

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

MARSHA MARTIN and FERN CAMIRAND

Plaintiffs

- and -

**MICHAEL BARRETT, JOHN REBRY, LLOYD CRAWFORD,
WILLIAM DEMERLING, CLAUDE GAUTHIER, CLARE HAYES,
JIM MADILL, MICHAEL STEVENS, BRIAN ASHFORD,
JOHN BLACK, JOHN HILL, CHARLES MACDAID,
JOSEPH MARTIN, JUNE MCFARLANE, LARRY MELNYK
JOHN STAFFORD, as trustees of the Participating Co-Operatives
of Ontario Trusteed Pension Plan (FSCO Reg. No. 345736),
THE CANADA TRUST COMPANY, CIBC MELLON TRUST COMPANY,
CIBC MELLON GLOBAL SECURITIES SERVICES COMPANY,
CANADIAN IMPERIAL BANK OF COMMERCE, MELLON BANK, N.A.,
MARK EDWARD WORKMAN carrying on business as
WHITTACAT CONSULTING ASSOCIATES,
WHITTACAT HOLDINGS LTD., TURNBULL AND TURNBULL LTD.,
THE ESTATE OF JOHN A. TURNBULL, deceased, LOUIS ELLEMENT,
ANTHONY F. COOPER and ANTHONY F. COOPER
ACTUARIAL SERVICES LIMITED**

Defendants.

Proceeding under the Class Proceedings Act, 1992.

**STATEMENT OF DEFENCE AND CROSSCLAIM OF
THE DEFENDANT LOUIS ELLEMENT**

1. The Defendant, Louis Ellement ("Ellement") admits the allegations contained in paragraph 34, 36 (first sentence), 37 (first sentence), 38 (first and second sentences), 50, 54, 77-79 (inclusive), 95, 96, 97(a), (b), except for the reference to "current long

term rate”, 97(c) except for the reference to “current long term bond rate”, 108 and 115 (second and third sentences) of the Fresh as Amended Statement of Claim (“Claim”).

2. Except where hereinafter expressly admitted, each and every allegation in the Claim is denied. Specifically, Ellement denies the allegations contained in paragraphs 2, 3, 4, 7, 36 (second and third sentences), 37 (second, third and fourth sentences), 39, 48, 49, 55, 56, 63-67 (inclusive), 69, 72-76 (inclusive), 80-83 (inclusive), 90-91, 94, 101-104 (inclusive), 113, 114, 115 (first and fourth sentences), 116-118 (inclusive), 122 and 125 of the Claim as they relate to Ellement and further denies that the Plaintiffs are entitled to the relief claimed in paragraph 1 of the Claim or any relief at all.

3. Ellement has no knowledge of the allegations contained in paragraphs 5, 6, 8-33 (inclusive), 35, 38 (third sentence), 40-47 (inclusive), 51-53 (inclusive), 57-62 (inclusive), 68, 70, 71, 84-89 (inclusive), 92, 93, 98-100 (inclusive), 105-107 (inclusive), 109-112 (inclusive), 115 (fifth sentence), 119-121 (inclusive), 123, 124 and 126-130 (inclusive) of the Claim.

4. In answer to the Claim as a whole, Ellement says that he was not retained by the Co-Op Trustees in his personal capacity, and as such did not owe any legal or other duty to the Co-Op Trustees or the Plaintiffs. Consequently, there is no basis in fact or in law for any claim against Ellement.

5. In further answer to paragraph 4 of the Claim and to the Claim as a whole, Ellement says that his role *vis a vis* the Plan and the Co-Op Trustees of the Plan was limited to reporting on the performance of the adopted investment strategy of the Co-Op Trustees. At all material times, Ellement was only involved in the preparation of the 1994 and 1995 actuarial valuation reports. Ellement was in no way involved either in rendering advice on investment policies or strategies; choosing a particular investment policy or strategy; choosing a particular person to execute a particular investment policy or strategy; or, in assessing the risks of the particular investment policy or strategy ultimately chosen by the Co-Op Trustees. His advice with respect thereto was neither sought by the Co-Op Trustees or anyone acting on their behalf nor given by Ellement.

6. In further answer to paragraph 4 of the Claim and to the Claim as a whole, Ellement says that the 1994 actuarial report and the 1995 actuarial report, which were prepared by the Defendant Turnbull and Turnbull Ltd. (“the Company”) and signed by Ellement and John A. Turnbull, reported on the failure of the “protection” investment strategy chosen by the Co-Op Trustees. Moreover, in the 1994 actuarial valuation report, an alternative investment strategy was suggested. Specifically, the report suggested that there be an “immunization” of pension liabilities in respect of pensioners (which constituted approximately 57% of total liabilities). Such an immunization could have taken the form of investment in long term bonds. That suggestion was ignored or dismissed by the Co-Op Trustees and their investment advisors.

