

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

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

**Heard: June 11, 2015, by teleconference**

**HEARD BEFORE:**

BRIGITTE GEISLER

Appeal Committee Member

**APPEARANCES:**

James Gibson

) Counsel for Canadian Investor  
) Protection Fund Staff

[REDACTED]

) On their own behalves, and representing  
) [REDACTED] and [REDACTED]  
)

**DECISION AND REASONS**

**Introduction and Overview**

1. [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 (“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 with its reasons released on December 17, 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 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 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, 2010.

3. On June 11, 2015 an Appeal Committee Member of CIPF’s Board heard an appeal to determine whether to depart from the decision of CIPF Staff. [REDACTED], and [REDACTED] were in attendance by teleconference, representing all of the Appellants.

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

#### *(i) The Appellants’ Investments and Claim*

4. The claim arises from the purchase by the Appellants of various First Leaside Group products as follows:

[REDACTED]:

- i. 400 units of First Leaside Properties Fund (Class B) for a value of \$400 purchased on April 9, 2009. On May 1, 2010, an additional 9,635 units were purchased for \$9,635;

[REDACTED]:

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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”.

- ii. 5,000 units of First Leaside Properties Fund (Class B) for a value of \$5,000 purchased on May 1, 2010. On June 1, 2010, an additional 5,061 units were purchased for \$5,061;

██████████:

- iii. 400 units of First Leaside Properties Fund (Class B) for a value of \$400 purchased on April 9, 2009. On May 1, 2010, an additional 9,635 units were purchased for \$9,635;

██████████:

- iv. 61,257.14 units of Wimberly Apartments Limited Partnership for a value of \$42,880<sup>2</sup>. ██████████ submits a value of \$61,257.14 for this fund;
- v. 50,000 units of First Leaside Expansion Limited Partnership for a value of \$50,000 purchased on December 29, 2005;
- vi. 108,695 units of First Leaside Fund for a value of \$124,879.00 purchased on February 28, 2006. On September 28, 2006, the funds were converted to 121,934 units of First Leaside Fund Series “B” Trust Units for a value of \$121,934;<sup>3</sup> and
- vii. 5,000 units of First Leaside Properties Fund (Class B) for a value of \$5,000 purchased on May 1, 2010. An addition 5,061 units were purchased on June 1, 2010 for a value of \$5,061.

5. The Appellant ██████████ has received \$3,503.04 in distributions from his investments as well as \$74,054 in interest.

*(ii) The Appellants’ Application for Compensation*

6. The Appellants applied to CIPF on September 11, 2013 for compensation for their losses in investments made through FLSI. By letters dated January 16, 2015, the Appellants were advised

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<sup>2</sup> On December 9, 2005, ██████████ purchased 85,763 units in First Leaside Enterprises Limited Partnership (the “Enterprise Units”) for the amount of \$85,763. In December 2009, ██████████ exchanged 42,880 of the Enterprise Units for 61,257.14 units of Wimberly Apartments Limited Partnership. The balance of the Enterprise Units were sold on February 23, 2010. [Appeal Record, vol 1, pp.176, 178, 241-242]

<sup>3</sup> Appeal Record, vol 1, p.184

that CIPF Staff were unable to recommend payment of their claims. The relevant parts 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 was converted or otherwise misappropriated. In addition, as a basis for explaining your claim, you stated:

- “When we first invested with First Leaside our understanding was that First Leaside (FL) would be responsible for determining the suitability and ensuring the appropriate supervision was performed for all trading activity done in our accounts[...].”
- “During conference calls with the court appointed lawyers and monitor, after the insolvency of FL, we learned of all the very expensive trips, art, boats and vehicles that David Phillips and John Wilson had been buying. They were found guilty of Fraud by the OSC and IIROC [...].”
- “There were improprieties discovered years ago by The OSC, Grant Thornton, and most likely, The Board of Trustees for First Leaside [...].”

We take note of your explanations. However, 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 an account 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.

██████████: 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. In addition, as a basis for explaining your claim, you stated:

- “[...] We completed due diligence and after studying the highly respected financial advisors on their Board of Directors, we decided to invest with First Leaside [...].”

- “[...] I believed that we were deceived, misrepresented and lied to when things began to go wrong at First Leaside.”
- “When we first invested with First Leaside our understanding was that First Leaside (FL) would be responsible for determining the suitability and ensuring the appropriate supervision was performed for all trading activity done in our accounts [...]”
- “During conference calls with the court appointed lawyers and monitor, after the insolvency of FL, we learned of all the very expensive trips, art, boats and vehicles that David Phillips and John Wilson had been buying. They were found guilty of fraud by the OSC and IIROC [...]’
- “There were improprieties discovered years ago by The OSC, Grant Thornton, and most likely, The Board of Trustees for First Leaside [...]”

We take note of your explanations. However, 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 accounts 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.

## Analysis

7. The Appellants commented on the process by which many entities in the First Leaside Group eventually ended up in insolvency. They noted that the OSC investigation process was

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

<sup>5</sup> See Paragraph 4 (iv) and (v) for details of the securities.

lengthy and that there were about three months between the time that the Grant Thornton report was delivered and when investors were first notified that there were issues with the First Leaside Group. They noted that they had tried to withdraw their funds but had been refused. They also expressed their concern that Grant Thornton had engaged in a conflict of interest by initially preparing the report that had commented on the impropriety of newly invested funds being used to finance ongoing payments and expenses and then being the same entity to benefit from the insolvency which resulted. They speculated that had there been communication and not the precipitous action by the regulators, it might have been possible to rescue more of the entities, as has been the case for some of their First Leaside Group investments.

8. The Appellants commented that, prior to investing with the First Leaside Group, they had performed due diligence with respect to their prospective investments which were primarily pension funds for [REDACTED]. They attended annual meetings and carefully reviewed the audit reports for their investments. They believed they were being careful investors who were not willing to take the risks that are usually associated with higher returns, being content with more modest income.

9. The Appellants noted that entities in the First Leaside Group were regulated by either the OSC or IIROC, and they took comfort from this fact. They were also mindful of FLSI's membership in CIPF, which they believed provided insurance coverage against a loss in their investments. 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.

10. The original investment made by [REDACTED] was in 2005, with the majority of investments being made prior to 2009. An additional \$10,000 was invested in 2010. Each of the remaining family members invested approximately \$10,000 in 2009 and 2010, with half of those investments being made in May, 2009, prior to the commencement of the OSC investigation into

the First Leaside Group. The timing of these investments is important with respect to the adoption by the Appellants of arguments similar to those advanced at the October 27, 2014 hearing.

11. The October 27, 2014 decision addressed the arguments relating to the 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. Having consideration for the timing of the Appellants’ investments, any submissions relating to the allegation of “property unlawfully converted” would not be applicable to the majority of the amounts claimed by the Appellants.

12. Further, 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.

13. 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. As was indicated in the October 27, 2014 decision, the CIPF brochure outlines limitations on coverage. The documentation provided by the Appellants confirms that the certificates representing their investments were delivered to them or were transferred to accounts in their names at Fidelity.

14. The October 27, 2014 decision deals extensively with the misrepresentation argument submitted by the Appellants; that reasoning is adopted by this Appeal Committee. As in the October 27, 2014 decision, while the Appeal Committee has considerable sympathy for the Appellant’s position, I conclude that their 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 15<sup>th</sup> day of June, 2015

Brigitte Geisler

Brigitte Geisler