

**IN THE MATTER OF AN APPEAL TO THE APPEAL COMMITTEE
OF THE CANADIAN INVESTOR PROTECTION FUND**

RE: [REDACTED] and [REDACTED]

Heard: March 16, 2015

HEARD BEFORE:

BRIGITTE GEISLER

Appeal Committee Member

APPEARANCES:

James Gibson

)

Counsel for Canadian Investor
Protection Fund Staff

)

[REDACTED]

)

On behalf of himself and [REDACTED]

Brian Gover

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Independent Legal Counsel for the
Appeal Committee of the Canadian
Investor Protection Fund

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DECISION AND REASONS

Introduction and Overview

1. [REDACTED] and [REDACTED] (the “Appellants”) were clients of First Leaside Securities Inc. (“FLSI”), an investment dealer through which over 1,200 customers made investments in various affiliated companies, trusts and limited partnerships (collectively the “First Leaside Group”). FLSI was registered with the Ontario Securities Commission and was a member of the Investment Industry Regulatory Organization of Canada (“IIROC”). It was also a member of the Canadian Investor Protection Fund (“CIPF” or the “Fund”) until its suspension by IIROC on

February 24, 2012, being the same date that FLSI sought protection under the *Companies' Creditors Arrangement Act*. The relevant history leading up to these events and the role of CIPF with respect to claims to the Fund are set out in detail in the Appeal Committee's decision dated October 27, 2014.¹

2. FLSI was declared to be insolvent on February 24, 2012. The Appellants invested a total of \$43,563 in the First Leaside Funds. The Appellants sought recovery from CIPF on the basis that FLSI was a Member of CIPF and as such the Appellants were entitled to protection through the Fund which was established to provide coverage in the event of insolvency. CIPF Staff made a decision denying compensation to the Appellants on the basis that the Appellants' losses did not arise as a result of the insolvency of FLSI and thus were not covered under the CIPF Coverage Policy dated September 30, 2010.

3. On March 16, 2015 an Appeal Committee Member of CIPF's Board heard an appeal to determine whether to depart from the decision of CIPF Staff. The appeal hearing took place at Neeson Arbitration Chambers in Toronto, Ontario and was open to the public. The Appellant [REDACTED] was in attendance and made submissions on behalf of both Appellants.

Chronology of Events Relevant to the Appellants' Claim

(i) The Appellants' Investments and Claim

4. The claim arises from
 - a. the Appellant [REDACTED]'s purchase of
 - i. 5,000 units of First Leaside Fund on February 20, 2009 and a further 5,372 units on February 8, 2010 in a TSFA account, and
 - ii. 11,000 and 11,819 units of First Leaside Fund on February 20, 2009 and February 8, 2010, respectively, in a SPRRSP account; and
 - b. the Appellant [REDACTED]'s purchase of 5,000 and 5,372 units of First Leaside Fund in a TFSA account, on February 20, 2009 and February 8, 2010, respectively.

¹ This decision is available on the CIPF website and will be referenced throughout as the "October 27, 2014 decision".

5. The total cost of the purchase of the units was \$43,563. These investments were transferred to accounts in the Appellants' names at Fidelity Clearing Canada ULC ("Fidelity") following FLSI's insolvency. The Appellants have submitted a claim to the insolvency Trustee and have received a distribution of \$14,102.78. The Appellant [REDACTED] also purchased 31,000 units of the First Leaside Prog LP on February 23, 2009 in a cash account. The certificate representing this investment was delivered to him. This investment does not form part of the claim.

(ii) The Appellants' Application for Compensation

6. The Appellants applied to CIPF on July 5, 2013 for compensation for their losses in investments made through FLSI. By letter dated August 1, 2014, the Appellants were advised that CIPF Staff were unable to recommend payment of their claim. The relevant part of the letter reads as follows:

CIPF does not cover customers' losses that result from other causes such as dealer misconduct, changing market values of securities, unsuitable investments or the default of an issuer of securities.

With respect to the securities that you purchased and which are described in the table below², they were properly recorded in the books and records of FLSI at the date of insolvency. Those securities were transferred to accounts in your name at another IIROC Dealer Member subsequent to February 24, 2012. Therefore, the loss is not one that is eligible for CIPF coverage, as indicated above.

² See paragraph 4 for details of the securities.

Analysis

7. The Appellant [REDACTED] made submissions with respect to the assurances that were provided by FLSI regarding CIPF coverage. He was unable to recall whether these assurances related to coverage for the securities or coverage for the account. In any event, it was his impression that he would have coverage for a loss of value in the investments made with FLSI. The FLSI representative told the Appellant that he would be protected by the Fund. This assurance gave the Appellants more confidence in investing. As was indicated in the October 27, 2014 decision, the CIPF brochure outlines limitations on coverage. Furthermore, any misrepresentations in relation to CIPF were made by FLSI and oversight of members is within the jurisdiction of IIROC.

8. Second, the Appellants relied upon the arguments which had been raised by Representative Counsel for the investors of FLSI. This argument focused on the interpretation of the phrase “including property unlawfully converted” in the Coverage Policy. The Appellants argue that the funds they invested were to have been invested in proprietary First Leaside products on the understanding that such funds would be invested in those products for the primary purpose of funding the acquisition and/or development of various real estate products. The Appeal Committee is of the view that the adoption of these arguments suggests that the Appellants' claim is really one of fraud, material non-disclosure and/or misrepresentation which does not fall within the meaning of the phrase "including property unlawfully converted". Such an interpretation would in effect create a new head of coverage.

9. The other main argument raised in the Representative Counsel submissions related to the exercise of discretion by the Appeal Committee under the Coverage Policy. As was indicated in the October 27, 2014 decision, the Appeal Committee is bound to exercise its discretion within the limits of the CIPF mandate which is to provide custodial coverage to customers in the event of the insolvency of a Member. While the Coverage Policy provides a residual discretion, it is limited to cases where the application of the Policy might result in an outcome that frustrates or defeats the purpose of the compensation scheme. It is not intended to use discretion to create a new head of compensation such as misrepresentation or the default of an issuer. The Appeal Committee's

discretion is limited to the Coverage Policy which, in general terms, provides for the return of the Appellant's property. In this case, the Appellants' investments were held by FLSI at the date of insolvency and were subsequently transferred to Fidelity.

10. As in the October 27, 2014 decision, while the Appeal Committee has considerable sympathy for the Appellants' position, I conclude that their submissions in this appeal are not persuasive and do not give rise to a successful claim for compensation from CIPF.

Disposition

11. The appeal is dismissed. The decision of CIPF Staff is upheld.

Dated at Toronto, this 17th day of March, 2015

Brigitte Geisler

Brigitte Geisler