

CANADA / JUDGMENT

iAnthus Capital Holdings, Inc. (Re)

2020 BCSC 1484

COURT

Supreme Court of British Columbia

DECIDED

5 October 2020

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2020 BCSC 1484 iAnthus Capital Holdings, Inc. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

iAnthus Capital Holdings, Inc. (Re),

2020 BCSC 1484

Date: 20201005

Docket: S207785

Registry: Vancouver

In the Matter of Part 9, Division 5, Section 291

of the Business Corporations Act, S. B.C. 2002, c. 57, as amended

And:

In the Matter of a Proposed Arrangement of iAnthus Capital Holdings, Inc. and iAnthus Capital Management, LLC, and Involving S8 Rental Services, LLC, MPX Bioceutical ULC, Bergamot Properties, LLC, iAnthus Holdings Florida, LLC, Growhealthy Properties, LLC, Fall River Development Company, LLC, CGX Life Sciences Inc., GTL Holdings, LLC, iAnthus Empire Holdings, LLC, Ambary, LLC, Pakalolo, LLC, iAnthus Arizona, LLC, S8 Management, LLC, Scarlet Globemallow, LLC, GHIA Management, Inc., McCrory's Sunny Hill Nursery, LLC, IA IT, LLC, Pilgrim Rock Management, LLC, Mayflower Medicinals, Inc., IMT, LLC, Greenmart of Nevada NLV, LLC, iAnthus New Jersey, LLC, IA CBD, LLC, Citiva Medical, LLC, Grassroots Vermont Management Services, LLC, and FWR, Inc.

And

iAnthus Capital Holdings, Inc. and iAnthus Capital Management, LLC

Petitioners (Respondents)

And

Walmer Capital Limited, Island Investments Holdings Limited

and Alastair Crawford

(Applicants)

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

In Chambers

Counsel for the Petitioners, iAnthus Capital Holdings, Inc. and iAnthus Capital Management, LLC, appearing by teleconference:

J. Levine

Counsel for Senvest Master Fund, LLP. and other unsecured debenture holders, appearing by teleconference:

M. Buttery, Q.C.

Counsel for Gotham Green Partners, a secured debenture holder, appearing by teleconference:

R. Schwill

Counsel for Oasis Investments II Master Fund Ltd., appearing by teleconference:

E.N Kolers

Counsel for the Respondents, Walmer Capital Limited, Island Investments Holdings Limited and Alastair Crawford, appearing by teleconference:

B. Roberts Jones

Counsel for Blue Sky Realty Corporation, appearing by teleconference:

H. Davarinia

Counsel for Sean Zaboroski, appearing by teleconference:

M. Singh

Place and Date of Hearing:

Vancouver, B.C.

October 1, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2020

Overview

- [1] This is the second application by the petitioners ("iAnthus") to approve a plan of arrangement (the "Plan") under the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. The first application failed because I did not accept the terms of a release and injunction contained in the Plan. I found that, apart from the release and injunction, the Plan was fair and reasonable and ought to be approved. iAnthus has narrowed the scope of the release and eliminated the injunction in a revised plan of arrangement (the "Revised Plan") that it now asks me to approve.
- [2] These reasons should be read in conjunction with my earlier decision indexed at 2020 BCSC 1442. In these reasons, I will only address matters canvassed in my earlier decision to the extent necessary to explain my reasoning.
- [3] The Plan was made pursuant to a Restructuring Support Agreement (the "RSA") negotiated between iAnthus and its secured and unsecured noteholders. It provides for the noteholders to give up some of the money owed to them in exchange for 97.25% of the company's equity.
- [4] The possibility of this further application was contemplated in my earlier reasons. I stated, at para. 99:

It is possible that iAnthus and the noteholders may agree to amend the plan to narrow the release and injunction to the point of acceptability. To preserve that possibility, I do not dismiss the petition. I grant iAnthus liberty to apply, if it thinks fit, on the basis of an amended plan of arrangement. I am seized of any further applications in this matter.

- [5] On receipt of my decision, iAnthus and the noteholders negotiated the Revised Plan.
- [6] At the first hearing, three counsel appeared for parties objecting to the Plan. These objectors all represented persons who are suing iAnthus and persons associated with iAnthus. Two of the objectors still maintain their objections. They are Walmer Capital Limited, Island Investments Holdings Limited, and Alastair Crawford (collectively, "Walmer") and Sean Zaboroski. The third, Blue Sky Realty Corporation, does not oppose the Revised Plan.
- [7] The Revised Plan addresses points of concern specifically noted in my earlier decision (at paras. 58, 83, 85, 87, and 93-97). In particular, the release no longer bars claims of historical shareholders and no longer comprehensively protects historical shareholders, auditors, and iAnthus' agents generally.
- [8] Walmer and Mr. Zaboroski dispute my jurisdiction to consider the Revised Plan at all. They further maintain that the changes in the Revised Plan do not go far enough, the release remains one that cannot be legally justified under the BCA, and, because of the release, the Revised Plan is not fair and reasonable.

