

CANADA / JUDGMENT

Re iAnthus Capital Holdings, Inc.

2020 BCSC 1383

COURT

Supreme Court of British Columbia

DECIDED

4 September 2020

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2020 BCSC 1383 Re iAnthus Capital Holdings, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re iAnthus Capital Holdings, Inc.,

2020 BCSC 1383

Date: 20200904

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

(appearing by teleconference)

Oral Reasons for Judgment

In Chambers

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

V.L. Tickle

J. Levine

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

B. Roberts Jones

Counsel for the Attendees, Senvest Master Fund, LP, Senvest Global (KY) LP, Hadron Alpha PLC - Hadron Alpha Select Fund, and Hadron Healthcare and Consumer Special Opportunities Master Fund, appearing by teleconference:

H.L. Williams

Counsel for the Attendee, Gotham Green Partners, appearing by teleconference:

R. Schwill

Place and Date of Hearing:

Vancouver, B.C.

September 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 4, 2020

Introduction

- [1] THE COURT: On August 6, 2020, on the application of iAnthus Capital Holdings, Inc. ("iAnthus"), I made an interim order pursuant to s. 291 of the Business Corporations Act, S.B.C. 2002, c. 57 of British Columbia in connection with an arrangement proposed by iAnthus.
- [2] Consistently with the practice described in authorities such as *Re Pacifica Papers*, 2001 BCSC 701 at paragraph 36, the order was made ex parte. The interim order provides for meetings of noteholders and shareholders to be held on September 14, 2020, followed by a full hearing before me to address the fairness of the proposed arrangement and other statutory requirements on September 25, 2020.
- [3] The nature of this kind of interim order was discussed by Justice Fitzpatrick in *Mason Capital Management LLC v. TELUS Corporation*, 2012 BCSC 1582 at paragraphs 28 to 44. She emphasized that it is preliminary in nature and "simply sets into motion the process by which the arrangement, as proposed by the company, is to be considered by both the shareholders and the court" at paragraph 36. She held that substantive submissions as to the fairness of the arrangement and compliance with other statutory requirements should be deferred to the later hearing. She stated at paragraph 32:
- [32] . . . It is at the fairness hearing that the court must fully examine and determine whether the arrangement meets all applicable statutory requirements, including whether it constitutes an "arrangement", and whether it is procedurally and substantively fair and reasonable [citations omitted].
- [4] Walmer Capital Limited, Island Investments Holdings Limited, and Alastair Crawford are plaintiffs in an action against, iAnthus and others commenced in this Court in August 2019. They apply to set aside the interim order and, in the alternative, for other relief. The application is opposed by iAnthus and representatives of the unsecured and secured noteholders.

The application to set aside the interim order

- [5] The applicants submit that the interim order must be set aside because iAnthus obtained it without disclosing their intended opposition to the scheduling proposed by iAnthus. iAnthus accepts, as it must, that in seeking the order, it was subject to an obligation to make full and frank disclosure of all relevant facts that affect the outcome of the application. It maintains that it was under no obligation to bring to my attention correspondence received from the applicants' counsel, Ms. Roberts Jones, stating her intention to appear in court proceedings seeking approval of the intended arrangement and requesting notice of the scheduling of the application for the interim order.

- [6] What happened here is regrettable. Ms. Roberts Jones wished to participate at the stage of obtaining the interim order only to address scheduling, but she did not make that clear in her letter to iAnthus' counsel. In reply on behalf of iAnthus, Mr. Levine flatly refused the request to be advised of the scheduling of the application for the interim order and offered a reassurance that it was not anticipated that her client's claim would be affected by the arrangement plan. As it turns out, the plan now proposed does affect the applicants' claim.
- [7] Having filed its materials and obtained the interim order on August 6, iAnthus issued a press release on SEDAR addressing scheduling on August 7, but did not post the materials on SEDAR until August 17. It was not until then that Ms. Roberts Jones became aware of materials that could have been provided to her on August 6. This unnecessary delay has contributed to making it more difficult for her to prepare materials in a timely way for the fairness hearing on September 25, and it may make it more difficult for the issues to be fully ventilated at that time. I can see no good reason for this.
- [8] Having said that, having regard to the authorities, I do not think that iAnthus was required to involve the applicants in fixing the schedule, and I do not consider that iAnthus's failure to bring to my attention Ms. Roberts Jones's general request to be involved in seeking the interim order was a breach of her obligation to make full and frank disclosure on an ex parte application. I dismiss the order sought in paragraph 1 of the notice of application.

