Neutral Citation Number: [2022] EWHC 426 (QB)

Case No: QB-2021-003648

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2022

Before:

JASON BEER QC
(Sitting as a Deputy Judge of the High Court)

- -

Between:

LAW BY DESIGN LIMITED	**Claimant**
- and –	
SAIRA ALI	**Defendant**

- -
- -

Selwyn Bloch QC and **Nicholas Goodfellow** (instructed by **Mayfair Rise Solicitors**) for the **Claimant**
Andrew Burns QC and **Alice Carse** (instructed by **BBS Law Limited**) for the **Defendant**

Hearing dates: 13th – 15th December 2021

- -

APPROVED JUDGMENT

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties or their representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 28th February 2022.

Jason Beer QC (Sitting as a Deputy Judge of the High Court):

A. Introduction

1. It all went well for a number of years. Everyone wanted the same things in their professional lives – to practise law in a small, but niche (sometimes described as "*boutique*"), firm of solicitors that was free from the demands that working within larger corporate bodies often brings. That all changed in May 2021, when one of the solicitors in the firm handed in her resignation (meaning that she could leave in November 2021) and explained to the managing director, and principal shareholder, of the firm that she intended to join a much larger firm, as a partner. In this claim the firm says that the post-termination clauses contained in agreements entered into by the solicitor restrict her ability to do so for a period of 12 months after the end of her employment in November 2021. The solicitor says that the clauses are drawn too widely, last for too long, and are unenforceable.

2. These proceedings accordingly concern whether, and if so to what extent, the court should restrain the solicitor, Saira Ali ("*Ms Ali*"), from involvement in a business that competes with the firm, Law by Design Ltd ("*LBD*") for 12 months after the termination of her employment with LBD.

3. In the light of undertakings given by Ms Ali in correspondence, by which she agreed to abide by the terms of the agreements insofar as they restricted her from using confidential information acquired during her employment with LBD, or soliciting clients of LBD, for 12 months after the termination of her employment with LBD, it is not necessary for me to determine the effect or enforceability of the clauses of the agreements which regulate the use of confidential information or the solicitation of clients. The sole issue was as to the meaning, effect and enforceability of the clauses of the agreement which seek to prevent Ms Ali from involvement in a business in competition with LBD for 12 months after the termination of her employment with LBD.

4. The hearing was conducted entirely in public, despite the existence of a large volume of material that was said to be confidential being placed before the Court. On the first day of the trial LBD made an oral application (albeit heralded in its Skeleton Argument) for orders protecting the confidentiality of that material despite the likely reference to some of it in the course of the trial. I made orders in relation to the material that was said to be confidential and which was contained in certain bundles provided to the Court ("*the Confidential Bundles*"), namely: (i) disapplying the exception in CPR 31.22(1)(a), so that if a document in the Confidential Bundle was read to or by the court, or referred to, at a public hearing then this would not relieve the parties from the obligation only to use that document for the purpose of the proceedings; and (ii) any person who is not a party to these proceedings may not apply for a copy of the Confidential Bundles from the court records pursuant to CPR 5.4C and/or pursuant to the court's inherent jurisdiction save for on 21 days' written notice to LBD. As it was apparent that there was, to some extent, a live issue between the parties as to whether all of the material in the Confidential Bundle was in fact confidential, the orders were specifically made without prejudice to Ms Ali's ability to challenge

in the course of the trial the question of whether the information contained within the Confidential Bundles is properly to be regarded as confidential to LBD.

B. Background

The Parties

5. Sue Morrison ("*Ms Morrison*") qualified as a solicitor on 15th October 1984. She moved to Hill Dickinson LLP ("*HDn*") in 2007 – joining as a partner and working from HDn's Manchester office in the employment team (HDn had a significant presence in NHS employment law work in the North West of England).

6. Ms Ali qualified as a solicitor on 3rd April 2006, and soon thereafter began work at HDn, specialising in employment law.

7. In 2011, Ms Ali moved within HDn to work on Ms Morrison's employment law team (by this time, Ms Morrison was an equity partner at HDn). This meant that that the majority of Ms Ali's work was for NHS clients (of which she had little, if any, previous experience). Ms Ali worked closely with an Associate Solicitor in that team, Caroline Shafar, whose work also mainly involved NHS clients.

8. It is apparent from the evidence of both Ms Morrison and Ms Ali that each held the other in high regard – with Ms Ali describing how she built up a really good professional and personal relationship with her manager and mentor; and Ms Morrison for her part describing Ms Ali as a friend, and a very good lawyer.

The "by Design" companies are established

9. Ms Morrison decided that she wished to move away from working for a large firm of solicitors. And so, in early 2013 she decided to found three companies: (i) a company that carries out investigations in human resources issues, in particular the conduct of employees: Investigations by Design ("*IBD*"); (ii) a company that provides assistance and training in relation to human resources issues generally: HR Solutions by Design ("*HRSBD"*); and (iii) LBD, which was incorporated as a limited company on 8th February 2013. Ms Morrison was at that time the sole director of LBD and also the sole shareholder – holding 100% of the issued shares in LBD (she also held, and holds, shares in IBD and HRSBD).

10. IBD is a client of LBD: when investigations require legal advice to be given (*e.g.*, in relation to employment law issues that arise in the course of the investigation), that advice is given by LBD lawyers, and the time spent by them so advising is either invoiced to LBD at a commercial rate (with IBD then invoicing the paying client and passing on the money received in respect of the legal advice to LBD), or invoiced directly to the paying client by LBD.

11. LBD is based in offices located in Manchester – from where, before the occurrence of the pandemic, all staff worked.

Ms Ali joins LBD

12. As she undertook the process of establishing LBD, Ms Morrison approached Ms Ali and invited her to join LBD. It is common ground between Ms Morrison and Ms Ali that (despite an email dated 7th May 2013, which set out in very summary form the terms of the offer of employment, suggesting that "*Your new role will include not only fee earning but business developmental work and training*"), Ms Ali would *not* be required to undertake any business development activities – this was consistent with the fact that she did not bring significant business or client contacts with her from HDn and her skill-sets were not developed so far the funding, management and marketing of LBD were concerned. And so it was that Ms Ali joined LBD on 13th May 2013 as an Associate Director on a salary of £50,000 per annum (she had previously been an Assistant Solicitor at HDn, on a salary of £45,000 per annum).

13. At about this time, and in the six month or so period that followed it, Ms Morrison also recruited Caroline Shafar from HDn, along with Katie Tomes (a Professional Support Lawyer at HDn), Neal Mellor (a Solicitor at HDn), and James Upton (a Partner at HDn).

The Contract of Employment

14. Ms Morrison (on behalf of LBD) and Ms Ali signed a contract of employment on 13th May 2013 ("*the contract of employment*"). As the terms of the contract of employment are not directly relied on by LBD in this claim and, as will appear below, some of the terms of that contract were superseded or supplemented by a later shareholders agreement and, still later, a service agreement (which agreements *are* relied on by LBD), it is not necessary to set out in detail the terms of the contract of employment. A summary will suffice. The contract of employment: (i) provided for a 3-month notice period (see Clause 4.2); (ii) contained restrictions as to the use and disclosure of confidential information (see Clause 16, read with the definition of "confidential information" in Clause 1); and (iii) contained post-termination restrictions – these sought, in broad terms, to prevent Ms Ali from soliciting clients away from LBD, and from being involved in any capacity with any business which was in competition with those parts of the business of LBD with which Ms Ali was involved to a material extent in the 12 months before termination of her employment (see Clause 22.1). These post-termination restrictions were limited in duration to 6 months after termination of Ms Ali's employment (see Clause 22.1), and did not prevent Ms Ali from being engaged or concerned in any business concern insofar as her duties or work (with that business) related "*…solely to geographical areas where the business concern is not in competition with [those parts of the business of [LBD] with which [Ms Ali] was involved to a material extent in the 12 months before the termination of her [employment]*".

15. Finally, it is of note that, although the pre-contractual email of 7th May 2013 referred to above spoke of Ms Ali "*…working across both Commercial and Public employment sectors*…" the contract of employment defined Ms Ali's job role and duties as follows (see Clause 2.1, read with paragraph 1 of Schedule 1):

> "As an Associate Director of [LBD] your role is deemed equivalent to the role of an Associate Partner in a traditional law firm. This is a senior position and as such you are expected to conduct all types of employment work for Respondent (Employers)…"

Discussions over Shareholders Agreement

16. In the second half of 2015 discussions between Ms Morrison and some LBD employees began about entering a shareholders agreement in respect of LBD. Ms Morrison says that, although she recognised that LBD would not generate significant profits in its early years (taking account, in particular, of the overheads associated with setting up a new law firm), it was always her plan that some employees would be offered the opportunity to become shareholders in the business – this would be attractive to them and to LBD, as (i) they might be paid dividends from profit, in addition to their salaries, which would be tax-efficient, (ii) they may have a further incentive to work hard with existing clients and develop new ones (and might see themselves as key to the future of the business), and (iii) they might in due course take over the business by purchasing Ms Morrison's shares.

