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

RE: [redacted]

Heard: February 29, 2016

PANEL:

BRIGITTE GEISLER	Appeal Committee Member
ANNE WARNER LA FOREST	Appeal Committee Member
PATRICK LESAGE	Appeal Committee Member

APPEARANCES:

R. Shayne Kukulowicz Jane O. Dietrich	))	Counsel for [redacted] and [redacted]
James D. G. Douglas Nicholas Businger	))	Counsel for Canadian Investor Protection Fund Staff

DECISION AND REASONS

Introduction and Overview

1. [redacted] and [redacted][1] (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

[1] [redacted] is the wholly-owned corporation of [redacted]. For ease of reference, this Appellant will be considered to be, and referred to, as [redacted].

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.[2]

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 October 2, 2015, Brigitte Geisler, an Appeal Committee Member of CIPF's Board heard an appeal to determine whether to depart from the decision of CIPF Staff. Following consultation among all of the Appeal Committee Members, it was determined that there were unique issues raised in this appeal which should be determined by a panel of the Appeal Committee (the "Panel") of CIPF. The Appellants were given the option as to how they wished to proceed; they chose to have a hearing de novo addressing specific issues. The appeal hearing was held at Neeson Arbitration Chambers in Toronto, Ontario on February 29, 2016.

Chronology of Events Relevant to the Appellants' Claim

(i) Background

4. The investments made in First Leaside products were made by [redacted], the deceased father of the Appellants. [redacted] worked with John Wilson, a principal at FLSI in making these investments. [redacted] died on February 7, 2011 leaving a will dated February 19, 2008. The Appellants were named in the will as joint executors of [redacted] estate. [redacted] however, surrendered this role shortly after his father's death due to the difficulty

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

of dealing with estate matters from his residence in [redacted]. The Appellants are also equal beneficiaries of [redacted] estate.

5. The Appellant [redacted] advised John Wilson of [redacted] death within five days; in turn, John Wilson offered his assistance and assured that all of her questions and requests would be taken care of. Throughout the following several months, until early November, 2011, the two exchanged numerous emails and telephone calls dealing with the process of resolving [redacted] estate. [redacted] also had several telephone calls with John Wilson. There is considerable disagreement between the Appellants and CIPF Staff as to the characterization and significance of these oral and written discussions. The facts will be further addressed later in these reasons.

(ii) The Appellants' Investments and Claim

6. The Appellants claim the total sum of $2,481,568[3] representing the number of units of the investments that [redacted] made in various First Leaside Group products between August 7, 2008 and November 30, 2010. As a result of distributions received from the insolvency trustee, these claims have been reduced to $1,089,878.41 for [redacted] and $1,089,876.47 for [redacted].

7. The Certificates representing [redacted] investments had been delivered to his possession. One of the first actions of [redacted], as requested by John Wilson, was to return these certificates to FLSI for processing the estate account for [redacted]. She did so on April 11, 2011 and the Certificates were received by John Wilson of FLSI on April 14, 2011. On November 4, 2011, FLSI delivered certificates to [redacted] representing the division of [redacted] estate in that half of the certificates were in the name of [redacted] and half were in the name of [redacted].

(iii) The Appellants' Application for Compensation

[3] [redacted] claims the sum of $1,240,785; [redacted] claims the sum of $1,240,783. The total purchase price of [redacted] investments in First Leaside Group products was $2,441,041.00.

8. The Appellants applied to CIPF for compensation for their losses in investments made through FLSI. By separate letters dated February 2, 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:

> …losses caused by dealer misconduct, compliance failures or breach of a securities regulatory requirements in respect of the distribution of securities are not covered by CIPF. The securities that were 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.

Issues

9. The Panel had requested that the re-hearing of the Appeal direct itself to two specific issues:

> i) What the phrase "unlawful conversion" means in the context of an instruction given to redeem the securities into cash not being followed; and
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> ii) the impact of the proscriptions in the offering documents with respect to the instruction to redeem, that is to say, is this the fault/obligation of the issuer or of the member receiving the instruction.

Analysis

(i) The Meaning of "Unlawful Conversion" in the Context of an Instruction Given to Redeem the Securities into Cash Not Being Followed.

