

SUPERIOR COURT OF JUSTICE

BETWEEN:

PERCY LEVY

Plaintiff

- and -

NELBAR FINANCIAL CORPORATION, ESSEX CAPITAL MANAGEMENT LTD., GEORGE NELSON ALLEN, ROBIN MORLARTY, BARBARA ALLEN, 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

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

AMENDED THIS 9th DAY OF March 2000
PURSUANT TO THE ORDER OF Justice Cummins
DATED THE 10th DAY OF March 2000
[Signature]
CLERK OF COURT, SUPERIOR COURT OF JUSTICE
MONTREAL
CONFORMEMENT A L'ORDONNANCE DE

Date July 15, 1999

Issued by "Steven Allen"
Local registrar

Address of court office Ministry of the Attorney
General
Civil, Landlord/Tenant Section
Ground Floor, Unit "A"
80 Dundas Street
London, Ontario
N6A 6A3

- TO: NELBAR FINANCIAL CORPORATION
c/o Nelson Allen, 337 Park Avenue
Newmarket, Ontario L3Y 1V4
- AND TO: ESSEX CAPITAL MANAGEMENT LTD.
c/o Nelson Allen, 337 Park Avenue
Newmarket, Ontario L3Y 1V4
- AND TO: GEORGE NELSON ALLEN
337 Park Avenue
Newmarket, Ontario L3Y 1V4
- AND TO: ROBIN MORLARTY
7 King Street
Toronto, Ontario
- AND TO: WOODBINE DRIVING RANGE LIMITED, FORMERLY KNOWN AS 884085
ONTARIO LIMITED
c/o Nelson Allen, 337 Park Avenue
Newmarket, Ontario L3Y 1V4
- AND TO: 1272327 ONTARIO INC.
c/o Nelson Allen, 337 Park Avenue
Newmarket, Ontario L3Y 1V4
- AND TO: NELSON ALLEN FINANCIAL CORPORATION
c/o Nelson Allen, 337 Park Avenue
Newmarket, Ontario L3Y 1V4
- AND TO: KUKOKE HOLDINGS INC.
5285 Tomken Road, Unit 4
Mississauga, Ontario L4W 3N8

CLAIM

1. The plaintiff claims as against all the defendants, on his own behalf and on behalf of the members of the class of persons in Canada who invested in short-term and long-term investment certificates in Nelbar Financial Corporation, before March 22, 1999, (the "Class Period"), and suffered a loss as a result thereof:

- a) an order certifying this proceeding as a class proceeding and appointing Percy Levy as representative plaintiff;
- b) a reference or such other directions as may be necessary to determine issues relating to liability and damages not determined in the trial of the common issues in this action;
- c) an order pursuant to s.103 of the *Courts of Justice Act* appointing a receiver and manager, or interim receiver and manager, of all the property, assets and undertakings of the defendants, without security, and with the authority and power to carry on the business and undertakings of Nelbar Financial Corporation and Essex Capital Management if so advised, and to take possession and thereafter sell or otherwise disposed of or realize all or any part of the property, assets and undertakings of Nelbar Financial Corporation; and directing the proceedings of sale to be held by the receiver and manager pending further order of the court;
- d) a declaration that the defendants breached section 213, of the *Loan and Trust Corporations Act*, R.S.O. 1990, c.L.25 by virtue of the acceptance of deposits from the plaintiffs without being registered under said legislation;
- e) damages for conspiracy;

