IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 109

Suit No 772 of 2016

Between

Prudential Assurance
Company Singapore (Pte) Ltd

… *Plaintiff*

And

(1) Peter Tan Shou Yi
(2) PTO Management and
Consultancy Pte Ltd

… *Defendants*

And Between

Peter Tan Shou Yi

… *Plaintiff in counterclaim*

And

Prudential Assurance
Company Singapore (Pte) Ltd

… *Defendant in counterclaim*

JUDGMENT

[Contract] — [Breach]

[Contract] — [Illegality and public policy] — [Restraint of trade]
[Contract] — [Remedies] — [Damages]
[Equity] — [Fiduciary relationships] — [Duties]
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v
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5 May 2021 Judgment reserved.

Chua Lee Ming J:

Introduction

1 It is said that insurance is sold, not bought. This statement underscores the importance of distribution channels used by insurance companies to sell their products. An insurance company may sell its insurance products through the following distribution channels:

(a) a tied agency, *ie*, agents who sell only its policies; and/or

(b) banks (often referred to as bancassurance);

(c) financial advisory ("FA") firms, which may sell insurance products from different insurance companies subject to any restrictions in their agreements with the insurance companies; and/or

(d) online platforms.

2 At all material times, the plaintiff, Prudential Assurance Company Singapore (Pte) Ltd ("PACS"), sold its products primarily through a tied agency although it also sold through banks.

3 Between 15 and 17 June 2016, 195 agents of PACS gave notice of termination of their agency agreements with PACS *en masse*. By the end of June 2016, another 31 agents had done the same. This was followed by another 12 agents in July 2016, and another six agents between August 2016 and 27 February 2017. Of the total of 244 agents, 241 had belonged to what was known as the Peter Tan Organisation ("PTO") which was run by the first defendant, Mr Peter Tan Shou Yi ("Peter"). PTO was the biggest and most successful group of agents selling insurance products for PACS.

4 Peter himself gave notice of termination of his agency agreement with PACS on 8 July 2016. PACS responded by summarily terminating Peter's Agency Agreement for breach of the same.

5 In this action, PACS alleges that Peter breached his agency agreement and/or his fiduciary duties by soliciting the 244 agents to leave PACS to join a competitor of PACS, Aviva Limited ("Aviva"), and/or its subsidiary financial advisory firm, Aviva Financial Advisors Pte Ltd ("AFA"). PACS claims damages, alternatively, equitable compensation, in the form of loss of profits which range from about $2.4m to $2.5 billion. Alternatively, PACS claims an account of profits by Peter. PACS also claims damages against the second defendant, PTO Management and Consultancy Pte Ltd ("PTOMC"), for dishonest assistance in relation to Peter's breach of fiduciary duties.

Alternatively, PACS claims an account of the benefits received by PTOMC.

6 Peter counterclaims against PACS for damages for (a) wrongful termination of his agency agreement, (b) inducing certain agents to breach their confidential obligations owed to Peter, (c) breach of confidential obligations owed to Peter, and (d) conspiracy to injure Peter by unlawful means. Peter's counterclaims for inducement of breach, breach of confidential obligations and conspiracy to injure relate to alleged confidential information obtained by certain agents from Peter during several meetings with him between April and early June 2016. PACS claims that Peter carried out his acts of solicitation during these meetings.

Regulation of the insurance business

7 The Monetary Authority of Singapore ("MAS") is the regulatory authority of the insurance business in Singapore. The Life Insurance Association Singapore ("LIA") is a not-for-profit trade association of life insurance companies and life reinsurance companies which are based in Singapore and regulated by MAS. One of its roles is to provide industry guidelines on matters affecting the life insurance business.

8 In March 2000, MAS appointed a private sector-led committee known as the Committee for Efficient Distribution of Life Insurance ("CEDLI") to propose recommendations to raise standards, transparency and efficiency in the distribution of life insurance products. CEDLI submitted its main report[1] in August 2000 and its supplementary report[2] shortly after. MAS accepted CEDLI's recommendations in its main report and most of CEDLI's recommendations in its supplementary report. MAS and LIA jointly

implemented CEDLI's recommendations, which were subsequently rolled out through various LIA guidelines and MAS regulations.