10. CIPF Staff began their argument by discussing the general purposes of the Coverage Policy. CIPF Staff submitted that the Coverage Policy provides that eligible losses must arise from the

insolvency of the Member and be in respect of the Member's failure to return or account for property held by the Member for the customer. The purpose of the Coverage Policy is to return the customer's missing property to them or to provide appropriate compensation for that missing property when the Member fails in their capacity as a custodian of property.

11. For its part, counsel for the Appellants argued that there was an eligible loss in this case because the Appellant, [redacted], transferred custody of the Certificates representing the investments of [redacted] to FLSI on April 14, 2011 and instructed representatives of FLSI to redeem those Certificates and it failed, either negligently or intentionally, over a period of more than 7 months to do so. Instead, after the voluntary cease trade on October 31, 2011, FLSI delivered reissued certificates to the Appellants representing the division of the original investments held by [redacted]. FLSI was thus unable to redeem the Certificates as a result of the cease trade orders and the eventual insolvencies of the First Leaside Group and FLSI and therefore deprived the Appellants of their value. Had FLSI followed the Appellants' instructions to redeem on a timely basis, the redemptions and dispersal of funds as requested by the Appellants would have been done before the cease trade orders and the insolvencies.

12. While there is no question that the Certificates were transferred to FLSI on April 14, 2011, there are significant differences between the parties in respect of two matters. The first is whether the Appellants can be said to have instructed FLSI to redeem the Certificates. The second is whether a failure or refusal to redeem can constitute an "unlawful conversion" that would fall within the protection of the Coverage Policy.

(*a*) *Do the Facts Disclose an Instruction to Redeem*?

1. The Appellants' Position

13. Counsel for the Appellants presented the case as one where [redacted] had invested the majority of his savings with FLSI over a twenty-nine month period beginning in July 2008. In August of 2009, [redacted] wrote an email to John Wilson advising him that he had been diagnosed with cancer and that he had shared information about his investments with the Appellant [redacted] as she was to be the executor of his estate and he wanted her to have a better idea of

his investments and who to deal with in the event of his death. The Appellant, [redacted], stated that her father told her that he had invested his savings in FLSI to protect and consolidate his investments in a way that would make it easier for the Appellants to liquidate his holdings after his death. She also stated that [redacted] further attempted to ease this transfer by introducing the Appellants to John Wilson, the principal at FLSI who worked with him, at an investor appreciation event on September 26, 2009. The Appellants stated that at this meeting, John Wilson, [redacted], and the Appellants discussed the plans to liquidate the estate. The position is that from the outset, the intention was that the Certificates would be liquidated upon [redacted] death and that John Wilson was aware of this fact.

14. [redacted] died on February 7, 2011. The Appellant [redacted] advised John Wilson of her father's death on February 12, 2011 and on February 13, 2011 John Wilson acknowledged receipt of her email and in that email stated that: "We know [redacted] was counting on First Leaside to help you with his estate". At the hearing, the Appellant [redacted] stated that she called John Wilson around this time and that they discussed liquidating her father's investments in FLSI. On February 24, 2011 John Wilson requested that the Appellant, [redacted], return the Certificates to FLSI and provided her a list of the relevant Certificates that would have been in [redacted] possession. [redacted] sent all of these documents to John Wilson on April 11, 2011 and as of April 14, 2011, FLSI had custody and control of the Certificates. In her affidavit and at the hearing, [redacted] stated that from February to July 2011 she corresponded and had telephone conversations directing John Wilson to liquidate the investments and that John Wilson advised that he would need to first transfer the Certificates to an estate account and from there steps would be taken to liquidate the estate. [redacted] stated that in telephone conversations around this time John Wilson advised her that the liquidation would take 30 to 90 days. In particular [redacted] advised John Wilson in writing of her immediate need for $700,000 to satisfy a mortgage burden that she was carrying. She did so on three occasions: April 11, 2011, May 18, 2011, and July 14, 2011. John Wilson responded within one hour to her email on May 18, 2011 and stated that he would increase the liquidity request to $700,000. On June 21, 2011, he wrote requesting that she call him on a toll free line to discuss which investments to liquidate. At the hearing, [redacted] stated that her intention in the July 14, 2011 email was to request a liquidation of all of

the investments representing her interest with only $400,000 of her assets to be left in First Leaside which was the amount sitting in cash and bonds with FLSI's carrying broker. As to the Appellant [redacted], her intention was to express that his one half interest would first go into [redacted] and then be liquidated. Correspondence in relation to the estate continued after July 14, 2011 until November 14, 2011, nine months after the death of [redacted].

