CITATION: Fairfield Sentry Limited et al v. PwC et al, 2017 ONSC 3447
COURT FILE NO.: CV-14-10550-00CL
DATE: 20170607

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

BETWEEN:

FAIRFIELD SENTRY LIMITED, FAIRFIELD SIGMA LIMITED, FAIRFIELD LAMBDA LIMITED AND KENNETH KRYS, AS LIQUIDATOR FOR FAIRFIELD SENTRY LIMITED and FAIRFIELD SIGMA LIMITED AND FAIRFIELD LAMBDA LIMITED

Plaintiffs /
Defendants to Counterclaim

- And -

PRICEWATERHOUSECOOPERS LLP and STEPHEN WALL

Defendants /
Plaintiffs by Counterclaim

BEFORE: Newbould J.

COUNSEL: *Peter F.C. Howard, Patrick O'Kelly and Aaron L. Kreaden*, for the plaintiffs

Gerald L.R. Ranking, Sarah J. Armstrong and Kimberley Potter, for the defendants

HEARD: May 29, 2017

DECISION ON SUMMARY JUDGMENT MOTION

Nature of motion

[1] This is a motion for summary judgment by the defendants for an order dismissing this action in its entirety.

[2] This action arises out of one of the largest and longest running "Ponzi" schemes in history orchestrated by Bernard L. Madoff, a fraud which went undetected for more than 20 years and involved investments intended to be made through Bernard L. Madoff Investment Securities LLC ("BLMIS") with funds deposited with BLMIS. Madoff never invested customer funds. Returns to investors were fictitious and the corresponding documentation fabricated.

[3] The fraud was only revealed on December 10, 2008 by Mr. Madoff's own confession. He was arrested for securities fraud and related criminal charges on December 11, 2008. On March 12, 2009, Madoff confessed to federal authorities and pled guilty to 11 charges, including federal securities fraud and related offences. On June 29, 2009, he was sentenced to 150 years in federal prison.

[4] Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma") and Fairfield Lambda Limited ("Lambda") (collectively, the "Fairfield Funds") by their Liquidators seek damages from the defendants (collectively, "PwC"). They either directly or indirectly through Sentry provided funds to BLMIS for investment. They claim on the alleged basis that PwC was in breach of contract and/or negligent in performing the audits of the Fairfield Funds' financial statements for the two years ending December 31, 2006 and December 31, 2007.

[5] The Fairfield Funds are in liquidation. It is claimed by the Liquidators, that PwC should have uncovered the Ponzi scheme and that by reason of PwC's failure to do so, the Fairfield Funds remained invested with BLMIS and suffered damages of $5 billion[1]. The defendants say that the claim should be dismissed because the plaintiffs have failed to prove that they suffered any damages.

[6] For the reasons that follow, the motion is allowed and the action is dismissed.

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[1] Apparently, after the motion for summary judgment was brought, the Liquidators reduced their claim to approximately $2.5 billion.

Relevant factual background

[7] Sentry, Sigma and Lambda were all incorporated under the *International Business Companies Act* of the British Virgin Islands ("BVI").

[8] From 1997 to 2008, Sentry was the largest of a number of funds which placed money with BLMIS for investment. Sentry was the largest of the Fairfield Funds and its assets were valued at approximately $6.2 billion at the end of 2006 and $7.3 billion at the end of 2007. Over that period, about 95% of its assets, amounting to some $7.2 billion[2], were invested with BLMIS.

[9] Sigma was a "feeder fund" which invested solely in Sentry. It was a euro-denominated fund and its purpose was to allow investors to participate in Sentry without taking on the risk of currency fluctuations between the euro and the U.S. dollar. It purported to have assets under management of approximately $651 million at the end of 2006 and $1.141 billion at the end of 2007. Its funds were indirectly invested in BLMIS through Sentry.

[10] Lambda, incorporated in late 1990, was also a "feeder fund" that, like Sigma, invested solely in Sentry. Its currency was the Swiss franc rather than the euro. It purported to have assets under management of approximately $34 million at the end of 2006 and $38 million at the end of 2007. Its funds were indirectly invested in BLMIS through Sentry.

[11] PwC was engaged to audit the Fairfield Funds' financial statements for the year ending December 31, 2006. PwC's reports in respect of the 2006 audit are dated April 24, 2007.

[12] PwC was subsequently engaged to audit the Fairfield Funds' financial statements for the year ending December 31, 2007. PwC's reports in respect of the 2007 audit are dated April 7, 2008.

[13] BLMIS was a registered broker-dealer, regulated by the U.S. Securities and Exchange Commission ("SEC"). BLMIS was also a member of the Securities Investor Protection

[2] All references to investment amounts are in U.S. currency.

Corporation ("SIPC"), which provides funds and other assistance to customers when brokerage firms such as BLMIS fail.

[14] On December 15, 2008, SIPC filed an application in the District Court on the basis that BLMIS's customers needed the protection afforded by SIPC's enabling statute; i.e., the *Securities Investor Protection Act* of 1970 ("SIPA"). By order dated December 15, 2008, the District Court appointed Irving H. Picard as trustee for the liquidation of the business of BLMIS under SIPA (the "SIPA Trustee"), and moved the case to the United States Bankruptcy Court for the Southern District of New York.

[15] As is characteristic of a Ponzi scheme, BLMIS used the investments of new and existing BLMIS customers to fund withdrawals of principal and supposed profit made by other customers. There were inevitably winners (those who withdrew more than they deposited) and losers (those who withdrew less than they deposited) from the fraud. The mandate of the SIPA Trustee was to collect and set aside a fund of BLMIS customer property for priority distributions among BLMIS customers in proportion to each customer's "net equity" or "net investment", meaning the amount of funds advanced to Madoff less the amount received from BLMIS.

[16] Prior to the appointment of the SIPA Trustee, BLMIS customers held their own causes of action and had standing to bring them. For example, net losers from the fraud held potential claims against Sentry as the recipient of fraudulent conveyances from BLMIS in the period prior to BLMIS's filing, as well as potential claims against Sigma and Lambda in their capacity as subsequent transferees of BLMIS fraudulent conveyances from Sentry.

[17] Upon the appointment of the SIPA Trustee, BLMIS customers lost their individual standing to assert any claims directly against the Fairfield Funds, including fraudulent conveyance and subsequent transferee claims. Any and all such claims devolved to the SIPA Trustee who became the only person who had standing to advance them.