9 On 1 October 2002, MAS issued MAS Notice 306 ("MAS 306").[3] Among other things, MAS 306 requires direct life insurers to:

(a) cap tier structures to a maximum of three tiers (para 7). A tier exists when overriding benefits are payable by the insurer to a representative for the provision of financial advisory services by another representative (para 8); and

(b) ensure that its representatives are trained and assessed as competent to carry on financial advisory services. Direct life insurers are expected to prepare and implement a Training and Competency Plan ("T&C Plan") for its representatives and to refer to the Guidelines on Training and Competency issued by LIA (para 10).

10 On 20 October 2011, LIA issued Members' Undertaking No 31 ("LIA MU 31/11"), which sets out guidelines on the minimum standards for T&C Plans.[4] LIA MU 31/11 also recommended a "span of control" under which a supervisor (Tier 2) operating under a tier structure (defined as a structure in which overriding benefits are payable) should have a maximum of 15 representatives (Tier 1) under him and an agency manager (Tier 3) a maximum of 10 supervisors under him (Section I, para 3.8).

11 On 23 January 2015, LIA issued a further Members' Undertaking No 59 ("LIA MU 59/15") which repealed LIA MU 31/11 save for the provision on "span of control".[5] LIA MU 59/15 sets out guidelines on competency requirements for agents and supervisors. This includes, among other things,

requirements for (a) new agents to attend weekly one-on-one coaching with their supervisors and to be accompanied by their supervisors for completed sales to three clients during the first six months, and (b) new Tier 2 supervisors to attend weekly one-on-one coaching with their Tier 3 supervisors for the first three months.

12 On 3 December 2015, LIA issued Members Undertaking No 65 ("LIA MU 65/15").[6] LIA MU 65/15 repealed LIA MU 31/11 in totality and set out Guidelines on Span of Control ("Span of Control Guidelines"). In summary, the Span of Control Guidelines prescribe a maximum of 176 persons within an agency unit comprising three tiers:

(a) one Tier 3 Agency Manager;

(b) ten Tier 2 Agency Supervisors (an Agency Manager can have up to ten Agency Supervisors); and

(c) 165 Tier 1 Agents (the Agency Manager and Agency Supervisors can each have up to 15 Tier 1 Agents).

Subject to the approval of the insurer, deviations in the mix are permissible (whilst keeping within the limit of 176 persons overall) but a Tier 2 Agency Supervisor cannot in any event have more than 20 Tier 1 agents under him and a Tier 3 Manager cannot have more than 20 Tier 1 Agents or 15 direct Tier 2 Supervisors under him.

13 Thus, MAS 306 (see [9(a)] above) sets a limit of three tiers in any structure in which overriding commissions ("overrides" or "OR") are paid, and

the Span of Control Guidelines (see [12] above) limited the total number of agents within such structures to 176.

14 The obligations set out in LIA MU 59/15 and LIA MU 65/15 are referred to generally as "CEDLI obligations".

Terminology in this judgment

15 The term "agent" is sometimes used to refer to a Tier 1 agent. However, in this judgment, I shall use the term "agent" (*ie*, without reference to a tier) in the general sense to refer to agents of *all tiers*.

16 I shall use the term "agency leader" to refer to *all* Tier 2 and Tier 3 agency leaders. I shall also refer to each group of agents headed by a Tier 2 AL or a Tier 3 AL, as an "agency unit" or "agency group" or a "unit" or "group".

PACS' agency structure

Overview

17 The agents were not employees of PACS. Instead, each agent was an independent contractor. The role of the agent was to "sell" insurance policies for PACS. Technically, the agent only canvassed for insurance policies on behalf of PACS. He could not commit PACS to sell the policy. The agent would submit a proposal from a potential insured to PACS. PACS had the final say as to whether to accept the proposal and enter into an insurance agreement with the potential insured.

18 Another role of the agent was to "recruit" new agents for PACS. Again, the agent had no authority to commit PACS. If PACS accepted the new agent, it then entered into an agency agreement with the new agent.

19 Agents could be promoted to a supervisory or leadership role in which he supervised other agents. In this leadership role, the agent may or may not also continue to sell policies for PACS.