15. In his affidavit and at the hearing, the Appellant [redacted] stated that John Wilson advised him to incorporate [redacted] for tax reasons and because he was then a resident of [redacted]. [redacted] also stated that he called John Wilson on a number of occasions about liquidating the estate because he was concerned about the status of the liquidation and that John Wilson had also told him that liquidation would take 30 to 90 days.

16. Counsel for the Appellants argued that these facts disclose that FLSI had custody of the Certificates and a clear instruction to liquidate. In his view, the correspondence that followed over several months after April 14, 2011 constituted an intentional or negligent refusal to follow the Appellant [redacted] instruction to liquidate and that in fact, both John Wilson and David Phillips tried to induce the Appellant [redacted] not to liquidate and to continue investing in the First Leaside Group products. The timeline of this correspondence coincided with the investigation by the OSC and in particular the period when Grant Thornton was retained in March 2011 to provide an independent review of the First Leaside Group. In August 2011, Grant Thornton presented its report which stated that the First Leaside Group's viability depended on its ability to raise new capital. Counsel for the Appellants stated that the First Leaside Group, through FLSI, was, during this period, seeking to raise capital and not wanting to return funds as directed by the Appellants. In his contention, it was the insolvency of FLSI that ultimately prevented FLSI from redeeming the investments. On October 28, 2011 IIROC designated FLSI in discretionary early warning status which prohibited reducing the firm's capital in any manner including by redemption of securities. On October 31 there was a voluntary cease trade and it was only on November 4, 2011 that FLSI delivered reissued certificates to the Appellants dated November 1, 2011 representing [redacted] investments.

2. The Position of CIPF Staff

17. CIPF Staff argued that the record did not support the Appellants' position that they had given appropriate instructions to redeem the securities. Their position was that the obligation lies with the security-holder to give proper notice of a redemption request in accordance with the proscriptions provided in the offering documents. Counsel for CIPF Staff presented what happened between February and November of 2011 as a continuing conversation between the Appellants and John Wilson that never reached the level of an instruction to redeem and that all that had been agreed upon is that accounts would be opened for each of the Appellants in which the Certificates of [redacted] would be divided in half and reissued to the Appellants and that at that point, the Certificates would be redeemed. CIPF Staff took the position that the Certificates, which beneficially belonged to the Appellants, were in fact transferred and reissued to the Appellants with their full knowledge and consent. They argue that while the Appellant [redacted] shared her plans and intentions with John Wilson, she did not, at any point in the written documentation, instruct John Wilson to redeem any specific securities nor did the Appellants make any complaint about his failure to redeem even though both had been advised that the timeline would be 30 to 90 days. CIPF Staff's position is that a careful review of the record forecloses the conclusion that there had been any instruction. As an example, counsel for CIPF Staff referred to the email of July 14, 2011 referred to above. CIPF Staff noted that in spite of the Appellant [redacted] explanations of what she meant when she wrote the email, the email itself did not provide a clear instruction to liquidate her one half interest; rather the email indicated that she was looking for advice. Furthermore, the email affirmatively stated that the Appellant [redacted] was intending to leave his one half interest entirely with FLSI. Even with respect to the $700,000, CIPF Staff argue that the timing of the liquidation was never specific; in one email dated April 11, 2011, the Appellant [redacted] referred to receiving these funds after the will was probated but again there was no reference to any specific assets that were to be used to fulfill this request. In another email, on May 18, 2011, she wrote about receiving that amount after the estate was to be divided. In summary, CIPF Staff stated that at best, the Appellants had demonstrated a passive disregard by FLSI of the interests of the Appellants and that this would constitute misconduct but not a failure to follow an instruction.

3. Discussion

18. CIPF Staff and the Appellants have provided us two very different narratives of what transpired in this case; the Appellants argue that the facts disclose a direction to liquidate [redacted] Certificates while CIPF Staff characterize the correspondence between the Appellants and FLSI as a conversation that never reached the point of any direction to redeem. It falls to the Appeal Committee to resolve this difference.