17. James Upton appears to have led on the discussions on behalf of himself, Neal Mellor and Ms Ali. There was a concern, certainly held by Ms Ali, that – in return for the allocation of a small shareholding – LBD sought to impose through the prospective shareholders agreement additional restrictions affecting her ability to work elsewhere in the event that her relationship with LBD came to an end. Thus, in an email from Mr Upton to Ms Morrison of 11th August 2015 Mr Upton said "*I spoke to Neal and Saira last Friday afternoon and write to update you. Saira still has a fear that she is placing herself in a position where she cannot work if she ever leaves but, following discussion, I think Saira appreciates that the risk has now been reduced by the side letter. Both are now willing to sign the Shareholders Agreement, subject to a small number of points set out below… - Existence of side letter stating that the non-compete covenant will not be enforced unless a shareholder seeks to go and work for any of the 7 firms you and I discussed*…" Neither Ms Morrison or Ms Ali could recall what the "side letter" said (and it is not within the papers that have been placed before the Court).

18. Ms Morrison replied by email on 21st September 2015, asking: "*Which clients do you have on your list?*" Mr Upton replied on the same day, saying "*My note of the list we compiled during our meeting is as follows…*[the list then set out the names of seven firms, one of which was Weightmans]." Ms Morrison replied later that day, saying that she wished to add the names of four additional firms to the list.

19. In the event, neither the terms of the "side letter" (whatever those terms were), nor a separate agreement under which the terms of the non-competition clauses of the prospective shareholders agreement would be enforced save in the event that a shareholder sought to join one of a list of identified firms of solicitors, was advanced by the parties. The relevance of what occurred is limited to the fact that, shortly before entering into the Shareholders Agreement, the parties appeared to have a common understanding that any non-competition clause

within it would be enforced if a shareholder left LBD and sought to work for Weightmans. And even here the relevance is modest, because – as will be seen – the non-competition clause in the Shareholders Agreement operates in a way that requires attention to be focussed on the extent to which the business to which the shareholder proposes to be engaged competes, directly or indirectly, with the business of LBD in the 12 months before the shareholder ceased to be a shareholder. It thus requires the position to be analysed at some future date – i.e., ahead of the date on which the Shareholders Agreement was signed – at which point, of course, the position may be different as to whether the other business is to be treated as a relevant competitor of LBD for the purposes of the non-competition clause.

The Shareholders Agreement

20. On 31st March 2016 Ms Ali entered into a Shareholders Agreement ("*the SHA*") with Ms Morrison and LBD. In return for being issued with 3% of LBD's shares (Mr Upton received 10%, Ms Shafer 3%, and Mr Mellor 3% - the remaining 81% being retained by Ms Morrison), Ms Ali agreed to abide by certain non-competition covenants. The SHA was signed as a Deed. The relevant clauses in the SHA are within Clause 6.1 and they provide as follows:

> "6.1 Each B Shareholder [i.e., including Ms Ali] severally undertakes with each other Shareholder and, as a separate undertaking, with the Company [i.e., LBD] that he will not, either solely or jointly with or through any other person, on its own account or as agent, manager, advisor or consultant for any other person or otherwise howsoever:
>
> 6.1.1 for so long as that B Shareholder is a registered holder of any Shares, carry on or be engaged, concerned or interested in, or assist, a business which competes, directly or indirectly, with a business of the Company as operated at any time during the previous 12 months in a territory in which the Company has operated such business during such previous 12 months;
>
> 6.1.2 during the Restricted Period for that B Shareholder, carry on or be engaged, concerned or interested in, or assist, a business which competes, directly or indirectly, with a business of the Company as operated at any time during the Relevant Period for that B Shareholder in a territory in which the Company has operated such business during such Relevant Period"

21. The SHA says as follows about some of the defined phrases within Clause 6.1 (see Clause 1.1):

> "**Restricted Period** means in relation to each Shareholder, the period commencing on the date such Shareholder ceases to be the registered holder of any Shares (**Cessation Date**) and ending on the date which is 12 months after the relevant Cessation Date.

> **Relevant Period** means in relation to each Shareholder, the period of 12 months ending on the Cessation Date of that Shareholder."

Ms Ali becomes a director

22. In April 2018, Ms Ali became an LBD director – this was a promotion from her position as an Assistant Director (in her unchallenged evidence on this point, Ms Morrison described this as conferring a status on Ms Ali equivalent to that of a salaried partner in a conventional law firm structure).

23. This reflected part of a gradual process of allocating clients which Ms Morrison had either brought to LBD or had nurtured once there to other members of the LBD team, including Ms Ali.

Other Staff Leave LBD

24. In late 2019 Mr Upton and Ms Shafar (both of whom were shareholders) handed in their resignations, the former to re-join HDn and the latter to join the firm Ward Hadaway. Ms Morrison came to learn that Ms MacDonald and Ms Ali also had met up with Ward Hadaway for discussions about employing them. Ms Morrison regarded the prospect of three of LBD's fee earners joining Ward Hadaway "…as extremely problematic – indeed, life-threatening for LBD." This existential threat to LBD was seen off by Ms Morrison, through undertakings given by Ward Hadaway in respect of Ms Shafar, and Ms MacDonald and Ms Ali abandoning their plans to leave LBD. One effect of the departure of Mr Upton and Ms Shafar was that Ms Ali's employment law work for NHS clients increased still further. Additionally, and notwithstanding Ms Morrison's shaken faith in her as a result of the episode with Ward Hadaway, Ms Ali was made a member of the 'Senior Management Team' of LBD.

The Service Agreement

25. In consequence of her increased responsibilities for servicing the demands of NHS clients, and in order to seek to secure a period of stability and growth for LBD following the departures referred to above, Ms Morrison recognised that Ms Ali's remuneration needed to increase and that the firm should take steps to secure Ms Ali's long-term commitment to the firm. Accordingly, on 25th January 2021 Ms Morrison sent an email to Ms Ali concerning a proposed increase in her salary (from £70,000 to £92,000 (Ms Ali's pay had been increased to £70,000 in 2019)), in exchange for Ms Ali agreeing (i) to extend her notice period from 3 months to 6 months, and (ii) entering into a Service Agreement ("*the SA*"). Ms Morrison's email enclosed a copy of a draft SA and relevantly stated as follows (with my emphasis added):

> "This email is to confirm that LBD would like to increase your salary commensurate with your role and responsibilities. As I made you aware, I have had concerns for some time that the remuneration was not on [a] par with comparator colleagues…I want to put the inequality right acknowledging your hard work over the last few months in

particular, and trusting that you Kirsty and I will continue to ensure the success of the business.

I indicated that we would need to [sic.] you to agree a notice period of 6 months and, looking at the contract you signed initially, we would need you to agree a contract more suited to your current role within the business…"

26. On 27th January 2021, at 1.51pm, Ms Ali sent the draft SA from her work email to her private email and then at 2.33pm sent it on to her colleague Ms MacDonald's private email, noting in the covering email "Hate the 12 months but what I to do. I need the money! Xx" Ms MacDonald replied that the draft SA was materially identical to a draft SA that she, Ms MacDonald had been sent and added "I would take the money, love xx."

27. That is what Ms Ali did: she took the money, and returned the signed agreement to Ms Morrison on 18th February 2021 (in what she described in evidence to me as a "pragmatic approach").

28. The SA relevantly provides as follows:

"**19 Post Termination Restrictions**

19.1 In order to protect the Confidential Information and business connections of the Company to which she has access as a result of the Appointment, the Employee covenants with the Company that she shall not:

(a) for 12 months after Termination solicit or endeavour to entice away from [LBD] the business or custom of a Restricted Customer with a view to providing goods or services to that Restricted Customer in competition with any Restricted Business;

….

(d) for 12 months after Termination, be involved in any Capacity with any business concern which is (or intends to be) in competition with any Restricted Business;

(e) for 12 months after Termination be involved with the provision of services to (or otherwise have any business dealings with) any Restricted Customer in the course of any business concern which is in competition with any Restricted Business…

19.2 None of the restrictions in clause 19.1 shall prevent the Employee from:

(a) holding an investment by way of shares or other securities of not more than 5% of the total issued share capital of any company, whether or not it is listed or dealt in on a recognised stock exchange.

(b) being engaged or concerned in any business concern insofar as the Employee's duties or work shall relate solely

> to geographical areas where the business concern is not in competition with any Restricted Business; or
> (c) being engaged or concerned in any business concern, provided that the Employee's duties or work shall relate solely to services or activities of a kind with which the Employee was not concerned to a material extent in the 12 months before Termination."

29. A "Restricted Business" is defined under the SA as meaning: "those parts of the Company with which the Employee was involved to a material extent in the 12 months before Termination"

Termination of employment

30. On 4th May 2021 Ms Ali resigned from LBD. Her notice period, and therefore her employment with LBD, thus came to an end on 3rd November 2021.