- [9] For the reasons that follow, I disagree. I have jurisdiction to consider and approve the Revised Plan. The narrower release contained in the Revised Plan is one authorized under the BCA. Taking into account the changes, in my view, the Revised Plan is fair and reasonable and should be approved by the Court.

Issues

- [10] In light of the objections raised by Walmer and Mr. Zaboroski, the issues are as follows:

- a) Have I jurisdiction to approve the Revised Plan?
- b) Is the release now proposed as part of the Revised Plan one legally justifiable under the BCA?
- c) Is the Revised Plan fair and reasonable?

Analysis

- a) Have I jurisdiction to approve the Revised Plan?
- [11] Sections 288 to 291 of the BCA establish the procedure for approval of a plan of arrangement, first by the parties directly concerned in it, and then by the court. As set out in my earlier reasons at paras. 16 to 19, in this case, creditor approval is required by s. 289(1)(d) of the BCA, and equityholder approval is required by an interim order that set the process in motion. Pursuant to s. 291(4) of the BCA, these steps have to precede court approval.
- [12] The equityholders approved the Plan as originally presented by a margin of approximately 66% to 34%. Walmer and Mr. Zaboroski maintain that, now that the Plan has changed, fresh shareholder or equityholder approval is required. I do not agree, for the following reasons.
- [13] In my view, the changes to the release are substantive but are not to the detriment of the shareholders (There are a few other changes to the Plan that are not substantive). That is, the shareholders or equityholders are no worse off being bound by the release now proposed than they would have been pursuant to the release that was contained in the Plan they approved by a significant majority.
- [14] The equityholders approved a Plan that expressly contemplated post-approval amendments by the parties to the RSA, acting together. Section 7.5(c) provides for amendments of an administrative nature, and s. 7.5(a) provides for more substantive amendments subject to certain protections for the equityholders. First, amendments under s. 7.5(a) must be approved by the court. Second, such amendments must be communicated to the noteholders and the shareholders in the manner required by the court. Section 7.5(a) of the Plan states:

the Petitioners reserve the right to amend, restate, modify and/or supplement this Plan at any time and from time to time, provided that (except as provided in subsection (c) below) any such amendment, restatement, modification or supplement must be contained in a written document

that is (i) filed with the Court and, if made following the Meetings, approved by the Court, (ii) agreed to by each of the [parties to the RSA], and (iii) communicated to the Secured Noteholders, Unsecured Debenture Holders and Existing Shareholders in the manner required by the Court (if so required).

- [15] In my view, the revisions to the release and related revisions in the Revised Plan fall within the scope of the amendment power preserved to iAnthus and the noteholders under s. 7.5(a) of the Plan. The equityholders must be taken to have contemplated amendments of the nature now presented, and their approval of the earlier version of the Plan continues to govern. Accordingly, I have jurisdiction to consider the revised Plan and approve it, if approval is legally and substantively justified.
- b) Is the release now proposed as part of the Revised Plan one legally justifiable under the BCA?
- [16] In my earlier reasons, I referred to the court's power under s. 291(4) to make "incidental, consequential and supplemental orders" and the decision in *Protiva Biotherapeutics Inc. v. Inex Pharmaceuticals Co.*, 2007 BCCA 161, aff'g 2006 BCSC 1729 [Protiva]. I concluded:
- [80] While Protiva makes it clear that the court's power to make "incidental, consequential and supplemental orders" may permit an order that would interfere with or impinge upon the rights of third parties to the arrangement, such an order can only be justified where it is truly ancillary and the substantive positions of third parties are protected.
- [81] Put another way, s. 291(4) does not afford the court a roving commission to limit the rights of third parties who are strangers to the arrangement in order that the company may be substantively protected from claims that were already in existence before the arrangement was proposed. That is not the purpose for which the arrangement procedure under the BCA was established, and it stretches the court's power to make ancillary orders for an arrangement beyond its proper bounds.
- [17] Walmer submits that the revised release amounts to a collateral attack on my earlier decision, because it continues to affect the rights of third parties to the Plan. An application expressly contemplated in a decision is not a collateral attack on the decision. The question is whether the revised application respects the legal reasoning underlying the decision.
- [18] Walmer's submission overstates my earlier legal reasoning. I did not hold that s. 291(4) of the BCA does not authorize orders that affect the rights of third parties. I noted that Protiva (a decision of the Court of Appeal) is authority to the contrary. The question is not whether third party rights are affected, but how they are affected, and whether an order approving a release is one that fairly falls within the scope of the authority conferred under s. 291(4) to make ancillary orders for the purpose of implementing an arrangement under the BCA.

