IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Re iAnthus Capital Holdings, Inc.,*
2020 BCSC 1442

Date: 20200928
Docket: S207785
Registry: Vancouver

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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, GHHIA 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

And

Walmer Capital Limited, Island Investments Holdings Limited and Alastair Crawford

Respondents

And

Blue Sky Realty Corporation

Respondents

And

Sean Zaboroski

Respondent

In Chambers

Corrected Judgment: The front page of the judgment was corrected on October 6, 2020.

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. September 25, 2020
Place and Date of Judgment:	Vancouver, B.C. September 28, 2020

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Introduction

[1] The petitioners ("iAnthus") are a publicly-traded cannabis company and a wholly-owned subsidiary that has issued secured debt instruments. There are a host of other subsidiaries identified in the style of cause. Collectively, iAnthus and its subsidiaries grow, process, and distribute cannabis products throughout the United States.

[2] While iAnthus' operates in the United States, it is incorporated pursuant to the *Business Corporations Act*, SBC 2002, c. 57 [*BCA*], and its shares trade on the Canadian Securities Exchange.

[3] iAnthus owes money under both secured and unsecured debentures. In early 2020, it ran short of cash and missed an interest payment, resulting in cross-defaults under all the debentures. A special committee of iAnthus' board entered into negotiations with the debenture holders. This led to an agreement, the "Restructuring Support Agreement" or "RSA", on July 10, 2020, between iAnthus, all of the secured noteholders, and the holders of 91% of the indebtedness under the unsecured notes.

[4] The RSA contemplates a restructuring of iAnthus by way of a plan of arrangement to be approved by the Court pursuant to s. 291 of the *BCA*. The face amount owing to the noteholders would be reduced from US$168.7 million (excluding fees and accrued and unpaid interest) as of June 30, 2020, to US$121.4 million, a reduction of 28%. The noteholders also made concessions as to the interest rate payable and other matters. The secured noteholders calculate that the total value of their concessions is US$33 million. The unsecured noteholders calculate that they are giving up US$45 million. In exchange, the noteholders would obtain 97.25% of the outstanding common shares of iAnthus, split evenly between the secured and unsecured noteholders. The present holders of common shares will be reduced to a 2.75% interest in the equity.

[5] The arrangement includes a broadly drafted release that would have the effect of immunizing iAnthus and persons presently or formerly associated with

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iAnthus from claims advanced in several securities class actions and a similar action brought by a holder of unsecured debentures that is also a shareholder. The claims allege that iAnthus was party to false and misleading statements to investors. The release would not bar claims for gross negligence, fraud, or wilful misconduct, but it would exclude claims in contract or for negligent misstatement.

[6] The RSA contemplates that if the arrangement is not approved by the court under s. 291, it will be effected through an equivalent plan of compromise and arrangement under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-35 [*CCAA*], except that the existing shareholders will receive nothing.

[7] On August 6, 2020, on iAnthus's application, I made an interim order pursuant to s. 291 of the *BCA* providing for meetings of noteholders and shareholders that have now taken place. The matter comes back before me to address the fairness of the proposed arrangement and the other statutory requirements under s. 291. iAnthus asks me to find that the arrangement is fair and reasonable, and to approve it.

[8] The order sought by iAnthus includes a permanent injunction enjoining "all persons" from advancing any of the released claims.

[9] The noteholders unanimously approved the arrangement at the noteholders' meetings and they ask me to find that it is fair and reasonable and approve it.

[10] The application is opposed as follows:

- Walmer Capital Limited, Island Investments Holdings Limited and Alastair Crawford (collectively, "Walmer") are plaintiffs in a pending action against iAnthus and present and former directors of iAnthus. They object that iAnthus has not brought forward the application in good faith, and has not established that the arrangement is substantively fair and reasonable. They object that the release will prevent them from pursuing the officers and directors and, by extension, their insurer.

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- Blue Sky Realty Corporation ("Blue Sky") is the plaintiff in one of the class actions. It objects that the release and injunction are overbroad.

- Sean Zaboroski is the plaintiff in a proposed class proceeding commenced in Ontario just days ago, in which he claims as a holder of 1.25 million common shares on behalf of all shareholders who are not also debenture-holders. He objects that the arrangement is unfair in the reduction of the shareholders' equity to 2.75% and in that it restricts their legal remedies against the persons allegedly responsible for the company's poor financial position.