20 Consistent with MAS 306 and the Span of Control Guidelines, PACS' agents worked within a group structure which comprised three tiers with payment of overriding benefits:

(a) Tier 1 agents – Tier 1 agents generally worked under the supervision of a Tier 2 agency leader ("AL") but may also work under the supervision of a Tier 3 AL. These Tier 1 agents held different ranks – Financial Consultant ("FC"), Senior FC, Executive FC, and Master FC. They earned commissions from selling insurance policies. They also recruited new agents to join PACS. These new agents would then join the group of Tier 1 agents working under the supervision of the recruiting agent's AL.

(b) Tier 2 ALs – Tier 2 ALs had supervisory responsibilities for Tier 1 agents working under them. These Tier 2 ALs also held different ranks – Financial Services Supervisor ("FSS"), FS Manager ("FSM"), Senior FSM, FS Director ("FSD"), Senior FSD/Group FSD. They earned commissions from the insurance policies that they sold, as well as ORs from the policies sold by their Tier 1 agents. Tier 2 ALs usually worked under a Tier 3 AL.

(c) Tier 3 ALs – PACS had two types of Tier 3 ALs – Group Agency Leader ("GAL") and Group Agency Manager ("GAM"). A GAL had Tier 2 ALs and Tier 1 agents under his direct supervision whereas a GAM had only Tier 2 ALs under his direct supervision. Both GALs and GAMs also had supervisory responsibilities for the agents in their GAL/GAM units. Both GALs and GAMs earned commissions from insurance policies that they sold (if any) and overrides from sales by their Tier 2 ALs' units. GALs also earned overrides from sales by the Tier 1 agents under their direct supervision. Payments by PACS to Tier 3 ALs differed according to whether they were GALs or GAMs.

21 A percentage of the premiums paid by the insured is paid (a) as commission to the agent who sold the policy, typically over a period of six years (on a reducing scale), and (b) as overrides to that agent's Tier 2 AL and GAL/GAM. The combined override paid to a Tier 2 AL and GAL/GAM in respect of a policy sold by a Tier 1 agent could be as much as 48% of the premiums paid.[7]

22 PACS also rewarded its agents with other pecuniary and non-pecuniary benefits and incentives, such as shopping vouchers and incentive trips. These rewards were paid pursuant to *ad hoc* incentive campaigns.

23 The designations of the agents in PACS have changed over the years. The various designations referred to in [20] above have been in use in PACS since 2002. Different designations were used before 2002.

The GAM scheme

24 As mentioned earlier, a GAL unit comprised a GAL, his own Tier 1 agents, and Tier 2 ALs (and their Tier 1 agents). When a Tier 1 agent was promoted to become a Tier 2 AL, the Tier 2 AL that he was under automatically became a GAL with his own separate GAL unit. The GAL that the newly promoted GAL was previously under would cease to receive overrides from the newly promoted GAL's unit. A GAL therefore had no incentive to help his Tier 2 ALs advance their careers. On the other hand, the Tier 2 AL may not wish to be promoted to a GAL. As a Tier 2 AL, he enjoyed structural and administrative support from his GAL. As a GAL, he would be the one providing the structural and administrative support to his team. If his team is small, he would not achieve economies of scale.

25 To address the above issues, the GAM scheme was introduced in 2006 to (a) provide "selected top agency groups with a new agency structure that promotes growth and greater autonomy", and (b) ensure that PACS' agency force "remains competitive and relevant".[8] Under the GAM scheme, when a Tier 1 agent was promoted to a Tier 2 AL, he would become a Tier 2 AL under the same GAM. His former Tier 2 AL could remain a Tier 2 AL. The GAM would continue to earn overrides from the Tier 2 ALs' units and the Tier 2 ALs continued to enjoy the GAM's structural and administrative support. A GAM did not have any Tier 1 agents directly under him, so that he could focus on supervising and managing the ALs under him.

26 To be eligible to participate in the GAM scheme, a Tier 3 AL's group had to meet certain performance criteria.[9] Additional benefits and privileges were given to GAMs, including subsidised office space, business allowances to defray the GAM's operating costs of managing his GAM agency group, an

interest free renovation loan and growth bonuses paid in recognition of the GAM's efforts to improve the sales brought in by his GAM agency group.

