

SUPERIOR COURT OF JUSTICE

THE HONOURABLE) TUESDAY, THE 4TH DAY
MR. JUSTICE PETER CUMMING) OF JANUARY, A.D. 2000.

BETWEEN:

PERCY LEVY

Plaintiff

- and -

**NELBAR FINANCIAL CORPORATION, ESSEX CAPITAL MANAGEMENT LTD.,
GEORGE NELSON ALLEN and ROBIN MORIARTY
WOODBINE DRIVING RANGE LIMITED, FORMERLY KNOWN AS
884085 ONTARIO LIMITED, 1272327 ONTARIO INC.,
NELSON ALLEN FINANCIAL CORPORATION and
KUKOKE HOLDINGS INC.**

Defendants

ORDER

UPON MOTION made by the Plaintiff for:

- a) An Order staying this action against the Defendants, Woodbine Driving Range Limited, formerly known as 884085 Ontario Limited, 1272327 Ontario Inc., Nelson Allen Financial Corporation and Kukoke Holdings Inc., until further order of this court;
- b) An Order that the within action be certified as a Class Proceeding pursuant to the *Class Proceedings Act, 1992, S.O. 1992, c.6;*



c) An Order that the Class be defined as:

***All persons in Canada who, prior to March 22nd, 1999, invested through the Defendants, Nelbar Financial Corporation or Essex Capital Management Limited, in any of Nelbar Financial Corporation "Corporate Investment Certificates" or in any private company and who remain unpaid*;**

d) An Order stating that the nature of the claim is a breach of the *Loan and Trust Corporations Act*, R.S.O. 1990, c.L.25, conspiracy to breach the *Loan and Trust Corporations Act*, breach of fiduciary duty and fraudulent misrepresentation in such conspiracy, and breach of s.52 of the *Competition Act*, R.S.C. 1985 c. 34;

e) An Order stating that the relief sought by the class in the Statement of Claim is damages for breach of the *Loan and Trust Corporations Act*, R.S.O. 1990, c.L.25, conspiracy to breach the *Loan and Trust Corporations Act*, breach of fiduciary duty and fraudulent misrepresentation in such conspiracy, breach of s.52 of the *Competition Act*, R.S.C. 1985 c.34, and breach of s.213 of the *Loan and Trust Corporations Act*, R.S.O. 1990, c.L.25;

f) An Order that the proceeding is certified on the basis of the following common issues:

- i) Did Nelbar Financial Corporation ("Nelbar") and/or Essex Capital Management Limited ("Essex") act illegally and in breach of s. 213 of the *Loan and Trust Corporations Act* by taking deposits from Class Members contrary to said *Act*?
- ii) If the answer to question (i) above is "yes", are the Class Members entitled to the return of their monies with interest?

- iii) Did the Defendants invest and secure the Class Members' deposits in a manner that was inconsistent with the terms of the Nelbar "Corporate Investment Certificates"?
 - iv) Did the Defendants invest the Class Members' deposits without an appropriate level of disclosure of the nature of the investment?
 - v) Did the Defendants breach s.52 of the *Competition Act R.S.C. c-34* giving rise to liability pursuant to s.36 of that Act?
 - vi) If the answers to (i), (ii), (iii), (iv) and/or (v) are "yes", are the Defendants, George Nelson Allen and Robin Moriarty liable on a personal basis for the actions of Nelbar and Essex?
-
- g) An Order ascribing the status of the representative plaintiff to Percy Levy for the within Class Proceeding;
 - h) An Order that Notice of Certification to the class shall be given pursuant to the Plan of Proceeding.
 - i) An Order that the members of the class who elect to opt out of the class proceeding must do so within 30 days of the date of the Notice of Certification to the class by advising counsel for the Plaintiff and counsel for the Defendants in writing;

ON READING THE materials filed, and on hearing the submissions of counsel for the Plaintiff, and upon hearing counsel for the Defendant, George Nelson Allen, who was not opposed to the Motion, no one appearing for the other Defendants, although duly served, and it appearing that counsel for the Defendant, Robin Moriarty and counsel for the Receiver of Nelbar Financial Corporation and Essex Capital Management Ltd., represented to the Plaintiff's counsel that they were unopposed to the relief sought in the Notice of Motion;

