Neutral Citation Number: [2020] EWHC 149 (QB)

Case No: QB-2019-001481

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2020

Before:

CHARLES BOURNE QC SITTING AS A DEPUTY HIGH COURT JUDGE

Between:

COLIN GORDON CHRISTIE	**Claimant**
- and -	
CANACCORD GENUITY LIMITED	**Defendant**

Gavin Mansfield QC and Mark Humphreys (instructed by **Gardner Leader LLP**) for the **Claimant**
Thomas Croxford QC (instructed by **Mishcon de Reya LLP**) for the **Defendant**

Hearing dates: 3 December 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHARLES BOURNE QC

CHARLES BOURNE QC:

Introduction

1. This is an application by the Defendant for summary judgment and/or to strike out parts of the Claimant's Particulars of Claim.

2. The Claimant, an investment banker, was employed by the Defendant until he was summarily dismissed in June 2016. He had originally joined Hawkpoint Partners Ltd ("Hawkpoint"), a financial advisory firm owned by Collins Stewart plc in February 2011. In 2012 Collins Stewart plc was purchased by Canaccord Financial, later Canaccord Genuity Group Inc ("CGG"), whereupon his employment transferred to the Defendant, a subsidiary of CGG, under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). When his employment terminated he held the posts of Managing Director, Head of Industrials and Co-Head of European Mergers and Acquisitions.

3. The Claimant claims that he was not paid the discretionary bonuses, or the full amount of such bonuses, to which he was contractually entitled in the financial years ending on 31 March 2015 and 2016 respectively. He further claims that in discussions about the 2015 bonus, he was separately promised a grant of shares with a value of £1 million (the "Retention Award") but the Defendant has failed to pay this.

4. By this application the Defendant contends that the Claimant has no real prospect of succeeding on these claims and that there is no compelling reason why the case or issue should be disposed of at a trial: CPR 24.2. Alternatively the Defendant contends that the Particulars of Claim disclose no reasonable grounds for bringing the claim: CPR 3.4(2)(a).

Legal framework

5. There is no real dispute as to the principles to be applied on an application for summary judgment. These have been considered in a number of cases, notably *TFL Management Services Ltd v Lloyds TSB Bank plc* [2014] 1 WLR 2006 at paragraphs 26-27. The parties agree that:

   i) A "real prospect of success" is a prospect which is more than merely fanciful.

   ii) The claim therefore must "carry some degree of conviction" as opposed to being arguable and no more.

   iii) The Court must not conduct a "mini-trial". But this does not mean that a Court must take the Claimant's case at face value. The Court can decide that factual assertions are without substance, particularly where these are contradicted by contemporaneous documents.

   iv) The Court should take into account not only the evidence placed before it on the application, but also the evidence that can reasonably be expected to be available at trial.

   v) The Court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, if there

are reasonable grounds for believing that a fuller investigation into the facts would add to or alter the available evidence and so affect the outcome.

vi) However, the Court should grasp the nettle of deciding issues such as points of law or construction, if it is satisfied that it has all the necessary evidence and that the parties have had an adequate opportunity to address them in argument.

6. Case law has also established a number of principles which are relevant in claims by employees for discretionary performance-related bonuses:

i) In the absence of specific criteria or formulae for the calculation of a bonus, the employee is entitled to a bona fide and rational exercise by the employer of its discretion: *Braganza v BP Shipping Ltd* [2015] ICR 44 per Lord Hodge, who said at paragraph 57: "The courts are charged with enforcing that entitlement but there is little scope for intensive scrutiny of the decision-making process".

ii) The rationality test is equivalent to the test used in public law, applying *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 223-224. This test has two limbs: first, whether the right matters have been taken into account in reaching the decision, and second, whether the result is so outrageous that no reasonable decision-maker could have reached it. See *Braganza* per Lady Hale at paragraph 24.

iii) Applying the first limb may require the Court to know the employer's reasons for the decision and more about the process in order to assess whether all relevant matters and no irrelevant matters had been taken into account. If the employee shows a prima facie case that the decision is at least questionable, an evidential burden might shift to the employer to show what its reasons were, in the sense that if the employer adduced no such evidence the Court might draw an inference that the decision lacked rationality. Nevertheless the legal burden of proof remains on the claimant: *IBM United Kingdom Holdings Ltd v Dalgleish* [2018] ICR 1681 per Sir Timothy Lloyd at paragraph 57.

iv) Where conduct or representations by the employer are such as to give rise to "reasonable expectations" on the part of the employee, these would be relevant factors to which the employer must have regard, but they are not in principle of such paramount significance as effectively to bind the employer: ibid, paragraph 229-232.

v) Such "reasonable expectations", from which it may be irrational for an employer to depart, are to be distinguished from "mere expectations" which are not: *Patural v DG Services (UK) Ltd* [2016] EWHC 3659 (QB), [2016] IRLR 286 per Singh J at paragraphs 69-71.

vi) Reasonable expectations may be overridden by changes in financial and economic circumstances: *IBM* paragraph 245.

vii) The burden of establishing that the level of a discretionary bonus payment was irrational or perverse is very high. The Court's function is only to decide whether the employer acted within or outwith the limits of its discretion, and not to substitute itself for the employer by awarding or fixing the level of a bonus:

Keen v Commerzbank AG [2006] EWCA Civ 1536 per Mummery LJ at paragraphs 39-40.

The Claimant's contract of employment

7. The basic contractual terms are found in a list of "Employment Particulars" ("the particulars") attached to a letter from Hawkpoint to the Claimant dated 24 January 2011 ("the offer letter"). The offer letter itself stated:

> "As discussed, you will be eligible for participation in the Collins Stewart plc 2010 Long Term Incentive Plan. Any award under this plan is subject to the approval of the Remuneration Committee."

8. In respect of remuneration the particulars stated:

> "You will be entitled to:-
>
> - a basic salary of £150,000 per annum.
>
> This will be paid by monthly instalments, normally on the 18th of each month, in respect of the whole of that month, into a current bank account maintained in the UK;
>
> - participate in a discretionary bonus scheme. Notification of bonus awards in respect of the prior year is normally made in the first quarter of each year, provided you are still in the service of the Company on bonus payment day and have not tendered your resignation or are not under a notice period."

