SUPREME COURT OF QUEENSLAND

CITATION:	*BDO Group Holdings (Qld) Limited & Anor v Sully* [2015] QSC 166
PARTIES:	**BDO GROUP HOLDINGS (QLD) LIMITED (FORMERLY BDO GROUP HOLDINGS (QLD) PTY LTD)** ACN 133 657 833 (first applicant) **BDO ADMINISTRATION (QLD) PTY LTD** ACN 134 036 490 (second applicant) **v** **BRIAN RUSSELL SULLY** (respondent)
FILE NO/S:	Supreme Court No 2666 of 2015
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	19 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2015
JUDGE:	Flanagan J
ORDER:	**1. The Court declares that, subject to clauses 23.2 and 23.4, clause 23.1(a)(i), clauses 23.1(b)(i) and (ii), and clauses 23.1(d), (f) and (g) of the BDO Shareholders' Agreement adopted by the first applicant and the respondent by Deed of Accession dated 5 June 2012 are binding on the respondent for the period of 12 months from 19 April 2015.** **2. The Court declares that clause 20(b)(i)(A), clauses 20(b)(ii)(A) and (B), and clauses 20(b)(iv), (vii) and (viii) of the Employment Agreement between the second applicant and the respondent dated 5 June 2012 are binding on the respondent for the period of 12 months from 19 April 2015.** **3. The respondent be restrained by injunction until 19 April 2016 from:** **(a) engaging in any activity which involves providing accounting services to any person who was, at any time within the 24 months prior to 19 April 2015, a client of the BDO Group;**

(b) inducing, soliciting or canvassing, approaching or accepting any approach from any person who was, at any time during the 24 month period prior to 19 April 2015, a client of the BDO Group, to obtain the custom of that person in a business or activity which:

(i) is the same or similar to the whole or material part or parts of the accounting services provided by the BDO Group; or

(ii) is in competition with the accounting services provided by the BDO Group.

4. I will hear the parties as to costs

CATCHWORDS: TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – RESTRAINTS OF TRADE – VALIDITY AND REASONABLENESS – PARTICULAR CASES – EMPLOYMENT – where the respondent was a partner at an accountancy firm that merged with, *inter alia*, the first applicant – where the respondent entered into a shareholders' agreement with the first applicant and an employment contract with the second applicant – where both the shareholders' agreement and employment agreement contained restraint provisions in respect of, *inter alia*, prohibiting the undertaking of services for clients, and soliciting employees, of the applicants – whether the restraints are valid and reasonable

TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – RESTRAINTS OF TRADE – VALIDITY AND REASONABLENESS – PARTICULAR CASES – PARTNERSHIPS – where the respondent was a partner at an accountancy firm that merged with, *inter alia*, the first applicant – where the respondent entered into a shareholders' agreement with the first applicant and an employment contract with the second applicant – where the respondent transitioned from being an equity affiliate to a salary affiliate – where the respondent's remuneration consisted of a combination of dividends paid to a nominated trustee company and employee entitlements paid to the respondent – where all similar officers were subject to the same restraint provisions – where the respondent and all other officers were required to ensure the applicants had sufficient working capital and undertook to protect and maintain the financial viability of the applicants – where both the shareholders' agreement and employment agreement contained restraint provisions in respect of, *inter alia*, prohibiting the undertaking of services for clients, and soliciting employees, of the applicants – whether the relationship between the applicants and respondent was akin to a partnership in the sense of mutuality – whether the restraints are valid and reasonable

TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – RESTRAINTS OF TRADE – CONSTRUCTION OF AGREEMENTS – GENERALLY – where the respondent was a partner at an accountancy firm that merged with, *inter alia*, the first applicant – where the respondent entered into a shareholders' agreement with the first applicant and an employment contract with the second applicant – where both the shareholders' agreement and employment agreement contained restraint provisions in respect of, *inter alia*, prohibiting the undertaking of services for clients, and soliciting employees, of the applicants – where the services the respondent was restrained from undertaking was defined to mean professional services and any other activity the applicants' board decided would be carried on by the group – where the clients the respondent was prohibited for providing services for extended to all clients of each subsidiary of the first applicant and also to entities that referred clients to the applicants – whether the restraints were too wide and broad in scope to reasonably protect the applicants' legitimate interest and were thus void

AGA Assistance Australia Pty Ltd v Tokody [2012] QSC 176, considered
Artcraft Pty Ltd v Chandler [2003] QSC 102, cited
BearingPoint Australia Pty Ltd v Hillard [2008] VSC 115, considered
Bridge v Deacons [1984] 1 AC 705, considered
Cactus Imaging Pty Ltd v Peters (2006) 71 NSWLR 9; [2006] NSWSC 717, considered
Koops Martin Financial Services Pty Ltd v Reeves [2006] NSWSC 449, cited
Queensland Co-operative Milling Association Ltd v Pamag Pty Ltd (1973) 133 CLR 260; [1973] HCA 24, cited
Stenhouse Australia Ltd v Phillips [1974] AC 391, considered
Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317, cited

COUNSEL: D G Clothier QC, with G Sheahan, for the appellants
K E Downes QC, with P McCafferty, for the respondent

SOLICITORS: McInnes Wilson Lawyers for the appellants
Holding Redlich for the respondent

Introduction

[1] The respondent, Mr Sully, is a 62 year old chartered accountant. He has practised as a chartered accountant for over 30 years.

[2] On or about 5 June 2012 he became a party to a Shareholders' Agreement with the first applicant, BDO Group Holdings (Qld) Pty Ltd (now BDO Group Holdings (Qld)

Limited).[1] BDO Group Holdings is the parent company of the BDO Group which operates a substantial accounting practice, with its principal office in Brisbane.

[3] Mr Sully also became a party to an Employment Agreement dated 1 July 2012 with the second applicant, BDO Administration (Qld) Pty Ltd.[2] BDO Administration is the service entity of the BDO Group.

[4] Both the Shareholders' Agreement and the Employment Agreement contain non-competition restraint clauses.[3]

[5] Mr Sully, by letter dated 19 January 2015,[4] gave notice of his resignation which took effect on 19 April 2015 (a 3 month notice period).

[6] By amended originating application filed by leave on 17 April 2015, the first and second applicants seek declaratory and injunctive relief to enforce those restraint provisions.

[7] Before I identify the issues to be decided it is necessary to outline some of the background to the proceedings.

Background

[8] Mr Sully, as a chartered accountant, has provided accountancy services predominately to medical practitioners and barristers. He practiced as a sole practitioner at the Australian Medical Association's headquarters at Kelvin Grove, Brisbane prior to joining an accountancy practice known as PKF in Brisbane.[5] Mr Sully was a partner at PKF in Brisbane. Whilst at PKF he built up a substantial client base of approximately 320 clients. In or about August 2012, he and other partners of PKF in Brisbane merged with the BDO Group.