7. In further answer to paragraph 4 of the Claim and to the Claim as a whole, Ellement on more than one occasion expressly advised the investment consultant and asset manager engaged by the Co-Op Trustees, the Defendant Mark Edward Workman (“Workman”), that the “protection” strategy implemented for the Plan was producing losses. Despite Workman’s urgings that Ellement must be incorrect in that regard, Ellement reported the losses based on statements of the Fund’s auditor, which demonstrated the actual experience of the “protection” strategy.

8. In further answer to paragraph 36 and 37 of the Claim, Ellement says that at all material times, he was an employee of the Company, but resigned as an employee of the Company effective May 1, 1996. Ellement’s only contact with the Plan after that point in time was in and about 1998, as an actuary on behalf of Ellement and Ellement Ltd., to provide option factors to assist the administrator while it transitioned over to the Plan’s new actuary. Accordingly, Ellement says he is not responsible or liable personally or otherwise for any alleged act, error, or omission, which may have occurred. Further, Ellement adopts the facts set out in paragraph 4 of the Turnbull and Turnbull Statement of Defence and Crossclaim.

9. In further answer to paragraph 37 of the Claim and to the Claim as a whole, Ellement denies that he provided the Co-op Trustees with actuarial advice and consulting services pertaining to the administration to the Plan and the Fund. Ellement’s role as an employee of the Company was to perform actuarial valuations based on existing plan texts; on promised benefits; and, on the audited financial

statements. In addition, Ellement would help set up the commuted value and option factors. Such activities were largely routine and did not involve exercising uncontested judgment. In fact, these duties were based on the latest actuarial report assumptions or legislative assumptions, which were completely out of Ellement's control. Ellement did not provide consultation on the benefits designed into the plan or on the investment strategy adopted. Ellement further denies that he is a shareholder of the Company. Moreover, the Company does not exist, having been dissolved on or about May 17, 2002.

10. In further answer to paragraphs 48, 72 and 73 of the Claim, Ellement says that he does not owe a fiduciary duty to the Plaintiffs and the Class members, as alleged, or at all. In the alternative to the above, Ellement says that if he does owe such a fiduciary duty, which is denied, he discharged that duty without breach. Ellement exercised the requisite care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person, and used all relevant knowledge and skill that he possesses by reason of his profession, business and calling, that he ought to possess.

11. In further answer to paragraphs 63, 67, and 74(a)-(c) of the Claim, Ellement says that operational policies and procedures were developed with respect to the investments, including, but not limited to, derivative investments. While Ellement did not play a role in the development of such procedures, a document entitled "Statement of Investment Policies and Goals for the Participating Co-operatives of Ontario Trusteed

Pension Plan” was approved and adopted at a meeting of the Board of Trustees of the participating Co-Operatives of Ontario Trusteed Pension Plan Trust Fund held on June 19, 1995. This document defined the risk considerations, performance measurement, and investment guidelines, which were applicable to derivative investments and alternative investments.

12. In further answer to paragraphs 68 and 69 of the Claim, Ellement says that if the Co-Op Trustees received the warnings from the Fund’s auditor as alleged, and failed to act on said warnings, then the Co-Op Trustees and their investment consultants and asset manager are responsible for any losses alleged in the reduction of Plan members’ pension benefits provided for under the Plan or for any increased contributions for active employee Plan members which may have been required to provide said Plan benefits due to any such alleged investment losses.

13. In further answer to paragraphs 94-112 of the Claim, Ellement denies that he failed to calculate, pay and administer Plan benefits in accordance with the Plan text and applicable Plan documentation and rules, and in particular denies involvement in any alleged recent reduction in the accrued invested pension entitlements of a number of certain retired and former plan members. This part of the Claim, as it pertains to actuaries, is only applicable to the Defendants Anthony F. Cooper and Anthony F. Cooper Actuarial Services Limited (together “Cooper”).

14. In further answer to paragraphs 102-104 of the Claim, Ellement says that Plan design consulting was not part of Ellement's role *vis a vis* the Plan. However, in any event, the Plan text document in section 10(i) did permit a member, who had terminated employment with his participating Co-op, and who was not immediately re-employed with a successor Co-op, to transfer out the commuted value of his deferred pension to an insurance company to purchase a life annuity. Also, if the subsequent termination from a successor Co-op occurred, then the commuted value of his deferred pension could be transferred out at that time.

15. In further answer to paragraph 104 of the Claim, Ellement says that if the Co-Op Trustees had adopted the immunization alternative, as stated in paragraph 6 above, the assets of the Plan could have been preserved in whole or in part.

16. In further answer to paragraphs 94-116 of the Claim, Ellement says that the allegations in the Claim conflate the actions of Ellement and the Company with the actions of Cooper. Such actions are not the same and were not associated with each other.