9. The particulars also provided (1) that the employer reserved the right to make reasonable changes to the terms and conditions of employment and (2) that the employment was terminable by either party on three months' written notice.

10. The particulars also incorporated Hawkpoint's staff handbook. The rights and liabilities of the employer having transferred to the Defendant on 1 March 2013 under TUPE, it appears to be common ground that the Defendant's Employee Handbook dated February 2015 ("the 2015 Handbook") was (in part) a contractual document at the time to which the claim relates.

11. Hawkpoint also sent the Claimant another letter dated 24 January 2011 (the "Side Letter"), of which the material parts read:

> "Dear Colin
>
> You asked if we would provide you with indicative guidance as to our likely approach to determining annual discretionary bonus levels following your joining us.
>
> Our likely approach would be first to determine revenues earned by Hawkpoint attributable to you, and then to apply a range of

percentages to these to arrive at an indicative bonus level, as follows:

Attributable revenues	**Indicative bonus level**
£m	% (within ranges indicated)
0-0.6	-*
0.6-1.0	20
1.0+	25

* This would change to 10% in the event of attributable revenues exceeding £1.5 million.

> The above is intended as guidance to us and would not preclude the possibility of a higher level of bonus being awarded. Specifically, in the first year we would expect to give some weighting to efforts made towards developing relationships and building up a transaction pipeline.
>
> The form of bonus in terms of split between cash and equity and deferred elements would be determined by overall Collins Stewart policy, which in turn will be governed by regulatory guidelines.
>
> For the avoidance of doubt, this letter is not intended to and does not create any legally binding or enforceable agreement or arrangement between us."

12. The Side Letter had been preceded by discussions, evidenced by an email from Hawkpoint's Managing Director Simon Gluckstein dated 8 December 2010, saying in particular: "As you would expect, all of this continues to fall under the discretionary nature of these discussions but I think that we all agree that we need to bring discussions to a head and, to that end, I hope that the clarity of the details below is helpful." The letter then set out two suggested formulae, of which the Side Letter eventually contained one. On 13 December an email from Paul Baines, Hawkpoint's Executive Chairman, to Simon Gluckstein said of the Claimant:

> "Rang and said in principle he is there. One or two issues to resolve. Would like side letter re option 1 and the words 'not less than' added. I said I would consult but must not turn goodwill guidance into a binding commitment."

13. A further email on 14 December 2010 shows Mr Baines agreeing that the wording would reserve the possibility of paying "higher" (rather than merely "different") amounts "on basis that it is not legally binding and of the juxtaposition of [a further sentence about giving some weighting in the first year to developing relationships and building up a 'pipeline']".

14. The Claimant signed and dated the Side Letter confirming his acknowledgement and understanding of it.

15. The Claimant claims that the Side Letter formed part of his contract of employment but the Defendant, relying in particular on the final paragraph quoted from the Side Letter above, denies this.

16. There is also an issue between the parties about how (if and when the formula in the Side Letter were used) "attributable revenues" would be calculated. The Side Letter states that the bank will determine these but does not say how.

17. Section 4.5 of the 2015 Handbook stated:

> "The Company operates a discretionary bonus scheme which is governed by a Remuneration Policy which complies with the FCA's rules surrounding remuneration ('the Remuneration Code'). In the absence of any specific contractual arrangements between you and the Company, all bonus payments are discretionary rather than contractual and the Company operates an overall remuneration structure which allows for the payment of no variable remuneration (i.e. bonuses) where the Company has failed to be profitable or for other reasons required by the FCA Code. A bonus paid in one payment period has no bearing on whether, and to what extent, a bonus may be paid in subsequent payment periods."

The Handbook further explained that bonus decisions were made by the Remuneration Committee, an independent committee of the Defendant. It also recited that certain senior employees would be "Code Staff" for the purposes of the Remuneration Code and that the implications of this would be explained to Code Staff on commencement of their employment or when they were deemed to fall within the definition. It continued:

> "Any bonus payment is determined by the Remuneration Committee at its sole discretion based entirely upon the Company's overall profitability. In determining any variable remuneration, the Remuneration Committee will take into account various factors, including your individual performance, your performance against agreed objectives, and the performance of your business area and the Company during the period to which the bonus determination relates, as well as certain non-financial performance metrics, such as your behaviour with regard to the Company's compliances procedures, your attendance, punctuality, attitude and teamwork. See also section 13 relating to the appraisal process which is the principal basis on which variable payments are made."

Section 13 refers to a formal annual appraisal against agreed objectives and job description, a process which "is required to be completed prior to the payment of bonuses normally in May".

18. The offer letter also referred to the Long Term Incentive Plan ("LTIP") as stated above. After the acquisition of Hawkpoint, the relevant LTIP was that of the Canaccord Genuity Group Inc, as amended from time to time. The stock component of bonus awards was paid under the LTIP, which determined when shares would vest in the recipient. Schedule A section 1 of the LTIP provided that shares would vest annually in equal portions over three years unless the Board or a Committee or Executive Officer decided otherwise.

19. The Defendant also relies on two events occurring after the Claimant had commenced employment.

20. First, by a memorandum dated 30 June 2011, the Hawkpoint Group head of human resources informed the Claimant that he was a member of "Code Staff" for the purposes of the Remuneration Code of the Financial Services Authority (FSA) which was applied to many financial services businesses for the first time in 2011. In response to the Code, the Collins Stewart Hawkpoint Board had approved a remuneration policy on 23 June 2011. The memorandum explained that the Group was required to ensure that the structure of remuneration was consistent with effective risk management, that the ratio between fixed and variable elements of remuneration should be appropriate and that the Group "may reduce or even determine to pay no variable remuneration if it considers that the circumstances so require". Performance-related remuneration would be based on the assessment of each employee's performance, the performance of their business unit and the overall results of the Group, and financial as well as non-financial criteria would be taken into account. A portion of both cash and equity awards would be deferred. Decisions on, inter alia, annual discretionary bonus awards would be subject to review and approval by the Remuneration Committee.

21. Second, on 31 August 2011 Hawkpoint wrote to the Claimant to announce changes arising from a review of compensation levels among its competitors:

> "As a result I am pleased to advise you that your salary will be increased from £150,000 to £175,000 per annum with effect from 1 September 2011. However, please note that regard may be had to this adjustment in determining any future discretionary bonus awards."