[9] Prior to this merger the BDO Group was restructured in about 2010. It moved from a partnership structure to a corporate structure. The Shareholders' Agreement and the Employment Agreement are pro forma agreements which reflect this restructuring. The Shareholders' Agreement states, under the heading "Background", that the parties agree that the BDO Group "must carry on the Business, and the Group's affairs must be managed and controlled, on the terms of [the Shareholders' Agreement]".[6] The BDO Group is defined to mean BDO Holdings, its subsidiaries, BDO Audit (Qld) Pty Ltd and BDO Kendalls Holdings Limited as trustee for the BDO Kendalls Group Trust.[7]

[10] Clause 3.1 of the Shareholders' Agreement identifies the objectives of the BDO Group. These objectives include carrying on and developing the business including securing new

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1 Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015.
2 Exhibit ACS-2 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015.
3 Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, cl 23; exhibit ACS-2 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, cl 20.
4 Exhibit ACS-5 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015.
5 Transcript of proceedings, 1-44, lines 9-13.
6 Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, 3.
7 Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, 8.

clients, providing timely and accurate service and advice to clients and providing a quality work environment.[8]

[11] The Shareholders' Agreement provides for two principal categories of shareholding: equity and salary.[9] Both of these categories of shares are redeemable preference shares with a face value of $1.00. An equity shareholding contemplates that an individual (described as an "affiliate") would be employed, on set conditions, by BDO Administration. That individual does not directly hold any shares. Rather, the shares are issued to an entity nominated by that affiliate. Both the shareholder and the affiliate are parties to the Shareholders' Agreement. The remuneration in respect of a particular shareholder and affiliate consists of a combination of dividends paid to the shareholder, and employee entitlements paid to the affiliate.

[12] At or about the time of the merger Mr Sully and Yllus Pty Ltd, as trustee for the Sully Family Trust, adopted the terms of the Shareholders' Agreement dated 25 November 2010 by Deed of Accession dated 5 June 2012.[10] Yllus Pty Ltd therefore became an equity shareholder and Mr Sully an equity affiliate.

[13] The merger was effected by the assets of PKF in Brisbane (including goodwill) being transferred to the BDO Group in return for, amongst other things, the issue of equity shares to associated entities of the PKF partners and the partners becoming affiliates of their equity shareholders. The transfer of the PKF assets (including the goodwill) was for a nominal consideration of $64.00.

[14] At the time of the merger Mr Sully was 59 years of age. He was concerned that, pursuant to clause 9.2(a) of the Shareholders' Agreement, he was required to resign from the BDO Group on 30 June 2013 following his attaining 60 years of age. This mandatory resignation was however, subject to Mr Sully applying to the Managing Director, Mr Schiffmann, to continue to work in the BDO Group after he had turned 60 on the basis that the decision to approve that continuation of work post-60 years of age was reviewed annually. Mr Sully raised this concern with Mr Schiffmann. By letter dated 7 June 2012,[11] Mr Schiffmann offered some comfort to Mr Sully in respect of that retiring provision. The letter relevantly stated:

> "What I have said to you is that, while we have a specific retirement age, that does not mean an individual has to retire at that stage from the firm. This process gives us the opportunity to ensure that there is an appropriate transition plan in place for clients particularly."

[15] Upon merging, Mr Sully joined the Private Client Division of the BDO Group and headed a sub-team comprising two managers, two senior accountants and a personal assistant who had all followed him from PKF. He also brought most of his 320 clients.

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8 Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, cl 3.1.

9 Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, cl 3.3. The other class of shares is "residuary shares".

10 Affidavit of Anthony Craig Schiffmann sworn 13 March 2015, [2]; exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, 49-53.

11 Exhibit ACS-3 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015.

[16] Mr Sully turned 60 by 30 June 2014. He informed Mr Schiffmann that he wished to stay on as a salary (rather than an equity) partner. Mr Schiffmann agreed to this. As a result, the equity shares of Yllus Pty Ltd were redeemed and it was issued with salary shares.[12]

[17] Mr Sully also asked that his remuneration be increased. By letter dated 9 September 2014 from Mr Schiffmann this request was refused and Mr Sully's remuneration remained the same.[13]

[18] Mr Sully did not execute a new Employment Agreement as a salary affiliate as distinct from an equity affiliate.

[19] By letter dated 19 January 2015, Mr Sully purported to resign pursuant to clause 9.3(a) of the Shareholders' Agreement.[14] This was the wrong clause. There were two clauses in the Shareholders' Agreement which dealt with resignation. Pursuant to clause 8.3(a) the affiliate of a salary shareholder could resign upon giving three months' notice whereas under clause 9.1 an affiliate of an equity shareholder could only resign upon giving nine months' notice. As Yllus Pty Ltd was, as at 19 January 2015, a salary shareholder, Mr Sully was only required to give three months' notice.

[20] Mr Sully met with Mr Schiffmann and Mr Crothers on 21 January 2015. Mr Crothers was the head partner of the Private Client Division in which Mr Sully had practised since he joined the BDO Group in 2012. There was some dispute as to what was actually said at this meeting. For the purposes of determining what relief should be granted it is not necessary to make findings of fact as to what was said at this meeting. It may however, be accepted that Mr Sully stated that at an appropriate time he intended to set up in private practice.[15] Mr Sully had also informed his sub-team that he was resigning from the BDO Group and was intending to commence in practice at the appropriate time. He had not, however, discussed with any person in his sub-team the prospect of employment in his new practice. Whilst he informed some clients, who were close friends, of his decision to resign, he has not sought to induce, solicit or canvass any of his clients to leave the BDO Group and follow him to his new practice. Mr Sully's position is that subject to the determination of this Court as to what, if anything, is a reasonable restraint, he wishes to start his new practice as soon as possible.[16]

[21] On 23 January 2015 Mr Schiffmann handed Mr Sully a letter of the same date which notified him that he was not required to attend at BDO's offices and should have no further contact with employees or clients other than through Mr Schiffmann.[17] Mr Sully has complied with Mr Schiffmann's instructions.[18]

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12 Exhibit BRS-1 to the affidavit of Brian Russell Sully sworn 31 March 2015.
13 Exhibit ACS-4 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015.
14 Exhibit ACS-5 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015.
15 Exhibit ACS-7 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015.
16 Transcript of proceedings, 1-48, lines 8-10.
17 Exhibit ACS-6 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015.
18 Affidavit of Brian Russell Sully sworn 31 March 2015, [9].

The issues

[22] The matter did not proceed by way of pleadings. The issues in the case were identified in the parties' written and oral submissions. The issues may be distilled as follows:

(a) What is the legitimate interest sought to be protected by the restraints by BDO Group Holdings and BDO Administration?

(b) Are the restraints reasonable as between the parties?

(c) What is a reasonable period of restraint (if any)?

(d) What relief should be granted?

[23] A further issue that was identified was whether, upon BDO Group Holdings redeeming the equity shares of Yllus Pty Ltd, Mr Sully's Employment Agreement was terminated. I will deal with this issue in the course of considering the relevant agreements.

The Shareholders' Agreement

[24] By Deed of Accession dated 5 June 2012, Mr Sully and Yllus Pty Ltd agreed with the parties to the Shareholders' Agreement to observe, perform and be bound by the Shareholders' Agreement as a party to the Shareholders' Agreement.[19]

[25] By clause 3.2 of the Shareholders' Agreement, Mr Sully and Yllus Pty Ltd were required to diligently and faithfully devote their attention (subject to the terms of any employment between the affiliate and a member of the Group) to the Business.[20] Business was defined to mean "professional services" and "any other activity the Board decides will be carried on by the [BDO] Group".[21] Clause 3.2 also required Mr Sully and Yllus Pty Ltd to cooperate and use their best endeavours to ensure that the Group successfully conducted the Business.[22] By clause 3.2, Yllus Pty Ltd was required to give approval to make decisions that were required of it in good faith and in the best interests of the Group and the conduct of the Business as a commercial venture.[23]

[26] As already observed, pursuant to clause 8.3(a) an affiliate of a salary shareholder may resign upon giving three months' notice whereas the notice required by an affiliate of an equity shareholder pursuant to clause 9.1 is at least nine months' notice.

