

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

RE: [REDACTED] and [REDACTED]

Considered: December 2, 2015, in writing

CONSIDERED BY:

BRIGITTE GEISLER

Appeal Committee Member

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 (“OSC”) 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 was declared to be insolvent and the day after 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 in relation to an appeal heard on October 27, 2014.¹

2. 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

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

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. The Appellants requested that their appeals be considered on the basis of written materials which they provided, including an additional written submission dated October 30, 2015.

Chronology of Events Relevant to the Appellants' Claim

(i) The Appellants' Investments and Claim

4. The claim arises from the Appellants' purchases of Wimberly Fund (Class B, Series 7%) (the "Wimberly Fund") in December 2010, for a total net claim of by [REDACTED] of \$25,928 and by [REDACTED] of \$28,794. The securities representing the Appellants' purchases were transferred to accounts in the names of the Appellants at Fidelity Clearing Canada ULC ("Fidelity").

(ii) The Appellants' Application for Compensation

5. The Appellants applied to CIPF for compensation for their losses in investments made through FLSI. By separate letters dated January 16, 2015, the Appellants were advised that CIPF Staff were unable to recommend payment of their claims. The relevant parts of the letters read as follows:

Regarding your claim for unlawful conversion, it does not appear to us that any property held by FLSI for you was converted or otherwise misappropriated. The securities that you purchased were subject to the disclosure of an offering memorandum or other offering documentation which, among other things, disclosed the risks relevant to the purchase and the investment. These investments, like any securities, were subject to market forces and, unfortunately, your loss appears to have been a loss caused by a change in the market value of your investments and not a loss resulting from the insolvency of FLSI or the conversion of your property. Losses caused by dealer misconduct, compliance failures or breaches of securities regulatory requirements in respect of the distribution of securities are not covered by CIPF.

Analysis

6. The Appellants' investments were made in a First Leaside entity which has not become insolvent. Wimberly Fund is a trust that is administered by a Board of Trustees led by one of the investors in First Leaside. At this point, it is unknown what recovery will eventually be realized in relation to this investment.

7. The Appellants invested approximately one third of their savings into the Wimberly Fund. They were reassured by the presence of the CIPF logo on brochures and statements from FLSI. They believed that there was a type of insurance coverage for their investments, including protection for fraud. They expressed the view that the use of the CIPF logo by FLSI was misrepresented and that CIPF must take responsibility for the actions of the employees of its member firms.

8. Although the CIPF logo appears on FLSI documentation, as required by IIROC rules, it does not follow that CIPF represents or has a relationship with member firms in the same way as a regulator. Member firms and their employees are not agents of CIPF; CIPF is not in a position to control the conduct of employees of member firms. It is a separate not for profit entity funded by member firms, but stands apart from them and their activities. CIPF is not a regulatory body; it has no powers to investigate or to discipline member firms. That authority lies within IIROC or the OSC.

9. The Appellants submit that their funds were never remitted to purchase property in Texas (as was the representation made to them), nor moved to an account in Texas. They believe that their funds were held in Canada in the general account and that this was taken over by the investor group that is now managing the Texas properties. In effect, they argue that their funds never reached the goal that was represented to them.

10. The Offering Memorandum for the Wimberly Fund provides that its business includes: "...the acquiring, investing in, holding, transferring, disposing of and otherwise dealing with securities of or lending to any First Leaside Group Member...."² It appears that the Appellants were unaware of these provisions. These provisions, in effect, permit the transfer of funds among the First Leaside entities for various business purposes.

11. In the written submissions attached to their claims, the Appellants raised arguments similar to those advanced at the October 27, 2014 hearing. This included interpretation of the phrase "including property unlawfully converted" in the Coverage Policy. The Appellants argued that they understood that the funds they invested were to have been invested in proprietary First Leaside products for the primary purpose of funding the acquisition and/or development of various real estate projects.

12. These submissions suggest that the Appellants' claims are really of fraud, material non-disclosure and/or misrepresentation which does not fall within the meaning of the phrase "including property unlawfully converted" as was discussed fully in the October 27, 2014 decision. Such an interpretation would in effect create a new head of coverage.

13. CIPF's mandate and its coverage is custodial in nature; in other words, to ensure that the clients of an insolvent member have received their property. The Appellants have received their property as it was transferred to Fidelity following the insolvency of FLSI. Accordingly the issue of CIPF coverage is not applicable. It is most unfortunate that the property has lost almost all of its value; however, the Coverage Policy clearly states that CIPF does not cover "changing market values of securities, unsuitable investments, or the default of an issuer of securities".

14. The October 27, 2014 decision deals extensively with the Appellants' arguments and the reasoning in the October 27, 2014 decision is adopted by this Appeal Committee. As in the

² See Appeal Record, Volume 2, page 2.

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

Disposition

15. The appeals are dismissed. The decisions of CIPF Staff are upheld.

Dated at Toronto, this 10th day of December, 2015.

Brigitte Geisler