19. During the course of the hearing, counsel for CIPF Staff cautioned the Appeal Committee in terms of our role in relation to fact-finding. In his view, the process applied in these cases does not have the advantage of cross-examination or swearing of evidence and as such, we must limit ourselves to what is available on the written record. The Appeal Committee agrees that it must be cautious but we are of the view that inferences about the facts can be drawn when statements that are made before us are supported by circumstantial or other indirect evidence that is not inconsistent with the written record.

20. The Appeal Committee agrees with CIPF Staff that the evidence is ambiguous in terms of a clear instruction to liquidate the whole of [redacted] estate. The difficulty with the position of the Appellants is that the written record before us is in fact inconsistent with what was allegedly said in telephone conversations. If we were to refer only to the statements of the Appellants in terms of what was said orally in telephone conversations, it would suggest an ongoing series of requests to liquidate the estate. The difficulty is, however, that the written record is not supportive of this conclusion. Even as late as July 14, 2011, [redacted] provided written instructions only with respect to her own one half interest and she was ambivalent even in that respect. As to her brother's one half interest, she indicated that he would be keeping his interest with FLSI for the time being. While this conflicts with her brother's statements in his affidavit, [redacted] only had conversations with John Wilson by telephone and by his own testimony, he had asked his sister to act as the sole executor in relation to the estate. In these circumstances, it is not possible to find, on the facts, a clear instruction from the Appellants that they wanted to liquidate the whole of the

estate. At the same time what is clear on the facts is a consistent statement that the Appellant, [redacted], was looking for the return of $700,000 to address a mortgage burden and there is a written acknowledgement of that fact by John Wilson on May 18, 2011.

21. Our conclusion is that there was a clear instruction by the Appellant [redacted] to redeem $700,000 that is amply supported by the record. There remains the matter of whether the instruction must, as counsel for CIPF argued, be one where the security-holder must give proper notice of a redemption request in accordance with the proscriptions provided in the offering documents. We reject this position in this case. The record is very clear that John Wilson on behalf of FLSI requested the return of the Certificates on February 24, 2011 and he did not at any time raise any further requirements nor did he at any point suggest that it would not be possible for FLSI to redeem the securities. FLSI, as custodian of the Certificates failed to follow the instruction of the Appellant [redacted]. While there is, in the written record, documentation in which John Wilson stated that he needed [redacted] further assistance and direction in this regard, it is quite clear from the facts presented to us that [redacted] was insistent on the need for these funds, that she was an unsophisticated investor, and that given the timing of the request, John Wilson was clearly stalling in fulfilling this instruction in circumstances where he offered his assistance to her in his email of February 13, 2011.

22. It is also to be remembered that the Appellants were not, as beneficiaries, the investors in the First Leaside Group; they inherited those investments. Accordingly, they would not have had the opportunity to review the Offering Memoranda that were provided to [redacted]. They did not know, nor could they be expected to have known, that there were possible restrictions with respect to the redemption of securities. In none of the emails which were passed between the parties did John Wilson state or even suggest that there would be additional requirements or notice to be provided or any other restrictions on redemption.

b. Is a Failure to Redeem an Unlawful Conversion?

23. CIPF Staff argued that for purposes of the Coverage Policy the meaning of "unlawful conversion" does not extend to intentionally or negligently failing to redeem securities in accordance with a customer's instructions and that at most, a Member's failure to execute their

customer's instructions give rise to a claim for negligence or breach of contract. Stated more succinctly, the argument is that a failure to follow instructions represents a form of misconduct that would allow a personal action against the Member but not the return of property under the terms of the Coverage Policy. In support of this, CIPF Staff relied upon our October 27, 2014 decision in which we stated that the Coverage Policy does not cover losses arising from dealer misconduct such as fraud, material non-disclosure or misrepresentation and decisions rendered by courts addressing the comparable U.S. compensation scheme ("SIPA") in which the failure to comply with instructions to sell securities were treated as constituting misconduct.

