

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

RE: [REDACTED]; [REDACTED]; [REDACTED];
[REDACTED]; [REDACTED]

Heard: February 18, 2015

HEARD BEFORE:

BRIGITTE GEISLER

Appeal Committee Member

APPEARANCES:

James Gibson

)
)

Counsel for Canadian Investor
Protection Fund Staff

[REDACTED]

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)

On their own behalves, and on behalf of
[REDACTED], [REDACTED] and [REDACTED]

DECISION AND REASONS

Introduction and Overview

1. [REDACTED], [REDACTED], [REDACTED], [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 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 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 dated October 27, 2014.¹

2. FLSI was declared to be insolvent on February 24, 2012. The following purchases/positions were made by the Appellants:

- a. [REDACTED] owned a net of 1,612 units of First Leaside Fund, Series C for a net claimed cost of \$1,612;²
- b. [REDACTED] purchased 30,000 units of First Leaside Properties fund (Class B) on November 9, 2009 and \$2,922 of a Mill St. LP MPOC 6% 15DC15 mortgage security on December 20, 2010 for a total investment of \$32,922;
- c. [REDACTED] made investments in a multiple of First Leaside products for a total investment cost claim of \$1,086,682.00. The records available to confirm the dates and purchase cost of his investments were incomplete;
- d. [REDACTED] also made investments in a multiple of First Leaside products for a total investment cost claim of \$543,748. The records available to confirm the dates and purchase cost of her investments were incomplete; and
- e. [REDACTED] purchased/transferred in, a total of 12,908 units of First Leaside Properties Fund (Class B) in 3 different registered accounts for a cost of \$12,908.

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

² An initial purchase of 8,403 units was made on November 30, 2005. Various exchanges and dividends were received and 10,850 units were sold on June 5, 2009, leaving a net of 1,612 units in the account.

3. 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 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^t, 2010.

4. On February 18, 2015 an Appeal Committee Member of CIPF's Board heard the Appellants' appeals. The main issue in each appeal was whether to depart from the decision of CIPF Staff. The appeals were heard together at Neeson Arbitration Chambers in Toronto, Ontario and the hearing was open to the public. [REDACTED] and [REDACTED], on behalf of themselves and the other Appellants, were in attendance.

Chronology of Events Relevant to the Appellants' Claims

(i) [REDACTED]'s Investments and Claim

5. [REDACTED]'s claim arises from his investment in 8,403 units of First Leaside Fund (Series C) for a net cost of \$9,863.69, purchased on November 30, 2005. Several stock dividends were received and the stock was exchanged on September 28, 2006 into 9,426 units of First Leaside T/U-C. On June 5, 2009, 10,850 units were sold for \$10,850, leaving 1,471 units in the account. The next account statement of April 30, 2011 shows 1,612 units in the account, there having been a stock distribution on April 15, 2011. The 1,612 units, being held by Penson Financial Services Canada, Inc. were transferred to an account in the name of [REDACTED] at Fidelity Clearing Canada ULC ("Fidelity") following FLSI's insolvency.

(ii) [REDACTED]'s Investments and Claim

6. [REDACTED]'s claim arises from her investment in 30,000 units of First Leaside Properties Fund (Class B) and \$2,922 of a Mill St. LP MPOC 6% 15DC15 mortgage security on December 20, 2010 for a total investment of \$32,922. Both of these investments were transferred to an account in the name of [REDACTED] at Fidelity following FLSI's insolvency.

(iii) [REDACTED]'s Investments and Claim

7. [REDACTED] is now [REDACTED] years of age and has been an investor with First Leaside since 1972. Some of these investments were made prior to March 1, 2004, the date FLSI became a member of CIPF and for others, no information as to the date of the investment and how it was held is available. In addition, no purchase price for those securities is available. Those investments are listed, in summary, as follows:

- i. 5,867 First Leaside Wealth Management Preferred Shares;
- ii. 20,000 units First Leaside Acquisitions Limited Partnership;
- iii. 399,200 units of First Leaside Capital (Class B);
- iv. 20,000 units of First Leaside Capital (Class C); and
- v. 7,000 units of First Leaside Realty Limited Partnership

