

Neutral citation number: [2022] EWHC 1277 (QB)

**IN THE HIGH COURT OF JUSTICE**

**Claim No. QB-2021-000021**

**QUEEN'S BENCH DIVISION**

Royal Courts of Justice,  
Strand, London WC2A 2LL

Heard on 27 January 2022  
Judgment given on 27 May 2022

**Before: DEPUTY MASTER YOXALL**

**B E T W E E N**

**MR CHARLES RAW**

**Claimant**

**And**

**GUY CARPENTER & CO LIMITED**

**Defendant**

**Representation:**

For the Claimant: Adam Solomon QC, instructed by Irwin Mitchell

For the Defendant: Carol Davis QC, instructed by Keystone Law

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**JUDGMENT**

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*My judgment will not be electronically recorded. Accordingly, this may be treated as authentic. This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on 27<sup>th</sup> May 2022*

1. A draft of this judgment was provided to the parties on 16<sup>th</sup> February 2022.

2. This is an application by the Defendant dated 24<sup>th</sup> June 2021 for an order that the claim be struck out under CPR r.3.4(2)(a) or for an order that the Defendant be granted summary judgment.
3. I also have an application by the Claimant dated 22<sup>nd</sup> October 2021 for permission to add JLT Reinsurance Brokers Ltd [“JLT”] as a Defendant. This judgment is primarily concerned with the Defendant’s application.
4. Adam Solomon QC appeared on behalf of the Claimant and Carol Davis QC appeared on behalf of the Defendant. I am truly grateful for their written and oral submissions. The skeleton arguments should be read with this judgment. I hope that I will be forgiven for not rehearsing the arguments in full. I also have the benefit of a helpful chronology prepared on behalf of the Defendant.
5. I have read the witness statements of Mr. Nicholas Robertson, solicitor for the Defendant; the witness statement by Ms Shah Qureshi, solicitor for the Claimant; and the Claimant’s witness statement dated 24<sup>th</sup> January 2022.
6. The claim is for wrongful dismissal. The Claimant states that he was constructively dismissed and seeks damages and declaratory relief. He contends that he is entitled to damages in respect of \$570,000 USD which he should have received pursuant to a letter dated 4<sup>th</sup> March 2019; and damages in respect of £85,000 which he should have received pursuant to a letter dated March 2019. The Claimant also claims £4,000 in respect of unpaid salary.
7. Against this, the Defendant contends that JLT is the proper Defendant; that the Claimant resigned; that there was no wrongful dismissal; and that the said letters, on their true construction, do not give the Claimant any vested rights upon which he can sue. As to the claim in respect of salary, the Defendant contends that the Claimant has been paid in full.

### *The Background*

8. From the 3<sup>rd</sup> February 1986, the Claimant was employed by a company which became JLT. The company was engaged in the business of reinsurance. Thereafter, there were a succession of contracts between the parties. There was a contract signed by the Claimant on 3<sup>rd</sup> October 2010. The then salary was at £240,000 a year accruing at a daily rate and payable monthly in arrears. In May 2014 the Claimant’s contract was varied so that his new employer became JLT.

9. Clause 4 of the contract deals with the Claimant's entitlement to Bonus payments. It states:

“4. Individual Performance Bonus

... you will be eligible to participate in the Bonus programme. The bonus year runs from 1 July to 30 June and bonuses are payable annually (usually in September). Your target bonus is 60% of your base salary. Any bonus awarded will be based on individual performance and reflect the performance of the overall Company and your Segment, Region, and Line of Business over the previous financial year.

In certain circumstances bonus payments may be prorated, for example, in line with base salary changes, part year periods of service or extended periods of absence, in accordance with applicable law. *A current condition of eligibility to receive a bonus payment is that you are still in [JLT] service on the date of payment and not working out any period of notice, whether given or received.*

*Any bonus payable under this programme is discretionary. [JLT] reserves the right to amend or terminate any and all bonus provisions at its sole discretion at any time, with or without notice or replacement. ...”*

The emphasis is mine.