24. Counsel for the Appellants argued that in our October 27, 2014 decision we held that wrongful conversion did not apply because the funds delivered to FLSI were applied in accordance with the customer's direction. In the current matter, the Appellant [redacted] returned the Certificates to John Wilson at his request along with a clear direction to liquidate the securities and return the funds to the beneficiaries. FLSI was thus in custody of the Certificates as of April 14, 2011. The unlawful conversion in this case involved FLSI failing to return the value of the Certificates upon request or within a reasonable time or even a reasonably extended time. At no time did FLSI indicate that it was unable to redeem the property, or even that there were technical requirements to meet in order to do so. It simply repeatedly failed to do so in breach of the direction of the Appellant [redacted]. Ultimately, it became unable to do so as a result of the insolvency of FLSI. The deliberate failure to act as directed by the Appellant for this lengthy period of time constituted an unlawful conversion of these Certificates and their value. Reissued certificates were placed in the account the day after the cease trade occurred. This was directly contrary to the Appellants' direction.

25. The role of the Appeal Committee in this case and indeed in all the cases it has heard is to assess the facts of each Appellant's case and determine whether or not the alleged loss falls within the Coverage Policy. In this regard, the critical sentence in the Coverage Policy reads as follows:

> CIPF covers customers of Members who have suffered or may suffer financial loss solely as a result of the insolvency of a Member. *Such loss must be in respect of a claim for the failure of the Member to return or account for* securities, cash balances...or other *property, received, acquired or held by, or in the control of, the Member for the*

customer, including property unlawfully converted.

26. In the October 27, 2014 decision and in all the decisions we have decided to the date of this decision, the facts have disclosed that clients of FLSI were induced to invest in the First Leaside Group products. The Appeal Committee has not, in any of these, questioned that the principals of FLSI misrepresented the First Leaside Group products or CIPF coverage or even that there may have been fraud in this regard. The difficulty in these cases has been that the former clients of FLSI directed the purchase of these investments, the purchases were made, and the investments were returned to the clients. As we have said in numerous cases, the Coverage Policy does not exclude losses arising from fraud but the fraud that is alleged must result in a failure to return or account for property. It is the failure to return or account for property including through unlawful conversion that triggers protection under the Coverage Policy. The facts in this case, however, substantiate a finding of unlawful conversion.

27. The inducement to [redacted] to make his investment in the First Leaside Group (through FLSI) included a misrepresentation that foresaw a further direction that would take place after [redacted] death; a direction to liquidate the Certificates. On the record before us, it is reasonable to conclude that John Wilson engaged in further misrepresentation and misconduct aimed at ensuring that the Appellants would continue investing in the First Leaside Group and would not redeem the Certificates, and to the extent that there was no clear direction to redeem as a result of that conduct, the Appeal Committee agrees with CIPF Staff that there was no failure to return or account for property and that the appropriate action in this regard would be one of breach of contract or negligence. However, to the extent that there was a clear direction to redeem and a failure to follow the Appellants' direction, that would constitute an eligible loss under the Coverage Policy. As noted above in our reasons, we have concluded that there was a clear instruction to redeem $700,000 by April 11, 2011.

28. Counsel for CIPF Staff has submitted that no specific instructions for redemption were given. In reality, the facts are that an instruction to redeem the amount of $700,000 would have required a redemption of all of the securities that could have been redeemed according to the

restrictions in the offering documents.[4] The net effect is that no specific instructions were, in fact, required. The Appeal Committee finds that there were sufficient instructions given and that a failure to follow those instructions, resulting in the funds not being in the account, was equivalent to unlawful conversion in the same way that a failure to apply funds coming into the account according to the instructions of the investor, resulting in the funds not being in the account, is unlawful conversion.

29. Finally, we refer briefly to the decisions of SIPA relied upon by CIPF Staff. They rely upon this jurisprudence in two respects. First, they argue that this jurisprudence establishes that passive disregard or mere failure to follow instructions does not ground a customer claim. Their position is that this is because the loss arising from such failure does not result from the insolvency of a member and gives rise only to a cause of action for breach of contract or negligence. Furthermore, CIPF Staff argue that this jurisprudence provides that a claimant must demonstrate a timely written objection after becoming aware of unauthorized actions by the Member and that there was no such complaint in this case. While these decisions are not binding upon us, they may be persuasive. Having reviewed these decisions, however, we determine that they do not affect our reasoning in this case.