The application to vary the interim order

- [9] Alternatively, the applicants seek an order adjourning the substantive fairness hearing by one week from September 25, 2020, until a later date, giving them until October 2, 2020, to file responsive materials. iAnthus replies that the arrangement is being proposed pursuant to an agreement between the company and the noteholders that requires issuance of a final order approving the arrangement by September 28, 2020.
- [10] The September 28, 2020, deadline could be waived by the parties to the agreement, but there is certainly a risk that it would not be. Counsel for the noteholders have advised that the timing was heavily negotiated and that the adequacy of an interim financing arrangement is engaged. The applicants have not provided any evidence that they are unable to prepare for a hearing on September 25, 2020, or are otherwise prejudiced by the present timing. Ms. Roberts Jones tells me that her difficulty lies in obtaining an expert report addressing valuation issues. She has a concern with the timing, but cannot say that it is impossible that she will be able to proceed on September 25.
- [11] Weighing the potential prejudice to each side, the potential prejudice to iAnthus's shareholders from a collapse of the arrangement into a CCAA proceeding is heavier. The application for the order sought in paragraph 2 of the notice of application is dismissed.

The application for documentation underlying the fairness opinion obtained by iAnthus in connection with the arrangement

- [12] The proposed arrangement, if approved, will give the noteholders 95 percent of the equity, diluting the present equity holders to five percent of their present ownership interests. At the fairness hearing, I will have to consider whether this is substantively fair and reasonable. iAnthus and the noteholders justify it by referring to the company's present parlous financial position.
- [13] iAnthus has placed before the Court, the noteholders, and the shareholders, evidence of its current assets and liabilities. As I have already noted, the applicants are attempting to obtain expert valuation evidence. The purpose would presumably be to persuade me that the arrangement is not fair and reasonable. It may be that on receipt of such an opinion, iAnthus will wish to provide expert valuation evidence in reply. Given the timing, all this will occur at the eleventh hour before the hearing on September 25.
- [14] iAnthus's materials include a lengthy fairness opinion prepared by PwC, an independent firm of financial advisors. The opinion lists extensive materials reviewed by PwC and states its opinion that:
- . . . the Proposed Recapitalization Transaction is fair, from a financial point of view, for the Existing Common Shareholders.
- [15] This is, of course, an aspect of the question I will have to address at the fairness hearing.
- [16] The applicants seek to challenge PwC's opinion and seek the production of communications with PwC, material considered by a special committee of iAnthus's board, and "all other non-disclosed documents relating to the current value of iAnthus, including but not limited to all documentation provided to PwC."
- [17] I observe that this last request could potentially embrace the entirety of the company's financial records. It is unreasonably broad.
- [18] iAnthus objects to producing any of this material. It maintains that it is irrelevant. It submits, at paragraph 27 of its application response:

The Petitioners are not asking this court to rely upon or accept the conclusions in the Fairness Opinion as expert evidence. As stated in the Information Circular, the Fairness Opinion was prepared for the sole use of the Board and Special Committee as one factor among others to consider in deciding whether to approve the recapitalization transaction contemplated by the Arrangement and the Plan. It was included in the Information Circular to allow the shareholders to reach their own conclusions regarding the integrity of the directors' recommendations and regarding the fairness of the transaction to them from a market perspective.

- [19] The materials relied upon by PwC are clearly pertinent to the question I will have to address at the hearing on September 25; that is, whether the arrangement is substantively fair and reasonable. There is a marked information asymmetry between the applicants and iAnthus in that most of the material PwC reviewed is not available to the applicants.

- [20] The PwC report itself is also relevant and there is an artificiality to iAnthus's submission that it is only before the Court to satisfy me that the process has been fair and that its conclusion is irrelevant to what I have to decide. Even if iAnthus is not relying on the substantive conclusion stated in the report, an informed critique of the report authored by the applicants may be illuminating.
- [21] The circumstances before me are quite different from those addressed in *Re Bear Lake Gold Ltd.*, 2014 ONSC 3428 at paragraph 15, and *Re Patents Royal Host Inc.*, 2014 ONSC 3323 at paragraph 8. In these cases, the court was concerned with whether a fairness opinion had failed to comply with the rules pertaining to the admissibility of expert evidence to be included in the materials before the court. The court was not being asked to address the use that might be made of such a report, perhaps by a respondent opposing approval of the arrangement at the contested fairness hearing.
- [22] In my view, fairness requires that the applicants be afforded a reasonable opportunity, consistent with the constraints imposed by the need to deal with this matter expeditiously, to review and bring forward at least some of the material they seek and offer an informed critique of the conclusion stated in the PwC report.
- [23] Concerning the order sought in paragraph 3 of the notice of application, I order iAnthus to produce to the applicants, to the extent that they are not already public, the retainer agreement between PwC and iAnthus, the documents listed at page 10 of the fairness opinion, and all correspondence between PwC and iAnthus, including its agents, advisors, and the special committee.

