# In The Supreme Court of Bermuda

## CIVIL JURISDICTION
## (COMMERCIAL COURT)

## 2016: No. 459

**BETWEEN:**

**DERK KOOLE**

**Plaintiff**

**- and -**

**HG (BERMUDA) LIMITED**

**Defendant**

## JUDGMENT

*Construction of Bye-laws and use of extrinsic information in a holding company structure, Meaning of "competition", Whether there was competition, Restraint of trade in a shareholder agreement in an employer/employee or vendor/purchaser relationship*

**Date of Hearing:** **8, 9, 10, 24 June 2021**
**Date of Ruling:** **20 October 2021**

**Appearances:** **Lilla Zuill, Zuill & Co, for the Plaintiff**

**Christian Luthi and Rhys Williams, Conyers Dill & Pearman Limited, for Defendant**

**JUDGMENT of Mussenden J**

## Introduction

1. The present action was commenced by Generally Indorsed Writ of Summons issued 30 November 2016 and amended 14 February 2017. A Statement of Claim was filed on 14 February 2017 and an Amended Statement of Claim ("**ASOC**") was filed on 5 September 2017.

2. The Defendant is an exempted company incorporated on 31 August 2000 with limited liability under the laws of Bermuda. The company was (prior to the events set out below) the ultimate holding company for the "**Hay Group**" human resource and management consultancy businesses, being human resource ("**HR**") consultancy companies in 49 countries.

3. The Plaintiff was employed by two Hay Group companies (firstly in the Netherlands and then in Russia) between 1 April 1996 and 23 May 2013 when he retired. At his retirement, the Plaintiff was a shareholder of the Defendant, owning approximately 0.4% of the redeemable preferred shares of US$0.01 each in the share capital of the Company.

4. In general terms, as a preferred shareholder, the Plaintiff qualified by operation of a warrant to a share of the proceeds of any sale of the Hay Group business within a certain period (the "**Warrant**" as further defined below). If he left the employment of the Hay Group, then he would retain his entitlement under the Warrant for a period of three years after leaving. That entitlement came with some conditions including that, once he left the employment of the Hay Group, he would not, for a period of three years, breach a non-compete obligation under Bye-law 78.1 in respect of the Hay Group (the "**Non-Compete**" or "**Covenant**").

5. On 23 May 2013 the Plaintiff retired from the Hay Group eventually returning to the Netherlands from Russia.

6. In September 2015, the Plaintiff, through his own company, engaged as a consultant with a company Bright & Company ("**Bright**") in the Netherlands which was a small firm focusing on the niche area of HR strategy for which he was paid a monthly fee.

7. On or about 23 September 2015, within the three years of the Plaintiff's retirement, the Hay Group entered into a Stock Purchase Agreement with Korn/Ferry International, a Delaware Corporation ("**Korn/Ferry**") which provided for a number of things, including the acquisition by Korn/Ferry (the "**Korn/Ferry Transaction**") of all the issued and outstanding shares and non-interest bearing convertible preferred equity certificates of the Hay Group's wholly owned subsidiary, HG (Luxembourg) S.a.r.l., a private limited liability company organized under the laws of Luxembourg ("**HG Luxembourg**").

8. The Plaintiff claims that he became entitled to the benefit under the Warrant.

9. However, on 7 October 2015 the Defendant informed the Plaintiff by email that its Ownership Board had determined that he was in breach of the Non-Compete, he having acted as a consultant to a competitor HR company, that is, Bright. Consequently, the Defendant refused to pay the Plaintiff his benefit under the Warrant. The Plaintiff brought these proceedings to make good his claim for his share of the proceeds of the sale of the Hay Group.

10. The trial was in order to establish liability with a further trial of quantum as necessary. The trial accordingly centred on the Bye-laws, the determination of factual disputes of the conduct of the Plaintiff, the HR services offered by Bright, officers/employees of the Defendant and expert evidence on behalf of the Plaintiff. There were also issues in respect of the Non-Compete in the Bye-laws.

11. Having received evidence at trial, together with submissions by Counsel, I reserved judgment which I now provide with reasons as set out below.

**The Pleadings**

Amended Generally Indorsed Writ of Summons

12. The Amended Generally Indorsed Writ of Summons set out that the Plaintiff's claim arose out of his contractual entitlements pursuant to the Bye-Laws of the Company, including but not limited to a "Warrant" at clause 3.7 of the Bye-Laws of the Company. It claimed a declaration that the Plaintiff is entitled to the benefit of the Warrant arising out of the Stock Purchase Agreement. It sought directions in respect of the assessment of monies owed to the Plaintiff.

Amended Statement of Claim

13. In the Amended Statement of Claim (the "**ASOC**"), Mr. Koole pleaded further details including that he would rely on the whole of the Bye-laws for their true meaning and effect, that he was and remained in "Good Standing" pursuant to Bye-law 3.6(b) and that he was entitled to the Warrant.

14. In respect of the Korn/Ferry Transaction, Mr. Koole pleaded that for the purposes of Bye-law 3.7 he is a Previous Shareholder, but he had not received his Final Redemption payment. Further, the Korn/Ferry Transaction was effected on 1 December 2015 and the consideration paid by Korn/Ferry to the Defendant for the transfer of the Shares, which was more than 50% of the shares or assets of the Hay Group, was approximately US$475 million. As the Korn/Ferry Transaction closed before the third anniversary of his Employment Cessation, defined to be 30 September 2016, he was entitled to and had benefit of the Warrant provided by Bye-Law 3.7.

Defence

15. In essence, the Defendant:

    a. Denied that the Plaintiff was and remains in Good Standing within the meaning of the Bye-laws.

b. Denied that the Plaintiff is entitled to the benefit under the Warrant.

c. Pleaded that the Plaintiff ceased to have the benefit of the Warrant upon his breach of the Non-Compete Bye-law 78.1; and

d. Denied the claims.

16. Further, in its Defence, in relation to the Bye-laws the Defendant stated as follows:

*"4. The Defendant will rely upon the full terms of the Bye-Laws for the true meaning and effect. In particular, the Defendant will rely upon:*

*a. Bye-law 3.6(b), which provides:*

*""Good Standing" shall mean not terminated for Cause, not in breach of any obligations at date of termination and thereafter not in breach of any obligations of these Bye-laws."*

*b. Bye-law 3.6(c), which provides, inter alia,:*

*"Departure not in good standing" shall mean a departure of a Shareholder… coming thereafter into breach of these Bye-laws or other contractual obligations to HG Group, including undertakings upon withdrawal or Retirement. Whether a Previous Shareholder made a Departure Not in Good Standing or remains in Good Standing may be determined by the Ownership Board at any time prior to payment in full of the Redemption Amount…Departure Not in Good Standing may arise, without limitation, by reason of breach of a Shareholder's obligations under these Bye-Laws existing on or prior to the date of Withdrawal or by reason of breach of the obligations not to compete contained in these Bye-laws."*

*c. Bye-law 3.7, which provides, inter alia:*

*"If a Shareholder shall breach the provisions of Bye-law 78.1 after the two year period but prior to the three year period after his or her Employment Cessation, then this warrant shall be deemed forfeited."* [1]

*d. Bye-law 78.1, which provides, inter alia:*
*"No Shareholder… shall compete with or undertake any investment or activity in competition with the Business…for a period of the longer of: (a) two (2) years after the HG Person…ceases to be an active employee; or (b) any period which the Redemption Amount paid on account of the Shareholder's…Preferred*

[1] This sentence, in respect of breach and forfeiture, follows the last sentence in the "Warrant" as set out above.

*Shares is not yet paid under any deferral required or permitted as on option pursuant to Bye-law 3."*

**Evidence - The Plaintiff's Case**

17. The Plaintiff gave evidence and called one expert witness.

***Plaintiff's Case - The Plaintiff – Evidence-in-Chief***

18. The Plaintiff's witness statements stood as his evidence-in-chief. He stated that the Hay Group was founded in 1943 and grew to become one of the top HR consulting firms globally, employing more than 2,000 professionals serving more than 7,000 clients from 88 offices in 47 countries providing a range of HR services including rewards management, performance management, job evaluation, organisational effectiveness, talent & leadership development, employee and customer surveys and more. In essence, it comprised of consultancy companies throughout the world generally incorporated in the country in which they operated ("**Affiliates**").

19. The Plaintiff stated that he commenced employment on 1 April 1996 at Hay Consultants in the Netherlands ("**HG Netherlands**") in the role of Junior Consultant and rose through the ranks to a senior position over the years. In January 2007 he started to support the Hay Group efforts in Russia and on 25 April 2008 he became an employee of Hay Group Limited Liability Company (LLC) in Russia ("**HG Russia"**) becoming the General Director on 6 November 2008.

20. About a year later, he was invited to become a shareholder of the Defendant, having been invited by Chris Matthews, ("**Mr. Matthews**") Chief Executive Officer of the Hay Group by way of a letter dated 17 November 2009. In March 2010 he made a subscription payment of US$110,000 to the Defendant and became a shareholder effective 1 October 2009. He was provided a copy of a document entitled the "***Shareholder Responsibilities and Guidelines***" (the "**Guidelines**") as agreed by the Ownership Board at its 12 June 2002

meeting. By further payments in 2011 and 2012 he increased his total subscription in shares of the Defendant to $414,950.

21. The Plaintiff stated that on 24 May 2013 his full-time employment with HG Russia ended but he continued to freelance for clients in Russia. At this point, his shares were valued at $657,000 which were converted into a three-year loan, with an interest rate of 8% on the agreement that for two years he would not work for any competitor companies. For each of the three years of the loan he would receive the 8% interest and then at the end of the loan period he would receive payment of the principal value of the shares.

22. The Plaintiff stated that eventually he returned to the Netherlands. Mr. Matthews provided him with a letter dated 16 June 2015 confirming his "Good Leaver" status and some other financial details to satisfy Dutch Immigration services. The Plaintiff stated that he started to look for jobs in the Netherlands. Out of loyalty to the Hay Group, he turned down several jobs from local and international competitors in the HR field. In August 2015, having been out of work for nearly 27 months he started his own company, K2M B.V. as he had to support his family.

23. The Plaintiff stated that in September 2015 he was offered a role in Management and Consulting Services at Bright, which was a small local Netherlands firm focusing on the niche area of HR strategy and employed around 10 people. He stated that he investigated to the best of his ability any competition which may have occurred between Bright and the Hay Group, by asking former clients, former Hay Group colleagues and the Bright partners. He also contacted Madeline Dessing ("**Mrs. Dessing**"), the head of HG Netherlands but was unable to reach her. The feedback he received was that Bright and the Hay Group had never competed. Therefore, he started his collaboration with Bright through his own company and was paid a monthly management fee at that time of €15,224 without bonus or dividend. He was not on Bright's payroll, he had no investment in Bright and he was not considered an employee.

24. The Plaintiff stated that his work at Bright was to support the partners as he did not have an active network of clients, as he had been out of the Dutch market for 8 years. Soon after,

it was agreed to reduce his fee by 25%, as he was not bringing in the work that was expected.

25. The Plaintiff stated that on 7 October 2015 he received an email from Mr. Matthews that he would not be able to participate in the proceeds of the sale because his role at Bright was considered to be a competitor. He noted that there had been no discussions with him about his role at Bright, the members of the Ownership Board, other than Mrs. Dessing, did not live in the Netherlands and were not active in the Dutch market and, from the litigation documents, the only information provided to the Ownership Board about Bright was the link to its website. His appeal of this decision was rejected a few weeks later in an email dated 21 October 2015 from Mr. Matthews. On 11 November 2015 he received $52,561.58 as interest for the redemption of his shares and on 20 October 2016 he received $709,581.27 as value and interest for the redemption of his shares, as a result of his resignation from HG Russia in May 2013. On legal advice, he declined to sign the General Release Agreement emailed to him on 12 September 2016 and his counsel wrote to counsel for the Hay Group informing that he maintained his entitlement to the benefit of the Warrant noting that receipt of any payment that did not include the benefit would be treated as part payment.

26. The Plaintiff stated that in October 2019 he stopped consulting with Bright as he couldn't develop enough business, as he did not have a personal network, and had been out of the market for too long and the Bright market did not recognise him as an expert in their niche field. During the three years with Bright, he never competed with the Hay Group and he was not aware of any ways in which Bright had the potential, or did cause any injury to the Hay Group's business. He never had a project that the Hay Group competed for and if a client requested services that Bright did not provide he referred them to the Hay Group.

27. The Plaintiff gave evidence about the comparison of services between Bright and the Hay Group as follows:

a. Mrs. Dessing had listed Korn/Ferry Hay Group's[2] services as organizational strategy, talent acquisition, rewards and benefits assessment and succession and leadership development.
b. In contrast, Bright's activities of HR Strategy, organization transformation, HR organization effectiveness and HR analytics were not listed as services offered by Korn/Ferry Hay Group. Also, talent acquisition was not a service offered by the Hay Group.
c. The Hay Group's global reach was a selling point in his view having read Mr. Matthews' witness statement about the Hay Group being recognised as a global brand.
d. The Hay Group sometimes serviced local Dutch clients, but that clients made decisions whether to go with a local or global brand.
e. Bright did not have any consultants abroad, so any work they did for multi-national companies were on local issues and solutions for the Dutch subsidiaries.
f. It was absurd to say that one provider delivers all HR services as for example, Hay Group does not provide HR IT systems, payroll services, labour law, tax, expatriate, health insurance, or pension broking services. Additionally, recruitment and outplacement services were not provided by the Hay Group before the acquisition by Korn/Ferry.
g. While he was at the Hay Group, it never was able to position itself for projects in the sphere of HR strategy development. However, when he was at Bright, they developed HR strategies to build on emerging trends, to set up HR analytics teams and skills within organisations to optimize the effectiveness of HR teams to execute these HR strategies and to support the implementation of governance structures to manage those changes (the "**Bright HR Strategies System**"). In contrast, the Hay Group built on their reputation of having an arsenal of global approaches, standards

[2] Mrs. Dessing, in her witness statement and in her evidence, used the term 'KFHG' for 'Korn/Ferry Hay Group' in reference to the company after the sale of Hay Group to Korn Ferry. The Plaintiff, in his second witness statement, in addressing Mrs. Dessing's evidence, used the term 'Korn/Ferry Hay Group'. In this judgment, in respect of their evidence, I use the term 'Korn/Ferry Hay Group' as necessary. However, generally, I equate 'Korn/Ferry Hay Group' to 'Hay Group' as the 'umbrella' organization, unless I state otherwise.

and databases making it possible to apply the same methods in the same ways to clients across the globe.

h. The pricing between the Hay Group and Bright was different in that Bright would work with clients with smaller budgets. Bright would also work on smaller projects as it had a small team.

i. Bright would take an individual approach to client matters whilst the Hay Group was known for a structured approach performing projects around the world in a consistent manner.

***The Plaintiff - Cross-Examination***

28. The Plaintiff was then cross-examined.

Roles in Netherlands and Russia

29. The Plaintiff accepted that he was trained in Hay Group methods but stressed that as there were different lines of business, there were different kinds of training. He stated that he had training or worked in various areas as follows: (a) job evaluations – he considered himself an expert; (b) reward strategy; (c) job analysis; (d) consulting skills; (e) professional growth; (f) building organizational effectiveness; (g) leadership effectiveness; and (h) accountability in top teams. He stated that he did not have training or work experience in job matching and leadership development.

30. He stated that in the Netherlands, he would have developed strong client relationships whilst he was in the market, would have had access to clients' business and assessment data, would have had dealings with clients' senior HR people and employment people, and would conduct interviews on location.

Becoming a Hay Group Shareholder

31. The Plaintiff stated that once he was invited to be a shareholder, he attended an orientation meeting when he met with the Admissions Committee and was present at a presentation

"***Becoming a Hay Group Shareholder***". The presentation was about the admission process, redemption of shares, redemption priorities. The Plaintiff stated that he received a letter and the "***New Shareholder's Information Package***" which contained various documents including the Disclosure Information document. He accepted that it had various clauses including: (a) "***No Employment Relationship***" setting out that being a shareholder had no impact on employment status with the Hay Group; and (b) "***Use of Term Shareholder***". In respect of the Guidelines, he was familiar with the Special Note on Bye-law 78 on non-competition in the Guidelines, noting that he had always abided them. He was aware of the consequences of a breach of the Non-Compete.

32. The Plaintiff stated that he was aware that he was investing in a holding company whose value came from all the subsidiaries. He loved the idea of investing in a company owned by the shareholders.

Joining Bright

33. The Plaintiff maintained that he did extensive due diligence on the Non-Compete and tried to reach out to the Hay Group by calls and text messages to Mrs. Dessing but was unsuccessful. He held himself out as a representative of Bright on their website and was listed as a partner in order to show more people on the website, to win more work and to show they could do the work. In respect of his Netherlands network, he stated that as he was out of the market for about 8 years, people who he knew were now either retired or working independently, although a few may still be working for companies. He disagreed that he had a high-level network.

34. The Plaintiff stated that he thought he had done everything he could to ascertain that he was not in breach of the Non-Compete. In retrospect he agreed that he should have had a more formal communication with the Hay Group but that at the time he did not think it was a breach, perhaps he was naïve and he had no knowledge of a sale of the Hay Group to Korn/Ferry.