30. The decisions provided to us state that coverage under SIPA is accorded only to those claims that arise directly from a broker's insolvency.[5] For example, in *Kenneth A. Barton v. SIPC*, the bankruptcy court stated as follows:

> As to the failure to execute a sell order, numerous cases have held that "the failure to comply with a sell order does not result from the insolvency, but rather gives rise to an action for breach of contract".[6]

31. The rationale for this position is that coverage under SIPA applies to losses that arise as a result of the insolvency of the broker and the loss that is caused by a failure to comply with a sell

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[4] See the discussion under Calculation of the Award which provides detailed calculations with respect to the various securities and the redemption provisions.

[5] *Kenneth A. Barton v. SIPC*, 182 B.R. 981 (Bankr., District of New Jersey, 1995); *In re John Dawson & Associates*, Inc. 289 B.R. 654 (Bankr. N.D.III, 2003); *In re Mason Hill & Co.*, Inc. 2004 Bankr. LEXIS 1573.

[6] *Kenneth A. Barton v. SIPC*, 182 B.R. 981 (Bankr., District of New Jersey, 1995), para. 12. See also *In re John Dawson & Associates, Inc.* 289 B.R. 654 (Bankr. N.D.III, 2003) at page 10, and *In re Mason Hill & Co., Inc.* 2004 Bankr. LEXIS 1573 at page. 10.

order would have occurred even if the debtor had not been insolvent. Thus, for example, in the *Barton* decision, the client had asked his broker to sell securities on a specific date which would have resulted in a price of $19,375. The broker failed to do so and sold the shares some three weeks later at a price of $3,467. The client sought to recover the return he should have received. The court held that the client had a claim in breach of contract rather than under SIPA; the financial loss was not as a direct result of the insolvency of their stockbroker because it would have occurred even if the debtor had not become insolvent. But that is not this case. As outlined above, the repeated failure to follow the Appellant, [redacted], instruction in this case constituted an unlawful conversion. The written evidence in this case makes it clear that as a result of the cease trade in late October, FLSI became unable to redeem the Certificates.

32. Counsel for CIPF Staff submitted that the Appellants did not provide a written objection to the failure to redeem the securities on a timely basis. In support of the requirement of a written objection, CIPF Staff relied heavily on the case of *In re John Dawson & Associates, Inc*.[7] The client in this case, a sophisticated investor, became aware of several unauthorized trades being made in his account and contacted his broker by telephone and instructed him to sell these securities and the broker failed to do so. The bankruptcy court held that in order to establish a claim in a SIPA proceeding based on unauthorized trading, a claimant must provide evidence that the trading was unauthorized through a timely objection in writing. It is however, important to note that in this case, the bankruptcy court cited the decision of the Second Circuit Court in *Modern Settings, Inc. v. Prudential-Bache Securities Inc.*[8] which stated as follows:

> …the written notice clause should be flexibly applied where there is a disparity in sophistication between a brokerage firm and its customer…In addition, the Court did not "foreclose the possibility that a broker may be estopped from raising a defence based on the written notice clause if the broker's own assurances or deceptive acts forestall the customer's filing of the required written complaint.[9]

33. The case before us falls more properly within this limitation to the general rule. We have

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[7] 289 B.R. 654 (Bankr. N.D.III), 2003 at page 11.
[8] 936 F.2d 640 (2d Circuit 1991), 645-646. CIPF Staff also relied upon the case of *In re Klein, Maus & Shire Inc.* 301 B.R. 48 (Bankr, SDNY, 2003) at page 14. This decision also relied upon the Second Circuit Court decision in *Modern Settings, Inc.* to support its decision.
[9] *In re John Dawson & Associates, Inc.* 289 B.R. 654 (Bankr. N.D.III, 2003) at page 11.

already indicated that the Appellant [redacted] was not even the investor in this matter; she was his beneficiary. This was known to John Wilson who on the evidence did not simply disregard the instruction; he also continued to induce the Appellants to further invest in the First Leaside Group. In these circumstances, it is not reasonable to impose a duty to provide a written objection in order to be entitled to coverage under the Coverage Policy. In any event, while this was not discussed at the hearing before us, a close reading of the *Dawson* decision suggests that a written objection is a SIPA requirement; it is not clear to us that CIPF has a similar requirement.

