

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

**RE:** [REDACTED] and [REDACTED]

**Heard: May 15, 2015**

**HEARD BEFORE:**

BRIGITTE GEISLER

Appeal Committee Member

**APPEARANCES:**

Bernard LeBlanc

)  
)

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.<sup>1</sup>

2. The Appellants 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 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<sup>th</sup>, 2010.

3. On May 15, 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 took place 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' investments in various First Leaside Group products as follows:

- ██████████
- i. 60,000 units of First Leaside Expansion Limited Partnership purchased for a value of \$60,000 on December 22, 2006;
  - ii. 123,954.29 units of Wimberly Apartments Limited Partnership purchased for a value of US\$86,768 on December 7, 2006<sup>2</sup>. A further 73,891 units were purchased for a value of US\$51,723.70 on December 8, 2006;
  - iii. 56,912 units of First Leaside Elite Limited Partnership purchased for a value of US\$53,365 on December 22, 2008;
  - iv. 100,000 units of First Leaside Fund (Series A) purchased for a value of US\$100,000 on November 12, 2009;
  - v. 86,767 units of First Leaside Premier Limited Partnership purchased for a value of US\$79,721.65 on November 17, 2009;

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

<sup>2</sup> On December 7, 2006, ██████████ purchased 86,768 units of First Leaside Advantage Limited Partnership ("FL Advantage") for the cost of \$86,768. In December 2009, the units of FL Advantage was exchanged for 123,954.29 units of Wimberly Apartments LP. Appeal Record, Vol 1, pp.147, 155-156.

- vi. 10,000 units of First Leaside Fund (Series B) purchased for a value of \$10,000 on February 17, 2010; and
- vii. 6,177 units of First Leaside Wealth Management Fund purchased for a value of \$6,177 on July 22, 2011.

- ██████████
- viii. 100,000 units of First Leaside Fund (Series B) purchased for a value of \$100,000 on November 25, 2009;
  - ix. 10,000 units of First Leaside Fund (Series B) purchased for a value of \$10,000 on February 17, 2010; and
  - x. 6,177 units of First Leaside Wealth Management Fund purchased for a value of \$6,177 on July 22, 2011.

5. The units of these securities listed above as items i) to v) were delivered to the Appellant ██████████. The balance of the securities, being held by Penson Financial Services Canada, Inc., were transferred to accounts in the names, as appropriate, of ██████████ and ██████████ at Fidelity Clearing Canada ULF following FLSI's insolvency. ██████████ has also received a return of \$10,592.35.

*(ii) The Appellants' Application for Compensation*

6. The Appellant ██████████ applied to CIPF on October 9, 2013 for compensation for his losses in investments made through FLSI. ██████████ also applied to CIPF on October 8, 2013 for compensation for her losses in investments made through FLSI.<sup>3</sup> By letters dated May 21, 2014, the Appellants were advised that CIPF Staff were unable to recommend payment of their claims. The relevant part 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 has been converted or otherwise misappropriated. In addition, as a basis for explaining your claim, you stated:

- "1. Losses are due insolvency and it is covered by CIPF"

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<sup>3</sup> Both of the Appellants had made earlier claims in 2012 and 2013.

- “2. FL was a member of CIPF, fraudly marketing CIPF verbally assuring about risk and display on every statement etc”
- “3. Purchasing direction stated FLS/Penson”
- “4. My investment amount is confirmed by Grant Thornton and legal firm.”
- “5. This was my retirement income and for last 2 years I am deprived of my life savings.”
- “CIPF Coverage Policy is applicable, because it is a clear case of insolvency. Not a case of market value losses. FL suspended trading on November 7, 2011 and after that day statement shows N/A or zero (overnight FL representative clearly stated when opening account that all investments are protected by FL is a member of CIPF.”
- “FL Securities Inc. closed operation and sent statements that accounts are “0”. Therefore losses are calculated as difference between original amount listed above and final zero.”

While you have not provided evidence of the truth of all of the assertions in support of your claim, 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.

With respect to the securities that you purchased and which are described in Table 1 below<sup>4</sup>, they were properly recorded in the books and records of FLSI at the date of insolvency. Those securities were transferred to an account in your name at another IIROC Dealer Member subsequent to February 24, 2012.

In addition, at the date of insolvency, the securities described in Table 2 below<sup>5</sup> were not held by, or in the control of, FLSI. Therefore, the loss is not one that is eligible for CIPF coverage, as indicated above.

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<sup>4</sup> See paragraph 4 (vi) and (vii) for details of the securities.