[18] On May 18, 2009, the SIPA Trustee pursued these causes of action on behalf of the BLMIS customers by filing a complaint against Sentry (among others) seeking the return of approximately $3.5 billion, an amount which, if recovered, would be distributed to BLMIS customers (the

"BLMIS Customer Claim"). The SIPA Trustee subsequently amended the BLMIS Customer Claim to name Sigma and Lambda as co-defendants. The BLMIS Customer Claim included the following causes of action which were directly asserted against the Fairfield Funds on behalf of BLMIS customers:

(a) Claims to set aside transfers totalling approximately $1.1 billion that Sentry allegedly received from BLMIS during the 90 days preceding BLMIS's filing;

(b) Claims under s. 548 of the U.S. *Bankruptcy Code* to avoid transfers totalling $1.6 billion that Sentry allegedly received from BLMIS during the two years preceding BLMIS's filing;

(c) Claims under s. 544 of the U.S. *Bankruptcy Code* to avoid transfers totaling $3 billion that Sentry allegedly received from BLMIS during the six years preceding BLMIS's filing; and

(d) Claims to avoid transfers allegedly made by Sentry to Sigma and Lambda in their capacities as subsequent transferees.

[19] Between April and July 2009, each of the Funds was placed into liquidation in separate proceedings in the BVI, with Liquidators appointed pursuant to the provisions of BVI's *Insolvency Act, 2003*. Mr. Krys was subsequently named as one of two joint Liquidators for each of the Funds.

[20] Prior to Mr. Krys' appointment as Liquidator, each of the Fairfield Funds had also filed competing customer claims in the SIPA proceeding: Sentry for approximately $6.284 billion; Sigma for approximately $774 million; and Lambda for approximately $37 million.

[21] Sigma's and Lambda's claims were rejected by the SIPA Trustee on the basis that neither fund was a direct customer of BLMIS as they were customers of only Sentry. The SIPA Trustee objected to the amount of Sentry's claim on the basis of its methodology.

[22] The Sentry claim was based on the amount on the last statements of account issued by BLMIS (the "Last Statement Method"), whereas the SIPA Trustee took the position that, as a matter of U.S. Bankruptcy Law, the amount ought to have been the difference between the amount Sentry invested into BLMIS and the amount it withdrew (the "Net Investment Method"). The Last Statement Method determines net equity based on the "market value of the securities as

determined on an investor's last BLMIS customer statement." Judge Lifland, and on appeal the Second Circuit Court of Appeals, concluded that the SIPA Trustee was correct to reject the Last Statement Method, in large part because it included phantom or fictitious profits, the reason being that all entries in a BLMIS customer statement were fictitious.

[23] As of May 9, 2011 the SIPA Trustee and Mr. Krys entered into a settlement to settle both the claims asserted by the SIPA Trustee against the Fairfield Funds and the Fairfield Funds' claims against the BLMIS estate (the "Settlement Agreement").

[24] Pursuant to the Settlement Agreement, the Liquidators paid the SIPA Trustee $70 million and the parties consented to the Bankruptcy Court entering separate judgments in favour of the SIPA Trustee against each of Sentry ($3,054,000,000), Sigma ($752,300,000) and Lambda ($52,900,000). The judgments were no ordinary judgments. They were subject to the Settlement Agreement which provided that part of the judgment against Sentry was forborne and not to be collected. The remainder of that judgment and the judgments against Sigma and Lambda were to be paid from amounts collected by the SIPA Trustee from third parties against whom claims had been made. In exchange, Sentry was granted an allowed claim in the SIPA proceeding in the amount of $230 million.

[25] In this action, the Liquidators of the Fairfield Funds claim $5 billion in damages against PwC for breach of contract, negligence and negligent misrepresentation arising from the alleged defective audits of the Fairfield Funds for the years ending December 21, 2006 and December 31, 2007. The dates of the alleged breaches are April 24, 2007 and April 7, 2008.The Liquidators claim that in reliance on the unqualified opinions issued by PwC, the Fairfield Funds remained invested in BLMIS after PwC should have discovered and disclosed the substantial issues at BLMIS.

[26] The Liquidators claim that had PwC discovered the fraud earlier on April 24, 2007 rather than when the fraud became known, the Fairfield Funds would have been economically much better off than they were in comparison to their actual position when the fraud was disclosed on December 11, 2008. They use a formula based on the total liquidation deficit following the sale of the Fairfield Funds assets, (the actual liquidation deficit or ALD), less the estimated liquidation

deficit that would have resulted if the assets had been liquidated on April 24, 2007, the date of the breach (the estimated liquidation deficit or ELD). Because the actual liquidation deficit or ALD was greater than the estimated liquidation deficit or ELD, according to the numbers relied on by the Liquidators, by some US$2.577 billion, that amount plus interest is claimed. That formula was used in *Livent Inc. (Receiver of) v. Deloitte & Touche,* 2014 ONSC 2176; aff'd 2016 ONCA 11; leave to appeal to the SCC granted.

Summary judgment framework

[27] Rule 20.04(2)(a) provides that on a motion for summary judgment, a court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. Under rule 20(2.1) a court may weigh evidence, evaluate credibility and draw any reasonable inference from the evidence, unless it is in the interest of justice for such powers to be exercised only at a trial. In *Hryniak v. Mauldin,* 2014 SCC 7 at para. 27, Justice Karakatsanis said that these new fact-finding powers are presumptively available and may be exercised unless it is in the interest of justice for them to be exercised only at a trial. Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

[28] Both parties on a summary judgment motion have an obligation to put their best foot forward. See *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753 at para. 9. The onus of establishing that there is no genuine issue requiring a trial is on the moving party but a respondent on a motion for summary judgment must lead trump or risk losing. See *1061590 Ontario Limited v. Ontario Jockey Club et al.* (1995), 21 O.R. (3d) 547 (C.A.) per Osborne J.A. and *Goudie v. Ottawa (City),* [2003] 1 S.C.R. 141 at para. 32 per Binnie J..

[29] In *Hryniak,* Justice Karakatsanis discussed when a genuine issue may not require trial:

> 49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[30] The fact that the claim in this case involves a claim for a very large sum of money does not in itself necessarily lead to the conclusion that a summary judgment would not be a proportionate result. This is particularly the situation in this case involving an allegation of negligence against PwC and the auditing of BLMIS financial statements. On this motion, PwC does not contest the negligence allegation, but only the damages. A trial on the issue of the auditor's negligence would no doubt be long and expensive.

[31] It is argued on behalf of the Liquidators that a trial is required because it is necessary to decide if an expert witnesses for PwC is an impermissible advocate for PwC, and that to do that a judge must have the chance to see and observe the witness in the witness box. I do not think that is necessary in this case.