34. In coming to our decision, we have differentiated the two Appellants on the basis of the evidence provided with respect to the redemption instructions. It is clear from the emails that [redacted] was looking to redeem at least $700,000 from her portion of her father's estate and that instruction was acknowledged by FLSI. Beyond that amount, the evidence, both through the emails and given orally at the hearing, is less than clear as there was substantial reference to the intention of the parties. It was impossible for the Appeal Committee to verify those intentions other than through the emails. This is an important distinction as the Appeal Committee is well aware that in the normal course, it is unnecessary to issue instructions with respect to the purchase and sale of securities by email; verbal instructions are sufficient. However, in the circumstances of this Appeal, we find the verifiable emails to be crucial to our decision. It would have been insufficient for the Appellants to have submitted that oral instructions for redemption had been given without some independent evidence to substantiate those instructions. It is for this reason that we can only find in favour of the Appellant [redacted] and only for an amount not to exceed $700,000, having accounted for receipts from the Insolvency Trustee. We are not convinced on the totality of the evidence that it has been established that [redacted] had the same clear intent to liquidate his investments or a specific portion thereof. We note that the establishment of a corporate entity might indicate that he intended to retain his inheritance in specie. There is also the statement in [redacted] (the executor of the estate) email of July 14, 2011, that "I believe he is leaving his ½ entirely with First Leaside at this point". As a result we uphold the decision of CIPF Staff with respect to the Appellant [redacted] in denying his claim.

(ii) The impact of the proscriptions in the offering documents with respect to the instruction to redeem, that is to say, is this the fault/obligation of the issuer or of the member receiving the instruction.

1. The Proscriptions in the Offering Documents

35. Counsel for CIPF Staff submitted that FLSI, as the broker receiving the instructions to redeem securities, had no involvement in, or authority to decide, whether or not a redemption request could or would be granted. The suggested conclusion is that because there was no responsibility related to the redemption, FLSI could not be at fault for any failure of the issuer to fulfill the redemption request; this is a loss akin to the default of an issuer, which is not included in the Coverage Policy. Further, there were no specific instructions given as to which securities would be redeemed; only a dollar amount of $700,000 was discussed.

36. The Appeal Committee accepts that the issuers were responsible for the redemptions. The communications between the issuers and the investors, however, were through FLSI which was acting as an agent for the First Leaside Group. In this respect, although the Appeal Committee has stated that the First Leaside entities were legally separate, the fact of the overlap of employees in the First Leaside Group and FLSI is relevant. The instructions to redeem were received by the agent of the issuer, FLSI. That agent was in a position to effect the redemption because of the overlap of functions of the employees. As has been stated above, there was no communication from the agent that there were any impediments to the redemption of the securities. We therefore conclude that had there been any requirements to be met with respect to redemption, they would have been communicated, and because there was no such communication, the securities should have been redeemed in accordance with their redemption restrictions.

2. Calculation of Award

37. Given our discussion above, we will assume that any technicality relating to the redemption of securities (such as a specific notice, etc) have been satisfied and look to the redemption

provisions of the offering documents of the different First Leaside Group products. Pursuant to the findings above, we will only deal with the Appellant [redacted] half of the estate.

38. The various securities which had been purchased by [redacted] did not have uniform redemption provisions. The securities are divided into four different types of redemption provisions:

i. no redemption permitted ("Type I")
ii. discretionary redemption ("Type II")
iii. limited redemption rights; and ("Type III")
iv. unknown redemption rights. ("Type IV")

39. The different securities in each of these redemption categories and the investment values for one half of the estate of [redacted] at the time of their purchase, and as continually displayed on account statements, are as follows:

i. Type I – no redemption permitted

a.	First Leaside Investors Limited Partnership -	$ 175,000.50
b.	First Leaside Visions I Limited Partnership -	$ 50,000.00
c.	First Leaside Elite Limited Partnership -	$ 70,921.50
d.	Wimberly Apartments Limited Partnership -	$ 47,281.50
	TOTAL:	$ 343,203.50

ii. Type II – discretionary redemption

a.	Development Notes Limited Partnership -	$ 100,000.00
b.	First Leaside Universal Limited Partnership -	$ 75,000.00
c.	First Leaside Ultimate Limited Partnership -	$ 72,142.00
d.	First Leaside Visions II Limited Partnership -	$ 25,000.00