Services offered by Bright

35. The Plaintiff accepted that printed copies of the Bright website included material on organization transformation, organization effectiveness, human capital analytics, Bright partners and experts, links to projects, and organization transformation. He explained that if the Ownership Board read the titles they might think of Bright as a competitor but if they read the detail, then they would realise that Bright offered what the Hay Group did not offer, therefore he could not agree they were competitors.

36. The Plaintiff agreed that a global firm would try to get local work but not work from the small players. He accepted that Bright sought and did work for multi-national firms with head offices in the Netherlands. He maintained his position on the differences in services offered between the Hay Group and Bright stressing that he had never known the Hay Group to do strategy development. In respect of pricing, he stated that a lesser selling price would be a selling point if it was for the same services but the Hay Group and Bright offered different services, like a French bistro offering French fries compared to MacDonald's French fries.

37. In answer to a question of the Hay Group offering HR services one way and Bright offering HR services another way to address HR issues in a company, all being aimed at the same thing, the Plaintiff agreed there were different methods and routes to reach the objective but that the end result was not the only thing to consider. The Hay Group offered global solutions that it had developed as standard methods whilst Bright did the opposite, it did not do a global solution, but instead used creativity to address the need.

Emails with Mr. Matthews

38. In challenge to the content of his email dated 8 October 2015 to Mr. Matthews, the Plaintiff maintained that Bright and Hay Group were different and that the knowledge he had gained at the Hay Group was totally irrelevant to the job he was doing at Bright. When challenged

further if his experience was irrelevant, the Plaintiff stated that although he was senior in HR, he was new to analytics which Bright were pioneering in the Dutch market. Although he brought consulting skills to Bright, that did not mean that he used the skills of job evaluation and other Hay Group methods at Bright, that knowledge not being relevant to his role there.

***Plaintiff's Case - Expert Tom Rodenhauser – Evidence-in-Chief***

39. Mr. Rodenhauser was tendered and accepted as an expert on HR matters. He prepared an expert report dated 10 December 2020. The Expert Report set out a part on the "***Size and Composition***" of the Dutch HR consulting market and a second part on the "***Practice Differentiation***" between Hay Group and Bright. Mr. Rodenhauser used sourced material from "***ALM Intelligence, 2018***".

40. In respect of "*Size and Composition*" the Expert Report included the following information:

    a. The market for HR consultancy in the Netherlands is estimated at over US$206 million with full time employees estimated at 990. The market has been growing at 2.5% from 2012 – 2017.
    b. The Dutch HR consulting market is comprised of three primary types of HR consulting services:
        i. Rewards Management – comprising retirement benefits, health and wellness benefits and compensation;
        ii. Talent & Workforce – workforce management, communications and change and talent and leadership;
        iii. HR Operations – which is activities to support client's back office e.g. payroll, insurance processing).
    c. On a global scale, in respect of client composition, more than 50% of spending on HR comes from large, multinational companies (>$5 billion revenue) that employ many different types of consulting firms. They engage with specialist firms and/or

local boutiques. Mid-size and smaller companies (<$500 million) tend to be tactical in their use of consultants and tend to hire local firms or independent operators.

41. In respect of "*Practice Differentiation"* the Expert Report included the following information:
    a. HR Consulting is a collection of discretionary services targeted at helping clients improve productivity by growing their businesses and cutting costs. It has evolved to solutions comprising an integrated model targeted at front to back office transformations with the increased use of digital technologies and risk assessment.
    b. HR consulting in developed markets like the Netherlands has bifurcated into two types of providers:
        i. Global, multi-service providers that develop and deliver across all types of service categories, including strategy, implementation, and manage services; and
        ii. Specialist/Niche providers that focus primarily on strategy development and limited assistance in implementation.
    c. Korn/Ferry Hay Group and Bright represent each end of that bifurcated spectrum.
    d. Korn/Ferry Hay Group has 28 full-time HR employees in the Dutch market and 557 globally.
    e. Bright has 3 full-time partners, 3 freelance consultants and 2 internal admin staff.
    f. Korn/Ferry Hay Group and Bright both offer - people strategy, workforce management, human capital analytics and change management (the "**Common Service Offerings**").
    g. Korn/Ferry Hay Group offers (but Bright does not) - organization design, talent management, rewards management, leadership development.
    h. Bright offers (but Korn/Ferry Hay Group does not) – HR Operations.
    i. In the Netherlands, Korn/Ferry Hay Group's business is largely around executive compensation and leadership development (the "**HG Netherlands' Core Services**"). In the calendar year ending 2016, it generated approximately $500 million in global consulting fees and $230 million from the sale of product solutions through four practice areas – strategy execution & organization design, talent and

workforce management, rewards and benefits and leadership development. Korn/Ferry Hay Group's approach to talent management is by asking the following types of questions – (a) how do we get the most out of our talent; (b) what skills do they need to develop; (c) how do we engage them; and (d) how do we assess performance, compensation and development.

j. Bright offers a different value proposition from Korn/Ferry Hay Group in that it is more focused on strategy than execution.
    i. Bright offered Workforce Management which is the "**What**" of People Strategy which both Bright and Hay Group offered. Bright devised strategies that answer the following types of questions – (a) what kind of talent do we need to execute our strategy? (b) where do we need them; and (c) when do we need them?
    ii. The Hay Group offered Talent Management (which Bright did not), which was about the "**How**" of executing workforce strategy, devising strategies that answer questions – (a) How do we get the most out of our talent; what skills do they need to develop; (c) How do we engage them; and (d) how do we assess performance, compensation, leadership development pipelines.
k. Bright is more nimble, offers more competitive pricing and engages with the client with very small, senior-led teams focused on strategy engagements.
l. Bright's superiority in local market knowledge compared with Korn/Ferry Hay Group is the only demonstrable advantage for the firm, further exemplifying the difference between boutique and large global firms.

42. Mr. Rodenhauser offered his opinion that Bright and Korn/Ferry are significantly different firms. Further, the Plaintiff's work with Bright, either directly or indirectly, would have virtually no impact on Korn/Ferry Hay Group's business in the Netherlands.

***Plaintiff's Case - Expert Tom Rodenhauser – Cross-Examination***

43. Mr. Rodenhauser was cross-examined. He said that whilst he did not work as an HR consultant in the Netherlands, he has knowledge of its markets as he leads research, covers

consultants and markets in the region, attends conferences and writes for a Dutch consultancy. In respect of the definitions he used, he stated that they are generally accepted taxonomy in HR.

44. Mr. Rodenhauser gave answers including as follows:
    a. Bright does some HR operations but not payroll processing.
    b. He accepted that locals do work locally on global issues.
    c. Boutique firms have more local knowledge than "***glocals***" which are global firms working locally.
    d. He agreed local clients could go to both Bright or Korn/Ferry Hay Group, that mid-size firms may still hire large HR firm and that Korn/Ferry Hay Group was regularly instructed by mid-size firms (according to Mrs. Dessing).
    e. In respect of a partner from a large firm moving to a boutique firm making it more attractive, he stated that it depended on what the partner brought, his expertise in an area, and his knowledge of the local market or industry.
    f. He stated that mid-size clients would chose a boutique firm based on available brand expertise and price.
    g. In respect of strategy development, both offered it, but Bright didn't offer implementation, whereas Korn/Ferry Hay Group's strategy was "***land and expand***" meaning a partner offers strategy on a specific issue and then the services offered are expanded to other areas.
    h. In respect of his opinion on bifurcation, he agreed there was significant overlap in the services offered, but that bifurcation speaks to the size and scope of services offered.
    i. In respect of the Plaintiff working at a boutique firm at a lower price being attractive to a client, he stated that a client might choose based on expertise as at boutique firm, the senior consultant is usually working on the project and billing for it, whereas at a larger firm, the price drops as lower fee people work on the project.
    j. Mid-size clients go to boutique firms as they get senior level people doing the work.
    k. In respect of data analytics, in large companies, a department would be doing that task, while in a boutique firm a senior consultant does all the necessary work.

l. He agreed the Plaintiff had significant experience in strategy development and that he could add value to strategy advice.
m. In respect of the Plaintiff adding value to Bright thus making Bright more competitive, he stated that the attraction of boutique firms is that the consultant actually does consulting work.
n. In respect of Bright's impact on Korn/Ferry Hay Group to win small engagements, he stated that strategy projects were limited, whilst there could be some impact, strategy and delivery engagements were short term.

**The Defence Case**

45. The defendant called two witnesses, Mrs. Dessing and Mr. Matthews.

***Defendant's Case - Mrs. Madeline Dessing – Evidence –in-chief***

46. Mrs. Dessing's witness statement stood as her evidence in chief. It focused on replying to some of the views of the Expert Mr. Rodenhauser.

47. Mrs. Dessing stated there are no generally accepted or rigid definitions of the services provided as part of HR consultancy, describing such grouping of HR tasks as arbitrary. She stated that Korn/Ferry Hay Group services are grouped as follows:

a. Organizational Strategy – consisting of organizational effectiveness, cultural transformation, strategic workforce planning, employee engagement, performance management, HR effectiveness, and career transition.
b. Talent acquisition – consisting of board and CEO services, executive search, professional search, recruitment process outsourcing, and project recruitment.
c. Rewards and Benefits – consisting of executive pay and governance, employee rewards, work measurements, and sales compensation.
d. Assessment and Succession – consisting of executive success profiles, leadership assessment and succession management.

e. Leadership Development - consisting of enterprise leadership development, senior leadership team development, leadership accelerator portfolio, and custom leadership development programs.

48. Mrs. Dessing stated the following about Korn/Ferry Hay Group:

a. Approximately 30 to 40% of Korn/Ferry Hay Group's revenue in the Netherlands comes from local companies, with many of those local companies being regular clients of Korn/Ferry Hay Group. The other 60% to 70% of revenue arises from clients with a global presence. Korn Ferry is known as a '***glocal***' firm with local regional, multi-country and local clients.

b. Approximately 80% of Korn/Ferry Hay Group staff are working on local Dutch market matters. Their consultants have detailed knowledge of and experience in local culture and workforce issues.

c. Korn/Ferry Hay Group is a specialist and leader in HR organisational strategy but it also covers all of the HR space.

d. Korn/Ferry Hay Group does not provide back-office functions such as payroll management. But it does offer HR operations consulting which includes strategies and methods to improve efficiency and effectiveness of the total HR function.

e. Korn/Ferry Hay Group in the Netherlands has long-term partnerships with companies (local, global and those in between) seeking input from trusted advisers. It assists in the '***what***' of people strategy and the '***how***' of executing that strategy.

f. In order to compete in the Netherlands markets, Korn/Ferry Hay Group offers competitive pricing and allocates the appropriate consultants in terms of qualifications, experience and number to each project. Korn/Ferry Hay Group readily engages with clients in very small, senior led teams, focusing on client needs, including strategy.

49. In respect of the Netherlands market, Mrs. Dessing stated that there are many small consulting firms and a few large ones such as Korn/Ferry Hay Group, all which compete for clients irrespective of their size. She disagreed with the evidence of Mr. Rodenhauser that mid-size and smaller companies tend to hire local firms or independent operators,

noting that such companies regularly instruct Korn/Ferry Hay Group, which competes with and loses clients to small independent boutique firms and other global operators.

50. Mrs. Dessing stated that she was aware of Bright before the Plaintiff joined it, as she had heard of Bright from clients or at conferences and other events. She noted that the Bright website listed four areas of HR consulting that it offered: people strategy, organizational transformation, people analytics and HR organizational effectiveness. She agreed with Mr. Rodenhauser that there was significant overlap between the offerings by Bright and Korn/Ferry Hay Group but added that Korn/Ferry Hay Group also offers HR operations to the extent that it relates to strategy which Bright appears to offer under the heading "HR organisational effectiveness". Thus Korn/Ferry Hay Group offers all the "solutions" provided by Bright. She viewed Bright as a competitor as she stated that recently Korn/Ferry Hay Group had advised a supermarket chain in the Netherlands focused on HR and people strategy, a type of service that Bright claims to specialize in.

51. Mrs. Dessing stated that having reviewed Bright's list of clients on its website, she recognised that Korn/Ferry Hay Group have or had all of those as its own clients, some of which are multi-national companies. Therefore, in her view, Bright was not limited to local or small-to-mid-size clients.

52. In respect of the Plaintiff, Mrs. Dessing stated that she could not recall how she found out that he had joined Bright, noting she knew it had been announced in the Financial Times. At trial when she started her evidence, Mrs. Dessing stated that she did not recall that the Plaintiff had text messaged her, noting that she could not say that it did not happen.

53. Mrs. Dessing stated that Bright also announced it on their website which had included his former employment with Korn/Ferry Hay Group. She was of the view that by joining Bright, the Plaintiff was in breach of his Non-Compete so she shared that information with the Ownership Board, reviewed Bright's website and sent the link to Mr. Matthews, who in turn sent it to the Ownership Board. Mr. Matthews later sent her an email from the Plaintiff asserting that he is not in competition with Korn/Ferry Hay Group. She disagreed with his explanation as Korn/Ferry Hay Group provided the same services for which he

was supporting Bright. In any event, the Plaintiff's explanation did not cause her to change her mind that he was in competition with Korn/Ferry Hay Group.

***Defendant's Case - Mrs. Madeline Dessing – Cross-Examination***

54. On cross-examination, Mrs. Dessing stated she no longer works for the Hay Group. She stated that at the material time, HG Netherlands had about 180 employees whilst Korn/Ferry had about 15 people. She accepted that the Non-Compete was only in reference to the Hay Group before the sale, although deferred to Mr. Matthews on that point as he knew the Bye-laws better than she. She stated that she was on the Ownership Board. In respect of the five areas of HR work that Korn/Ferry Hay Group did in the Netherlands, as set out in her witness statement, she clarified that Korn/Ferry did talent acquisition while the Hay Group did the other four in 2015. She stated that she would consider everyone working in HR companies to be competitors and that was the test she used to determine that the Plaintiff was in breach of the Non-Compete. In respect of the names used for the various categories, she stated that different firms use different titles for different products as there was not 100% consistency in labelling service areas. She did not agree with Mr. Rodenhauser on his view in respect of people strategy of Bright doing the "***what***" of people and Korn/Ferry Hay Group doing the "***how***" of executing strategy as Korn/Ferry Hay Group was doing all of it, even if Bright was only doing the "***what***".

55. Mrs. Dessing stated that during the period September to December 2015, or any other time, no long-term partnerships ended because of Bright, something she would have known about. She stated that the Hay Group could offer competitive pricing as it had a number of consultants whereas Bright did not have such a large number. She agreed that long-term clients did not threaten to leave for Bright. In respect of fees, she stated that the Hay Group were asked to drop their fees because of Bright and others, but added that clients will ask for reduced fees as the Hay Group was on the high end of the fee scale. She did not recall any requests to drop fees during the period September to December 2015. She clarified that the example of project work for the supermarket took place over a long period of time, a few years before and after the Korn/Ferry acquisition. She maintained her view that the

supermarket project was one where Bright or any boutique company would be a competitor in offering many of the HR services.

56. Mrs. Dessing stated that the Hay Group did a conference around 2013 on HR analytics noting that the Hay Group was also known for their data and the analytics of their data. In respect of the clients listed on the Bright website, she was sure they were clients of the Hay Group and not of Korn/Ferry. She maintained her position that the Plaintiff was in competition with Bright because of his skills, expertise, experience and the network he was using whilst at Bright. She noted that he had been out of the Netherlands market for about eight years since 2007 or 2008. However, the Netherlands was a small HR market, and people meet each other on a regular basis. In September to December 2015 she considered that both the Plaintiff and Bright were in competition with the Hay Group.

57. In respect of her email dated 22 September 2015 to Mr. Matthews she accepts that she referred to Bright as "the competitor", not to the Plaintiff as "the competitor", adding that she noted him to be a competitor in the Ownership Board meeting/correspondence. She had no knowledge of Bright and the Plaintiff having a negative impact on the Hay Group. She added that if the Plaintiff took an in-house role with a client company then that would not cause a loss in business to the Hay Group.

58. Mrs. Dessing stated that she was the senior person in the HG Netherlands office. When she found out that the Plaintiff was with Bright, she spoke to the Ownership Board. She added that it was a short period of time with lots going on, including the sale with Korn/Ferry, but that she did not take other steps to protect the business. She was the only Dutch member on the Ownership Board and her assessment about Bright being in competition with the Hay Group would be influential to the Ownership Board. She recognised that the proceeds of the sale would be shared to the Plaintiff, however if he forfeited the Warrant, then his share would be for the other shareholders, of which she was one at that time and remained one in Korn/Ferry Hay Group. However, she stated that at the time, the Hay Group was admitting new shareholders, so her actions were about the principle of the matter, it was not about the money. She added that despite the imminent sale to Korn/Ferry, the new

shareholders would have to pay in as the process was already underway, recognizing those new shareholders contribution to the Hay Group.

59. Mrs. Dessing stated that she shared the information about the Plaintiff and Bright with the Ownership Board and Mr. Matthews on 22 and 23 September 2015 when a meeting was taking place in Toronto. In respect of the meeting, she reviewed a heavily redacted Minute, agreeing that in the section "***Other Business***", it was mentioned that the Plaintiff may have breached the Non-Compete. After the meeting she emailed Mr. Matthews, noting that the term 'detailed information' meant her email. She stated that the further investigation about whether Bright was a competitor involved conversations with clients and colleagues, even though she was busy at that time, although she did not think to record the details of those conversations. She denied that she had reached an advantageous decision as she was not thinking like that. She confirmed that she had been paid part of the proceeds from the Korn/Ferry Hay Group sale transaction and that a further payment rested on claims such as the present one, noting that she was not a big shareholder.

