



**In the matter of Vision Systems Limited 01  
[2006] ATP 32**

**Catchwords:**

*Agreement to accept takeover offer; decline to commence proceedings; pre-bid agreement; competitive market; ASX Market Rules*

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

*ASX Market Rules, 20.8.1, 20.3.1*

*Sedimentary Holdings Ltd [2006] ATP 24*

*Vision Systems Limited, Ventana Medical Systems, Inc., Cytyc Victoria LLC, Danaher Corporation, MM&E Capital Pty Ltd, Investors Mutual, BT Financial Group*

**These are the Panel's reasons for declining to commence proceedings on an application from Ventana Medical Systems, Inc. in relation to the affairs of Vision Systems Limited.**

**SUMMARY**

1. These reasons relate to an application (the **Application**) to the Panel from Ventana Medical Systems, Inc. (**Ventana**) received on 3 October 2006 under section 657C<sup>1</sup> in relation to the affairs of Vision Systems Limited (**Vision**).
2. On 29 September 2006, Cytyc Victoria LLC (**Cytyc**) announced that it had entered into agreements (**Pre-Bid Agreements**) with a number of institutional shareholders in Vision (MM&E Capital Pty Ltd, Investors Mutual and BT Financial Group (the **Funds**)) under which the Funds had agreed to accept Cytyc's offer for shares in Vision. The Pre-Bid Agreements were subject, inter alia, to Cytyc announcing an intention to increase the consideration under its offer from \$2.35 to \$3.25 and declaring its offers free from all defeating conditions.
3. Ventana submitted that the Pre-Bid Agreements:
  - (a) had the effect of substantially lessening the prospects of any competitive proposal from another bidder for Vision; and
  - (b) were inconsistent with various ASX Market Rules.
4. The Panel considered that subject to the Pre-Bid Agreements complying with the relevant Corporations Act provisions, it was unlikely that Cytyc entering into the Pre-Bid Agreements to secure a stake of up to 19.9% of the shares in Vision would affect the competition for Vision or Vision shares in an unacceptable way.
5. The Panel also found that there was no evidence presented on the face of the Application that the ASX Market Rules specified applied to the transactions contemplated by the Pre-Bid Agreements or that these ASX Market Rule had been contravened.

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<sup>1</sup> Unless otherwise specified, all statutory references are to the Corporations Act.

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6. Accordingly, the Panel did not consider that the material before it in relation to the Pre-Bid Agreements provided a sufficient basis for the Panel to commence proceedings in relation to the Application.

## PROCEEDINGS

### The Panel & Process

7. The President of the Panel appointed Michael Ashforth, Robert Johanson and Andrew Lumsden (sitting President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
8. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
9. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

### Background

10. On 14 August 2006, Vision and Ventana announced that they had entered into a Merger Implementation Agreement (**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. 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.
11. Under the MIA, if Vision received a competing proposal that was superior to the Ventana proposal, it was not entitled to recommend the competing proposal unless it had given Ventana a notice (the **Matching Notice**) informing Ventana of the competing proposal and giving Ventana two business days to make a proposal that the Board of Vision determined was more favourable than the competing proposal. If a matching proposal was not made by Ventana, Vision was entitled to terminate the MIA.
12. On 14 September 2006, Cytyc announced that it would make a takeover offer for all of the shares in Vision. Cytyc said it would offer \$2.35 per Vision share.
13. On 26 September 2006, Vision informed the market that another potential bidder, Danaher Corporation (**Danaher**), was conducting due diligence, although there was no assurance that Danaher would make an offer.
14. On 28 September 2006, Ventana lodged a substantial holding notice stating that it had acquired, on market, 22,166,603 shares, representing 12% of Vision at \$2.85 per share.
15. On 29 September 2006, after the market had closed, Cytyc announced that it intended, on 4 October, to:
  - (a) increase its offer consideration to \$3.25;
  - (b) declare its offer unconditional; and
  - (c) pay Vision shareholders who accept its offer as soon as practicable and in any event within 5 days of acceptance.

