

CITATION: Lubus v. Wayland Group Corp., 2022 ONSC 5148
COURT FILE NO.: CV-21- 00661981
DATE: 20220912

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JONATHAN A. LUBUS, MARCO STAJIC, MORDECAI BOBROWSKY, and
KYLE YAMAMURA, Plaintiffs

– and –

WAYLAND GROUP CORP., BENJAMIN ALLAN WARD,
CANACCORD GENUITY CORP., and GMP SECURITIES L.P., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Andrew Morganti and Albert Pelletier*, for the Plaintiffs

Gary Luftspring and Marcus Knapp, for Guarantee Company of North America

Gillian Dingle and Craig Gilchrist, for the Defendants, Canaccord Genuity Corp.
and GMP Securities L.P.

Roderic McLauchlan and Julia Vizzaccaro, for Starstone Insurance

HEARD: September 12, 2022

ENDORSEMENT

[1] The Guarantee Company of North America (“GCNA”), which is the insurer of the Defendants, Wayland Group Corp. (“Wayland”) and Benjamin Allan Ward (“Ward”), has brought a motion to appoint a litigation guardian for Wayland and/or for leave to intervene in this action as an added party. Wayland is insolvent and Ward has vanished. In its motion, GCNA also seeks to set aside the noting in default of Wayland for the purposes of allowing a defence to be delivered.

[2] Despite being notified of this claim at an early stage and, indeed, participating through counsel in the initial case conference for the action held a year ago, GCNA has brought its motion on short notice. The motion record was only served this past Thursday. Counsel for GCNA submits

that there have been coverage issues between GCNA and its insureds which go some way to explaining the delays that have occurred.

[3] There is a long and complicated history between the parties. For one thing, this action has been preceded by (and to some extent has run parallel to) a proceeding under the *Companies' Creditors Arrangement Act* ("CCAA") in respect of Wayland. I reviewed some of that history in my reasons for judgment in a recent motion brought by the underwriters of Wayland: see *Lubus v. Wayland Group Corp.*, 2022 ONSC 4606.

[4] Counsel for the Plaintiffs has expressed understandable frustration at having to seek an adjournment, but the short notice has compelled them to do so. Plaintiffs' counsel indicates that they will be filing a substantive response to GCNA's motion and may also seek to cross-examine GCNA's affiant.

[5] Plaintiffs' counsel's frustration is compounded in this case, as their forward movement has been slowed in numerous respects since the inception of the action. They have advised the court that many of Wayland's shareholders that are potentially members of the class of claimants have contacted them about the progress of the claim.

[6] In fact, until being served with GCNA's motion record this past week, Plaintiff's counsel were preparing to use today's court time to argue their motion under s. 138.8 of the Ontario *Securities Act* ("OSA") for leave to proceed with their secondary market cause of action. Since Wayland has been noted in default, that motion was predicted to take less than a full day and to be relatively straightforward.

[7] As discussed with counsel in court this morning, the leave to proceed motion cannot take place in advance of the GCNA motion. If the GCNA motion is successful, there may be new counsel appointed to defend Wayland, and they will then be participants in the motion for leave to proceed. The defence may change in significant ways in that case and the leave motion may become more protracted.

[8] Of course, if GCNA is not successful in its motion, the motion for leave to proceed can take place thereafter on the same basis as if it had been argued today. That eventuality will have to be addressed in an argument for costs at the relevant time.

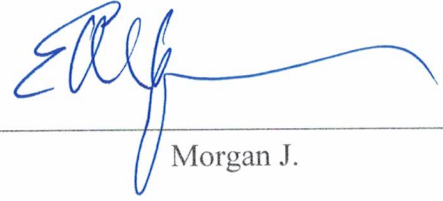
[9] GCNA's motion is adjourned to December 13, 2022. The costs of today's adjournment of that motion are reserved to that date.

[10] The Plaintiff's motion for leave to proceed under s. 138.8 of the OSA is adjourned to April 3, 2023. The costs of today's adjournment of that motion are reserved to that date.

[11] The Plaintiffs have indicated that there may be one or more other procedural motions brought in the interim. Some of these apparently relate to evidence which has come to light in the course of the CCAA proceedings, the production of which the Commercial List judge has deferred to further determination in this action.

[12] I will leave it to counsel to communicate with each other and with my assistant if any further motions need to be scheduled.

Date: September 12, 2022



Morgan J.