Paul De Fries v Noble Group Ltd
[2009] SGHC 40

Case Number : Suit 354/2008, RA 378/2008

Decision Date : 18 February 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Adrian Wong (Rajah & Tann LLP) for the plaintiff; Kenneth Pereira and Muralli Rajaram (Allen & Gledhill LLP) for the defendant

Parties : Paul De Fries — Noble Group Ltd

Contract

18 February 2009

Judith Prakash J:

Introduction

1 From August 2001 to 15 November 2007, the plaintiff was employed by Noble Resources Ltd ("NRL"). At all material times, NRL was an indirect subsidiary of the defendant, Noble Group Limited, a company incorporated in Bermuda.

2 On 15 April 2002, the defendant informed the plaintiff that he had been nominated to participate in the Noble Group Share Option Scheme 2001 (the "Scheme") set up by the defendant. Pursuant to this nomination, in consideration of the payment of a sum of HK$1, an offer was made to the plaintiff to grant him a Market Price Option (the "Option") to subscribe for and be allotted 3m shares at the Subscription Price of $1.69 for each share.

3 On 15 April 2003, pursuant to a second offer letter, the defendant granted the plaintiff a further option to subscribe for and be allotted another 3.75m shares in the defendant at a subscription price of $1.352 per share. The 15 April 2003 letter stated:

> If you accept the offer, the said Option will vest fully to you provided you are qualified under the Scheme on the last date of the fifth year from the date of this offer letter. Shares comprised in the Option are exercisable on the last date of the fifth year from the date of this offer letter (i.e. exercisable as from 15 April 2008).

The offer letter also stated that the Option was subject to the terms of the Scheme and a copy of those terms was enclosed with the offer letter.

4 The plaintiff accepted this option as well. As a result of adjustments arising out of a subdivision of shares and bonus share options given to the plaintiff, by June 2005, the plaintiff held Options to subscribe for and be allotted an aggregate of 17.160m shares in the defendant. In mid 2005, the plaintiff partially exercised the Option he held and took up 660,000 shares in the defendant. He continued to hold options to subscribe for an aggregate of 16.5m shares in the defendant.

5 On 15 November 2007, the plaintiff was retrenched by NRL. The reason given for his retrenchment was that the department which he worked for was being closed. The plaintiff took the

position that notwithstanding the termination, he was entitled under the Scheme to exercise the remaining Options in his hand and to subscribe for and be allotted 16.5m shares in the defendant within six months from the cessation of his employment.

6 By a letter dated 7 December 2007 to the defendant, the plaintiff gave notice of his intention to exercise these options. On 22 January 2008, the defendant told the plaintiff that he was not entitled to exercise the Options granted in April 2003 and informed him that he had no remaining Options to exercise. The plaintiff responded some two months later by forwarding to the defendant a cheque for the sum of $5,577,000 being the aggregate subscription price for the defendant's shares in connection with the Options as well as the duly completed prescribed form set out in schedule C-1 to the Scheme. Under r 10.3 of the Scheme, the defendant was obliged to issue shares in response to a validly exercised option within ten "market days" (as defined in the Scheme) of the exercise of the Options. The defendant did not issue any shares to the plaintiff in response to the plaintiff's purported exercise of the Options and the plaintiff accordingly brought this action to enforce his rights under the Scheme.

The application

7 By a summons filed on 11 September 2008, the plaintiff applied, *inter alia*, for an order that:

> The following question of law be determined by the Court pursuant to O 14 r 12 and/or O 18 r 19 of the Rules of Court and/or the inherent jurisdiction of the Court, i.e.:-
>
> > *Whether the Plaintiff was entitled under the terms of the Defendants' Noble Group Share Option Scheme 2001 to exercise the share options in his name and subscribe for an aggregate of 16,500,000 shares in the Defendants after 15 November 2007 (being the date of the effective cessation of his employment with Noble Resources Ltd)*

8 The application was heard before the Assistant Registrar on 29 September 2008. After hearing argument, the Assistant Registrar answered the question posed in the negative and therefore declined to either strike out the defence or enter judgment against the defendant as applied for by the plaintiff. The plaintiff was ordered to pay the defendant's costs of the application. The plaintiff appealed. I agreed with the decision of the Assistant Registrar and dismissed the appeal.

Analysis

9 The basic issue was whether the plaintiff was entitled to exercise the options after the termination of his employment with NRL. The answer depended on the true construction of the contract for the Option. The plaintiff argued that I should look only to r 8.4 of the Scheme to decide this. The defendant, on the other hand, referred to r 4 of the Scheme as well.