Master GAM scheme

27 The Span of Control Guidelines meant that the size of each GAL unit or GAM unit remained limited to 176 agents.

28 In 2011, PACS started a Master GAM scheme. This scheme envisaged a Master GAM unit as an alliance of GAMs managed by a Master GAM. The Master GAM did not receive any overrides from sales by the other GAM units within the alliance although he could receive overrides from sales by the agents within his own GAM unit. The Master GAM structure kept the overrides within three tiers and therefore complied with MAS 306 (see [9(a)] above). This also meant that the Master GAM structure was not subject to the Span of Control Guidelines (see [12] above) and therefore could grow beyond 176 agents. Each GAM unit within the Master GAM structure would however continue to be subject to the Span of Control Guidelines.

Prudence

29 Prudence was a representative body comprising some agency leaders. Its purpose was to represent the interests of the agency force in PACS. The management in PACS would consult Prudence if it wanted the views of the agency force on specific matters. The composition of Prudence was decided entirely by the agency leaders at large.

Agreements, Agency Instructions and Agency Circulars

30 All agents who contracted with PACS signed a basic agreement known as the "Agency Agreement" or the "Adviser's Agreement" depending on when it was signed. An agent who was appointed as an AL also signed a "Field Manager Agreement". ALs continued to be bound by their respective Agency or Adviser's Agreements. In this judgment, unless the context shows otherwise, I will use the term "Agency Agreement" to refer to both the Agency Agreement and the Adviser's Agreement.

31 Since around 1989, PACS' practice was to use Agency Instructions ("AIs") to communicate a wide range of matters to its agents. These matters included PACS' rules, guidelines and policies, as well as regulatory, compliance and compensation issues. Since around 1998, PACS' practice was to deposit copies of each AI, labelled with the agent's name, in the mailbox of the agent's agency unit. From around 2006, PACS disseminated AIs via email to its agents.

32 PACS also communicated with its agents through Agency Circulars. These Agency Circulars were meant to inform PACS' agents of company-related announcements and/or to announce *ad hoc* agency incentive campaigns.

Background facts

From agent to Master GAM

33 Peter first joined PACS as a probationary agent on 27 December 1996 and was confirmed as a Tier 1 agent on 18 February 1997. He signed an Agency Agreement dated 24 February 1997 ("Peter's Agency Agreement").[10]

34 By way of AI No 004/98 dated 13 March 1998 (the "March 1998 AI"),[11] PACS

(a) informed its agents that it had "formalised Agency Instructions as a medium of communicating new rules and regulations which may be declared from time to time"; and

(b) enclosed an addendum to all existing Agency Agreements, which sought to amend certain clauses in the Agency Agreements with effect from 13 March 1998.

35 In January 2001, Peter was appointed as a Tier 2 AL, with the rank of Field Manager, and he signed a Field Manager Agreement dated 1 February 2001 ("Peter's Field Manager Agreement").[12] Peter was promoted in January 2003 and again in January 2004 when he became a Financial Services Director ("FSD"). As a Tier 2 AL, Peter reported to one Mr Jack Cheong ("Cheong") who was then a GAL.

36 Peter's agency unit grew in size and in January 2005, his agency unit was spun off from Cheong's agency unit and became a standalone GAL unit known as "Peter Tan Organisation" or "PTO", headed by Peter as a GAL. As a GAL unit, the size of PTO was limited to 176 agents as prescribed by the Span of Control Guidelines.

37 In January 2006, Peter jointed PACS' GAM scheme.[13] PTO became a GAM unit and Peter was re-designated as a GAM with the rank of Group FSD. As a GAM, Peter ceased to have any Tier 1 agents reporting directly to him. As a GAM unit, the size of PTO remained limited to 176 agents as prescribed by the Span of Control Guidelines.

38 In 2010, Peter sought PACS' support for PTO to become an FA firm. PACS expressed support for PTO to become an exclusive FA firm ("EFA"). As an EFA, PTO would have been able to sell, with PACS' agreement, products of other insurance companies that were not offered by PACS. Eventually, however, this proposal did not bear fruit and PTO did not become an EFA.