Legal framework

[11] The court's power to approve an arrangement is statutory; it is conferred by s. 291 of the *BCA*. The power exists to provide a flexible tool to deal with corporate reorganizations generally; *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69 [*BCE*] at paras. 123-128. The court is engaged for the protection of shareholders and holders of corporate securities whose legal rights may be affected by the reorganization; *BCE* at paras. 130-135.

[12] While the release sought as a part of the arrangement raises distinct legal problems, the essential legal framework governing the exercise of the court's power under s. 291 was settled by *BCE*. Although that case involved an arrangement proposed pursuant to the *Canada Business Corporations Act* R.S.C. 1985, c. C-44 [*CBCA*], its principles are regularly applied in connection with arrangements proposed under the *BCA*; *Re Telus Corporation,* 2012 BCSC 1919 at para. 6; Re *First Bauxite Corporation*, 2019 BCSC 89 [*First Bauxite*] at para. 55.

[13] The *BCE* framework requires me to ask:

1. Have the statutory requirements been met?

2. Is the arrangement made in good faith?

3. Is the arrangement fair and reasonable?

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[14] Section 291(4)(a) of the *BCA* provides that, where the statutory requirements are satisfied, "the court may make an order approving the arrangement on the terms presented or substantially on those terms or may refuse to approve the arrangement". Section 7.5(a) of the plan of arrangement contemplates that it may be modified by the parties to the RSA following the shareholders' and noteholders' meetings, with the approval of the Court.

Analysis

[15] I will consider the arrangement without reference to the release and injunction and then return to the release and injunction afterwards. I will address the law bearing on the court's power to grant the release sought by iAnthus and the noteholders in that context.

Statutory requirements

[16] Section 288(2) of the *BCA* requires that an arrangement be adopted in accordance with s. 289. Subsection 289(1)(d) requires approval by the creditors by a majority in number and ¾ of the value.

[17] Pursuant to the interim order, three meetings were held on September 14, 2020. The secured noteholders were already party to the RSA. As expected, they approved the arrangement unanimously. So did the unsecured noteholders. This satisfied the requirement in s. 289(1)(d).

[18] The *BCA* only requires shareholder approval in the case of an arrangement proposed with the shareholders. The statute does not require shareholder approval in this case, because the proposed arrangement would not alter the legal rights of the shareholders, only their economic rights through dilution; *Re Telus Corp.,* 2012 BCSC 1919 at paras. 248-251.

[19] However, the interim order requires approval by a majority of all voting equityholders – that is, holders of shares, warrants, and option – excluding persons considered as related equityholders under securities legislation, and also approval by a majority of all voting equityholders, including related equityholders. This

requirement was included in the interim order to satisfy securities requirements and because shareholder approval informs the court's assessment of the fairness and reasonableness of the arrangement. Both thresholds specified in the interim order were satisfied: approximately 66% of non-related equityholders and 79% of all equityholders voted to approve the arrangement.

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[20] While Walmer's counsel does not press the point, its affiant, Mr. Crawford, objects that many of the votes cast by equityholders in favour of the arrangement were actually cast by management exercising proxies. Mr. Crawford's objection is grounded in inaccurate assumptions as to what occurred. I am not persuaded that the proxies were improperly obtained or exercised.

[21] I am satisfied that the statutory prerequisites to consideration and court approval of the arrangement are satisfied.

Good faith

[22] The arrangement is the product of arm-length negotiations between iAnthus, represented by its special committee, the secured noteholders and the unsecured noteholders. The special committee was assisted by counsel and a financial advisor. The negotiations resolved an immediate problem for iAnthus in that it was in default and, as of June 22, 2020, the secured noteholders had issued a demand letter giving notice of their intent to enforce their security. As part of the RSA concluded on July 10, 2020, the secured noteholders advanced interim financing of approximately $14.7 million so that iAnthus could continue operations until an arrangement could be implemented.

[23] iAnthus submits that it obtained, through difficult negotiations, a benefit for the shareholders in the form of a continuing 2.75% ownership interest in the company. It says this is a better result than any other possibility revealed through a strategic review process pursued by its special committee with the assistance of a financial advisor between April 6, 2020, and July 7, 2020. It submits that its efforts in this regard demonstrate its good faith.

[24] Walmer maintains that iAnthus is not putting forward the plan of arrangement in good faith because it will extinguish rights claimed by Walmer in its action against iAnthus before the action is determined. It relies on *Re Bravio Technologies Ltd.,* 2019 BCSC 2135.