[32] The witness is Dr. Laurentius Marais, a Vice President and Principal Consultant at William E. Wecker Associates, Inc., a consulting firm that specializes in applied mathematical and statistical analysis, including the application of mathematical and statistical principles and methods to the analysis of damages. He holds a Ph.D. degree and master's degrees in business administration, mathematics, and statistics from Stanford University.

[33] Dr. Marais filed two affidavits. He was cross-examined extensively. I did not see any evidence in those cross-examinations that suggested he was impermissibly acting as an advocate in any way for PwC. Had he been, it would have been evident from the transcript. Criticism is made that he has frequently been retained as an expert witness in many cases, including pharmaceutical and tobacco cases, and in recent years has testified in approximately nine or ten cases a year. He was referred to by Justice Perell in *Wise v. Abbot Laboratories Ltd.*, 2016 ONSC 7275 as a "professional witness". In that case, each side accused the other side's expert witnesses as being too closely tied to the party on whose behalf they gave evidence. Justice Perell reviewed the authorities and decided that all of the experts' evidence was admissible and held that all of them, including Dr. Marais, were able and willing to provide the court with fair, objective, and non-partisan evidence. I am satisfied that Dr. Marais in this case meets that test.

[34] It is argued that Dr. Marais has been retained by Kirkland & Ellis, the U.S. law firm that acts for PwC in the U.S. on the Madoff issues, some 15 to 25 times, some of which involved

litigation. Prior to being retained on this matter, Dr. Marais had also been retained by PwC to provide expert evidence in a U.S. class action brought on behalf of persons who had invested in certain BLMIS feeder funds, including Sentry and Sigma for which he was paid some $150,000-$200,000. It strikes me that it would be natural for Dr. Marais to be retained in this case by PwC taken his prior involvement with issues surrounding the BLMIS fraud.

[35] The fact that Dr. Marais was retained by the Kirkland & Ellis firm on other matters is something to be considered by a judge, but in this case it is really no difference in substance from an expert valuation witness put forward by the Liquidators. That expert, Mr. Ratner, was called by Livent in the case against Deloitte & Touche. Mr. Howard and his firm Stikeman Elliott acted for Livent and that was a complex lengthy case for which Mr. Ratner no doubt charged a huge fee. In that case Justice Gans, like Justice Perell regarding Dr. Marais, referred to Mr. Ratner as a professional witness. I do not suggest that Mr. Ratner can be said not to be independent because of that. A large number of expert witnesses testify in a good many cases. That is their job. It is important to keep the prior engagements of Dr. Marias and Mr. Ratner in mind in considering their evidence. So far as Dr. Marais is concerned, his evidence as to what he has done to analyze the damage claim of the Liquidators and why he has done that is clear and the issue is whether he has followed what the Liquidators say is the correct approach. That can be decided on this motion for summary judgment.

[36] PwC contends that the Liquidators have not put their best foot forward and have failed to provide certain evidence. It is said on behalf of the Liquidators that they had no right to file further affidavits under the rules because they had cross-examined on affidavits filed by PwC. I do not accept that. In the Commercial List, the right to file further affidavit material after cross-examinations is routine and had the Liquidators sought that right, I would no doubt have granted it to them.

[37] It is also said on behalf of the Liquidators that if a motion is complex in which there are competing experts, it is most likely not a good candidate for summary judgment. Reliance is placed on a statement by Brown J. (as he then was) in *George Weston Ltd. v. Domtar Inc.* (2012), 112 O.R. (3d) 190. I dealt with the same argument in *Re Nortel* (2016), 36 C.B.R. (6th) 119; leave to

appeal refused 41 C.B.R. (6th) 174, and noted that each case must be decided on its facts and that there is no hard and fast rule:

> **31** Both sides have filed expert reports dealing with the damages and profit claims. It is said by SNMP that if there are competing expert reports, it is a rare case that can be a proper candidate for a summary judgment. SNMP relies on a statement by Brown J. (as he then was) in *George Weston Ltd.* v. *Domtar Inc.* (2012), 112 O.R. (3d) 190 that:
>
> > **89.** The simple reality is that usually if a case is sufficiently complex that its adjudication requires resorting to expert evidence, then that case most likely is not a good candidate for a summary judgment motion. There may be exceptions, such as where the expert evidence is uncontested, but that is not this case.
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> **32** That statement was made in a highly complex case involving a price adjustment clause. There were obvious reasons why a summary judgment motion was not appropriate in that case. Justice Brown was not purporting to lay down any hard and fast rule. Each case must depend on its own facts. I also note that the decision was before *Hryniak.*

[38] See also *Wise v. Abbot Laboratories, supra*, in which Justice Perell heard and granted a motion for summary judgment in which there were competing expert witnesses.

[39] In this case, the argument that there are competing experts is way overblown. The damage claim of the Liquidators is laid out in an affidavit of Mr. Krys, one of the Liquidators and not purporting to be an expert witness. The valuation expert of the Liquidators is Mr. Ian Ratner. He did not provide any independent analysis of the damage claim but did opine that Mr. Krys has applied the appropriate approach and methodology to quantify damages.

[40] In Mr. Ratner's affidavit he was critical of the approach to value used by Dr. Marais. However he did not respond to Dr. Marais' second affidavit in which Dr. Marais used the approach said by Mr. Ratner to be the proper approach and concluded that no damages were proven by the Liquidators under that approach. PwC contends that while it is up to the Court to consider whether the approach used by Dr. Marais in his first affidavit is the correct approach, it accepts that for the purposes of this motion Dr. Marais accepted and applied Mr. Krys' methodology and that in doing so he has established that the approach advanced by Mr. Krys and Mr. Ratner results in no damages

having been proven. The Liquidators contend that the correct approach is a matter of law determined by the *Livent* case, which if true is something that if necessary could be decided on this summary judgment motion. However, I will deal with this motion on the basis, without deciding, that the approach or methodology to value used by Mr. Krys is the correct approach.

[41] Each side filed affidavit evidence as to applicable U.S. law, being the Honorable Robert E. Gerber, a retired judge of the U.S. Bankruptcy Court for the Southern District of New York for PwC, and Mr. Michael Pompeo, a U.S. attorney in New York City for the Liquidators. There is no real conflict between the evidence given by each. In Mr. Gerber's first affidavit he stated that he could see no instances in which any views that Mr. Pompeo stated with respect to applicable law contradicted his own views.

[42] I am satisfied that on the record before me, the motion for summary judgment can be decided.

Analysis

[43] The parties agree that the two relevant dates for considering losses suffered by the Liquidators are the date of the 2006 audit, being contained in the PwC audit report of April 24, 2007 and the date when the BLMIS fraud was made public, being December 11, 2008.