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16. In that announcement, Cytyc also stated that it had secured pre-bid acceptances from the Funds under the Pre-Bid Agreements for approximately 25 million shares (13.5% of Vision) and 3.6 million convertible notes which would convert into an additional 4.6 million shares.
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.
18. On 2 October 2006, Cytyc lodged a substantial holding notice setting out its voting power in Vision as a result of the entry into the Pre-Bid Agreements and attaching the Pre-Bid Agreements.
19. The Pre-Bid Agreements provided that:
  - (a) if Cytyc announced that it intended on 4 October 2006 to increase its offer price to \$3.25, each Fund would accept Cytyc's offer on 4 October 2006 for certain shares held by the relevant Fund (aggregating to 25,019,670 shares);
  - (b) each Fund would not otherwise deal in those shares; and
  - (c) Cytyc would, at the time it announced the increase in the offer price, declare its offer free from all conditions and pay shareholders as soon as practicable and in any event within 5 days after acceptance;
20. There was no ability for a Fund to withdraw its acceptance or accept any other offer under any circumstances if the relevant announcement was made by Cytyc.
21. Cytyc made the relevant announcement on 29 September 2006 (refer to paragraph 15 above).
22. The Pre-Bid Agreements were entered into during market trading on 29 September 2006 on the basis that the Cytyc offer price would be increased to \$3.25 while the market believed the Cytyc offer price to be \$2.35.
23. Cytyc dispatched its Bidder's Statement and offers on 2 October 2006. The Bidder's Statement dispatched offered \$2.35 per Vision share and still contained conditions to its offer.
24. On 2 October 2006, Vision gave a Matching Notice to Ventana. The time within which Ventana had to make a matching proposal expired at 12:00am on Wednesday 4 October 2006.
25. When the market opened for the first time since the announcement of the increase in the Cytyc offer price, the market price for Vision shares opened above the \$3.25 increased Cytyc offer price and ended the day at \$3.60.
26. On 4 October 2006, Cytyc varied its offer in accordance with the Pre-Bid Agreements and its 29 September 2006 announcement.

## APPLICATION

### Declaration sought

27. Ventana sought a declaration under section 657A to the effect that the circumstances relating to the entry into the Pre-Bid Agreements constituted unacceptable circumstances.

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#### Orders sought

28. Ventana sought final orders under section 657D to the effect that the Funds be released from any obligations under the Pre-Bid Agreements to accept the Cytyc Offer.

## DISCUSSION

#### *Anti-competitive behaviour*

29. Ventana submitted that the Pre-Bid Agreements had the effect of locking up 13.5% of Vision shares. Ventana submitted that this had the effect of substantially reducing the prospects that an alternative competing offer for Vision shares would emerge, to the detriment of shareholders of Vision.
30. The Panel considered that subject to such agreements complying with the relevant provisions of the Corporations Act, it was unlikely that Cytyc entering into the Pre-Bid Agreements with the Funds to secure a stake of up to 19.9% of the shares in Vision would affect the competition for Vision or Vision shares in an unacceptable manner.
31. The Panel was further reassured that the Pre-Bid Agreements were unlikely to have adversely affected the efficient, competitive and informed market for control of Vision shares by the fact that:
  - (a) the proposal by Ventana to merge with Vision had been publicly disclosed for over a month; and
  - (b) Cytyc's intention to make a takeover offer for vision had been announced for two weeks,prior to Cytyc and the Funds entering the Pre-Bid Agreements. The Panel also noted that Ventana had announced the day before the Pre-Bid Agreements that it had acquired 12% of Vision on-market.
32. In its submissions, Ventana sought to rely on the sitting Panel's decision in *Sedimentary Holdings Ltd*<sup>2</sup>. Ventana submitted that factors relied on by the sitting Panel in that case to conclude that unacceptable circumstances did not arise, did not exist in the present circumstances. The factors from the *Sedimentary Holdings* decision that Ventana pointed to included:
  - (a) a provision in the *Sedimentary Holdings* pre-bid agreement that permitted the shareholder to accept a higher, unmatched offer from another person; and
  - (b) the existence of a period of more than a month from the time of the announcement of the takeover bid (and the related pre-bid agreement), to the time at which the pre-bid agreement might require the shareholder to accept the bid, within which an alternative offer might emerge.
33. The Panel considered that the circumstances existing in *Sedimentary Holdings Ltd* were substantially different from those in the current proceedings. In particular, the shareholder that was a party to the pre-bid agreement in the *Sedimentary Holdings*

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<sup>2</sup> [2006] ATP 24

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Ltd held over 20% of the target and there were significant inter-relationships between that shareholder and the bidder. Accordingly, the Panel considered that the decision in Sedimentary Holdings Ltd was not a relevant decision to support the contentions of the Applicant in the current proceedings.

#### *ASX Market Rules*

34. Ventana submitted that the Pre-Bid Agreements:
  - (a) were, in substance, special crossings (in contravention of ASX Market Rule 20.8.1) and were made without prior announcement (in contravention of ASX Market Rule 20.3.1) in an uninformed market; and
  - (b) contravened the standard of market behaviour established by the ASX Market Rules that should apply during the bid period.
35. The Panel found that no evidence was presented on the face of the Application that these ASX Market Rules applied to the transactions contemplated by the Pre-Bid Agreements or that the ASX Market Rules had been contravened. The Panel considered further that even if the ASX Market Rules identified in the Application had been contravened, that alone would not have led the Panel to make a declaration of unacceptable circumstances. The Panel did not consider that it had been presented with arguments or evidence on which it could conclude that it was reasonable for it to “export” Market Rules designed to regulate the conduct of ASX’s market into off-market transactions.

## DECISION

36. The Panel did not consider that the submissions in the Application and material before it in relation to the Pre-Bid Agreements provided a sufficient basis for the Panel to commence proceedings in relation to the Application.
37. The Panel has made no costs order.

**Andrew Lumsden**  
**President of the Sitting Panel**  
**Decision dated 5 October 2006**  
**Reasons published 11 October 2006**