[27] Clause 10 gives to the outgoing shareholder an election to retain clients ("**outgoing clients**"). This requires the outgoing shareholder to pay an amount to the Group for the right to accept work from those clients. This amount is calculated in accordance with

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[19] Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, Deed Poll – Deed of Accession 5 June 2012, cl 3.
[20] Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, cl 3.2(a).
[21] Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, 4.
[22] Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, cl 3.2(b).
[23] Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, cl 3.2(e).

clause 10.4. If an outgoing shareholder, such as Yllus Pty Ltd, adopts this procedure the restraints provided by clause 23 do not apply. Clause 10.3 provides that all clients other than the outgoing clients are to remain clients of the Group and the restraints in clause 23 apply in respect of those clients.

[28] Clause 12.1(f) requires BDO Group Holdings and each equity shareholder to exercise its rights as the holder of equity shares to ensure that each member of the Group enters into and maintains an appropriate service or employment agreement with all officers and new employees who begin employment with the Group, including a restraint of trade clause generally in terms of clause 23.

[29] Clause 13.1 imposes upon equity shareholders an obligation to fund the Group. There is no similar obligation in respect of salary shareholders.

[30] Clause 23 is the restraint of trade clause:

> "**23.1 Non-competition restraint**
>
> Subject to clause 23.4, each Restrained Party must not during each Restraint Period and within each Restraint Area:
>
> (a) Engage In any activity which:
>
> (i) involves providing the same or similar services as comprised in any material part of the Business Activity to any person who was, at any time within the 24 months prior to the Retirement Date for the relevant Restrained Party, a client of the Group; or
>
> (ii) is in competition with the Business Activity or any material part of it;
>
> (b) induce, solicit or canvass, approach or accept any approach from, any person who was at any time during the 24 month period prior to the Retirement Date for the relevant Restrained Party, a Client to obtain the custom of that person in a business or activity which:
>
> (i) is the same or similar to the whole or any material part or parts of the Business Activity; or
>
> (ii) is in competition with the Business Activity or any material part of it;
>
> (c) do or say anything harmful to the reputation of the Group or which may lead a person to cease, curtail or alter the terms of its dealings with the Group;
>
> (d) interfere with the relationship between the Group and its Clients and employees;;
>
> (e) represent himself or herself as being in any way connected with or interested in the Group;

(f) seek to engage or engage the services of any employee of the Group; or

(g) induce or help to induce an officer or employee of the Group to leave their office or employment.

23.2 Exceptions

This clause does not restrict a Restrained Party from:

(a) performing any employment agreement with the Group;

(b) holding 5% or less of the shares of a company listed on a Stock Exchange;

(c) holding Shares in the Company; or

(d) recruiting a person through a recruitment agency (except if the agency targets employees of the Group) or in a response to a newspaper, web page or other public employment advertisement.

23.3 Acknowledgements

The parties agree:

(a) the restraints in clause 23.1 are separate from one another and if any of them is unenforceable the rest are unaffected;

(b) that any combination of the acts referred to in clause 23.1 is unfair and calculated to damage the Business; and

(c) that each of the restraints in clause 23.1 is reasonable in its extent (as to duration, geographical area and restrained conduct) considering the interests of each party to this document and goes no further than is reasonably necessary to protect the interests of the other Shareholders, the Group and the Business (including the goodwill of the Business).

23.4 No application

This clause has no effect if an Insolvency Event occurs in respect of the Company."

[31] Clause 1.1. of the Shareholders' Agreement contains the definitions of a number of words and terms used in clause 23:

1. "**Restrained Party**" is defined to mean "each Affiliate";

2. The term "**Affiliate**", which does not appear in clause 23 but which is relevant by reason of the definition of Restrained Party, means, *inter alia*:

> "in relation to a Shareholder who first acquires Shares after the date of this document – the individual identified as its Affiliate in the Deed of Accession."

3. "**Restraint Area**" is defined to mean:

"(a) Queensland, New South Wales and Victoria;;

(b) Queensland and New South Wales;

(c) Queensland; and

(d) within a 200km radius of the Group's principal place of business during the Restraint Period."

4. "**Restraint Period**" means each of the following:

"(a) the period starting when the relevant Restrained Party becomes an Affiliate and ending 18 months after the Retirement Date for that relevant Restrained Party;

(b) the period starting when the relevant Restrained Party becomes an Affiliate ending 12 months after the Retirement Date for the relevant Restrained Party;

(c) the period starting when the relevant Restrained Party becomes an Affiliate and ending 6 months from the Retirement Date for the relevant Restrained Party."

5. "**Engage In**" is defined to mean:

"to carry on, participate in or otherwise be involved in or have an interest in (directly or through any interposed body corporate, trust, partnership or entity) whether as a shareholder, unitholder, director, consultant, adviser, contractor, principal, agent, manager, employee, beneficiary, partner or associate'.

6. "**Business Activity**" is defined to mean "the activities of the Business".

7. The term "**Business**" is defined to mean:

"(a) professional services; and

(b) any other activity the Board decides will be carried on by the Group."

8. "**Group**" means:

"(a) the Company;

(b) its Subsidiaries;

(c) BDO Audit (Qld) Pty Ltd ACN 134 022 870; AND

(d) BDO Kendalls Holdings Limited as trustee for the BDO Kendalls Group Trust."

9. "**Retirement Date**" is defined to mean:

"in respect of an Outgoing Shareholder, a Salary Shareholder or the Affiliate of either, the date the Affiliate ceases to be Actively Engaged by the Group."

10. "**Actively Engaged**" is defined to mean:

"in respect of an Affiliate at any particular time, engagement with the Group on a basis consistent with his or her employment agreement at that time."

11. **"Client**" is defined to include:

"(a) a party for whom professional services are provided for a fee by any member of the Group or any Affiliate;

(b) any entity (other than a [sic] entity Controlled by that Affiliate or his or her family) in connection to which an Affiliate receives fees as a director; and

(c) any partnership, company, trust or entity which regularly refers parties described in paragraph (a) to members of the Group or any Affiliate to provide professional services."

The Employment Agreement

[32] Mr Sully's Employment Agreement dated 1 July 2012 is entitled "Employed agreement – Equity Affiliate".[24] It is an agreement as between Mr Sully and BDO Administration. By clause 1(a) it provides that Mr Sully will be employed in the position of "Director" and that his market facing title will be "Partner".

[33] Clause 20 is the relevant restraint clause and provides:

"(a) You acknowledge that:

(i) you have been placed in a position with us whereby you will establish personal contact and relationships with our clients and persons in the habit of dealing with us and that these relationships form part of our goodwill and are of great value to us; and

(ii) the covenants in respect of restraint of trade contained in this clause are fair and reasonable having regard to:

(A) the relationships which you will develop with our Clients, employees and other persons in the habit of dealing with us and the ability you have, or will have, to influence their business decisions after employment;

(B) the Confidential Information disclosed to, or accessed by, you during the course of your employment, and your involvement in reviewing and developing that Confidential Information;

(C) our legitimate business needs to protect the Confidential information from use or disclosure other than allowed by this agreement;

[24] Exhibit ACS-2 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015.

(D) the irreparable damage that would be done to our business if:

(I) the Confidential Information was disclosed to our competitors; and

(II) you were not restrained from engaging in the activities set out in clause 20(b) below after termination of employment;

(iii) we rely upon these acknowledgements in entering into this agreement; and

(iv) substantial and valuable consideration has been received for each separate covenant and restraint in this clause directly and indirectly by you, including your employment and remuneration and leave entitlements.