[44] In his first affidavit, Dr. Marais looked at the money "invested" by the Fairfield Funds in BLMIS and the money "redeemed" from BLMIS between those two dates. He concluded that the Fairfield Funds withdrew $1.03 billion more from BLMIS during that period of time than they put in and said that had PwC exposed the fraud on April 24, 2007, as the Liquidators say should have happened, the Fairfield Funds would not have received the benefit of the $1.03 billion excess withdrawals after April 24, 2007. He therefore concluded that the Fairfield Funds received a benefit by the fraud not being discovered at the time of the audit report of April 24, 2007.

[45] In response, the Liquidators filed an affidavit of Mr. Krys, one of the Liquidators. He referred to advice from the Liquidators' counsel that the formula for considering the damage claim was that adopted in the *Livent* case, an approach that Mr. Ratner agreed was the appropriate

approach. The *Livent* case involved a claim against Deloitte & Touche for auditors' negligence in failing to discover and disclose that the financial statements of Livent were fraudulent and materially understated its losses.

[46] The methodology set out in the *Livent* decisions was as follows. Loss (L) = Actual Liquidation Deficit (ALD) – Estimated Liquidation Deficit (ELD) (the "Damages Formula"). Thus, Mr. Krys said that the ALD in this case is designed to capture what actually occurred from and after the revelation of the fraud on December 11, 2008. The ELD, on the other hand, is necessarily hypothetical and is intended to address what would have happened had PwC performed their audits properly and revealed the fraud on April 24, 2007.

[47] Mr. Krys was critical of the net redemption approach used by Dr. Marais. He said that in order to assess the losses to the Fairfield Funds, it is necessary to consider all their assets and liabilities including, without limitation, contingent claims by and against the Fairfield Funds, rather than only the net change in investments and redemptions as calculated by Dr. Marais. He concluded that after considering the other balance sheet items, the losses sustained by the Fairfield Funds from the fraud not being discovered until December 11, 2007 were $2.508 billion.

[48] In his supplementary affidavit, Mr. Krys adjusted some of the figures and arrived at a loss of $2,422,186,732. His supplementary chart, to which Dr. Marais responded in his supplementary affidavit is as follows:

Net Assets / Liabilities ($)	24-Apr-07	11-Dec-08	Increase (Decrease)
Assets			
Cash	269,976,015	114,208,107	(155,767,908)
Investments other than in BLMIS	238,335,756	101,434,127	(136,901,629)
Investments in BLMIS	345,000,000	172,500,000	(172,500,000)
Other Assets	100,228,608	22,642,358	(77,586,250)
Total Assets	**953,540,379**	**410,784,592**	**(542,755,787)**
Liabilities			
Actual and constructive fraudulent conveyance liabilities to Madoff Investors	(1,529,675,000)	(3,703,875,000)	2,174,200,000
Investors' Liabilities	(7,367,610,594)	(7,195,543,655)	(172,066,939)
Other Liabilities	(386,425,958)	(263,723,842)	(122,702,116)
Total Liabilities	**(9,283,711,552)**	**(11,163,142,497)**	**1,879,430,945**
Net (Liabilities)	**(8,330,171,173)**	**(10,752,357,905)**	**2,422,186,732**

[49] Dr. Marais was asked to review the computation of damages of $2,422,186,732 made by Mr. Krys in his supplementary affidavit[3]. Dr. Marais took no position on the relevance of the *Livent* case to the present action or on its proper application to the measurement of economic damages in general. He accepted for the purposes of his assignment that Mr. Krys has properly implemented his understanding of *Livent* in his damages calculation, and he then conducted a detailed, line-by-line analysis of the elements of Mr. Krys' calculation.

[50] Dr. Marais was critical of several aspects of Mr. Krys' computation and concluded that using the damage formula used by Mr. Krys, no damages were suffered by the Fairfield Funds. He concluded that Mr. Krys' analysis suffered from a number of problems, being,

(a) Mr. Krys double-counted the investments made by Sigma and Lambda in BLMIS (by including those same amounts in the investments made by Sentry in BLMIS), resulting in errors which total $644,058,176;

(b) Mr. Krys included "phantom" earnings in his calculations (by relying on purely fictitious entries reflected on the BLMIS statements), resulting in an error of $1,055,628,556; and

(c) Mr. Krys included entirely hypothetical claims of BLMIS investors against the Fairfield Funds (when no such claims were ever asserted and are now statute-barred), resulting in an error of $1,580,000,000.

[51] Dr. Marais stated that when these flaws are corrected, and the double-counting and unsupported line-items are removed, what remains is a damage calculation essentially consistent with the calculation he reported in his first affidavit and he therefore found no reason to change his previous conclusion that the Fairfield Funds suffered no actual harm by reason of PwC's alleged negligent conduct.

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[3] The final revised damage calculation of $2,577,511,732 set out in the third chart of the Liquidators to be discussed below was not produced by counsel for the Liquidators at the time of Dr. Marais' second affidavit. For the purposes of this motion it makes no difference.

[52] No further affidavit was filed by the Liquidators in response Dr. Marais' second affidavit.

[53] I will deal with the items in dispute.

(i) Liability to BLMIS investors

[54] The figures were adjusted again by counsel to the Liquidators to reflect the formal judgments resulting from the settlement agreement resulting in a loss of $2,577,511,732 as shown in the following table:

Net Assets / Liabilities ($)	24-Apr-07	11-Dec-08	Increase (Decrease)
Assets			
Cash	269,976,015	114,208,107	(155,767,908)
Investments other than in BLMIS	238,335,756	101,434,127	(136,901,629)
Investments in BLMIS	345,000,000	172,500,000	(172,500,000)
Other Assets	100,228,961	22,642,358	(77,586,603)
Total Assets	**953,540,379**	**410,784,592**	**(542,755,787)**
Liabilities			
Actual and constructive fraudulent conveyance liabilities to Madoff Investors	(1,529,675,000)	(3,859,200,000)	2,329,525,000
Investors' Liabilities	(7,367,610,594)	(7,195,543,655)	(172,066,939)
Other Liabilities	(386,425,958)	(263,723,842)	(122,702,116)
Total Liabilities	**(9,283,711,552)**	**(11,318,467,497)**	**2,034,755,945**
Net Assets / (Liabilities)	**(8,330,171,173)**	**(10,907,682,905)**	**2,577,511,732**

[55] This chart was delivered by counsel for the Liquidators on March 11, 2017 at the outset of the cross-examination of Mr. Krys on his two affidavits. Whereas the entry for liability to Madoff investors at the time of Mr. Krys' second affidavit was based on withdrawal figures on the relevant bank account statements for six years prior to the audit date of April 24, 2007, it quickly became apparent from his cross-examination that in the new chart delivered by counsel and unsworn by Mr. Krys, the amount of the judgments resulting from the Settlement Agreement are used in place

of the bank records of net withdrawals. Why the change was made at this late date instead of in the first affidavit of Mr. Krys has not been explained. The judgments were obtained in May 2011.

