

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

RE: [REDACTED]

Heard: February 5, 2016, by teleconference

HEARD BEFORE:

BRIGITTE GEISLER

Appeal Committee Member

APPEARANCES:

[REDACTED]

) On her own behalf

Graeme Hamilton

) Counsel for Canadian Investor
) Protection Fund Staff

DECISION AND REASONS

Introduction and Overview

1. [REDACTED] (the “Appellant”) was a client 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 Appellant sought recovery from CIPF on the basis that FLSI was a Member of CIPF and as such the Appellant was 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 Appellant on the basis that the Appellant's 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 February 5, 2016, 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 by teleconference. The Appellant was in attendance and made submissions.

Chronology of Events Relevant to the Appellant's Claim

(i) The Appellant's Investments and Claim

4. The Appellant claims the net amount of \$10,003 with respect to her purchases of First Leaside Properties Fund (Class B) on March 27, 2009 and November 1, 2010.

5. Certificates representing the Appellant's purchases were transferred to an account in her name at Fidelity Clearing Canada ULC.

(ii) The Appellant's Application for Compensation

6. The Appellant applied to CIPF for compensation for her losses in investments made through FLSI. By letter dated February 13, 2015, the Appellant was advised that CIPF Staff were unable to recommend payment of her claim. The relevant parts of the letter read as follows:

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

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

7. The Appellant raised various issues at the hearing. She submitted that the insolvency of FLSI was due to the interference of the regulatory bodies, namely IIROC and the OSC. This submission has been raised by other Appellants as well, but no evidence in substantiation of this claim has been presented. A lawsuit against the OSC by a group of investors addresses conduct by the OSC Staff, but relates to issues arising out of the same time period in question in the actions by the OSC against Messrs. Phillips and Wilson, former principals of the First Leaside Group of companies. In any event, even if such an allegation were to be proven, it would not assist the Appellant in her claim as a claim to CIPF must be for losses arising out of the insolvency of a Member; possible regulatory misconduct would not be a relevant consideration.

8. The Appellant submitted that the insolvency trustee could have done a better job in its resolution of the various First Leaside Group of companies' insolvency proceedings. I am not in a position to make any observations in this respect. However, as above, even if the Appellant is correct in her submissions, this does not assist the Appellant as she is addressing the loss of market value of her property which is not covered by CIPF.

9. The Appellant submitted that CIPF had a fiduciary duty to the customers of Member firms and that it had failed in that duty. CIPF's function is to ensure that property belonging to customers of a Member firm is returned to those customers. That function has been fulfilled for the

Appellant, and if a fiduciary duty is owed, that duty has been fulfilled. The real complaint of the Appellant is, of course, that her property has diminished substantially in value. CIPF's Coverage Policy does not include coverage for a loss of market value.

10. CIPF's mandate and its coverage is custodial in nature; in other words, to ensure that the customers of an insolvent Member have received their property. The Appellant has received her 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".

11. Lastly, the Appellant submitted that the CIPF appeal process was biased and lacked a true independent review of CIPF Staff decisions. The process for review of CIPF Staff's original decisions with respect to customer claims is provided for in the CIPF's Claims Procedures. CIPF is subject to the oversight of the Canadian Securities Administrators which reviews CIPF on a regular basis. The CIPF Board of Directors has acknowledged the possible issues of bias and has taken steps to ensure that any discussions of substance relating to the FLSI appeals be held in the absence of the Appeal Committee Members. The Appeal Committee Members see their role as fair adjudication of appeals brought before them, having consideration for the terms of CIPF's Coverage Policy and Mandate. Appeal Committee Members have no interest or role to protect the Fund from payouts to eligible customers. The Appeal Committee Members address the issues and arguments before them according to their merits, without regard to the potential impact upon the Fund. The Appellant suggested that the fact that all of the claims to date have been denied is indication of bias. The response to this assertion is that, on the contrary, the similarity of outcomes indicates a consistency of application of the Coverage Policy.

12. The Appellant's written appeal arguments are similar to those advanced at the October 27, 2014 appeal hearing. This included interpretation of the phrase "including property unlawfully converted" in the Coverage Policy, with particular application to investments made after the OSC began investigating the First Leaside Group in 2009. The Appellant submitted that she intended the

funds she invested be applied to proprietary First Leaside products for the primary purpose of funding the acquisition and/or development of various real estate projects; instead, these funds were unlawfully converted by FLSI for its own use.

13. As stated in other Appeal Committee decisions, these arguments suggest that the Appellant's claim is really of fraud, material non-disclosure and/or misrepresentations. However, as was fully discussed in the October 27, 2014 decision, these arguments do not lead to the conclusion that what happened in this case falls within the meaning of the phrase "including property unlawfully converted" as set out in the Coverage Policy. That phrase is intended to address the situation where there is a failure to return property to the customer because it has been improperly confiscated by the broker. The Appellant has acknowledged that the securities in which she had invested were transferred to an account in her name at Fidelity. To apply the interpretation suggested by these written submissions would, in effect, create a new head of coverage.

14. I have sympathy for the losses suffered by the Appellant; however, I conclude that the Appellant's 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 18th day of February, 2016

Brigitte Geisler