

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

RE: [REDACTED]

Heard: September 27, 2016, by teleconference

HEARD BEFORE:

BRIGITTE GEISLER

Appeal Committee Member

APPEARANCES:

[REDACTED]

) On her own behalf

James Douglas
Graeme Hamilton

) Counsel for Canadian Investor
) Protection Fund Staff

DECISION AND REASONS

Introduction and Overview

1. [REDACTED] (the “Appellant”) was an employee and 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 August 12, 2015, this matter initially came before another Appeal Committee. The Appeal was adjourned in order to provide the Appellant an opportunity to prepare written submissions with respect to the issues which were only raised at the hearing itself, and to allow CIPF Staff to respond thereto. Those submissions have been prepared and exchanged between the parties. On September 27, 2016, an Appeal Committee Member of CIPF's Board re-heard the appeal to determine whether to depart from the decision of CIPF Staff. At the request of the Appellant, the hearing was held by teleconference. The Appellant was in attendance.

Chronology of Events Relevant to the Appellant's Claim

(i) The Appellant's Investments and Claim

4. The Appellant originally claimed the sum of \$55,023 with respect to her purchases of First Leaside Series II Preferred shares and First Leaside Wealth Management Fund. In her submissions at the August 12, 2015 appeal hearing, she amended her claim to a total of \$26,094.03. This claim comprises a claim for \$16,000 in respect of a withdrawal which she was unable to make from her RRSP account relating to an attempt to redeem the aforementioned First Leaside investments and

¹ This decision is available on the CIPF website.

\$10,094.03 in respect of default insurance which she states she was required to obtain with respect to a mortgage.

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 May 26, 2014, the Appellant was advised that CIPF Staff were unable to recommend payment of her claim. The relevant parts of the letter 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. 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. As stated above, the Appellant amended her claim to \$26,094.03, relating to a failure to redeem First Leaside investments from her RRSP account and a default mortgage insurance premium paid upon the purchase of her home. She states that the default mortgage insurance would not have been required had she been able to redeem her First Leaside investments.

8. The Appellant states that she orally requested the redemption of \$25,000 from her RRSP to apply this to the purchase of a home. Her request was taken to senior management for approval.

She stated that the response was that the First Leaside investments could not be redeemed; however, she could redeem a Goldman Sachs investment and other cash for a total of \$9,000. The Appellant submitted that the entry on her account statement for September, 2011 showing the withdrawal for a home purchase substantiates that she wished to make a withdrawal from her RRSP. This is the only physical evidence that she has provided that she wished to redeem funds from her RRSP account and that that redemption would have included a portion of her First Leaside investments.

9. The Appellant stated that the failure to honour her oral request to redeem a portion of her First Leaside investments was an unlawful conversion by David Phillips, the principal of FLSI, whose motive in denying redemption was to preserve capital in companies which were suffering capital constraints according to the Grant Thornton report issued in August, 2011.

10. The Appellant referred to the Appeal Committee's decision dated May 26, 2016² which dealt with similar circumstances, that is, a request to redeem First Leaside investments during 2011. The circumstances arising in the May 26, 2016 decision, however, are substantially different than those in this appeal. In that decision, there was clear and repeated written evidence of an instruction to redeem securities of a specific amount.³

11. The May 26, 2016 decision discussed the issue of verifiable instructions in paragraph 34 thereof. That decision acknowledged that in the normal course of dealings with a broker, it is unnecessary to put buy or sell orders in writing. However, the May 26, 2016 decision emphasized the importance of having additional clear evidence beyond an assertion of verbal instructions in order to find that there may have been an unlawful conversion in the failure to follow those instructions.

12. In the present appeal, there is no evidence beyond the Appellant's assertions that instructions to redeem had been given. This is not to say that the Appellant is making a false claim

² In relation to an appeal heard on February 29, 2016. This decision is available on the CIPF website and will be referenced throughout as the "May 26, 2016 decision".

³ There were other unwritten instructions contained in conversations between the parties, however, the Appeal Committee did not accept that these verbal instructions were sufficiently specific.

with respect to her redemption instructions. However, without documentation or other corroboration of redemption instructions, it is not possible to find that these instructions were given and that this resulted in an unlawful conversion by failing to follow those instructions. The Appellant stated that she did not make complaint or otherwise protest the decision by senior management to disallow her redemption request as she did not wish to imperil her employment situation, especially as she had just purchased a house. I have considerable sympathy for this situation; however, there are no facts in evidence which substantiate the Appellant's assertions.

13. A review of the Declaration of Trust for the First Leaside Wealth Management units indicates that there were specific requirements for redemption, being a written notice during a specified time period. As stated above, there is no evidence with respect to a written notice being given. The evidence is that the Appellant's request was not in writing but was oral. With respect to the Series II Preferred Shares of First Leaside, the May 26, 2016 decision found that since it was unknown what redemption provisions were contained within the Preferred Shares of First Leaside, an assumption would be made that there would be no prohibition on their redemption.

14. The difficulty, however, is that there is no indication of what shares or units the Appellant wished to redeem. In the May 26, 2016 decision, the Appeal Committee, while also not seeing specific instructions for redemption, was able to conclude what those instructions would have been. The present case does not permit those same assumptions. In short, there is a failure to provide sufficient evidence of instructions to redeem the First Leaside investments.

15. The Appellant also claimed for consequential damages arising from these events, being the cost of purchasing default mortgage insurance required when a mortgage is of a certain size. The argument is that because the funds withdrawn from her RRSP were not as large as she had anticipated, she had to acquire the default mortgage insurance in order to close the house purchase transaction. This claim is not eligible for CIPF coverage as it is not a claim for a "loss in respect of a claim for the failure of the Member to return or account for securities, cash balances ... or other property", as is required by the CIPF Coverage Policy.

16. A claim to CIPF must be made with respect to the custodial nature of CIPF's mandate and Coverage Policy. The Coverage Policy is designed to ensure that clients of an insolvent Member have received their property. The Appellant has received her property; accordingly CIPF coverage is not applicable.

17. 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.

Disposition

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

Dated at Toronto, this 12th day of October, 2016

Brigitte Geisler