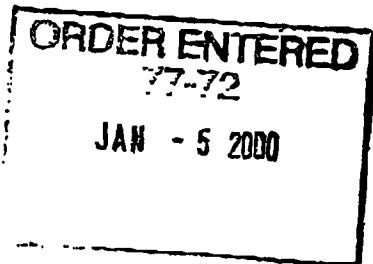
1. **THIS COURT ORDERS** that this action is stayed against the Defendants, Woodbine Driving Range Limited, formerly known as 884085 Ontario Limited, 1272327 Ontario Inc., Nelson Allen Financial Corporation and Kukoke Holdings Inc. until further Order of this Court;
2. **THIS COURT ORDERS** that the within action be certified as a Class Proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
3. **THIS COURT ORDERS** that the Class be defined as:

All persons in Canada who, prior to March 22nd, 1999, invested through the Defendants, Nelbar Financial Corporation or Essex Capital Management Limited in any of Nelbar Financial Corporation "Corporate Investment Certificates" or in any private company and who remain unpaid;
4. **THIS COURT STATES** that the nature of the claim is a breach of the *Loan and Trust Corporations Act*, R.S.O. 1990, c.L.25, conspiracy to breach the *Loan and Trust*

Corporations Act, breach of fiduciary duty and fraudulent misrepresentation in such conspiracy, and breach of s.52 of the *Competition Act R.S.C. 1985 c.34*;

5. **THIS COURT STATES** that the relief sought by the class in the Statement of Claim is damages for breach of the *Loan and Trust Corporations Act*, R.S.O. 1990, c.L.25, conspiracy to breach the *Loan and Trust Corporations Act*, breach of fiduciary duty and fraudulent misrepresentation in such conspiracy, breach of s.52 of the *Competition Act R.S.C. 1985 c.34*, and breach of s.213 of the *Loan and Trust Corporations Act*, R.S.O. 1990, c.L.25;
6. **THIS COURT ORDERS** that the proceeding is certified on the basis of the following common issues:
- i) Did Nelbar Financial Corporation ("Nelbar") and/or Essex Capital Management Limited ("Essex") act illegally and in breach of s. 213 of the *Loan and Trust Corporations Act* by taking deposits from Class Members contrary to said Act?
 - ii) If the answer to question (i) above is "yes", are the Class Members entitled to the return of their monies with interest?
 - iii) Did the Defendants invest and secure the Class Members' deposits in a manner that was inconsistent with the terms of the Nelbar "Corporate Investment Certificates"?
 - iv) Did the Defendants invest the Class Members' deposits without an appropriate level of disclosure of the nature of the investment?
 - v) Did the Defendants breach s.52 of the *Competition Act R.S.C. c-34* giving rise to liability pursuant to s.36 of that Act?

- vi) If the answers to (i), (ii), (iii), (iv) and/or (v) are "yes", are the Defendants, George Nelson Allen and Robin Moriarty liable on a personal basis for the actions of Nelbar and Essex?
7. **THIS COURT ORDERS** that the status of the representative plaintiff is ascribed to Percy Levy for the within Class Proceeding;
8. **THIS COURT ORDERS** that Notice of Certification to the class shall be given pursuant to the Plan of Proceeding;
9. **THIS COURT ORDERS** that the members of the class who elect to opt out of the class proceeding must do so within 30 days of the date of the Notice of Certification to the class by advising counsel for the Plaintiff and counsel for the Defendants in writing.
10. **THIS COURT ORDERS** that costs of this Motion be to the Plaintiff class, the amount of which is reserved to the Judge who deals with the matter in the final event.



M. Long
Justice, Superior Court of Justice
Registrar

SUPERIOR COURT OF JUSTICE

Proceedings commenced at London

ORDER

SISKIND, CROMARTY, IVEY & DOWLER
Barristers and Solicitors
680 Waterloo Street
London, Ontario N6A 3V8
R. F. Lersch TEL: (519) 672-2121 FAX: (519) 672-6065

GIGNAC SUTTS
Barristers & Solicitors
500 Westcourt Place, 251 Goyeau Street
Windsor, Ontario N9A 6V4
Harvey T. Strosberg, Q.C. TEL: 519-258-9333 FAX 519-258-9527

GENEST MURRAY DesBRISAY LAMEK
Barristers & Solicitors
130 Adelaide Street, West, Suite 700
Toronto, Ontario M5H 4C1
William Papall TEL: 416-360-2616 FAX 416-360-2625

Co-counsel for the Plaintiff

RFL/dh
Our File No. 85137