<sup>5</sup> See paragraph 4 (i) to (v) for details of the securities

██████████:

Regarding your claim for unlawful conversion, it does not appear to us that any property held by FLSI for you has been converted or otherwise misappropriated. In addition, as a basis for explaining your claim, you stated:

- “First Leaside Securities Inc. was a member of CIPF Coverage of Investment was discussed with FL agent and confirmed. It was a major selling point. It is clearly stated on 1 page CIPF policy that this investment is covered. FL is in bankruptcy. For details, CIPF can receive confirmation from Grant Thornton.”
- ...I totally disagree with statement of February 29, 2012 showing zero on the account. At the day of November 7, 2011 when FL security suspended trading value of the investment become not available (N/A). Therefore overnight \$100,000 Trust funds etc become 0. That is why I claim CIPF coverage....”

While you have not provided evidence of the truth of all of the assertions in support of your claim, 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.

In addition, with respect to the securities that you purchased, they were properly recorded in the books and records of FLSI at the date of insolvency. Those securities were transferred to accounts in your name at another IIROC Dealer Member subsequent to February 24, 2012. Therefore, the loss is not one that is eligible for CIPF coverage, as indicated above.

## **Analysis**

7. The Appellants described how they had been solicited by the principals of FLSI, who made assurances that investments in First Leaside Group products were safer than the bank and were insured by CIPF. They noted that brochures produced by FLSI displayed both the CIPF logo and

the IIROC logo, indicating that FLSI was a Member of both organizations. The principals of FLSI gave assurances that there was CIPF coverage for their investments, which gave them more confidence in investing with FLSI. They relied upon these representations and believed that their investments were protected against loss.

8. The Appellants submitted that there was an obligation on CIPF to ensure that its logo and explanations regarding its coverage not create unwarranted expectations. In response, it must be noted that CIPF is not a regulatory body. It provides strict guidelines as to the usage of its logo and has produced a brochure for Members to use to describe the limitation in its coverage. If misrepresentations as to coverage were made, those were by FLSI or the First Leaside Group, which are subject to the oversight of IIROC and the OSC, respectively.

9. The Appellants addressed what they felt were regulatory shortcomings with respect to FLSI. This included an obligation by the OSC and IIROC to regulate the conduct of the First Leaside Group. [REDACTED] advised that he had been contacted by a representative of the OSC in the fall of 2010, who asked questions regarding how he had made his investments. He queried whether he should be concerned, but was assured that there was no reason to be worried about his investment. He submitted that both the OSC and Grant Thornton knew at that time that there were issues; however, to the detriment of investors, this was not communicated to investors until November, 2011.

10. The Appellants observed that the CIPF mandate represented that it was to serve and protect the public. He submitted that the fees paid by FLSI were indirectly paid by investors and as such any fees collected from FLSI should be returned to investors in compensation. He submitted that CIPF should provide compensation on the basis of fairness and a moral obligation to the investing public.

11. CIPF Staff and the Appeal Committee explained CIPF's mandate and that its insurance 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.

12. The Appellants addressed what they felt were shortcomings by the regulators with respect to FLSI. This included an obligation by the OSC and IIROC to regulate the conduct of the First Leaside Group. IIROC's regulatory function relates to the business and operations of FLSI. It does 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.

13. In their written submissions, the Appellants raised arguments similar to those advanced at the October 27, 2014 hearing. This included interpretation of the phrase "including property unlawfully converted" in the Coverage Policy. The Appellants argued that the funds they invested were to have been invested in proprietary First Leaside products on the understanding that such funds would be invested in those products for the primary purpose of funding the acquisition and/or development of various real estate products. They submitted that all of their investments were made between 2006 and 2011, during the period in which the OSC was investigating the First Leaside Group,<sup>6</sup> and were unlawfully converted by FLSI for their own use.

14. After reviewing the dates of the investments, I have concluded that this submission cannot be wholly substantiated. Of the total claimed amounts by [REDACTED], 56% of the investments were made prior to the beginning of the OSC investigation. Any submissions relating to the

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<sup>6</sup> The OSC investigation began in the fall of 2009. For ease of the calculations in paragraph 14, all purchases made in 2009 were deemed to be after the OSC began its investigations, even though some purchases were made in the first half of 2009.

allegation of “property unlawfully converted” would not be applicable to 44% of [REDACTED]’s claimed amounts.

15. With respect to that portion of the Appellants’ claims for investments made after mid-2009, the Appeal Committee is of the view that the adoption of these arguments 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.

16. The October 27, 2014 decision deals extensively with the Appellants’ arguments and the reasoning in the October 27, 2014 decision is adopted by this Appeal Committee. As in the October 27, 2014 decision, 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**

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

Dated at Toronto, this 3<sup>rd</sup> day of July, 2015

Brigitte Geisler

Brigitte Geisler