***Defendant's Case - Mr. Chris Matthews – Evidence –in-chief***

60. Mr. Matthews witness statements stood as his evidence in chief.

61. Mr. Matthews stated that he was the Chief Executive Officer ("**CEO**") and a director of the Defendant at all material times. He was responsible for overseeing the formation of the Bermuda partnership in 1990 and then became CEO upon incorporation as a limited liability company in 2000 serving on the Ownership Board since that time.

62. Mr. Matthews stated that the Hay Group was one of the top consulting companies in HR consulting, with over 2,000 professionals serving more than 7,000 clients from 88 offices in 49 countries. It was distinguished in its niche providing a range of services, including but not limited to performance management, job evaluation, organization effectiveness, talent management, capability assessment, reward strategies, executive rewards, leadership transformation, reward information services, employee and client surveys. It also helped clients clarify strategy, develop operating models and design organization structures.

Background corporate structure

63. Mr. Matthews stated that on 31 August 2000 Hay Bermuda was incorporated, when the Preferred Shares were transferred to former partners of the partnership, with the shareholders' agreement containing the Bye-laws of Hay Bermuda adopted on 22 September 2000. The Defendant had only one asset. It owned indirectly through intermediary subsidiary corporations, Hay Group Investment Holding B.V. ("Holding Company"), which owned the Affiliates, that is, the operating subsidiaries in the Hay Group.

64. The Hay Group was very successful, with a widely recognized global brand where each consultancy relies on the other Hay Group companies to maintain the Hay Group brand, share methodologies, data bases, client relationships and to refer work. Only senior consultants nominated by another partner and approved by an Admissions Committee could become shareholders in the Defendant. In doing so, they would become joint owners of a global enterprise, separate from their position as an employee at an Affiliate doing the HR consultancy work. The value of the shares of the Defendant was derived solely from the success of the Affiliates.

The Evolution of the Bye-laws

65. Mr. Matthews stated that in the partnership, the partners agreed by a covenant not to compete, that no partner would compete with Hay Group whilst a partner and for a specified period afterwards, originally 2 years. It applied to all partners, in order to preserve the value of the partnership, they all knowing it would be enforced upon a breach. It continued upon incorporation as set out in the Shareholder's Agreement dated 29 September 2000, at paragraph 10.1 as follows:

> *"Undertaking not to compete. Each Member, by the execution of this Agreement, or a counterpart hereof, or by execution of a deed of adherence...hereby covenants and agrees in favour of each of the other Members and the Company that he or she shall*

*not compete with or undertake any investment or activity in competition with the business of the company during the term of his status as a Member of the Company or for a period of the longer of (a) two (2) years after the Member ceases to be a Member of the Company or (b) any period which the Redemption Amount paid on account of a Member's Preferred Shares is not yet paid under any deferral required or permitted as an option pursuant to Article V of the Bye-laws. The provisions of this Section 10.1 shall be in addition to any provision regarding obligations not to compete or restrictions upon activities after termination that may arise out of the terms of employment of an individual by the HG Group."*

66. Mr. Matthews stated that on 22 June 2007 the Supreme Court of Bermuda sanctioned a scheme of arrangement, which *inter alia* allowed the Board to amend the Shareholder's Agreement to permit the assignment of the restrictive covenants in the event of any sale, transfer, merger or amalgamation. Bye-law 78 of the 2008 Bye-laws contained a similar Non-Compete provision including the period being linked to the redemption of the Member's shares. However, it contained an additional clause permitting the Defendant to assign or transfer the benefit of the Non-Compete obligations in the event of a sale, transfer, merger or amalgamation.

67. Mr. Matthews stated that the original Bye-laws did not provide for Previous Shareholders who had recently left the Defendant, to benefit from any sale of the Company. The shareholders recognized that there may be in the future a desire to sell the business. This meant that shareholders who otherwise might have retired would be reluctant to do so. It was therefore agreed that a mechanism which allowed recently retired shareholders to benefit from the proceeds of any sale ought to be incorporated into the Bye-laws. The Hay Group determined that it would enable succession by permitting recently departed partners to participate in the value of the business in any subsequent sale. However, there had to be a cut-off point. It was determined that the Warrant would be given for a period of three years after the date of Employment Cessation.

68. Mr. Matthews stated that in 2011 the Bye-laws were further amended. One of the amendments in 2011 was the insertion into the "Second Priority" status of Bye-law 3.7 of the Warrant as set out above. This provided that former shareholders of the Hay Group ("**Previous Shareholders**") in "**Good Standing**" could benefit from a sale transaction, provided they were able to satisfy the conditions of the Warrant, one of them being that they do not compete with the business. The Warrant was available to all shareholders equally and its forfeiture for breaching the Non-Compete applied equally to all shareholders. It procured retirement of certain shareholders holding on and hoping for a sale and opened up opportunities for senior consultants to become members, which was part of succession planning. The new shareholders could purchase their interest safe in the knowledge that retiring shareholders were subject to the Non-Compete, but also in the knowledge that if there was a sale certain retired shareholders would be entitled to benefit from it.

Determination of Standing

69. Mr. Matthews stated that the amount of payments to a Previous Shareholder and the timing of such payments are dictated by the 'standing' of that person. Where a person is in breach of the Bye-laws, including the Non-Compete, they fall within the definition of "**Departure Not in Good Standing.**" This places them in the 'third priority' in a table at Bye-law 3.7, and a person 'Not in Good Standing' is not entitled to the Warrant. However, they still receive the other payments including any increase in the value of their shares. Bye-law 3.8 provides that the determination of the Ownership Board as to the reason for redemption and the timing of payments (i.e. the "priority" status afforded to any Previous Shareholder) shall be final and binding.

The Plaintiff

70. Mr. Matthews stated that the Plaintiff had become a shareholder in 2010 upon the purchase of shares, with further purchases in 2011 and 2012. He retired in 2013 when it was determined he left in "Good Standing". The Bye-laws in place when he became a shareholder were dated 24 June 2010 and the Bye-laws in place at his retirement were dated

9 April 2012. He received a salary and also a share of the profits by way of a global profit-sharing plan. In 2012, when he became bound by the Non-Compete, Hay Group was operating in 49 countries providing a spectrum of HR consulting services to a wide variety of clientele. He was of the view that the Plaintiff was fully aware of the depth and breadth of the Hay Group business.

71. Mr. Matthews stated that the Plaintiff paid US$414,960 for his investment, which as a result of the success of the business rose by US$242,059.70 or 58%. He also benefited from an 8% interest rate on his investment in the sum of $52,561.58. He therefore received $709,581.27 on 17 October 2016, providing a 71% return on his investment.

72. In respect of Bright, Mr. Matthews stated the following:

    a. On 22 September 2015 he received an email from Mrs. Dessing providing a link to 'Bright and Company' which appeared to show that the Plaintiff had joined it, which seemed to him to be a competitor.
    b. On 22 and 23 September 2015 the Hay Group had its annual general meeting when it was discussed that the Plaintiff may have breached the Non-Compete. It was agreed that he would seek the Plaintiff's explanation in accordance with Bye-law 3.8 which provides that a Previous Shareholder shall be given an opportunity to provide a written statement to the Ownership Board prior to any determination that a person is 'not in good standing'.
    c. On 7 October 2015 he emailed the Plaintiff setting out the basis of belief that he had breached the Non-Compete and he sent Mrs. Dessing's email to the Ownership Board for their consideration.
    d. On 8 October 2015 he received the Plaintiff's reply email indicating that he had returned to his "*profession, (HR) consulting*", starting his own company, and he '*associated*' himself from 1 September 2015 to Bright, asserting that Bright was not a competitor to the Hay Group.

e. On 8 October 2015[3], he received emails from 13 members of the Ownership Board who had agreed that Bright was a direct competitor, and as such the Plaintiff was in breach on the Non-Compete.

f. On 3 November 2015 at a meeting of the Ownership Board, the members were provided with copies of the correspondence with the Plaintiff, considered and discussed whether the Plaintiff was in breach of the Non-Compete. The decision of the Board, which he stated was final and binding pursuant to Bye-law 3.8, was set out in the Minute of that meeting as follows:

> *"Derk Koole is in breach of the non-competition bye-law 78.1 therefore should forfeit his right to the warrant. Chris Matthews was authorized to communicate to Derk Koole that his warrant has been forfeited and that he will not participate in the transaction with Korn/Ferry."*

Plaintiff's Entitlement to the Warrant

73. Mr. Matthews stated that in March 2015 negotiations began for the sale of Hay Bermuda to Korn/Ferry. The sale and purchase agreement was signed on 23 September 2015 and the sale closed on 1 December 2015. As the closing of the sale was within three years of the Plaintiff's date of retirement, provided he had complied with the Non-Compete, the sale transaction occurred within the prescribed period for the Plaintiff to benefit from the Warrant. However, as the Ownership Board had determined that the Plaintiff had breached Bye-law 78.1 by joining Bright, which was a competitor of the Hay Group, he was 'Not in Good Standing', therefore he was no longer able to benefit from the Warrant.

***Defendant's Case - Mr. Chris Matthews – Cross-Examination***

74. Mr. Matthews was cross-examined.

[3] At the start of his evidence Mr. Matthews clarified that it was on 8 October 2015 that he received emails from other members of the Ownership Board, having had telephone calls with them beforehand.

75. Mr. Matthews stated that senior consultants were invited to become shareholders as a recognition, but only for as long as they remained an employee. Their employment role did not change because they became a shareholder. He explained the corporate structure by reference to the Disclosure Information package, stating that Hay Group Bermuda owned the holding company that owned the Affiliate companies. In respect of the term, 'shareholder' he explained that when they were a partnership, if someone held themselves out as a partner, then all the partners could be liable, and when they incorporated no-one held themselves out as a shareholder.

76. In respect of the definition of '***Business***' in the 2012 Bye-laws, he agreed that the definition drew a distinction between the holding company and the Affiliate companies. In respect of Bye-law 78.7, the Non-Compete provision, he agreed that it made reference to a '*Business*'- in its capitalized 'B' form. However, when challenged that the '*Business*' meant the holding company and not the Affiliates, he stated that he was not sure that he concluded that. In that '*Business*' definition he stated that the '*Subsidiary Company*' was defined as "***HG Luxembourg S.a.r.l, a Luxembourg company***". He agreed that it was HG Luxembourg that was sold to Korn/Ferry and that it had the "Business" of the holding of the shares in the subsidiary company. He agreed it was now Korn/Ferry which had the 'Business' as defined in the Bye-laws. He agreed that Hay Bermuda held the proceeds of the sale of HG Luxembourg. He added that it also held other assets and other liabilities including amounts due under the Korn/Ferry transaction. He agreed that the deal that was done was not as he had stated in his witness statement that negotiations had begun for the sale of 'Hay Bermuda' to Korn/Ferry. He agreed that it was correct that the deal that was actually done, was that it was HG Luxembourg that was sold to Korn/Ferry.

77. In respect of Bye-law 78.3, he agreed that the Non-Compete was supposed to be assignable to Korn/Ferry and that his counsel had confirmed that the benefit of the Bye-law provision at 78.1 was assigned to Korn/Ferry as part of the sale transaction.

78. Mr. Matthews stated that in respect of the Guidelines, it was a committee together with legal advisors who put the document together, with his involvement later on for review and agreement. As the Guidelines were agreed on 12 June 2002 then it was correct that he and

other shareholders could not have seen the Guidelines when they became shareholders in 2000 when HG Bermuda was incorporated. Therefore, he agreed it was correct that when it was put to the Plaintiff on cross-examination that all incoming shareholders would have been provided the document, that was not quite right.

79. Mr. Matthews stated that in respect of the Subscription Agreement for Shareholders, his legal advisers were responsible for drafting it. He agreed that in Clause 1(b) the Subscriber agreed to be bound by the Bye-laws. Also, he agreed that clause 7 provided that the Subscription Agreement set forth the entire understanding of the parties, that is between the subscriber and HG Bermuda Ltd. He stated that there was a comprehensive process of explaining what their duties were during a three day presentation and when they signed the Subscription Agreement they agreed to be bound by the Bye-laws.

80. Mr. Matthews stated that he was closely involved in the negotiation and process for the Korn/Ferry Transaction. He indicated that the negotiation process took place over 6 months. He was not aware of any events of the Plaintiff or Bright during that time. He did not agree that there were no disruptions in the negotiation process as a result of Bright and Kool. Further, he could not agree that there was no impact on the sale price as Korn/Ferry had become aware of Bright and the Plaintiff. The basic price was agreed in August 2015 and then there were adjustments to the price. He was not aware if any adjustment was as a result of Bright and the Plaintiff as he was not a part of the due diligence team. He was not aware that the Plaintiff had any effect on the closing of the transaction. He was not aware of any "consequences" or 'injuries' caused by the Plaintiff as defined in the Guidelines.

81. In respect of the Annual General Meeting on 22 – 23 September 2015, Mr. Matthews explained that Mrs. Dessing told him about the Plaintiff working for Bright at a dinner and then sent the Bright website link to him the next morning. He stated that he saw Bright and the Plaintiff as being one and the same competitor and any breach of Bye-law 78.1 was a breach of the promise not to compete. The Minute of the meeting reflected that if he had breached the Non-Compete then he would forfeit the Warrant. It was normal to discuss such breaches at Ownership Board meetings. He never considered an injunction to stop him from working, but he did write to the Plaintiff and sent him his telephone number. He

recalled the cautions given by him at the initial presentation to prospective new shareholders. In any event, he wanted to give the Plaintiff an opportunity to respond before the Ownership Board made a determination. He clarified that the Board '***concluded***' but not '***decided***' the issue, a '***conclusion***' being something reached before a decision which is made with further analysis. So too, a '***determination***' was a '***conclusion***'.

82. Mr. Matthews was then extensively cross-examined on his email dated 7 October 2015 to the Plaintiff with the aim of showing that the Ownership Board had already made up its mind that he was in breach of the Non-Compete and therefore would not participate in the proceeds of the sale. However, Mr. Matthews maintained his position that the Ownership Board had only made a '***conclusion***', was expecting a reply from the Plaintiff and received his email the following day. He agreed that the email replies from the Ownership Board were dated 7 October 2015 and thereafter he emailed the Plaintiff. He recalled that he sent the Plaintiff's reply email to the Ownership Board before their November meeting. He stated that he had informed the Plaintiff in an email dated 21 October 2015, that having discussed the matter with Mrs. Dessing and the Ownership Board, that he had breached the Non-Compete, forfeited his benefit under the Warrant and there was no other path to reach a different decision. The Ownership Board made a resolution on the issue on 3 November 2015 based on the Bright website, discussion with Mrs. Dessing and amongst the Ownership Board.

83. Mr. Matthews denied that the process was cursory involving one line answers from the Ownership Board about the Bright website. He agreed there was no evidence that the Plaintiff had trade secrets that he could use in the Dutch market and no evidence that he was going to poach clients or Hay Group employees.

84. In respect of the Expert Report, Mr. Matthews stated that he considered all HR consultants in the Dutch market as competitors. He considered the Plaintiff was a shareholder with access to privileged and propriety information despite the fact that he had left HG Russia over two years prior to joining Bright.

85. Mr. Matthews denied that he acted on this matter to deprive the Plaintiff of his approximately $900,000 share of the proceeds of the sale which had proceeded as planned. He agreed he owned 36.4% of the Defendant but denied that he would receive that percentage of the Plaintiff's forfeited cash in cash, as the nature of the transaction was that a shareholder would receive 60% cash and 40% shares. Having received his distribution, he did not consider the Plaintiff's forfeited benefit to be significant.

**The Plaintiff's Submissions in General**

86. The Plaintiff submissions were based on three parts:
    a. First, to explain why the narrow construction of "*Business*" is the correct one for the purposes of Bye-Law 78.1.
    b. Second, to explain why neither Bright not the Plaintiff were in 'competition' with the Hay Group, as that term is understood in law.
    c. Third, to explain why the Non-Compete Bye-law is (if it does what HG Bermuda says it does) an obvious unreasonable restraint of trade, which is therefore unenforceable.

87. The Plaintiff highlighted some points as follows:
    a. There is no suggestion that the Plaintiff was other than a loyal, able and successful longstanding employee of the Hay Group;
    b. There is no suggestion that he left under a cloud;
    c. There was no credible challenge to the Plaintiff's evidence that he turned down roles as he was concerned not to breach the Non-Compete;
    d. There was no credible challenge to the Plaintiff's evidence that he genuinely did not think that working for Bright would breach the Non-Compete and he made no secret of it from the Hay Group. The Court should accept that he took steps to reach Mrs. Dessing;
    e. There is no allegation that the Plaintiff has done anything wrong other than having "*acted as a consultant to a competitor company*". He did not try to poach Hay Group clients, employees or confidential information;

f. His role with Bright did not work out because Bright's work was outside his area of expertise developed within the Hay Group;

g. The Ownership Board gave only the most cursory consideration to his role with Bright, by reference to the Bright website and decided he should lose the Warrant without seeking his input. His fate was sealed and communicated to him on 7 October 2015 and reiterated on 21 October 2015. The resolution of 3 November 2015 was never communicated to him; and

h. The Plaintiff, with $900,000 on the line, was entitled to better treatment than what he got from the Ownership Board.

