

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

RE: [REDACTED] and [REDACTED]

Heard: June 13, 2016, by teleconference

HEARD BEFORE:

BRIGITTE GEISLER

Appeal Committee Member

APPEARANCES:

[REDACTED]	)	On his own behalf and representing
	)	[REDACTED]
Graeme Hamilton	)	Counsel for Canadian Investor
	)	Protection Fund Staff

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 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 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 13, 2016, an Appeal Committee Member of CIPF’s Board heard an appeal to determine whether to depart from the decision of CIPF Staff. At the request of the Appellants, the hearing was held by teleconference. The Appellant, [REDACTED], was in attendance.

Chronology of Events Relevant to the Appellants’ Claim

(i) The Appellants’ Investments and Claim

4. The Appellant, [REDACTED], claims the net amount of \$335,261.29² with respect to his purchases of various First Leaside Group products between December 12, 2007 and October 4, 2011. The Appellant, [REDACTED], claims the net amount of \$157,670.30³ with respect to her purchases of various First Leaside Group products between March 27, 2009 and December 21, 2010. These claims consist of purchases of securities and stock dividends received.

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

² [REDACTED] has claimed \$17,526.71 less than the documented purchase prices with respect to his claim for units in First Leaside Expansion Limited Partnership (\$11,874.06 less), First Leaside Mortgage Fund (Series A) (\$5,381.68 less), and First Leaside Venture Limited Partnership (\$270.97).

³ [REDACTED] has claimed \$11,839.70 less than the documented purchase price with respect to her purchase of 55,000 units of First Leaside Mortgage Fund at \$1.00 per unit.

5. Certificates representing the Appellants' purchases were transferred to an account in the names of the Appellants at Fidelity Clearing Canada ULC with the exception of the certificate for First Leaside Venture Limited Partnership which was delivered out to the Appellant, [REDACTED].

(ii) *The Appellants' Applications for Compensation*

6. The Appellants applied to CIPF for compensation for their losses in investments made through FLSI. By separate letters dated April 22, 2015, the Appellants were advised 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. 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. [REDACTED] made brief submissions related primarily to the purchase of \$60,000 of First Leaside Venture Limited Partnership ("Venture") on October 4, 2011. Making reference to prior decisions of the Appeal Committee, he advised that he is not pursuing the Appellants' claims for compensation for the other investments made in the First Leaside Group.

8. [REDACTED] submitted that he was sold the Venture investment contrary to the instructions of the OSC that no further investments were to be sold by FLSI in First Leaside Group products. While there was a specific restriction, there was no general restriction agreed to between the OSC

and the First Leaside Group. The decision of the OSC in the prosecution of Messrs. Phillips and Wilson indicates the following finding which deals with the issues of misrepresentation and fraud in the sale of products in the time period following the Grant Thornton Report.

[190] This Panel finds that the Respondents sold securities of FLG Entities during the Sales Period, without disclosing the Grant Thornton Report and, in particular, the important facts in the Grant Thornton Report, to FLG Sales Investors, which they knew would perpetrate a fraud within the meaning of subsection 126.1(b) of the Act. Phillips and Wilson had the subjective knowledge that by not disclosing the Grant Thornton Report and, in particular, the important facts in the Grant Thornton Report, to FLG Sales Investors they put the financial or pecuniary interests of FLG Sales Investors at risk.⁴

9. The sale to [REDACTED] in October, 2011 was not specifically prohibited by the involvement of the OSC with the First Leaside Group; however, as stated above, the sale was made without disclosing the necessary relevant information which was available in the Grant Thornton Report. This activity was found to be improper, resulting in a finding against Messrs. Phillips and Wilson by the OSC.

10. Unfortunately for the Appellants, regulatory findings by the OSC, and even by IIROC, indicating misconduct by the First Leaside Group principals do not assist in a claim to CIPF. CIPF's mandate and its coverage is custodial in nature; in other words, to ensure that the clients of an insolvent Member have received their property. The Appellants have received their property; accordingly the issue of CIPF coverage is not applicable. It is most unfortunate that the value of the property is uncertain; however, the Coverage Policy clearly states that CIPF does not cover "changing market values of securities, unsuitable investments, or the default of an issuer of securities".

11. In their written submissions, the Appellants raised arguments similar to those advanced at the October 27, 2014 appeal hearing. This included interpretation of the phrase "including property

⁴ In the Matter of the SECURITIES ACT, R.S.O. 1990, c. S.5, as amended, and In the Matter of David Charles Phillips and John Russell Wilson, Reasons and Decision dated January 14, 2015, paragraph 190.

unlawfully converted” in the Coverage Policy, with particular application to investments made after the OSC began investigating the First Leaside Group in 2009. The Appellants submitted that they intended the funds they invested be applied to proprietary First Leaside products for the primary purpose of funding the acquisition and/or development of various real estate projects; instead, these funds were unlawfully converted by FLSI for its own use. In effect, these arguments suggest that the Appellants’ claims are really of fraud, material non-disclosure and misrepresentations.

12. The Appellants’ written arguments are focused on the investments made during the time period following the commencement of the OSC investigation into the First Leaside Group. However, as was fully discussed in the October 27, 2014 decision, the Appellants’ arguments of the possible misuse of investors’ funds do not lead to the conclusion that what happened in this case falls within the meaning of the phrase “including property unlawfully converted” as set out in the Coverage Policy. That phrase is intended to address the situation where there is a failure to return property to the customer because it has been improperly confiscated by the broker, an issue which has not been raised in this Appeal. To apply the interpretation suggested by these written arguments would, in effect, create a new head of coverage relating to fraud, material non-disclosure and misrepresentation. The October 27, 2014 decision deals extensively with these written arguments which were raised. This Appeal Committee adopts the reasoning in the October 27, 2014 decision.

13. ██████████ suggested that information regarding the scope and limitations of CIPF coverage should be made clearer for the benefit of investors who are not familiar with the regulatory structure surrounding investing in securities. It was his view that the promotional literature prepared by the First Leaside Group was misleading in its use of the CIPF (and IIROC) logos. The Appeal Committee has often heard this observation. The CIPF Board of Directors is reviewing its own communications to try to make the presentation of the CIPF Coverage Policy as clear as possible.

14. I have sympathy for the losses suffered by the Appellants; however, I conclude that the Appellants’ submissions in this appeal are not persuasive and do not give rise to a successful claim.

Disposition

15. The appeals are dismissed. The decision of CIPF Staff is upheld.

Dated at Toronto, this 17th day of June, 2016.

Brigitte Geisler