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[25] In *Bravio,* a proposed arrangement involved an exchange of shares in Bravio for shares of another company. Objecting parties claimed to be entitled to have shares issued to them, and Bravio ignored their claim. The claim had apparent merit, and Bravio's only response was a bare denial. Approval of the arrangement before the question of the objectors' entitlement was resolved and would extinguish the claim. Justice Marchand held that the arrangement was not put forward in good faith.

[26] Walmer's claim derives from its interest in MPX, a company acquired by iAnthus through a plan of arrangement in early 2019. Walmer contends that MPX's obligations to it under debentures became obligations of iAnthus and have not been honoured. It says that it is entitled to a secured interest in certain iAnthus assets, and, through wrongful conduct, its interests have been subordinated to those of iAnthus' secured noteholders.

[27] This case is different than *Bravio* because this plan of arrangement would not extinguish Walmer's claim. While the release could well affect Walmer's claim for damages, the arrangement would not prevent Walmer from pursing its claim to enforce its rights under its debentures. iAnthus has not ignored Walmer's claim, but is defending it through the litigation process.

[28] I am satisfied that the arrangement is put forward in good faith in an attempt to resolve iAnthus' financial difficulties affecting all its stakeholders. It is not targeted at Walmer, nor does it unduly affect Walmer, in comparison to other shareholders.

Is the arrangement fair and reasonable?

[29] In assessing whether an arrangement is fair and reasonable, courts consider its business purpose and whether it resolves objections in a fair and balanced way;

First Bauxite, at para. 56. Approaching the matter in this way should not prevent the court from considering the question from all angles; fairness and reasonableness are broad, substantive, requirements. Prejudicial effect for some may be off-set by overall benefit; *BCE* at para. 145.

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[30] iAnthus submits that the arrangement has a business purpose, in that it will preserve some value for the shareholders in comparison to the alternative of a *CCAA* filing under which the existing equity will be eliminated. It submits that the negotiations that led to the RSA, support of a large majority of the noteholders, and lack of alternatives in the company's present financial circumstances are indicia of substantive fairness and reasonableness.

[31] I agree with iAnthus that the arrangement has a proper business purpose, namely, the resolving of the company's present financial difficulties and providing some value to shareholders. I turn to the resolution of objections.

[32] Walmer and Mr. Zaboroski submit that the process leading to the negotiation of the RSA was tainted such that I should not conclude that the arrangement provides fair value for the shareholders. iAnthus and the noteholders disagree. In essence, this is a debate about the value of the company. Is it worth as much or more than the amounts owed to the noteholders? iAnthus and the noteholders are asking me to infer the value of the company from the result of the negotiations, and the objectors are asking me to examine the process with a critical eye.

[33] iAnthus submits that I can take comfort from the approval of the arrangement by a strong majority of shareholders. Walmer objects that I cannot infer that the arrangement is fair and reasonable from the approval in the circumstances of this case.

[34] I do not have an affidavit from an expert as to the value of iAnthus. iAnthus' board obtained a fairness opinion from PwC, a large and respected firm. It concludes that the arrangement is fair, from a financial point of view, to the shareholders. However, the fairness opinion does not qualify as expert opinion

evidence. iAnthus does not rely on the substance of the opinion; it only puts it forward as evidence that the board approached the matter fairly. Accordingly, I find that the fairness opinion provides some evidence in support of the arrangement, but do not give it great weight.

Process leading to the negotiation of the RSA

[35] iAnthus defaulted on its obligations to the noteholders on April 3, 2020, and the board created the special committee on April 6, 2020. The special committee engaged Canaccord Genuity Corp. (“Canaccord”) to assist it in a strategic review process. The objective was to resolve iAnthus’ liquidity crisis by obtaining additional working capital. Through Canaccord, the special committee explored the possibility of selling off assets (subsidiaries), or bringing in an equity investor. It also negotiated with the secured noteholders, represented by Gotham Green Partners, and representatives of a group representing most of the unsecured debenture holders.

[36] Canaccord contacted 102 potential investors or buyers and entered into non-disclosure agreements with 55 of them. Letters of intent were received from 19, and 15 followed up by obtaining access to a data room maintained by Canaccord. Five toured iAnthus facilities. None of the letters of intent proposed a transaction that would provide more value to the shareholders than the RSA transaction the special committee has negotiated with the noteholders. The special committee and the board concluded that the RSA transaction reflects the true value of iAnthus and is in the company’s best interest.

[37] iAnthus observes that the RSA transaction has been in the public domain since July 2020 and submits that, if there were a vastly superior transaction available, the bidder would have made itself known by now.