39 On 14 September 2010, PACS issued AI No 017/10 (the "September 2010 AI"), which introduced the following provision (the "Non-Solicitation Clause"):[14]

> 5 NON-SOLICITATION
>
> 5.1 The Prudential Financial Consultant shall not at any time during the continuance of his/her Adviser/Financial Consultant Agreement and for a period of twenty-four (24) months after the termination of his/her Adviser Financial Consultant Agreement for whatever reason directly or indirectly and whether in his/her own behalf or on behalf of or in association with others or otherwise in any capacity whatever:
>
> (a) canvass or solicit the custom of or endeavour to entice any Customer away from the Company or induce any Customer to cancel any product provided by the Company to the Customer or allow such product to lapse; and
>
> (b) employ or endeavour to entice away from the Company any person who is an employee, officer, agent, Financial Consultant or manager of the Company as at the date his/her Adviser/Financial Consultant Agreement is terminated.

40 As stated at [28] above, PACS came up with the Master GAM scheme in 2011. The impetus for this scheme was the fact that by March 2011, the size of PTO had exceeded the Span of Control Guidelines. To comply with the Span of Control Guidelines, some of the Tier 2 ALs in PTO had to be promoted to become Tier 3 GALs or GAMs. However, PACS regarded Peter as being central to the growth of PTO. PACS therefore wanted the Tier 2 ALs in PTO to remain

as part of PTO under Peter's management, after they were promoted to become Tier 3 GAMs. The Master GAM scheme achieved this objective.

41 The Master GAM scheme was implemented via a Memorandum of Understanding dated 30 March 2011 ("the 2011 MOU"),[15] as amended by various addenda dated 29 April 2011,[16] 20 May 2011[17] and 20 September 2011.[18] The 2011 MOU was entered into between PACS and Peter Tan. It was clear that the Master GAM scheme was created for Peter.

42 Pursuant to the 2011 MOU, as subsequently amended:

(a) Two Tier 2 ALs in PTO, Mr Darren Tan ("Darren") and Ms Cynthia Tan ("Cynthia"), were promoted to become Tier 3 GAMs.

(b) PTO was restructured and became a Master GAM unit, comprising three separate GAM units headed by Peter, Darren and Cynthia respectively.

(c) Another Tier 2 AL, Mr Steven Peh ("Steven") was also promoted as a Tier 3 GAM. However, unlike Darren and Cynthia who remained within PTO, Steven's unit was spun off and became a GAM unit that operated independently of PTO.

(d) Peter became the Master GAM of PTO. Concurrently, he was also a GAM within PTO.

43 As a Master GAM, Peter could no longer receive ORs from sales generated by each of the GAM units in PTO (other than his own GAM unit). Peter negotiated for and PACS agreed to pay him the following:

(a) special sell-out payments amounting to about $7m from PACS;

(b) a Master GAM growth bonus for the growth of PTO; and

(c) a Master GAM super bonus of up to $1m if PTO achieved certain sales targets set by PACS.

The Master GAM growth and super bonuses were over and above what Peter was entitled to be paid as a GAM. It was at least unclear whether the Master GAM super bonus breached MAS 306 since arguably, it could be seen as payments of overriding benefits from sales generated by agents under the other GAMs in PTO. As these payments were to be made to Peter as the Master GAM, arguably the payment of overrides involved four tiers. However, this was not an issue that I had to decide.

44 The sell-out payments that Peter negotiated for included sell-out payments in respect of Darren's and Cynthia's GAM units. These payments were meant to compensate Peter for his loss of overrides from Darren's and Cynthia's units following their promotion to GAMs. The amounts had been fixed in 2011 with no further revisions to the amount (whether upwards or downwards) to take into account the actual performance of these units. In January 2013, Peter asked for an increase in the sell-out payments because Darren's and Cynthia's GAM units had performed much better than expected.

45 By way of a letter dated 31 January 2013,[19] PACS agreed to:

(a) re-compute, annually, the sell-out payments in respect of Darren's and Cynthia's GAM units based on the actual sales

performance of these units and the agency rank achieved by each AL in these units ("true up adjustments"); and

(b) pay Peter 50% of the true up adjustments in five instalments over a five-year period; conversely, PACS would also be able to claw back from Peter 50% of the true up adjustments for any underperformance.

The final true up exercise was to be conducted in April 2016.