22. Against that factual background, the Claimant identifies five alternative ways in which he claims to be able to rely on the Side Letter:

i) It had direct contractual effect.

ii) It created a contractual obligation to award a bonus of at least the amount produced by the formula in the letter but with a discretion to award more.

iii) It had direct contractual effect unless and until the Defendant notified the Claimant that it would cease to have effect.

iv) The Defendant was obliged to have regard to the Side Letter as a relevant consideration when discharging its implied obligation to make a rational bonus decision.

v) The Side Letter was a representation made to the Claimant as to the manner in which his employer's discretion would be exercised in determining his bonus. There being no resiling from its terms, the employer continued to represent that the bonus would be calculated in accordance with it. The Claimant at all times relied on the representations by continuing to work for the Defendant, so that the Defendant is estopped from denying the applicability of the Side Letter.

The facts relating to the claims for bonuses and for the Retention Award

23. By a letter dated 16 March 2012, Hawkpoint informed the Claimant of a bonus award stated to be in respect of the period to December 2011 (there was no other bonus calculation for the financial year 2011/12). He was awarded a cash bonus of £192,500, a further cash bonus of £65,000 to be paid by October 2012 if the acquisition of Collins Stewart Hawkpoint plc by Canaccord Financial was completed (payment otherwise to be at the Board's discretion) and a share award of £67,500. His attributable revenues were assessed at £1,740,000 for that period. The total award was worth £325,000, which is the figure that would be produced by the formula in the Side Letter although it is notable that, contrary to that formula, part of the award was said to be contingent on completion of the acquisition.

24. For the financial year ending in 2013, the Claimant's attributable revenues were assessed at £289,000. There was no bonus award, which is consistent with the Side Letter.

25. That is the only year for which I have seen an appraisal document which contains substantive comment by the employer in addition to self-appraisal by the Claimant. His manager, Simon Bridges, praises him e.g. for having high intellectual, technical and ethical standards but also states: "With Colin its all about the potential" and "this is going to be a critical year". The document grades the Claimant under numerous headings. Under "Financial Contribution" he is graded as not having met expectations.

26. Towards the end of the next financial year, on 17 February 2014, the Defendant's Chairman of European Investment Banking ("EIB") Peter Kiernan had emailed the Claimant and other Managing Directors, asking for their assessment of their and others' percentage contribution to revenue-producing transactions, ahead of "our discussions regarding compensation".

27. The Claimant replied on 26 February 2014, identifying a number of transactions and also noting that these would or might generate total revenue of over £5 million in the next financial year, 2014/15.

28. For the financial year ending in 2014, the Claimant's attributable revenues were assessed at £253,750. Although the formula in the Side Letter again would not have produced a bonus award, he received a bonus of £50,000.

29. I have seen a partly completed appraisal form for the Claimant for 2013/14, but each box for his manager's appraisal merely states "verbal discussion" and the form otherwise contains only the Claimant's self-appraisal. Under "Financial Contribution" he states: "Improving. Current outlook is well above MD target."

30. In May 2014 the Defendant issued a new edition of its remuneration policy. In respect of attributable revenues, it stated:

> "Once a proportion of revenue has been allocated across departments, the costs associated with this are set against it. These include salaries and benefits, the amortisation costs of share awards, direct travel & entertainment … costs market data costs, cost of capital where applicable leaving a residue which represents bonus pools by department including National Insurance. The individual allocation is then decided by both the Head of Department with input from the relevant sector teams, taking into account both revenue and non-revenue contribution, which is then reviewed and approved by the Executive Committee, the Remuneration Committee and Parent Company."

31. The policy further stated that the Defendant's policy was not to award "guaranteed variable remuneration" save exceptionally in the first year of employment of a newly hired "business critical" employee and then only with the approval of the Remuneration Committee.

32. In November 2014 there was an "update meeting" for the EIB department. A presentation slide identifies a "medium term target" of £3 million for each Managing Director.

33. The financial year ending in 2015 is the first of two years for which the bonus is in issue in this claim. For that year the Claimant's attributable revenues were assessed at £3,351,742. He received a bonus of £350,000 (a cash award of £113,750 and a share award of £236,250). The formula in the Side Letter would by my reckoning have produced a bonus award of £727,935.50 from the stated revenue figure.

34. In advance of the award, on 20 March 2015 the Claimant had emailed Jacques Callaghan (Co-Head of EIB), putting forward his view of attributable revenues. He gave a figure of £6,422,798.

35. It is clear that the subject of the Side Letter came up in the discussions regarding the 2015 bonus. On 20 April 2015 Steve Gardner emailed a number of colleagues, saying "Please see attached Colin's letter. This is very clearly not a guaranteed methodology and given it's also 4 years old, I am comfortable there is no obligation."

36. Peter Kiernan replied on the same day and said:

> "I don't believe he thinks it is legally binding either but he was using it as an illustration of what the organisation deemed appropriate when he joined and therefore an indication of what he believes is the order of magnitude of what is fair now. To be clear, he did say that the letter would give rise to a number that was too big but he wouldn't be drawn on how much lower it should be. He also wouldn't be drawn on what his net as opposed to his gross revenues should be."

37. On the same date Peter Kiernan emailed Steve Gardner after speaking to the Claimant again. He said that the Claimant "accepts that life has moved on since the [Side Letter]" and now put his attributable revenues at a figure which would yield a bonus of £847,788.

38. The Defendant's Chief Operating Officer, Darren Ellis, responded on 21 April 2015 stating:

> "I think we all accept that his guidance letter is over 4 years old, and relates to an advisory business rather than the integrated business we have now, so the relevance is questionable.
>
> However, I do not understand how we get to £847K as three of the fees would be shared with Securities ... and that is before we consider Jacques role in Volution in particular.
>
> Also the guidance gives 10% of attributable revenue above £1.5m, so if we adjust for the above we would be nearer £388k."