10. Clause 5 provides, inter alia, that either party may terminate the employment at any time by giving six months written notice. It also states:

“... We may make a payment in lieu of all or part of your notice period. We reserve the right during all or part of your notice period (whether given or received) to keep you away from work or to limit your duties. This could include asking you to remain at home ... During any garden leave period, you will continue to receive your normal pay and benefits and you will continue to be bound by the remaining terms of this agreement. Any period of garden leave may be offset by the same period of any restriction after termination.”

11. In about September 2018, it was announced that Marsh & McLennan Companies, Inc (“MMC”) had agreed to acquire the Jardine Lloyd Thompson Group plc, of which JLT was the insurance arm. The Claimant pleads that the acquisition completed on 1<sup>st</sup> April 2019, and included the acquisition of JLT and that JLT was integrated into MMC's reinsurance company, being the Defendant.

12. The Claimant's case is that on 1 April 2019, his employment was transferred by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") to the Defendant. Accordingly, the effect of the transfer under TUPE was to transfer his employment, together with all the rights and obligations that JLT owed to the Defendant.
13. The Defendant pleads that the business of JLT and the Defendant integrated and employees transferred to the Defendant under the operation of TUPE on 1 January 2020, some weeks after the termination of the Claimant's employment on (according to the Defendant) 24 November 2019. Accordingly, it is denied that the Claimant was ever employed by the Defendant, whether as Executive Committee Chairman of what the Claimant calls the Defendant's London North America Business, or otherwise.

*The March 2019 letters*

14. The March 2019 letter from JLT to the Claimant stated:

"... I am pleased to confirm that in respect of the 2018 financial year, you will receive a total bonus of £170,000 ("Bonus Award").

You will receive £85,000 via payroll (subject to statutory deductions for tax and national insurance) on 25 March 2019.

Subject to the transaction close between MMC and JLT, you will also receive an award of £85,000 in lieu of the award that would previously have been made under the JLT senior executive share scheme (known as "SESS").

This award will be made in the form of an MMC stock unit grant. The local currency value of the award will be converted to U.S dollars at MMC's budgeted exchange rate for the purpose of determining the number of stock units to be granted. Further information about the award is provided in the enclosed summary of MMC Compensation and benefits information, titled 'MMC Compensation and Benefits overview – Deferred Awards Restricted Stock Units'.

In the event you give or receive notice prior to the award date the respective Bonus Award shall become void. In the event you give or receive notice after

the award date then the provisions in the enclosed summary referred to above will apply.<sup>1</sup>

All your other terms and conditions remain unchanged.”

The Claimant was paid the £85,000 via payroll.

15. The 4<sup>th</sup> March 2019 letter from MMC to the Claimant, headed “Retention Award”, stated:

“... To recognise the commitment you are making to ensure that our combined business remains strong, you will be granted an award of MMC deferred stock units (“DSUs”) on the first of the month following the closing of MMC’s acquisition of JLT. The awards will have a grant date value of \$570,000 and will be in addition to any other compensation and benefits to which you are entitled to from the Company. The award will be converted from the dollar value of the grant into DSUs based upon the average of the high and low prices of Marsh and McLennan Companies stock on the New York Stock Exchange one trading day prior to the grant date of the award.

*Subject to your continued employment, 100% of the DSUs are scheduled to vest on the 15<sup>th</sup> of the month in which the third anniversary of the grant date occurs. As soon as practicable after the vesting date, DSUs that vest will be settled in shares of MMC common stock along with accumulated dividend equivalents, net of applicable tax withholding. The MMC shares will then be yours to hold or sell.*

*The award will be subject to the terms and conditions approved by MMC’s Compensation Committee as set forth in the award documentation you will receive shortly after the award is granted... ”<sup>2</sup>*

(The emphasis is mine).

