

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

RE: [REDACTED] and [REDACTED]

Heard: November 17, 2015

HEARD BEFORE:

BRIGITTE GEISLER

Appeal Committee Member

APPEARANCES:

Nicolas Businger

) Counsel for Canadian Investor
) Protection Fund Staff

[REDACTED]

) On his own behalf
) On her own behalf

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 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 November 17, 2015, an Appeal Committee Member of CIPF's Board heard an appeal to determine whether to depart from the decision of CIPF Staff. The hearing was held at Neeson Arbitration Chambers in Toronto, Ontario. The Appellants were in attendance; [REDACTED] 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 the Appellants' investments in First Leaside Fund Series C for a total net claim by [REDACTED] of \$139,665.71 and by [REDACTED] of \$123,860.64. The securities representing the Appellants' purchases were transferred to accounts in the names of the Appellants at Fidelity Clearing Canada ULC.

(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

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

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.

...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. 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.

Analysis

6. The Appellants' investments were made in a First Leaside entity which has not gone insolvent. First Leaside Fund is a trust which is being administered by a Board of Trustees led by one of the investors in First Leaside. The Declaration of Trust document establishing the fund declared that its powers included the loaning to any Wimberly Group Member. At this point in time, it is unknown what recovery will eventually come from this investment.

7. [REDACTED] referred to the litigation against David Phillips and Margaret Davis, his wife. The allegations, which he acknowledged had not been proven, state that Phillips and Davis had misappropriated funds from various First Leaside entities, including FLSI, for their own personal benefits. He queried whether it was possible that it was his funds which had been misappropriated. As monies are fungible, it would be extremely difficult and expensive to trace the movement of specific funds from one entity to another; it does not appear that this has been done by the insolvency trustee. In any event, the litigation refers to funds being improperly taken from FLSI and not from customer accounts, which is where CIPF coverage would be applicable.

8. In their written submissions, the Appellants explained that, prior to investing with FLSI, they had investigated the company with IIROC, reviewed information on the internet and noted the

involvement of prominent Canadians as First Leaside entities directors. They were advised that should there be difficulties with the investment, there was CIPF coverage as indicated on the offering sheet. That offering sheet, which can be found at page 90 of Appeal Record, Volume 1 is a description of the First Leaside Fund offering. It includes a statement that the agent is First Leaside Securities Inc.; below that statement are the CIPF and IIROC logos. The presentation of the offering sheet can be seen as confusing, and possibly misleading with respect to the role of CIPF with reference to First Leaside Fund.

9. The conduct of the principals of FLSI has been called into question in proceedings of both IIROC and the OSC, and has been found wanting. Regrettably, for the Appellants, conduct such as fraud, material non-disclosure and/or misrepresentation is not covered by CIPF.² It is of great concern and disappointment to the CIPF Board of Directors that its coverage has been misrepresented to investors by FLSI. Efforts have been, and continue to be undertaken to promote a proper understanding of CIPF coverage within the investment industry. A review of CIPF's communication with investors through its website and brochures is also being undertaken.

10. 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. 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.

11. 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; accordingly the issue of CIPF coverage is not applicable. It is most unfortunate that the value of the property is uncertain, 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".

² A full discussion of this can be found in the October 27, 2014 decision.

12. 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 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

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

Dated at Toronto, this 25th day of November, 2015.

Brigitte Geisler