The revised release

- [19] I summarized the essential elements of the original release at paras. 56 to 58 of my earlier decision. The release contained in the Revised Plan is narrower in scope. It no longer refers generally to shareholders, auditors, and agents. It remains a complicated and difficult provision to parse, requiring reference to defined terms and a statutory definition.
- [20] The release is found at s. 5.1 of the Revised Plan. Broadly speaking, it operates as follows.
- [21] Everything in the release is subject to a carve-out for "liabilities or claims attributable to such Released Party's gross negligence, fraud or wilful misconduct as determined by the final judgment of a court of competent jurisdiction following the exhaustion of all rights of appeal".
- [22] The revised Plan defines a pool of Released Parties. The pool includes persons who were directors or officers of iAnthus on April 6, 2020, at the start of the company's strategic review process, and well before the RSA and the Plan were conceived and negotiated. Notably, it includes Mr. Ford, the company's former president, who resigned on April 27, 2020 under a cloud emanating from his dealings with the lead secured noteholder, Gotham Green. It also includes the noteholders and legal and financial advisors who guided iAnthus through the strategic review process and development of the RSA, the Plan, and this legal proceeding.
- [23] Subsection 5.1(a) provides for the release of claims brought by anyone against any of the Released Parties in connection with the RSA, the Plan, and this legal proceeding. No one expressly takes objection to this. It provides a good example of a provision affecting third party rights that is clearly justified as an ancillary order serving the purposes of the BCA. It prevents claims that would amount to an attack on a process that took place largely under court supervision, resulting in a plan of arrangement judged fair and reasonable by the court.
- [24] Subsections 5.1(b) to (d) are less straight-forward.
- [25] Subsection 5.1(b) limits the ability of two groups of people to advance "Affected Equity Claims" against the Released Parties. As under the previous release, these are defined by reference to a definition in s. 2(1) of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-35. This definition encompasses a claim for "a monetary loss resulting from the ownership, purchase or sale of an equity interest" in iAnthus. The two groups are: (1) shareholders and equityholders who had an opportunity to vote on the Plan; and (2) Released Parties.
- [26] Subsection 5.1(c) limits the ability of the same two groups of people to advance claims against the Released Parties in connection with the notes (secured and unsecured) and other enumerated matters.

- [27] Subsection 5.1(d) limits claims for contribution or indemnity against a Released Party that could only be brought, as a practical matter, by a Released Party following a successful defence of a Released Claim. I am told that the provision is to foreclose claims for costs incurred in the defence.
- [28] In sum, the revised release broadly limits the rights of two groups of persons--Released Parties and existing shareholders--both of whom obtain some benefit under the Revised Plan. Released Parties obtain the benefit of the release and are burdened by it. Shareholders preserve an equity position that would be lost if the noteholders pursued their claims to be paid all they are owed (In argument, no one paid attention to the position of equityholders who are not also shareholders. It is unlikely that there are any).

Assessment

- [29] In contrast to the earlier version of the release, in my view, this is the kind of release that is, in principle, justifiable in the exercise of the court's power to make ancillary orders pursuant to s. 291(4) of the BCA.
- [30] As I commented in my earlier reasons at para. 11, the court's power to approve an arrangement is one that exists to provide a flexible tool to deal with corporate reorganizations generally. The court is engaged for the protection of shareholders and holders of corporate securities--that is, stakeholders--whose legal rights may be affected by the reorganization.
- [31] In this case, as in many other cases, the arrangement involves a reorganization of iAnthus' capital structure. The Plan will reduce iAnthus' debt and drastically change its shareholder base. The Plan is being funded by the noteholders. It is they who are giving up debt in exchange for equity. The objective of the arrangement is one contemplated by the statute. It enables the company to move forward towards profitability, freed of debt obligations it does not have the cash flow to service.
- [32] The release limits (although it does not eliminate) the exposure of iAnthus and persons associated with iAnthus to litigation that may enmesh the company and prejudice its ability to move forward following the restructuring. It does so in a targeted manner, because the parties who are bound by parts (b), (c), and (d) of the release are all persons benefitting from the Revised Plan. This is a benefit to the company associated with the revision of the capital structure I have described.
- [33] In my view, such a release can be imposed under s. 291(4) as an incident of the arrangement. An order approving this release is truly an incidental or supplementary order to further proper objectives of an arrangement under the BCA. It is a legally justifiable exercise of the court's power under s. 291(4) of the BCA.