31. Ms Ali stated her intention was to immediately to join Weightmans LLP ("*Weightmans*") as a partner in their Manchester office. Weightmans is a much larger firm of solicitors than LBD, employing some 1300 people in offices in Birmingham, Glasgow, Leeds, Leicester, Liverpool, London, Manchester and Newcastle.

Undertakings

32. On 10th May 2021 Ms Morrison wrote to Ms Ali, stating:

> "…I understand that you have accepted a position as a partner with Weightmans in Manchester and as you are aware, they are direct competitors of LBD. You are in possession of commercially sensitive information that is confidential to our business which is the principal reason for the restrictions in your shareholder and service agreements (alongside the non-compete/non-solicit covenants).
>
> You have said you have no intention of breaching your restrictions (apart from the fact you have already breached one of them by accepting a position with a direct competitor) and I assume you have discussed what you might bring to the party when discussing the position with Weightmans.
>
> You will appreciate that I have to take whatever steps I can to protect the business and the jobs of those within it. I hope we can resolve the conflicting positions in an amicable way so I invite your proposals as to how you suggest we achieve this…."

33. Ms Ali replied the next day, stating:

> "I have discussed the matter with Weightmans who are fully apprised of my restrictive covenants. Neither they nor I consider there has been a breach of my covenants (I appreciate there is a

> difference of opinion on the enforceability of the non compete), nor will there be. Please be assured that I have no intention of breaching my covenants. As such I am hopeful that we can reach an amicable agreement."

34. Ms Morrison replied the same day, saying that she had taken advice from Leading Counsel, who was clear that the covenants were enforceable. She therefore asked for written undertakings from Ms Ali and the senior partner at Weightmans that Ms Ali would abide by the restrictive covenants.

35. On 24th May 2021 Ms Ali replied to that request by stating "…I have not breached any covenants so do not consider undertakings to be appropriate". Ms Morrison replied to that email on the same day, stating:

> "Your response is disappointing given I am trying to deal with this in an amicable fashion…If you have no intention of breaching your covenants then I do not see why the giving of undertakings is a problem as it evidences good faith…By joining Weightmans you are in a position to do significant damage to LBD's business given your personal contacts and connections with clients built up over the 7 plus years you have been with us. I would ask you to reflect on your decision."

36. Ms Ali replied on 27th May 2021, stating: "…as I will act lawfully when I join Weightmans I do not consider that undertakings are necessary or appropriate".

37. Ms Morrison followed this chain of emails up with further requests in early July 2021, asking Ms Ali a series of questions seeking to narrow the issues between them – including: (i) whether Ms Ali believed that there was any material difference between the covenants in the SHA and the SA in terms of enforceability or otherwise, (ii) whether Ms Ali accepted that any of the restrictions in either agreement was enforceable, and (iii) in respect of those covenants which Ms Ali denied were enforceable, the reasons for the same. Ms Ali sent a series of holding responses to these requests, and did not answer the substance of the questions asked of her. In the meantime, however, she progressed the process of joining Weightmans (liaising with their HR Co-ordinator, including as to a starting date of 15th November 2021).

38. On 24th August 2021 Ms Morrison sent a letter of claim to Ms Ali – seeking formal undertakings from Ms Ali that she would comply with the restrictive covenants in the SHA and the SA.

39. Ms Ali instructed solicitors, who on 10th September 2021 responded to the letter of claim, stating in summary that the non-competition restrictions in both the SHA and the SA were unenforceable, that Ms Ali had intimated that she would comply with the non-solicitation and non-dealing provisions in both agreements, but that undertakings were not necessary. Rather incongruously, the letter then continued:

> "[Ms Ali] has a very close relationships [sic.] with a number of clients whom she believes would no longer instruct LBD after she leaves. If that was to be the case LBD would have [no] legitimate business interests to protect. We would in respect of such clients seek a carve out from the non-dealing provision"

40. In response to a letter from LBD's solicitors on 15th September 2021 that observed that not only was Ms Ali threatening to breach the non-competition covenants by joining Weightmans, she was also threatening to breach the other restrictive covenants, on 17th September 2021 Ms Ali provided LBD with undertakings to comply with the restrictive covenants relating to non-solicitation, non-dealing, non-poaching of staff, non-disparagement of staff and the protection of LBD's confidential information. She refused to give undertakings in relation to the non-competition covenants.

The Claim

41. In the light of Ms Ali's refusal to give LBD undertakings in relation to the non-competition clauses in the SHA and SA, on 28th September 2021 a claim was issued, seeking only interim and final injunctive relief.

Interim Relief

42. There was a slew of correspondence that followed the issue of the claim and in the run-up to a hearing listed before Mr John Kimbell QC, sitting as a Deputy High Court Judge, on 6th October 2017 to determine LBD's application for interim relief.

43. Suffice it to say that, at 6.27pm on the night before the hearing, Ms Ali offered undertakings to LBD which LBD regarded as satisfactorily protecting its position pending the trial of its claim. On the following day, when the matter came before the Deputy High Court Judge, these undertakings were given to the Court. They were as follows (I presently omit the definitions of certain terms, which appeared in Schedule 1 to the Order):

> "1. [Ms Ali] shall not, until the earliest of trial or further order:
>
> i. carry on or be engaged, concerned or interested in, or assist, a business located in England and Wales which competes, directly or indirectly, with [LBD] in relation to the provision of employment law services to any NHS Entity located in the North West (as defined below) or in the geographical area served by the Herts Valley Clinical Commissioning Group, including the law firm Weightmans;
>
> ii. be involved in any Capacity with any business concern which is (or intends to be) in competition with any Restricted Business, including the law firm Weightmans;
>
> 2. The restriction in sub-paragraph (ii) above shall not prevent [Ms Ali] from:

i. holding an investment by way of shares or other securities of not more than 5% of the total issued share capital of any company, whether or not it is listed or dealt in on a recognised stock exchange.

ii. being engaged or concerned in any business concern insofar as [Ms Ali's] duties or work shall relate solely to geographical areas where the business concern is not in competition with any Restricted Business, namely all geographical areas apart from the North West and the geographical area served by the Herts Valley Clinical Commissioning Group.

iii. being engaged or concerned in any business concern, provided that [Ms Ali's] duties or work shall relate solely to services or activities of a kind with which [Ms Ali] was not concerned to a material extent in the 12 months before Termination, namely services or activities other than the provision of employment law services to any NHS Entity."

44. It will be seen, in broad terms, that:
    a. The restrictions set out in paragraph 1(i) of the undertaking correspond to the restriction in Clause 6.1.1 of the SHA. Ms Ali was, of course, still a shareholder when the undertakings were given and so therefore Clause 6.1.1 provided the justification for relief being obtained under the SHA at that time.
    b. The restrictions set out in paragraph 1(ii) of the undertaking (read with paragraphs 2(i), (ii) and (iii)), correspond to the restriction in Clause 19.1(d) of the SA.

45. The Deputy High Court Judge was not, therefore, called upon to adjudicate on the merits of the application for interim relief. There was a dispute over the costs of the application: the Deputy High Court Judge, after hearing argument on 6th October 2021, handed judgment down on 7th October 2021 in which he ordered Ms Ali to pay LBD's costs of the application for interim relief, which he summarily assessed as being £41,667.00.

Ms Ali ceases to be a shareholder

46. Ms Ali's employment with LBD terminated on 3rd November. On 15th November 2021 she ceased to be a shareholder in LBD.

C. The Law

(1) The correct approach to assessing the reasonableness of a restrictive covenant

45. The central question that a court must ask itself, when considering the enforceability of a restrictive covenant to which the doctrine of restraint of trade applies is whether it is reasonable in the interests of both the parties and the public and, in particular, whether the party seeking to rely upon them can show that the

restrictions go no further than is reasonably necessary to protect that party's legitimate business interests: see, amongst many other cases, *Office Angels Ltd v Rainer-Thomas* [1991] IRLR 214. The level of scrutiny that is applied may depend upon whether the restriction was imposed in the context of an employment relationship, or something that is akin to an employment relationship, on the one hand, or in the context of a commercial relationship, on the other.

46. In *TFS Derivatives Ltd v Morgan* [2005] IRLR 246 Cox J held that the correct approach to the question of assessing reasonableness of covenants is as follows (see [37]):

> "Firstly, the court must decide what the covenant means when properly construed. Secondly, the court will consider whether the former employers have shown on the evidence that they have legitimate business interests requiring protection in relation to the employee's employment…Thirdly, once the existence of legitimate protectable interests has been established, the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests. Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties as at the date of the contract, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then realistically have been expected to apply."

47. At [40] Cox J referred to a fourth stage in the process:

> "Even if the covenant is held to be reasonable, the court will then finally decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted, having regard, amongst other things, to its reasonableness as at the time of trial."

