

BIOTECHNOLOGY AUSTRALIA P/L V. PACE (1988) 15 NSWLR 130

New South Wales Court of Appeal – 30 November 1988

FACTS

Dr Pace was employed by Biotech as a senior research scientist. The letter of offer for employment provided that Biotech would “...confirm a salary package of A\$36,000 per annum, a fully maintained company car and the option to participate in the company’s senior staff equity sharing scheme.”

When he was employed Dr Pace became aware that no such scheme had been established.

The staff equity sharing scheme was never established and Dr Pace eventually left the employ of Biotech. Dr Pace sued for breach of contract as Biotech had failed to provide shares under a staff equity sharing scheme.

ISSUES

Was the promise to Dr Pace of an option to participate in a non-existent share scheme capable of being part of the employment contract?

FINDING

The promise of an option to participate in a then non-existent equity sharing scheme was dependent on the circumstances of the particular employment relationship and was incapable of being valued according to any existing or reasonable standards. Therefore, the promise was illusory and did not give rise to an enforceable contractual obligation

If the promise of an option was a term of the contract, the promise was so vague and uncertain as to be unenforceable. It was unclear how and when Dr Pace would be entitled to equity in Biotech.

QUOTE

Kirby P said:

“The problem for the court is that the term is just too uncertain of content. It depends for fulfilment upon the decision of one party to the agreement only, namely the appellant. There is no external standard which can be appealed to in order to fix an appropriate or reasonable equity participation scheme, even assuming that to be what was intended or what the law would impute to the appellant. The appellant is not and never was a publicly listed company.

Accordingly, there was no external standard by which shares in the enterprise could be determined authoritatively. It has not shown in the evidence that there was any standard or market reference point for a participation scheme in the equity of a company such as the appellant.” – page 137 of (1988) 15 NSWLR 130

IMPACT

When negotiating contracts, the parties need to clearly define the important terms of the contract. In this particular case the staff equity sharing scheme was important for Dr Pace, but he took no steps to ensure that his entitlement to equity in Biotech was clarified.

If a particular term is important for one or both parties then care should be taken to ensure that the term is clear and enforceable before finalising negotiations to contract.

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