**The Defendant's Submissions in General**

88. The Defendant submitted that the ultimate question the Court is asked to determine is whether the Plaintiff breached the Non-Compete contained at Bye-law 78.1. If the Plaintiff did breach it, then he forfeits the Warrant contained in Bye-law 3.7 and his claim for payment pursuant to the Warrant fails. In order to determine that question, the Court will have to determine the meaning of "*Business*" in Bye-Law 78, and then determine if the Plaintiff competed with that "*Business*".

89. Mr. Luthi submitted that in light of all the circumstances, the Plaintiff's case must fail as: (a) the Non-Compete applies to the HR consultancy business operated by the Hay Group and owned by its parent, the Defendant; (b) Bright is a competitor of the Hay Group in the Netherlands; (c) the Plaintiff competed with the Defendant in assuming his partner role at Bright and as such breached the Non-Compete provision contained at Bye-law 78; and (d) he therefore automatically forfeits the Warrant contained in Bye-Law 3.7 and his claim for payment pursuant to that Warrant fails.

**What does Bye-law 78.1 mean?**

Plaintiff's Submissions on Bye-Law 78.1 and Business

Admissible material as an aid to construction

90. The Plaintiff submitted that in constructing the Bye-law, the Court must not look beyond the terms of the operative Bye-Laws themselves. Ms. Zuill submitted that although the Defendant places considerable reliance on extraneous information provided to incoming shareholders in support of their broad construction, the Court would err in law in taking it into account in an exercise of construction.

    a. First, she relied on the case of *Kuczkiewicz v HG (Bermuda) Ltd* [2018] Sc (Bda) 26 Com where Subair Williams J held that there is no value in extrinsic evidence in construing these very Bye-laws. In that case the same Defendant as in the present case, in respect of a narrow point of construction about timing, was again seeking to refer to earlier iterations of the Bye-laws, and by reference to the authoritative case of *Capital Partners Securities Co. Ltd v Sturgeon Central Asia Balanced Fund Ltd* [2017] SC (Bda) 55 Comm. This case involved a narrow point of construction about the meaning of "*Business*".
    b. Second, the Defendant's stance proceeds on the factual premise that every person to whom the Bye-laws may have been addressed would have received the same shareholder information. Ms. Zuill submits that this entails the unsustainable conclusion that the Bye-laws might mean different things to different people depending on whether or not a member had received this information, which was a practice, not an obligation. Also, she submitted that this was wrong in fact, as Mr. Matthews agreed that the earlier shareholders, between 2000 and 2002, cannot have been given the information before they became members because it did not exist before 2002. Therefore, as the Bye-Laws must mean the same for the pre-2002 and post-2002 members, it follows that the shareholder information cannot affect the interpretation of the Bye-Laws. Further, as the initial members were permitted to

make a "Permitted Transfer" to immediate family or a trustee, the Bye-laws must mean the same thing to either an original member or their transferee, but there is no reason to suppose that such person would receive the Shareholder Information Pack.

The meaning of "*Business*"

91. Ms. Zuill submitted that it is necessary to consider the definition of the word "*Business*" in Bye-law 78.1, which is a defined term in Clause 1.1. She states that the definition makes a clear distinction between the business of the Defendant as a holding company of the HG Luxembourg and the operational HR business of the underlying Affiliates and that Mr. Matthews accepted the distinction under cross-examination with an explanation about the intention, which she submits is not admissible as an aid to construction.

92. Ms. Zuill submitted that an exercise of construction must seek to give effect to the language of the Bye-laws. Taking those words naturally and literally gives rise to a narrow meaning of the Bye-law 78.1, but not one which is so absurd or unreasonable as to require the ordinary meaning of the word to be ignored. Ms. Zuill cited the case of *Arnold v Britton* [2015] UKSC 36. In demonstrating actions of a former member of the Defendant competing with its "*Business*", Ms. Zuill gave some examples of such a former member acting in various ways that affected HG Bermuda and or HG Luxembourg. Then she gave some examples of what an impermissible construction would be, which was one that included within the definition of "*Business*", the business of an individual Affiliate. She stressed that the Affiliate's business is not carried on by the Defendant, and the Bye-Laws are careful to distinguish between the two. She says that such a construction would be impermissible.

93. Further, Ms. Zuill submitted that that construction is impermissible because it leaves without content the further words in Bye-law 78.1: "*The provisions of this Bye-law 78.1 shall be in addition to any provision regarding obligations not to compete or restrictions upon activities after termination that may arise out of the term of employment of an*

*individual by the HG Group.*" If the "*broad*" construction is right then Bye-law 78.1 would already restrict competition of the Affiliates and there would be no utility in preserving those Affiliates' rights to prevent competition themselves. She adds that the Defendant's position requires the actual wording of the Bye-laws to be ignored which is not a proper basis for construction. Therefore, it is plain that there has been no breach of Bye-law 78.1.

Assignment and Bye-law 78.1

94. Ms. Zuill submitted that there are only two points that the Defendant can point to in favour of their broad construction. The first is that Bye-law 78.1 was, pursuant to Bye-law 78.3 assignable on a sale of the Company's assets. The argument is that the covenant must have the "*broad*" construction because a construction that only prevented competition with the Defendant (and not the wider group) would be useless to an assignee who had purchased the underlying Hay Group business. She submits this is a bad point because it ignores the definition of "*Business*" which is "*the holding by the Company of the shares of the Subsidiary Company and the benefit thereof ...*". She submits that a purchaser of the Subsidiary Company will (in place of the Respondent) be the entity carrying out that "*Business*" and the assignment of the non-compete Bye-law 78.1 to it makes sense. Therefore, Bye-law 78.3 is therefore perfectly consistent with the 'narrow' construction.

95. Ms. Zuill submitted that the second point is that the Defendant seeks to rely on the case of *Beckett Investment Management Group Ltd and others v Hall and others* [2007] EWCA Civ 613 as authority for the general proposition that covenants preventing competition with a holding company should be read widely so as to encompass the business of the subsidiaries. However, she argues that there is no such legal principle as that case was an example of construction, which on the facts, led to a wide construction where there an inconsistency between the terms "*the provision of advice*" and "*the company*" which needed to be resolved in an exercise of construction. Ms. Zuill submitted that there is no such inconsistency in the present case as the Defendant does have a "*Business*", as a holding company, that "*Business*" is defined, and a clause that prevents competition with that "Business" presents no inconsistency or difficulty on the language of the Bye-laws.

The Affiliates have different, separate, businesses to that of the Defendant and there is no express language in the Bye-laws that prevents competition with those businesses.

The Defendants Submissions on Bye-Law and meaning of Business

Interpretation of Bye-laws

96. Mr. Luthi submitted that the Court was indeed entitled to consider extrinsic material for the purpose of interpreting the articles of association of a company. He relied on the case of *Cosmetic Warriors Limited v Gerrie* [2015] EWHC 3518 (ch) where the High Court held that "*there is no absolute prohibition on considering extrinsic material for the purpose of interpreting the articles of association of a company … however, the admissible background for the purposes of construction is limited to what any reader of the articles would reasonably be supposed to know.*" He submitted that in the present case, the articles are of a private company, being read by senior employees of the Hay Group, thus the Court can ascertain what information those senior employees would reasonably be expected to know, what information is generally available and what information is shared with prospective shareholders.

97. Mr. Luthi relied on several other cases as follows:
    a. In *Re Coroin Limited* [2011] EWHC 3466 (Ch) where Richards J held (at para 69) that it was "*somewhat artificial to construe the articles in isolation from the shareholders' agreement*".
    b. In *Egyptian Salt and Soda Co. Ltd v Port Said Salt Association Ltd* [1931] AC 677 where it was held (at page 682) "*A memorandum of association like any other document must be read fairly and its import derived from a reasonable interpretation of the language which it employs.*"
    c. In re *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736 where Arden LJ held (at para 41) "*The test for exclusion of extrinsic material is whether the document is intended to be addressed to third parties.*"
    d. Subair William J's decision in *Kuczkiewicz v HG (Bermuda) Ltd*, was not an authority for a stricter rule of interpretation than that under English law as in that

case, the parties were in agreement that for the purpose of interpretation of one particular aspect of that particular bye-law, no extrinsic evidence need be considered.

98. In light of the above authorities, the Court should consider the evidence of Mr. Matthews that the Company had a programme of admission and education for all prospective shareholders which included a briefing on the purpose and intent of restrictive covenant in Bye-law 78.1 and the evidence of the Plaintiff that the documents were given to him prior to admission as a shareholder. Therefore, it would be entirely artificial to exclude the documents when interpreting Bye-law 78 as all the shareholders would be aware of the same. In particular, the Court is entitled to consider that HG Luxembourg is the holding company for the Hay Group, the only business of the Hay Group was that of HR Consultancy with about 88 offices in 49 countries, and the value in the shares of Hay Group lay solely in the goodwill of the business, that is the Affiliates operated by the Hay Group. Further, the Court is entitled to take into account information that is public and generally known as well as what was in the information package given to prospective shareholders.

Meaning of "*Business*" in the Hay Group Bye-laws

99. Mr. Luthi submitted that adopting the Plaintiff's submission of a narrow interpretation of the term "*Business*" is absurd in light of the corporate structure of the Hay Group. The narrow interpretation would mean that the only way the Plaintiff can compete, is in relation to the ownership of shares in HG Luxembourg. He submits that it is impossible for a shareholder to compete with the Defendant in relation to the ownership of its wholly owned privately held subsidiary. Further, Bye-law 78.1 was intended to protect the value of the goodwill of the business by reference to the operating entities.

100. Mr. Luthi submitted that the narrow interpretation should be rejected as Bye-law 1.1 addresses the absurdity that would otherwise arise if the interpretation was limited to a strict definition. Bye-law 1.1 provides that the definition set out therein only applies "*where not inconsistent with the context*". Therefore, the Court is entitled to interpret the meaning

of Bye-law 78 without any reference to the definition given in Bye-Law 78.1, where the context requires.

101. Mr. Luthi submits that the Plaintiff's position justifying a narrow interpretation means that any restriction on competition with the underlying operating entities must be in the employment contracts. He submits that this is misconceived for several reasons: (a) the Plaintiff benefitted from the value derived from the goodwill of the Hay Group business in all jurisdictions, not just where he was employed; (b) any restrictive covenant in the employment contract would be enforceable only be the operating entity, protecting a legitimate interest it had and subject to the governing law of that jurisdiction; (c) an individual operating entity could not seek to protect the legitimate interest of the Affiliates in other jurisdictions, thus not prohibiting the employee from moving to a new jurisdiction and competing with the Hay Group as a whole; (d) the individual employer may still wish to enforce covenants with is employees under a contract of employment; (e) the '*shall be in addition to*" wording in Bye-Law 78.1 is nothing more than a "*for the avoidance of doubt*" clause making it clear that any covenants by the employer are in addition to the Bye-Law 78.1 and (f) the purpose of Bye-law 78.1 is to protect the goodwill of the Hay Group business as a whole from competition by its shareholders, by restricting competition with the Hay Group business as a whole.

102. Mr. Luthi submitted that Bye-Law 78.1 contemplated the transfer or assignment of the restrictive covenant. The indirect sale of the company's assets would include all assets owned indirectly through the Subsidiary Company. Therefore the Non-Compete could be assigned to a purchaser of the operating entities leaving the Defendant still "holding" the subsidiary company. Further, the Plaintiff's examples to give utility of a non-compete at the holding company level serve only to demonstrate that the value of the parent is wholly dependent on the sum of its parts.

103. Mr. Luthi submitted that the Court must interpret "*Business*" in Bye-law 78.1 fairly, using a reasonable interpretation of the language used in light of information that a reader

of the articles would reasonably be supposed to know, concluding that "*Business*" means the 'HR consultancy business'.

104. Mr. Luthi submitted that the case of *Henry Leetham & Sons v Johnstone–White* [1907] 1 Ch 322, relied on by the Plaintiff, about a corn-miller seeking to protect an affiliated furniture business is distinguishable as the Hay Group structure is not a conglomerate of different businesses.

105. Mr. Luthi made reference to the Plaintiff's reliance on the case of *Business Seating (Renovations) Ltd v Broad* [1989] ICR 729 in which the employee was a salesman for a furniture manufacturer, and the restrictive covenant extended to "affiliated companies". The Court held that the employers' interest did not extend to customers of an "associated" manufacturing company. Therefore, *Business Seating (Renovations) Ltd v Broad* does not apply to the present case.

106. Mr. Luthi disagreed with Ms. Zuill distinguishing the Privy Council case of *Stenhouse Australia Ltd v Phillips* [1974] AC 391 as he submitted that *Stenhouse Australia Ltd v Phillips* established that a holding company can protect the interest in its subsidiary operating entities and is on all fours with the present case where it was stated "*the Business of the Stenhouse group was controlled and co-ordinated by the appellant company, and all funds generated by each of the companies were received by the appellant. The subsidiary companies were merely agencies or instrumentalities through which the appellant directed its integrated business. Not only did the appellant company have a real interest in protecting the businesses of the subsidiaries, but the real interest of so doing was that of the appellant company."*

107. Mr. Luthi submitted that in *Systems Reliability Holdings plc v Smith*, Harman J granted an injunction against a defendant who covenanted with a purchaser of a holding company not to compete. The defendant asserted that such a covenant could not prohibit competition with the subsidiary entities when the covenant was with the purchaser. Harman J rejected the argument.

108. Mr. Luthi relied on the case of *Beckett Investment Management Group Ltd and others v Hall and others* [2007] EWCA Civ 613 where Kay LJ sitting on the Court of Appeal held as follows:

> *"For my part, I do not feel driven to such a futile conclusion. I do not attach such significance to the differential use and non-use of the words "or subsidiary company". To do so ascribes to the parties and to "a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" an understanding that they were agreeing upon a pointless provision. Moreover, unlike the judge, I do not feel inhibited by a purist approach to corporate personality. The judge referred, at para 98, to the words of Lord Denning MR in Littlewoods Organization Ltd v Harris [1977] 1 WLR 1472, 1482: "The answer is, I think, the law today has regard to the realities of big business. It takes the group is being one concern under one supreme control."*

109. Mr. Luthi submitted that in the case of *Kynixa Limited v Hynes* [2008] EWHC 1495 (QB) Wyn Williams J held (at paragraphs 130(7) and 174) that "*where a covenant is capable of being construed in one of two ways the interpretation to be adopted as the one which allows the covenant to be enforceable.*" and (at paragraph 130(8)) "*a covenant should be interpreted in the context of the agreement as a whole so as to give effect to the intention of the parties*."

110. In light of the above, Mr. Luthi submitted that a strict/narrow interpretation would result in the covenant having no material effect. Therefore, the Court is entitled to determine that the business being referred to in Bye-law 78.1 is the HR consultancy business operated by the subsidiary companies which gives effect to the covenant and to the intention of the parties. This is further buttressed when taking into account the extrinsic evidence.

Analysis - The Interpretation of the Bye-laws

111. In my view, the Bye-laws should be interpreted taking into account the extrinsic information for several reasons. First, I rely on the case of *Cosmetic Warriors Limited v Gerrie* where it stated "… *however, the admissible background for the purposes of construction is limited to what any reader of the articles would reasonably be supposed to know*". In the present case, it is common ground the new shareholders were all senior employees of the Hay Group who were invited to become shareholders in reward for their contributions to the Hay Group. The Plaintiff stated that in 2009 he was invited to become a shareholder and he attended a three-day orientation meeting where there was a presentation on "*Becoming a Hay Group Shareholder*". He also accepted that he was provided with several documents including (a) the Guidelines, which set out a special note on Bye-law 78; (b) the New Shareholder's Information Package which contained the Disclosure Information, defining various terms; (c) the Subscription Agreement; and (d) significantly, a section on the "*Historical Information*" of the Hay Group dating from the 1990 creation of the Partnership to the 2008 Changes to the Bye-laws. Further, he accepted that Mr. Matthews had likely addressed the meeting and he was also aware of the consequences of a breach of the Non-Compete. Mr. Matthews himself stated that there was a comprehensive process of explaining to the new shareholders what their duties were during a three-day presentation. In my view, the evidence is clear that new shareholders having been through the orientation process would have had knowledge of the detail workings of the Hay Group, its Bye-laws and its corporate structure.

112. Second, I am unable to agree with the Plaintiff's submission that the Court is not able to look beyond the terms of the operative Bye-laws. I agree with Mr. Luthi that the case of *Kuczkiewicz v HG (Bermuda) Ltd* was not an authority for a stricter rule of interpretation than that under English law due to the narrow circumstance of interpretation in that case. On that basis, it would be entirely artificial to exclude the documents when interpreting Bye-law 78. I have considered Ms. Zuill's submission about Mr. Matthews' admission on cross-examination that the earlier shareholders between 2000 and 2002 cannot have been given the Guidelines document because it did not exist before 2002 thus

it showed that the pre-2002 shareholders had different information from the post-2002 shareholders. In my view, I am unable to attach any weight to this point as there has been no evidence that all the shareholders were not aware of the Guidelines on or after 12 June 2002 when they were agreed by the Ownership Board.