#### *Outline of events leading to termination of contract*

16. On 26 April 2019, Mr. Peter Hearn, the President and CEO of the Defendant sent an email headed “Leadership Announcement” to all of the Defendant’s employees

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<sup>1</sup> According to the Defendant the award date was 1<sup>st</sup> May 2019. As will be seen, the Claimant’s case is that he resigned with immediate effect on 24<sup>th</sup> May 2019. The Defendant’s case is that his employment continued until 24<sup>th</sup> November 2019.

<sup>2</sup> According to the Defendant, the award was granted on the 1<sup>st</sup> May 2019.

stating that Mr Kevin Fisher would be made Chairman of the Defendant's London North America Business. This email was sent without any prior consultation with the Claimant.

17. Although other employees were mentioned, with whom it was said Mr Fisher would work to ensure business success, the Claimant saw that he was not mentioned in that email.
18. The Claimant pleads that the email communicated to all employees of the Defendant, including the Claimant, that Mr Fisher was henceforth carrying out the role that had been the Claimant's. The Claimant's case is that his omission from the email made it clear that he was not involved in the Defendant's future plans. The Claimant states that the receipt of the said email shocked and humiliated him.
19. The Claimant pleads that the management of the Defendant (including Mr Mayer, Mr Fisher, Mr Howard and Mr Dominic Burke) had discussed in advance of sending the 26<sup>th</sup> April email the following: that the integration of JLT into the Defendant would require a reorganisation, which would involve the appointment of Mr Fisher in the role as set out in the 26<sup>th</sup> April email; and that the appointment of Mr Fisher would inevitably result in the removal of Mr Raw from his post. The Defendant denies that there was any such discussion.
20. There was a further email announcement by the Defendant dated 8 May 2019 and expressed to be a message from Mr Hearn. In it the Defendant announced a further tranche of "leadership appointments" for individuals holding leading roles in the Defendant. The Claimant's name did not appear in this email as holding a leading role, or any role, in the Defendant. The Claimant's case is that this email made clear, from his omission from the email, that he was not involved in the Defendant's future plans.
21. Thereafter, the Claimant sought further clarification from the Defendant as to his role and position, including two meetings with Mr John Pascoe, HR Director for the Defendant. The Claimant states that there were two meetings; the first on 15<sup>th</sup> May 2019, and the second on 21<sup>st</sup> May 2019. The Claimant's case is that no clarification of his role was forthcoming save that it was noted that other senior employees of JLT had been given new contracts of employment.
22. The Defendant accepts that there were two meetings between the Claimant and Mr. Pascoe but puts the dates as 21<sup>st</sup> and 23<sup>rd</sup> May 2019. In short, the Defendant's case

is that clarification was given and that Mr. Pascoe explained that Mr. Fisher was replacing the Claimant's line manager, a Mr. Harrison.

23. By an email dated 24<sup>th</sup> May 2019, the Claimant wrote to Mr Pascoe stating that in light of the 26<sup>th</sup> April 2019 email and 8<sup>th</sup> May 2019 email, and the lack of clarification from the Defendant as to his role he had no choice but to tender his resignation, effective as from that date. The Claimant contends that the Defendant was in breach of the terms of trust and confidence implied into his contract of employment.
24. Very shortly after the Claimant's email of 24<sup>th</sup> May 2019, a company client of the Defendant requested that the Claimant remain in post until the 1<sup>st</sup> June 2019 in order to oversee the completion of their reinsurance programme in London. The Claimant's case is that the request was made to John Trace (CEO of Guy Carpenter & Co Ltd US) and that Claimant continued to work until the 1<sup>st</sup> June 2019 under protest. His pleaded case is that this additional work was under a discrete contract. He states that he did the work out of obligation to the client not to the Defendant.
25. The Defendant pleads that the Claimant worked until 6<sup>th</sup> June 2019. Be it the 1<sup>st</sup> or 6<sup>th</sup> June 2019, it is not disputed that thereafter, the Claimant did not attend to work for the Defendant and that he was paid up to 24<sup>th</sup> November 2019. The Defendant states that the Claimant was on garden leave "for the remainder of his notice period, which terminated on 24<sup>th</sup> November 2019." The Defendant pleads that if the Claimant's contract of employment was breached, the Claimant waived the breach by continuing to work and remaining in the garden in receipt of salary.

