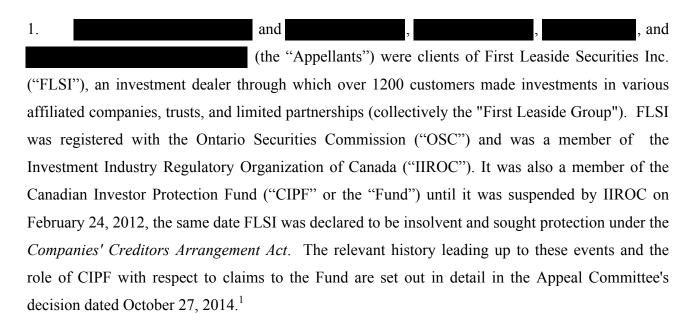
IN THE MATTER OF AN APPEAL TO THE APPEAL COMMITTEE OF THE CANADIAN INVESTOR PROTECTION FUND

RE: ;	AND ;	;	
Heard: 3 February 2015			
PANEL:			
ANNE WARNER LA FOREST	Appeal	l Committee Member	
APPEARANCES:			
) On the)	eir own behalves, and on behalf of , and	
James Gibson	,	sel for Canadian Investor tion Fund Staff	
Sam Robinson) Independent Legal Counsel for the Appeal Committee of the Canadian Investor Protection Fund		