[56] It is understandable why counsel for the Liquidators changed the figures to reflect the judgments obtained in favour of the SIPA Trustee. As stated above, under the SIPA legislation BLMIS customers lost their individual standing to assert any claims against the Fairfield Funds, including fraudulent conveyance and subsequent transferee claims. All such claims devolved to the SIPA Trustee who was the only person who had standing to advance them. In the Settlement Agreement, the SIPA Trustee released all of the claims asserted on behalf of the BLMIS investors and a limitation period would have prevented any action at this stage. The opinion of Mr. Gerber is clear on these issues. Thus the theory that had been advanced by Mr. Krys to support the liability of the Fairfield Funds to BLMIS investors had no basis in law and the claim was changed to rely on the judgments in favour of the SIPA Trustee.

[57] Regarding the stated liability to the SIPA Trustee for actual and constructive fraudulent conveyance liabilities to Madoff [BLMIS] investors on this third chart now relied on by the Liquidators, the figure for the ALD at December 11, 2008 is $3,859,200,000. This represents the total of the three judgments made in favour of the SIPA Trustee pursuant to the Settlement Agreement in May 2007. While Dr. Marais in dealing with Mr. Krys' second affidavit said that the alleged liabilities should not be taken into account because no claims had been made by BLMIS investors against the Fairfield Funds and he was advised of a limitation period and other issues, the argument of PwC is now based on the effect of the judgments and of the Settlement Agreement.

[58] PwC contends that there can be no liability of the Fairfield Funds taken into account under the judgments, which are subject to and to be construed in accordance with the Settlement Agreement, for several reasons. Reliance is placed on the opinion of Mr. Gerber. I agree with PwC for the following reasons.

[59] The figure of $3,859,200,000 involves double-counting. The judgment against Sentry, the fund that invested in BLMIS, is for $3.045 billion. The judgment against Sigma which invested in Sentry and not directly in BLMIS, is for $752,300,000. The judgment against Lambda which invested in Sentry and not directly in BLMIS is for $52,900,000. These judgments against Sigma

and Lambda were based on funds obtained by Sentry from BLMIS and then transferred by Sentry to Sigma and Lambda. Together, these three judgments total $3,859,200,000.

[60] However, the U.S. Bankruptcy Code under which the judgments were obtained prevents double recovery in this case. The opinion of Mr. Gerber is that while the Bankruptcy Code permits recovery from initial transferees, immediate transferees and mediate transferees, section 550(d) of the Code prohibits windfalls resulting from duplicative recovery, limiting the trustee to a "single satisfaction." Thus the maximum liability under the three judgments would be $3.045 billion. Mr. O'Kelly conceded this in argument.

[61] With respect to the $3.045 billion, all three of the judgments against Sentry, Sigma and Lambda provide that they are limited by the terms of the Settlement Agreement and that enforcement and satisfaction of the judgments are governed entirely and exclusively by the Settlement Agreement. The judgments also provide that they are not assignable and that interest does not accrue on the judgment amounts. The Settlement Agreement includes the following provisions:

(a) The Liquidators shall pay $70 million from Sentry to the SIPA Trustee.

(b) A customer claim by Sentry for $230 million against the BLMIS estate shall be recognized and given priority over other customer claims.

(c) The SIPA Trustee forbears any right to collect $1,130,000,000 on the Sentry judgment. (The record did not contain any evidence of the reason for the forbearance or how it was calculated.)

(d) The remaining non-forbearance amount against Sentry is $1,924,000,000. There is no forbearance of any amounts of the Sigma and Lambda judgments of $752,300,000 and $52,900,000.

(e) The Liquidators and the SIPA Trustee agreed to an arrangement under which the SIPA Trustee and the Liquidators are to share proceeds of seven litigation claims against third parties. In each instance, the Liquidators and the SIPA Trustee agreed to share specified percentages in any recoveries, with one or the other designated to take the lead in the litigation to be pursued.

(f) Paragraph 11 of the Settlement Agreement provides that collection of money by the SIPA Trustee from the seven litigation claims shall be applied against the judgments on a dollar for dollar basis.[4]

(g) Paragraph 15 of the Settlement Agreement provides for a very broad release by the SIPA Trustee against the Fairfield Funds and the Liquidators from all claims whatsoever except for obligations of the Liquidators under the Settlement Agreement.

[62] On a plain reading of the judgments and the Settlement Agreement, and as confirmed by Mr. Gerber, the judgments for the forbearance amount of the judgment against Sentry and the amounts of the judgments against Sigma and Lambda can only be satisfied from funds of third parties through the litigation to be pursued against those third parties. There can be no attempt to collect on those judgments from the Fairfield Funds or their Liquidators. Thus I agree with PwC that Mr. Krys erred in including in liabilities of the Fairfield Funds any liability of the Fairfield Funds or their Liquidators to the SIPA Trustee or to customers of BLMIS. This applies to both the ELD as at April 24, 2007 and the ALD as of December 11, 2008.

[63] In argument, Mr. O'Kelly asserted that the amount of the judgments is an item on the Fairfield Funds balance sheets and whether they can be paid or not is irrelevant. I disagree. First, there is no accounting evidence of any kind that a balance sheet at the relevant dates would include as a liability the judgments in this case in which no payments will come from the Fairfield Funds. It would make little sense for a balance sheet to list a liability that did not have to be paid by the particular Fund. Moreover, the formula in the *Livent* case was to take into account the actual losses (the Actual Liquidation Deficit or ALD) and the actual estimated loss, (the Estimated Liquidation Deficit or ELD), in that case involving losses on the sale of assets. In this case, the expert valuation expert for the Liquidators, Mr. Ratner, said the same thing, although in this case he said there are other things to be valued at the ALD and ELD dates, including the liabilities of the Fairfield Funds. What is to be garnered from the various calculations is the loss (or liquidation deficit) actually

[4] In his supplementary affidavit, Mr. Gerber said that the judgments could only be collected from funds received by the Fairfield Funds from the litigation claims. This was a misreading of paragraph 11 of the Settlement Agreement which refers to money received by the Trustee, and counsel for PwC confirmed that in argument.

incurred and the loss (or liquidation deficit) estimated that would have actually occurred at the earlier date. A loss is not some paper entry that bears no reality to what actually occurred.