8. The securities purchased subsequent to March 1, 2004 are summarized as follows:

- vi. 26,675 units of First Leaside Fund (Series C), of which 6,971 were received on exchange or stock dividends. The available purchase price for the balance of the units was \$20,795.87. The purchase dates were between October 17, 2005 and June 9, 2009 with the exception of 451 units for which the purchase date is not available;
- vii. 55,355 units of First Leaside Fund (Series B) purchased between October 21, 2005 and January 27, 2010 for a total purchase cost of \$55,233;
- viii. 6,604 units of Wimberly Fund (Class B 8% Designation) purchased on July 27, 2010 for \$6,604;
- ix. 20,000 First Leaside Wealth Management Series II Preferred Shares purchased on May 6, 2008 for \$20,000;
- x. 296,171 units of Wimberly Apartments Limited Partnership for a cost of \$72,910 between September 20, 2004 and December 24, 2009. The date and price for 201,832 units is not available;
- xi. 15,000 units of First Leaside Progressive Limited Partnership purchased on December 14, 2009 for \$15,000;

- xii. 5,000 units of first Leaside Expansion Limited Partnership purchased on December 24, 2009 for \$5,000;
- xiii. 288 units of First Leaside Properties (Class A) purchased on April 9, 2009 for \$288; and
- xiv. 1,256 units of First Leaside Properties (Class B) purchased on April 9 and June 5, 2009 for \$1,256.

9. These securities were either delivered in certificate form to Mr. [REDACTED] or were transferred to an account in his name at Fidelity, with the exception that the information regarding the securities noted as items ii) to v) above is not available. It appears that certificates were not issued for some investments with the First Leaside Group. However, Mr. [REDACTED]'s claim to the insolvency Trustee (Grant Thornton Limited) for all of the above securities has been accepted by the Trustee, and as such, is accepted by CIPF as sufficient evidence of the investments having been made.

(iv) [REDACTED]'s Investments and Claim

10. Similar to [REDACTED], some of [REDACTED]'s investments appear to have been made prior to March 1, 2004, the date FLSI became a member of CIPF and for others, no information as to the date of the investment and how it was held is available. In addition, no purchase price for those securities is available. Those investments are listed, in summary, as follows:

- i. 62,647 First Leaside Wealth Management Preferred Shares;
- ii. 199,600 First Leaside Capital Class B shares; and
- iii. 10 First Leaside Capital Class C shares.

11. The securities purchased subsequent to March 1, 2004 are summarized as follows:

- iv. 40,000 units of First Leaside Expansion Limited Partnership purchased on June 29, 2005 for \$40,000;
- v. 7,010 units of First Leaside Fund (Series C), of which all but 4,166 were received on exchange or stock dividends. The available purchase price for the 4,166 units is \$4,950.87 which was purchased on October 17, 2005. The

exchange took place on September 28, 2006 and stock dividends continued until April 15, 2011;

- vi. 85,443 units of First Leaside Fund (Series B) purchased between September 13, 2006 and January 30, 2009 for a total purchase cost of \$85,443;
- vii. 50,287 units of First Leaside Fund (Series B) purchased between October 31, 2006 and January 27, 2010 for a total purchase cost of \$50,287;
- viii. 5,000 units of First Leaside Properties Fund purchased for \$5,000 on April 9, 2009; and
- ix. 14,217 units of First Leaside Mortgage Fund purchased on July 27, 2010 for \$14,217.

12. These securities were transferred to an account in the name of [REDACTED] at Fidelity, with the exception of item iv) which was delivered to [REDACTED]; and items ii) and iii) for which information is not available. As in the case of [REDACTED], it appears that certificates were not issued for some investments with the First Leaside Group. However, [REDACTED]'s claim to the insolvency Trustee, Grant Thornton Limited, for all of the above securities has been accepted by the Trustee, and as such, is accepted by CIPF as sufficient evidence of the investments having been made.

(v) [REDACTED]'s *Investments and Claim*

13. [REDACTED]'s claim arises from her investment in 12,908 units of First Leaside Properties Fund (Class B) for a total investment cost of \$12,908, held in three different registered accounts. Of these investments, 5,000 units had been transferred into the RESP account from another account. All of these investments were transferred to an account in the name of [REDACTED] [REDACTED] at Fidelity following FLSI's insolvency.

