Takeovers Panel

Reasons for Decision
Vision Systems Limited 02

In the matter of Vision Systems Limited 02
[2006] ATP 33

Catchwords:
Competitive market; confidential information under lock-up device; decline to commence proceedings; disclosure requirement under lock-up device; informed market; lapse of lock-up device because of last and final statement; lock-up device; merger implementation agreement; no increase statement; No-Shop Agreement; pre-bid acquisition; rival offers; scheme of arrangement; truth in takeovers;

Corporations Act 2001 (Cth), sections 602, 657A, 657C, 657D

Guidance Note 7: Lock-up Devices

Vision Systems Limited, Ventana Medical Systems, Inc., Cytyc Victoria LLC, Danaher Corporation

These are the Panel's reasons for declining to commence proceedings on an application from. Cytyc Victoria LLC in relation to the affairs of Vision Systems Limited.

SUMMARY

1. These reasons relate to an application (the **Application**) to the Panel from Cytyc Victoria LLC (**Cytyc**) received on 4 October 2006 under section 657C[1] in relation to the affairs of Vision Systems Limited (**Vision**).

2. Cytyc's complaint concerned the acquisition of 12% of Vision at $2.85 per share by Ventana Medical Systems, Inc. (**Ventana**) on 27 September 2006 (**Ventana Acquisition**) when considered in light of:

   (a) provisions of the Merger Implementation Agreement (**MIA**) between Vision and Ventana in relation to Ventana's proposed merger (**Merger**) with Vision which prevented Vision from soliciting a rival bid (**No-shop Agreement**) and required Vision to inform Ventana immediately of any competing proposal and to provide Ventana with all material details in relation to such competing proposal (**Vision Disclosure Obligation)**;

   (b) Cytyc's announcement on 14 September 2006 that it intended to make a full takeover offer for Vision at $2.35 per share; and

   (c) Ventana's statement on 17 September 2006 that it would not increase the $2.13 proposed to be offered under the Merger.

3. Cytyc submitted that unacceptable circumstances existed because the Ventana Acquisition took place in circumstances where (according to Cytyc):

   (a) the MIA was effectively redundant as a consequence of Ventana's announcement on 17 September 2006;

   (b) due to the Vision Disclosure Obligation remaining on foot, Ventana had obtained confidential information regarding a proposal by Danaher Corporation (**Danaher**) at an indicative price believed to be $2.50;

[1] Unless otherwise specified, all statutory references are to the Corporations Act.

(c) as a result, Ventana had a distinct "head-start" advantage over the rest of the market resulting in the Ventana Acquisition taking place in a market that was not efficient, competitive and informed; and

(d) Ventana had not subsequently launched a takeover bid for the rest of Vision shares.

4. The Panel considered that the media release published by Vision on the evening of 26 September 2006, in which Vision had confirmed that it had allowed Danaher to conduct due diligence in relation to a possible competing proposal, indicated that the market was likely to have been sufficiently aware of the substance of any information that may have been provided to Ventana under the Vision Disclosure Obligation, for over 19 hours before the Ventana Acquisition was effected.

5. The Panel did not consider that the submissions in the Application and the material before it provided a sufficient basis for the Panel to commence proceedings in relation to the Application.

PROCEEDINGS

The Panel & Process

6. The President of the Panel appointed Robert Johanson, Andrew Lumsden (sitting President) and Jennifer Seabrook as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.

7. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

8. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

Background

9. On 14 August 2006, Vision and Ventana announced that they had entered into a MIA under which Wattle Ventures Pty Ltd, a wholly-owned subsidiary of Ventana, would acquire all the shares and convertible notes in Vision by way of two schemes of arrangement (**Schemes of Arrangement**). Ventana agreed to pay $2.13 per Vision share under the share scheme and Vision would redeem and cancel the convertible notes for $2.73 per note under the notes scheme. The MIA contained the No-Shop Agreement and the Vision Disclosure Obligation.

10. Ventana and Vision had entered into an agreement pursuant to which Ventana agreed to a standstill during which Ventana was not permitted to acquire or purchase any Vision shares (**Standstill**) other than pursuant to the Schemes of Arrangement[2].

11. On 14 September 2006, Cytyc announced that it intended to make a takeover offer for all of the shares in Vision. Cytyc said it would offer $2.35 per Vision share (**Cytyc Offer**). At that time, Cytyc sought a recommendation of the Cytyc Offer from the board of directors of Vision. The board of directors of Vision declined to make such a

[2] The statement concerning the Standstill came from Cytyc's application. The agreement has not been made public.

recommendation. On the same day, Ventana was released from the Standstill as a result of Cytyc's announcement.

12. On 17 September 2006, Ventana announced that "*it will not increase the price offered under the Vision Systems Limited (ASX:VSL) Scheme of Arrangement and will immediately commence to file patent litigation against Vision in US federal court*".

13. On 26 September 2006 at 3:25 p.m., rumours that Danaher was considering a bid for Vision at an indicative price of $2.50 per Vision share first appeared in online news services *The Wall Street Journal Online* and *Reuters*. In light of the rumours, at the end of trading on 26 September 2006, Vision shares closed at $2.54.

14. On 26 September 2006 at 6.58 p.m., in response to press speculation, Vision confirmed that it had allowed Danaher to conduct due diligence on Vision in relation to a possible competing proposal. Vision did not confirm or comment on any indicative price range which Danaher may have provided to Vision in order to gain access to due diligence material. Vision's statement also provided an update on Vision's discussions with Ventana (which it clearly indicated had not terminated) and Vision's discussions with Cytyc about its offer.

