdictions at different stages of the litigation.

21 We do not find it necessary to comment on the evidence relating to the difficulties the moving party would face if forced to litigate in the United Kingdom. If the moving party is permitted to litigate in Ontario claims based upon Ontario law related to securities purchased on the NYSE, it is difficult to see why he should not be permitted to include similar claims related to the relatively small number of securities purchased on other foreign exchanges.

22 We express no view as to the limitations issue raised by BP in the U.S. District Court or as to the effect of the U.S. District Court's ruling on that issue. Those issues were not fully argued before us on this motion and they are better left to be dealt with on a full record and after full argument in the Superior Court.

Disposition

23 Accordingly, the motion is granted and the stay is lifted to permit the moving party to proceed in Ontario with a claim based upon the alleged pre-explosion misrepresentations.

24 Costs to the moving party fixed, in accordance with the agreement of counsel, at $20,000, inclusive of disbursements and taxes.

Motion granted.