48. This four-stage approach has consistently been adopted since *TFS Derivatives* was decided in 2005 – and it is the approach that I shall apply.

(2) Interpretation and severance

49. On the first question of construction, in *TFS Derivatives* Cox J held at [43]:

> "[I]f, having examined the restrictive covenant in the context of the relevant factual matrix, the court concludes that there is an element of ambiguity and that there are two possible constructions of the covenant, one of which would lead to a conclusion that it was in unreasonable restraint of trade and unlawful, but the other would lead to the opposite result, then the court should adopt the latter construction on the basis that the parties are to be deemed to have intended their bargain to be lawful and not to offend against the public interest."

50. This approach was adopted by Waller LJ in *Turner v Commonwealth & British Minerals Ltd* [2000] IRLR 114 at [14] (note, however, that in order for the "validity principle" to be engaged – *viz.* where there are two possible constructions the court should lean towards that which validates the instrument, it is necessary for the contract to be capable of being read in two ways, and the alternative construction must be "realistic": *Egon Zehnder Ltd v Tillman* [2020] AC 154 at [39]-[42]).

51. It is not the function of the court either to give a restrictive covenant a meaning it cannot reasonably bear in order to improve it so as to make it a restraint that would be of some use in practice (see, for example, *Prophet v Huggett* [2014] EWCA Civ 1013, at [35]). But where there are two possible constructions available, the court is entitled to prefer the construction that is consistent with business common sense and to reject the other: *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at [21].

(3) Time of assessment and burdens

52. The reasonableness or otherwise of a restraint is to be assessed as at the time when the covenant is entered into. Thus, in *Watson v Prager* [1991] 1 WLR 726, Scott J held at page 749*E-F*:

> "The reasonableness of a contract in restraint of trade must be tested not by a reference to what the parties have actually done or intend to do but by what the terms of the contract entitle or require them to do."

53. The covenantee bears the onus of establishing reasonableness, and in particular of establishing that the restraint is no greater than is reasonably necessary for the proper protection of his protectable interests: *QBE Management Services (UK) Ltd v Dymoke* [2012] IRLR 458, per Haddon Cave J at [210].

(4) Competition

54. It will be observed that the relevant non-competition clauses in both the SHA and the SA frame, as might be expected, the prohibition by reference to (in summary terms) participation in a business which is in competition with, or competes with, LBD. As this is a significant control mechanism within each clause as to the scope of the prohibition it imposes, and therefore potentially to the reasonableness of the clause as a whole, it is important to note the difference in the approach taken to the issue of competition in each clause. Clause 6.1.2 of the SHA contains a prohibition on participation in a business "…which <u>competes, directly or indirectly</u>, with a business of [LBD]…" Clause 19.1(d) of the SA contains a prohibition on involvement in any capacity with "…any business concern which <u>(is or intends to be) in competition</u> with [those parts of LBD which [Ms Ali] was involved to a material extent in the 12 months before [termination of her employment]]". The meaning and effect of these prohibitions is addressed below (and, in particular, the differences between a prohibition on participation in a business which *indirectly* competes with LBD and involvement in a business which is or intends to be in competition with LBD). For present purposes it is

sufficient to note that, in the different context of determining whether two businesses are in competition in a particular area or areas, the Court of Appeal held in *Morris-Garner v One Step (Support) Ltd* [2017] QB 1 that there are two relevant considerations in determining whether two businesses are in competition in a particular area or areas (see [57]-[58]):

a. The first consideration is whether A and B are properly to be regarded as supplying goods or services which are sufficiently comparable to mean that they are in competition.
b. The second consideration is whether A is to be regarded as competing in the same area as that in which B was carrying on its business.

55. In relation to the second consideration, the Court of Appeal went on to observe (at [59]) that:

a. A and B, whilst supplying identical, similar, or interchangeable products, may operate in areas which are sufficiently disparate to mean that they are not in reality in competition.
b. Whether that is so may depend, at least, in part on (a) the nature of the product(s) supplied; and (b) whether potential consumers could "realistically be expected to purchase" from either A or B.
c. This in turn may depend on "the manner in which consumers make decisions about what to purchase".

56. Finally, the Court of Appeal concluded at [64] that:

> "[w]hilst the issue of competition can be analysed in the way…suggested the question whether A is in competition with B needs to be considered with a rather broader brush. The essential question is whether the scope of the businesses was the same."

(5) The context in which the covenant was agreed

57. The authorities reveal that, depending on the context, a different approach may be adopted towards enforcement of covenants in commercial agreements as opposed to those in service contracts: see, for example, *Allied Dunbar (Frank Weisinger) Ltd v Weisinger* [1988] IRLR 60 at [20].

58. At a high level, a distinction is drawn between: on the one hand, a covenant against competition entered into by a vendor with the purchaser of the goodwill of a business (which will be upheld as necessary to protect the subject-matter of the sale, provided that it is confined to the area within which competition on the part of the vendor would be likely to injure the purchaser in the enjoyment of the goodwill he has bought); and on the other, a covenant between master and servant designed to prevent competition by the servant with the master after the termination of their contract of service.

59. But where covenants involve both the sale of (part of) a business *and* the relationship of employer and employee, the courts have resisted the rather blunt approach of seeking strictly to categorise the relevant transaction so as to determine whether to apply a more stringent test of reasonableness by reason of the employer/employee relationship - instead, the question is one of substance,

not of form: see *Allied Dunbar* at [21] *per* Millett J and *System Reliability Holdings plc v Smith* [1990] IRLR 377 *per* Harman J at [48] (cited with approval by Evans LJ, with whom Ward and Nourse LJJ agreed, in *Dawnay, Day & Co Ltd v D'Alphen* [1998] ICR 1068).

60. The relevant principles were summarised in *Cavendish Square Holdings BV v El Makdessi* [2012] EWHC 3582 (Comm), by Burton J at [15] – they included:

> "(vi) The law distinguishes between covenants in employment contracts and covenants in business sale agreements. There is more freedom of contract between buyer and seller than between master and servant, because it is in the public interest that the seller should be able to achieve a high price for what he has to sell: *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, *Mason v Provident Clothing (supra) and Attwood v Lamont* [1920] 3 KB 571: see also *Ronbar Enterprises Ltd v Green* [1954] 1WLR at 820 and at 821 per Jenkins LJ: "It is obvious that in many types of business the goodwill would be well-nigh unsaleable if it was unlawful for the vendor to enter into an adequate covenant against competition." The quantum of consideration may enter into the question of the reasonableness of the covenant: *Alec Lobb Ltd v Total Oil (Great Britain) Ltd* [1985] 1WLR 173 (CA) at 179, 191 (citing *Nordenfelt* (supra) at 565).
>
> (vii) Even in the business sale context, however, if a covenant goes further than is reasonably necessary to protect a legitimate business interest, it is void and will not be enforced: *Nordenfelt* (supra).
>
> (viii) The Court should be slow to strike down clauses freely negotiated between parties of equal bargaining power, recognising that parties are often the best judges of what is reasonable as between themselves: *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461 at 471, *Esso Petroleum Ltd v Harpers Garage Ltd* [1968] AC 269 at 300, *Allied Dunbar* (supra) at paragraph 32, *Dawnay, Day* (supra) esp. at 1107 (CA), *Emersub XXXVI Inc v Wheatley* per Wright J (QB) at p. 13. However, the court's deference to the parties is not absolute. The mere fact that parties of equal bargaining power have reached agreement does not preclude the court from holding the agreement bad where the restraints are clearly unreasonable in the interests of the parties: *Kores Manufacturing Co. Ltd v Kolok Manufacturing Co. Ltd* [1959] 1 Ch 108 (where the restraint was held to be "grossly in excess of what was adequate" (at 124))."

61. This approach was aptly summarised by Sir Ross Cranston, sitting as a Judge of the High Court, in *Ideal Standard International S.A v Herbert* [2019] IRLR 431, where at [41] he held (with emphasis added):

> "… it is not simply a matter of categorization, non-compete clauses in employment agreements on the one hand, non-compete clauses

> in shareholder agreements on the other. Non-compete clauses for the vendor of a partnership share or the shares in a business will generally be enforced as reasonable and enforceable. Apart from anything else, such clauses are negotiated in a commercial context and have the legitimate aim of preventing vendors from attacking the goodwill of the partnership or business which they have just transferred. Towards the other end of the spectrum are ordinary employees who have a small shareholding in their employer-company as part of a share participation scheme."

(6) Legitimate business interests

62. It will be recalled that the court is required to consider whether the covenantee has shown on the evidence that it has legitimate business interests requiring protection. Thus, in *Stenhouse Ltd v Phillips* [1974] AC 391 at 400, Lord Wilberforce held that:

> "The employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation."