113. Third, in coming to this view about the interpretation of Bye-law 78, I rely on the case of *Re Coroin Limited* about the artificial nature of construing the articles in isolation from the shareholder's agreement when in the present case, in the Subscription Agreement, the subscriber agreed to *"... undertake all of the obligations of and will become subject to all the benefits of a shareholder pursuant to the Bye-laws.*" Further, I rely on the case of *Egyptian Salt and Soda Co. Ltd v Port Said Salt Association Ltd* in that the fair way to read the documents and derive its import from a reasonable interpretation is that the history and evolution of the Bye-laws as set out in the documentation should be taken into consideration when interpreting Bye-law 78.

The Meaning of Business in the Hay Group Bye-Laws

114. In my view, the term "*Business*" means the business of "HR consultancy" and not the narrow business of a holding company for several reasons. First, in light of the Bye-laws, all the documents and circumstances it would indeed be absurd to adopt a narrow interpretation that means that competition by the Plaintiff means in relation to the ownership of the shares in HG Luxembourg. Therefore, I disagree with the examples provided by the Plaintiff about the types of competition that could arise, namely a former member of the Hay Group acting in various ways affecting the Hay Group or HG Luxembourg. I also disagree with the Plaintiff's contention that it would an impermissible construction that "*Business*" was that of an individual Affiliate. This applies with force particularly in light of the new shareholder three-day orientation process that highlighted what the Non-Compete was all about and the consequences of a breach of the same. In my view, the Plaintiff knew full well that the Non-Compete was in respect of the HR consultancy business rather than in respect of competition with HG Luxembourg, the holding company. I am satisfied that Bye-Law 1.1 addresses the circumstances by

providing that the definition set out therein only applies "*where not consistent with the context*". In my judgment, the context is competition in respect of the HR consulting business. Therefore, it follows that I should reject the narrow interpretation as argued by the Plaintiff.

115. Second, I accept Mr. Matthews' evidence when he stated that the value of the shares of the Defendant was derived solely from the success of the Affiliates, that is, the subsidiary companies of the Hay Group which operated in the various jurisdictions around the world. Therefore, the purpose of Bye-Law 78.1 is to protect the goodwill of the Hay Group business as a whole from competition by its shareholders, by restricting competition with the Hay Group business as a whole. Further, I place reliance on the case of *Stenhouse Australia Ltd v Phillips* which established that a holding company can protect the interest in its subsidiary operating entities. It follows that the Hay Group had a real interest in protecting the business of the operating subsidiaries and by extension that of the Hay Group. I also rely on the case of *Systems Reliability Holdings plc v Smith* where Harman J rejected the argument by the defendant that a non-compete covenant could not prohibit competition with the subsidiary entities. Also, I rely on Kay LJ in *Beckett Investment Management Group Ltd and others v Hall and others* where he reflected that the law today has to have regard to the realities of big business. In my view, the Hay Group and its structure is the kind of business to which these principles apply.

116. Third, I reject the submission or implication that the Non-Compete should have been in the employment contract for the reasons as set out above by the Defendant, in particular the Non-Compete would be enforceable only by the operating entity that employed the Plaintiff, protecting the interest that it had whilst the Plaintiff had benefitted from the value derived from the Hay Group business in all jurisdictions. It follows that one operating entity could not protect the legitimate interest of all the other operating entities, allowing the employee to move to another jurisdiction and compete against the Hay Group. In my judgment, it is appropriate for the Non-Compete to be in the Bye-laws as well as in the employment contract, based on the wording "*shall be in addition to*" in Bye-Law 78.1.

117. Fourth, in my view, the term "*Business*" in Bye-law 78.1 should be interpreted fairly, and to do so would mean that a reader of the Bye-Laws with relevant information would reasonably conclude that "*Business*" means the HR consultancy business. On the contrary, it seems fanciful that any reader would look at the circumstances and documents and conclude that specialist in the various field of HR would be prohibited from competing against having holding companies but would not be prohibited from competing in the fields of HR consultancy. I rely on the case of *Kynixa Limited v Hynes* where the court held that of two competing interpretations, the one to be adopted is the one that allows the covenant to be enforceable and interpreted in the context of the agreement as a whole giving effect to the intention of the parties. In my view, the Plaintiff and the Defendant had always intended that the "*Business*" was the HR consultancy business and the Non-Compete was in respect of the same. This position is fully supported by the evidence in that the three-day presentation for new shareholders focused on the Non-Compete and consequences and the Plaintiff stated that he steered clear of employment opportunities for a long period of time after retirement that gave rise to competition.

118. Fifth, as Bye-law 78.3 permitted the assignment of the Bye-law 78.1 Non-Compete, I am of the view that this leads to a broad construction of the term "*Business*". On a sale of the Hay Group's assets, that is the Affiliates, the Non-Compete could be assigned to a purchaser of those Affiliates. In my view, this framework clearly contemplated protecting the business of the Affiliates, not the business of the holding company HG Luxembourg. On that basis, I disagree with the Plaintiff's submission that the narrow construction makes sense and presents no inconsistency or difficulty on the language of the Bye-laws.

**Has there been Competition?**

Plaintiff's Submissions on Competition

119. Ms. Zuill submitted that if HG Netherlands and Bright were not in '*competition*', then the Defendant and the Plaintiff were not either.

Legal significance of the word "*competition*"

120. Ms. Zuill relied on the case of *Morris-Garner v One Step* in *Argus Media* [AB/32] to set out what competition means in the legal sense as follows:

> *"88. It is necessary first to consider the law as to what amounts to competition in the context of restrictive covenants. In Morris-Garner v One Step (Support) Ltd [2017] QB 1 (overturned on appeal, but not on this issue) the Court of Appeal (Christopher Clarke LJ) stated:*
>
> > *"57. Whether or not A is carrying on business in competition with B in a particular area or areas is dependent on at least two considerations, each of which raises questions of definition. The first 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…*
> >
> > *58. The second consideration is whether Positive Living is to be regarded as competing in the same area as that in which One Step was carrying on business in December 2006.*
> >
> > *59. As to that, 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. 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. That in turn may depend on the manner in which consumers make decisions about what to purchase.*
> >
> > *60. The answer to the question may also turn on whether the area in which A and B are said to be in competition ought to be subdivided to allow for the fact, if such it be, that in sub-areas 1, 2, and 3 A carries on business in the supply of product X, whereas B supplies only product Y and does not aim or has no prospect of supplying product X. In such a case it may be that, although A and B both carry on business supplying products X and Y in the area taken as a whole, they are not in truth in competition in sub-areas 1–3….*

*61. The analysis in the previous paragraph assumes that in the relevant sub-areas B does not aim, or has no prospect, of supplying product X. That in turn raises the question of whether A and B are in competition if B hopes to do so. The answer to that seems to me to depend on (a) the degree of similarity between products X and Y; (b) the genuineness of B's hope; and (c) whether, and to what extent, it is realistic to expect that he may obtain customers for Y as well as X.*

*Conclusion on competition*

*….*

*64. Whilst the issue of competition can be analysed in the way that I have 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, and, as Rose J put it, in Invideous Ltd v Thorogood [2013] EWHC 3015 Ch whether the provision of adult services to any authority in those regions was "within the scope of [One Step's] business plan". It is also necessary to bear in mind that A can be in competition with B if both of them are supplying the same product and B seeks to provide it to outlets previously supplied only by A."*

*89. In Gamatronic (UK) Ltd v Hamilton [2016] EWHC, Mr Choudhury QC sitting as a Deputy Judge of the High Court (as he then was) applied the Morris-Garner approach and distilled four questions from it at paragraph 95 (which I shall adapt to the fact of this case), namely:*

*" i) Were the two companies supplying goods or services which are sufficiently comparable to mean they were in competition?*

*ii) If so, were they competing in the same area?*

*iii) If [Afriqom] was not supplying the same products or service as Argus did it have a realistic prospect of doing so (or vice versa)?*

*iv) Was the scope of [Afriqom's] business the same as Argus or was the provision of goods or services provided by [Argus] "within the scope of [Afriqom's] business plan"?"*

*90. In deciding that the two businesses in that case were competitive, the Court observed that "[t]here was nothing of significance to suggest that Vox's products*

*would only be of interest to a unique sector of the market to which Gamatronic UK had no access…" (paragraph 101(ii)).*

*91. There has been a focus on whether interchangeability of products is required. It is not a particularly precise concept, and that by itself seems to be a problem about applying it as a sole or a necessary criterion. Subject to that, if there is interchangeability within the same area, it is very likely that competition will be established. However, in my judgment, and contrary to the submission on behalf of Dr Halim [Day 7, page 69, line 21 – page 70, line 4], interchangeability of products is not a pre-requisite of a finding that two business are competitive. It suffices if the products are 'similar' (paragraph 59 of Morris-Garner) or 'sufficiently comparable' (paragraph 95 of Gamatronic UK). Every case is fact specific: in each case, a broad-brush approach is appropriate (paragraph 64 of Morris-Garner)."*

121. Ms. Zuill submitted that the Court must apply two tests in parallel:

a. The first is the "*granular*" approach – The Court must ask whether: (i) the services offered are sufficiently comparable to be viewed in competition; and (ii) are being in offered in the same area; and
b. The second is the "*broader brush*" assessment of whether the scope of the businesses was the same.

122. Ms. Zuill also submitted that the Court should have regard to whether the supposed competitor thought he was in competition in deciding whether he was. She relied on the *Argus Media Ltd v Halim* case as follows:

*"A possible, but in no way decisive, indicator of whether the new business was competitive, is the belief of Dr Halim that it was not competitive. He has expressed that in his evidence. However, this indicator is undermined by the way in which Dr Halim has not been open or truthful on my findings in the information which he provided to Mr Thompson on 12/13 July 2018 and in the information which he provided on 3 September 2018 to Mr Thompson and Mr Binks. That indicates a desire to conceal*

*information because of a knowledge that his business at least might be regarded as competitive and thus forbidden to him under the PTRs."*

Was Bright a competitor of the Dutch Affiliate?

123. Ms. Zuill submitted that the Plaintiff does not contend that there was no degree or overlap between the services offered by Bright and the Dutch Affiliate in the Netherlands. Nor does he contend that it is implausible to imagine that there might be, hypothetically, a potential customer who would weigh up whether to instruct the Dutch Affiliate or Bright for the same or similar role. Rather, his position is that the degree of overlap is sufficiently slight that the services are not sufficiently comparable for the two business to be viewed as in competition and/or that on the broad brush approach, the scope of the business is not the same. She used the analogy of a Venn diagram where the Hay Group/Dutch Affiliate is a large circle in terms of geography and range of services and the Bright circle is smaller in the same terms. She posed that the task for the Court is to consider whether sufficient of the Bright circle overlaps with the Hay Group circle that the two businesses can properly be regarded as being in competition. The Plaintiff submits that the degree of overlap is sufficiently slight that the question must be answered in the negative.

124. Ms. Zuill submitted that Mr. Rodenhauser, an independent and qualified expert, helped to answer that questions as follows: (a) he described the general shape of the Dutch market as having approximately 10 large international players which between them account for about half the market, global firms account for about 75% and smaller local firms make up the rest; (b) Global firms tend to be attractive to larger clients with international businesses and smaller local businesses tend to prefer small local consultants; (c) his firm tracked about 100 different HR firms and he carried out interviews with those firms and customers; (d) he described the '*land and expand*' nature of the Defendant; (e) Bright was more exclusively focused on strategy as they did not have capacity to do the execution role; (f) even though they both offered some "*strategy services*", it was a different role in each firm; (g) he explained the "*what*" v "*how*" distinction; and (h) he concluded that the significant differences between the two firms led to an opinion that the Plaintiff's work

with Bright, either directly or indirectly, would have no impact on Korn/Ferry Hay Group's business in the Netherlands such that there is no competition.

125. Ms. Zuill also submitted that the Plaintiff's evidence on the issue of competition between Bright and the Defendant assisted as follows: (a) the Plaintiff is the only person who actually worked for both Bright and the Dutch Affiliate; (b) he has considerable experience in the HR consulting industry; and (c) he gave frank, clear evidence.

126. Ms. Zuill submitted that the Plaintiff helped to identify differences between the Hay Group and Bright's businesses as follows: (a) the central offering of the Hay Group focused on its job-scoring tools producing a '*Hay Score*' allowing comparisons to be made between different roles; (b) the Hay Group offered a standardized approach across 88 offices making it attractive to large and international clients; (c) the Hay Group's tools allowed an organization to work out how its strategies should be implemented; (d) Bright focused on the HR operation itself, assisting companies in how to optimize their HR team; (e) the Hay Group helps an HR Department to understand a company whilst Bright helps a company understand its HR Department; (f) the Defendant's approach was to blur distinctions and apply broad labels to the respective services being provided by them and bright in an attempt to show overlap was not limited to references to strategy in broad terms; (g) clients were buying a process and an end result. Also some clients want a standardized approach from a well-known brand whilst others want a bespoke project from a local specialist; and (h) the Plaintiff had the experience to decline other jobs because he considered them to be competitors but he associated with Bright because he did not view it as a competitor or as a risk to him under the Bye-law.

127. Ms. Zuill submitted that Mrs. Dessing's evidence was less helpful as follows: (a) she applied the wrong test of "*competition*"; (b) she considered that the Hay Group covered all of the HR space; and (c) she was lacking objectivity in her assessment of the true scope of the core Hay Group offerings, which really were job evaluation and compensation services.

128. Ms. Zuill submitted that Mrs. Dessing's evidence was more helpful as follows: (a) she was not aware of the Hay Group losing any important long-term partnerships to Bright; (b) no clients threatened to leave for Bright; (c) it a reasonable inference that clients mentioned Bright because clients viewed the two businesses as offering different services; and (d) it was impossible to fathom how the example of the supermarket client could be considered an act of competition by either Bright or the Plaintiff as the supermarket had been a client of the Dutch Affiliate for some time.

129. In light of the above evidence, Ms. Zuill submitted that whilst there was some overlap at the margins, the scope of businesses of the Dutch Affiliate and Bright and the services they offer are too divergent to be competitors as follows: (a) they are geographically divergent; (b) the size divergence – Korn/Ferry Hay group has 180 employees in the Netherland, 557 consultants and over 7,000 employees globally whilst Bright has six consultants and 2 admin staff; (c) the core services offering is different, ie the "*what/how*" distinction; and (d) in light of the above, the Plaintiff did not see Bright as a competitor which is why Bright had no impact on the Dutch Affiliate or the Defendant.

130. Finally, Ms. Zuill presented a stark choice for the Court on this issue: on the one hand to conclude that Bright and the Dutch Affiliate were in competition, meaning that every business operating in the Dutch HR consultancy market is a competitor to the Dutch Affiliate and by extension that every global HR consultancy business, in at least 49 countries, is a competitor to the Hay Group; and on the other hand, to take a more discerning approach that to conclude that they were not competitors because the Defendant had failed to point to any factor that makes Bright more of a competitor or the scope of its business more like that of the Dutch Affiliate than any other operator.

<u>Was the Plaintiff a competitor of the Dutch Affiliate?</u>

131. Ms. Zuill submitted that if Bright was not a competitor of the Dutch Affiliate then the answer to this question is obviously no. However, even if Bright was a competitor of the Dutch Affiliate, then it does not follow that the Plaintiff was in competition with the

Dutch Affiliate or the Hay Group more widely, the relevant period being September to December 2015. She submitted that the sole allegation of competition was the mere act of working as a consultant for Bright referring to the pleaded case of the Defendant "… *the Plaintiff was in breach of the non-compete obligations under Bye-law 78.1, the Plaintiff having acted as a consultant for a competitor company*". On that basis, Ms. Zuill submitted that it was inappropriate for the Plaintiff to have been cross-examined on the following to establish a factor of competition: (a) that he may have breached by remaining available for clients in Russia and Kazakhstan; (b) his research of the job opportunities in the Dutch market; (c) his use of skills learned from the Hay Group in his work with Bright; and (d) the fact that he referred to his previous role in the Hay Group in his online profile for Bright.

132. Ms. Zuill submitted that on the basis that the Plaintiff's act of "*competition*" was no more than being a good and attractive candidate for Bright, which the Defendant already viewed as an existing competitor, being such before and after the Plaintiff joined it, the Defendant must be alleging that the Plaintiff made Bright a more worthy competitor between September and December 2015. However, Ms. Zuill submitted that the Plaintiff's engagement with Bright cannot amount to an act of "*competition*" without more, as the Defendant would need to show something peculiar to the Plaintiff that he brought to Bright that could not have been brought by another suitably qualified candidate.

133. Further, Ms. Zuill submitted that the Court can safely conclude that the Plaintiff was not actually in competition with the Hay Group or any part of it because the Hay Group did not do anything about: (a) Bye-Law 78.1 being a contractual promise not to compete, *prima facie* enforceable by an injunction; Mr. Matthews stating there was never an intention to get an injunction; (b) trying to hold the covenantee to the promise if the convenatee's action could be damaging; and (c) writing or making a call to the Plaintiff to remind him of the terms of his promise, Mrs. Dessing being too busy to address this point.

134. Ms. Zuill submitted that the Court would be entitled to find that the Ownership Board did not think that the Plaintiff was acting in a manner prejudicial to the Hay Group interests, because they would have tried to stop him. Rather, they were acting in their

personal interest in looking to deprive the Plaintiff of his benefit of $900,000, noting Mr. Matthews' personal benefit of that forfeiture was approximately one third, or $300,000, a sum he described as not a significant amount of money.

