

SUPERIOR COURT OF JUSTICE

THE HONOURABLE)
MR. JUSTICE CUMMING)
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THURSDAY, THE 29TH DAY
OF JULY, 1999.



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

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the Plaintiff for an Order granting leave to the Plaintiff to appoint a Receiver or interim Receiver of the property and assets of the defendants, Nelbar Financial Corporation and Essex Capital Management Ltd., without security, was heard this 29th day of July, 1999, at the City of Toronto.

ON READING the affidavits of Montgomery Shillington and John M. Harper, filed, the Consent of Solursh Feldman Goldberg Inc. and upon hearing submissions of counsel for the Plaintiff and in the presence of counsel for the Defendants:

1. THIS COURT ORDERS that Solursh Feldman Goldberg Inc. be and it is hereby appointed Receiver, without security, of the lands, buildings, property (real and personal), assets, business, undertakings, rights and interests of Nelbar and Essex wherever situate including, but not limited to, the lands, buildings, improvements and fixtures, goods, and chattels located at the lands known municipally as 36 Toronto Street, Suites 1100 and 1120, and 20 Toronto Street, Suite 1130, in the City of Toronto, in the Province of Ontario, and all monies, currency, securities, treasury bills, negotiable instruments, insurance policies and proceeds, accounts receivable and choses in action (hereinafter "the Property").
2. THIS COURT ORDERS that the said Receiver is to act until further Order of this Court with full authority and power to receive and retain possession of, preserve and protect the Property in its discretion pending further Order of this Court.
3. THIS COURT ORDERS that the said Receiver shall be at liberty and is hereby empowered to take such steps as may be necessary or desirable to effect the purpose of this Order; that is to investigate and report in writing to this Court the results of its investigation into the affairs of Nelbar and Essex, and make available to the Court all documents and information

relative to the investigation by it, if required, within forty-five (45) days of the date of this Order, as hereinafter set out.

4. THIS COURT ORDERS that the Receiver shall be required to:

- a) investigate and identify through the documents and information available to it the Property and all expenses, deposits, loans, payments, and encumbrances and such other assets, rights, liabilities, and obligations of Nelbar or Essex;
- b) reconcile, to the extent possible, through the documents and information available to it, net deposits received by Nelbar and/or Essex against assets of and cash flows from Nelbar and/or Essex and report as to any apparent discrepancies.

5. THIS COURT ORDERS that the said Receiver in its discretion, shall be at liberty and empowered in connection with the taking of possession of the property, and the investigation so ordered herein, to have authority to receive, preserve and protect the Property in its custody or under its control, and shall have the authority:

- a) to make or cause to be made any enquiry or investigation that the Receiver deems necessary in respect of the conduct of Nelbar and Essex and its directors, board members, management, officers or employees, whether past or present;
- b) to examine under oath before the Registrar of this Court, the Official Examiner or other authorized person, any of the persons referred to in subparagraph a. hereof, any person reasonably thought to have knowledge of the affairs of Nelbar and Essex,

their dealings or property, and any person to be so examined shall produce, upon request, any books, documents, general ledgers, receipt books, budgets, accounting records, computer programs, computer records, access codes, computer tapes and any other records of any nature or kind related in any way to this property, correspondence or papers in his, her or its possession or power relating in all or in part to Nelbar and Essex;

- c) without limiting the generality of the foregoing, the Receiver shall have all of the investigative powers described and which enure to the benefit of a Trustee in Bankruptcy, in the *Bankruptcy and Insolvency Act*, and particularly, the provisions of section 161 through and including 167 of the said Act are hereby incorporated into this Order;
- d) to receive and collect all income, revenue, rent, fees, insurance proceeds or receipts of any kind pertaining to the affairs of Nelbar and Essex;
- e) to enter into agreements with respect to the Property or any part or parts thereof with any person or persons in connection with the protection and preservation of the Property and, in connection with the foregoing, to obtain and/or extend credit and to enter into contractual arrangements and obligations reasonably incidental to the exercise thereof;
- f) to take such steps as the Receiver may deem appropriate to establish and maintain control over the Property, including but not limited to, the changing of locks, the

taking of physical inventories including the supplies, chattels, art works, furnishings and equipment and the placement of adequate insurance coverage as required;