63. The legitimate interests which generally justify the imposition of a covenant in restraint of trade in the present context are, in broad terms:
    a. Trade connections: these are established where it can be shown, by virtue of their position with the employer, the employee will have recurrent contact with customers or suppliers such that the employee is likely to acquire knowledge of and influence over the customers or suppliers.
    b. Trade secrets or confidential information akin to trade secrets: In *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251 Staughton LJ defined a 'trade secret' at page 260*B* as information used in a trade or business; which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret; and in respect of which the owner has limited the dissemination of it or at least has not encouraged or permitted widespread publication. He further observed that 'trade secrets' include, in an appropriate case, "the names of customers and the goods which they buy" and, at page 260*C* that "some may say that not all such information is a trade secret in ordinary parlance. If that view be adopted, the class of information which can justify a restriction is wider, and extends to some confidential information which would not ordinarily be called a trade secret." In *Faccenda Chicken v Fowler* [1984] ICR 589 Goulding J identified three classes of information in cases of masters of servants relevant to duties of confidence (see page 598*F* – 600*D*). The second of those is information which the employee must treat as confidential (either because he has been told it is, or because its character makes it obvious) in the course of their employment; which – once learned – necessarily remains on the

> employee's head and becomes part of their own skill and knowledge applied in the course of their employer's business; but which he is free to use or disclose after the termination of employment. The third class are specific trade secrets which are so confidential that, even though they may not necessarily have been learned by heart, they cannot be used for anyone's benefit except the employer's either during or after employment. In the Court of Appeal (see [1987] 1 Ch 117) Neill LJ (giving the judgment of the Court) identified a series of factors that assist in establishing whether information is within the second or the third class identified by Goulding J: see pages 137*B* – 138*G*. These are: (i) the nature of the employment itself, (ii) the nature of the information itself, (iii) whether the employer impressed upon the employee the confidentiality of the information, and (iv) whether the information can be easily isolated from other information which the employee is free to use or disclose.

c. Staff stability.

(7) Justifications for non-competition clauses

64. Non-competition restrictions are commonly used, and upheld, where lesser forms of restriction (such as confidentiality clauses or prohibitions on solicitation or dealing) would be inadequate or difficult to police. That is because a non-competition covenant avoids a number of difficulties presented by these other types of covenants and, as such, will often be the only practicable means to protect an employer's legitimate interest: see, for example, *Littlewoods Organisation Limited v Harris* [1977] 1 WLR 1472 at page 1479*A*-*B*:

> "It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade but experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period."

65. This approach was reaffirmed by the Court of Appeal in *Thomas v Farr plc* [2007] IRLR 419, at [41]-[42] per Toulson LJ:

> "[**41**] In order to establish that the inclusion of a non-competition clause in an employment contract was reasonably necessary for the protection of the employer's interest in confidential information, the first matter which the employer obviously needs to establish is that at the time of the contract the nature of the proposed employment was such as would expose the employee to information of the kind capable of protection beyond the term of

> the contract (i.e. trade secrets or other information of equivalent confidentiality). The degree of the particularity of the evidence required to establish that matter must inevitably depend on the facts of the case…
>
> [**42**] Provided that the employer overcomes that hurdle, it is no argument against a restrictive covenant that it may be very difficult for either the employer or the employee to know where exactly the line may lie between information which remains confidential after the end of the employment and the information which does not. The fact that the distinction can be very hard to draw may support the reasonableness of a non-competition clause…it is because there may be serious difficulties in identifying precisely what is or what is not confidential information that a non-competition clause may be the most satisfactory form of restraint, provided that it is reasonable in time and space."

66. In *Tradition Financial Services Ltd v Gamberoni* [2017] IRLR 698 at [96] Foskett J reiterated that:

> "…the necessity for non-compete provisions arises where non-solicitation and non-dealing covenants and confidential information restrictions are difficult to police or where there are material disputes as to what information is confidential."

67. Finally, and more recently (albeit in the context of covenants in an agreement between firms of solicitors), the Supreme Court in *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] 3 WLR 598 noted at [84(iv)]:

> "…it is often difficult to prove what is and what is not confidential information and, in particular, whether that information has been misused. A non-compete undertaking may be a useful means of ensuring that confidential information is protected without needing to prove, through protracted litigation, that the information has been misused."

(8) Duration

68. Although I was shown a series of cases in which restrictive covenants of 12 months duration were enforced by reference to the protection of confidential information, I found more helpful the judgment of Haddon-Cave J in *Dymoke* at [215] (with my emphasis added):

> "… it is only if the Court finds that a "<u>much less</u> far-reaching" covenant would have afforded adequate protection is it likely to regard the existing restriction as unreasonable. The exercise is not a marginal one, otherwise Courts would be faced with a paralysing debate in every case about whether a covenant with x days shaved off would still provide adequate protection."

(9) Discretion

69. As explained above, it is necessary for the Court to determine whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted having regard, amongst other things, to its reasonableness at the time of trial. Accordingly, the Court may, as a matter of discretion, decline to enforce an enforceable post termination restriction, whether in whole, or in part: see *Tullett Prebon v BGC* [2010] IRLR 648 at [221]-[225] (although this case went on appeal, this element of Jack J's judgment was not challenged in the Court of Appeal: see [2011] IRLR 420).

70. If the restrictions in a covenant are held to be otherwise enforceable, the covenantor has the burden of demonstrating the injunctive relief ought not as a matter of discretion to be granted: *Lawrence v Fen Tigers* [2014] AC 822, at [121] and *Dyson Technologies Ltd v Pellerey* [2016] ICR 688, at [75] – [76].

D. Findings on Relevant Issues

71. It is necessary to make findings on a small number of issues which are relevant to the restrictive covenants and their enforceability.

The nature of the work undertaken by LBD

72. It is necessary for the purposes of Clause 6.1.2 of the SHA to determine what the business of LBD was (in order to establish whether the business which is *ex hypothesi* in competition with it is in fact directly or indirectly in competition with a business of LBD); and it is necessary for the purposes of Clause 19.1(d) of the SA to establish the "parts of [LBD]".

73. At the outset, it was intended that there should be four "parts" of LBD's business: (i) employment law work for NHS clients, (ii) employment law work for commercial clients (*viz.* small to medium sized employers), (iii) insurance backed employment work from an insurance company called ARAG plc, and (iv) employment law work referred to LBD by a friendly society (it is common ground that this, fourth, class of work never really took off). These divisions are reflected in the way that financial information is reported within the firm, in different engagement letters, precedents and fee structures. It is clear in my view that LBD's principal work is for clients that are entities which provide healthcare services – in particular, NHS entities. This emerges from, and is established by, a range of evidence that I have seen and heard, principally financial reporting as to the revenue of LBD.

Geographical location of the work undertaken by LBD

74. Under both the SHA and the SA (albeit in very different ways), in order to determine whether a business relevantly *competes* with LBD, it is necessary to consider in which geographical areas LBD provided legal services.

75. The principal part of the business of LBD is the provision of employment law services to NHS bodies (i) in the North West of England (by which I mean: Cheshire, Cumbria, Greater Manchester, Lancashire and Merseyside – and in this

regard I accept the evidence of Ms Morrison that this is how most people certainly those that work or live there, would describe "the North West of England); and (ii) a single NHS body located outside of that region – in Hertfordshire. Although LBD's website has on its homepage the statement that it provides legal services "to employers throughout the UK and overseas", this does not describe in fact what occurred on the ground. This emerges very clearly from a range of evidence, including: the experience and expertise of Ms Morrison; the raison d'etre for the establishment of LBD; the balance of expertise of individuals who have been recruited to join the firm; the applications under a tendering process formerly known as the North West Procurement Hub (which later became part of the National Shared Business Services Framework ("*the SBS* Framework")); and the Work in Progress (*"WIP*") reports that have been produced in these proceedings and which go back to 2014 (and the last of which showed that about 60% of income came from NHS clients).

The work undertaken by Ms Ali in the 12 months before the termination of her employment

76. This is an important issue under the SA, but not a relevant one under the SHA. Rather oddly, Ms Ali sought to argue at trial that she *was* materially involved in aspects of LBD's business other than employment work for NHS bodies. This was, I assume, to seek to demonstrate that Clause 19.1(d) of the SA would operate in a way that meant that it had an expansive effect, preventing her from a wide range of work as a solicitor and in a manner that was unnecessary to secure LBD's legitimate business interests. However, this is not consistent with (i) Ms Ali's own evidence, nor (ii) the financial material placed before me.

77. As to the former, Ms Ali agreed in evidence that the majority of her fee earning work involved the provision of legal services in employment law to NHS Bodies – that is consistent with her witness statement prepared for these proceedings, in which she stated that the "vast majority" of her work in the last 12 months of her employment with LBD was for NHS clients (predominantly the Manchester University Hospitals NHS Foundation Trust ("*MFT*"), the Warrington & Halton NHS Foundation Trust and Herts Valley CCG). It is right that she did do *some* commercial employment law work, and *some* investigation work for LBD's sister company: but individually, and taken together, this work was *de minimis.*

78. As to the latter, the financial material adduced at trial also showed that Ms Ali's billings in the non-NHS parts of LBD's practice were *de minimis*. In the year to the end of October 2021, Ms Ali had billed only £110 for work backed by the insurer ARAG and £1,544 for employment law advice to commercial clients. In the same period, she posted billings of £137,008 in respect of NHS clients. As Ms Ali agreed in her evidence, the amount billed to non-NHS clients was a "tiny amount". Even allowing for the fact that some non-billable time may be attributed to these clients, it remains the case that Ms Ali's work for them was *de minimis* and not material.