[64] Thus for all of these reasons, the net liability figure used by Mr. Krys in his damage calculation of $2,329,525,000 is not valid and should be removed from his damage calculation.

(ii) Investor liabilities

[65] The second item in dispute is the entry in Mr. Krys' second chart and in the third chart produced by counsel for the Liquidators for "Investor Liabilities", showing an ELD at April 24, 2007 of $7,367,610,594 and an ALD at December 11, 2008 at $7,195,543,655, for a net increase in liabilities, or a loss, of $172,066,939.

[66] Dr. Marais has broken the figures down in his chart to its constituent components. He was not cross-examined on his breakdown and I accept it. His chart is as follows:

Analysis of Krys Damages Calculation

Reproduction of Krys Revised Summary (¶ 25) Showing Components of
- Liability to Madoff Investors
- Liability to Funds Investors

		(a)	(b)	(c)
		24-Apr-07	11-Dec-08	Increase (Decrease)
	Assets			
(1)	Cash	269,976,015	114,208,107	(155,767,908)
(2)	Non-BLMIS investments	238,335,756	101,434,127	(136,901,629)
(3)	Investments in BLMIS	345,000,000	172,500,000	(172,500,000)
(4)	Other assets	100,228,608	22,642,358	(77,586,250)
(5)	**Total Assets**	**953,540,379**	**410,784,592**	**(542,755,787)**
	Liabilities			
(6)	Madoff investors			
(6.1)	*Sigma and Lambda (double counted)*	214,675,000	808,875,000	594,200,000
(6.2)	*Sentry Redemptions from BLMIS during look-back*	1,315,000,000	2,895,000,000	1,580,000,000
(7)	Funds investors			
(7.1)	*Cash*	269,976,015	114,208,107	(155,767,908)
(7.2)	*Non-BLMIS investments*	238,335,756	101,434,127	(136,901,629)
(7.3)	*BLMIS holdings: Sigma and Lambda (double counted)*	809,132,760	858,990,936	49,858,176
(7.4)	*BLMIS holdings: Sentry net equity*	2,081,000,000	1,051,000,000	(1,030,000,000)
(7.5)	*BLMIS holdings: Sentry phantom earnings*	4,255,363,413	5,310,991,969	1,055,628,555
(7.6)	*Other assets*	100,228,608	22,642,358	(77,586,250)
(7.7)	*Other liabilities*	(386,425,958)	(263,723,842)	122,702,116
(8)	Other liabilities	386,425,958	263,723,842	(122,702,116)
(9)	**Total Liabilities**	**9,283,711,552**	**11,163,142,497**	**1,879,430,945**
(10)	Net = Assets–Liabilities	(8,330,171,173)	(10,752,357,905)	(2,422,186,732)

[67] As can be seen from this chart, some of the components are offset by the same amount in the assets shown by Mr. Krys, being cash in lines 1 and 7.1, non-BLMIS investments in lines 2 and 7.2 and other assets in lines 4 and 7.6. Of the balance, Dr. Marais accepted an entry at line 7.4 for "BLMIS holdings: Sentry net equity" for a gain of $1,030,000,000. He does not accept the entries at lines 7.3 and 7.5 for BLMIS holdings due to double counting and the use of phantom earnings.

[68] Lines 7.3 and 7.5 were calculated by Mr. Krys on the net asset value (NAV) of the accounts of the Fairfield Funds investors, which were based on account statements received by Sentry from BLMIS, that are now known to have been fictitious. Mr. Krys described the entries as follows:

> 58. For April 30, 2007 and December 11, 2008, the following table sets out the balance shown as outstanding to investors, which amount was calculated by multiplying the applicable NAV per share by the number of shares appearing on the shareholders register of the Funds:

Investors' Liabilities ($)	24-Apr-07	11-Dec-08	Increase (Decrease)
Sentry	6,558,477,834	6,336,552,719	(221,925,115)
Sigma	774,477,064	823,202,669	48,725,605
Lambda	34,655,696	35,788,267	1,132,571
Total	**7,367,610,594**	**7,195,543,655**	**(172,066,941)**

[69] Dr. Marais' first criticism of this is that Mr. Krys has double counted by adding the liabilities of Sigma and Lambda to those of Sentry to arrive at his total for each of the ALD and ELD. I agree with this criticism. The investments of Sentry in BLMIS included investments on behalf of the Sigma and Lambda funds. The entries for Sentry of $6,558,477,834 and $6,336,552,719 on the two dates included the investments on behalf of Sigma and Lambda shown on the second and third lines of this chart. Therefore to add the investment figures of Sigma and Lambda to the investment figures of Sentry is to impermissibly double-count. I agree with Dr. Marais who zeroed out this double counting shown on line 7.3.

[70] Dr. Marais' second criticism is that Mr. Krys has used a NAV approach in valuing these liabilities to the investors in the Fairfield Funds. Dr. Marais said in his supplementary affidavit that the $1,055,628,566 of Mr. Krys' estimate of damages consists of the change in the Fairfield Funds' balance of "phantom earnings" in BLMIS (row (7.5)). He said that this component of Mr. Krys' damages estimate was a product not of real transactions but rather of the fictitious values that Bernard Madoff and his associates assigned to holdings in BLMIS, and of changes in those fictitious values over time. These "phantom earnings" reflect mere paper entries on the BLMIS statements that never existed in reality. Accordingly, Dr. Marais said that he zeroed out row (7.5).

[71] The argument by counsel for the Liquidators is that BVI law obliges redemption claims to be paid out on the basis of NAV calculations prepared on the basis of the account statements received from BLMIS. BVI law governs the claims against the Fairfield Funds by shareholder members in those funds. Reliance is placed on a case that went to the Privy Council. Mr. Krys referred to the articles of incorporation of each of the Fairfield Funds and he referred to a case in the Privy Council. He of course is not a lawyer and no doubt his affidavit as to that case was provided to him by counsel to the Liquidators. Apart from relying on the case in question, the Liquidators filed no expert evidence of BVI law.

[72] The case in question is *Fairfield Sentry Limited (in Liquidation) v Migani* [2014] UKPC 9. It concerned redemptions paid to investors in the Sentry Fund before the BLMIS fraud was discovered. Consistent with the Fund's Articles of Association, Sentry had honoured members' redemption requests, paying a redemption price equal to the NAV per share on the day the redemption was effected. The price so calculated included fictitious profits because both parties honestly believed at the time that BLMIS was a legitimate business. Shortly after the fraud was disclosed, the directors of the Fund suspended the determination the Fund's NAV per share, thus effectively terminating the redemption of shares, and shortly afterwards the BVI High Court ordered the Fund to be wound up.