- g) to engage any individual on such terms as it may in its discretion deem appropriate to carry out this Order and that such employment shall not constitute nor shall the Receiver be deemed to be a successor employer of Nelbar or Essex with respect to its employees at common law or under or pursuant to any federal or provincial statute or otherwise;
- h) to apply for any permits, licensing, approvals or permissions as may be required by the Receiver from any governmental or regulatory authorities;
- i) to execute, assign, issue or endorse any cheque, Bill of Exchange, Bill of Sale, assignments, conveyances, discharges or document necessary or convenient for any purpose pursuant to this Order; and,
- j) to take any other steps, enter into any other agreements or incur any other obligations that the Receiver deems necessary or reasonably incidental to the exercise of the powers accorded in this Order including, without limitation, entering into banking arrangements.

6. THIS COURT ORDERS that the Defendants, Nelbar and Essex, their respective officers and directors, agents, employees and assigns, professional advisors and anyone having knowledge of this Order including, but not limited to, the Financial Services Commission of Ontario upon being made aware of this Order, do forthwith make the Receiver aware of

any property of Nelbar or Essex in their possession or control of every kind and upon the request of the Receiver shall deliver to it all such property including books, securities, documents, contracts, papers, deeds, records, information and accounts of every kind whatsoever relating thereto. Delivery aforesaid, once requested, shall be immediate and the Receiver shall be accorded continuous and unrestricted access to the said property and to all information necessary to the performance of any and all of its duties herein.

7. THIS COURT ORDERS that the Receiver shall be at liberty in its discretion to open bank accounts with chartered banks and to place funds collected in the exercise of its powers under this Order on deposit in such accounts, in term deposit receipts or otherwise in the name of the Receiver and the Receiver shall keep full records of such funds.

8. THIS COURT ORDERS that the said Receiver be at liberty and is hereby authorized, and empowered to institute, prosecute and/or settle any claims, suits, proceedings, hearings, cases and actions at law as may, in its judgment, be necessary for security, possession of, or for the proper protection or preservation of the Property and, if so advised and in its discretion, to defend and/or settle any claims, suits, proceedings, hearings, cases and actions instituted against Nelbar and Essex and/or the Receiver. The Receiver is further authorized and empowered to appear and conduct in its discretion the prosecution or defense of any such proceedings or actions now pending in any Court against Nelbar and Essex (except as initiated by the applicant and subject to the respondents cross claiming against Nelbar and

Essex, the prosecution or defense of which will, in the judgment of the Receiver, be necessary for securing possession of or for the proper preservation or protection of the Property. The authority hereby conveyed shall extend to such appeals as the said Receiver shall deem proper and advisable in respect of such Order or Judgment pronounced in any such suit or action excluding the within action.

9. THIS COURT ORDERS that the said Receiver shall be at liberty to retain solicitors and to appoint an agent or agents, employees, consultants, appraisers and such additional assistance that the Receiver may reasonably consider necessary for the purpose of performing any and all of its duties herein. Such employment shall not, as stated in paragraph 5(g) above, constitute the Receiver a successor employer to Nelbar and Essex with respect to its employees. Any expenditure which shall be properly made and incurred by the said Receiver in so doing (including, without limitation, payment of legal fees and disbursements) shall be allowed to the Receiver in the passing of its accounts and shall be a charge on the Property in priority to the claims of all encumbrances and unsecured creditors, subject to the limit as hereinafter set out in paragraph 16.

10. THIS COURT ORDERS that no one may interfere with the possession and the control of the Property by the Receiver without leave of the Court first being obtained. For greater certainty and without limitation, no application or action at law or other proceeding, shall be taken or continued against Nelbar and Essex in connection with the Property or against the

Receiver without leave of this Court first being obtained on at least seven (7) days notice to the Receiver, including any right of distress, petition in bankruptcy, enforcement of security, termination of any contract, acceleration of accounts or application of set-off.