Defendant's Submissions on Competition

Meaning of Compete

135. Mr. Luthi took issue with the Plaintiff's submissions in respect of a granular examination and a broad brush approach running in parallel. He submitted that in the case of *Argus Media Ltd v Halim* Freedman J held as follows:

> *"If there is interchangeability [of products] within the same area, it is very likely that competition will be established. However, ... interchangeability of products is not a pre-requisite of a finding that two business are competitive. It suffices if the products [or services] are 'similar' (paragraph 59 of Morris-Garner) or 'sufficiently comparable' (paragraph 95 of Gamatronic UK). Every case is fact specific: in each case, a broad-brush approach is appropriate (paragraph 64 of Morris-Garner)."*

136. Mr. Luthi submits that the Plaintiff's submission on the granular approach is not correct. He states that the *Argus Media Ltd v Halim* case is authority that the question of competition needs to be considered with a broad-brush approach and ask itself (a) were the services offered by Bright and Hay Group interchangeable? (b) if not, were Bright and Hay Group supplying services which are similar or sufficiently comparable to mean they were in competition; and (c) if so, were they competing in the same areas?

Materiality of the Competition

137. Mr. Luthi submitted that the test in *Argus Media Ltd v Halim* does not require the Court to find that any 'competition' was '*successful*', or '*material*' as in that case, the Court

noted in *Gamatronic* the question of competition included whether there were '*realistic prospects*' of the companies supplying the same products or services, and whether the provision of the same were within the scope of the business plan. Thus the test of competition can be forward looking. In *Allied Dunbar (Frank Weisinger) Ltd v Weisinger* [1988] IRLR 60 the Court granted an injunction to restrain the defendant from beginning his employment with a competitor company. Mr. Luthi further submitted that the length of competition is also irrelevant, so the Plaintiff working only three months for Bright was immaterial as well as the notion of having to wait until sufficient time had elapsed after he joined Bright to found competition. It was also immaterial that the sale and purchase agreement was signed in September and completed in December.

138. Mr. Luthi submitted that *Argus Media Ltd v Halim* acknowledged that the belief of a person about competition was a 'pos*sible, but in no way decisive, indicator*' of competition. However, he submitted that the Plaintiff's own expert accepted there was overlap in services whilst the Plaintiff's belief was not a part of the test for determining if there has been competition and is of no probative value in any event.

Was there Competition?

139. Mr. Luthi submitted that it is wrong for the Plaintiff to say that he was not competing based on the evidence. He made various references to the evidence, generalised as follows:

a. The Plaintiff having joined Bright and held out as a partner, the Ownership Board, each member a senior HR consultant, reviewed the services offered by Bright, and unanimously concluded that Bright competed with the Hay Group in the Netherlands.
b. The Plaintiff's expert Mr. Rodenhauser determined that the Hay Group offered four of the five services offered by bright. Mrs. Dessing confirmed that Hay Group offered all five services offered by Bright.
c. The Expert report showed that the '*visions*' of each organization were similar, the services have clear overlap and the Plaintiff appears to accept that there is overlap.

d. The Expert in oral evidence, accepted that the Hay Group and Bright offered strategy development and consulting services. He also accepted that Netherland clients might instruct the Hay Group for strategy specialists or for growth or efficiency initiatives, mid-size to small companies may still hire large firms such as Bright, there would be competition between boutique and large firms for mid to small clients and competition between the firms could have some impact on Hay Group.

e. Mrs. Dessing had disagreed that the Hay Group's emphasis was on '*talent management*' and the '*how*' of executing strategy noting it was broader than that and that Hay Group was also doing the '*what*'. The Hay Group was also doing HR strategy, in the supermarket example as well as HR effectiveness, and did a conference on HR analytics noting that Hay Group had always been known for its data and analytics of that data. She also stated that the Hay Group would do work for smaller clients.

f. Mr. Rodenhauser and Mrs. Dessing agreed that both companies would be seeking to work for mid-size clients.

g. The Plaintiff had accepted that Bright went after multinational companies, that a smaller organisation price might be a selling point, and that Bright would do work outside of its core business.

140. In light of the evidence, Mr. Luthi submitted that it was clear that all of the services offered by Bright were also provided by the Hay Group, even if it was not a part of Hay Group's core business. Therefore, it follows that clients had a choice between the two companies for their HR consultancy needs in the Netherlands, with the indisputable conclusion that Bright and the Hay Group were in competition in the Netherlands.

The Actions and Conduct of the Plaintiff

141. Mr. Luthi submitted that the Plaintiff invites the Court to accept that a '*granular examination*' is required to see precisely what the Plaintiff was doing and then separate that from Bright. Mr. Luthi noted that the covenant restrains the Plaintiff from competing.

However, the Plaintiff had held himself out as a partner of Bright and therefore this is a distinction without a difference unless the Plaintiff was performing services wholly unrelated to Bright's HR consulting offering. He submitted that it is quite clear that the Plaintiff himself was competing by the work he did and by what he was doing to further Bright's offering. He invited the Court to take into consideration the career of the Plaintiff while he was at the Hay Group including (a) he was leader of the '*organisation clarity team*'; (b) he was managing 1/3 of HG's business in the Netherlands and received extensive training in Hay Group methods; (c) he offered a range of services; (d) engaged with clients and developed long-term relationships with them with insight into sensitive aspects of their businesses; and (e) he managed the Moscow office and developed the Russian market while working on the Baltics market also.

142. Mr. Luthi submitted that on the Bright website, the Plaintiff was held out as a partner and described what he did at the Hay Group, presumably with a view to demonstrating how it complemented Bright's offerings. He stated that there was an element of generality to the bio but it was clear he was leveraging his experience at the Hay Group noting that the Plaintiff and Mr. Rodenhauser accepted that the Plaintiff would enhance Bright's offering. Therefore, if Bright was competing as he maintained, then the Plaintiff himself was competing.

143. Mr. Luthi referred to the Plaintiff's email to Mr. Matthews where he attempted to explain that he was not competing, highlighting that he started his own company and was only working for Bright. Mr. Luthi invited the Court to accept that the Plaintiff had not lost his network, but that it existed as he was able to tap into it for contacts and advice. The Plaintiff described Bright as very small although it was accepted by Mrs. Dessing and Mr. Rodenhauser that small boutiques can compete against the bigger players for clients. The Plaintiff said that Bright is a '*local strategy firm which focuses mainly on HR analytics*" although there is evidence that Hay Group did both strategy and HR analytics at the time. The Plaintiff said he was "*helping companies to retrieve better information from their available internal HR and business databases*" as well as "*clarifying which information*

*line management needed and training HR professionals in working with the information*" which was what he was doing at the Hay Group.

144. Mr. Luthi submitted that Mr. Rodenhauser, having been instructed to provide his analysis "*by reference to the Plaintiff's role with Bright*", never stated precisely in the report what the Plaintiff was actually doing for Bright other than HR Consultancy. Further, the Plaintiff stated that he mainly supported the Bright partners without any attempt to distinguish his work from the services that Bright offered generally.

145. In light of the above evidence, Mr. Luthi submitted that even on a granular examination, by assisting Bright in performing HR strategy and/or HR analytics, the Plaintiff was competing with the Hay Group.

Analysis - The Meaning of Competition

146. In addressing the issue of competition, I am cognizant that the relevant period to determine whether there was competition during the period from when the Plaintiff joined Bright, that is September 2015 to when the Korn/Ferry Transaction was executed that is, on or about 1 December 2015. During that period, it is necessary to examine whether Bright and/or the Plaintiff were in competition with the Hay Group.

147. In respect of the meaning of competition, I am guided by the case of *One Step (Support) Ltd. v Morris-Garner* where Clarke LJ stated: (a) are the goods and services sufficiently comparable; and (b) are they competing in the same area or sub-area. Further, he stated that the question needs to be considered with a broad brush with the essential question being whether the scope of the business was the same. *Argus Media Ltd v Halim* also stated that a possible indicator as to whether there was competition is the belief of the person alleged to be competing.

Was there competition?

148. In respect of whether there was competition, in the case of *Gamatronic (UK) Ltd v Hamilton,* as cited in *Argus Media Ltd v Halim*, four questions were distilled which I will adapt to this case.

149. Question 1 - Were the Hay Group and Bright supplying services which are sufficiently comparable to mean they were in competition? In my view, using a broad brush, they were not sufficiently comparable for several reasons. On the face of it, this question should attract a simple answer. However, that is not the case, as there are various labels that have been attached to various disciplines. The evidence was that there was no industry approved labels for the technical areas or for the services offered, although there appeared to be general groupings of similar services under close or similar labels. Therefore, it was necessary to drill down a bit to give consideration to specific services within those general groupings.

150. First, there is some merit to use the method recommended by Ms. Zuill that the services offered should be considered using the Venn diagram approach. On that basis, both the Hay Group and Bright did offer some services that the other did not. However, they both did offer the Common Service Offerings, for which further analysis is required to determine if they were sufficiently comparable.

151. Second, I found the Plaintiff to be a credible witness who gave solid evidence and who displayed a level of forthrightness including when he made attempts to inform Mrs. Dessing of his engagement with Bright. I accept the Plaintiff's evidence where he identified the differences between the Hay Group and Bright, primarily that the Hay Group offered a standardized approach across 88 offices in 49 countries with tools that allowed an organization to work out how its strategies should be implemented and helping an HR department to understand the organization. Bright on the other hand, focused on the HR operation assisting companies on how to optimize their HR team thus helping the organization to understand its HR Department. I also accept that Bright's offerings of HR strategy, organization transformation, HR organization effectiveness and HR analytics

were not listed as services offered by the Hay Group and talent acquisition, recruitment and outplacement services were not services offered by the Hay Group. I also accept his evidence that Bright developed the Bright HR Strategies System for an individual approach which differed significantly from the Hay Group structured approach used globally. He maintained these positions on cross examination stressing that although there were different methods and routes to reach HR solutions in a company, the end result was not the only thing to consider. I found this to be a compelling argument using a broad brush that the Hay Group and Bright services were not sufficiently comparable.

152. Third, I found the expert witness Mr. Rodenhauser to be a reliable expert witness with expertise in the HR field who gave credible evidence on the HR market in the Netherlands. I accept the opinion evidence of the expert Mr. Rodenhauser in respect of Practice Differentiation and that the two firms are significantly different for several reasons: (a) that the Hay Group and Bright were at opposing ends of a bifurcated spectrum where the Hay Group was a global multi-service provider whilst Bright was a specialist niche provider primarily of strategy development; (b) he listed services that the Hay Group offered but which Bright did not offer and he listed services that Bright offered but which the Hay Group did not; (c) he stated that in the Netherlands, the Hay Group's business was largely about executive compensation and leadership development; (d) Bright did not offer implementation of strategy development whereas the Hay Group's approach was "*land and expand*" meaning strategies were offered and then services are expanded to other areas; (e) although there was overlap in services offered, the bifurcation spoke to the size and scope of services offered; and (f) the Hay Group approached talent management and people strategy focused on the '*how*' to do it, while Bright focused on the '*what*' of those areas. Again, I find that using a broad brush, that the Hay Group and Bright services were not sufficiently comparable.

153. Fourth, I was not persuaded by Mrs. Dessing's evidence that she considered everyone working in HR companies to be competitors to the Hay Group as that was a vague assertion and a general view. In my judgment, the evidence shows that there are a range of services offered in the HR field and the Hay Group offered some and did not offer others. I accept her evidence that there was overlap, in the context of the Venn diagram example,

between the services offered but as I have stated, a further analysis is required to determine if the services are sufficiently comparable. In my view, the Hay Group was dealing with one aspect of those overlapping areas whilst Bright was dealing with another aspect but for different scopes as set out below.

154. Question 2 - If so, were they competing in the same area? I have answered Question 1 above in the negative and so there is no need to answer Question 2. However, a short review of the locations where they were operating is useful. The evidence shows that the Hay Group and Bright were offering their services in the same area, namely the Netherlands. To that point, it is also clear that the Hay Group were offering their services to 88 offices in 49 countries around the world whilst Bright was focused on the Netherlands market. Mr. Rodenhauser stated that the Hay Group had offices in Amsterdam and Enschede and Bright's one office was in Maarssen.

155. Question 3 - If Bright was not supplying the same products or service as the Hay Group, did it have a realistic prospect of doing so (or vice versa)? In my view, Bright did not have a realistic prospect of supplying the same services as the Hay Group. First, Bright did not have the capacity to provide all the services that the Hay Group was offering as it was a small firm of 11 people (3 partners, 3 employed consultants, 3 freelance consultants and 2 admin staff). The Hay Group offered services with 28 full-time consultants and another 180 full-time employees in the Dutch market. In my view, with that small size boutique firm, Bright was focused on providing niche services in the areas that it did – it did not have a realistic prospect of offering the other services that Hay Group was offering.

156. Second, Bright did not have the intention to offer the other services that the Hay Group offered that Bright did not. Those areas required the "how" approach, which was the Hay Group's approach but not Bright's approach which was focused on the "what" approach.

157. Third, in considering whether the Hay Group had a realistic prospect of offering the services which Bright offered and it did not, that is HR Operations, I note that the expert Mr. Rodenhauser stated that the Hay Group did not offer it whilst Mrs. Dessing stated that

the Hay Group did not offer back office functions but it did offer HR operations consulting which includes strategies and methods to improve efficiency and effectiveness of the total HR function. In my view, I prefer to accept the view of the expert Mr. Rodenhauser rather than Mrs. Dessing who seemed to take the view that the Hay Group covered and did all HR matters. In light of that, my conclusion is that the Hay Group did not have a realistic prospect of offering HR Operations that Bright did because it was not a part of their global or Dutch offerings or ever intended to be such a part.

158. Question 4 - Was the scope of Bright's business the same as the Hay Group or was the provision of goods or services provided by the Hay Group "*within the scope of Bright's business plan*"? In my view, I am compelled to answer this question in the negative for several reasons. First, I accept that the Plaintiff was the only person who worked for both the Hay Group and Bright. I accept the Plaintiff's evidence that when he was offered a role at Bright in the niche area of HR strategy he investigated whether there was any competition between the Hay Group and Bright by asking other former clients, colleagues and the Bright partners and even tried to reach Mrs. Dessing, unsuccessfully. The feedback was that they had never competed. Later on he informed Mrs. Dessing that he was collaborating with Bright.

159. Second, Bright did not have the global scope of the Hay Group which generated on the global scale $500 million in consulting fees and $230 million from four practice areas. Bright was focused on a niche area of HR offerings in the Dutch market.

160. Third, in respect of the size of the Bright organization, it only had a fraction of the size of the Hay Group's consultants and staff. Thus, it did not offer all the services offered by the Hay Group, thus it had a limited scope as compared to the Hay Group's business.

161. Fourth, in respect of the services offered by Bright, it only offered four of the eight services offered by the Hay Group.

162. In light of the answers to the four questions considered above as set out in *Gamatronic (UK) Ltd v Hamilton*, it is my judgment that Bright was not in competition

with the Hay Group. Also, my view is fortified by Mrs. Dessing's evidence that she was not aware of the Hay Group losing any long-term clients to Bright and that no clients threatened to leave the Hay Group for Bright. Further, in following *Argus Media Ltd v Halim*, I am minded to note as a possible but not decisive indicator that the Plaintiff believed that in working for Bright, he was not competing with the Hay Group. For clarity, I give this possible indicator very little weight in my assessment of whether there was competition.

163. I now turn to the arguments of the Defendant that the Plaintiff and/or Bright were in competition with the Hay Group. First, in respect of the members of the Ownership Board coming to their respective conclusions that Bright was in competition, they each replied to Mr. Matthews email invitation dated 7 October 2015 for them to review Bright's website to determine whether in their judgment Bright was a competitor to the Hay Group. He added that if they agreed with Mrs. Dessing that it is a direct competitor then the Plaintiff would forfeit the Warrant. The members each replied on 7 or 8 October 2015 with one-line emails stating that Bright was a competitor. One member made reference to "*HR strategy, transformation, HR org*" and another member made reference to "*HR Strategy*". However, none of the members indicated what test, if any they applied to their review of the Bright website as to what constituted "*competition*". At that point, they did not have the Plaintiff's explanation of why he considered that he was not in completion with Hay Group. In light of these circumstances, I am unable to attach any weight to the individual replies of the Ownership Board that Bright was a competitor and that the Plaintiff should forfeit his Warrant.

164. In respect of the Ownership Board meeting on 3 November 2015, the matter of the Plaintiff was discussed and the correspondence with the Plaintiff was reviewed, after which the Ownership Board decided by resolution that the Plaintiff had breached the Non-Compete. There is no evidence of what test was used to determine "*competition*". Again, I am unable to attach any weight to the resolution that the Plaintiff and/or Bright was in competition with Hay Group.

165. Second, I do not accept that because there is an overlap in the visions of the Hay Group and Bright that means they were in competition. Such determination requires more analysis than a comparison between vision statements which in my view were general and vague statements in any event.

166. Third, the Defendant relied on the evidence of the expert Mr. Rodenhauser and Mrs. Dessing that Bright and the Hay Group would both be seeking work for mid-size clients, therefore they were in competition. I disagree with this contention on the basis that despite the size of the potential client firm, for the reasons already stated above, Bright was offering different services to its clients than the Hay Group was offering to its own clients. In my view, the fact that they both would be seeking work from mid-size clients does not mean they were automatically then in competition. The same reasoning applies in respect of other factors such as Bright sought multi-national companies and that price would be a selling point – those factors do not mean that Bright was automatically competing with the Hay Group.