39. Minutes of a Remuneration Committee meeting on 13 May 2015 show that the Defendant had made a loss in 2014/15. Its performance did not "generate a bonus pool" but CGG nevertheless provided a budget for bonuses. The bonuses proposed were deferred to a greater extent than previously, in that 65% of bonuses over £50,000 would be in stock, with a three year cliff vesting schedule (i.e. vesting in the employee could be affected by the employee leaving the company during the three year period, subject to the circumstances). The Committee was satisfied that the Defendant's CEO, Alexis de Rosnay, had allocated bonuses to departments and to "senior people" at an appropriate level, and it approved the budget. Mr de Rosnay said that attempts had been made for some time to manage expectations and he hoped that a weighting of bonuses towards share awards rather than cash would not come as a surprise.

40. The Claimant's award was the third highest paid by the Defendant to any employee in EIB in that year.

41. After the event, on 21 May 2015, Mr de Rosnay emailed the acting President of CGG, David Kassie, summarising how the bonus round had been received and referring to disappointment in several quarters. The email said that "We are going to have to throw some stock at several key people", though such further awards would be "not a lot". The Claimant was identified as "potentially" being one of those who should be mollified with a further share award. In fact the Remuneration Committee on 26 May 2015 gave final approval to some exceptional stock awards for some employees but not for the Claimant.

42. On 10 June 2015 an EIB quarterly presentation took place. Slides reveal, among other things, a reduction in the cost base (including a reduction in the number of Managing Directors) for the year 2015/16 and a further statement of the target of £3 million per Managing Director.

43. Following the 2015 bonus decision, the Claimant was concerned about his overall remuneration. He sought a meeting with Mr de Rosnay. By email on 29 June 2015 Mr de Rosnay asked him to send his "18 months pipeline". On 30 June 2015 the Claimant sent details of transactions on which he was working.

44. The Claimant says that the meeting took place on 16 July 2015. The Defence (at paragraph 73) appears to agree that date, although Mr Horner's statement (paragraph 129) refers instead to 24 July 2015. However, it appears to be common ground that Mr de Rosnay at a meeting in July 2015 expressed willingness to increase the Claimant's salary from £175,000 to £200,000, a step which was taken in due course (see also paragraph 47 below). Meanwhile the Claimant's case is that Mr de Rosnay on that occasion also agreed that he would receive the Retention Award of stock valued at £1 million for the financial year 2015/16.

45. On 17 July 2015, the head of HR Steve Gardner emailed Mr de Rosnay, though it is not clear to what he was responding. The subject line read "P&C – Christie", and the message said:

> "I've given this some thought. I think there are two options.
>
> 1) We just give him a cash allowance for a fixed period of time; or
>
> 2) We just give him a lump sum
>
> I wouldn't support increasing his actual base salary for a fixed period. However carefully we word that, it could be difficult to reduce salary later and we know Colin can be difficult.
>
> Whatever approach we take will need RemCo sign off, so I'm not sure what the advantage of the allowance would be over the lump sum. The cleanest approach might be to pay a lump sum in October and badge it as part of the interim bonus process?"

46. On 22 July 2015 the Claimant wrote to Mr Bridges, referring to a "constructive conversation" with Mr de Rosnay the previous Thursday (which was 16 July). The email dealt in part with discussions about contracts with senior advisers and their bonus arrangements. The Claimant also stated his own wish for "a clear and committed compensation structure that reflects the value that I am bringing and will bring to the firm".

47. By mid August 2015, the Defendant was considering a revised package for the Claimant. On 18 August 2015, Mr Bridges wrote to Mr de Rosnay:

> "Summarising my last discussion with Colin, and consistent with your earlier discussion with him and my update to you late last week, I suggested the following:
>
> 1. The scale for bonus as described by you, applied to net revenues
>
> 2. The commitment to deliver 65% of this year's bonus in cash

3. Salary to £200k, with the increase back dated to April

4. A one-off payment of 10% of the fee on Clarke Energy – in effect treating him like a senior advisor for this deal. This could be between £175k and £250k

5. A material stock grant in the Autumn – he believes you suggested a grant of £1m

His reaction was negative. He believes the Clarke fee should be 20% as a make-up payment for last year's bonus. We will know more about the Clarke fee at the end of this week. My instinct is to wait and see what we found out (Friday is a deadline for the bid) and then revisit together next week. As of now Colin has a good book of business and is an important member of the team. I don't want to lose him but equally there comes a point where we have to say enough is enough."

48. This is evidence that a stock award of £1 million was "discussed", but not that it was promised, offered or agreed.

49. On 24 September 2015 an email from Mr de Rosnay to the Claimant said:

> "Further to our meeting and further to my recent discussions with Dan Daviau [CGG's President], I am pleased to confirm that the Firm will grant you a stock award at some stage during this fiscal year. We are still working on the quantum and timing; please bear with us.
>
> I want to insist on the confidential nature of this future award. Only a very select few senior high performers have been approached. Any form of disclosure of this award other than between you and CG would most certainly trigger a cancellation of the award.
>
> We are pleased you have been selected and we will be in touch as soon as practical."

50. There were a number of significant emails on 15 October 2015.

51. First I have seen one from Mr de Rosnay to the Claimant, praising his attitude as "engaged, supportive, motivated".

52. Then an email from Mr de Rosnay to Mr Daviau said:

> "I know your plate is full, but I need to tell the key guys (Bridges, [name redacted], Christie, [name redacted] ...) as to when they can expect the stock. I think it's not a disaster if they get it at year-end, but a letter indicating that the award is coming and the timing within the next 4 weeks would be appropriate. There is a lot of unrest in IB since [2 employees] resigned ... and this stock award will calm a few down."

53. A response from Mr Daviau said:

> "Alexis I thought the numbers you discussed were about $750,000 per person - correct".

54. Mr de Rosnay responded, not querying the figure but asking whether Mr Daviau felt that it had to be the same amount for each individual and suggesting that there was a hierarchy in which the Claimant was the second of four employees. Mr Daviau responded saying "Yes. Different fine."

55. By an email on 6 November 2015, Mr de Rosnay told the Claimant that it was hoped to tell all recipients formally about their stock award in 3 or 4 weeks. On 2 December 2015 the Claimant emailed Mr de Rosnay, asking for an update, saying "I believe I have been very patient since our initial discussion in July, and the prospective award is fundamental for me".