(b) In consideration of this agreement and to protect our goodwill, you agree that you will not for the Restraint Period:

(i) Within the Restraint Area, engage in any activity which:

(A) involves providing the same or similar services as comprised in any material part of our business to any person who was, at any time within the 24 months prior to the termination of your employment, a Client of BDO; or

(B) is in competition with our business or any material part of it;

(ii) induce, solicit or canvass, approach or accept any approach from, any person who was, at any time during the 24 month period prior to the termination of your employment, a client of BDO to obtain the custom of that person in a business or activity which:

(A) is the same or similar to the whole or any material part or parts of our business; or

(B) is in competition with our business or any material part of our business;

(iii) do or say anything harmful to our reputation or which may lead a person to cease, curtail or alter the terms of its dealings with us;

(iv) interfere with our relationship with our Clients or employees;

(v) represent yourself as being in any way connected with or interested in us;

(vi) become an employee of any Client of ours in order to perform work which we might reasonably expect to otherwise perform;

(vii) seek to engage or engage the services of any of our employees; or

(viii) induce, help to induce or encourage any of our officers or employees to leave their office or employment.

(c) You agree that the restraints set out above will apply as if they consisted of several separate, independent and cumulative restraints.

(d) The validity of each separate restraint will not be affected by the invalidity, if any, of any other restraint.

(e) You may seek our consent in writing to be released from any restraint.

(f) 'Restraint Area' for the purpose of this clause means each of the following:

(i) Queensland, New South Wales and Victoria;

(ii) Queensland and New South Wales;

(iii) Queensland;

(iv) within a 200km radius of our principle [sic] place of business during the Restraint Period.

(g) 'Restraint Period' for the purposes of this clause means each of the following:

(i) 18 months after termination of your employment;

(ii) 12 months after termination of your employment;

(iii) 6 months after termination of your employment;

(iv) 3 months after termination of your employment.

(h) 'Client' for the purposes of this clause includes:

(i) a party for whom professional services are provided for a fee by us or our employees;

(ii) any company in connection to which we or any of our employees receives fees as a director; and

(iii) any partnership, company, trust or entity which regularly refers parties described in paragraph (i) to us to provide professional services,

but does not include a party you have elected to continue to accept work from and in respect of whom you have complied with clause 10 of the Shareholders' Agreement.

(i) 'Engage in' for the purposes of this clause means to carry on, participate in or otherwise be involved in or have an interest in (directly or through any interposed body corporate, trust, partnership or entity) whether as a shareholder, unitholder, director, consultant,

adviser, contractor, principal, agent, manager, employee, partner or associate.

(j) 'Shareholders' Agreement' means the shareholders agreement between us, you and BDO Group Holdings (Qld) Pty Ltd.

(k) This clause has no application if an Insolvency Event occurs in relation to BDO."

[34] Clause 34 contains the definition of "Group" to mean:

"A. BDO Group Holdings (Qld) Pty Ltd and its subsidiaries;

B. BDO Audit & Assurance (Qld) Pty Ltd; and

C. BDO Holdings Limited as trustee for the BDO Group Trust."

[35] Clause 26 deals with termination. Clause 26(c) required Mr Sully as an equity affiliate to give at least nine months' notice.

[36] Clause 33 provides that if there is any inconsistency between the Employment Agreement and the Shareholders' Agreement, the Shareholders' Agreement prevails to the extent of that inconsistency.

[37] Clause 35 identifies the obligations owed by Mr Sully not only to BDO Administration but also to any member of the Group which is a defined term.

[38] It is convenient at this point to deal with the submission of the respondent that upon the equity shares of Yllus Pty Ltd being cancelled in BDO Holdings on 1 July 2014, the Employment Agreement as between BDO Administration and Mr Sully (as an equity affiliate) was terminated. The respondent's argument is that the restraints imposed by clause 20 of the employment agreement were only binding on Mr Sully whilst he was employed as an equity affiliate. He ceased to be an equity affiliate on 1 July 2014 upon the equity shares of Yllus Pty Ltd being redeemed. Thereafter he became a salary affiliate but did not enter into a new employment agreement as a salary affiliate.[25] This argument should be rejected.

[39] There is no dispute that after 1 July 2014 Mr Sully's employment continued. This is recorded in Mr Schiffmann's letter of 23 January 2015 which states:[26]

"Your 1 July 2012 Employment Agreement was modified in terms of our letter to you dated 9 September last year (**the Employment Agreement**). We agree your modified status as Salary Shareholder and Affiliate brought into effect Clause 8 of the BDO Shareholder's [sic] Agreement and particularly paragraph 8.3 (not 9.3 as appears in your letter of resignation) regarding resignation as follows:

'8.3 Resignation

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[25] Respondent's outline of submissions dated 17 April 2015, [113]-[123].

[26] Exhibit ACS-6 to affidavit of Anthony Craig Schiffmann sworn 13 March 2015.

> *(a) The Affiliate of a Salary Shareholder may resign upon giving three months' notice in writing to the Board or such lesser period as the Managing Director may accept.*"

[40] Clause 26 of the Employment Agreement which deals with termination does not identify as an event of termination of employment the redeeming of shares of an equity shareholder. The only relevant difference between an employment agreement for an equity affiliate as opposed to a salary affiliate is the period of notice that is required for resignation, namely at least nine months rather than three months. To the extent that this gives rise to an inconsistency, such an inconsistency is dealt with by clause 33 of the Employment Agreement which provides that the Shareholders' Agreement prevails. The Shareholders' Agreement states the relevant period of notice required of a salary affiliate in clause 8.3. It follows that after 1 July 2014 the terms and conditions of Mr Sully's employment with BDO Administration continued to be governed by the 1 July 2012 Employment Agreement save for the period of notice constituting 3 months in accordance with the Shareholders' Agreement.

Issue (a) – what is legitimate interest sought to be protected by the restraints by BDO Group Holdings and BDO Administration?

[41] All parties agree that no public interest consideration arises. It may also be accepted that the merger of PKF Brisbane with BDO Group cannot be characterised as the sale of a business. The applicants' characterise the legitimate interest sought to be protected by the restraints as going beyond a mere employment relationship to something akin to that of a partnership. What the restraints seek to protect is the goodwill of the BDO Group which include, or is substantially the result of, the relationships developed between the partners and the clients of the BDO Group.[27] The respondent identifies the relevant interest sought to be protected as one of "customer connections" only arising whilst Mr Sully was employed by BDO Administration.[28]

[42] The legitimate interest cannot necessarily be ascertained by placing the agreement in a particular category and then trying to align that category with existing cases.[29] In *Bridge v Deacons* [1984] 1 AC 705 the Privy Council considered a restraint clause in a partnership agreement. The person sought to be restrained had become a full capital partner in Deacons with a 5% share of the business and assets, including the goodwill. Clause 28(a) of the relevant partnership agreement provided that no partner ceasing to be a partner should for five years thereafter act as a solicitor in the colony of Hong Kong for any person, firm, or company who was at the time of him ceasing to be a partner or had during the period of three years prior, been a client of the partnership. The partnership increased and was divided into separate departments whereby Bridge became the partner in charge of the intellectual and industrial property department. As a consequence he acted only for clients of that department, having no contact with 90% of the firm's clients. On his retirement from the partnership at the end of 1982, he transferred his share of the assets to the continuing partners in accordance with the partnership agreement.

