

Still out of time: Ontario Court of Appeal considers when a claim of fraudulent misrepresentation is discoverable in a securities class action

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In *Kaynes v. BP p.l.c.*¹, the Ontario Court of Appeal clarified when a claim for fraudulent misrepresentation is discoverable under the Ontario *Limitations Act, 2002*. The Court also confirmed the circumstances in which a limitations defence may be decided through a rule 21 motion. This decision is the latest in a series that has stood in the way of this action being litigated in Ontario.

What you need to know

- The limitation period in a fraudulent misrepresentation claim only starts when the fraudulent nature of a misrepresentation is discoverable.
- Courts will permit a limitation period defence to be considered under a rule 21 motion to determine a legal issue in circumstances where the facts regarding discovery of the claim are undisputed.
- This case demonstrates the importance of observing limitation periods in securities class actions. Throughout the life of this action, the plaintiff advanced three different misrepresentation-based causes of actions. The defendant, relying on limitation period defenses, was able to substantially limit the plaintiff's claims, ultimately leading to the dismissal of the action.

Background

This motion relates to a proposed securities class action brought by Peter Kaynes against British Petroleum (BP), following the Deepwater Horizon explosion in 2010. Peter Kaynes, on behalf of the class, claimed that BP made securities misrepresentations about the safety of its drilling operations in the Gulf of Mexico prior to the explosion, which had the effect of artificially inflating its share price. Following the explosion, Kaynes alleged that BP publicly corrected these misrepresentations, causing the share price to significantly drop.

This case has a long procedural history. After a failed attempt to bring the claim in Alberta², the plaintiff filed a statement of claim in Ontario in November 2012, advancing two causes of actions: 1) statutory misrepresentation under Ontario's *Securities Act*; and 2) common law negligent misrepresentation (the plaintiff later withdrew this claim).

BP brought a motion challenging Ontario's jurisdiction to hear some of these claims, arguing that there was no real and substantial connection between Ontario and the claims of Canadian residents who purchased their shares on foreign exchanges. This posed an issue for the class action as Kaynes purchased his shares on the NYSE, and the number of individuals who purchased BP shares on the TSX were negligible. The Ontario Court of Appeal ruled that Ontario had jurisdiction, but that it should not be exercised under the *forum non conveniens* doctrine, as the US and UK were more appropriate forums available to Canadian residents who purchased their shares on foreign exchanges. The claim of Canadians who purchased their shares on foreign exchanges was stayed³.

In March 2015, after being denied leave to appeal the jurisdiction decision, Kaynes pursued his proposed class action in the United States District Court for the Southern District of Texas, asserting a claim for pre-explosion misrepresentations based on Ontario's *Securities Act*. BP successfully brought a motion to dismiss this action: class action proceedings already existed there and Kaynes claim was time-barred by the three-year limitation period under Ontario's *Securities Act*. Instead of appealing, he brought a successful motion to lift the stay of his Canadian proceedings in Ontario⁴.

With the stay lifted, in June 2017 Kaynes delivered his second amended statement of claim. It limited the scope of his statutory misrepresentation claims solely based on Ontario's *Securities Act*. Subsequently, BP successfully brought a motion challenging the timeliness of many of the statutory misrepresentation claims, shortening the scope of the class period and rendering the plaintiff's personal claim statute-barred⁵.

In September 2019, in an attempt to overcome his limitation period defeat, Kaynes delivered an amended statement of claim that included a claim of fraudulent misrepresentation⁶.

BP subsequently brought a motion under rule 21, seeking an order declaring that the fraudulent misrepresentation claim was statute-barred under the *Limitations Act, 2002*. In response, Kaynes argued that a limitations issue cannot be determined on a rule 21 motion when discoverability is in issue.

The motion judge granted BP's motion and dismissed the fraudulent misrepresentation claim. He found that the two-year limitation period started when BP made corrective disclosure in June 2010 because this was when BP's alleged misrepresentations were discoverable. Therefore, the limitation period for this cause of action expired in June of 2012. The fraudulent misrepresentation claim was not launched until 2019 and was therefore out of time.

As the fraudulent misrepresentation claim was struck, Kaynes was disqualified as a representative plaintiff for the class. The statutory claims that remained covered a time period that did not include Kaynes' claim because his personal claim had already been found statute-barred. No substitute plaintiff was available, making certification of the proposed class action impossible. The proposed class action was dismissed.