[38] Walmer contends that the process was deficient in several respects. It points to evidence that Gotham Green was apparently engaged in soliciting bids for iAnthus’ business with the assistance of Roth Capital Partners in early May 2010. Mr. Crawford, who is a member of the Walmer group, says that he has been advised

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"by a number of bidders and potential bidders that this duplicative process confused potential bidders". He adds that travel restrictions imposed by the Covid-19 pandemic limited iAnthus' ability to effectively market its assets.

[39] I give no weight to Mr. Crawford's assertion that unnamed potential bidders were confused and I approach his affidavit generally with a certain scepticism. It suffers from his failure to name his sources and a certain imprecision of expression. For example, he refers to the equityholders' meeting held pursuant to the court's interim order in this proceeding as an annual general meeting, which it was not. Mr. Crawford refers to advice he says he obtained from "a large accounting firm" that he says calls into question the fairness opinion iAnthus obtained from PwC. This hearsay assertion is inadmissible as evidence, and if it were admissible, it is too general to be helpful.

[40] While the special committee was doing its work, members of management were canvassing the possibility of a management bid. Walmer and Mr. Zaboroski point to slides from a presentation they prepared in April 2020 ascribing substantial value to the company. Mr. Crawford asserts:

> According to the Project Greta power point presentation, iAnthus estimated the mid-range valuation in April 2020 to be approximately $2 billion.

[41] The slide show presents cash flow forecasts and a wide range of valuations. The forecasts are highly contingent: "key assumptions" include annual sales per dispensary ranging from $2.6 to $7.0 million, 15% annual growth in retail sales from 2022 to 2024 and only 5% to 10% growth in expenses in the same period, and so on. The practical test of this kind of financial forecasting is whether investors can be persuaded to rely upon it. There is no evidence that this presentation resulted in any expressions of interest or that the authors of the presentation were able to put together a management bid.

Role of Gotham Green

[42] Walmer and Mr. Zaboroski rely on the resignation of iAnthus' former president, Mr. Ford, on April 27, 2020, due to a conflict of interest arising in

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connection with his acceptance of a personal loan from Gotham Green. Walmer submits that the loan "calls into question whether Gotham Green exerted an unspecified amount of influence on iAnthus prior to the Plan of Arrangement".

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[43] While Mr. Ford was in a position to have influenced iAnthus' dealings with Gotham Green prior to April 27, there is no evidence that it did so. It beggars belief that Mr. Ford had any opportunity to influence or interfere with the work of the special committee subsequently. His resignation occurred at the beginning of the process. I conclude that Gotham Green could not have exerted influence on the special committee through Mr. Ford.

[44] Walmer asks me to infer that Gotham Green played an invidious role behind the scenes from what it maintains are suspicious circumstances. One of these circumstances is a failure to disclose minutes of a meeting of the special committee preceding the press release that announced Mr. Ford's resignation. It stated that "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". The relevant board minute has been produced. It directed counsel to draft and the Special Committee to review the press release and I infer that took place. Counsel for iAnthus advises me that there is no separate minute of the special committee to disclose and I accept counsel's assurance.

[45] Walmer also points to iAnthus' decision not to waive privilege over advice from law firms received by the board and the special committee in connection with the investigation of Mr. Ford's conflict of interest. Walmer's decision not to waive privilege does not justify an adverse inference as to the contents of the lawyers' advice.

[46] Walmer asks me to accept hearsay assertions in Mr. Crawford's affidavit concerning an alleged $10 million side deal between iAnthus and Gotham Green, and in another affidavit concerning advice received by the affiant concerning the work undertaken by Roth Capital for Gotham Green. In the latter case, it is double

hearsay. In neither case is the source of the hearsay identified. Walmer says that I should accord weight to these assertions because there were good reasons not to disclose the names of the sources, who were at risk of being sued for breach of confidence, and because Walmer had no other way to put the assertions before the court.

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[47] I reject Walmer's argument. There is no proper basis for me to admit these assertions into evidence for their truth. Circumstantial indications of reliability are distinctly lacking. Nor is the requirement of necessity satisfied. Walmer could have applied to cross-examine iAnthus' affiant, Mr. Kalcevich, and sought to substantiate its suspicions concerning Gotham Green's role in that way.

[48] It follows from inadmissibility of Mr. Crawford's hearsay assertions that there is nothing to be taken from iAnthus' decision not to address them in evidence. I will add, however, that the theory of Gotham Green's misconduct, as it was developed in argument, is implausible at best. The theory is that, by the end of May 2020, Gotham Green was confident that it would be able to address iAnthus' liquidity crisis through an "internal solution", because it knew that it would be able to work a deal along the lines of that achieved in the RSA in July, and it knew this because it had an inappropriate insider role with the company. This theory implies that all the work done by Canaccord and the special committee in June and July was window dressing for an undisclosed deal that was already in place. The theory does not address the distinct position of the unsecured noteholders or explain how Gotham Green could be sure that they would play along.