46 PTO continued to grow. Pursuant to a MOU dated 23 July 2013,[20] another of Peter's Tier 2 ALs, Mr Smith Foo, became the fourth Tier 3 GAM in PTO. Pursuant to another MOU dated 28 July 2015,[21] various Tier 2 ALs' agency units were transferred between the four GAM agency units in PTO.

47 In late 2013, Peter raised the question of the EFA option again. According to Peter, PACS suggested a limited FA ("LFA") scheme. The LFA was similar to the EFA except that the LFA would be allowed to sell other insurance companies' products subject to a limit. However, the discussions again did not bear fruit.

48 Although each of the GAM units within PTO had to comply with the Span of Control Guidelines, PTO itself, as a Master GAM unit, could grow beyond 176 agents, which it did, eventually comprising some 500 agents in 2016.

The Pegasus Agreement

49 PTO became the largest agency group in PACS, contributing approximately 10% of PACS' entire agency force sales production measured in annual premium equivalent ("APE"). The APE is calculated by adding the

annualised regular premiums from new policies and 10% of single premiums on new policies written during a specified period.[22] It reflects the value of sales of insurance products and is a sales measure used in the insurance industry. Agents in PTO were also generally more productive in terms of the amount of APE generated per agent as compared to PACS' overall agency force.

50 On 1 July 2015, Peter entered into an agreement with PACS under which Peter would receive further payments over and above those payable to him as a Tier 3 GAM and as a Master GAM (the "Pegasus Agreement").[23] The commencement of the Pegasus Agreement was backdated to 1 January 2014. It was for an initial term of six years, renewable for another six years on terms and conditions to be agreed. The agreement would terminate if the parties could not agree on the terms and conditions for its renewal.

51 The Pegasus Agreement was meant specifically for Peter and was intended to incentivise him to remain with PACS and grow PTO. It provided for a deferred profit-sharing arrangement; Peter would be paid certain sums, which depended on PTO's performance over the initial six-year term.

52 The amounts due to Peter under the Pegasus Agreement were to be paid over a ten-year period as long as Peter remained a Tier 3 GAM with PACS, or upon death or one year after Peter's retirement provided that Peter did not join a competitor or otherwise compete with PACS during the one-year period. Based on PACS' assessment at that time (around 2015), the total amount to be paid to Peter under the Pegasus Agreement at the end of the ten-year period was estimated to range from $6.2m (assuming 0% growth year-on-year during the initial six-year term) to $15.9m (assuming 30% growth year-on-year during the initial six-year term).[24]

53 The Pegasus Agreement was terminated upon Peter's summary termination from Prudential on 12 July 2016.

54 By all accounts, Peter had done extremely well and was highly valued by PACS. Between 2006 and 2016, the total amount of remuneration (comprising commissions, bonuses, incentives and other benefits) paid by PACS to Peter was approximately $56.2m.[25] In 2015 alone, Peter was paid $9.7m by PACS.[26]

Complaint about PACS' CEO

55 Mr Seah Cheng Chua Philip ("Philip") took over as Chief Executive Officer ("CEO") of PACS in December 2015. In a letter dated 2 February 2016 addressed to the Group Chief Executive of Prudential plc (the holding company of PACS), the chairman of Prudence expressed Prudence's disappointment with Philip's leadership and management of PACS.[27]

Events between April and June 2016

Peter's discussions with Aviva

56 Around mid-April 2016, Peter met with Aviva and explored the idea of being a consultant with Aviva. According to Peter, Aviva had plans to establish an independent financial agency model. On 21 April 2016, Aviva sent the following document to Peter:[28]

(a) A draft letter of intent to engage in exclusive negotiations towards appointment as President and employee of Aviva's subsidiary.[29]

(b) A draft President Agreement for the appointment as President of a subsidiary of Aviva to control, manage and supervise a group of

representatives to be appointed.[30] The Agreement noted that Aviva's subsidiary was undergoing internal restructuring and that it would accede to the Agreement upon completion of the restructuring.

(c) Schedules 1 to 7 to the President Agreement.[31] These Schedules set out the President's financial benefits.

