

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

RE: [REDACTED] and [REDACTED]

Heard: August 19, 2015

HEARD BEFORE:

BRIGITTE GEISLER

Appeal Committee Member

APPEARANCES:

Nicolas Businger

)
)

Counsel for Canadian Investor
Protection Fund Staff

[REDACTED]

)
)

On their own behalves

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 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 August 19, 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 was held at Neeson Arbitration Chambers in Toronto, Ontario. The Appellants were in attendance.

Chronology of Events Relevant to the Appellants' Claim

(i) The Appellants' Investments and Claim

4. The claim arises from the Appellants' purchase by [REDACTED] of \$20,000 in units of First Leaside Properties Fund (Class B) and by [REDACTED] of \$150,000 in units of First Leaside Wealth Management Fund². Certificates 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 letters dated August 1, 2014 to [REDACTED] and January 6, 2015 to [REDACTED]

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

² \$9,957.68 has been returned to [REDACTED]. See Appeal Record, vol.1, p.101.

██████████, 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.

...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 explained how they were persuaded to invest in First Leaside Group products on assurances from Mr. Wilson, one of the principals. Mr. Wilson mentioned the protection of CIPF explaining that there would be insurance coverage if anything went wrong. He also promoted the investment as low risk, consistent with the Appellants' desire for safe investments. ██████████ also commented that he was reassured in that FLSI's board of directors included at least one prominent Canadian businessman. The Appeal Committee took note of the comments.

7. ██████████ noted that by the time they made their investments at the end of 2010, the OSC had been investigating the First Leaside Group for over a year. During that period, it was his view that the principals of FLSI misrepresented the nature and quality of the various properties in which they were encouraging investment, engaging in a pattern of misleading statements and marketing.

8. ██████████ noted the disciplinary actions by IIROC and the OSC, however, he also noted that these were not criminal proceedings and had provided no benefits to the investors. He expressed his concerns about the misrepresentations which were made and the failure to keep investors informed as to what was going on. He emphasized the meaning of the individual words

comprising the name of CIPF and expressed his view that CIPF should be doing more to assist investors.

9. ██████████ expressed the view that the date of the insolvency of FLSI is irrelevant, as he believes fraud was taking place at the time he made his investments. He did not believe that he had received the promised investment. This argument was supported in the Appellants' written submissions which repeated the arguments that were presented by representative counsel in the October 27, 2014 appeal hearing. Those arguments focused on an interpretation of the phrase "property unlawfully converted", which can be found in the CIPF Coverage Policy.

10. CIPF's mandate and Coverage Policy is limited to its member, FLSI and not the various entities in the First Leaside Group. From CIPF's perspective, the Appellants' funds were applied as instructed to FLSI and were not unlawfully converted. To adopt these arguments relating to "property unlawfully converted" suggests 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.

11. The Appellant also addressed the matter of 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 Appellants' property. In this case, the Appellants' investments were held by FLSI at the date of insolvency and were subsequently transferred to Fidelity.

12. CIPF is not a regulator. Unlike IIROC and the OSC, it does not have investigatory or disciplinary powers. 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. This custodial coverage is set out in CIPF's mandate, which is approved by the OSC and other provincial securities regulators. The mandate is restricted to this coverage, and does not extend to coverage for fraud, material non-disclosure and/or misrepresentation. The nature and extent of the coverage is discussed in full in the October 27, 2014 decision.

13. The Appellants made observations concerning the fact that the role of CIPF was misrepresented by principals of FLSI and that there appeared to be no repercussions for doing so. ██████████ suggested that CIPF be more concerned about protecting investors, rather than the assets of its fund. I advised that the directors of CIPF are extremely concerned about what appears to be either, or both, uninformed or deliberate misrepresentation of CIPF's role. While there are IIROC rules setting out the use of the CIPF name and its logo, it is difficult to monitor deliberate misrepresentation, which appears to be what happened in this case.

14. While I have considerable sympathy for 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 appeal is dismissed. The decision of CIPF Staff is upheld.

Dated at Toronto, this 2nd day of September , 2015.

Brigitte Geisler