[49] I am not persuaded that Gotham Green played an invidious role that calls into question the process that culminated in the negotiation of the RSA.

The shareholders' approval

[50] The authorities recognize securityholder approvals as one among several indicia of fairness; *First Bauxite* at para. 143. Walmer and Mr. Zaboroski challenge the cogency of the shareholder approvals.

[51] Mr. Zaboroski submits that the voting results overstate shareholder support for the plan because, according to the company's affidavit, approximately 7% of the votes cast in favour of the arrangement were cast by current and former officers who would benefit from the release offered under the plan. While this is a fair point, it still leaves the plan supported by 59% of the remaining, unrelated, shareholders.

[52] Walmer submits that the shareholders were denied access to the most up-to-date financial information prior to the shareholders' meeting, because iAnthus took advantage of a regulatory extension to postpone making public its second quarter 2020 financial results in advance of the meeting. iAnthus responds that the shareholders were advised by press release that there were no undisclosed material changes from the first quarter financial results. I find that the shareholders were adequately informed.

Conclusion as to approval apart from the release and injunction

[53] I find that the arrangement is the best iAnthus could do for its shareholders following a thorough and professional attempt to market itself and its assets.

[54] It may well be that the marketing of the company was adversely affected by the Covid-19 pandemic. The issue is not what the company would have been worth if it were not for the pandemic, or what it might be worth some day when the pandemic has run its course. What matters is what the company is worth now. iAnthus is in default of its obligations to the noteholders, who are insisting on their rights to be paid. That the company might be worth more under different circumstances is irrelevant. A clear majority of the shareholders have accepted this unfortunate economic reality and approved the arrangement.

[55] Taking everything I have reviewed into account, I am satisfied that, apart from the release and injunction, the arrangement is fair and reasonable and should be approved.

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The release

[56] The plan of arrangement defines "iAnthus Released Parties" as including iAnthus "and each of their respective current and former officers, directors, employees, current and former shareholders, auditors, financial advisors, legal counsel, and agents". It defines the "Securityholders' Released Parties" as including the noteholders and persons associated with them. These are the beneficiaries of the release. They include persons who provided advice to iAnthus at arms' length years ago, former officers and directors, and former shareholders who may have held shares and sold them years ago.

[57] The release is set out in Art 5.1 of the plan of arrangement. Its elements include the following:

a) It is for the benefit of persons including the iAnthus Released Parties;

b) It excludes "liabilities or claims attributable to any Released Party's gross negligence, fraud or wilful misconduct as determined by the final, non-appealable judgment of a court of competent jurisdiction". (I understand from counsel that the reference in the exclusion for claims of fraud to the "final, non-appealable judgment of a court of competent jurisdiction" is intended to capture a final judgment of a court of competent jurisdiction, following the exhaustion of all rights of appeal);

c) The claims subject to the release are all those arising on or prior to the Effective Date in connection with various matters such as the Secured Notes, including "the Affected Equity Claims", defined by reference to a definition in s. 2(1) of the *CCAA*. The definition encompasses a claim for "a monetary loss resulting from the ownership, purchase or sale of an equity interest" in iAnthus;

d) The subject claims are further extended to "any other actions or matters related directly or indirectly to the foregoing".

[58] This is broad language, even for a release, For example, it would encompass a claim against a former shareholder arising from a sale of shares years ago where

it is alleged that the sale was induced by the vendor's innocent misrepresentation. It would also encompass a claim against iAnthus' agents that the purchaser incurred losses in a transaction in iAnthus shares induced by negligent misstatements of iAnthus' agents. It would capture similar claims against a noteholder.

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[59] iAnthus maintains that these features of the release are justified by the benefit to the common shareholders under the plan of arrangement. It accepts that the release would extinguish the claims of "historical equityholders" who will obtain nothing from the plan but maintains that the plan will nonetheless resolve their interests in a fair and balanced way. iAnthus and the noteholders stress that the alternative to the current plan is a *CCAA* filing under which neither present nor former shareholders would receive anything from the company.