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*The Defendant's application*

26. As far as the application to strike out the claim under r.3.4(2)(a) is concerned, the Defendant must show that the Particulars of Claim disclose no reasonable grounds for bringing the claim. Of course, I accept that a defendant who can show that a case is bound to fail because of a point of law, such as the construction of a document, can seek to strike out the claim under r.3.4(2)(a) as well as under Part 24; see PD3A para 1.7.<sup>3</sup>

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<sup>3</sup> However, the construction of a document may be controversial. At the Bar, I was instructed for the defendant in a case which turned solely on a point of construction of an exemption clause. The defendant regarded the clause as giving it a sure-fire defence. The defendant lost at first instance. In the Court of Appeal, one Lord Justice stated that there was only one possible construction of the clause. His two colleagues disagreed, so the defendant won. In the House of Lords, the defendant lost 3-2. I hope I will be forgiven this anecdote.

27. As far as the Defendant's application for summary judgment is concerned, I remind myself that the Claimant does not have to show that he will win at trial. The Defendant must show that the Claimant has no *real* prospect of succeeding on the claim or issue. Of course, a fanciful prospect of success will not do. As is well known, I must not conduct a mini-trial.

*The TUPE Defence*

28. There was pre-action correspondence between the parties and draft Particulars of Claim were sent pre-issue to those acting for the Defendant. However, it was only when the Defence was served that the Defendant took the point that it was not the proper party to the claim given the operation of TUPE.
29. There is a clear issue between the parties on the operation of TUPE. The Claimant states that the relevant date is 1<sup>st</sup> April 2019. The Defendant's case is that it is 1<sup>st</sup> January 2020 as that is when the business of JLT and the Defendant integrated. In case the Defendant is correct, the Claimant has applied for permission to amend to add JLT as a Defendant.
30. I have not heard any argument on the operation of TUPE and I have had no direct factual evidence on the stages of integration of the businesses.<sup>4</sup> The reality is that the Defendant has been content to proceed with its application on the basis of the construction of the March 2019 letters. The Defendant believes it has a knockout blow with its construction arguments.
31. In the circumstances, I do not intend to give any ruling in relation to the operation of TUPE in this case. As matters stand, I cannot say that the Claimant has no real prospect of proving that the Defendant is the correct party.

*Wrongful Dismissal*

32. I have set out the background history. In my judgment, it cannot be said that the Claimant has no real prospect of establishing that he was wrongfully dismissed. No doubt the allegation of wrongful dismissal will be controversial at trial but that is another matter. The credibility of the Claimant and any witness may well come into play (credibility is pleaded in the Defence) but that is for a trial judge to resolve. The parties may well argue over the significance of email correspondence of 26<sup>th</sup>

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<sup>4</sup> I was taken to an email dated 10<sup>th</sup> December 2019 from the Defendant to a redacted addressee stating that the business was to transfer on 1<sup>st</sup> January 2020. The email made no reference to JLT. The Claimant's witness statement sets out some factual matters in support of the contention that his employment was transferred on 1<sup>st</sup> April 2019.



April 2019 which is referred to in the pleadings. Again, that is for the trial judge to resolve in the context of all the evidence.