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[27] Applicants' outline of submissions dated 17 April 2015, [62]-[63].
[28] Transcript of proceedings, 1-58, lines 15-20.
[29] Respondents' outline of submissions dated 17 April 2015, [50].

[43] The Privy Council upheld the validity of the restraint. Lord Fraser, Lord Wilberforce, Lord Scarman, Lord Roskill and Lord Templeman observed that:[30]

> "… a decision on whether the restrictions in this agreement are enforceable or not cannot be reached by attempting to place the agreement in any particular category, or by seeking for the category to which it is most closely analogous. The proper approach is that adopted by Lord Reid in the *Esso Petroleum* case [1968] A.C. 269, where he said, at p. 301:
>
> > 'I think it better to ascertain what were the legitimate interests of the appellants which they were entitled to protect and then to see whether these restraints were more than adequate for that purpose.'
>
> What were the respondent's legitimate interests will depend largely on the nature of their business, and on the position of the appellant in the firm. Their Lordships therefore turn to consider the evidence on these matters."

[44] The applicants submit that the nature of the arrangements between the applicants and the respondent, as evidenced by the Shareholders' Agreement and Employment Agreement, is in substance a partnership.[31] The restraints are therefore directed to protecting the goodwill as well as the established customer connections of the BDO Group. What is sought to be protected is "the common good of BDO".[32]

[45] As to the protection of established customer connections, it may be accepted that while an employer is not entitled to be protected against mere competition by a former employee, the employer is entitled to be protected against unfair competition based on the use by the employee after termination of employment of the customer connections which the employee has built up during the employment.[33] The customer connection factor can be significant in cases involving professionals in whom clients personally repose trust and confidence.[34] The applicants, however, submit the present case goes beyond that of a pure employment relationship. Here the restraints seek to also protect the goodwill of the partnership. The applicants rely on *Bridge v Deacons* where the fact that the restraint was mutual was considered an important factor. So too was the fact that the clients were clients of the firm as whole. As their Lordships observed:[35]

> "… it is necessary to recall that the partners in the respondent firm, as constituted from time to time, are the owners of the firm's whole assets, including its most valuable asset, goodwill. The appellant had owned a share of the assets while he was a partner, but he transferred his share to the continuing partners when he ceased to be a partner. …
>
> On this question the mutuality of the contract is a most important consideration. The contract applied equally to all the partners. None of them could tell whether he might find himself in a position of being a retiring

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30 *Bridge v Deacons* [1984] 1 AC 705, 714.
31 Applicants' outline of submissions dated 17 April 2015, [60]-[67].
32 Applicants' outline of submissions dated 17 April 2015, [87], [89].
33 *Koops Martin Financial Services Pty Ltd v Reeves* [2006] NSWSC 449, [30]. See also, *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9, 17-18 [25].
34 *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9, 18-19 [28].
35 *Bridge v Deacons* [1984] 1 AC 705, 716.

> partner subject to the restriction in clause 28, or of a continuing partner with an interest to enforce the restriction."

[46] The respondent, however, submits that this is not a partnership situation. Rather it was a business operated by one company, in which the respondent held no shares, which had a contract with another company, a service company, which employed the respondent. His position was that of partner but no partnership in fact existed.[36] This submission ignores the commercial reality of the relationship established by the Shareholders' Agreement and the Employment Agreement as between the applicants and the respondent.

[47] By clause 2.1 of the Merger agreement,[37] the PKF East Coast Partnership and the PKF entities identified in the agreement agreed to transfer to BDO Group Holdings and the BDO Queensland entities identified in the Merger agreement all the assets set out in Schedule 5 to the agreement free of all encumbrances. By Schedule 5 what was transferred was all the goodwill of PKF Queensland including general goodwill, audit goodwill, corporate finance goodwill, corporate recovery goodwill, insolvency goodwill and all contracts, intellectual property and records. The BDO entities to which these assets were transferred included not just the first and second applicants but also BDO (Qld) Pty Ltd, BDO Audit Goodwill Co (Qld) Pty Ltd, BDO Business Recovery & Insolvency (Qld) Pty Ltd and BDO Corporate Finance (Qld) Limited. The partners of PKF Queensland were also transferred by the mechanisms identified in clause 2.2 which included their eligible nominees agreeing to subscribe for the number of equity shares in BDO Group Holdings and the making of loans by their eligible nominees to the BDO Group in accordance with clause 13 of the Shareholders' Agreement. The effect of the merger was that all former partners, staff and clients of PKF Queensland became the partners, staff and clients of the BDO Group.

[48] By executing the Deed of Accession and accepting the allocation of shares in BDO Holdings, the respondent's nominee, Yllus Pty Ltd, became an equity shareholder and thereafter a salary shareholder. By clause 13 of the Shareholders' Agreement the respondent and Yllus Pty Ltd along with the BDO Group had to ensure that the Group had sufficient working capital to conduct the business by providing loans from the equity shareholders to the Group in their respective proportions. Yllus Pty Ltd, as an equity shareholder, also had certain responsibilities pursuant to clause 12.1(f) to ensure that all officers and new employees entered into an employment agreement which included the restraint clause in terms of clause 23 of the Shareholders' Agreement. These obligations are generally consistent with the mutuality of obligations found in a partnership agreement. This is further supported when one has regard to the objectives of the BDO Group as outlined in clause 3.1 of the Shareholders' Agreement and each shareholder's general commitments to the Group outlined in clause 3.2. The respondent, as an affiliate, was also responsible, pursuant to clause 5.12(a) of the Shareholders' Agreement, to protect and maintain the financial viability of the BDO Group and, pursuant to clause 5.12(b) to, as much as possible, support the other affiliates in achieving the objectives set out in clause 3.1.

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[36] Respondent's outline of submissions dated 17 April 2015, [53].
[37] Exhibit BRS-4 to the affidavit of Brian Russell Sully sworn 16 April 2015.

[49] These clauses, when taken together in the context of an accountancy practice, seek to protect the goodwill of the practice. The restraint provisions in clause 23.1 are expressly identified as being reasonably necessary to protect the interests of the other shareholders, the BDO Group and the business including the goodwill of the business.[38]

[50] The mutuality of these obligations including the payment of dividends to equity and salary shareholders was explained by Mr Schiffmann:[39]

> "26. All of the equity affiliates at BDO are paid a salary of $217,000. The payment of dividends depends upon the performance of both the individual partner and the overall performance of BDO. Notwithstanding an equity affiliate may not achieve their own budgeted profit level, they will receive an increase in the dividends paid to them if BDO exceeds its budgeted profit level. The Respondent therefore directly benefited from BDO's profitability irrespective of his own performance.
>
> 27. In addition to the former partners of PKF Brisbane signing the Shareholders' Agreement and Equity Affiliate Agreement in the same format as that signed by the Respondent, since 2009 when BDO incorporated, all of the current and former Shareholders and Equity Affiliates of BDO have signed agreements with restraint provisions identical to those contained in the agreements exhibited at ACS1 and ACS2. All Salary Affiliates of BDO are also required to sign agreements that contain restraint provisions similar in terms to those exhibited at ACS1 and ACS2 to my first affidavit. Exhibited hereto and marked **ASC-16** is a proforma copy of the Employment Agreement for Salary Affiliates.
>
> 28. As stated above, each of the equity and salary affiliates receive dividends based on the performance of BDO. In the event that an equity affiliate or a salary affiliate left BDO and took with them their client base and the revenue that goes with that, that would have a direct effect on the profitability of BDO and the dividends payable to the remaining equity and salary affiliates. For example, if the Respondent was permitted to take with him his complete client list, which generates fees of $1.7m to $1.8m per annum, that would directly impact upon the profitability of BDO and therefore the dividends payable to the remaining salary and equity affiliates. I estimate that on the figures for the financial year ending 30 June 2014 (with all other things remaining the same), that would have resulted in the salary and equity affiliates receiving in total approximately $700,000 less by way of dividends.
>
> 29. The loss of a client list the size of the Respondent's has consequences over successive financial years, that is the loss is not confined to only one financial year.
>
> 30. The Respondent's client list and revenue generated therefrom represents a major contribution to BDO's overall profitability. I