[73] The Liquidators of the Fund brought proceedings against a number of financial institutions who were members of the Fund that had redeemed their shares before December 2008 when the fraud was discovered on the footing that they were paid out in the mistaken belief that the assets were as stated by BLMIS when there were in fact no such assets. The case turned on what was meant by the word "certificate" in the articles of the Funds which referred to any certificate given in good faith by the directors to be binding. It was held that the Fund was bound by documents held to be certificates that had been issued at the time of the redemptions and relied on by the members who redeemed their shares before they were aware of any fraud.

[74] In the Privy Council, Lord Sumption said:

> 3. It is inherent in a Ponzi scheme that those who withdraw their funds before the scheme collapses escape without loss, and quite possibly with substantial fictitious profits. The loss falls entirely on those investors whose funds are still invested when the money runs out and the scheme fails. Members of the Fund who redeemed their shares before 18 December 2008 recovered the NAV which the Directors determined to be attributable to their shares on the basis of fictitious reports from BLMIS. The loss will in principle be borne entirely by those who were still Members of the Fund at that date.
>
> 17. The availability of a claim for restitution arising out of a transaction governed by the Articles of the Fund is governed by the same law which governs the Articles themselves, namely the law of the British Virgin Islands. In every relevant respect, the principles of the law of the British Virgin Islands governing the construction of the Articles and any associated common law right to restitution are the same as those of English law.
>
> 18. The basic principle is not in dispute. The payee of money "cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him": *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 408B (Lord Hope). Or, as Professor Burrows has put it in his *Restatement of the English Law of Unjust Enrichment* (2012) at §3(6), "in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation." Therefore, to the extent that a payment made under a mistake discharges a contractual debt of the payee, it cannot be recovered, unless (which is not suggested) the mistake is such as to avoid the contract: *Barclays Bank Ltd v W.J. Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 695. So far as the payment exceeds the debt properly due, then the payer is in principle entitled to recover the excess.
>
> 19. It follows that the Fund's claim to recover the redemption payments depends on whether it was bound by the redemption terms to make the payments which it did make....

[75] I agree with counsel for PwC that *Migani* did not deal with the rights of members of the Fairfield Funds who claim redemptions after the fraud was discovered and the Funds went into liquidation. The documents held to be certificates by the Privy Council that would need to be issued to effect any redemption would, unlike the situation in *Migani*, be issued after notice of the fraud. I am simply not prepared without expert evidence as to BVI law or as to the applicability of *Migani* to redemption rights after the fraud was discovered to hold that after the fraud was discovered, investor members of the Fairfield Funds would be able to request and obtain redemptions on the basis of a NAV knowingly calculated on fraudulent account statements sent

out by BLMIS, or that if the Liquidators made redemption payments to some of these investors, a claim against those investors for unjust enrichment would not succeed[5].

[76] In his affidavit, Mr. Krys said that no certificates of NAV per share were ever issued to investors in respect to any date after October 2008, despite the fact that certain investors filed requests to redeem in November, 2008 and later, and that no redemption payments were made by the Fairfield Funds to those investors. He also said that it is the Liquidators' position that the certificates that have been issued at the relevant dates up to October, 2008 are not binding for lack of good faith. It is not clear what certificates he had in mind in making that statement.

[77] On his cross-examination Mr. Krys said that he was not relying on *Migani* for his inclusion of phantom or fictitious profit liabilities to Fund investors but rather on an order in the BVI of November 1, 2016 after he asked for permission to make a distribution to Sentry members. However, the order did not at all say that payment could be made on any NAV basis or that the payment could include phantom profits based on the fraudulent statements issued by BLMIS. The order simply stated that the Liquidators were given permission to pay an interim distribution from the assets of Sentry to its members of USD $15 per share, subject to certain directions.

[78] The witness statement of Mr. Krys in support of the BVI order was provided in a heavily redacted form, but the parts that were not redacted said nothing of the basis on which a distribution to Sentry members was to be made other than dividing the available funds by the number of shares in Sentry. Nothing was said that any distribution was to be made on the basis of a NAV calculation. The statement did ask the Court to confirm that no provision was necessary in respect of rejected claims asserting entitlements as unpaid redeemers.

[79] One of the directions in the order provided that the Liquidators were not required to provide for any claims in the liquidation of Sentry which they have rejected. The Liquidators have not

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[5] See Maddaugh and McCamus, *The Law of Restitution*, (Thomson Reuters, Looseleaf Edition) at chapter 3. Taken that the Liquidators have not filed any expert opinion on BVI law or on the applicability of *Migani* to redemption rights after the discovery of the BLMIS fraud, it is appropriate to consider the Ontario law of restitution and unjust enrichment. It appears from the decision in *Migani* that the equitable principles in the BVI are the same as in the U.K., which are not materially different from Canada.

provided any information as to what claims they have rejected or whether such claims are included in Mr. Krys' damage calculation.

[80] Mr. Krys says in his affidavit that whether the Fairfield Funds are liable to investors "are the subject of separate proceedings in the BVI, in which judgment is awaited". Unfortunately, no details of any kind have been given by the Liquidators as to those separate proceedings. Mr. Krys did not explicitly say what position the Liquidators are taking in any BVI proceeding on the issue of liability now to investors in the Fairfield Funds based on phantom or fictitious profits, although it can perhaps be inferred from what he said in his affidavit that the Liquidators oppose any such redemptions. The Liquidators ought to have been clear on the record what position, if any, they take in the BVI. They were not.

[81] I do not think it can be said that the Liquidators have put their best foot forward on this issue at all, which they were obliged to do. A self-serving affidavit simply referring to "separate proceedings" is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence. See *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 31.

[82] The Liquidators failed to file any expert evidence of BVI law that they are now obliged to pay members of the Sentry Funds on the basis of NAV or phantom profits or that the *Migani* decision would be applicable to requests for redemption after the fraud was discovered.

[83] In this case, the Liquidators have not established that they have any liability to pay redemptions that would amount to a payment of phantom profits based on a NAV calculation derived from fraudulent and fictitious BLMIS account statements. In the circumstances, I accept Dr. Marais' opinion that the liability for phantom profits included in the damage calculation of Mr. Krys should be zeroed out or removed from his damage calculation.