33. How the Claimant came to be on “garden leave” after the 1<sup>st</sup> or 6<sup>th</sup> June 2019 and receiving salary until 24<sup>th</sup> November 2019 remains unclear to me. The Defendant states that the Claimant was paid for the entirety of his notice period. However, the Claimant never gave six months notice. The only evidence of notice given by him is the email of 24<sup>th</sup> May 2014 and that was expressed to take effect that day. The Defendant did not give notice. The Claimant insists that his contract with the Defendant ended with immediate effect on 24<sup>th</sup> May 2019. His case is that he accepted payments up to 24<sup>th</sup> November 2019 as he was entitled to those monies as damages in any event.
34. In the circumstances, I consider that the question of whether or not the Claimant affirmed the contract by continuing to work under protest for a few days, remaining on garden leave and receiving salary should be determined by the judge. It may well be that a judge would be assisted by additional evidence about how the continuing work and “garden leave” arrangement came about. I bear in mind that in deciding whether an innocent party has affirmed a contract, the court will be exercising a judgment on evidence. A judge may find that working under protest for a limited period is equivocal and does not amount to affirmation; see e.g; *W E Cox & Toner (International) Ltd v Crook* [1981] IRLR 443 (EAT) at [13]; *Rigby v Ferodo Ltd* [1988] ICR 29 (HL); (employee in continuing to work and receiving a reduced payment under protest had not accepted a variation in the terms of the contract).

*The £4,000 claim.*

35. The Claimant pleads that the final salary payment was £12,000 and not £16,000 as was due. Beyond this there are no particulars as to how the sum claimed is arrived at. In argument, Mr. Solomon made clear that the £4,000 related to the additional days the Claimant worked under the discrete contract for the special client.<sup>5</sup> There are no particulars, and no evidence, of how the alleged separate or new short contract was negotiated. Perhaps the new contract is to be implied in the circumstances. Perhaps the new contract was pleaded to avoid the dangers of the Claimant being held to have affirmed the main contract by working on for the special client.

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<sup>5</sup> At the same daily rate.

36. In my judgment, it is unnecessary for the court to decide whether or not there was a discrete short contract. This is because the Claimant is unable to prove any loss under this head of claim. It is not disputed that the Claimant has been paid the equivalent of his salary up to 24th November 2019. The measure of damages for wrongful dismissal is the amount that a claimant would have earned had the employment continued according to contract subject to a deduction in respect of any amount accruing from any other employment which the claimant, in minimising damages, either had obtained or should reasonably have obtained.<sup>6</sup> Accordingly, the Claimant has suffered no loss.
37. In argument, Mr. Solomon submitted that an employee is under no obligation to mitigate his or her loss in a claim in respect of salary. I agree with this submission but only in so far as the claim for loss of salary or wages is for non-payment of a debt. In the present case, the Claimant states that his employment ended on 24<sup>th</sup> May 2019. On this basis, had the Defendant not paid any salary for the notice period under the main contract, the Claimant would have had to bring a claim for damages. As already stated, in a damages claim, a claimant is under a duty to mitigate his or her loss and must give credit for sums received. Accordingly, in the present case, the Claimant has all that he is entitled to in respect of salary up to 24<sup>th</sup> November 2019.
38. The Claimant has no real prospect of succeeding on this issue.

*The March Letters*

39. The Claimant pleads that but for the wrongful dismissal he would have continued to work for the Defendant and would have received the \$570,000 and the £85,000 under the March 2019 letters.<sup>7</sup> The Defendant pleads that but for the Claimant's resignation, which, it says, took effect on 24<sup>th</sup> November 2019, the Claimant's role would have continued.<sup>8</sup>
40. Notwithstanding these assertions that the Claimant's employment would have continued, I accept that damages in a wrongful dismissal claim are assessed on the basis that the employer will perform the contract in the manner most beneficial from their standpoint; see *Lavarack v Woods of Colchester [1967] 1 Q.B. 278 CA*. Accordingly, in assessing damages, the court must proceed on the basis that the Defendant would have given the contractual six months notice of termination. The

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<sup>6</sup> See: McGregor 33-005.

<sup>7</sup> See: para 35 of the Particulars of Claim.