56. On 20 December 2015 an email from Mr Daviau to the Claimant stated:

> "Alexis mentioned to me that he is contemplating a share issuance scheme to key employees in the context of our year end compensation process. Obviously you are one of those key employees. I am certainly supportive of that effort.
>
> Alexis was trying to get some kind of indicative note out to you as soon as possible. Given I am trying to integrate the process with other regions and any such award needs to integrate with the broader picture on compensation, we are still a couple of months away from formalizing exact details.
>
> I will keep you posted but wanted to let you know that I am aware of your contribution and look forward to finalizing details soon."

57. The Defendant makes the point that none of the employer's communications are clearly consistent with an award of £1 million having been promised on 16 July 2015, and none of the Claimant's communications protest about the apparent difference between such a promise and the unquantified nature of what was now being referred to.

58. On 7 January 2016, Mr Bridges announced that the Claimant and a Mr Robinson had now been appointed as Co-Heads of M&A. There is no suggestion that this would affect the Claimant's remuneration in any way.

59. On 12 January 2016, Mr de Rosnay shared with some senior colleagues a discussion that he had had with Mr Daviau about the Defendant's financial situation. The figures for 2015/16 were bad, and it was anticipated that many employees would receive no bonus and/or be dismissed.

60. It is clear that at or around that time, for whatever reason, the Defendant's attitude to the Claimant fundamentally changed. By 2 February 2016, internal discussions were contemplating the Claimant's departure and a message from Mr de Rosnay to Mr Bridges included the phrase "Christie out". The next day, Mr de Rosnay and Mr Bridges were going through the Claimant's revenues since he had joined. The figure which they

identified for 2015/16 was £325,575, arising from two transactions ("Orca Bidco" and "Volution").

61. An email from Mr de Rosnay on 3 March 2016 remarked that the Claimant "has produced very little in years (£3.8m), yet has the most resources at his disposal. His pipeline for Fiscal17 stands at £500k."

62. An email from Mr De Rosnay to Mr Daviau on 4 April 2016 stated:

> "In speaking to Simon Bridges, we have decided to assess Colin's pipeline in late June and then decide at that moment. We will not be giving him any bonus. We feel it's better this way, due to the fragile state of the 8th floor at present."

63. However, further emails of 5 and 9 May 2016 referred expressly to the Claimant's departure, the latter stating "we are going to make him redundant this month".

64. On 10 May 2016 the Remuneration Committee decided to award no bonus to the Claimant for the financial year 2015/16. His attributable revenues were assessed at £325,575. The formula in the Side Letter would not have produced a bonus award from that figure.

65. The Claimant emailed Mr Daviau on 23 May 2016, asking for a meeting. He raised both the bonus issue and the Retention Award saying, among other things:

> "As you know, Alexis made a verbal commitment last July on a grant of stock, he mentioned £1m award saying that I would receive a letter in September for grant in May of this year. As you probably also know, I have received emails from Alexis about that award. I received an email from you in December.
>
> During 2016 to date and last week's bonus discussion, no mention was made of any award. Indeed, I got the impression from Simon that during February/March I had been considered for possible cost rationalization.
>
> ...
>
> ... Alexis in particular has decided to make very significant representations to me that he has not delivered on and even worse he will barely communicate with me. Investment banking is built on trust, with clients and colleagues."

66. In his reply on 24 May 2016 Mr Daviau said:

> "I'm not aware of any explicit amount of promise that was made on a share award. The letter I sent you in December was simply acknowledging Alexis had spoken to a handful of people on share awards in the context of year end compensation for this year."

67. The Claimant responded on the same date. He described the fiscal year to 2015 as "my very good year" and noted that his bonus had been £350,000 but slanted towards stock with the three-year cliff vesting, describing this as "insufficient (particularly cash) reward for when I have performed strongly". He did not refer in these emails to the Side Letter.

68. The proposed meeting never took place. The decision to terminate the Claimant's employment was communicated on 25 May 2016 and was set out formally in a letter dated 10 June 2016.

69. The Claimant in due course brought a claim for unfair dismissal in the Employment Tribunal. Although the Defendant filed a response contesting the claim, it eventually consented to a judgment containing a finding of unfair dismissal and an order for the statutory maximum compensation. There has therefore not been any finding by the Employment Tribunal as to the reason for the dismissal.

The Defendant's application

70. In order to decide the Defendant's application, it is necessary to consider each of the relevant contentions in the Claimant's Particulars of Claim in turn.

The 2015 bonus

71. The Claimant's first contention (Particulars of Claim paragraph 40) is that the Side Letter had direct contractual effect, obliging the Defendant to pay a bonus calculated in accordance with the formula (or at least to do so unless it indicated in advance that it would not, or unless there were exceptional circumstances to justify not doing so). That would mean that the Defendant must be in breach of contract because the formula produces a figure greater than the Claimant's 2015 bonus.

72. I am satisfied that that contention has no real prospect of success. Far from stating that it had contractual effect, the Side Letter stated that it did not. It did not on its face purport to vary the particulars which accompanied the Claimant's offer letter, and those particulars clearly stated that bonuses were discretionary. Whilst the Court must always be alert to reality and not necessarily take a label at face value, the evidence in this case overwhelmingly indicates that both parties believed that the Claimant's employer at all times had a discretion as to the award and the amount of any bonus. The formula was only applied once, in 2012, and even then there was a departure from the strict terms of the Side Letter in that part of the bonus was contingent on the corporate acquisition. The lack of award in 2013 was consistent with the Side Letter but by its nature did not engage the formula. There was an award in 2014 although the Side Letter's formula would not have produced one. In 2015 the Defendant's internal correspondence shows that its officers did not regard the Side Letter as binding. When the formula was not followed, there is no evidence that there was any protest by the Claimant on the basis that it was binding. There is evidence (see paragraph 36 above) that the Claimant himself thought that the formula would produce an award that was "too big".

73. The Claimant's case is further weakened by his designation as Code Staff and by the terms of the pay rise which he received, both in 2011. A rigid obligation to apply the Side Letter in the formula, regardless of (for example) the bank's financial performance, would be inconsistent with the Remuneration Code. The express

statement that the salary increase could impact on future discretionary bonuses was entirely inconsistent with the Side Letter having contractual effect.