167. Fourth, I disagree with the Defendant's submission that all the services offered by Bright were provided by the Hay Group although they may not have been a part of the Hay Group's core business and it followed that potential clients had a choice between the two companies for their HR needs in the Netherlands. As stated previously, the companies did not overlap in every area, but they did overlap in the Common Service Offerings but not on a sufficiently comparable basis. Further, in my view, potential clients did not simply have a choice for their needs between the two companies. Instead, potential clients would have had to decide based on their own needs, which company offered what they wanted, and then make their decision accordingly.

168. Fifth, the Defendant argues that the Court should not conduct a granular analysis to separate the role of the Plaintiff at Bright from Bright's work itself in order to determine if there was competition. But even if it did, then in essence, the Plaintiff, with all his attributes, was working for Bright and furthering their offerings, therefore there was competition. I have given some consideration to these factors including the evidence that that the Plaintiff had experience as a senior executive of the Hay Group, he had years of

career experience working with them in the Netherlands and Russia, he had extensive training in the Hay Group methods and had engaged with clients when he was with the Hay Group. In my view, the Plaintiff's engagement with Bright did not automatically mean that he was in competition with the Hay Group the moment he started that engagement. I accept the Plaintiff's evidence that the knowledge and experience he gained at the Hay Group were totally irrelevant to the job he was doing at Bright as he was new to analytics which Bright was pioneering in the Netherlands and further that the skills of job evaluation and other the Hay Group methods were not relevant to his role at Bright. Further, I am persuaded by the Plaintiff's submission that simply using skills acquired from one employer for another is not an act of competition. In light of these circumstances, I am not satisfied that the Plaintiff with his background and experience of the Hay Group was furthering Bright in any competition with the Hay Group.

169. The evidence also shows that the Plaintiff's engagement was featured on Bright's website where his Hay Group career and experience were highlighted. In my view, featuring the Plaintiff on Bright's website does not automatically mean that he and Bright were competing with the Hay Group. I accept the Plaintiff's evidence that he was featured on the website to show more people on it and to show that they could do HR work.

170. Sixth, I now turn to a brief submission by Ms. Zuill as to whether the Plaintiff was a competitor to the Hay Group because of free-lance work in Russia or that he made contacts with his network in the Netherlands once he returned. In my assessment, I place no reliance whatsoever on the evidence that the Plaintiff remained available for clients in Russia and Kazakhstan and that the Plaintiff made contact with members of his network in order to investigate job opportunities.

171. Ms. Zuill highlighted the Defendant's pleaded case that the Plaintiff breached the Non-Compete by having acted as a consultant for a competitor company. In light of the above reasons, I am not satisfied that on the pleaded case, for the period in question, the Plaintiff was in breach of the Non-Compete, having acted as a consultant for a competitor company. Further to that, I am not satisfied that Bright was in competition with the Hay Group.

**Restraint of Trade**

Plaintiff's Submissions on Restraint of Trade

172. Ms. Zuill submitted that there was a restraint of trade in this case citing Chitty 33rd Ed at 16-106 "*all covenants in restraint of trade are prima facie unenforceable at common law, and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public.*"

173. She cited the case of *Hepworth Manufacturing Co. Ltd. v Ryott* [1920] 1 Ch 1, 29 which stated a "*trade*" extends to a man's profession or calling. She also cited the case of *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, 180 where Diplock LJ stated a covenant "*in restraint of trade*" is defined as one "*in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses*". Further, she cited the case of *Stenhouse Australia Ltd v Phillips* [1974] AC 391 where Lord Wilberforce stated that whether a party has covenanted to restrict his liberty to carry on trade "*is to be determined not by the form the stipulation wears … but by its effect in practice*" and the test "*is whether, in effect, it is likely to cause the employee to refuse business which otherwise he would take*".

174. Ms. Zuill submitted that Bye-law 78.1 is an unreasonable restraint of trade and accordingly unenforceable. She stated that even if the Court agrees with the Defendant that the '*broad*' construction of business is right and that the Plaintiff in fact competed with the Hay Group whilst working at Bright, the restraint of trade argument means the Plaintiff's claim must succeed because the effect of the unreasonable breadth of the covenant would be to prevent the Plaintiff from even working for any other HR consultancy anywhere in any of the 49 countries which the Hay Group occupied for three years, even where doing so involved no use of confidential information or solicitation of clients or employees.

175. Ms. Zuill submitted that the restraint of trade argument had two parts:

a. Bye-law 78.1 fails the general test of reasonableness that applies to all covenants in restraint of trade; and
b. The Court must also apply the far more stringent test appropriate to covenants between an employee and his employer, noting that Bye-Law 78.1 fails that test even more emphatically.

*The absolute unenforceability of overly-wide clauses*

176. Ms. Zuill submitted that if a covenant is too wide, then that covenant is unenforceable in its entirety. It is not unenforceable only to the extent that it is unreasonable and the Court cannot save it by substituting it with a narrower covenant that might have been reasonable. She relied on the case of *Provident Clothing & Supply Co. Ltd v Mason* [1913] AC 724 where Viscount Haldane LC said:

> *"Had they been content with asking him to bind himself not to canvass within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places where the knowledge which he had acquired in his employment could obviously have been used their prejudice, they might have secured a right to restrain him within these limits. He appears, indeed, to have been, in point of fact, carrying on his canvassing for a similar business very near to his old place of employment, and it is probable that by a properly limited clause they could have restrained him from doing this. But the question is not whether they could have made a valid agreement, but whether the agreement actually made was valid."*

177. Ms. Zuill submits that this is a matter of public policy as otherwise covenantors and their future employers would be in state of uncertainty not knowing what their legal obligations were. However, the doctrine of unreasonable restraint of trade was to protect covenantors and their prospective employers from this kind of predicament, by rejecting

over-broad covenants on principle, rather than leaving them dormant. On this basis, in the present case, Ms. Zuill contends that the Court need not concern itself with what the Plaintiff has in fact done – because if the clause is too wide it is irrelevant what he has in fact done.

The test for employer-employee covenants (i): the substance of the relationship between the Defendant and the Plaintiff

178. Mrs. Zuill submitted that it seemed to be common ground that if Bye-Law 78.1 was put in an employment contract, it would be unreasonably wide and an unlawful restraint of trade. Therefore, the issue is whether the fact the covenant is in the Bye-laws compels a different result.

179. Ms. Zuill referred to an example where in the circumstances where the defendants were employees who also held shares, the covenant was in the shareholders agreement. She relied on the case of *Kynxia v Hynes* [2008] EWHC 1495 (QB) at paragraphs 130 – 136 where the Court held that it would apply the employer/employee principle for the stated reason that "*the covenants impugned in this case apply only to shareholders who are connected with the Claimant as defined. As is obvious, employees of the Claimant who are shareholders are within [this] category*". Ms. Zuill submitted that the covenant in substance governed the defendants as employees, not as shareholders who might sell their interest. Thus, in the present case, Bye-law 78.1 only binds shareholders who are employees of the Hay Group. In respect of another defendant in *Kynxia v Hynes*, a second reason was that she owned "*a very small proportion of the company*" similar to the Plaintiff in the present case.

180. Ms. Zuill submitted that where the Court has instead put the emphasis on the covenantor's role as a vendor, the facts have tended to be starkly different from those in the present case. She relied on several cases as follows:

a. In *Cyrus Energy* , the Court held that the covenantor fell towards the vendor end of the spectrum because "*very few employees have a twenty-five percent shareholding in the business by which they are employed, as well as holding a directorship and rights to the parent company*."
b. In *Dawnay, Day & Co. Ltd v D'Alphen* [1998] ICR 1068, the Court relied on the fact that the covenantor had brought a substantial existing business with them when they joined the covenantee company. The point was made that unlike the Plaintiff, they had not been recruited simply as employees.
c. In *Systems Reliability Holding PLC v Smith*, the covenantor invested in the business while still employed, and was then dismissed. He retained his shares but then sold them when the company as a whole was sold. He agreed the covenant with the purchaser, which had never been his employer and which ultimately enforced he covenant. Ms. Zuill submits that by contrast, the Plaintiff was required to redeem his shares when his employment ceased and it is the Hay Group that now seeks to enforce the Non-Compete.

181. Ms. Zuill submitted the key principles were as follows:

a. There is a '*spectrum*' between a covenantor who is an employee and one who is better understood as the vendor of the business. She relied on the case of *Cyrus Energy v Stewart* [2009] CSOH 53.
b. In deciding where a covenantor falls on the spectrum, the Court must look to the '*substance, not form*' of the relationship. She relied on the case of *Allied Dunbar v Weisinger* [1988] IRLR 60.

182. Ms. Zuill stated that in respect of the substance of the relationship:

a. It is key to see how the Plaintiff acquired his shares. If he were at the '*business owner*' end of the spectrum, then he could do so as an independent investor. However, he acquired his shares as a result of the Defendant inviting him to buy the shares because he was an employee of the Hay Group and only employees were invited.

b. In respect of how the Plaintiff could deal with his shares, if he were at the '*business owner*' end of the spectrum, he would be able to sell them to whom he wished. Ms. Zuill cited the case of *Systems Reliability Holdings v Smith* where the covenantor had this right, and the eventual buyer of the whole company had to persuade him to sign a purchase agreement. However, in the present case, the Plaintiff had barely any scope for selling his shares – he could only transfer them to a '*Permitted Transferee*' but he could not sell them to an open-market purchaser for profit.

c. In respect of whether the Plaintiff could keep his shares after ceasing employment, if he were at the '*business owner*' end of the spectrum one would expect that he could. However, he had to surrender his shares on the day he left the Hay Group, and those shares had to be cancelled. Bye-law 3.3 says that '*Employment Cessation*' triggers a '*Final Redemption*'. Although he maintained a financial interest by way of the Warrant, he had no freedom to sell that interest.

d. In respect of the Non-Compete, if the Plaintiff was a business owner for the purpose of the covenant, it would constrain him primarily in that role, thus he would be barred from competing as a business owner. Note the non-compete in *Systems Reliability Holdings* was invoked to prevent the covenantor from starting his own rival company.

183. In light of these factors and the evidence, Mr. Zuill submits that the Defendant's concerns of the Plaintiff, were not in his role as a shareholder, but in his roles of being an employee of: (a) the Hay Group – his training, his contacts; and (b) at Bright – not as an owner, but as an employee offering his services to a competitor business. Therefore, this is an employee/employer case, precisely what a former employer is not allowed to protect on policy grounds. Further, the Defendant relies on: (a) a definition of "*Business*" including the Affiliates' businesses, noting that the Plaintiff was an employee of Affiliates; (b) per the Shareholder Information Pack, the Plaintiff was prohibited from referring to himself as a "*shareholder*". Therefore, Ms. Zuill submits that if the Plaintiff's relationship with the Affiliates was always one of an employee, then a covenant which prevents him competing with the businesses of the Affiliates is an employer/employee covenant, despite the appearance of a business-investor relationship, this was an employer-employee covenant.

The test for employer-employee covenants (ii): The analogy with a partnership

184. Mr. Zuill submitted that the Defendant has relied on the case of *Bridge v Deacons* [1984] AC 705 for guidance in the present case in respect of the Non-Compete of the former partnership governing the shareholders of the successor company. She rejected that contention as the case was not analogous to the present case, as first, on the basis that a true partnership like the one in *Bridge v Deacons* stands further towards the "*business owner*" end of the spectrum than a covenantor who is a company shareholder. Partners are more involved in the governance of the partnership and have more at stake than an employer-shareholder, thus a partner is more similar to a classic vendor selling his own business. Ms. Zuill cited the cases of *Kynixa v Hynes* and *Cyrus Energy* where the covenantor's role as a director of and major player in a company was decisive in pushing him away from the employee end of the spectrum. Thus, a partner in a small partnership is in the same position – and in a very different position from the Plaintiff. Therefore, the Court should conclude that this is an employer-employee case in substance, and that Bye-law 78.1 by far exceeds the narrow restraints that are permitted in such cases, so is unenforceable.

The Covenant is too wide to pass even the general test

185. Ms. Zuill submitted that even if the general test alone was appropriate, Bye-law 78.1 would still be unreasonable and unenforceable. She referred to the Defendant's reliance on *Bridge v Deacons* where the Board found that the covenant at issue was reasonable, noting that the terms of the *Bridge v Deacons* covenant was narrow in two aspects: (a) it only forbade the covenantor from acting for persons who were clients of the partnership at the time the covenantor left, or had been clients within the previous three years; and (b) it only applied to the then Colony of Hong Kong – there was no bar on acting for the partnership's client in any other jurisdiction. Therefore, the covenant in *Bridge v Deacons* was not a non-compete at all – it was a non-solicitation clause designed to protect

the partnership's goodwill, as limited to its existing and very recent client base. She submitted that Bye-law 78.1 defies the principle from *Dawnay Day & Co. Ltd v D'Alphen* at 1106-7 where it stated '*The covenant may be enforced when the covenantee has a legitimate interest … to protect, and when the covenant is no wider than is necessary to protect that interest*."

186. Ms. Zuill submitted that in the case of a covenant between a vendor of a business and a purchaser, the additional legitimate interest is goodwill – which a vendor cannot sell and then exploit himself. Bye-law 78.1 was obviously wider than necessary to protect the Hay Group's goodwill from the Plaintiff as (a) a covenant confined to Russia, and forbidding solicitation there would have been enough - anything wider would have been unreasonable and unenforceable; and (b) even if a non-compete covering Russia and the Netherlands would have been appropriate, that is not the covenant that was drafted, therefore, a global covenant is no more reasonable or enforceable because the covenantor has acted in a way that would have breached a genuinely reasonable covenant. Thus Bye-law 78.1 is too wide and unenforceable as it purports to prevent the Plaintiff from working for a competitor business anywhere in the world where the Hay Group operates in at least 49 countries for three years, with no connection between that work and the Defendant's legitimate interest in preserving its goodwill in the form of existing clients, staff and proprietary information and is not limited to the protection of goodwill.

Defendant's Submission on Restraint of Trade

Covenants in restraint of trade - generally

187. Mr. Luthi submitted that all parties were in agreement that "*all covenants in restraint of trade are prima facie unenforceable at common law, and are enforceable only if they are reasonable.*" The date for determining whether the covenant is reasonable is the date upon which the covenant was entered into citing Chitty and the case of *Kynxia v Hynes*. In the present case the Covenant was entered into when the Plaintiff became a shareholder in 2010. Mr. Luthi relied on the cases of *Dawnay, Day & Co. Ltd v D'Alphen*

and *Bridge v Deacons* where parties entered into a covenant although it did not bite until a later date. He submitted that it was important to note that the circumstances applicable at the time of enforcement of a restrictive covenant do not impact on its reasonableness at the time it was entered into citing, *Thomas v Farr plc* [2007] EWCA Civ 118, where the Court of Appeal upheld a non-compete provision against an ex-employee in order to protect against the misuse of confidential information.

188. Mr. Luthi stated that the Plaintiff's personal circumstances when the Covenant bit are irrelevant to its reasonableness, rather the reasonableness was to be determined in light of the circumstances at the time it was entered into. He highlighted the following: (a) the Plaintiff accepted he agreed to abide by the Shareholder Responsibilities including to act in the best interests of the Hay Group; (b) the Plaintiff accepted that he was making an investment decision in becoming a shareholder; and (c) the Plaintiff accepted the Non-Compete at the time he became a shareholder and that the Ownership Board's wide interpretation of the provision was explained to him.

Covenants in Restraint of Trade – Legitimate Interests

189. Mr. Luthi submitted that the parties are in agreement that covenants against mere competition from an employee is not a legitimate interest of the employer that he is entitled to protect citing the case of *Reiter v Ness* (Court of Appeal) Bermuda, 6 November 1998 where Zacca J cited Younger LJ in *Attwood v Lamont* [1920] 3 KB 571 as follows:

> *"An employer is not entitled by a covenant taken from his employee to protect himself after the employment has ceased against his former servant's competition per se, although a purchaser of goodwill is entitled to protect himself against such competition."*

190. Mr. Luthi also stated that the parties were agreed on the points that: (a) very different principles apply as between covenants for the protection of the goodwill of a business sold by the covenantor to the covenantee from those where it is taken by an

employer from an employee - in the latter case, the Courts adopt a much less stringent approach to the covenant; and (b) the context is not whether the relationship was one of master and servant or purchaser and vendor, rather the approach was as stated in *Dawnay Day* as follows: "*It was wrong and unnecessary to categorise the cases strictly in this way. The question is one of substance, not of form … and the court has always to try and apply the test of reasonableness to the facts and circumstances of the particular case.*"

191. Mr. Luthi submitted that the Plaintiff was inviting the Court to find that the present case is not a vendor/purchaser case, but between an employee and employer. He submitted that the evidence shows that becoming a shareholder was distinct from becoming an employee as follows: the documentation provided to prospective shareholders, the Plaintiff's acceptance that he was investing and taking an ownership stake, he received the presentation '*Becoming a Hay Group Shareholder*' in September 2009 and attended the presentation and he made a significant profit on his investment, far higher than any remuneration as an employee.