(iii) Other matters

[84] In his first affidavit, Mr. Krys stated at paragraph 19 that at the trial of this action, unless the parties can agree as to some or all of the facts, there will be extensive evidence to establish the

details of the ALD. In paragraph 65 he referred to his quantum of loss, at that time $2.508 billion, as a best estimate, calculated in the for the purposes of the current motion for summary judgment and that it might be necessary, predicated on the dismissal of this motion and if any hearing on damages quantification is deemed subsequently relevant, that certain financial statement items are revisited to assess whether any more timely adjustments are appropriate. He referred to other items that he said were too difficult to reliably estimate, without providing any details at all of what he was talking about.

[85] In my view, this is the kind of self-serving evidence that is not appropriate for a motion for summary judgment. The Liquidators are not putting their best foot forward. It is exactly what was said in *Guarantee Co. of North America v. Gordon Capital Corp.* as not being sufficient to establish a triable issue.

Conclusion

[86] Dr. Marais has set out his conclusion based on his analysis which I have accepted and after taking into account the double counting in the asset and liability numbers of Mr. Krys. He has concluded that the Fairfield Funds are better off by some $857,500,000, as set out below.

Analysis of Krys Damages Calculation

		Reproduction of Krys Revised Summary (¶ 25) Showing Components of • Liability to Madoff Investors • Liability to Funds Investors			Cancel Offsetting Pairs of Line Items	Zero Out Double-Counted and Unsupported Line Items
		(a)	(b)	(c)	(d)	(e)
		24-Apr-07	11-Dec-08	Increase (Decrease)	Increase (Decrease)	Increase (Decrease)
	Assets					
(1)	Cash	269,976,015	114,208,107	(155,767,908)		
(2)	Non-BLMIS investments	238,335,756	101,434,127	(136,901,629)		
(3)	Investments in BLMIS	345,000,000	172,500,000	(172,500,000)	(172,500,000)	(172,500,000)
(4)	Other assets	100,228,608	22,642,358	(77,586,250)		
(5)	Total Assets	953,540,379	410,784,592	(542,755,787)	(172,500,000)	(172,500,000)
	Liabilities					
(6)	Madoff investors					
(6.1)	*Sigma and Lambda (double counted)*	214,675,000	808,875,000	594,200,000	594,200,000	0
(6.2)	*Sentry Redemptions from BLMIS during look-back*	1,315,000,000	2,895,000,000	1,580,000,000	1,580,000,000	0
(7)	Funds investors					
(7.1)	Cash	269,976,015	114,208,107	(155,767,908)		
(7.2)	Non-BLMIS investments	238,335,756	101,434,127	(136,901,629)		
(7.3)	*BLMIS holdings: Sigma and Lambda (double counted)*	809,132,760	858,990,936	49,858,176	49,858,176	0
(7.4)	*BLMIS holdings: Sentry net equity*	2,081,000,000	1,051,000,000	(1,030,000,000)	(1,030,000,000)	(1,030,000,000)
(7.5)	*BLMIS holdings: Sentry phantom earnings*	4,255,363,413	5,310,991,969	1,055,628,556	1,055,628,556	0
(7.6)	Other assets	100,228,608	22,642,358	(77,586,250)		
(7.7)	Other liabilities	(386,425,958)	(263,723,842)	122,702,116		
(8)	Other Liabilities	386,425,958	263,723,842	(122,702,116)		
(9)	Total Liabilities	9,283,711,552	11,163,142,497	1,879,430,945	2,249,686,732	(1,030,000,000)
(10)	Net = Assets–Liabilities	(8,330,171,173)	(10,752,357,905)	(2,422,186,732)	(2,422,186,732)	857,500,000

[87] I accept this and find that the Liquidators have not established any damages and that there is no genuine issue regarding damages that requires a trial.

[88] In the circumstances, the motion for summary judgment is granted and the action is dismissed.

Costs

[89] PwC is entitled to its costs. I have been provided with cost outlines by both PwC and the Liquidators. On a partial indemnity basis, PwC ask for costs of approximately $451,700 plus taxes. This is compared to the request of the Liquidators of partial indemnity costs of approximately $303,400 plus taxes, about 45% of the PwC request.

[90] Both claim partial indemnity costs based on 60% of their actual rates. The hourly rates are not entirely the same. Mr. Ranking's hourly rate was lower than Mr. Howard's and about the same as Mr. O'Kelly's. Mr. Ranking claimed for 487.4 hours against a total of 405.61 hours claimed for

Messrs. Howard and O'Kelly. Ms. Armstrong's rate was quite a bit higher than the rates for the junior lawyers for the Liquidators and she claimed 304.5 hours as against 237.32 claimed by the junior lawyers for the Liquidators. Thus it would appear that the difference in the fee request for each side is the extra hours docketed by Mr. Ranking and the extra hours at a higher rate docketed by Ms. Armstrong.

[91] With respect to the extra hours docketed by the lawyers for PwC, it is often the case that more work is required to mount a defence than to start an action. The plaintiff usually knows its case and a defendant often needs considerable more time to understand the case it needs to meet. In this case, the Liquidators changed their theory of liability of PwC to the SIPA Trustee from one based on claims by investors to a claim based on the judgments obtained under the Settlement Agreement. It was necessary to obtain a supplementary affidavit of Mr. Gerber to respond to that change. More time was spent by the lawyers for PwC on the factum as a reply factum was required. Having said that, the lawyers for PwC docketed 307.3 hours for the facta and associated work as against 83.09 hours for the lawyers for the Liquidators. That appears to me to be somewhat excessive.

[92] A fixing of costs is not a line by line matter for a judge. The factors in rule 57.01 must be considered, including what the losing party could reasonable expect to pay in costs. In this case, the stakes were extremely high for PwC and the Liquidators had to know a full defence would be maintained. The issues were complex and the material voluminous.

[93] In all of the circumstances, a reasonable amount for costs for the motion for summary judgment which I fix is $400,000 plus taxes, or $452,000.

[94] PwC claims disbursements of $735,185.35, inclusive of HST. This is considerably higher than the disbursements in the cost outline of the Liquidators which are $266,648.26. The main difference is caused by PwC engaging two experts, Dr. Marais and Mr. Gerber, as opposed to only one expert, Mr. Pompeo. As well, Mr. Gerber had to prepare a second affidavit to respond to the change in the damage theory of the Liquidators. I see no basis to interfere with the disbarments claimed on behalf of PwC and they are allowed as claimed at $735,185.35.

[95] In the circumstances, the Liquidators are to pay the costs of PwC for the motion for summary judgment in the total amount of $1,187,185.35, to be paid within 30 days.

Newbould J.

Date: June 7, 2017