74. The second contention (paragraphs 42-60) is that even if bonuses were discretionary, the 2015 bonus was outside the permitted scope of discretion in its total amount, in the balance between cash and stock and in the application of a three year "cliff vesting".

75. The complaint about the amount has a number of components:

    i) The Claimant claims that his attributable revenues were £6.6 million, not £3,351,742.

    ii) He was not consulted about the revenue figures, the level of bonus or any reason to depart from the formula in the Side Letter.

    iii) He was given no warning of any intention to depart from the formula in the Side Letter.

    iv) In the relevant financial year the Defendant made a profit, before deduction of "incentive compensation", of £11,701,000. It paid a total incentive compensation of £18,026,000 including £1,731,000 to Mr de Rosnay. However it paid no or no sufficient heed to the Claimant's performance (he claims at paragraph 50 of the Particulars of Claim to have "originated and/or been responsible for £10.6 million of new business").

    v) Whilst the Claimant (at paragraph 55 of the Particulars of Claim) acknowledges a significant decline in the Defendant's revenues in 2014 and 2015, he emphasises his own high level of performance and the payment of substantial bonuses to some staff.

76. In light of those matters, the Claimant asserts that any discretion as to his bonus was exercised in bad faith and/or the decision was perverse and irrational.

77. In its Defence, the Defendant repeats (paragraph 50) that the Claimant's attributable revenues were £3,351,742 and further gives reasons why some of those revenues could have been disregarded. The reason for the bonus figure was (paragraph 52) that the Defendant posted a loss and its European Investment Bank had under-performed. As to consultation, the Claimant took the opportunity to submit feedback for the purpose of the remuneration discussions (see paragraph 34 above) and, on his own case, there was discussion about the effect of the Side Letter.

78. In deciding this part of the application, I remind myself that the Court should not conduct a "mini-trial". That guidance is however of limited usefulness, in particular because it is difficult to identify what a "mini-trial" is or would consist of. It seems to me that my duty is to consider whether any issues can clearly, safely and fairly be decided on the basis of the documents and submissions before me or whether, conversely, there is a need for full disclosure, witness statements and oral evidence.

79. I also bear in mind that in judging the exercise of the Defendant's discretion, both limbs of the *Wednesbury* test are to be applied. I respectfully share the view expressed by Singh J (as he then was) in *Patural* (at paragraph 61) that this exercise calls for a degree

of caution because of the differences between a judicial review of a public law decision and a civil law trial of an issue relating to a contractual discretion. The duties of public bodies and private actors are different, as Singh J said. Also, whereas in judicial review the default position is that cases are decided on the papers, in civil litigation that is the exception rather than the rule.

80. The Defendant relies on a witness statement dated 9 August 2019 by Edward Horner, the Defendant's General Counsel and Head of Compliance. There is no statement from any of the individuals who participated in making the bonus decisions. Mr Horner also exhibits a quantity of contemporaneous documents, including some of those summarised above.

81. The Claimant's evidence in response is contained in his witness statement dated 30 October 2019 which supports the contentions made in the Particulars of Claim and which also refers to some of the contemporaneous documents that I have summarised above.

82. Mr Horner explains how the bonus system worked in practice. He says that the starting point each year was for representatives of CGG to determine the size of the bonus pool, if any, depending on the profitability of the business and other commercial factors such as the stability of the workforce and wider market practices. He points out that in a loss-making year, CGG would have to fund any bonus pool for the Defendant. Once an indicative bonus pool was agreed with CGG, sums were allocated across departments. Departmental heads would then work with senior management to formulate awards which, for senior employees such as Managing Directors, were agreed on a case-by-case basis. All proposed bonuses were then reviewed by the Remuneration Committee. This broad description does not appear to be contested by the Claimant in his witness statement (paragraph 118).

83. In my judgment, the Claimant has no real prospect of persuading a Court at trial that there was no lawful exercise of the Defendant's discretion.

84. As I have already said, there was no obligation to apply the Side Letter formula. The Claimant may well have retained a "reasonable expectation" (of the kind discussed in *IBM* and in *Patural*) that regard would be had to the formula, but not in my view that the formula would necessarily be applied. I therefore consider that the Side Letter was a relevant factor to which the Defendant was obliged to have regard. However, the internal emails (from Mr Kiernan in particular) show that it was brought to the attention of senior decision makers and regard was had to it. There were straightforward reasons for not applying the formula, over and above the fact that the Defendant rightly believed that the formula was not binding. The application of the Remuneration Code post-dated the Side Letter and, at the very least, underlined the undesirability of an investment bank committing itself to paying bonuses without regard to performance. The terms of the 2011 salary increase signalled at least a potential move away from the formula. The Defendant's poor performance in 2014 and 2015 provided a rational and indeed obvious reason to pay fewer or lower bonuses.

85. I have also seen no basis for the bonus decision being undermined by any procedural failure. The Claimant was consulted about his revenues and there was in any event no contractual or other obligation to enter into any other consultation or warning about the level of his bonus. He complains that in 2015 the Defendant did not carry out a formal

annual performance appraisal in the manner described in its policy contained in the Employment Handbook. As this is a summary judgment application, I assume that he is right about that. However, the Defendant had regard to his, and its own, performance, and it awarded him one of the highest bonuses in the department for that year. I see no real prospect of the Court at trial forming a view of what a formal appraisal would have contained and, on the basis of that view, concluding that the Defendant was bound to exercise its discretion by awarding a higher bonus.

86. The Claimant's main or most detailed attack is on the quantification of his attributable revenues. It seems to me that, properly analysed, this is a difference of opinion between the parties. The gross revenues on which he relied were identified to the Defendant, as I have said, by an email dated 20 March 2015. That email itself identified other individuals with whom the credit might, in the Claimant's view, need to be shared. The further internal emails show that regard was had to those transactions but that the Defendant reached a different conclusion about whether they should be attributed to the Claimant for bonus purposes.

87. The Claimant complains that the Defendant has not set out a detailed calculation or given disclosure of the underlying documents. It seems to me that that complaint is based on the incorrect assumption that his bonus would be calculated by means of an arithmetical formula. The Side Letter apart, there is no basis for such an assumption.