Kaynes appealed the motion judge's decision.

Analysis by the Court of Appeal

Kaynes's appeal raised two key issues: 1) when is a claim for fraudulent misrepresentation "discoverable", in the context of the *Limitations Act*; and 2) are there circumstances where an amendment to a statement of claim can be dismissed as statute-barred on a motion brought under rule 21⁷?

When is a claim for fraudulent misrepresentation discoverable?

The Court of Appeal disagreed with the Motion Judge's conclusion that the fraudulent misrepresentation claim was discoverable by June 2010. The Court concluded that the Motion Judge erred when he found that the limitation period started running when the misrepresentations were discovered because he failed to consider whether fraudulent nature of those statements was discoverable at that time⁸.

The limitation period for a fraudulent misrepresentation claim starts when the claimant is able to discover that a misrepresentation was made "with knowledge that the representation was false, an absence of belief in its truth or recklessness as to its truth"⁹. To decide otherwise would mean "that the claimant would be required to commence an action alleging fraud within two years of the misrepresentation, whether or not he knew or ought reasonably to have

known of the defendant's fraudulent intent"¹⁰.

Despite disagreeing with the Motion Judge's analysis, the Court of Appeal's reasoning led to the same outcome for Kaynes and the class. The Court concluded that BP's fraud was discoverable in July 2015, when it settled several actions in the U.S. Therefore, the limitation period expired in July 2017. As the claim was not commenced until September 2019, the claim for fraudulent misrepresentation was out of time¹¹.

When can a claim be dismissed as statute-barred on a rule 21 motion?

The Court of Appeal agreed with the Motion Judge that it was appropriate to determine the limitation issue through a rule 21 motion. Where the facts regarding discovery of the claim are undisputed so that the determination of the issue is "plain and obvious", then whether the action is statute-barred is considered a question of law that can be determined on a r. 21.01(1)(a) motion.

This was such a scenario. The plaintiff conceded in its pleadings that July 2015 was the last date the fraud could have been discovered. Since the July 2015 date was not in dispute, the Court concluded that it is plain and obvious that the appellant's claim for fraudulent misrepresentation in the 2019 amended statement of claim was out of time and statute-barred.

Implications for litigants

This decision highlights the importance of being attuned to limitation periods in the context of securities class actions and provides a possible path forward for Defendants who are faced with a statute-barred claim.

Claims for fraudulent misrepresentation may only be discoverable years after the initial misrepresentation is made or discoverable. This opens parties up to larger periods of liability as a fraudulent misrepresentation claim may expire significantly later than common law and statutory misrepresentation claims.

Bringing a rule 21 motion to dismiss a claim under the *Limitations Act* gives litigants an efficient way to dismiss statute-barred claims in circumstances where the facts regarding discovery of the claim are undisputed. Although this is not a new use of the rule, the Court of Appeal's application here provides litigants with clear framework on when and how their rights under the *Limitations Act* can be quickly enforced.

¹ [2021 ONCA 36](#) ["Kaynes"].

² Under the Alberta *Rules of Court*, leave is required to serve a defendant outside of Canada. Leave was denied on the basis that the plaintiffs had failed to establish that the claim had a real and substantial connection to Alberta.

³ See *Kaynes v. BP, PLC*, [2014 ONCA 580](#).

⁴ See *Kaynes v. BP P.L.C.*, [2016 ONCA 601](#).

⁵ The Court concluded that the limitation period for statutory misrepresentation claims start to run the day the misrepresentations are made, not when they are discoverable. This significantly reduced the scope of the class action from May 9, 2007 to April 23, 2010 (1,080 days) to February 27, 2010 to April 23, 2010 (55 days). The appellant acquired his BP shares on or before August 12, 2008, making his personal statutory claims statute-barred (See 2017 ONSC 5172; upheld at 2018 ONCA 337).

⁶ Fraudulent misrepresentation occurs where (1) a false representation is made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014 SCC 8](#) at para. 21.

⁷ *Kaynes*, para. 3.

⁸ *Kaynes*, paras. 61-63.

⁹ *Kaynes*, para. 59.

¹⁰ *Kaynes*, para. 63.

¹¹ *Kaynes*, paras. 69-73.

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