

Ontario Court of Appeal Affirms Dismissal of Action Against Auditors Because of Failure to Prove Damages

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By

The Court of Appeal for Ontario recently addressed the issue of auditor's liability, post-*Livent*[1], in *Fairfield Sentry Ltd. v PricewaterhouseCoopers LLP*, 2018 ONCA 696. The Court of Appeal's decision highlights the importance of putting one's best foot forward on a motion for summary judgment, and the risk of not responding to some of the issues addressed by the other side's experts.

This case arose out of the "Ponzi" scheme orchestrated by Bernard Madoff through his company, Bernard L. Madoff Investment Securities LLC ("**BLMIS**"). The Plaintiffs ("**Funds**") were funds that invested, directly or indirectly, in BLMIS. The Funds' court-appointed liquidators brought an action against Pricewaterhouse Coopers LLP, the Funds' auditors, asserting that PwC should have uncovered Madoff's Ponzi scheme no later than in April 2007, and that, as a result, PwC breached its contract or was negligent in performing the audits of the Funds' financial statements for the years 2006 and 2007.

PwC moved for summary judgement dismissing the action on the basis that the Funds had not suffered any damages. Liability was assumed for the purpose of the motion. In first instance, Newbould J. granted summary judgment and dismissed the action. The Funds appealed, raising various grounds of appeal related to questions of fact and questions of mixed fact and law.

The Court of Appeal reiterated that, absent an error of law, the exercise of powers under Rule 20 of the *Rules of Civil Procedure* attracts deference. Palpable and overriding error is the standard of review for questions of mixed fact and law (when there is no extricable error in principle), and for findings or inferences of fact.

The Court reviewed in detail the evidence adduced by the parties on the issue of damages, including the expert evidence. The method used by the parties for assessing whether the Funds had suffered any damages by reason of PwC's alleged negligence was the method set out in the Court of Appeal's decision in *Livent*[2], i.e., Loss = Actual Liquidation Deficit – Estimated Liquidation Deficit.

The Funds' liquidators' position was that the motion judge had failed to consider whether additional evidence from them was necessary to address the issue on the motion. In their view, the record as it stood did not eliminate the possibility that the Funds could recover damages, so the motion judge could not grant summary judgment.

The Court of Appeal rejected this submission: the motion judge was entitled to rely on the lack of evidentiary support. Further, the Court found that the Funds' liquidators had no basis to complain that the motion judge took into account the absence of evidence, expert or otherwise, responding to the critique levelled by PwC's experts at some of the Funds' damages evidence. The Court of Appeal noted that this was a Commercial List proceeding, and stated the following:

Great flexibility is available in Commercial List proceedings to ensure the fairness of the ultimate hearing. If the Liquidators had wanted to file evidence responding to the detailed critique performed by Dr. Marais in his second affidavit or Mr. Gerber's evidence,

notwithstanding that they had already conducted cross-examinations, all they had to do was ask the motion judge for leave: r. 39.02(2).

The Court also pointed out that parts of the evidence of PwC's experts were not challenged on cross-examination, and that the absence of such cross-examination was a tactical decision made by the liquidators.

The Court of Appeal addressed the tension between the burden of proof and the obligation to put one's best foot forward as follows:

In flagging this absence of evidence from the Liquidators, I am not suggesting that the Funds bore the ultimate burden of demonstrating the existence of a genuine damages issue requiring a trial. They did not. On a motion for summary judgment, the ultimate burden remains on the moving party to demonstrate that no genuine issue requiring a trial exists. However, on a motion for summary judgment a responding party runs significant litigation risk if it leaves unchallenged key evidence of the moving party adduced to establish there is no genuine issue requiring a trial.

In the end, the Court of Appeal concluded that the motion judge's findings were firmly anchored in the evidentiary record, and rejected all of the Funds' grounds of appeal.

This decision shows how a party's tactical decision not to respond to certain evidence or not to cross-examine on certain issues can come back to haunt that party and its counsel. In light of the Court of Appeal's reasons, it may often be more prudent not to leave any issue unanswered on a motion for summary judgment, even though this may require obtaining leave to file sur-reply evidence, or sur-sur-reply evidence.

[1] *Deloitte & Touche v Livent Inc.*, [2017] 2 SCR 855.

[2] *Livent Inc. v Deloitte & Touche*, 2016 ONCA 11 at paras. 62-63.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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