- f) special damages, general damages, aggravated damages, exemplary damages and punitive damages in the sum of \$10,000,000 or such further sum as this Honourable Court may find appropriate;
- g) an accounting, an equitable tracing order, and an order requiring disgorgement of all income earned by the defendants through their receipt of the investment certificate deposits, all proceeds received by the defendants in the form of commissions on the sale of the investment certificates and any other proceeds or income earned relating to the investment certificates;
- h) an interim, interlocutory and permanent injunction:
 - i. restraining the defendants, or any of them, from selling, transferring, assigning, disposing of, pledging, removing from Ontario or otherwise encumbering any assets owned by them, in their names or standing to their credit, either directly or indirectly, or any equitable interests in any assets or assets in possession of any financial institution or other person, save and except with permission of and by Order of this Honourable Court;
 - ii. restraining the defendants Nelbar Financial Corporation or Essex Capital Management Ltd. from accepting or recording upon their books any transfer or purported transfer of the shares of Nelbar Financial Corporation or Essex Capital Management Ltd. save and except a transfer in favour of the plaintiff herein;
 - iii. requiring the defendants or any of them to deliver up to this Honourable Court copies and originals of any and all share certificates owned by them or held by them whether directly or indirectly, or whether held in trust for them together with details of all shareholdings (whether or not certificates for the same are in their possession) of which they have knowledge;

- i) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*;
- j) the costs of this action as between a solicitor and his own client, including any applicable taxes; and
- k) such further and other special relief as to this Honourable Court seems just.

2. The plaintiff further claims as against Nelbar Financial Corporation, Woodbine Driving Range Limited formerly known as 884085 Ontario Limited and Kukoke Holdings Inc.:

- a) a declaration that the conveyance of real property known municipally as 173 Woodbine Avenue, Newmarket, Ontario (the "Woodbine Property") between 884085 Ontario Limited, as transferor, on the 29th day of May, 1999, which transfer was registered as instrument No. R741066 in Land Registry Office #65 for Newmarket, to Kukoke Holdings Inc. is fraudulent, unenforceable and void against the plaintiff as:
 - i. constituting a fraudulent conveyance within the meaning of s.2 of the *Fraudulent Conveyances Act* R.S.O. 1990, c.A.33, as amended, or
 - ii. constituting a preference within the meaning of s.4 of the *Assignment and Preferences Act* R.S.O. 1990, c.A.33, as amended, or
 - iii. constituting a conveyance to a non-existent legal entity, in that the defendant, Kukoke Holdings Inc., which is or was not a duly incorporated legal entity entitled to hold property at the time aforesaid transfer.

3. The Plaintiff further claims as against Nelbar Financial Corporation, 1271217 Ontario Inc., Woodbine Driving Range Limited formerly known as 884085 Ontario Limited, Nelson Allen Financial Corporation and Kukoke Holdings Inc.:

- a) a declaration that the defendant, 1272327 Ontario Inc. holds a charge/mortgage on the Woodbine Property as constructive trustee for the plaintiff and the class he represents;
 - b) an order for an accounting, tracing, recovery and seizure of monies or other consideration provided to the defendants Woodbine Driving Range Limited formerly 884045 Ontario Limited, 1272327 Ontario Inc. and Nelson Allen Financial Corporation, or any of them, in respect of the sale(s), or transfer(s), charging/mortgaging and assignment of any charges/mortgages of Woodbine Property; and
 - c) an order granting leave to have issued and registered a Certificate of Pending Litigation against the Woodbine Property.
4. The Plaintiff further claims as against George Nelson Allen and Barbara Allen:
- a) a declaration that the conveyance of real property known municipally as 337-339 Park Avenue, Newmarket, Ontario (the "Allen Property") between George Nelson Allen and Barbara Allen, as transferors, on the 23rd day of March, 1999, which transfer was registered as instrument No. R738793 in Land Registry Office #65 Newmarket, to Barbara Allen is fraudulent, unenforceable and void as against the Plaintiff as:
 - i. constituting a fraudulent conveyance within the meaning of s.2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c.F.209, as amended; and
 - ii. an order granting leave to have issued and registered a Certificate of Pending Litigation against the Allen Property.