17. In further answer to paragraphs 111-116 of the Claim, Ellement denies that he was an agent of the Co-Op Trustees or accrued significant professional fees. Ellement says further that he was not negligent, careless, reckless, or in a breach of any duty or contractual obligation, in any way, whatsoever.

18. In further answer to paragraphs 111-116 of the Claim and to the Claim as a whole, Ellement says that the allegations of the Plaintiffs attribute a breadth of scope of duties and responsibilities to Ellement which, at all material times, did not exist. Ellement was not a “decision maker” who had any influence over the direction of the Plan and the Fund. He had a very limited and narrow set of duties and responsibilities which, at all material times, he executed in a manner above legal reproach. Furthermore, the heart of the allegations in the Claim centre around events that occurred after May 1, 1996, when Ellement ceased to be involved in any material way with the Plan and the Fund as an employee or otherwise.

19. In further answer to paragraph 116 of the Claim and to the Claim as a whole, Ellement denies that he would have owed the obligation to warn as alleged, or at all. In the alternative, Ellement says that if he owed the obligation to warn as alleged, which is denied, he did warn the Plaintiffs, the Co-Op Trustees, Workman and Robert Bethune, who was the investment manager of the Plan and the Fund while Ellement and the Company were involved with the Plan and the Fund, and all readers of the 1994 and 1995 actuarial valuation reports, that the results of the investment strategy adopted by the Co-Op Trustees on the advice of their investment consultants and asset manager were that the Fund incurred certain losses and diminution in the value of the Plan assets, which was clearly and discretely articulated in said reports. Furthermore, the Plaintiffs through the Co-Op Trustees and their advisors were advised by Ellement and the Company of the efficacy of protecting the assets of the Plan and the Fund through an immunization of the Plan as more particularly referred to in paragraph 6 above.

20. In further answer to paragraph 116 of the Claim, Ellement denies that he was aware of the Fund's auditor's concerns in 1997, not having been involved in the Plan or the Fund in 1997, but says in any event, his reports and warnings as set out in paragraphs 7 and 19 above, were not inconsistent with or unrelated to the auditor's warnings.

21. In further answer to the Claim as a whole, Ellement denies that the rate of return on the Plan's assets between 1994 and 2000 was significantly worse than the rate of return experienced by other investors, including other pension plans during that period. Ellement denies that the Plaintiffs have suffered the losses alleged, or at all, and puts the Plaintiffs to strict proof thereof. Furthermore, and in the alternative, Ellement says that, if any losses alleged to have been suffered by the Plan or by the Plaintiffs occurred, which is denied, then they are not as a result of any breach of duty or contractual obligations by Ellement.

22. In further answer to the Claim as a whole, Ellement says that the Fund was in a financially healthy surplus position on both a "going concern" and "solvency" basis, when Ellement and the Company stopped providing services to the Co-Op Trustees and to the Fund. Thus, at all material times, when Ellement and the Company were involved with the Plan, no losses were suffered by the Plaintiffs and the Plan and the Fund were in a position to provide the Plaintiffs and Class members with the pension benefits obligated to be paid under the Plan.

23. Accordingly, Ellement submits that the Plaintiffs' claim as against him be dismissed with costs on a fully indemnified basis.

CROSSCLAIM

24. Ellement claims as against the co-defendants Michael Barrett, John Rebry, Lloyd Crawford, William Demerling, Claude Gauthier, Clare Hayes, Jim Madill, Michael Stevens, Brian Ashford, John Black, John Hill, Charles MacDaid, Joseph Martin, June McFarlane, Larry Melnyk, John Stafford, as Trustees of the Plan, The Canada Trust Company, CIBC Mellon Trust Company, CIBC Mellon Global Securities Services Company, Canadian Imperial Bank of Commerce, Workman, Mark Edward Workman carrying on business as Whittacat Consulting Associates, Whittacat Holdings Ltd., and Cooper:

- (a) contribution, indemnity and other relief over in respect of any damages and costs to which Ellement may be found liable with respect to the plaintiffs;
- (b) costs in defending the main action herein;
- (c) costs of this crossclaim; and
- (d) such further and other relief as this Honourable Court may deem just.

25. Ellement repeats and relies upon the statements contained in the Statement of Defence herein.

26. Ellement states that if the plaintiffs sustained the damages alleged in the Claim and if such damages were caused or contributed to by the conduct of Ellement as alleged in the Claim, which is denied, then Ellement is entitled to contribution, indemnity and other relief over from the co-defendants.

27. Ellement pleads and relies upon the provisions of the *Negligence Act*, R.S.O. 1990, C.N.1.

28. Ellement asks that this crossclaim be tried together with the main action.

April 1, 2004

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Court File No. 03-CV-244195CP

MARSHA MARTIN and FERN CAMIRAND
Plaintiffs

v.

MICHAEL BARRETT et al
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

(Proceeding commenced at Toronto)

STATEMENT OF DEFENCE OF
THE DEFENDANT LOUIS ELLEMENT

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