79. This is all consistent with the way that Ms Ali sold herself to Weightmans in her Business Plan (as to which, see below): of the £252,000 which she estimated she

may well bring across from LBD by way of revenue, only £7,000 of it would come from non-NHS clients.

80. In short, by the last 12 months of her employment with LBD, Ms Ali's work for the firm had narrowed in a way that meant that her practice was almost exclusively in employment law for NHS clients.

Ms Ali's Business Plan

81. Unknown to LBD from the time that Ms Ali handed her notice in on 4th May 2021 until after disclosure was given in these proceedings, Ms Ali had prepared and sent to Weightmans a detailed 7-page "Business Plan". The circumstances in which this was prepared, and its purpose, appeared a little opaque on Ms Ali's evidence. It seems that Ms Ali had been approached by a head-hunter in February 2021 (just after signing the SA), about working for Weightmans and in March 2021 was asked by Weightmans to produce a business plan. The Business Plan was, in the event, sent to Weightmans on 26th March 2021. The document: explains Ms Ali's background and experience (including a personal statement from her – essentially a "pitch"); sets out her reasons for wishing to leave LBD and join a larger, full-service, firm; sets out a three-year business plan by reference to a table which lists the client (not by name, but by general description), describes the "estimated annual employment revenue" from that client, sets out the percentage prospects of moving that client from LBD to Weightmans, and provides explanatory comments; narrates likely investment costs; and includes a section concerning "Risks and Mitigation". So far as is material, the Business Plan states (with my emphasis added):

> "Saira is a Director at [LBD], a boutique employment law practice which she helped establish in 2013…She has longstanding relationships with a number of NHS organisations and is wanting to move back to a full service firm with established NHS service lines…By moving to a larger firm, Saira will have the opportunity to 'drive down' work, whilst maintaining and developing relationships with current and potential clients and dealing with the more complex matters…
>
> Saira's work is self-generated and based upon the relationships she has built up predominantly whilst at [LBD]. Saira anticipates transitioning these clients and revenue, as detailed below [a table is then set out which describes estimated annual employment revenue of £252,000]…
>
> The revenue is subject to any profit sharing agreement entered into with LBD…
>
> Saira is subject to 12 month restrictive covenants, including a non-compete clause, in both her service agreement and a shareholders' agreement.

> It will assist that Weightmans is a member of the SBS Hub and that Saira's largest client is a mutual one. A commercial profit-sharing agreement could potentially be negotiated with [LBD]…
>
> **If** Saira is restrained for 12 months, then she anticipates supporting other areas of the business and would be keen to explore business development opportunities in relation to the provision of training and investigations"

82. In my view the Business Plan is a most significant document in a number of respects:
    a. First, it shows in the clearest possible terms that Ms Ali intended to "transition" (to borrow the word used in the document itself) some £252,000 of LBD's business over to Weightmans. That is a substantial proportion of LBD's turnover (over a third). It is also very significantly more than Ms Ali had billed in respect of these clients in the year before the Business Plan was created (even if one includes in Ms Ali's totals the revenue brought in by a newly qualified solicitor, whom she supervised).
    b. Second, it is clear that Ms Ali proposed "transitioning" all of the significant clients for whom she worked at LBD to Weightmans (which work she wrongly described as "self-generated": it was not; it was provided to her by LBD, as Ms Ali accepted when she said in evidence that "My connections with the clients described in this Business Plan were all derived from Sue and LBD – all of them in this document" In this regard, it is to be noted that Ms Morrison has acted for MFT for some 15 years).
    c. Third, the language used in the Business Plan discloses something about how Ms Ali regarded clients. The document states that "…Saira's largest client is a mutual one…" tending to suggest that she regarded the client as personal to her, her own, and as something that she was entitled to transport. In her evidence Ms Ali disclaimed the significance of this use of language. But it is consistent with a later email that she sent, on 28th April 2021, to a recruitment/HR consultant working for Weightmans in which she asked "However, what will happen in the event that I am held to my covenants and cannot freely transition my clients during the first year?" (emphasis added).
    d. Fourth, although it is clear that Ms Ali had made Weightmans aware of the nature and existence of the restrictive covenants to which she was subject, Ms Ali plainly regarded it as unlikely that she would ever be held to the non-competition clause. She said in evidence that did not ever think that Ms Morrison would take steps to enforce this clause (seemingly mistakenly relying on the approach that Ms Morrison had taken to the rather different circumstances that existed when Mr Upton and Ms Shafar left the firm; or perhaps believing that, because LBD had been weakened, Ms Morrison would not have the funds or the stomach for litigation) or that, if Ms Morrison did seek to enforce that restriction, it would be held to be unenforceable (albeit she accepted that she had not taken advice on this issue). This is consistent with Ms Ali's use of

language in the Business Plan itself: "If Saira is restrained for 12 months…"

e. Fifth, the mention of the possibility of some form of fee-sharing agreement within the Business Plan tallies well with Ms Ali's approach, as disclosed by her evidence, of rather naively thinking that the movement of £1/4 million of business out of LBD would somehow be sorted out through a fee-sharing agreement. It is notable in this regard that (save in the response to the letter before claim, when vague mention was made of the same), Ms Ali made no proposals to LBD for such an agreement (and does not appear to have asked Weightmans to do the same either).

83. Overall, it is very difficult to square the terms of the Business Plan with Ms Ali's arguments in these proceedings that the non-competition clauses should not be enforced as a matter of discretion because they are unnecessary by reason of the non-solicitation and non-dealing undertakings that she has given. Ms Ali suggested in her evidence that Weightmans were, in fact, not really interested in the Business Plan at all insofar as it spoke about the transitioning of work to that firm (instead: "They were more interested in me as a person"). But fine words butter no parsnips: I prefer to rely on what the Business Plan discloses as regards Ms Ali's intentions.

E. Analysis and Decision

84. For reasons which will become clear, I propose to address the enforceability of the non-competition clause in the SA first, and then turn to consider the enforceability of the non-competition clause in the SHA.

Clause 19.1(d) of the SA

(1) Meaning of the provision upon its proper construction

85. The first task is to establish what this Clause means when it is properly construed. In my judgement, Clause 19.1(d) of the SA operates as follows.

86. First, the business in which the covenantor is prohibited from becoming involved in must be or intend to be *in competition with* any "Restricted Business". Before turning to what "Restricted Business" means, and its effect on the operation of the clause as a whole, this element of it imports the ordinary concepts of when business A is *in competition with* business B and in essence requires in the present context that Law Firm A must be targeting potential clients who could realistically be expected to obtain legal services from Law Firm B (here, LBD).

87. Second, there is a further – and in my view, significant – limitation on the operation of the primary elements of this clause in that the requirement that such competition must be with "any Restricted Business". This is defined as "…those parts of [LBD] with which the Employee was involved to a material extent in the 12 months before Termination". It follows from the requirement of *material* involvement that the employee's involvement cannot be *de minimis* and that such involvement is measured from a time that is proximate to the departure of the employee from LBD.

88. Third, Clause 19.2(b) contains an additional limitation (by way of proviso to Clause 19.1(d)), so that the principal restriction does not prevent the employee from "…being engaged or concerned in any business concern insofar as the Employee's duties or work shall relate solely to geographical areas where the business concern is not in competition with any Restricted Business…" This is another important limitation, a territorial one. It focusses on location of the work or duties of the employee in the future, and not where he or she has worked for LBD. It means that even if the employee wished to work for a business that was in competition with LBD in the sense that the legal services provided, and the nature of the clients to whom they were provided, were the same as those provided by LBD, then the clause would not bite if such services and clients were located solely in an area in which the employee had not provided such service to a material extent in the 12 months before termination of their employment.

89. Fourth, Clause 19.2(c) additionally limits the scope of the restriction in that it does not prevent the employee from "being engaged or concerned in any business concern, provided that the Employee's duties or work shall relate solely to services or activities of a kind with which the Employee was not concerned to a material extent in the 12 months before Termination". This limitation is in fact partially duplicative of the scope of the primary restriction in the restrictive covenant itself in that Clause 19.1(d), read with the definition of "Restricted Business" is only operative to prevent an employee from involvement in a business which is in competition with those parts of LBD with which the employee was involved to a material extent in the 12 months before termination of their employment.