[38] Exhibit ACS-1 to the affidavit of Anthony Craig Schiffmann sworn 13 March 2015, cl 23.3(c).
[39] Affidavit of Anthony Craig Schiffmann sworn 9 April 2015, [26]-[33].

estimate that each of the current 40 equity and salary affiliates achieves a gross fee level in the range of $1.5m to $2m for BDO per annum. The contribution from the Respondent's clients therefore represents approximately 4% of BDO's total revenue, which is material.

31. In my experience, if the Respondent was able to take his clients with him and otherwise not be subject to the restraint the subject of clause 23 of the Shareholder Agreement, I do not believe BDO would be able to replace that number of Personal Client Services clients.

32. Further, if an equity or salary affiliate left BDO and took their client base and associated revenue with them, BDO would retain the staffing costs and associated overheads attributable to the former practice area of that affiliate without the revenue to cover those overheads. That would result in a direct material loss to BDO. It may also result in the reduction of staff through redundancies if the staff in that practice area could not otherwise be redeployed in the practice. Thus the staff of the equity and salary affiliates, in addition to the equity and salary affiliates, also benefit from the restraints contained in the Shareholder Agreement in terms of the retention of clients and the revenue derived from the clients should an equity or salary affiliate resign from the practice.

33. As each of the equity and salary affiliates are bound by identical restraints they are all afforded the protection of mutual restraints as against each other. This specifically guards against the above outcomes and enhances the appeal to prospective equity and salary affiliates to join and/or be elevated within BDO so as to enhance BDO's profitability."

[51] Whilst this is not a partnership in the sense of the partners sharing in the profits and losses of the partnership, there is however an element of mutuality in that the payment of dividends depends upon the performance not only of an individual affiliate but the overall performance of the BDO Group, including all affiliates.

[52] I therefore accept that the legitimate interests sought to be protected by the restraint clauses include both the goodwill of the BDO Group and its established customer connections.

[53] The respondent submits, in respect of the Employment Agreement, that the second applicant has not identified any legitimate interest which was capable of protection. It is a service company which employs the staff who work in the business operated by the first applicant.[40] This submission, however, takes too narrow a view of the goodwill that is sought to be protected. The goodwill of PKF Queensland was not merely transferred to BDO Group Holdings. Clause 2.1 of the Merger Agreement provides that the goodwill was transferred to BDO Queensland which is defined in clause 1.1 of the Merger Agreement as meaning not only BDO Holdings, but all those companies identified in Schedule 4 to the Agreement. This includes the second applicant, BDO Administration. By the restraint clauses in the Employment Agreement, BDO Administration seeks to protect the same goodwill as is sought to be protected under the Shareholders' Agreement.

[40] Respondent's outline of submissions dated 17 April 2015, [64].

By clause 20(a)(i) of the Employment Agreement, the respondent acknowledged that he had been placed in a position whereby he would establish personal contact and relationships with clients and persons in the habit of dealing with the BDO Group and that these relationships form part of the goodwill of the BDO Group and are of great value to it. The Employment Agreement also identifies in clause 35(a) that references to "we", "us", "our business", "our employees" and "our clients" are references not only to BDO Administration but also to members of the Group. Clause 35(b) further provides that a number of the respondent's duties and obligations apply not only to BDO Administration, but also to any member of the Group. These obligations include the non-competition provisions in clause 20.

Issue (b) – are the restraints reasonable as between the parties?

[54] The relief sought in paragraphs 1 and 1A of the amended originating application are declarations that clause 23 of the Shareholders' Agreement and clause 20 of the Employment Agreement are binding on the respondent for the period of 18 months, alternatively 12 months, and within the restraint area of Queensland and New South Wales or for such other period or within such other area as the Court determines. The reference to "for such other period" as the Court determines is not to be understood as permitting the Court to re-write the Shareholders' Agreement or the Employment Agreement so as to, for example, arrive at a restraint period not contemplated by those agreements.

[55] On their face, the declarations sought in paragraphs 1 and 1A require a consideration of the whole of clause 23 and clause 20. The injunctive relief sought by the applicants, however, is narrower in compass and only seeks to restrain Mr Sully in his dealings with clients and employees. Clause 23.3(a) and 20(d) provide in effect that the restraints are separate from one another and if any of them is unenforceable the rest are unaffected. During the hearing of the application, the oral submissions of Senior Counsel for both the applicants and the respondent were more focused on the restraints concerning clients and employees. The relevant clauses of the Shareholders' Agreement which are the subject of the injunctive relief sought are clause 23.1(a)(i), clauses 23.1(b)(i) and (ii) and clauses 23.1(d), (f) and (g). The relevant clauses of the Employment Agreement are clause 20(b)(i)(A), clauses 20(b)(ii)(A) and (B) and clauses 20(b)(iv), (vii) and (viii).

[56] A restraint of trade clause is contrary to public policy and *prima facie* void. The onus is on the applicants to establish that the relevant restraints are reasonably necessary to protect their legitimate interest. The reasonableness of the restraint clauses is to be determined at the time the contract was made, namely 5 June 2012 for the Shareholders' Agreement and 1 July 2012 for the Employment Agreement.[41]

[57] In both clause 23.3(c) of the Shareholders' Agreement and clause 20(a)(ii) of the Employee Agreement the respondent acknowledged the reasonableness of the restraints. Whilst Mr Sully did not obtain legal advice prior to executing the Deed of Accession or the Employment Agreement,[42] he had been provided draft copies of both the Shareholders' Agreement and the Employment Agreement approximately two months

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41 *Artcraft Pty Ltd v Chandler* [2003] QSC 102, [24].

42 Affidavit of Brian Russell Sully sworn 16 April 2015, [5].

prior to their execution.[43] No issues were raised by Mr Sully in relation to the restraints. This was in circumstances where he raised specific concerns in respect of clause 9.2 of the Shareholders' Agreement which dealt with the requirement for retirement by age 60. Whether the restraints are reasonable is a matter of law for the Court to decide and not something which is the proper subject of an admission.[44] There is however no suggestion that the parties were on unequal bargaining terms. Accordingly, whilst such an acknowledgement is not conclusive, it is a matter to which weight should be given in deciding whether or not the restraint is reasonable between the parties.

[58] The respondent submits that because of the width of the definition of "Business Activity", the restraints in clauses 23.1(a)(i) and 23.1(b)(i) and (ii) of the Shareholders' Agreement preclude him from providing any form of professional service, including those not provided by him during his employment or not provided by the Group while he was so employed and as such the clauses are void.