11. THIS COURT ORDERS that the said Receiver shall not, when carrying out the powers and performing the duties accorded under this Order be deemed at common law or by statute to be a person responsible for, or the owner, the occupant or the person in control, management or in charge of any premises owned or leased by Nelbar or Essex with specific reference to the Property for the purposes or reason of the Ontario Environmental Protection Act, The Canadian Environmental Protection Act, the Ontario Water Resources Act or any other like statute, regulation or rule of law or equity applicable in Ontario which imposes liability on the basis of or pursuant to the said statutes as amended from time to time or any rules or regulations passed pursuant thereto.

12. THIS COURT ORDERS that without limiting the generality of paragraph 11 hereof, all persons, firms and corporations, be and they are hereby enjoined from disturbing or interfering with utility services, including but not limited to furnishings of heat, gas, electricity, water, telephone, cable or any other utilities of like kind furnished up to the present time at or to either Nelbar or Essex and they are hereby enjoined from cutting off, discontinuing or altering any such utilities or service except upon order of this Court.

13. THIS COURT ORDERS that the Receiver be at liberty to and is hereby authorized and empowered from time to time to apply to this Court for advice and direction in the discharge of its powers and duties hereunder.
14. THIS COURT ORDERS that liberty be reserved to any interested person or persons to apply to this Court for further Orders on at least seven days notice to the Receiver.
15. THIS COURT ORDERS that the Receiver shall not incur any liability or obligations as a result of the appointment of the Receiver hereunder or as a result of the exercise by the Receiver of the powers hereunder granted, save and except that the Receiver shall be liable for any negligent act or any omission or wilful misconduct on its part while carrying out its duties hereunder which liability shall be limited to the aggregate of the cash receipts realized by the Receiver pursuant to this Order after deducting its remuneration and disbursements, any monies borrowed and any payments distributed to creditors.
16. The Receiver's fees for conducting its investigation and report to the Court shall not exceed TWENTY-FIVE THOUSAND DOLLARS (\$25,000), including all disbursements but exclusive of G.S.T, without direction from the Court to incur further costs of investigation. Subject to the monetary limitations set forth herein or as amended by this Court, such costs are to be a first charge against the assets of Essex to the extent of TWELVE THOUSAND, FIVE HUNDRED DOLLARS (\$12,500), against the monies on deposit with the Royal Bank

of Canada, Main Branch, Toronto, Account No. 1131820, identified as still existing, if any, and against the assets of Nelbar to the extent of TWELVE THOUSAND, FIVE HUNDRED DOLLARS (\$12,500) charged against a cheque in the amount of Sixteen Thousand Dollars now held by Financial Services Commission of Ontario. For greater certainty each of Nelbar and Essex is only responsible for TWELVE THOUSAND, FIVE HUNDRED DOLLARS (\$12,500) of the Receiver's fee. If no such property exists, such costs are to be allowed the Receiver in the passing of its accounts, and shall form a charge on the Property in priority to the claims of all encumbrances and unsecured creditors to the extent of its fees for the investigation and report which shall in any event, not exceed TWENTY-FIVE THOUSAND DOLLARS (\$25,000) including disbursements but exclusive of G.S.T. The Receiver shall be at liberty to render its account for services other than investigation and report thereon, which are in addition to the TWENTY-FIVE THOUSAND DOLLARS (\$25,000) aforesaid. The Receiver shall be at liberty to pass its accounts from time to time and shall distribute and deal with funds in its hands as this Court may direct. The accounts of the Receiver may be assessed by this Court or may be referred to the Master. Any such amounts assessed as fees and disbursements of the Receiver shall be and form a first charge in accordance with the provisions of this paragraph. Notwithstanding the aforesaid, no services other than the investigation and report shall be undertaken by the Receiver without further Order of this Court.

17. THIS COURT ORDERS that all parties appearing to date shall receive notice of any future proceedings unless otherwise ordered by further Order of this Court.

18. THIS COURT ORDERS that the costs of this motion be fixed at FIVE THOUSAND DOLLARS (\$5,000) payable by the defendants to the plaintiff in the cause.

Peter A. Cumming J.

SUPERIOR COURT OF JUSTICE

Proceedings commenced at London

ORDER

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