[60] Counsel for the noteholders urge me to accept that a practice has developed by which arrangements under company statutes are utilized to reorganize insolvent or nearly insolvent companies such as iAnthus. By comparison with arrangements under the *CCAA,* arrangements under the company statutes are more quickly accomplished, less expensive, and they hold out the possibility of value for the shareholders that would not be possible in a *CCAA* arrangement. Counsel for Gotham Green submits that lenders giving up debt for equity in these circumstances will demand third party releases of the kinds they have become accustomed to obtaining under the *CCAA*; if they cannot obtain them, they will not continue to pursue arrangements under the company statutes and the advantages associated with the practice that has developed will be lost.

[61] While I am not unsympathetic to the argument that the practice that has apparently evolved may be one that offers many advantages, the question at hand is a legal one: is it authorized under the *BCA*?

Law pertaining to third party releases in an arrangement under the *BCA*

[62] Section 288(1) of the *BCA* describes an arrangement as something proposed by the company with "shareholders, creditors, or other persons" that may involve:

> (g) an exchange of securities of the company held by security holders for money, securities or other property, rights and interests of the company or for money, securities or other property, rights and interest of another corporation”
>
> …
>
> (i) a compromise between the company and its creditors or any class of its creditors, or between the company and the persons holding its securities or any class of those persons.

[63] Pursuant to s. 289(1)(d), an arrangement with creditors must be approved by the creditors as I have noted.

[64] iAnthus relies on s. 291(4)(a) and (c) as providing authority for the court to approve third party releases required by a plan of arrangement. These sections provide:

> (4) Without limiting subsections (1) to (3) but despite any other provision of this Act, on an application to court for approval of the arrangement,
>
> (a) if the arrangement has been adopted under section 289 and, if required, approved by the shareholders in accordance with an order made under subsection (2) (e) of this section, the court may make an order approving the arrangement on the terms presented or substantially on those terms or may refuse to approve that arrangement,
>
> …
>
> (c) the court may make any incidental, consequential and supplemental orders necessary to ensure that the arrangement is fully and effectively carried out.

[65] An arrangement with creditors could involve a compromise of the claims of creditors and a release binding on the creditors approved by the court pursuant to s. 291(4)(a). This would not be a third party release. If third party releases are authorized by s. 291, it can only be pursuant to the court’s power under sub-s. (4)(c) to make “incidental, consequential and supplemental orders necessary to ensure that the arrangement is fully and effectively carried out”.

[66] *Protiva Biotherapeutics Inc. v. Inex Pharmaceuticals Co.,* 2007 BCCA 161, aff’g 2006 BCSC 1729 [*Protiva*], addressed the court’s powers to make orders under sub-s. 291(4)(c). Speaking for the Court at para. 16, Justice Donald described them as “ancillary orders for an effective arrangement”, and he held that they

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encompassed a power to adjust contractual rights. Accordingly, a creditor objecting to an arrangement that effected an assignment of its contractual rights to a different entity without its consent was not afforded a veto. Donald J.A. stated, at para. 21:

> Third party rights must be considered and accommodated within the discretionary analysis but they cannot be erected as an impermeable barrier to an arrangement. Were it otherwise, the third party could exercise powerful leverage wholly out of proportion to the value of the rights compromised by the arrangement, or the party could simply act as a spoiler for purposes unrelated to those rights.

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[67] In *Protiva,* a finding that the objecting creditor would not suffer actual prejudice was critical to the conclusion that approval of the arrangement was justified in the circumstances.

[68] iAnthus relies on *Re Concordia International Corp.,* 2018 ONSC 4165 at paras. 37-52 where, in the context of an arrangement proposed pursuant to s. 192 of the *CBCA,* the court applied principles developed under the *CCAA* in deciding that third-party releases were appropriate..

[69] I do not accept this reasoning.

[70] The *CCAA* is a statute that deals with insolvent corporations. It permits a company to propose a compromise arrangement with its creditors. It is skeleton legislation establishing judicial powers and procedures to address, outside of bankruptcy, the enormous variety of scenarios under which a corporation's liabilities exceed its assets; in consequence, its provisions are given a broad and generous interpretation.

[71] Despite some common terminology – both statutes contemplate "arrangements" – the arrangement provisions of the *BCA* and *CBCA* serve different purposes and operate differently than the *CCAA.* The purposes and inquiries engaged by a corporate arrangement are more focused. It is central to an arrangement under the *CCAA* that substantive rights will be compromised; that is not the case under corporate arrangement legislation.