88. I have been given no good reason to doubt Mr Horner's evidence that the Claimant's bonus of £350,000 was the third highest of any paid to anyone in EIB that year and that other Managing Directors received lower bonuses and others received no bonus.

89. In the absence of an entitlement to the use of a formula or a convincing case based on a comparison with another employee in comparable circumstances, the Claimant cannot overcome the difficulty identified in *Keen*, per Mummery LJ at paragraph 59:

> "The burden of establishing that no rational bank in the City would have paid him a bonus of less than his line manager recommended is a very high one. It would require an overwhelming case to persuade the court to find that the level of a discretionary bonus payment was irrational or perverse, in an area where so much must depend on the discretionary judgment of the bank in fluctuating market and labour conditions."

90. Mummery LJ so decided in allowing the bank's application for summary judgment although, as in the present case, the bank's evidence was in a witness statement by an in-house lawyer rather than a decision-maker and the evidence did not identify the person who decided the size of the relevant bonus pool or include contemporaneous documents explaining the actual bonus figure. A further reason for the Court of Appeal's decision (ibid paragraph 60) was that, as in this case, there was no independent evidence, expert or otherwise, to support the Claimant's claim of irrationality.

91. As in *Patural*, it also seems to me that the Claimant is not assisted by referring to *Braganza* and the two-limb *Wednesbury* test, because he has no real prospect of showing that the Defendant had regard to an irrelevant factor or that it failed to have regard to a relevant factor as I have said.

92. For the same reasons it also does not assist the Claimant to rely on the implied term requiring the Defendant not to act in a manner calculated to destroy or seriously damage the parties' relationship of trust and confidence, and I see no basis for his assertion that the Defendant acted in bad faith.

93. Having reached those conclusions in respect of the size of the 2015 bonus, I reach the same conclusions for the same reasons about the structure of the bonus and the weighting towards stock with three-year cliff vesting. It seems to me that the Defendant had a wide discretion as to the structure of such bonuses as it saw fit to award. The change in the structure was noted and discussed at the meeting of the Remuneration Committee on 13 May 2015 (see paragraph 39 above). The Claimant has no real prospect of showing that the Defendant exceeded the limits of its discretion.

94. These conclusions are notwithstanding the fact that the Claimant made a lengthy request for further particulars of the Defence but many parts of the request were parried with the response that matters had already been sufficiently pleaded. In my view, there is no real prospect that extracting further information from the Defendant about its decision-making process would enable the claim to succeed.

95. As an alternative to his case in contract, the Claimant contends that the Defendant is estopped from denying that it was obliged to apply the formula in the Side Letter (Particulars of Claim paragraphs 23-27). The effect of the proposed estoppel, explicitly, would be to make the Side Letter binding in practice.

96. The problem is that Side Letter expressly represented, among other things, that it would not be binding.

97. The estoppel case therefore has no real prospect of success (in respect of either 2015 or 2016). It falls at the first hurdle because there was no representation that the formula would be applied in the Claimant's favour. In addition to the fact that the Side Letter originated from Hawkpoint and not from the Defendant (a point whose significance was not explored before me), the Side Letter referred to "indicative guidance" as to "our likely approach". It stated that its contents would not be "binding or enforceable". In respect of the split between cash and equity and deferred elements, it said that this would be determined by company policy "which in turn will be governed by regulatory guidelines".

98. In addition the effect of the Side Letter was further qualified by the Code Staff announcement and by the terms of the 2011 salary rise as I have said.

99. In those circumstances, whether or not the Claimant could establish that any representation in the Side Letter was continued and adopted by the Defendant by its conduct, there is no prospect of establishing an estoppel which would contradict its stated terms.

The 2016 bonus

100. The issues are similar to those arising in 2015 and can be discussed more briefly.

101. The Claimant first contends that the Defendant was contractually obliged to award a bonus in accordance with the Side Letter (Particulars of Claim paragraph 89). Although

the Defendant assessed his attributable revenues as £325,575, he says that the appropriate figure was £1.2 million (Particulars of Claim paragraph 87). On this basis he was contractually entitled to a bonus of £130,000.

102. For the reasons given above, the Claimant has no real prospect of establishing that the formula in the Side Letter was contractually binding (either in its simple form or with a rider that it must be followed save where advance notice is given or where exceptional circumstances apply).

103. Similarly there is no real prospect of the claim succeeding on the basis of any failure to consult (Particulars of Claim paragraph 90). There was no contractual obligation to consult the Claimant, although the Defendant was obliged to have regard to all relevant factors including the Claimant's performance.

104. The Claimant then contends that there was a failure to have regard to the Side Letter (paragraph 90c) and/or that the decision to award a zero bonus was outside the scope of the contractual discretion (paragraph 91). For the reasons which follow, I consider these contentions together.

105. The particulars of the complaint of acting outside the scope of discretion are that the Defendant:

i) had regard to irrelevant considerations, namely a non-existent target of £3 million and a wrong revenue total of £325,575, and failed to have regard to the relevant considerations of revenues of £1.2 million and the absence of a revenue target (paragraph 92);

ii) failed to have any or any sufficient regard to the Claimant's excellent performance in a difficult financial environment (paragraph 93); and

iii) failed to have regard to what the Claimant saw as the underpayment of his 2015 bonus, or to the non-payment of the Retention Award.

106. It seems to me that the contemporaneous email exchanges reveal the reality of the situation. By early 2016 it was clear that the Defendant was still performing poorly. Meanwhile the Claimant had not managed to sustain the level of revenues which he had achieved in the previous year. By 3 February 2016, Mr de Rosnay and Mr Bridges had formed the view that his up-to-date atrributable revenues were £325,575, a figure which would not yield a bonus even if the Side Letter formula were applied.