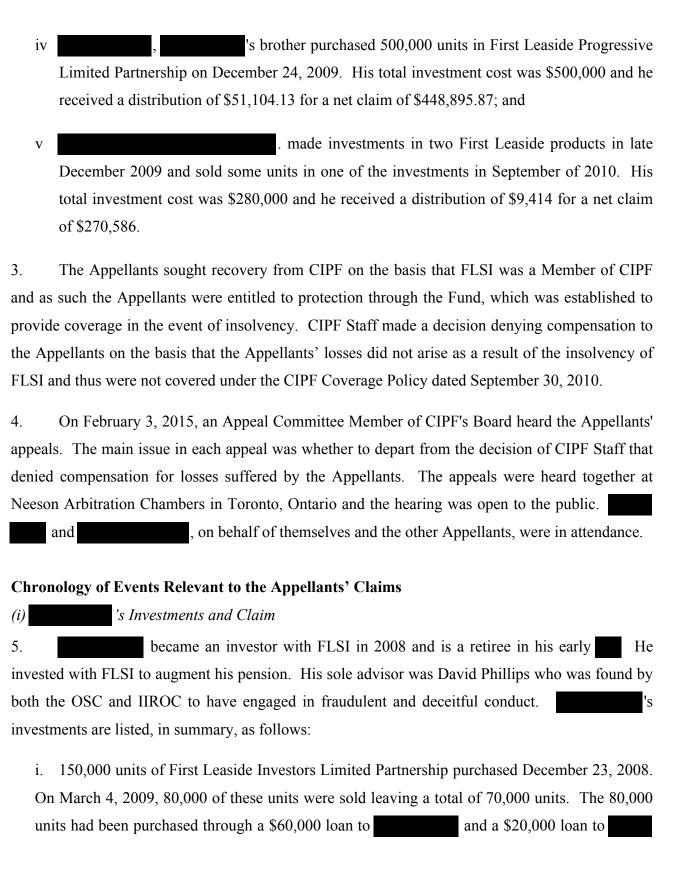
DECISION AND REASONS

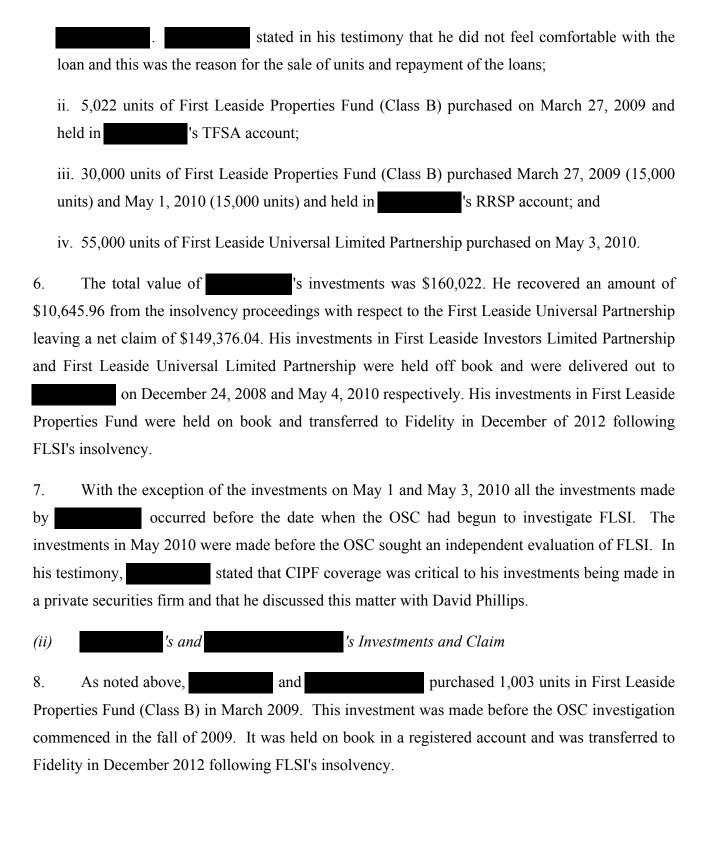
Introduction and Overview



- 2. The following investments were made by the Appellants:
 - made investments in a number of First Leaside products between late December 2008 and early May 2010 in the amount of \$160,022 and received distributions in the amount of \$10,645.96 from the insolvency proceedings for a net claim of \$149,376.04;
 - ii and his wife, purchased 1,003 units of First Leaside Properties Fund on March 27, 2008 for a total investment cost claim of \$1,003;
 - purchased 20,022 units in First Leaside Properties Fund (Class B) on March 27, 2009 for a total investment cost claim of \$20,022;

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





's Investments and Claim			
9. As noted above, purchased 20,022 units in First Leaside Properties Fund			
(Class B) in March 2009. 5,002 of these units were held in her TFSA account and the remaining			
15,000 units were held in a registered account. These units were purchased before the OSC			
investigation commenced in the fall of 2009 and were held on book until transferred to Fidelity in			
December 2012 following FLSI's insolvency.			
(iv) 's Investments and Claim			
10. is in his late and has had to restart a private business due his losse			
from investments in FLSI. His sole advisor was also David Phillips. purchased			
500,000 units in First Leaside Progressive Limited Partnership in late December of 2009 which was			
just after the OSC investigation into FLSI began. As noted, he recovered an amount of \$51,104.13			
from the insolvency proceedings with respect to his investment and subtracted this amount from the			
purchase price of \$500,000, leaving a net claim of \$448,895.87. The units were held off book and			
were delivered out to on December 29, 2009.			
(v) 's Investments and Claim			
11. As noted, made two investments as follows:			
i 250,000 units of First Leaside Series II Preferred Shares purchased December 24, 2009; and			
ii 80,000 units of Development Notes Limited Partnership purchased December 24, 2009. On			
September 1, 2010, 50,000 of these units were sold, leaving a total of 30,000 units.			
12. The total value of these investments was \$280,000.00.			
received distributions of \$9,414 through the insolvency proceedings in relation to his investments in			
the Development Notes Limited Partnership. His net claim is \$270,586. His investments in the			
First Leaside Series II Preferred Shares and the Development Notes Limited Partnership were held			

off book and were delivered out to on December 29, 2009.

13.	The investments made by were made after the OSC began its
inves	tigation of FLSI.
14.	None of , , or or
were	aware of the problems with FLSI until November of 2011.
The A	Appellants' Application for Compensation
Board information correst 2012 subm Circu	The Appellants applied to CIPF for compensation for their losses in investments made gh FLSI prior to the October 12, 2013 deadline for submitting claims that was set by the CIPF of Directors. The Appellants and also provided additional mation regarding the claim attached as the "Claim Rationale" in Attachment D, email spondence dated April 25, 2013 and August 6, 2013, and written correspondence dated May 4, and January 10 2014. The Appellants and itted a document entitled "Investor" and mstances" dated May 30, 2012 and correspondence dated January 11, 2014 in response to Staff's request for a claim confirmation on November 15, 2013.
16.	By letters dated March 14, 2014 [and , and , , , , , , , , , , , , , , , , , , ,
], the Appellants were advised that CIPF Staff was unable to recommend payment of their
claim	: Regarding your claim for unlawful conversion, it does not appear to us that any property held by FLSI for you was converted or otherwise appropriated. In addition, 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 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

With respect to the securities that you purchased [in First Leaside Properties Fund], they were properly recorded in the books and records of FLSI at the date of the

change in the market value of your investments and not a loss resulting from the

insolvency of FLSI.

insolvency. Those securities were transferred to accounts in your name at another IIROC Dealer Member subsequent to February 24, 2012.

Furthermore, at the date of insolvency, the securities [in First Leaside Investors Limited Partnership and First Leaside Universal Limited Partnership] 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.

and : Regarding your claim for unlawful conversion, it does not appear to us that any property held by FLSI for you was converted or otherwise appropriated. In addition, 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 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.