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[72] The leading case on the availability of an order releasing the claims of third parties to facilitate an arrangement under the *CCAA* is *ATB Financial v Metcalf & Mansfield Alternative Investments II Corp.,* 2008 ONCA 587 [*ATB*], leave to appeal ref'd [2008] S.C.C.A. No. 337. The analysis in *ATB* was applied in British Columbia in *Re Bul River Mineral Corp*, 2015 BCSC 113 at paras. 77-81 and *Re Walter Energy Canada Holdings, Inc.*, 2018 BCSC 1135 at paras. 30-37. Speaking for the Court in *ATB,* Justice Blair explained why third-party releases that are reasonably connected to a proposed restructuring are authorized under the *CCAA*. He stated:

> [43] On a proper interpretation, in my view, the *CCAA* permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the *CCAA* itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[73] This description underscores some of the differences between the *CCAA* and the arrangement procedure under the *BCA*. While arrangements under the *BCA* are a flexible tool and the legislation itself is enabling in character, it is not as open-ended as the *CCAA*. What may constitute an arrangement under the *BCA* is more carefully described than under the *CCAA*. Most significantly, the *CCAA* expressly contemplates an arrangement proposed with all creditors, or a class of creditors, in which all of them may have a say in whether it should be adopted. As I have already noted, a third party release under the *BCA* restricts the rights of persons who have not been given a say.

[74] In this case, the RSA was negotiated between iAnthus and its noteholders. Third parties were not at the table. The legislative scheme under the *BCA* does not give them a vote. In contrast to the position under the *CCAA*, in the language of

Blair J.A., there is no opportunity to negotiate offered "to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process".

[75] In *Sturm v. Sprott Resource Lending Corporation,* 2014 BCSC 190 at paras. 163-164, Justice Fitzpatrick analogized the procedure under the *BCA* to that under the *CCAA*, in relation to proposals by which shareholder rights are to be affected and concluded that, with court approval, a proposed arrangement becomes a binding contract on the shareholders. She did not address a third party release that would extend to the claims of claimants who were not shareholders.

[76] Some courts and commentators have expressed concern that it is not always appropriate to analogize arrangements under the *CCAA* with arrangements under companies' statutes such as the *BCA*. In *9171665 Canada Ltd.*, 2015 ABQB 633, at para. 34, Justice C.M. Jones quoted William Kaplan, Q.C. in an article written for the *2011 Annual Review of Insolvency Law*. Mr. Kaplan stated:

> The C*BCA* arrangement provisions were not designed to deal with the full range of issues affecting multiple parties that many insolvencies can present. It is a focused remedy and requires focus for its proper use. Where an applicant requires broader third party orders restraining otherwise lawful conduct, especially on a permanent basis, one must question whether the proceeding is more properly administered under true insolvency process as opposed to the C*BCA*. The broader the third party impact requested, the more searching the analysis of whether the C*BCA* truly should be applied.

[77] Similarly, in their article, "C*BCA* Section 192 Restructurings: A Streamlined Restructuring Tool or a Statutory Loophole?", *2013 Annual Review of Insolvency Law,* (Janis P. Sarra, ed.) (Toronto: Thompson Reuters, 2014), Martin McGregor and Paul Casey caution against the loss of protections for stakeholders inherent in the more streamlined process of restructuring an insolvent company under the C*BCA* arrangement provisions instead of the *CCAA*.

[78] In a brief endorsement in *Re Banro Corp.*, 2017 ONSC 2176, Justice F.L. Myers approved third party releases contained in an arrangement proposed under the C*BCA* while expressing disquiet over the practice. He stated:

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> 2 I am very dubious as to the appropriateness of the order sought in paras. 10 & 11 of the draft. The aim is to prevent third parties from enforcing rights based on events of default cured by the arrangement. But this is not a CCAA proceeding. The arrangement is not a comprehensive compromise among creditors intended to facilitate a restructuring of a debtor's finances to avoid the devastation of bankruptcy. A CBCA plan is intended to assist corporations implement fundamental changes that they cannot conveniently do on their own under corporate law. While C*BCA* arrangements allow debt reorganization at times, there are too few safeguards for creditors and other interested parties to treat a CBCA arrangement as equivalent to a CCAA plan. If a debtor needs to cure a prevailing or threatened insolvency by compromising debt and curing defaults comprehensively, a CCAA plan with service on all parties affected by the compromise and curing provisions is required.

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[79] Despite these doubts, Myers J. made the order sought because interested persons had apparently been notified of the application, while expressing no opinion as to “whether this binds non-parties in foreign countries with claims against subsidiaries who are not before this Court”.

[80] In my view, the analogy to an arrangement under the *CCAA* is not persuasive in the particular context of an arrangement proposed under the *BCA* that would bar the claims of third party creditors. 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.

