
Dispute Resolution

Singapore High Court Decides on Landmark Claim for Mass Poaching and Solicitation of Insurance Agents

Introduction

In mid-2016, the attention of the financial services industry was captured by the exodus of a record number of agents then – numbering more than 240 – from Prudential Singapore ("Prudential") to a competitor financial advisory firm ("Aviva FA") solely owned by Aviva Ltd ("Aviva"). The move led to a landmark claim against a former top agency leader ("AL") from Prudential, Peter Tan ("Tan"), for orchestrating the mass exodus. Apart from being closely followed by those in the financial services industry, the case has also attracted intense media attention due to the sheer number of agents involved in the mass exodus as well as the immense financial impact and repercussions arising thereof.

After a lengthy 49-day trial conducted over three months in 2019 and 2020, the Singapore High Court has now issued its decision on the claim.

In *Prudential Assurance Company Singapore (Pte) Limited v Peter Tan Shou Yi and another* [2021] SGHC 109, the Court, in deciding on Prudential's claims against Tan for breach of his contractual obligations of non-solicitation and breach of fiduciary duties, had to consider issues of incorporation and enforceability of such non-solicitation clauses, as well as whether Tan, by reason of his role and position as a senior AL of Prudential where trust and confidence was reposed in him, could be said to be a fiduciary of Prudential owing certain fiduciary duties and obligations to it.

In the end, the Court found that Tan had, whilst contracted with Prudential, indeed carried out preparatory steps such as having discussions with Aviva on an arrangement which would involve him procuring Prudential's ALs and agents to leave and to join the Aviva FA, as well as the subsequent acts of solicitation. The Court therefore held that Tan was liable for breach of his contractual obligation to conduct his insurance business with integrity and honesty, and also dismissed all of Tan's four counterclaims against Prudential.

In reaching its decision, the Court agreed with Prudential's arguments that Tan had acted in breach of a clause in his agency agreement which provided that Tan shall "*conduct his insurance business with integrity and honesty*" as such a clause required Tan, whilst he was contracted with Prudential, to deal with and serve Prudential in good faith and with undivided interest and not to do anything during the pendency of his agency agreement which may harm Prudential. Importantly, the Court provided

Dispute Resolution

guidance that such a duty was tantamount to a duty of fidelity, and included a duty on the part of Tan not to solicit Prudential's ALs and agents (during the currency of his agency agreement) to join a competitor.

Prudential was represented by Murali Pillai SC, Luo Qinghui, Jared Kok, Andrea Tan, Tao Tao and Joey Ng of Rajah & Tann Singapore LLP. This Update provides a summary of the case and highlights the key aspects of the Court's decision.

Brief Facts

At the material time, Tan was a senior AL of Prudential who had been with Prudential for almost 20 years. Tan led a group of approximately 500 agents and ALs of Prudential under an agency unit in Prudential known as Peter Tan Organisation ("**PTO**"). PTO was the largest and most productive agency unit in Prudential at that time, generating approximately 10% of the aggregate sales generated by Prudential's agency force.

While he was still contracted with Prudential, Tan incorporated a company on 1 June 2016, known as PTO Management and Consultancy Pte Ltd ("**PTOMC**"), of which he is the sole shareholder and director. Tan used PTOMC to enter into an agreement with Aviva pursuant to which Tan, through PTOMC, would be paid for providing various services to Aviva FA, including growing Aviva FA from a 'base number' of 250 agents.

Using his position in Prudential, Tan embarked on a campaign to surreptitiously entice and persuade the ALs and agents in PTO to leave Prudential collectively. Tan's solicitation and poaching campaign was supported by a 'war-chest' of S\$100 million provided by Aviva. Tan also took deliberate steps to prevent Prudential from learning about his plan, and enforced the secrecy of the intended move through non-disclosure agreements that he procured the PTO ALs and agents to sign, to ensure that they would not alert Prudential to his plan.

Prudential received termination notices from approximately 200 PTO ALs and agents over a three-day period in June 2016. Eventually, after the coordinated departure of more than 240 PTO ALs and agents, Tan submitted his own notice of termination, but was then summarily terminated by Prudential on account of his wrongful acts.