	TOTAL:	$ 272,142.00

iii. Type III – limited redemption

a.	First Leaside Fund (Series B) -	$ 105,175.00
b.	First Leaside Mortgage Fund (Series A) -	$ 200,000.00
c.	Wimberly Fund (Class B) -	$ 50,000.00
d.	First Leaside Wealth Management Fund -	$ 175,000.00
	TOTAL:	$ 530,175.00

iv. Type IV – unknown redemption

a.	First Leaside Wealth Management Series II Preferred Shares –	$ 75,000.00
	GRAND TOTAL:	$ 1,220,520.50

40. There are several dates which are important for consideration when looking at the redemption provisions of the investments. The initial date is February, 2011 when [redacted] passed away. From the emails, there do not appear to be instructions dealing with the liquidation of the estate. In April, 2011, [redacted] forwarded all of the share certificates for the First Leaside investments to FLSI for processing. At the same time, she clearly stated that she wished to redeem $700,000 from her share of her father's estate. In August, 2011, probate was received for the estate and forwarded to FLSI.

41. Counsel for CIPF Staff submits that any calculation of redemption privileges be applied from the date of August, 2011 when probate was received for the estate. The Appeal Committee prefers the date of April, 2011 when instructions for redemption were received. Although probate had not been received for the estate, there was no reason for FLSI to doubt that they were dealing with the appointed representatives of the estate. Verification of this through the granting of probate was a mere formality. All of the parties were aware of [redacted] terminal illness; in fact, in

2009 [redacted] and the Appellants met with Mr. Wilson (the representative of FLSI through which [redacted] had all of her dealings), so that the Appellants and Mr. Wilson would get to know each other in preparation for future dealings after [redacted] death.

42. The Appeal Committee makes the reasonable assumption that under the unusual circumstances of the death of one of its investors, the principals of the Type II investments would have acceded to a request from the investor's estate that the investments be redeemed. The Appeal Committee also makes the reasonable assumption that there was sufficient time prior to the cease trade order in October, 2011 that these redemption instructions could have been processed. Accordingly, we order that the Appellant [redacted] is entitled to compensation of the full sum of this claim, $272,142, less the $57,719.08 received from the Insolvency Trustee for a net award of $214,422.92.

43. With respect to the Type III investments, the Appeal Committee is assuming that a redemption of $50,000 per month for each of the four securities in this category should have been made on the instructions of the Appellant. Using April, 2011 as the starting date, this would mean that all of these securities (total value - $530,175) could have been redeemed within four months. This amount must be reduced by the receipts from the Insolvency Trustee in the amount of $82,369.52 for a net amount of $447,805.48.

44. In considering the matter of the Type IV investment for which no information regarding redemption provisions is available, the Appeal Committee takes the view that there is no prohibition regarding redemption, which should have resulted in these shares having been redeemed to cash as was instructed. The Appellant [redacted] is entitled to compensation for the full sum of this investment in the amount of $75,000. No amounts were received from the Insolvency Trustee with respect to this investment.

45. The remaining Type I investments contained provisions prohibiting redemption. From the evidence which has been presented, it would appear that this was contrary to [redacted] intentions which were to consolidate his assets for ease of redemption upon his death. However, if

[redacted] had clearly conveyed his instructions, for which we have no direct evidence, we would find that the making of these investments for [redacted] was a matter of misconduct or a breach of suitability obligations, and as such, would not be eligible for compensation under the CIPF Coverage Policy.

46. The total of the possible awards calculated in the foregoing paragraphs exceeds the amount which the Appeal Committee has determined is the appropriate award, namely $700,000, less receipts from the Insolvency Trustee ($140,088.60)[10].

Disposition

47. The Appeal Committee orders that compensation be provided to the Appellant [redacted] in the amount of $559,911.40. The Appeal Committee would like to thank counsel for their submissions as well as [redacted] and [redacted] for attending at the re-hearing of this matter.

Dated at Toronto, this 26th day of May, 2016.

Brigitte Geisler

Anne Warner La Forest

Patrick LeSage

[10] See paragraph 34 above for the reasoning with respect to the $700,000 award.