10 The relevant rules of the Scheme are:

> 2 **Definitions**
>
> 2.1 Unless the context otherwise requires, the following words and expressions shall have the following meanings:-
>
> …
>
> "Participant" The holder of an Option

…

4 **Eligibility**

4.1 Save for Controlling Shareholders and their associates who are not eligible to participate in the Scheme, the following persons shall be eligible to participate in the Scheme at the absolute discretion of the Committee:-

(a) Group Employees

(i) confirmed full-time employees of the Company and/or its subsidiaries who have attained the age of 21 years;

8 **Rights to Exercise Options**

8.4 If a Participant ceases to be employed by the Group or an Associated Company, as the case may be, by any reason other than by the provisions of Rule 8.3, or any other reason approved in writing by the Committee, he may exercise any unexercised Options within a period of six months commencing from the date of such cessation of employment, unless the Committee at its own discretion directs otherwise.

11 The plaintiff's position was that following the termination of his employment, he was still entitled to exercise the Options in his name for a period of six months from the date of termination pursuant to r 8.4. The plaintiff pointed out that his termination was due to the closure of his department and not caused by any misconduct on his part. Accordingly he was not disqualified under the provisions of r 8.3. He argued that there was nothing in the Scheme to provide that the Options in his name had been extinguished by cessation of employment. He asserted that from the time he accepted the various offers, the Options were in his name and he had an accrued right to them. Thus, the only question was when his right to exercise the Options would vest. The answer he gave was that in the normal course he would be able to exercise the Options on the fifth anniversary of acceptance but, on termination, as long as the reason for termination did not fall within r 8.3, the right would vest pursuant to r 8.4 on the termination date. Thus, the Options vested when his employment terminated in November 2007 and he had six months from 15 November 2007 in which to exercise the Options.

12 I was not convinced by the plaintiff's arguments. The plaintiff wanted me to look only at the Scheme to decide what his entitlement was. That was not correct because the offer of the Options was made by the letter of 15 April 2003 and the plaintiff had to accept the terms of this letter in order to obtain his Options. It was therefore clear that the Option contract between the plaintiff and the defendant was governed by both the offer letter and the terms of the Scheme. The offer letter stated in no uncertain terms that the Options would only vest on 15 April 2008. It also stated that the Option would vest "fully" in the plaintiff provided he was "qualified under the Scheme" on 15 April 2008. Rule 4.1(a)(i) sets out the situation when an employee would be considered as being "qualified under the Scheme". Such a qualified employee would be a full-time employee of the defendant and its subsidiaries who had attained the age of 21.

13 It therefore appeared to me that, as contended by counsel for the defendant, the plaintiff could only exercise the Options that he accepted in April 2003 on 15 April 2008 (and for six months thereafter) if he was on that later date eligible to participate in the Scheme by being a full-time employee of NRL. The plaintiff's employment with NRL having been terminated on 15 November 2007, on 15 April 2008, he was not a qualified person and therefore the Options did not vest in him and he was not able to exercise them. Rule 8.4 which provided for an ex-employee to exercise unexercised

Options within six months of termination of his employment deals with rights that have already accrued to such ex-employee because the Options vested prior to the termination of his employment. If the plaintiff had been employed by NRL on 15 April 2008 and his employment had been terminated on 16 April 2008, he would have had an accrued right to exercise his Options (the Options would have vested on 15 April 2008) within six months from 16 April 2008. Whilst the plaintiff became a participant in the Scheme when he accepted the offer on 15 April 2003, the Options were not fully vested in him on that date because it was a term of the offer that full vesting would only take place if he was qualified on 15 April 2008.

14 The defendant submitted that r 8.4 does not apply in situations where the Options had not yet vested when the employee left the employment of the defendant or its subsidiaries. That is why r 8.4 refers to "exercise of any unexercised Options" and not to "unvested Options". Construing r 8.4 in the manner in which the plaintiff sought to have it construed would mean that the express terms of the 2003 letter would have to be completely ignored. I agreed with this submission.

15 It is also clearly the law in Singapore that unvested options do not confer any rights of exercise on the holder thereof. In a recent case, *Tan Ging Hoon v MMI Holdings Ltd* [2008] SGHC 57, one of the issues that arose was whether the plaintiff was entitled to exercise unvested options. It was held that no rights would accrue to an employee or an ex-employee where the share options had not yet vested at the time of termination of employment.