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Assessment

[82] Because the release would bar claims of historical shareholders that preceded the proposal of the plan of arrangement, I do not think it can be legally justified as an ancillary order under the *BCA*.

[83] Even if I am mistaken and the court's power to extinguish the claims of third parties to an arrangement is broader than I suppose, I do not think that the release sought in this case can be justified as a fair and reasonable balancing of the interests of the historical shareholders, who receive nothing under the plan and may very well be unaware of this proceeding.

[84] It matters not that the plan is otherwise fair and reasonable and that it offers a significant benefit to the present shareholders. It matters not that the alternative may well be a *CCAA* filing under which a release might be ordered that could not be ordered under the *BCA*. I should add, however, that it is not obvious to me that such a release would be justified applying the analysis set out in *ATB.*

[85] If former shareholders have suffered losses resulting from the negligence of iAnthus' former auditors, officers or directors, it is difficult to see why they should lose their rights of action as an incidence of the company's insolvency, obtaining nothing in return.

[86] If the concern is with claims over against the company by the auditors, officers, or directors, the solution would be to protect the company from claims for contribution or indemnity, not to bar the main claim. That is effectively what happened in *Re Sino-Forest Corp.,* 2012 ONCA 816, aff'g 2012 ONSC 4377, in the context of an arrangement proposed under the *CCAA*. Shareholders pursued class actions against the auditors and underwriters of Sino-Forest, and the defendants sought to claim as creditors of the company on the basis of claims for contribution or indemnity. The defendants' third-party claims were considered as equity claims and subordinated to the claims of other creditors under the *CCAA*. The plaintiffs' claims against the auditors and the underwriters were not so restricted.

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[87] If the noteholders have engaged in tortious misconduct unrelated to the proposed plan of arrangement, it is difficult to see why they should be immunized from suit by injured parties who are not part of the arrangement simply because they have proposed and funded the plan of arrangement.

[88] I offer these hypothetical examples without suggesting that any such claims would have merit. I am not in a position to say one way or the other. The release is only meaningful if it may be effective to bar claims that might otherwise succeed. The issue is whether the possibility of otherwise meritorious claims should be eliminated. It is a question of principle.

[89] In my view, the release contained in the plan of arrangement is not legally justified and its presence renders the arrangement unfair and unreasonable.

[90] iAnthus and the noteholders maintain that the release, in its present form, is essential to the bargain contained in the RSA. I could not edit the release to the point that the plan would be acceptable without making a change of substance. It would not be an order authorized by s. 291(4)(a) of the *BCA* and it would not be fair to the noteholders.

The injunction

[91] The plan of arrangement contemplates a permanent injunction barring “all persons” in the following terms:

> All Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Date, with respect to any and all Released Claims, from (a) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever against the Released Parties, as applicable; (b) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties; (c) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or (d) taking any actions to interfere with the implementation or consummation of this Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under this Plan.

[92] The injunction gives teeth to the release and, by reason of the carve-out for gross negligence, fraud, or wilful misconduct, there may be questions as to the applicability of the release.

[93] Counsel for iAnthus submits that the purpose of the injunction is not to forestall reliance on the carve-out, but to ensure that the issue of the applicability of the release may be addressed early on in connection with any litigation in which the release may be raised in defence. I do not accept that this is necessary and appropriate.

[94] The effects of the injunction would go well beyond encouraging early resolution of any issues concerning the availability of the release. Subparagraphs (a) and (b) of the proposed injunction would convert any unsuccessful attempt to challenge the release into a contempt of this Court. No matter where a released party was sued, the defendant could force a hearing in British Columbia. The injunction would encourage tactical manoeuvering on the part of the defence and make possible a multiplicity of proceedings. Neither is procedurally desirable.

[95] The availability of 'anti-suit' injunctions is strictly limited for reasons of comity; this Court will only dictate to persons what proceedings they may bring in other courts in restricted circumstances; *Li v. Rao,* 2019 BCCA 264 at paras. 40-48.

[96] A defendant may always invoke the release in its defence. The question of when and how that defence may be raised should be a matter for the court in which the action is advanced.

[97] The injunction would bind persons, such as historic shareholders, who may not have had notice of this proceeding. It is unclear on what basis the court could make such an order.

[98] Even if the release were modified to the point of acceptability, in my view, the injunction as presently formulated is not an order that the Court should countenance.

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Disposition

[99] For these reasons, I decline to approve the plan of arrangement. If it were not for the release and injunction, I would approve it. 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.

"Gomery J."

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