107. As in the case of 2015 the Claimant argues that his attributable revenues should have been assessed at a much higher figure. I have considered whether that issue about 2016 ought to be explored at a trial. In 2015 there was explicit documentary evidence showing that the Claimant put forward the transactions on which he relied and the Defendant's senior officers considered them and reached a different view of them. In 2016 there is no evidence of a similar debate taking place. Having considered the Claimant's pleaded case and evidence, however, I have concluded that they are insufficient to shift an evidential burden to the Defendant in this regard. The Particulars of Claim at paragraph 87c simply allege that the correct figure was £1.2 million instead of £325,575. The Defendant having asserted the contrary in its Defence and in Mr Horner's witness statement, the Claimant's witness statement at paragraph 97a merely

repeats the unparticularised claim that "My FY 2016 Attributable Revenues amounted to £1,200,000". In my judgment that mere assertion does not place a burden on the Defendant to justify its figure – or at any rate no burden that is not discharged by the email of 3 February 2016 which, in a list of all the transactions which were attributed to the Claimant in the financial years from 2013 to 2016, identifies the two transactions from which the 2016 figure was derived.

108. And on any view, the Claimant's revenues were substantially lower than in the previous year. In those circumstances I see no basis for the submission that any rational employer must have awarded the Claimant a bonus. Whether or not a target had been formally agreed (and as I have said, there is evidence that a target of £3 million per MD was communicated – see in particular paragraph 29 above), it is clear that a rational employer could have concluded that the Claimant should not receive a bonus.

109. At paragraph 93 of the Particulars of Claim, the Claimant sets out extensive reasons why his contribution demanded a more generous reaction from the Defendant. In my judgment that paragraph is inviting the Court to do what it is not permitted to do, namely to usurp the employer's function of deciding what bonus to award. Where (as is common ground) the bank was struggling, and the Claimant's figures were well down on the previous year, the question whether the Claimant had nevertheless achieved an impressive performance which should be rewarded was a question for the bank alone, and not for the Court.

110. The contemporaneous documents also reveal a further overriding reason why the Claimant received no bonus, namely the fact that the Defendant had decided to terminate his employment. As I have said, that was stated unequivocally in emails in the few days before the Remuneration Committee made the bonus decision on 10 May 2016. In these circumstances, far from it being irrational for the Defendant to award no bonus, it would have been surprising if any bonus had been awarded.

111. It therefore does not avail the Claimant to argue that other relevant factors, such as the Side Letter, the failure to pay the Retention Award (discussed further below) or the size of the previous year's bonus, or even any different view as to his attributable revenues, should have persuaded the Defendant to award him a bonus in 2016.

112. Nor, in these circumstances, does the Claimant have any real prospect of showing that the 2016 bonus decision was taken in bad faith or was (or resulted from) any error of procedure or any infringement of the implied term as to trust and confidence or any other term of his contract of employment.

113. In particular I do not consider that any such inference can be drawn from the manner or the legal consequences of the Claimant's dismissal. The agreed ruling of unfair dismissal contained no findings of fact, and in particular could make no distinction between substantive and procedural unfairness. Meanwhile a failure to give notice may have been a breach of contract but does not, in my view, have any significance for the bonus issue.

The Retention Award

114. The Claimant contends that the Defendant by its CEO Mr de Rosnay promised him a stock award worth £1 million, and that this promise had contractual effect and/or gives rise to a proprietary estoppel (Particulars of Claim paragraphs 67-82).

115. The evidence referred to above shows that the Defendant in the second half of 2015 was considering making one-off stock awards, essentially to improve morale after a disappointing bonus round.

116. There is evidence that the Claimant met Mr de Rosnay on 16 July 2015 to discuss his remuneration. Emails post-dating that meeting do not confirm that any agreement was reached about a stock award of an identified value. However, it is clear that the Claimant soon afterwards had the figure of £1 million in mind (see paragraph 47 above). The Defendant at that time does not appear to have contradicted what he said.

117. By 24 September 2015 Mr de Rosnay was in a position to confirm that there would be a stock award (see paragraph 49 above). However, he said that the quantum was not yet decided, and I have seen no communication from the Claimant retorting that a figure of £1 million had already been agreed (although he now argues that "quantum" only meant the number of shares which would make up the £1 million value).

118. In relation to this issue of the Retention Award, I am not much assisted either by the various references to the fact that the Claimant in 2015 was seen as a key staff member whose services should be retained, or by the fact that the Defendant clearly changed its view of him in early 2016 and, thereafter, changed its mind about making a stock award.

119. Mr Croxford QC, for the Defendant, points out that the LTIP makes provision for awards of shares in CGG, not shares in the Defendant. It provides in Articles 4.1 - 4.3 for awards to be made by CGG's Board or by that Board's Corporate Governance and Compensation Committee or by any Executive Officer (as defined in the LTIP) of CGG. It follows, he submits, that Mr de Rosnay as the CEO of one of CGG's subsidiaries could not have decided upon such an award and/or the Claimant could not have believed that he had authority to do so.

120. However, as Mr Mansfield QC for the Claimant contends in response, that depends on what if any discussion had taken place between Mr de Rosnay and officers of CGG before the meeting of 16 July 2015. It is clear that the making of one-off stock awards was under consideration and therefore it is not safe to assume that authority was not in place.

121. The Claimant in his witness statement claims that he desisted from discussions about other potential employment opportunities in reliance on the promise of the Retention Award.

122. In these circumstances I do not believe that I can fairly and safely decide the Retention Award issue in the Defendant's favour on this application. There is a critical issue of fact, namely what was said by Mr de Rosnay at the meeting on 16 July 2015. Although Mr Horner's statement contains his instructions that no promise was made, I have seen no evidence from Mr de Rosnay. The Claimant's version of events has not been examined in oral evidence. There has been no full disclosure process.

123. To make good its application in this regard, the Defendant would have to persuade me that the claim for the Retention Award cannot succeed even if an award of £1 million was promised in the meeting. Although there may yet be significant obstacles to this part of the claim (whether based on contract or on proprietary estoppel, the detail of which was not argued before me), I am not persuaded that it cannot succeed. There is a real prospect of success, and/or a compelling reason for the case to be disposed of at trial, and/or reasonable grounds for bringing this part of the claim.

Conclusion

124. The Defendant's application therefore succeeds in part. For the reasons given above, the claims in respect of the 2015 and 2016 bonuses have no real prospect of success and there is no compelling reason for that part of the case to be disposed of at trial. However the application fails in respect of the Retention Award, where the issues should be determined at trial and it does not seem to me that I can at this stage take a view of the merits which would persuade me to attach any conditions to my order. I will invite the parties' submissions on the appropriate form of order to give effect to this judgment.