[59] The respondent also refers to the definitions of "Group" which includes the subsidiaries of BDO Holdings and the definition of "Client" which includes any partnership, company, trust or entity which regularly refers parties to the Group or any affiliate to provide professional services. The respondent submits that having regard to the width of these definitions, the restraints extend to someone who was not a client of the Group and with whom the respondent may have had no relationship. This may subject the respondent to liability for acting in contravention of the restraint without knowledge that the person or entity fell within the definition of "Client" simply because they happened to refer someone else to the first applicant.[45]

[60] This submission does not give sufficient recognition to the underlying commercial purpose of the Shareholders' Agreement. It is an agreement that is intended to apply to all equity and salary shareholders as well as affiliates. It seeks to identify mutual covenants which provide protection for the business. The obligations of the shareholders and the affiliates identified in the Shareholders' Agreement extend to obligations owed to the BDO Group. The width of the definitions and the extent of the restraints are reasonable when one correctly identifies that what is sought to be protected is the goodwill of the BDO Group as a whole. The Shareholders' Agreement is a pro forma agreement which applies not only to the particular circumstances of the respondent but to all aspects of the business activity of the BDO Group. Similar observations may be made in respect of the Employment Agreement.

[61] The width of these definitions does not detract from the fact that the BDO Group was in essence an accountancy practice headed by BDO Group Holdings with a number of subsidiaries which are specific to different client groups and work areas. Mr Schiffmann identified the nature of these business activities as including not only private clients but also tax, audit and advisory services.[46] The Court must determine the reasonableness of the restraints at the time the parties entered into the relevant agreements. There is no suggestion that at the time of entering into these agreements any party contemplated a

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43 Affidavit of Anthony Craig Schiffmann sworn 9 April 2015, [16]-[17].
44 *Queensland Co-operative Milling Association Ltd v Pamag Pty Ltd* (1973) 133 CLR 260, 268 (Walsh J).
45 Respondent's outline of submissions dated 17 April 2015, [84].
46 Affidavit of Anthony Craig Schiffmann sworn 9 April 2015, [9].

departure from the basic nature of the business of the BDO Group being an accountancy practice.

[62] The respondent further submits that the restraints in clause 23.1(d) of the Shareholders' Agreement and clause 20(b)(iv) of the Employment Agreement, namely that the respondent is not to engage in any activity which interferes with the relationship between the Group and its clients and employees, are uncertain. The uncertainty arises because of the vagueness of the meaning of the words "interfere" and "relationship".[47] The restraint however, whilst in general terms, is aimed at protecting not only the goodwill of the BDO Group but also customer and employee connections. The real issue, in relation to the reasonableness of the restraints, is the question of duration. The geographical restrains are largely irrelevant to the restraints concerning clients and employees. The reasonableness of the restraints in relation to obtaining clients and employees does not fall to be considered by reference to geographical considerations.

Issue (c) – what is a reasonable period of restraint (if any)?

[63] The restraint period under clause 23.1 of the Shareholders' Agreement cascades from 18 months to 12 months to 6 months. The restraint period under clause 20(g) of the Employment Agreement cascades from 18 months to 12 months to 6 months to 3 months. The notice period for a salary shareholder affiliate is three months.

[64] In *Cactus Imaging Pty Ltd v Peters*, Brereton J stated:[48]

> "Generally, the test of reasonableness for the duration of a non-solicitation covenant, when it is supported by customer connection, is what is a reasonable time during which the employer is entitled to be protected against solicitation, which in turn depends on how long it would take a reasonable competent replacement employee to show his or her effectiveness and establish a rapport with customers". (citations omitted)

[65] That case concerned a senior employee. His Honour found that a restraint period of 12 months was not excessive:[49]

> "In favour of the view that 12 months is not excessive is, first, that that is what the parties agreed; secondly, that at least for lower volume customers, it will probably take that long for a replacement to prove his or her competence and establish a rapport with the customer; thirdly, that insofar as the restraint protects confidential information, it would not have been unreasonable to think that knowledge of Cactus' pricing parameters and marketing strategies might well afford the employee an unfair advantage for as long as twelve months after separation; and fourthly, albeit slightly, that Ms McFarlane [a fellow employee] has a similar restraint."

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47 Respondent's outline of submissions dated 17 April 2015, [96]-[98].
48 *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9, 20 [36].
49 *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9, 22 [42].

[66] The respondent relies on the decision of Habersberger J in *BearingPoint Australia Pty Ltd v Hillard*.[50] Hillard was employed as managing director of information management. The period of notice he was required to give was 180 days. The team that Hillard led employed approximately 140 people across Australia. BearingPoint sought to have Hillard restrained from engaging in other employment and from contacting clients or prospective clients of BearingPoint or employees of BearingPoint for a period of 12 months. Habersberger J considered that the period of 12 months restraint was unreasonable:[51]

> "Most importantly, in my opinion, the twelve month period of the restraint on Mr Hillard performing information management services for any person, firm or company who was at the Termination Date a client of BearingPoint is too long. It seems to me that whilst BearingPoint has a legitimate interest in having some time in which to establish the new relationship between Mr Hillard's replacement and the client, twelve months is simply too long and is really an attempt to prevent competition. This is particularly the case where BearingPoint may have had up to a further 180 days in which to establish the new relationship, whilst Mr Hillard served his notice period."

[67] This case is relevant for three purposes. First, one may take into account a period of notice for the purposes of determining the reasonableness of the length of the restraint. Second, this was not a case that concerned mutuality of covenants nor the protection of goodwill. Third, his Honour considered that a period of three months was adequate for the purposes of BearingPoint protecting itself against a senior employee leaving and soliciting others to follow him:[52]

> "… I do not consider that a twelve month period is reasonable. If the other employees are not happy with the new arrangements at BearingPoint after a period of, say, no more than three months, then I do not see why the former senior employee cannot seek to persuade them to join his new employer."

[68] His Honour refused to grant injunctive relief in that case restraining the defendant from breaching the restraints because there was no existing threat that they would be breached.[53]

[69] The issue of duration was also considered by McMurdo J in *AGA Assistance Australia Pty Ltd v Tokody*.[54] In that case the defendant had built up a significant customer connection with clients who had insurance contracts that generally were for a duration of about three years. His Honour observed:[55]

> "… it is not simply a matter of looking at whether any of these contracts with clients was due to expire within a particular period from 12 April 2011. Rather, what is required is some assessment of the time during which these advantages of personal connection and knowledge would diminish to a point

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50 [2008] VSC 115.
51 *BearingPoint Australia Pty Ltd v Hillard* [2008] VSC 115, [156].
52 *BearingPoint Australia Pty Ltd v Hillard* [2008] VSC 115, [160].
53 *BearingPoint Australia Pty Ltd v Hillard* [2008] VSC 115, [164].
54 [2012] QSC 176.
55 *AGA Assistance Australia Pty Ltd v Tokody* [2012] QSC 176, [36].

> when they would no longer be worthy of protection by a restraint against employment in a substantially similar or competing business."

[70] That case did not concern a mutuality of covenants nor the protection of goodwill.

[71] In determining the period of restraint, the Privy Council in *Stenhouse Australia Ltd v Phillips*[56] identified some relevant factors:

> "It is for the judge, after informing himself as fully as he can of the facts and circumstances relating to the employer's business, the nature of the employer's interest to be protected, and the likely effect on this of solicitation, to decide whether the contractual period is reasonable or not. An opinion as to the reasonableness of elements of it, particularly of the time during which it is to run, can seldom be precise, and can only be formed on a broad and common sense view."

