Beyond the fine print: employer bound by assurances about retention of share options

The High Court's decision in *Dixon v GlobalData Plc* highlights the risks associated with informal promises and unclear drafting in settlement agreements, particularly where share options and discretionary powers are involved. The case revolved around whether a former employee was entitled to retain and exercise his share options after leaving the company, based on verbal assurances and ambiguous settlement terms.

What happened in this case?

The Claimant was a long-serving employee of Canadean Ltd, a market research firm later acquired by GlobalData. During his exit negotiations, the Claimant received verbal and written assurances from the group's CEO, Mr Pyper, that he would retain his share options, and they would *"vest in line with current conditions."* The options were subject to performance targets being met.

Relying on Mr Pyper's assurances, the Claimant agreed to settlement terms under which his employment would be extended by four months beyond the initial proposed termination date, and he would be bound by post-termination restrictive covenants. The assurances about the share options were also incorporated into the settlement agreement. The Claimant assumed that this meant the position regarding the share options was *"watertight."* He did not review the underlying

share plan rules, nor were they mentioned during negotiations.

The share options were divided into three tranches.

- The first tranche of share options vested before the Claimant's employment ended in 2014 and the Claimant went on to exercise these options. There was no dispute about this tranche.

- The Claimant attempted to exercise the second tranche of share options in 2020. However, the company argued that his options had lapsed when he left the company because the necessary discretion had not been exercised to permit the continued exercise of the share options post-termination. The Claimant sought an order that he was either entitled to exercise the options or receive damages.

- Due to the impact of COVID, it was clear that the performance targets for the third tranche of options would not be met, meaning that those options would lapse. In response, in 2020, the company introduced a replacement share plan to compensate the affected employees, including those who had left employment and had approved good leaver status. The Claimant was excluded from the replacement plan on the basis that the

company believed his options had lapsed when he left the company. The Claimant argued that he was entitled to participate in the new scheme and, if not, his exclusion amounted to an irrational exercise of discretion for which he should be compensated.

What was decided?

The Court addressed several key issues:

Had discretion been exercised under the share plan in the Claimant's favour?

Rule 7.1 of the share plan allowed the grantor to exercise its discretion to permit the continued exercise of options post-termination. The Claimant's position was that Mr Pyper had exercised the rule 7.1 power. However, the Court found there was no evidence that Mr Pyper had sought to do this. To exercise the power, Mr Pyper would have had to specify the basis on which the options might be exercised, and he did not do this. Even if he had purported to exercise the power, it would have been invalid on the grounds of uncertainty. Therefore, there had been no exercise of discretion permitting the Claimant to retain his share options and exercise them post-termination.

Did the CEO have authority to exercise the discretion?

Because discretion had not been exercised in the Claimant's favour, the Court did not need to consider the question of whether Mr Pyper had the authority to exercise such discretion. However, the Court made some useful remarks on this point which are worth noting.

On the facts, it was clear that Mr Pyper would not have had *actual* authority to exercise the discretion. There was no evidence that the Board of the company had authorised him to do so. Yet the Court said that, given his seniority, it was likely that Mr Pyper would have had *ostensible* authority to exercise the discretion. This would have bound the company had the discretion been exercised.

If the Claimant did not retain his share options, was the equitable remedy of proprietary estoppel available to him?

In the alternative, the Claimant claimed a remedy based upon "proprietary estoppel." To succeed in such a claim, three elements must be satisfied:

- a clear and unequivocal assurance or representation;
- reasonable reliance on that assurance; and
- substantial detriment resulting from that reliance.

The Court found that all three elements were present. Mr Pyper's assurances were sufficiently clear and unambiguous. The Claimant's reliance upon the assurances was reasonable, given the overall context and his understanding. And finally, the detriment he suffered was substantial, namely, working for four additional months and agreeing to be bound by post-termination restrictive covenants. The company had acted unconscionably in not giving effect to Mr Pyper's assurances. Therefore, the claim succeeded.

Did the "Micklefield" clause in the share plan defeat the claim of proprietary estoppel?

The company argued that rule 14 of the share plan prevented claims for loss of benefits due to termination (often referred to as a "Micklefield" clause). The company argued that this clause barred the proprietary estoppel claim. The Court disagreed, finding that the Claimant was not claiming loss due to termination. Instead, he was seeking relief in equity for the denial of promised rights, meaning rule 14 was not engaged. Even if it was, the Court said that the assurance made by Mr Pyper implicitly included a promise not to rely on rule 14. Therefore, the Micklefield clause did not defeat the claim.

Remedy

The question of remedy is to be determined at a later date, although the Court indicated that the Claimant would have been entitled to exercise the second tranche of share options had the assurance been honoured. The burden is on the company to prove that this would be disproportionate.

The position on the third tranche – which related to a new scheme introduced after the original plan had expired – was less clear and would be addressed separately.

What are the learning points?

This decision has wide-ranging implications for both employers and employees.

Key takeaways for employers include:

- **Avoid making assurances unless they align with rules of the relevant share plan:** equity awards are not just a matter of plan rules and contracts. As this case demonstrates, they are also be governed by equitable principles. You may find that an informal verbal promise made by a senior leader, or wording in a settlement agreement which does not reflect the position under the share plan, is enforceable through proprietary estoppel (and a Micklefield clause will not come to the rescue). If you intend to offer post-termination benefits, make sure this is clearly documented and consistent with the share plan rules.

- **Exercise discretion properly:** if discretion is required under a share plan, it must be exercised formally. Be clear on the conditions, basis, and timing of the exercise. Remember that senior leaders in the business may be deemed to have ostensible authority to bind the company in this respect.

- **Think beyond exits:** this case is not just relevant to exit negotiations. It potentially has implications for recruitment, retention bonuses, deferred compensation, and any situation where an employee relies on a promise of future benefit. Employers must consider whether their actions could give rise to proprietary estoppel even in the absence of a formal contract.

Key takeaways for employees include:

- **Check the share plan rules thoroughly:** understand the leaver provisions and what is required for a valid exercise of discretion permitting the retention of share options post-termination. Ask to see evidence that the discretion has been so exercised, for example, request a copy of the relevant Board resolution.

- **Make sure the settlement agreement drafting is watertight:** do not assume that merely referencing the retention of share options in a settlement agreement is sufficient.

- **Get the right parties on board**: if the discretionary power lies with a parent company, it is advisable to either make them a party to the settlement agreement, obtain separate legally binding assurances from them or require the employing entity to procure a parent approval. Otherwise, the agreement may be unenforceable or lead to disputes. If Board approval is required, then the employer should be asked to confirm that it has in fact been obtained.

- **Protect your future position:** consider including protective drafting in the settlement agreement to ensure you are entitled to benefit from any favourable variation to performance conditions and to participate in any replacement scheme or benefits offered by the employer after you have left. For example, seek to include wording that you will be treated no less favourably than active employees.

Dixon v GlobalData Plc

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