The application for documentation relating to an investigation of iAnthus's former Chief Executive Officer Hadley Ford

- [24] On April 27, 2020, iAnthus issued a press release announcing that it had determined that Mr. Ford had acted improperly by borrowing money from a manager of iAnthus's senior secured lender, Gotham Green Partners ("Gotham Green"). The loans were made only a day after a financial transaction was concluded between Gotham Green and iAnthus. The press release reported that the transactions were investigated by a special committee of the board. Mr. Ford had resigned.

- [25] The press release stated:

The Special Committee did not find a basis to conclude that Ford's conduct in the face of the potential or apparent conflict impacted the terms, timing, or negotiations the Company had with the related-party or the non-arm's length party. Nevertheless, the Special Committee concluded, and the Board accepted, that the failure to disclose such personal loans to the Board was a breach of the Company's conflict policies and other obligations as an officer and director of the Company.

- [26] The applicants seek production of documents pertaining to the special committee investigation. iAnthus objects that this material is irrelevant to the matters to be addressed at the fairness hearing.
- [27] The proposed arrangement includes a release to be given effect by court order that would have the effect of protecting the secured noteholders, including Gotham Green, from any liability they might have to the applicants. Gotham Green is not named as a defendant in the applicants' action, which was brought before the events of April 2020, though Mr. Ford is named as a defendant. However, Ms. Roberts Jones submits that iAnthus has preferred the interests of Gotham Green over the interests of the applicants who were themselves debenture-holders, and that the arrangement is tainted thereby.
- [28] The fairness and reasonableness of the arrangement, in spite of the release, will certainly be an issue at the hearing of September 25.
- [29] Having regard to the applicants' allegations concerning the role of Gotham Green, the circumstances of Mr. Ford's departure, the broad releases sought by court order as a part of the arrangement, and the information asymmetry present in this case, I think it is fair that the applicants should have access to the agendas, minutes, materials provided to the special committee in connection with the investigation referenced at the press release of April 27, 2020. I order iAnthus to produce this material to the applicants.

Confidentiality

- [30] Ms. Roberts Jones has advised that she will be prepared to receive any materials ordered produced to her on reasonable terms to preserve any necessary confidentiality. Ms. Tickle did not address this point in her submission. If counsel are not able to agree on terms to protect the confidentiality of materials provided to the applicants pursuant to this order, I give iAnthus leave to apply to me to settle the terms of the appropriate order. If there is some dispute in this regard, it should not be a cause for delay in providing the materials.
- [31] Counsel, is there anything arising?
- [32] I am going to take that as a no.
- [33] MS. ROBERTS JONES: I forgot it was on mute, my apologies. My Lord, could we -- could we address a schedule for the delivery of the ordered documentation, please?
- [34] THE COURT: That is Ms. Roberts Jones?
- [35] MS. ROBERTS JONES: Yes, sir.
- [36] THE COURT: Ms. Tickle, are you there?
- [37] MS. TICKLE: Yes, My Lord, I'm here.
- [38] THE COURT: How long do you think you need to provide this material?

- [39] MS. TICKLE: I might need a moment to obtain some instructions from my colleagues who have more familiarity with the actual documents, if I could seek the court's indulgence on that?
- [40] THE COURT: Yes, of course.
- [41] MS. TICKLE: Thank you.
- [42] MR. LEVINE: My Lord, it's Jeff Levine appearing with Ms. Tickle. I might offer a suggestion.
- [43] THE COURT: Yes.
- [44] MR. LEVINE: Perhaps -- though I think the next steps would be -- pardon me -- for us to confer with, number 1, Canaccord and PwC, and second, with our client, get an assessment of just how quickly this can reasonably be pulled together, and then we'll -- as soon as we have that, I expect very early next week, we'll be -- we'll reach out to Ms. Roberts Jones, and should there be any -- should she take any issue with the timing upon which we propose to deliver the material, we'll come to see you, but hopefully we can work it out.
- [45] THE COURT: Ms. Roberts Jones, is that acceptable to you?
- [46] MS. ROBERTS JONES: Yes, it is, My Lord.
- [47] THE COURT: Very well, we will leave it on that basis that there will be liberty to apply if there is some dispute as to the timing of delivery.
- [48] MS. ROBERTS JONES: Thank you.
- "Gomery J."

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