(2) Demonstration that legitimate business interests require protection

90. In my view LBD has legitimate business interests that very clearly required protection. LBD employees all worked in an open-plan office environment, which facilitated the easy sharing of information, including confidential information. In any case, being a relatively small firm, in which each of the individuals mentioned above was not only an employee but a shareholder (reflecting not only their trusted status, but also the intention that they should have a stake in the long-term development of the firm), the evidence suggests that confidential information as to key individuals within client organisations, pricing structures, and deals offered to clients was well known to Ms Ali. Ms Ali was treated in the same way, and equally as senior, as Ms MacDonald (who was a statutory director of LBD) and was therefore privy to the same information about the inner workings of the firm as a statutory director. Ms Ali was responsible for important NHS client relationships (in particular MFT, the Herts Valley Clinical Commissioning Group ("*Herts CCG*"), the Royal Salford NHS Foundation Trust, and Warrington & Halton NHS Foundation Trust).

91. By the time that the SA was executed, Ms Ali was exposed to a wide range of confidential but transportable information and data, including:
    a. Client contacts: including the identities of key contacts within client organisations, their contact details and their preferred means of communication. Whilst it may be the case that the names of some,

indeed, many NHS employees are in the public domain (e.g. on NHS websites, or through LinkedIn), I think that this misses the point: the availability of a mass of public domain information is very different from actually knowing who within an organisation is responsible for procurement decision-making and the allocation of work when a contract has been let (i.e. where the *power* rests within an organisation to make relevant decisions). As Ms Ali herself said in her written evidence: "…movement of NHS work is very much tied to the contacts at the NHS Bodies". This information was maintained on a series of (updated) client contact sheets kept on LBD's L: drive (to which Ms Ali had full access). It is clear that very personal relationships were built up between the LBD lawyers and the clients in the NHS bodies (I note again Ms Ali's reference in her Business Plan and elsewhere to NHS clients as if they were her own clients).

b. Charge-out rates: This is significant confidential information in the arena in which LBD principally operated, namely the provision of legal services to NHS clients. Whilst I accept that there are standardised NHS rates, the evidence suggests that charge-out rates are frequently negotiated outside of the SBS Framework, that discounts from published rates are agreed and that bespoke arrangements, including fixed fees, are concluded. Small differences in such rates can affect the costs of a case to a client (and the profitability of the case to the lawyers) over its lifetime. Pricing may therefore be an important part of the awarding of contracts under framework agreements (indeed, Ms Ali agreed in evidence, if a new firm wished to be appointed under a framework agreement, it would be "incredibly useful" to have such information in order to be able to pitch its bid – this is supported by the fact that, under the SBS Framework, a weighting of 50% is given to price in the tender criteria). Ms Ali had access to LBD's Practice Management System ("PMS") and the L: drive, which contained detailed information about clients and revenue streams not only of clients serviced by Ms Ali but of all other lawyers within LBD. Possession of such information (which Ms Ali accepted that she would be able to retain and recall) would allow predatory pricing by a competitor to LBD.

c. The status of ongoing matters: Lawyers within LBD have access to information relating to the status of ongoing files on which they have worked, including details of the previous advice given and the strategy for the case. Good evidence of this is seen in the handover notes which Ms Ali properly prepared before she left LBD. This information would be very valuable to a competitor seeking to take over a case from LBD, disclosing as it would the strategy in the case, and the likely yield in terms of further fee-earning work on the case.

d. The content of LBD training materials: LBD regarded the training that it delivered to, in particular, NHS bodies as an important part of its offering and a significant element of its strategy in building relationships with clients, thereby generating fee income. Ms Morrison drafted a series of training plans targeted at NHS employees and regarded them as qualitatively different to the training offered by many law firms to their existing and prospective clients. In this respect, Ms Ali appears at one time to have held the same view – in a training record she noted that

> "there is a real demand for the *unique* type of and high-quality sessions we offer" (emphasis added). This may explain why, in her Business Plan, Ms Ali spoke in terms of providing *that* training after she moved to Weightmans, noting that "A key way Saira has developed her profile and practice is through the delivery of training to clients, potential clients and external networks…Two such programmes are currently underway…Saira is looking forward to developing the training offering with a firm that has the resources and reach to maximise its potential…"

92. Quite aside from the significant range of confidential information requiring protection, in my view LBD was entitled to seek to protect the customer connections built up by LBD employees providing legal services to NHS clients. Although the nature of the relationship is of course different to those who work in sales (where customer connections may be readily found to be protectable), it seems to me that the *modus operandi* of LBD also created a properly protectable interest in terms of the customer (*i.e.,* client) connections built up over time. I accept Ms Morrison's evidence that the "by Design" approach to the provision of legal services that LBD adopted in relation to NHS clients – involving the offering of a complete package of employment law services, tailored to the client's individual needs, and provided by a small and accessible team of specialist lawyers – readily created the circumstances in which close and enduring relationships were built up, and were intended to be built up. That is how Ms Ali pitched herself to Weightmans in the Business Plan: she said in the introduction to that document that she had "longstanding relationships with a number of NHS organisations" and, later, that "…she is now embedded in two large, multi-site NHS Foundation Trusts, one of which is the largest acute NHS Trust in the country". In the table that followed she emphasised the nature of her relationship with these NHS clients by using the word "longstanding" five times to describe it.

(3) Covenant no wider than is reasonably necessary for protection of legitimate business interests

93. In the light of my judgement as to the way in which Clause 19.1(d) (read with the provisos to it) operates, and the legitimate business interests of LBD that properly required protection, it is an uncomplicated conclusion to reach that this covenant extended no wider than was reasonably necessary for the protection of those business interests. The critical fulcrum around which the covenant turns is the definition of "Restricted Business" – this limits the operation of the covenant to parts of LBD in which Ms Ali was involved to a material extent proximately to her departure from the firm. This device ensures that the covenant is reasonable in the scope of its operation: (i) if Ms Ali was *not* involved in parts of LBD to a material extent, then the covenant is not operative in relation to those parts; (ii) if Ms Ali *was* involved in such parts of the business to a material extent, then the covenant bites – but that is because it is reasonable to restrict her from joining a business which competes with those parts of LBD's business.

94. In relation to the *duration* of prohibitions imposed by Clause 19.1(d) I would hold that 12 months is a reasonable period for the protection of LBD's legitimate business interests. I therefore reject Ms Ali's submissions that the covenant's

duration should be restricted to 6 months. Such a period is reasonably necessary in order to find, successfully recruit, and then train/integrate a lawyer in a small firm such as LBD. Finding a suitable recruit is of course conditioned by the fact that LBD is a relatively small firm, working in niche areas, in Manchester. The pool of potential recruits is narrowed by all of these factors: finding someone who does not want to work in a larger firm, who specialises in the relevant areas of work, who is of sufficient seniority to Ms Ali, and who is reasonably local (or prepared to move house or have a long commute). Then, the recruit must serve out any notice period they have in their existing employment or other contract (which may well be 6 months' in length), and abide by any restrictive covenants to which they are subject (which could easily be of an equivalent duration to those which are in issue in the present claim). As Ms Ali accepted in evidence, "…6 months is nowhere near enough time for all of that to take place". Additionally, such a period reasonably reflects in my view the shelf life of the confidential information and Ms Ali's ability to remember it.

(4) Discretion

95. I have no hesitation in holding that, as a matter of discretion, this covenant ought to be enforced by way of injunctive relief.

96. First, the SA, and therefore the covenant, was agreed (by renewal and extension) between the parties comparatively recently (in the context of the relationship between the pair of them), namely on 18th February 2021 – that was less than 4 months before Ms Ali tendered her resignation. It reflected very well, as both sides to the bargain knew, the development of the relationship between them and, in particular, the need to secure a period of stability and growth for LBD. Ms Ali was by this stage an experienced employment law solicitor who had often been involved in drafting documents of this nature (albeit NHS contracts of employment do not tend to have restrictions of this nature included within them): understanding the meaning, and implications, of a clause such as this was – as she accepted in evidence - "meat and drink" to her.

97. Second, the agreement was reached in the context of significant give and take by both sides. In exchange for the extension of the duration of the restrictive covenant from 6 months to 12 months, LBD gave Ms Ali a significant pay increase from £70,000 to £92,000 (an increase of 25%). As an experienced employment law solicitor, Ms Ali understood completely the bargain that she here struck, as disclosed by her private email exchange (using non-work email) to her colleague Ms McDonald on 27th January 2021. In that exchange she expressly recognised the duration of the restrictive covenants, including the non-competition clause ("Hate the 12 months…"), but indicated that she was prepared to agree to these covenants because of material benefits that she would receive ("…what to do, I need the money"). As Ms Ali candidly accepted when she gave evidence to me "I did not complain about [the covenants], I accepted it – I took a pragmatic approach." As Ms Ali further accepted in her oral evidence, all of this was occurring at a time when Ms Ali was unhappy in her work at LBD, as was Ms MacDonald, and Ms Ali knew that there was a real possibility of the pair of them leaving LBD.