The Appellants' Applications for Compensation

14. The Appellants applied to CIPF for compensation for their losses in investments made through FLSI as follows: [REDACTED], on April 28, 2013; the balance of the Appellants on May 7, 2013.

15. By letters dated December 30, 2013, the Appellants were advised that CIPF Staff was unable to recommend payment of their claims. The relevant parts of the letters read as follows:

[REDACTED]: With respect to the security you purchased and which is described in the table below, it was properly recorded in the books and records of FLSI at the date of insolvency. That security was transferred to an account in your name at another IIROC Dealer Member subsequent to February 24, 2012.

[REDACTED] and [REDACTED]: With respect to the securities that you purchased and which are described in the table below, 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.

[REDACTED] and [REDACTED]: CIPF does not cover customers' losses that result from other causes such as dealer misconduct, changing market values of securities, unsuitable investments or the default of an issuer of securities. [In addition, we note that the CIPF Coverage Policy limits coverage to CDN \$1 million per account]³

With respect to the securities that you purchased and which are described in table 1 below, 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.

At the date of insolvency, the securities described in Table 2 below 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.

In addition, you indicated that your loss, or part of it, was a result of "the default of an issuer of securities". As mentioned above, losses resulting from the default of an issuer of securities are not covered by CIPF.

³ This additional sentence only appears in the CIPF letter to [REDACTED].

Analysis

16. Ms. [REDACTED] made submissions on behalf of all of the Appellants. She confirmed that, to date, no payments had been received from the insolvency Trustee by any of the Appellants, neither had there been a letter stating that there were insufficient assets to warrant a payment. As of the hearing date, it does not appear that the Trustee has completed its winding up of the companies.

17. The CIPF Coverage Policy deals with the matter of the maximum payment which can be received by a customer. The relevant provision of the Coverage Policy is as follows:

The Directors may rely on the trustee in bankruptcy or the receiver under applicable law in determining the amount and validity of claims of a customer and for the purpose of calculating financial loss.

18. In other words, as the Trustee has accepted the claims of the Appellants, which claims are confirmed by the Appellants to include all of the investments they made with the FLSI Group, any payments made by the Trustee would be the only payment to which the Appellants would be entitled under the Coverage Policy. The date of the insolvency, February 24, 2012, is the date for determining financial loss. As there was no public market for the securities, their value was equal to their residual value in the receivership, which appears to have been minimal, if anything at all.

19. Ms. [REDACTED] expressed concern that the denial of the claim by CIPF referred to “a change in market value” when she had never seen any changes of market value in her investments on statements issued by FLSI. It was pointed out, that since all of the investments made in the FLSI Group were in unlisted securities, the values on the statements were supplied by the FLSI Group and not determined independently, as would be the case for a listed security. As a consequence, when the FLSI Group was placed into insolvency following the Grant Thornton Report, no further information regarding the value of the investment was available. Thereafter, statements from FLSI showed “not applicable” under the heading of market value. The value of the investments, as of the date of the insolvency, would be determined by the insolvency Trustee, after all prior claims of creditors had been satisfied.

20. It is unfortunate that the investments in real property investments made on behalf of the Appellants were not profitable. It is apparent from the Grant Thornton Report, as referred to in the October 27, 2014 decision, that the deficiencies in the operations of the properties required additional infusions of cash to support the enterprise, which were seriously below equity in value. When notice of this was brought to the attention of investors by FLSI, further investments were not made, which caused the enterprise to collapse. Seen in this light, the losses suffered by the Appellants are clearly losses due to a change in market value.

21. Mr. [REDACTED] stated that he was personally acquainted with Mr. D. Phillips, one of the principals of FLSI and had been an early investor in the FLSI Group. In addition, he was a director and member of the Audit Committee for First Leaside Wealth Management Inc. in 2008-2009. He advised that his investments with FLSI represented his retirement funds and that their loss represented substantial hardship for his family.

22. The Appeal Committee has substantial sympathy for the Appellants, and appreciates their attendance to put forth their submissions. However, I conclude that the submissions in this appeal are not persuasive and do not give rise to a successful claim for compensation from CIPF.

Disposition

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

Dated at Toronto, this 20th day of February, 2015

Brigitte Geisler

Brigitte Geisler