15. Cytyc submitted that on 27 September 2006, Caliburn Partnership Pty Limited (Vision's advisers) confirmed to Morgan Stanley (Cytyc's advisers) that Vision had previously provided Ventana with details of the Danaher proposal pursuant to the Vision Disclosure Obligation.

16. On 27 September 2006 at 2:30 p.m., Ventana concluded the Ventana Acquisition under an on-market crossing arranged through Macquarie Equities.

17. On 2 October 2006, Danaher made an announcement that Danaher and Ventana were engaged in discussions regarding a potential, cooperative effort to acquire Vision.

APPLICATION

Declaration sought

18. Cytyc sought a declaration under section 657A to the effect that the circumstances in which the Ventana Acquisition took place, including the No-shop Agreement and the Vision Disclosure Obligation constituted unacceptable circumstances.

Orders sought

19. Cytyc sought final orders to the effect that the MIA be immediately terminated and the Vision shares acquired as part of the Ventana Acquisition be vested in the Australian Securities and Investment Commission, to sell the shares by bookbuild and account to Ventana the proceeds of sale, net of the costs, fees and expenses of sale.

DISCUSSION

20. In its Application, Cytyc submitted that the circumstances in which the Ventana Acquisition took place constituted unacceptance circumstances. Cytyc submitted that this was because the Ventana Acquisition took place in circumstances where:

    (a) the MIA, which contained the No-Shop Agreement and Vision Disclosure Obligation, was effectively redundant as a consequence of Ventana's

announcement on 17 September 2006 that it would not increase the price offered under the Schemes of Arrangement;

(b) notwithstanding that the Schemes of Arrangement were effectively redundant and the agreement between Vision and Ventana under which Ventana was not permitted to acquire or purchase any Vision shares other than under the Schemes had fallen away, Ventana obtained confidential information regarding the Danaher proposal and an indicative price believed to be $2.50;

(c) as a result of having obtained confidential information at a time significantly in advance of such information being available to the market[3], Ventana had a distinct "head-start" advantage over the rest of the market resulting in the Ventana Acquisition taking place in a market that was not efficient, competitive and informed; and

(d) Ventana had not subsequently launched a takeover bid for the rest of Vision shares,

which taken together, were in breach of the principles as set out in section 602 of the Corporations Act.

21. The Panel noted that (on the facts described in the Application):

(a) rumours that Danaher was considering a bid at an indicative price of $2.50 had appeared in online news services *The Wall Street Journal Online* and *Reuters* at 3:25 pm on 26 September 2006 resulting in the price of Vision shares on the market of Australian Stock Exchange (**ASX**) closing at $2.54 on that day;

(b) Vision had published a market release on the evening of 26 September 2006 (at 6:58 p.m.) in which, amongst other items concerning possible control of Vision, Vision had confirmed that it had allowed Danaher to conduct due diligence in relation to a possible competing proposal. However, Vision did not disclose the indicative price advised by Danaher. Vision's market release also provided an update on Vision's discussions with Ventana (which it clearly indicated had not terminated) and Vision's discussions with Cytyc about its offer for Vision;

(c) Ventana did not conclude the Ventana Acquisition until 2.30 p.m. on 27 September 2006; and

(d) on 27 September, Caliburn Partnership Pty Limited confirmed to Morgan Stanley that Vision had previously provided Ventana with details of the Danaher proposal pursuant to the Vision Disclosure Obligation.

22. The Panel considered that this indicated that the market was likely to have been sufficiently aware of the substance of any information that may have been provided to Ventana under the Vision Disclosure Obligation, for over 19 hours before any transaction was effected. The Panel also noted that the Ventana Acquisition was made in the context of the original Merger announcement of 14 August 2006, Ventana's 17 September 2006 announcement, Cytyc's 14 September 2006 announcement of its intention to make a takeover offer for all of Vision and Vision's

[3] The Panel noted that when Ventana published a media release in relation to the possible competing proposal from Danaher Corporation, it did not disclose all of the information which Cytyc submitted Vision would have previously given to Ventana in relation to that proposal (i.e. the indicative price of $2.50).

26 September market release which discussed progress with Ventana and Cytyc about their proposals for Vision. Accordingly, the Panel considered that the market was adequately informed, and the No-shop Agreement and Vision Disclosure Obligation had not had a substantial anti-competitive effect.

23. The Panel noted that Cytyc made no submissions in the Application in relation to the circumstance in paragraph 20(d) above that Ventana had not subsequently launched a takeover bid for the rest of decision shares contributed to a breach of section 602 of the Corporations Act. The Panel considered that this submission was not relevant to its decision.

24. The Panel considered that, even assuming the Applicant made out all of its factual claims, there would not be a sufficient basis on which to make a declaration of unacceptable circumstances. The Panel would not have made a declaration of unacceptable circumstances, given that there was no impairment of the purposes of section 602.

25. In view of the above, the Panel did not find it necessary to consider whether the terms and operation of the No shop Agreement was consistent with the Panel's Guidance Note 7: Lock-up Devices.

Decision

26. The Panel did not consider that the submissions in the Application and material before the Panel provided a sufficient basis for the Panel to commence proceedings in relation to the Application.

27. The Panel has made no costs order.

Andrew Lumsden
President of the Sitting Panel
Decision dated 6 October 2006
Reasons published 20 October 2006