<sup>8</sup> See: para 20.2 of the Defence.

question remains: to what was the Claimant *contractually* entitled on the assumption his employment would have been ended by the Defendant on 24<sup>th</sup> November 2019?

41. I bear in mind that where an employee bonus scheme gives the employer a very wide discretion as to the payment and size of bonus, this discretion must nevertheless be exercised bona fide, rationally and not perversely; see: *Horkulak v Cantor Fitzgerald* [2004] EWCA Civ 1287, [2005] I.C.R. 402.
42. I should mention that in addition to the March letters themselves, there are other documents which deal with the operation of the bonus scheme. These documents may or may not have contractual force. There is an issue between the parties as to which documents (and their terms and conditions) have been incorporated into the contract between the parties.

*The March 2019 letter*

43. It is important to note that the March 2019 letter is a letter providing for a “Bonus Award” in respect of the 2018 financial year; i.e., for the Claimant’s *past* services. It is part of the Claimant’s remuneration package for the previous year.
44. In *Keen v Commerzbank AG* [2006] EWCA Civ 1536, the court was concerned with an employment contract and whether or not s.3 of the Unfair Contract Terms Act 1977 was applicable in a claim for payment of a discretionary bonus. It was held that the 1977 Act was not applicable because the claimant did not deal as a consumer and that the term relating to the payment of the bonus was not within the defendant’s standard terms of business. Mummery LJ said:

“91. This particular contract term is concerned with the payment of discretionary bonuses. Although described as a “scheme” in which Mr Keen is entitled to participate and although payment is called an “award” made at the discretion of the employer bank, *a bonus paid by the bank is additional pay for work done by Mr Keen under a contract of employment with the bank i e it supplements wages already paid. The “discretionary bonus” is payable by the bank to Mr Keen for the work personally rendered by Mr Keen, as an employee, to the bank, as his employer, under a personal contract of service. To my mind Mr Keen does not fall within the natural and ordinary meaning of a “consumer” vis-...-vis the bank in respect of pay for service rendered by him as an employee.*”

(My emphasis)

45. I accept the Claimant’s submission that the letter gave rise to binding legal obligation to pay the declared bonus; see *Dresdner Kleinwort Ltd v Attrill* [2013] IRLR 548 CA. The Claimant did not have to “accept” the terms of this letter to create the binding obligation. Indeed, JLT made the £85,000 payroll payment without any further formality.
46. The remaining part of the Bonus Award was to be made in the form of an MMC stock grant. The letter states that further information about the award is provided in the enclosed summary of MMC Compensation and benefits information, titled ‘MMC Compensation and Benefits overview – Deferred Awards Restricted Stock Units’. I have not seen a document with precisely this title. In any event, the Claimant accepts that he did receive a document dated March 2019 entitled “C&B<sup>9</sup> Summary including Restricted Stock information (Non US).” [The “Summary”]. This is the only document the Claimant accepts receiving in respect of the March 2019 letter and the 4<sup>th</sup> March 2019 letter.<sup>10</sup>
47. The Summary states:

“... Awards vest one third ... per year for three years on the anniversary of the grant date, subject to your continued employment...”

The Summary appears to be of wide application. In my view, the words “subject to your continued employment” relate to awards which are made by the employer to secure future loyalty or retention. They are of no relevance to an award in respect of past services. In any event, the Summary goes on to state:

“... *If your employment is terminated by MMC without cause (for example, redundancy), you will receive any outstanding unvested portion of your award, if you resign voluntarily or your employment is terminated by MMC for cause (for example, gross misconduct), any unvested portion of your award will be forfeited and cancelled....*” (My emphasis).

48. On this application, I must proceed on the assumption that the Claimant was wrongfully dismissed; i.e., that his employment was terminated without cause.
49. I also proceed on the assumption that no other terms and conditions were incorporated into the contract contained in the March 2019 letter.

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<sup>9</sup> For: Compensation & Benefit.