The Parties

5. The plaintiff Percy Levy is a retired senior citizen residing in Toronto, Ontario.

6. The defendant Nelbar Financial Corporation ("Nelbar") is an investment banking firm operating in Toronto, Ontario. At no time was Nelbar registered under the *Loan and Trust Corporations Act*.
7. The defendant Essex Capital Management Ltd. ("Essex") is an investment dealer affiliated with Nelbar. It operates out of the same premises in Toronto, Ontario; as Nelbar and received, at various times, in various amounts deposits from Nelbar which emanated from the class the plaintiff represents.
8. The defendant 1272327 Ontario Inc. is a company incorporated pursuant to the laws of Ontario, with its head office in Toronto, of which the defendant George Nelson Allen is president and treasurer and a director.
9. Woodbine Driving Range Limited ("Woodbine Limited") is an Ontario company with its head office in Newmarket, Ontario, originally incorporated as 884045 Ontario Limited. By articles of amendment dated July 12, 1990, 884084 Ontario Limited changed its name to the current defendant. Mr. Allen is its president, secretary and a director.
10. The defendant Nelson Financial Corporation was incorporated pursuant to the laws of Ontario, with its head office in Toronto. Mr. Allen is president, treasurer and a director.
11. The defendant George Nelson Allen, is the president of Nelbar, Essex, 1272327 Ontario Inc., Woodbine Limited, Nelson Allen Financial Corporation as well as being the sole or major common shareholder in those corporations.
12. The defendant Kukoke Holdings Inc. is a company which was incorporated pursuant to the laws of Ontario on July 7, 1999, and in which Mr. Allen has a financial interest.
13. The defendant Robin Moriarty, is an employee of Nelbar and an officer and director of Essex.
14. The defendant Barbara Allen is the wife of the defendant George Nelson Allen, and is the registered owner of a property municipally known as 337-339 Park Avenue, Newmarket, Ontario.

The Depositors dealings with Nelbar

15. On or about February 22, 1999, Mr. Levy invested \$40,000 in a short-term investment certificate at the suggestion of Ms. Moriarty. Ms. Moriarty represented to Mr. Levy this certificate was to mature on April 22, 1999, and would bear simple interest at 2.5% per month. The total amount due to Levy on the maturity date, therefore, was \$42,000.

16. Mr. Levy was one of approximately 110 members of the public (the "Depositors") who entrusted his money with Nelbar and/or Essex and for which Nelbar issued for each deposit, a "Corporate Investment Certificate" which certificate was represented by Allen, Moriarty and other employees, servants, and agents of Nelbar and/or Essex to be an investment which guaranteed the return of capital and a fixed rate of interest for a fixed period of time.

17. On or about March 22, 1999, the Superintendent of Financial Services at the Financial Services Commission of Ontario ("FSCO") issued freeze orders on the bank account of Nelbar and Essex because Nelbar accepted deposits from the public without being registered under the *Loan and Trust Corporations Act*. Furthermore, an immediate temporary cease and desist order was made against Nelbar and its president, Mr. Allen, prohibiting them from conducting any commercial or financial business in Ontario. This cease and desist order was made permanent on March 30, 1999, and the appeal period has expired.

18. On or about the 22nd day of March, 1999, the Investment Dealers Association of Canada, of which Essex is a member, issued a Suspend Trading Order against Essex to cease carrying on business with the public.

19. The defendants failed to pay Levy \$42,000 on April 22, 1999. None of the Depositors were paid. The plaintiff and all the Depositors have suffered damages as a result.

20. The defendants, including Mr. Allen and Ms. Moriarty conspired, *inter alia*, to breach the *Loan and Trust Corporations Act* at places and times unknown to the plaintiff. The wrongful actions included, *inter alia*:

- a) using the Depositors money for improper purposes;

- b) fraudulently misrepresenting the what assets of Nelbar were in Nelbar's financial statements;
- c) fraudulently transferring assets acquired by Nelbar to other entities, many or all of which were corporate vehicles controlled by Mr. Allen; and
- d) other wrongful acts, the details of which are within the defendants' knowledge, but not known to the plaintiff at this time.