192. Mr. Luthi disagreed with the two grounds given by the Plaintiff asserting that this was an employer/employee context, namely only employees of the Hay Group were entitled to be shareholders and that the Plaintiff only held a small shareholding. He relied on the case of *Systems Reliability Holdings plc v Smith* where Haman J granted an injunction against Smith, an ex-employee of a company holding a small ownership stake, stating it is the *"underlying business and the people who work in it" that "remain the substance of the transaction*" and that Smith "*was selling his fraction – a small fraction but nonetheless his fraction of the company. He was getting a price no different from the price being paid to other vendors.*" Therefore, the fact that the Plaintiff has a small shareholding is irrelevant.

193. Mr. Luthi submitted that although only senior employees were invited to become shareholders, the Plaintiff was under no obligations to do so. He relied on *Systems Reliability* where Harman J held:

*"In my judgment in these days when it is increasingly a matter – I believe I can say as a matter of judicial knowledge – that employees are to be encouraged to have shareholding stakes in their companies that employ them, and to be involved with the capital interest in their employer, it would in my view be most undesirable for the courts to say that such persons cannot be bound as vendors of the goodwill of the business."*

194. Mr. Luthi submits therefore that it is clear that in this case the legitimate interest sought to be protected by the covenant in Bye-law 78 was the goodwill of the business similar to *Bridge v Deacons*, in which the Privy Council upheld the "*goodwill of the partnership as a whole*" as a legitimate interest which could be protected by the partnership. Further, in *Dawnay, Day & Co. Ltd v D'Alphen*, in circumstances similar to this case, Walker J held as follows:

*"But it is possible to imagine a partnership agreement which permitted a partner though withdrawing from active participation, to continue as a sleeping partner and retain his partnership share, pending an advantageous disposal of the partnership business as a whole. Such a provision would show indulgence to the outgoing partner, and it would hardly lie in the outgoing partner's mouth to protest that he should not be bound by a restriction against competition because he was not simultaneously disposing of his partnership share. All the more reason, it would be said, why the outgoing partner should be bound, in his own interest as well as in the interest of his partners, to maintain the value of the business until its eventual sale as a whole."*

195. Mr. Luthi submitted that the importance of the protection of the goodwill of a business has been emphasised in many cases. In *Petrofina (Great Britain) Ltd. v Martin* [1966] Ch 146 Diplock LJ stated:

*"In the master and servant cases there is the protection of confidential information. The master's right to have his confidential information protected has to be weighed against his former servant's right to compete or help others to compote with his former master. The master is asserting one public interest, the servant a conflicting interest. A*

*compromise between these two conflicting interests, if reasonable in reference to the interests of the parties concerned, is reasonable in reference to the interests of the public. So too in the cases about covenants against competition on the sale of the goodwill of a business. It encourages trade that a person should be able to build up a goodwill of a business of which he can dispose for valuable consideration on retirement. It offends public morality if he can filch back what he has sold. The purchaser of the goodwill in enforcing a covenant against competition by his vendor is asserting this public interest, the vendor in resisting such enforcement is asserting the conflicting public interest in his right to carry on any trade or business he chooses. A compromise of these two conflicting interests, if reasonable in the interests of vendor and purchaser, is reasonable in reference to the interests of the public."*

Reasonableness of Non-Compete Covenants

196. Mr. Luthi submitted that the Non-Compete benefited the Plaintiff in respect of the goodwill contributing to his 60% return on his investment as well as the sale price in the Korn Ferry transaction. Therefore, the covenant protected the Plaintiff and all the other shareholders. He relied on a number of cases where the Courts stressed the importance of upholding such bargains.

197. In *Herbert Morris v Saxelby* [1916] 1 AC 688 where the House of Lords noted, that in a case of vendor and purchaser, the vendor, in order for him to sell in the most advantageous way in the market:

*"… should be able to preclude himself from entering competition with the purchaser", and that he would "in the absence of some restrictive covenant be entitled to set up in the same line of business as he sold in competition with the purchaser, though he could not solicit his own old customers. The possibility of such competition would necessarily depreciate the value of the goodwill. The covenants excluding it necessary enhances that value, and presumably the price demanded and paid, and, therefore, all those restrictions on trading are permissible which are necessary at once to secure that the*

*vendor shall get the highest price for what he has to sell and that the purchaser shall get all he has paid for." (page 701)*

*"... still it may be for his advantage to be able to so subject himself in cases where, if he could not do so, he would lose other advantages, such as the possibility of obtaining the best terms on the sale of existing business..." and that "it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing." (page 707)*

198. The House of Lords further held that where a vendor agrees not to compete:

*"the law upholds such a bargain, and declines to permit the vendor to derogate from his own grant. Public interest cannot be invoked to render such a bargain nugatory: to do so would be to use public interest for the destruction of property. Nothing could be a more sure deterrent to commercial energy and activity than a principle that its accumulated result could not be transferred save under conditions which would make its buyer insecure." (page 718)*

199. In *Vancouver Malt and Sake Brewing Co. v Vancouver Breweries Ltd* [1934] AC 181 the Privy Council held as follows:

*"More especially is this so where the doctrine represents a compromise between two principles of public policy; in this instance, between, on the one hand, the principle that persons of full age who enter into a contract should be held to their bond and, on the other hand, the principle that every person should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit. ... The law does not condemn every covenant which is in restraint of trade, for it recognizes that in certain cases it may be legitimate, and indeed beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser." (page 188)*

Reasonableness – Application to the facts

200. Mr. Luthi submitted that having established that the Defendant has a legitimate interest to protect the goodwill of the Hay Group business by way of a restrictive covenant and that it is also for the benefit of the Plaintiff's investment, it is necessary to consider whether the terms of the covenant in Bye-Law 78 are reasonable as affording "*no more than adequate protection to the party in whose favour it is imposed*" per *Herbert Morris v Saxelby*. He submitted that the Plaintiff's objections are wrongly based on the context being that of employer-employee such that a non-compete is not permissible and a simple 'non-poaching' or 'anti-solicitation' clause would suffice to protect the legitimate interest.

201. Mr. Luthi cited *Office Angels Ltd v Rainer-Thomas* [1991] IRLR 214 where the Court of Appeal stated:

> *"Other circumstances, apart from the existence of confidential information, may in particular cases render a covenant against solicitation and dealing of little practical use to an employer and may thus justify the imposition on his employee of a covenant against competition drawn by reference to an area."*

202. In *Allied Dunbar v Weisinger* Millet J held as follows:

> *"It may be legitimate to require the vendor to retire completely for a period of time from any form of competing business" and that "it is obvious that, to protect the goodwill of the business which they had bought, it would not be sufficient for the plaintiffs to rely on a non-solicitation clause … It is also obvious that it would not be sufficient to rely on a non-dealing clause ... a non-dealing covenant, particularly one extending to new clients, is difficult to police and enforce, and depends on the honest co-operation of the covenantor … At the very least, if he obtains the vendor's*

*agreement to the inclusion of a covenant which avoids these dangers, it hardly lies in the vendor's mouth to argue that he should have been content with less."*

203. Mr. Luthi submitted that the question was whether the '*goodwill*' of the business would be sufficiently protected by a lesser restrictive covenant than the Non-Compete, taking into account the mutuality of the obligation as the Plaintiff when he became a shareholder did not know whether the covenant would be enforced against him or used to protect his own investment and other shareholders. He stressed that the present case is clearly at the vendor/purchaser end of the spectrum as the Plaintiff was never an employer of the Defendant, but rather he was a shareholder of the Defendant now seeking his share of the proceeds of the sale.

204. Mr. Luthi submitted that the goodwill of the business included prospective new clients, not merely existing clients stating that a non-solicitation clause would not prevent the Plaintiff from expanding Bright's business into areas occupied by the Hay Group or attracting clients who may otherwise have gone to the Hay Group in the Netherlands – thereby undermining the goodwill of the business. Further any less restrictive covenant would be impossible to police across 49 countries.

205. In light of the above, Mr. Luthi submits that the Non-Compete was reasonable in all the circumstances.

206. Mr. Luthi submitted that the Plaintiff does not dispute that a three year clause may be reasonable, but that the worldwide application is unreasonable on the basis that the Plaintiff only worked in the Netherlands and Russia, therefore it should have been tailored to his own personal circumstances, affording no more protection than is reasonably required. However, Mr. Luthi countered that the goodwill of the Hay Group comprises its operations in 49 countries, for which competition in any of those countries would undermine that goodwill. He noted that the significant financial return was a result of the global business, thus the remaining and new shareholders, purchased the Plaintiff's shares on the basis that the global goodwill would be retained. In effect, they were entitled to get what they paid for.

207. Mr. Luthi submitted two further considerations in relation to the territory to which the Covenant applies. First, the Covenant applies to the countries in which the Hay Group operates, not the whole world. Secondly, the Court should not focus on '*remote possibilities*' or accept arguments that the Covenant fails the reasonableness test by reference to relatively uncommon or likely situations. Therefore, the Court should reject any pleas about the breadth of a '*worldwide*' covenant in respect of the Plaintiff who only worked in the Netherlands and Russia, causing an otherwise reasonable covenant to become unreasonable.

208. In light of the above reasons, Mr. Luthi submitted that a three year clause, applicable in the countries that the Hay Group operates in, is reasonable as regards both duration and territory.

Effect of avoiding Bye-law 78

209. Mr. Luthi submitted that the Plaintiff's submission that if Bye-Law 78.1 is unenforceable it can be disregarded, fails to address the test that the Court must apply if it is to remove the offending provision from the contract. He cited *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388 where the Court was able to remove the offending provision prohibiting competition and permit the employee to retain post-termination benefit. He submitted that the proviso could only be struck out if three conditions were satisfied as follows: (a) the unenforceable provision must be capable of being removed without the requirement of adding or amending the wording of what remains; (b) the remaining terms must continue to be supported by adequate consideration; and (c) the removal of the unenforceable provision must not so change the character of the contract that it becomes "*not the sort of contract that the parties entered into at all*".

210. Mr. Luthi submitted that the Court cannot simply strike out the forfeiture provision in Bye-law 78.1 which cross-refers to Bye-law 78 as the consideration for the Warrant is the agreement by the shareholder not to compete and to remove that part would be to leave the Warrant without adequate consideration. Further, the Warrant and the Covenant go

hand in hand, similar to the 'sleeping partner' in *Dawnay, Day & Co. Ltd v D'Alphen*, and to permit a former shareholder to compete with the Defendant but also to retain the right to benefit from a sale of the business would run contrary to all sense of reasonableness and would fundamentally change the nature of the contract that was agreed between the shareholders. Therefore, it would be impermissible under the test in *Sadler v Imperial Life Assurance Co of Canada Ltd* to strike-out the Non-Compete whilst leaving the right to benefit from any sale. He submitted that if the Court was minded to find that the Non-Compete is unenforceable then it must find that the Warrant is also unenforceable and must fall.

211. Mr. Luthi relied on *Sadler* and *Bull v Pitney-Bowes Ltd* [1967] 1 WLR 273 where the plaintiffs were employees of the defendant companies, and the restraint of trade in each was in the form of a financial inducement not to compete. In *Sadler v Imperial Life Assurance Co of Canada Ltd*, the employee was entitled to post-termination commission and in *Bull v Pitney-Bowes Ltd* the plaintiff was entitled to pension rights. In both cases, the employees had earned the benefit that competition would deny. However, in the present case, absent the Warrant, the Plaintiff would not have been entitled to the benefit of the sale of the Hay Group shares as he was no longer a shareholder, thus he had not earned a right to a share of the proceeds post-redemption of his shares. Mr. Luthi submitted that the position would therefore revert to that prior to the insertion of the Warrant in the Bye-Laws, leaving the Plaintiff with his entitlement to the redemption payment, but no rights as a sleeping partner.

Analysis - Restraint of Trade

212. In my view, the Non-Compete was not an unreasonable restraint of trade for several reasons. First, I do not agree that the Non-Compete was an employer-employee covenant. It is correct that the basis of the invitation to the Plaintiff to become a shareholder was that he was a senior employee of the Hay Group. However, in my view, there are various factors which support my view that this was not an employer-employee covenant. Further, in following the case of *Dawnay Day*, I am obliged to avoid categorising the cases strictly as

employer and employee or purchaser and vendor, rather I am obliged to apply the test of reasonableness to the fact and circumstances of this case.

213. Second, I have already set out the process that the Plaintiff was required to undertake in order to become a shareholder based around the three-day orientation process. At that time, he agreed to abide by the "*Shareholder's Responsibilities*" in the best interests of the Hay Group, he accepted that he was making an investment decision and he agreed to the Non-Compete. Further, he received the presentation "*Becoming a Hay Group Shareholder*" and eventually he made a significant profit on his investment, far more than any remuneration as an employee.

214. Third, I note that the Plaintiff had a small shareholding in the Hay Group. In applying *Systems Reliability Holdings plc v Smith*, I am obliged to find that the fact of the small shareholding was irrelevant as a small shareholding was nonetheless still a shareholding of the Hay Group.

215. Fourth, I also find that although the Plaintiff was an employee who was a shareholder in the Hay Group, he was still bound to protect the goodwill of the Hay Group. I rely on *Systems Reliability Holdings plc v Smith* where Harman J stated that "… *that employees are to be encouraged to have shareholding stakes in their companies that employ them, and to be involved with the capital interest in their employer, it would be most undesirable for the courts to say that such persons cannot be bound as vendors of the goodwill of the business*". Also, in my view, in following *Bridge v Deacons*, there is a legitimate interest of the goodwill of the Hay Group that is properly protected by Bye-Law 78. Similar to the principles stated by Walker J in *Dawnay, Day & Co. Ltd v D'Alphen*, the Plaintiff was entitled to enjoy the benefit of the Warrant for a period of three years after he ceased employment in exchange for protecting the goodwill of the Hay Group by abiding by the Non-Compete. This was clearly in his own interest as well as the interest of the other shareholders to maintain the value of the Hay Group in contemplation of any sale, which in fact did materialize. Further, I rely on the principles in *Petrofina (Great Britain) Ltd. v Martin* in that the Plaintiff should not be allowed in the public interest to compete against the Hay Group whilst enjoying the benefit of the Warrant. As Diplock LJ stated conduct

of '*filching back what was sold*' offends public morality. Likewise, in my view, the conduct of the Plaintiff competing against the Hay Group whilst enjoying the benefit of the Warrant during the same period of time would offend public morality.

216. Fifth, in my view, the Non-Compete was reasonable in order to protect the Plaintiff and the other shareholders in their investment in the company. The evidence of Mr. Matthews shows that the Plaintiff enjoyed a 58% return on his investment due to the success of the business. Further, the evidence also shows that the Hay Group did benefit and that the Korn/Ferry transaction was beneficial to all the shareholders. In my view, in order for such success to materialize, it was necessary to have the Non-Compete as envisaged in the case of *Herbert Morris and Saxelby* where it was held that the possibility of competition from the vendor would depreciate the value of the goodwill while the restrictive covenant would enhance it and that the vendor would get the highest price for what he has to sell and the purchaser would get all he paid for. Also, I rely on the case for the principle that the law would uphold such a Non-Compete in order to prohibit the vendor to derogate from his own grant. I also rely on the case of *Vancouver Malt and Sake Brewing Co. v Vancouver Breweries Ltd* for the position that it may be legitimate and beneficial to have a restrictive covenant in order to obtain a good price on the sale of a business. In light of these authorities, in my view, it was reasonable to have the Non-Compete in the Bye-Laws in order to maintain the goodwill of the business and in turn its value for any potential sale to the benefit of all the shareholders.

217. Sixth, I am of the view that the terms of the Non-Compete in Bye-Law 78 are reasonable as affording "*no more than adequate protection to the party in whose favour it is imposed.*" per *Herbert Morris v Saxelby*. I am satisfied that the time period of three years post-employment was reasonable as it equated to the same time period for the duration of Warrant. In respect of the goodwill of the Hay Group, I am satisfied that it comprises its operations in 49 countries. Therefore, it seems to me that it follows that if the Plaintiff competed in any of those 49 countries then he would have been affecting the goodwill of the Hay Group. Thus, a lesser Non-Compete for just the Netherlands and Russia where the Plaintiff was formerly employed would not be effective and if the Plaintiff had

developed Bright or any other entity into other countries where the Hay Group operated, then it would indeed be impossible to protect the goodwill in those countries. In my view, the most effective Non-Compete would be one which prohibited the Plaintiff from competing in the countries where the Hay Group operated. To this point, I reject the contention that this was a worldwide Non-Compete. On that basis, I am satisfied that the Non-Compete for three years in the countries that the Hay Group operated in was reasonable and was no more than adequate protection to the Hay Group. After the period of three years had expired, then the Plaintiff was free of the Non-Compete and could work in any country where the Hay Group operated.

**Conclusion**

218. The Plaintiff's claim for a declaration that he is entitled to the benefit of the Warrant arising out of the Stock Purchase Agreement in respect of the Korn/Ferry Transaction is granted.

219. Unless the parties agree the amounts due and owing to the Plaintiff and the terms of such payment within 21 days, I will hear the parties as to the consequential directions which are necessary to give effect to the declaration as stated above.

220. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis, to be taxed by the Registrar if not agreed.

Dated 20 October 2021

**HON. MR. JUSTICE LARRY MUSSENDEN**
**PUISNE JUDGE OF THE SUPREME COURT**