<sup>10</sup> The Summary only related to stock provided under the March 2019 letter. The relevant provisions relate to the replaced Senior Executive Share Scheme [“SESS”] referred to in the March 2019 letter.

50. In the circumstances, in my judgment the Claimant has a real prospect of succeeding with his damages claim under the March 2019 letter. He has a real prospect of showing that the withholding of the award by the Defendant was not done in good faith or rationally. I should add that the damages will not be £85,000 but will reflect the valuation of the stock in May 2022.

*The 4<sup>th</sup> March 2019 letter*

51. The 4<sup>th</sup> March 2019 letter is in marked contrast with the March 2019 letter. The obvious intention is to make an award of deferred stock units to secure the Claimant's *future* loyalty. The letter is entitled "Retention Award". The letter expressly states that it is subject to the Claimant's continued employment. The stock units are to vest on the 15<sup>th</sup> of the month in which the third anniversary of the grant date occurs.
52. The letter states that the award is subject to the terms and conditions approved by MMC's Compensation Committee as set out in the award documentation to be received shortly after the award is granted. The award was granted on 1<sup>st</sup> May 2019.<sup>11</sup>
53. In my judgment, this letter did not give rise to an immediately binding obligation on the Defendant to provide the Claimant with deferred stock units. Furthermore, the letter was not a letter which contained an offer which was capable of immediate acceptance.
54. The offer of the retention award was only capable of acceptance once the approved terms and conditions were provided and accepted. The letter is clear on this and the Claimant could not have expected an award of this size to be effective without being subject to the terms and conditions. Indeed, those terms and conditions expressly provide a machinery for acceptance.
55. The MMC Terms and Conditions of Deferred Stock Unit Awards state by way of background that the award is granted subject to acceptance as described in Section II.A.1. This states:

"1. Award Acceptance. The grant of this award is contingent upon your acceptance, by the date and in the manner specified .... of these Terms and Conditions ... and Restrictive Covenants Agreement as described in Section II.A.3. If you decline

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<sup>11</sup> One month after MMC's acquisition of JLT on 1<sup>st</sup> April 2019.

the Award or if you do not accept the Award ... by the deadline date and in the manner specified, then the Award will be cancelled as of the grant date of the Award.”

56. Section II.A.3 states:

“3. Restrictive Covenants Agreement. As described in Section II.A.1., a Restrictive Covenants Agreement ... in a form determined by [MMC] must be in place in order to accept the Award and you must execute or reaffirm, as determined by [MMC], in its sole discretion, the Restrictive Covenants Agreement in order for the award to vest pursuant to certain employment events as described in Section III. Failure to execute the Restrictive Covenants Agreement by the date specified ... will result in cancellation or forfeiture of any rights, title and interest in and to the Award, without any liability to the Company.”

57. Section II.B.2 states:

“2. Vesting. Subject to your continued employment, 100% of the Stock Units will vest on the 15<sup>th</sup> of the month in which the third anniversary of the grant date occurs...”

58. The relevant vesting and employment event is Section III, under the sub-heading “C. Termination by the Company Other Than for Cause”, states:

“1. General. ... in the event the Company, in its sole discretion, determines that your employment is terminated by the Company other than for Cause, the unvested Stock Units will vest at such termination of employment on a pro-rata basis as described in Section III.G ...”<sup>12</sup>

59. The Claimant failed to accept the award as required and failed to provide the restrictive covenants agreement as required.

60. As to the acceptance of the award point, on 17<sup>th</sup> July 2019, MMC Compensation sent an email to the Claimant, headed: in bold, “Your MMC LTI Award will be cancelled if not accepted by July 19, 2019.” The email stated:

“The grant of your MMC LTI award is contingent upon your acceptance of the award by Friday, July 19. You should have received several emails from Fidelity Stock Plan Services with instructions to accept your award. However, our records show that you have not yet accepted your award as of yesterday’s close of business.

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<sup>12</sup> There are various definitions of “Cause”. They all amount to misconduct. The pro-rata basis is determined by application of a set formula involving length of service.

