

**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 OF
THE DEFENDANTS TURNBULL AND TURNBULL LTD. and
THE ESTATE OF JOHN A. TURNBULL, deceased**

1. Turnbull and Turnbull Ltd. (the "Company") and the Estate of John A. Turnbull, deceased ("Turnbull") admit the allegations contained paragraphs 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, these Defendants deny each and every allegation in the Claim. Specifically, these Defendants deny 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 these Defendants and further deny that the Plaintiffs are entitled to the relief claimed in paragraph 1 of the Claim or any relief at all from these Defendants.

3. These Defendants have 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 and to paragraph 36 of the Claim, the Defendants say that the Company was not a going concern business from 1998 onwards, and was effectively dissolved in or about May 17, 2002. The Company has no assets. Therefore, the Company is in no way liable for any of the acts, errors and

omissions alleged as against it. Further, John A. Turnbull personally was not involved with the Plan and the Fund beyond 1996, and did not carry on any actuarial services beyond 1997. He died on August 31, 2002. Turnbull is wound up and has no assets. In the premises Turnbull has no liability for the acts, errors and omissions alleged in the Claim.

5. In further answer to paragraph 4 of the Claim and to the Claim as a whole, these Defendants deny that they adopted an inappropriate and aggressive investment strategy for the Fund, including, but not limited to the purchase of the “protection contracts” based on derivative investments. The Company possessed no power or authority to “adopt” an investment strategy on behalf of the Co-Op Trustees of the Fund. Such power and authority to “adopt” an investment strategy was vested entirely with the Co-Op Trustees and others, including the Defendant Mark Edward Workman (“Workman”) and Robert Bethune, who was an investment consultant engaged by the Co-Op Trustees when the Company provided services for the Plan and the Fund.

6. In further answer to paragraph 4 of the Claim and to the Claim as a whole, these Defendants say that the 1994 and 1995 actuarial reports, which were prepared by the Company and co-signed by the Defendant Louis Ellement (“Ellement”) and John A. Turnbull, reported on the failure of the investment strategy chosen by the Co-Op Trustees. Moreover, in the 1994 actuarial valuation report an alternative investment strategy was suggested by the Company. Specifically, the report suggested that there be an “immunization” of pension liabilities in respect of pensioners (which constituted

approximately 57% of total liabilities). Such immunization could have taken the form of the investment in long term bonds. That suggestion was ignored or dismissed by the Co-Op Trustees and their investment advisors. Furthermore, these Defendants adopt the facts set out in paragraph 7 of the Ellement Statement of Defence and Crossclaim.

7. In further answer to paragraph 36 of the Claim, these Defendants say that the last actuarial valuation report prepared for the Co-Op Trustees by the Company covered the year ending September 30, 1995, and was signed in January, 1996. Thereafter, the services of the Company provided to the Co-Op Trustees and the Plan were limited to administrative services. Administrative Services included such services as interpreting specific benefits and a plan text, formulating factors, and calculating lump sum pay-outs based on such factors. At some point after January 1996, the Defendant Anthony F. Cooper and Anthony F. Cooper Actuarial Services Ltd. (together "Cooper") formally took over the provision of all relevant actuarial services for the Co-Op Trustees and the Plan. Accordingly, neither the Company nor Turnbull can be held in any way responsible or liable for such actions, errors, or omissions that occurred upon Cooper becoming involved in the provision of actuarial services for the Co-Op Trustees and the Plan.

8. In further answer to paragraphs 48, 72 and 73 of the Claim, these Defendants say that they do not owe a fiduciary duty to the Plaintiffs and the Class members as alleged, or at all. In the alternative to the above, if these Defendants do owe such a fiduciary duty, which is denied, they discharged that duty without breach. The Company 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 they possess by reason of their profession, business and calling, that they ought to possess.

9. In further answer to paragraphs 63, 67 and 74(a)-(c) of the Claim, the Defendants deny that proper operational policies were not developed with respect to these investments, including, but not limited to, in respect of derivative investments. The responsibility to implement such policies and procedures lay with the Co-Op Trustees. In any event, 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 Trusted Pension Plan Trust Fund held on June 19, 1995. This document specifically provides guidelines and policies with respect to derivate instruments.

10. In further answer to paragraphs 68 and 69 of the Claim, these Defendants state that, if the Co-Op Trustees received the warnings from the Fund's auditor as early as 1997 of the dangers of pursuing an investment strategy based on derivatives and "protection contracts" as alleged, and failed to act on said warnings, then the Co-Op Trustees and their investment consultants and asset manager are responsible for the losses alleged, if any, in the reduction of pension benefits obligated to be paid under the Plan to Plan members or for any increase in contributions required, as alleged. In any event, given that the Company did not provide actuarial services to the Co-Op Trustees

beyond 1996, Turnbull was in no position to advise the Co-Op Trustees, or otherwise to act upon any such auditor's warnings.

11. In further answer to paragraphs 94-112 of the Claim, these Defendants deny that the Company failed to calculate, pay and administer plan benefits in accordance with the Plan text and applicable Plan documentation and rules, and in particular unreasonably reduced the accrued invested pension entitlements of a number of certain retired and former Plan members. This part of the Claim is only applicable to Cooper.

12. These Defendants adopt the facts set out in paragraphs 14 and 15 of the Ellement Statement of Defence and Crossclaim.

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

14. These Defendants say that were not negligent, careless, reckless, or in breach of any duty or contractual obligation, in any way, whatsoever.

15. In further answer to paragraphs 94-116 of the Claim, these Defendants say the allegations in the Claim conflate the actions of the Company and the actions of Cooper. They are not the same. Such actions are not the same and were not associated with each other.

16. These Defendants adopt the facts set out in paragraphs 19 and 20 of the Ellement Statement of Defence and Crossclaim.

17. In further answer to the Claim as a whole, these Defendants deny 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. These Defendants deny that the Plaintiffs have suffered the losses alleged and put the Plaintiffs to strict proof thereof. Furthermore, or in the alternative, these Defendants deny that any losses suffered by the Plan or by the Plaintiffs are the result of the any breach of duty or contractual obligations on the part of these Defendants.

18. Accordingly, these Defendants submit that the Plaintiffs' claim as against them be dismissed with costs on a full indemnity basis.

CROSSCLAIM

19. These Defendants claim 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 these Defendants 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.

20. These Defendants repeat and rely upon the statements contained in the Statement of Defence herein.

21. These Defendants state 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 these Defendants are entitled to contribution, indemnity and other relief over from the co-defendants.

22. These Defendants plead and rely upon the provisions of the *Negligence Act*, R.S.O. 1990, C.N.1.

23. These Defendants ask that this crossclaim be tried together with the main action.

April 1, 2004

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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 DEFENDANTS TURNBULL AND TURNBULL LTD.
and THE ESTATE OF JOHN A. TURNBULL, deceased

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