Furthermore, with respect to the securities that you purchased, they were properly recorded in the books and records of FLSI at the date of the insolvency. Those securities were transferred to an account in your name at another IIROC Dealer Member subsequent to February 24, 2012.

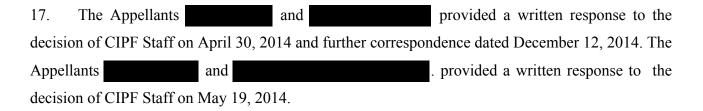
: Regarding your claim for unlawful conversion, it does not appear to us that any property held by FLSI for you was converted or otherwise appropriated. In addition, while you have not provided evidence of the truth of all of the assertions in support of your claim, losses caused by dealer misconduct, compliance failures or breaches of securities 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.

Furthermore, at the date of insolvency, the securities [in First Leaside Progressive Limited Partnership] was not held by, or in the control of, FLSI. 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 appropriated. In addition, 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 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.

Furthermore, at the date of insolvency, the securities [in First Leaside Series II Preferred Shares and Development Notes Limited Partnership] was 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

- 18. The Appellants made arguments in their correspondence mentioned above. Many of the arguments raised by the Appellants are similar to those that were addressed in the October 27, 2014 decision and in this regard, we rely upon our analysis in that decision at paragraphs 27 through 49. The Appellants in this case provided a well organized and thorough presentation that sought to restate and develop these arguments while using the specifics of their own situation to argue that they fit within the parameters of the Coverage Policy.
- 19. In their executive summary, the Appellants focused on three arguments connected to the terminology of the Coverage Policy. First, they argued that their losses were due solely to the insolvency. Second, that there was a failure of FLSI to return their property due to the insolvency and that failure included the fact that there had been an unlawful conversion of their property. Third, the Appellants argued that CIPF allowed itself to be marketed by FLSI in a manner that led to their losses.

- 20. In arguing that their losses were soley due to FLSI's insolvency, the Appellants submitted that the word "insolvency" in the Coverage Policy should not be assessed on the basis of the date of February 24, 2012 as relied upon in other decisions of the Appeal Committee. In their view, since the Coverage Policy does not itself define the "type" of insolvency that is intended, the appropriate approach is to focus upon "accounting insolvency" or the date upon which total liabilities exceeded total assets. While the Appellants did not then identify a specific date upon which FLSI was accounting insolvent, they alleged that FLSI was accounting insolvent at least as early as 2008 and that this continued through 2011 and the cessation of FLSI in February of 2012. Such a conclusion would mean that all of the Appellant's investment occurred during this period. The Appellants then argued that their losses were in effect caused by the insolvency because FLSI would not during this period have been in the position to return any of their investments. In short, their argument is that their losses were not so much as a result of loss of market value, unsuitable investments, or the default of an issuer as stated by CIPF Staff in their decision, but rather that FLSI was accounting insolvent at the date of their investments and could not return their investments.
- 21. While counsel for CIPF Staff made two responses to this set of arguments around insolvency, I accept their first point and there is no need to discuss the second. Their argument was that the Coverage Policy is concerned only with the insolvency of the member here FLSI and not the issuers in whose investment vehicles the investors have placed their monies. In this regard, CIPF Staff referred to the Coverage Policy itself which states:

The date at which the financial loss of a customer is determined shall be fixed by the Directors as the date of bankruptcy of the Member, if applicable, or the date on which, in the opinion of the Directions, the Member became insolvent.

In this case, CCAA proceedings were commenced on February 23, 2012 and the following day, FLSI was suspended by IIROC.

22. The date of FLSI's insolvency is not an issue to be debated as part of proceedings before the Appeal Committee. Insolvency refers to CIPF Members, and in this case the relevant date is February 24, 2012, which was the date of FLSI's suspension from IIROC. The insolvency date is set as part of the claims procedure.

