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Monday, 3rd March 2008

2 (10.30 am)

3 MR NASH: My Lord, the parties have been discussing things
4 over the weekend. We are very close, I think, to
5 settlement. Another half an hour until 11.00 I think
6 will tie it up.

7 MR JUSTICE BURTON: Very well, thank you very much indeed.
8 Yes, of course. So that, shall I say 11.15?

9 MR BEAR: 11.00 would be fine, my Lord.

10 MR NASH: 11.00, I think, yes.

11 MR JUSTICE BURTON: If it doesn't settle then we are going
12 to need to talk timetabling, but I hope it does.

13 MR BEAR: Indeed. That's why we would like to have 11.00
14 and then review matters.

15 MR JUSTICE BURTON: Good. 11.00. Thank you very much.

16 (10.35 am)

17 (A short break)

18 (11.13 am)

19 Discussion re settlement terms

20 MR NASH: My Lord, I'm happy to be able to tell that you the
21 parties have been able to resolve their differences.

22 MR JUSTICE BURTON: Thank you.

23 MR NASH: There's an order in front of you, my Lord, which
24 perhaps we can go through swiftly.

25 MR JUSTICE BURTON: Yes.

1 MR NASH: The first part involves certain undertakings to be
2 given by the claimant which track the injunction which
3 was being sought by the counterclaim, but with some
4 amendments.

5 MR JUSTICE BURTON: Yes.

6 MR NASH: Then the body of the order itself: the claim is
7 dismissed, permission to apply to enforce but otherwise
8 the counterclaim to be stayed, injunctions granted
9 previously discharged. A costs provision in
10 paragraph 4. Money in court to be drawn out under
11 paragraph 5.

12 MR JUSTICE BURTON: Just a second. 700,000 plus VAT in such
13 sum not exceeding 122,500, I follow. So that 122,500 is
14 the maximum amount of VAT?

15 MR NASH: Yes.

16 MR JUSTICE BURTON: But it is hoped that it may not all be
17 necessarily payable?

18 MR NASH: That's right, my Lord, yes. Payment out of court
19 in 5. Then a reduced balance payable subject to
20 instalments being met.

21 MR JUSTICE BURTON: Yes.

22 MR NASH: That's 6. And then 7, the obverse of that, the
23 full sum becomes payable in the event of failing to meet
24 an instalment.

25 MR JUSTICE BURTON: Yes.

1 MR NASH: Xytis Inc, the parent, accepts a liability for
2 the -- a joint and several liability for the costs.

3 MR JUSTICE BURTON: Thank you.

4 MR NASH: Then in the schedule, an agreed joint statement,
5 we see the form of that in italics.

6 Paragraph 2 of the schedule, the defendant to be
7 entitled to continue its collation and cleaning process
8 and submission to the DSMB. Best endeavours in 3, to
9 ensure a meeting of the TSC takes place within seven
10 business days of a DSMB recommendation.

11 MR JUSTICE BURTON: Yes.

12 MR NASH: 4 deals with the possible ending of the clinical
13 trial and certain circumstances.

14 MR JUSTICE BURTON: Can we desplit the infinitive in
15 paragraph 4? Further to fund -- or to fund the clinical
16 trial further is probably better, isn't it?

17 MR NASH: To fund the clinical trial further, yes.

18 MR JUSTICE BURTON: And again the second one as well.

19 MR NASH: And to fund the --

20 MR JUSTICE BURTON: The manufacture and the supply of the
21 trial drug further.

22 MR NASH: I think with that one it becomes to fund further
23 doesn't it: to fund further the manufacture and supply
24 of the drug.

25 MR JUSTICE BURTON: Yes, that's fine, it doesn't matter.

1 MR NASH: Then 5, an acknowledgment that the defendant won't
2 be able to conduct the clinical trial beyond completion
3 without further funding and/or if the claimant is unable
4 to fund the manufacture and supply of the trial drug,
5 and 6 an obligation to bring the clinical trial to an
6 orderly conclusion in that event.

7 MR JUSTICE BURTON: Yes.

8 MR NASH: Then a deeming provision in relation to
9 termination.

10 Paragraph 8 deals with the return of trial documents
11 in the event that the trial comes to an end and certain
12 copyrights included in relation to the database.

13 MR JUSTICE BURTON: Yes.

14 MR NASH: Clause 9 deals with the outstanding obligations on
15 either side in the event that the trial comes to an end.

16 MR JUSTICE BURTON: What is the claim in (a), 9(a)?

17 MR NASH: That would be a claim for any further funds in the
18 event that the trial comes to an end.

19 MR JUSTICE BURTON: What's the position in relation to the
20 present dispute on fees which I haven't litigated?

21 MR NASH: That's intended to be dealt with in paragraph 10.

22 MR JUSTICE BURTON: Thank you.

23 MR NASH: And by the same token 11 I think deals with any
24 potential non-money claims which might be raised by the
25 claimant.

1 MR JUSTICE BURTON: Yes.

2 MR NASH: Then 12 deals with -- 12 and 13 I think deals with
3 intellectual property rights and copying and 14,
4 similarly, intellectual property rights in the event
5 that the defendant publishes a report on the trial.

6 MR JUSTICE BURTON: Yes.

7 MR NASH: And then finally item 15 deals with the copying
8 and return of trial materials in the event that there's
9 any delay with the process which is being gone through
10 at the moment, and I don't know whether your Lordship
11 can read that manuscript?

12 MR JUSTICE BURTON: Yes, I can indeed. Thank you all very
13 much.

14 MR NASH: My Lord, those are the terms which have been
15 agreed between the parties and I'd invite your Lordship
16 to make that order unless Mr Bear has some further
17 comment?

18 MR BEAR: My Lord, those terms are satisfactory to my
19 clients.

20 MR JUSTICE BURTON: Good, thank you very much. I didn't get
21 the opportunity, in the rush of Friday night, to
22 reassure Professor Sandercock that what he had said as
23 an independent witness was not something he should be
24 concerned about in the slightest. I know all parties
25 found his evidence very valuable.

1 MR BEAR: I certainly did and I will pass that on to him,
2 my Lord. Thank you for making that clear.

3 MR JUSTICE BURTON: Thank you very much.

4 MR NASH: My Lord, I think perhaps Mr Simmon needs formally
5 to be released. He is still on oath.

6 MR JUSTICE BURTON: Yes, I think he shouldn't expect to have
7 to go back into the witness-box, no. Thank you very
8 much.

9 I think everyone has worked very hard indeed on
10 this. I know it's not often that one gets orders that
11 matters be done by noon on a Sunday and you've all
12 complied with those orders and I'm sure that you should
13 be -- I'm sure both sides won't be pleased, but at any
14 rate satisfied that everything possible has been done to
15 ensure a proper result and a proper outcome of these
16 proceedings.

17 I will initial this order and date it 3rd March.

18 (11.20 am)

19 (The court adjourned)

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INDEX

| | | |
|----|--------------------------------------|------|
| 1 | | |
| 2 | | PAGE |
| 3 | Discussion re settlement terms | 1 |
| 4 | | |
| 5 | | |
| 6 | | |
| 7 | | |
| 8 | | |
| 9 | | |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