- [34] That is not to say that the Revised Plan containing the release is necessarily fair and reasonable. A release imposed as an ancillary term of a plan of arrangement might engage a justifiable exercise of the court's authority yet go so far as to render the plan unfair and unreasonable. I turn now to that substantive question.
- c) Is the Revised Plan fair and reasonable?
- [35] Walmer maintains that the release wipes out its claim, or much of its claim, in an action against iAnthus and Mr. Ford that is pending in this Court. It points in particular to the protection afforded in relation to conduct that preceded the negotiation of the RSA. It observes that all the persons making up the Walmer group are Affected Equityholders who are bound by the release even in respect of claims they may have in other preceding capacities, such as shareholder, or creditor.
- [36] Mr. Zaboroski echoes these concerns, and submits that it is unfair to exclude claims in relation to the strategic review process, when those claims are being advanced in an action that has already been commenced.
- [37] I do not read the release as broadly as Walmer. In my view, it does not eliminate Walmer's claim to a secured interest in certain iAnthus assets (as described in para. 26 of my earlier reasons). Walmer's claim to a secured interest is not an "Affected Equity Claim" caught by part (b) of the release, and it is not one of enumerated categories of claim listed in part (c). On the other hand, Walmer has named Mr. Ford as a defendant in its lawsuit, and it is clear that the release limits Walmer's ability to pursue Mr. Ford for damages.
- [38] It is important to bear in mind that the effect of the release is attenuated by the carve-out of claims arising from gross negligence, fraud, or wilful misconduct attributed to a Released party. Walmer says that the carve-out is of little use to it. Mr. Ford was a fiduciary and Walmer submits that the claims for breach of fiduciary duty are excluded from the carve-out, and accordingly barred by the release.
- [39] I doubt that claims for breach of fiduciary duty, as a class, are necessarily barred by the release. Claims for breach of fiduciary duty bear, in the oft-cited words of Justice Southin (as she then was), "the stench of dishonesty"; *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.) at 362; *Meng Estate v. Liem*, 2019 BCCA 127 at paras. 33-34. It may not be difficult to characterize dishonest conduct in this sense as fraud or wilful misconduct, though much would depend on the facts. This is not a comment on Walmer's potential claims against Mr. Ford, which have not been described with specificity. The point is that the release is not absolute in nature.

- [40] Addressing Mr. Zaboroski's concern, from an analytical point of view, I do not think it matters whether claims eliminated by the release are ones that have already been advanced in an action or merely claims that could be advanced. To afford special status to claims that have already been advanced would reward the commencement of actions for tactical purposes in the face of a pending application to approve an arrangement, and penalize persons whose lawyers are not so aggressive.
- [41] The release must not be examined in isolation. The question is not whether it is a fair and reasonable release, but whether it is contained in a fair and reasonable Revised Plan. One must balance the benefits from the Revised Plan against the burdens associated with the release. One must evaluate the benefits and the burdens collectively, and not focus solely on the position of individual stakeholders in isolation, bearing in mind that individual circumstances will differ: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 148-149; *Protiva* at para. 21.
- [42] In my previous reasons, I reviewed the benefits of the Plan for existing shareholders. The benefits of the Revised Plan are the same and, in my view, they justify the burdens imposed on existing shareholders by the release.
- [43] The circumstances of "Released Parties" are disparate. All have been closely associated with iAnthus within the past six months, or were involved with the noteholders in connection with the RSA. Some receive significant benefits from the Revised Plan, and others will not. All receive the benefit of the release.
- [44] Taking everything into account, I find that the Revised Plan as a whole is procedurally and substantively fair and reasonable. To recapitulate, the Revised Plan offers substantial benefits to shareholders and was approved by a significant majority of shareholders. Its purpose is to effect a capital restructuring that will allow iAnthus to move forward towards profitability. The release is an ancillary order for the accomplishment of that purpose. Its effects are targeted and attenuated by the carve-out of claims for gross negligence, fraud, or wilful misconduct. The persons who are most likely to suffer adverse effects from the release also receive benefits under the Revised Plan, or the benefit of the release, or both.

Disposition

- [45] For these and my previous reasons, I allow the application and approve the Revised Plan. References to the Plan of Arrangement in the form of order submitted by iAnthus must be changed to references to the Amended and Restated Plan I have approved. The reference to "injunctions" in paragraph 7 of the form of order must be deleted.

"Gomery J."

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