If you do not accept your award by the deadline date, the award will be cancelled including any rights, title and interest and to the award as of the grant date....”

The email went on to provide a link to access the Fidelity’s Netbenefits website; to set out the information to access the Claimant’s account at Fidelity; to encourage the Claimant to contact Fidelity if he needed assistance with acceptance; and provide a Fidelity’s contact telephone number.

61. The Claimant states that the Compensation and Benefit Summary which he received in March 2019 provided details of the mechanics for logging on to the Fidelity system.<sup>13</sup> He states that he was unable to logon to the Fidelity Website and confirm his acceptance of the terms and conditions because he was no longer employed by the Defendant.
62. I find the Claimant’s evidence to be remarkably sparse on this point. He gives no indication of how often or when he tried to logon to the Fidelity website to accept the award. There is no evidence of the Claimant’s response to the helpful email of the 17<sup>th</sup> July 2019 or of his efforts following that email. I have not been taken to a single contemporaneous document in which the Claimant complains of his inability to lodge his acceptance.
63. The Claimant had from March to 19<sup>th</sup> July 2019 to lodge his acceptance but failed to do so. In my judgment, the Claimant has no real prospect of showing that he took reasonable steps to lodge his acceptance. The Claimant submits that acceptance is a mere technicality. I reject that submission. In the circumstances, acceptance under the terms and conditions is an essential prerequisite to creating a binding obligation on the Defendant.
64. The Claimant gives no explanation as to his failure to provide the necessary restrictive covenants agreement.
65. In these circumstances, on the true construction of the 4<sup>th</sup> March 2019 letter and of the terms and conditions, the Claimant never became entitled to the deferred stock units under the 4<sup>th</sup> March 2019 letter and, having failed to lodge his acceptance or the restrictive covenants agreement, he never became entitled to the pro-rata vesting of stock units under Section III.C.1.

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<sup>13</sup> This Summary only related to stock provided under the March 2019 letter. The relevant provisions relate to the replaced Senior Executive Share Scheme [“SESS”] referred to in the March 2019 letter.

66. I heard brief arguments on the application of the Unfair Contract Terms Act 1977 in these circumstances. In my view, the 1977 Act is of no application here as the contractual requirements relating to acceptance and the necessity of a restrictive covenants agreement are not terms which exclude or restrict liability. They are terms which define what the Claimant must do to create a binding contract and to become entitled to the deferred stock units.<sup>14</sup>
67. In the circumstances, even assuming that the Claimant was wrongfully dismissed, I consider that he has no real prospect of succeeding with his claim under the 4<sup>th</sup> March 2019 letter.

*The Claimant's application*

68. As far as the Claimant's application is concerned, I will give permission to the Claimant to amend the claim form and Particulars of Claim as asked. I understand that the application is unopposed save as to costs.

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*Conclusion*

69. The Claimant has no real prospect of succeeding on his claim in respect of £4,000 unpaid salary or his claim under the 4<sup>th</sup> March 2019 letter – and there is no other compelling reason why those claims should be disposed of at a trial. Accordingly, I shall give summary judgment to the Defendant on those claims and strike out those claims.
70. The claim under the March 2019 letter remains.

Dated the 27<sup>th</sup> May 2022

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<sup>14</sup> The 1977 Act (as amended by the Consumer Rights Act 2015) might, in appropriate circumstances, arguably be relied on by an employee in a case concerning the transfer of bonus stock options – assuming that the employer is proceeding on his written standard terms of business. The 1977 Act is no longer confined to consumer contracts (as it was at the time of *Keen*). The employee's claim relating to stock units would be for pay (see *Keen*) and would not be excluded under Schedule 1, paragraph 1(e) as a contract relating to the "creation or transfer of securities". Cf. *Micklefield v SAC Technology Ltd [1990] IRLR 218 ChD*. However, in this case the 1977 Act is of no application.