21. Nelbar and Essex, through Allen and Moriarty and other employees, servants and agents, of Nelbar and/or Essex, represented to the various Depositors that they were financially sound, duly registered with the proper financial authorities to accept deposits and able to provide through Nelbar's "Corporate Investment Certificates" guaranteed, safe investments. In fact, in brochures provided to Depositors it was represented that:

"Corporate Investment Certificates are guaranteed by Nelbar Financial Corporation and pledged against an equivalent value of conservative financial securities that can be liquidated immediately and settled within five days. In addition, a surplus of approximately 20% will be kept in the investment trust. A CIC must offer at least one dollar for every dollar invested. These conditions as applied to the investment trust and the security it offers to investors are maintained regularly by independent legal and accounting firms. The account is operated by the Toronto head office of the Bank of Montreal and supervised by the law firm of Daigle and Hancock. Audited statements are prepared by the accounting firm of Francis and McKinney, with Gerâld Francis overseeing the account."

In addition to those representations on which the plaintiff and other Depositors relied, Nelbar and Essex, through Allen and Moriarty and other employees, servants and agents, held themselves out as financial consultants and advisors to the Depositors, including the plaintiff, who placed their trust and financial goals with the said defendants, and as such Nelbar, Essex, Allen and Moriarty acquired a fiduciary responsibility and relationship with the plaintiff and other Depositors.

22. The plaintiff states that Nelbar, Essex and their principals have breached the fiduciary duty owed to the plaintiff and all of the Depositors.

23. The plaintiff claims that all of the property acquired from the funds of the Depositors is subject to a constructive trust in favour of the plaintiff and the Depositors.

The Woodbine Property

24. The plaintiff pleads that Allen, through Woodbine Limited conveyed the Woodbine Property to the defendant Kukoke Holdings Inc. for the purpose of hindering, delaying or defeating creditors including the plaintiff and the Depositors in this action.

25. Further, and in the alternative, the plaintiff pleads that the conveyance of the Woodbine Property to Kukoke Holdings Inc. is void and unenforceable because Kukoke Holdings Inc. was nonexistent and/or unincorporated at the time of the purported conveyance.

The Woodbine Property Mortgage

26. The plaintiff pleads that the a first mortgage against the Woodbine Property in the amount of 5500,000.00 where 1272327 Ontario Inc. is named as mortgagee, was acquired from the Toronto Dominion Bank with the funds of Nelbar which originated from the Depositors. It was always the intention of Mr. Allen and 1272327 Ontario Inc. that the mortgage would be held in trust for Nelbar.

27. The plaintiff pleads that Nelbar's beneficial interest in the mortgage is subject to a constructive trust in favour of the plaintiff and the Depositors.

The Allen Property

28. On March 23, 1999, Barbara Allen and George Nelson Allen transferred the property municipally known as 337-339 Park Avenue, Newmarket, to Barbara Allen. The plaintiff pleads that the said transfer was effected for the purpose of hindering, delaying or defrauding creditors including the plaintiff and the Depositors in this action, contrary to the provisions of the Fraudulent Conveyances Act, R.S.O. 1990, c. F.29, as amended.

The plaintiff proposes that this action be tried in the City of Toronto, in the judicial District of York, in the Province of Ontario.

SISKIND, CROMARTY IVEY & DOWLER Barrister & Solicitor 680 Waterloo Street London, Ontario N6A 3V8 R. F. LEACH Tel: 519-672-2121 Fax: 519-672-6065	GIGNAC, TUTTS Barristers & Solicitors 600 Westcourt Place 251 Goyeau Street Windsor, Ontario N9A 6V4 HARVEY T. STROßBERG, Q.C. Tel: 519-258-9333 Fax: 519-258-9527	GENEST, MURRAY DesBRISAY LAMEK Barristers & Solicitors 130 Adelaide St. W. Suite 700, TORONTO M5H 4C1 WILLIAM PEPALL Tel: 416-360-2616 Fax: 416-360-2625
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Co-counsel for the plaintiff

PERCY LEVY and **NELBAR FINANCIAL CORPORATION,**
Plaintiff and ET AL
Defendants

Court File No: 31902/99

SUPERIOR COURT OF JUSTICE

Proceeding commenced at London

AMENDED STATEMENT OF CLAIM

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Toronto, Ontario
MSH ACI

William E. Pepall LSUC# 15736T
Tel: (416) 360-2882
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Solicitors for the Plaintiff