- 23. The second argument presented by the Appellants was that FLSI had failed to return or properly account for their investments due to the accounting insolvency. In short, the Appellants argued that the reported value of their investments was never there and thus could never be returned from the day that their funds were invested. In particular, the Appellants argued that their investments were reported at a valuation of \$1/unit throughout the relevant period in circumstances where FLSI knew otherwise. Furthermore, the Appellants suggested that the form of reporting was constantly changing from the time of their investments to the date of insolvency. In terms of unlawful conversion, the Appellants stated that their understanding was that the funds they invested would be invested in products for the primary purpose of funding the acquisition and/or development of various real estate products. They argued that their investments were not used for the intended investment purpose, but rather were unlawfully converted by the First Leaside Group for its own uses during a period when there was an OSC investigation and a review by Grant Thornton Limited. Finally, the Appellants argued that even if these arguments were not accepted, I should revisit the conclusion in the October 27, 2014 decision to the effect that fraud, nondisclosure, and misrepresentation is not included in the Coverage Policy as in their view, that conclusion was unreasonable.
- 24. For its part, counsel for CIPF Staff noted that the Appellants' arguments focused on issuer failures rather than upon FLSI's failure to return or account for their property and upon FLSI's misconduct through fraud, non-disclosure and misrepresentation. Counsel submitted that the relevant question is what the Coverage Policy provides for, and that document focuses upon the Member's failure to return or account for property and does not provide for misconduct of the kind at issue in this case.
- 25. Ultimately, the Coverage Policy provides for custodial protection and the question for the Appeal Committee is whether Appellants' property was returned to them. In this case, the Appellants acknowledged that they were in possession of the certificates representing their off book investments and the Appellants' units in other investments had been transferred to another IIROC Member after the insolvency of FLSI. The difficulty with the Appellants' position in general is that it represents an attempt to characterize what is clearly a claim for fraud, material non-disclosure and/or misrepresentation as one of failing to return or account for property and unlawful conversion

in particular. The language that the Appellants used in their submissions, both written and oral, makes this very clear. While they assert that their property has been unlawfully converted, the foundation for that statement is concisely summarized in the following excerpt from an email dated August 6, 2013, authored by the Appellant :

FLSI's solicitation and use of the Claimed Funds represented an unlawful conversion of that money. In particular, in soliciting and accepting my money while *knowingly concealing* from me that First Leaside's financial viability was entirely contingent on FLSI's ability to obtain such further deposits, FLSI *unlawfully induced* me to deposit the Claimed Funds.

- 26. Similarly, in their claims in relation to insolvency, the Appellants commented on the fact that the principals of FLSI misled investors in their reports to investors. There is no question that the decisions of both IIROC and the OSC determined that the principals of FLSI engaged in fraudulent actions. But neither the IIROC nor OSC decisions suggests that there was a misappropriation or conversion of property. The difficulty is that while the actions of FLSI's principals are egregious, they do not fall within CIPF's Coverage Policy. While the Appeal Committee certainly sympathizes with the Appellants' situation, our role is to interpret the Coverage Policy as drafted. To include claims in relation to fraud, non-disclosure, and misrepresentation would be to amend rather than interpret the document.
- 27. Thirdly, the Appellants' submissions focused upon CIPF's role in their losses. They argued that in effect, CIPF allowed itself to be used in FLSI's marketing endeavours. In this regard, they referred to investment documentation in relation to the First Leaside Group in which the CIPF logo was used to assure investors that their investments were covered. The Appellants also argued that CIPF should be aware of the fact that investors rely upon CIPF coverage when choosing to invest in a private investment firm and a review of the CIPF website and documentation could reasonably be interpreted by an investor as covering all investor losses following the insolvency of a member. Indeed, the Appellants suggested that those in the industry understood that CIPF coverage would apply to their situation. Furthermore, it was their view that the CIPF website does not express the limitations of the Coverage Policy clearly enough and that changes in the policy support that conclusion. Finally, it was their argument that CIPF had a duty to oversee how members use the logo on account statements and market themselves using CIPF's name.

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28. As we indicated in the October 27, 2014 decision, any misrepresentations in relation to

CIPF were made by FLSI itself or by members of the First Leaside Group. Furthermore, the CIPF

brochure and website clearly state that there are defined limits on the return of cash and securities.

Additionally, oversight of members is within the jurisdiction of IIROC, and not CIPF itself.

29. Finally, in their written submissions and at the hearing, the Appellants undertook

considerable effort to identify and outline what they described as a systemic failure in terms of the

oversight of FLSI. In this regard the Appellants discussed, among others, the OSC, IIROC, and

CIPF itself. In particular, the Appellants stated that CIPF was part of the audit and review of FLSI

in early 2009. Counsel for CIPF Staff was quite right to say that there was no evidence supporting

this statement. The Appellants also expressed their disappointment that CIPF Staff seemed to be

focused on looking for ways in which to avoid liability rather than upon ways to help investors.

While the Appeal Committee appreciates the substantial effort of the Appellants in developing this

discussion, its jurisdiction is limited to assessing whether or not the Coverage Policy is applicable

to these facts. While, as noted, the Appeal Committee has considerable sympathy for the

Appellants, unfortunately, their circumstances do not give rise to a successful claim for

compensation from CIPF.

Disposition

30. The appeal is dismissed. The decision of the CIPF Staff is upheld.

Dated at Toronto, this 24th day of March, 2015.

Anne Warner La Forest