Prudential was able to obtain direct evidence of Tan's acts of solicitation in the form of contemporaneous audio recordings of Tan's numerous meetings with PTO ALs and agents to entice and convince them of the benefits of moving over to the Aviva FA. Prudential initiated court proceedings against Tan and PTOMC for the following:

Dispute Resolution

- (a) Breach of Tan's contractual obligations, including an obligation of non-solicitation, the obligation to conduct his insurance business with integrity and honesty, and an implied duty of mutual trust and confidence owed to Prudential;
- (b) Breach of Tan's fiduciary duties to Prudential; and
- (c) In respect of PTOMC, dishonestly assisting in Tan's breach of fiduciary duties and/or that PTOMC was the alter ego of Tan.

In turn, Tan counterclaimed against Prudential for wrongful termination, inducement of breach of contract, breach of confidence, and conspiracy to injure by unlawful means.

Holding of the High Court

The Court found that Tan had acted in breach of his contractual obligation to conduct his insurance business with integrity and honesty – which required him to serve Prudential with good faith and undivided interest – by reason of his preparatory steps and acts of solicitation during the currency of his agency agreement, to solicit Prudential's ALs and agents to join a competitor.

On the facts of the case, the Court found that Tan was not contractually bound by the non-solicitation clause (which was only found in an agency instruction) on the basis that the clause was not validly incorporated into his agency agreement or field manager agreement with Prudential; had the non-solicitation clause indeed been a term of Tan's contracts with Prudential, it would have been reasonable and enforceable against Tan. The Court also found that the legal test for implication of terms *in fact* could not be satisfied on the facts of the case, to imply a duty of mutual trust and confidence into Tan's contracts with Prudential.

Additionally, the Court held that Tan could not be said to be a fiduciary of Prudential, whether based on the established category of fiduciary relationship of agent and principal, or based on the specific facts of the case as Tan had managed PTO as an independent business without Prudential entrusting him with the management and control of the PTO ALs and agents, and that it was a purely commercial relationship as between two principals, each capable of advancing and protecting their own business.

Therefore, whilst the Court did find in favour of Prudential that Tan had indeed incorporated PTOMC on 1 June 2016 for the purpose of entering into the agreement with Aviva and that after its incorporation PTOMC would have participated (through Tan, as its sole shareholder and director) in discussions with Aviva, the Court ultimately had to dismiss Prudential's claim against PTOMC for dishonest assistance (since that was premised upon there being a breach of fiduciary duties by Tan).

Dispute Resolution

The Court directed for the assessment of the losses suffered by Prudential in terms of the profits that it would have earned from the 23 ALs and 204 (instead of 221) agents that had left Prudential as a result of Tan's acts of solicitation, for a loss period of between 9 May 2016 to 23 July 2016, to be calculated by Prudential's expert.

Finally, all of Tan's four counterclaims were wholly dismissed by the Court.

Concluding Words

The Court's decision provides useful guidance on issues of incorporation and enforceability of non-solicitation clauses in agency contracts, and the threshold required for an agent of the insurer principal to ever be deemed a fiduciary of the principal. Importantly, the Court's decision focuses attention on a typical clause commonly found in agency agreements and employment contracts, for one to conduct the business with integrity and honesty, and how it could be helpful in imposing a general duty of good faith and fidelity on the individual agent or employee.

Financial institutions and employers may therefore wish to review their respective agency agreements and employment contracts to ensure that such a general duty of good faith and fidelity has been properly provided for, and also to ensure that important clauses relating to non-solicitation obligations have been validly incorporated into the governing agreements and contracts where solicitation may be an issue.

For further queries, please feel free to contact our team below.

Contacts



Murali Pillai SC
Partner
Commercial Litigation, Appeals &
Issues

T +65 6232 0768

k.murali@rajahtann.com



Luo Qinghui
Partner
Commercial Litigation, Appeals &
Issues

T +65 6232 0587

qing.hui.luo@rajahtann.com



Jared Kok
Partner
Commercial Litigation, Appeals &
Issues

T +65 6232 0112

jared.kok@rajahtann.com



Andrea Tan
Senior Associate
Commercial Litigation, Appeals &
Issues

T +65 6232 0933

andrea.tan@rajahtann.com

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

Rajah & Tann Singapore LLP Shanghai Representative Office

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

Hanoi Office

T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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