[72] The applicants rely on the following matters to support a restraint period of 18 months:

(a) Mr Sully, having been given the opportunity to consider the restraints prior to executing the relevant agreements, acknowledged that the restraints were reasonable as to duration;

(b) the restraints (and the duration of the restraints) are directed to protect the Group's legitimate interest including its goodwill and established customer connections;

(c) it would take the Group and, specifically, the partners of the Private Client Division, a significant period of time to become familiar with the personal tax affairs of, and to build a rapport with, over 300 clients;[57]

(d) as Mr Sully's type of work is annual in nature, it would take at least one annual tax return cycle to have any prospect of developing a relationship with a particular client. Likewise, it would take the clients a period of time to become familiar with a new partner in circumstances where many were longstanding clients of Mr Sully;[58] and

(e) according to Ms Houghton, who is a partner in the Private Clients Division, she and other staff, during Mr Sully's period of notice, have already commenced taking the necessary steps to service and retain his clients. Ms Houghton has not been able to speak or write to all of Mr Sully's clients. She has concentrated on the clients with the highest fee value to the BDO Group. She has been attempting to build some rapport with these clients.[59]

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[56] [1974] AC 391, 402.
[57] Affidavit of Anthony Craig Schiffmann sworn 9 April 2015, [39].
[58] Affidavit of Anthony Craig Schiffmann sworn 9 April 2015, [39].
[59] Affidavit of Sharon Leigh Houghton sworn 9 April 2015, [7], [21]; transcript of proceedings, 1-38, lines 10-35.

[73] Ms Houghton, in cross-examination, identified that there were some clients that would be contacted only once a year and others who will be contacted regularly.[60] She does not know how often the clients will require assistance from the BDO Group throughout the year until a year has passed.[61]

[74] The respondent submits that a restraint period of either 12 or 18 months is unreasonable. The respondent relies on the evidence of Mr Crothers, the head partner of the Private Clients Division. According to Mr Crothers, since joining the BDO Group, Mr Sully actually did very little of the accountancy work for his clients. He relied heavily on his sub-team staff to maintain client contact.[62]

[75] Mr Sully, in cross-examination, stated that most of his clients "are looking for what I would describe as a virtual CFO type relationship."[63] There were some clients Mr Sully dealt with frequently and some infrequently.[64]

[76] The notice period of three months is in my opinion relevant in determining the appropriate period of restraint. The notice period always had the potential to be used to permit other staff to familiarise themselves with a resigning affiliate's client base. This was how the notice period was used in the present case. The real issue is, taking into account the notice period, what is the balance period that supports both the goodwill of the BDO Group and its customer connections. The duration should be such as to permit a rapport to be established with the whole of Mr Sully's former client base.

[77] On the evidence, a period of 12 months is sufficient time to permit the Private Clients Division, in particular, to establish a rapport with the clients. A period of 12 months also reflects that the compliance work is annual in nature and also reflects the differing frequency of contact with clients.

[78] The same period of restraint of 12 months should also apply to employees, primarily because these restraints seek to protect the same legitimate interests. It will be the case that Mr Sully's sub-team, subject to the exception in clause 23.2(d) of the Shareholders' Agreement, will continue to be available to assist Ms Houghton in familiarising herself with the clients and establishing the necessary rapport. The fact that Mr Sully's sub-team will remain in place is a factor that, in my opinion, would make a restraint period in excess of 12 months unreasonable.

Issue (d) – what relief should be granted?

[79] The respondent made a concession in writing[65] that to the extent that the following restraints are held to be valid:

(a) clauses 23.1(a)(i) and 23.1(b)(i) of the Shareholders' Agreement; and

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60 Transcript of proceedings, 1-37, lines 15-24.
61 Transcript of proceedings, 1-38, lines 4-6.
62 Affidavit of Darren Peter Crothers sworn 12 March 2015, [11].
63 Transcript of proceedings, 1-45, lines 23-28.
64 Transcript of proceedings, 1-45, lines 40-47; transcript of proceedings, 1-46, lines 1-6.
65 Exhibit 3.

(b) clauses 20(b)(i) and (b)(ii) of the Employment Agreement;

the respondent does not submit that a declaration should not be made or a final injunction should not be granted.

[80] This concession does not concede anything in relation to clauses 23.1(d), (f) or (g) of the Shareholders' Agreement. Nor does the concession extend to clauses 23.1(a)(ii) and 23.1(b) of the Shareholders' Agreement nor clause 20(b)(i)(B) and clause 20(b)(ii)(B) of the Employment Agreement. Using clause 23.1 of the Shareholders' Agreement as an example, there is a distinction to be drawn between clause 23.1(a)(ii) and clause 23.1(b)(ii). The restraint in clause 23.1(a)(ii) restrains the respondent from engaging in any activity which is in competition with the Business Activity or any material part of it. This clause constitutes a bare protection against competition and is impermissible.[66] Clause 23.1(b)(ii) is more limited in that it is focused upon the clients. It restrains the respondent from inducing, soliciting or canvassing, approaching or accepting any approach from any person who was at any time during the 12 month period prior to the Retirement Date a Client to obtain the custom of that person in a business or activity which is in competition with the Business Activity or any material part of it. The relevant competition must therefore be linked to a client.

[81] It follows that any declaration made should not include a declaration that the respondent is bound by clause 23.1(a)(ii). Any declaration should be limited to clause 23.1(a)(i), clauses 23.1(b)(i) and (ii), and clauses 23.1(d), (f) and (g) of the Shareholders' Agreement and clause 20(b)(i)(A), clauses 20(b)(ii)(A) and (B), and clauses 20(b)(iv), (vii) and (viii) of the Employment Agreement. The concession does not contemplate the granting of any injunctive relief in respect to clauses 23.1(d), (f) and (g) of the Shareholders' Agreement or clause 20(b)(iv), (vii) and (viii) of the Employment Agreement. There is no evidence that Mr Sully seeks to engage or induce any employee of the BDO Group to leave their employment. To the contrary, Mr Sully has complied with Mr Schiffmann's instructions in the letter dated 23 January 2015. Apart from informing his sub-team at the BDO Group that he was resigning and was intending to commence in practice at the appropriate time, he has not had any discussions with BDO employees.[67]

Disposition

[82] I make the following orders:

(1) The Court declares that, subject to clauses 23.2 and 23.4, clause 23.1(a)(i), clauses 23.1(b)(i) and (ii), and clauses 23.1(d), (f) and (g) of the BDO Shareholders' Agreement adopted by the first applicant and the respondent by Deed of Accession dated 5 June 2012 are binding on the respondent for the period of 12 months from 19 April 2015.

(2) The Court declares that clause 20(b)(i)(A), clauses 20(b)(ii)(A) and (B), and clauses 20(b)(iv), (vii) and (viii) of the Employment Agreement between the second

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66 *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, 329 (Gleeson CJ).

67 Transcript of proceedings, 1-47, lines 26-36.

applicant and the respondent dated 1 July 2012 are binding on the respondent for the period of 12 months from 19 April 2015.

(3) The respondent be restrained by injunction until 19 April 2016 from:

(a) engaging in any activity which involves providing accounting services to any person who was, at any time within the 24 months prior to 19 April 2015, a client of the BDO Group;

(b) inducing, soliciting or canvassing, approaching or accepting any approach from any person who was, at any time during the 24 month period prior to 19 April 2015, a client of the BDO Group, to obtain the custom of that person in a business or activity which:

(i) is the same or similar to the whole or material part or parts of the accounting services provided by the BDO Group; or

(ii) is in competition with the accounting services provided by the BDO Group.

[83] I will hear the parties as to costs.