98. Third, I accept that in the circumstances of this case the non-competition covenant is a necessary and practicable solution to the difficulty of policing and enforcing the confidentiality covenants in the SHA and SA. As the authorities referred to above suggest, a non-competition clause is plainly more straightforward and easier to police than a non-solicitation clause or a restriction protecting confidential information. That is because there may be serious difficulties in identifying precisely what is or what is not confidential information. I accept on a theoretical plane that it is in the nature of legal work that it will be transparent and obvious where a client asks for a file to be transferred from Firm A to Firm B (*cf* cases involving financial services or technology, where it may be easier for matters to proceed under the radar) and therefore an inference might therefore be drawn that the cause of this was the provision of confidential information, but (i) this ignores the fact that in this case LBD and Weightmans *already* share a significant client – the task of unpicking precisely why that client decided to re-allocate a file, or not to allocate a new file to LBD would be fraught indeed; and (ii) the very conduct of this litigation has showed that, even when dispassionate and objective advisers were instructed to assist the parties, no agreement could be reached as to what was, and was not, to be treated as confidential information.

99. Fourth, Ms Ali's conduct in drawing up and distributing the Business Plan is revelatory of her plans. Put simply her plan was – unless the restrictive covenants were enforceable (and, I would add, enforced by this Court), to shift or to move ("transition") clients from LBD to Weightmans. Weightmans is a firm which, by common agreement between the parties, is a direct competitor of LBD.

100. Fifth, although I was sorry to hear that Ms Ali has some financial difficulties (including by reason of the need to contribute to the cost of remediation work to the property in which she lives following the Grenfell Tower fire), in the circumstances this is not a sufficient basis to not enforce this covenant as a matter of discretion. Clause 19.1(d) of the SA allowed (and allows) Ms Ali to join a business anywhere in England and Wales that does not compete with LBD for NHS clients in the North West or in the area covered by the Herts Valley CCG.

101. Overall, as it seemed to me, the effect of Ms Ali's position in this claim – and her opposition to the claim for injunctive relief - was to ask the court to release her from a contractual restraint so that she could be free to take up employment with the very type of competitor in respect of whom the restraint was intended to apply.

102. My judgment as to the effect, reasonableness, and enforceability of Clause 19.1(d) of the SA is sufficient to dispose of this claim. However, in deference to the parties' arguments in relation to Clause 6.1.2 of the SHA, I shall address those too.

Clause 6.1.2 of the SHA

(1) Meaning of the provision upon its proper construction

103. Again, the first task is to establish what this Clause means when it is properly construed. Clause 6.1.2 has the following working parts within it that operate as follows.

104. First, it has a temporal restriction: it operates "during the Restricted Period for that B Shareholder". This means a period which commences on the date that the relevant shareholder ceases to be the registered shareholder of any shares, and which ends on a date 12 months after that commencement date. In Ms Ali's case, the period would be from 15th November 2021 (the date on which she ceased to hold shares in LBD) and 15th November 2022 (12 months after that date).

105. Second, it sets out the extent of involvement in another business which is prohibited: former shareholders must not "…carry on or be engaged, concerned or interested in, or assist [a relevant business: see below for what this means]…" No real difficulty is caused by these words: they bear their ordinary and natural meanings.

106. Third, it prohibits such involvement by the former shareholder in a limited range of business: former shareholders must be not involved in the ways previously mentioned in "…a business which competes, directly or indirectly, with a business of [LBD] as operated at any time during the Relevant Period for that [Shareholder] in a territory in which [LBD] has operated such business during such Relevant Period" (emphasis added). This plainly has a number of elements to it:
    a. The first is that the Clause is operative in relation to businesses which *compete* with LBD;
    b. The second is that it is operative if such competition is *direct* or *indirect,* which I take to mean as follows. Direct competition is when two or more businesses offer the same product or service and compete for the same market. Indirect competition is when two or more businesses offer different products or services and compete for the same market to satisfy the same customer need.
    c. The third is that such direct or indirect competition must be with "a business" of LBD. This part of the Clause is, therefore, broad in the scope of what it describes. It describes the *whole* of LBD's business – i.e., *all* of the business *activities* of LBD. It is operative whether or not the relevant shareholder had any role in the conduct of a part of the business (and whether the shareholder thereby had access to, and is now in possession of, confidential information in relation to that business activity; and whether the shareholder enjoyed customer connections in relation to that part of the business).
    d. The fourth is that there is a qualification or limitation in that the business which is *ex hypothesi* in indirect or direct competition with LBD must have operated in a territory in which LBD has operated such business in the 12 months before the shareholder ceased to hold registered shares in LBD (albeit the drafting is not completely clear, I believe this to mean that the business must have been in competition with LBD in the same territory; this may not matter as "the territory" is not limited and on its face would mean England and Wales – *i.e.,* the jurisdiction in which the lawyers in LBD were qualified to operate).

(2) Demonstration that legitimate business interests require protection

107. For the reasons set out above, I accept that the protection of confidential information and the guarding of valuable customer connections justified the imposition of a non-competition covenant. Although LBD suggested that it had a legitimate business interest in the protection of the goodwill of the company, it seems to me that this is not powerful consideration in the case of *this* SHA (notwithstanding the declaration in Clause 6.3 of the SHA that the shareholders agree that the restrictive covenants "…are reasonable and entered into for the purpose of protecting the goodwill of [LBD] and the legitimate commercial interests of the shareholders…"). Non-competition covenants (including those of many years' duration, especially in the context of partnerships: see *e.g. Bridge v Deacons* [1984] 1 AC 705) may be justified where the relevant transaction involves the *acquisition* of the goodwill of a company. But that was hardly the position here through the execution of this SHA.

(3) Covenant no wider that is reasonably necessary for protection of legitimate business interests

108. I do not accept LBD's submissions that I should approach this issue as if the parties to the SHA were parties to a commercial arrangement involving the sale of part of a business – and, therefore, that the less stringent approach to enforcement of covenants should be applied. This case is a very long way from the cases relied on by LBD.

109. In my view Clause 6.1.2 *does* go wider than is reasonably necessary for the protection of LBD's legitimate business interests. That is essentially because, as I say above, the broad scope of the clause means that it is operative to prevent involvement by a shareholder in any other business in England and Wales that *directly* or *indirectly* competes with *any* part of LBD's business as operated in the 12 months before the shareholder ceased to be a shareholder. It is operative whether or not the relevant shareholder had any role in the conduct of a part of the business (and whether the shareholder thereby had access to, and is now in possession of, confidential information in relation to that business activity; and whether the shareholder enjoyed customer connections in relation to that part of the business). By common agreement, LBD undertook commercial work. So Clause 6.1.2 would prevent a shareholder such as Ms Ali from involvement with any firm that indirectly or directly competed for such work in England and Wales, even though she undertook little or no such work herself and was in possession of no trade secrets or confidential information in relation to such work. As LBD put it in its Opening Skeleton Argument: "This [clause] extends to the NHS part of [LBD's] business with which [Ms Ali] was materially involved in the last 12 months, as well as the other (smaller) parts of [LBD's] business in which her involvement was *de minimis*". I agree. But that is why the clause is wider than is reasonably necessary for the protection of LBD's legitimate business interests.

110. Whilst LBD has indicated that it is content to enforce this covenant on a narrower basis to reflect what happened after the covenant was entered into – namely that Ms Ali worked in employment law for NHS bodies, rather than in other areas of LBD's portfolio of work – in my view this indication is not a sufficient basis to save the clause. It is clear from the authorities that the non-enforcement of the whole or part of a restrictive covenant to reflect the events which have happened

since it was agreed is a matter of discretion, to be applied to a covenant which was otherwise enforceable at the point at which it was entered into. In other words, the exercise of discretion cannot rescue a covenant which was unreasonably broad and which extended beyond the scope of protection that was reasonably necessary for the protection of legitimate business interests. It is suggested by LBD that, at the point that the covenant was entered into, it was not envisaged that Ms Ali would not be involved in *all* parts of LBD's business and that the non-material extent of her involvement in non-NHS work in the latter period of her involvement was not anticipated. That is not, however, consistent with the evidence. It was known at the point of covenanting that Ms Ali was an employment law specialist, recruited to work principally for NHS bodies. And that is exactly what happened.

(4) Discretion

111. In the light of my conclusions above, it is not necessary to address this issue. First, the covenant is not enforceable. Second, even if it was enforceable, I would decline to enforce it as a matter of discretion in the light of the narrower, more targeted scope of the enforceable covenant in Clause 19.1(d) of the SA.

E. Outcome

112. The claim therefore succeeds. Clause 19.1(d) of the SA has the meaning, and operates, in the way I have described above. It is no wider than is reasonably necessary for protection of LBD's legitimate business interests. As a matter of discretion, it falls to be enforced. I shall leave to the parties' good sense the translation of these conclusions into a draft Order (it is likely to mirror part of the Order of 13th October 2021, and its duration will be until 3rd November 2022).