

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

**RE:** [REDACTED]

**Heard: August 17, 2015, by teleconference**

**HEARD BEFORE:**

BRIGITTE GEISLER

Appeal Committee Member

**APPEARANCES:**

Nicolas Businger

) Counsel for Canadian Investor  
) Protection Fund Staff

[REDACTED]

) On her own behalf

**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 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.<sup>1</sup>

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 August 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 Appellant was in attendance by teleconference.

### **Chronology of Events Relevant to the Appellants' Claim**

#### *(i) The Appellant's Investments and Claim*

4. The claim arises from the Appellant's purchase of various products of the First Leaside Group, namely, Wimberly Apartments Limited Partnership; First Leaside Properties Fund (Class B); First Leaside Fund (Series B); and First Leaside Mortgage Fund (Series A). The total claim is for \$625,000, reduced by a payout of \$32,290.11, for a net claim of \$592,709.89.

5. The FLSI monthly statement for November, 2006 indicates that a certificate representing the Appellant's purchase of the Wimberley Apartments Limited Partnership ("Wimberly") was delivered to the possession of the Appellant; the Appellant states that she did not give her consent to same and does not have the certificate. The remaining securities were transferred to an account in the name of the Appellant at Fidelity Clearing Canada ULC.

#### *(ii) The Appellant's Application for Compensation*

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

6. The Appellant applied to CIPF on August 20, 2013 for compensation for her losses in investments made through FLSI. By letter dated March 16, 2015, the Appellant was advised that CIPF Staff were unable to recommend payment of her claim. The relevant part of the letter read as follows:

...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**

7. The Appellant advised that she had taken early retirement from her position in 2009. She withdrew her pension on the advice of a principal of FLSI, who assured her that her funds would be safe and 100% protected by CIPF. The Appellant attempted to withdraw funds in 2010 to retire her mortgage but was rebuffed by FLSI. As a result of the insolvencies of the First Leaside entities, she was left with her only retirement funds being \$80,000 in bonds. She has suffered both financial and physical health hardship as a result of the First Leaside Group insolvencies.

8. The Appellant submitted that the actual date of insolvency was earlier than February 2012 and should be taken into account when assessing the value of her investments. CIPF Staff counsel advised that with respect to CIPF's mandate, the actual date of the insolvency and the possible valuation of the investments would not have significant impact on the determination of the validity of a claim. It would only be relevant if there was an issue of having to replace missing property in the Appellant's account. The Appellant commented that she had not given consent that the share certificate for the Wimberly investment be delivered to her. As far as she was concerned, FLSI maintained control over the certificate, especially since she was unable to sell that investment. The investment did show on the internal record keeping system at FLSI.

9. The Appellant expressed her doubt that a change in market value had occurred as abruptly as shown on the statements received from FLSI, which indicated that her securities' market value went from \$1.00/unit to "N/A". It should be noted that this change was separate and apart from any change in the carrying broker, which also appears to have caused confusion to other investors. It must also be noted that since the First Leaside Group of products were not publicly traded, any value shown on FLSI statements had been assigned by the First Leaside Group, rather than an independent pricing mechanism such as a stock exchange. Once the insolvency had been announced, the carrying broker determined that showing the value as N/A (not available) was the prudent course of action.

10. The Appellant suggested that when an insolvency of a member occurs, this should be the sole determinant of coverage and CIPF should compensate investors without regard to any exclusions which are noted in its Coverage Policy. She also noted that although fraud is deemed as an exclusion, it seemed that payments have been made by CIPF when there was, in fact, fraud by the member.

11. The Appellant expressed her disappointment that the OSC had not advised investors that the First Leaside Group was under investigation. Had she known this was the case, she would not have made investments after the investigation had begun. She also opined that the issuance of the cease trade orders interfered with the business operations of First Leaside Group and prohibited any future recovery of the entities.

12. Lastly, the Appellant expressed her view that it was appalling that CIPF was not covering losses. She commented on the name of the fund – that it should be protecting investors; however, it appeared that it was simply protecting the assets of the fund. She also stated her view that the appeal process was biased and had put up road blocks to expeditious resolutions by requiring individual appeals rather than a class action.

13. Counsel for CIPF Staff explained that the similarity of names of the CIPF member – FLSI – and the affiliated entities – the First Leaside Group – has caused confusion for many investors,

especially since FLSI and many entities of the First Leaside Group went into insolvency at approximately the same time. He noted that CIPF coverage is restricted to the insolvency of the member and any resulting loss arising therefrom. It does not extend to coverage for the insolvency of an issuer – such as the entities in the First Leaside Group.

14. CIPF is not a regulatory body; it does not have the power to monitor or enforce conduct of member firms. The entities in the First Leaside Group were regulated by either the OSC or IIROC. IIROC's regulatory function relates to the business and operations of FLSI; it did not have jurisdiction over the various proprietary products that were marketed by FLSI to various investors. Those products, or issuers, were under the jurisdiction of the OSC, which, having concerns over those operations, began an investigation into the First Leaside Group in the fall of 2009. The jurisdiction of IIROC, and by extension, CIPF, within the limits of its mandate, is confined to FLSI only.

15. The purpose of CIPF coverage is limited to custodial coverage; in other words, to ensure that the clients of an insolvent member have received their property. It does not provide coverage for a change in market value. Its mandate is restricted to ensuring that the property of the investor which was, or should have been, on the books and records of the member at the time of the insolvency is returned to the investor. If the property is not available to the investor, CIPF will take steps to ensure the property is replaced or value given for same, determined at the discretion of the Board of CIPF.

16. I have considerable sympathy for the position in which the Appellant finds herself, through no fault of her own. However, having regard to the CIPF mandate and Coverage Policy, I conclude that her submissions in this appeal are not persuasive and do not give rise to a successful claim for compensation from CIPF.

**Disposition**

17. The appeal is dismissed. The decision of CIPF Staff is upheld.

Dated at Toronto, this 21<sup>st</sup> day of August, 2015.

*Brigitte Geisler*