(d) A draft Accession Agreement to admit Aviva's subsidiary as a party to the President Agreement.[32]

57 On the same day, Aviva also sent the following documents to Peter:[33]

(a) A draft letter of intent to engage in exclusive negotiations towards appointment as an Advisor of Aviva's subsidiary.[34]

(b) A draft Advisor Agreement for appointment as a representative of Aviva's subsidiary;[35]

(c) A draft appointment letter for appointment as an Advisor Manager to supervise a team of Advisors;[36] and

(d) Schedules on commissions, overrides and other financial benefits.[37]

58 Peter met with Aviva again in early May 2016, during which they discussed a FA model. According to Peter,

(a) Aviva told him that for any agents or ALs who wished to join, it would work out the terms of engagement with them directly and that they would be given a transition package, as was the standard practice

in the industry, since they would be foregoing future commissions and/or overrides;[38] and

(b) Aviva subsequently sent him template draft contracts for agents and ALs and he continued to engage Aviva to discuss the template contracts up to around mid to late May 2016.[39]

59 Rumours were circulating in the insurance industry that Peter was leaving with ALs and agents from PTO to join another insurance company. In late May 2016, PACS' then Chief Agency Officer ("CAO"), Mr Jon Sandham ("Jon") spoke to Peter. Peter assured Jon that he was not going anywhere. On 26 May 2016, Peter sent the following WhatsApp message to Philip:[40]

> … Frankly, I have no intention now to leave Pru. I understand that YOU may be concerned. But given our relationship, I will surely consult you for advice before I make any decision. I really value my 20 years of services with Prudential. Unless the management continues to irritates [*sic*] [PTO], nothing is going to change.

Peter's meetings with ALs

60 In May and June 2016, Peter held several meetings attended by ALs from PTO (the "Attendee ALs"). Each of the Attendee ALs signed a non-disclosure agreement with Peter (the "NDAs"). One of these meetings was held in Guangzhou, China (the "Guangzhou meeting").

61 At these meetings, Peter spoke to the Attendee ALs about, among other things, the move to AFA, the advantages of joining AFA, the financial package offered by AFA, and what the Attendee ALs should say to their agents.

62 Two of the Attendee ALs, Ms Wendy Ho Xiang Yu ("Wendy") and Mr Royston Ng Youliang ("Royston") secretly made audio recordings of some

of these meetings. The transcripts of these audio recordings were heavily relied upon by PACS in these proceedings.

63 On 31 May 2016, Peter met with the CEO of another insurance company, AXA Singapore ("AXA"). According to Peter, discussions did not progress with AXA because AXA did not offer a FA model.

Peter incorporates PTOMC and meets the Chief Executive, PCA

64 On 1 June 2016, Peter incorporated PTOMC; he was PTOMC's sole shareholder and director. On 2 June 2016, Peter updated Aviva on the intended timelines for the move and signed a non-disclosure agreement with Aviva.[41]

65 On the same day, Peter asked to meet with Ms Lilian Ng, the Chief Executive of Insurance in Prudential Corporation Asia ("PCA"), before deciding whether "to stay or go".[42] According to Philip, PCA (a Hong Kong company) is the "regional entity" of which PACS is a part.[43] The meeting took place in Hong Kong on 4 June 2016. Among other things, Peter agreed that he would meet his managers on 16 June 2016 "to affirm Pru support and continuity".[44]

Exodus of PTO agents begins

66 On 15 June 2016, agents from PTO started giving notice of termination of their agreements with PACS *en masse*. Jon met with Peter in the afternoon that day. In his WhatsApp message to the PACS Exco after the meeting, Jon said that:[45]

> … [Peter] seems quite disturbed – claims his senior guys are going nowhere but he cannot hold onto the junior ones who are apparently going to different places, Manulife, AXA, AVIVA. He says, "if the majority stay, I'll stay, if the majority go, I'll retire".

> My meeting with him and his Managers tomorrow is cancelled. The 38 resignations so far are all agents, not managers (yet).

Within two and a half hours after that, the number of Tier 1 agents from PTO, who had terminated their agreements with PACS, had increased to 140.

67 Between 15 and 17 June 2016, a total of 216 agents from PTO terminated their agreements with PACS. By the end of June 2016, another 10 agents had done the same, bringing the total number to 226 agents.

Peter leaves PACS

68 On 4 July 2016, The Business Times reported that Aviva had received in-principle approval to set up a new FA firm and that about 200 agents from PTO were expected to join the new firm.[46]

69 On 6 July 2016, Aviva announced at its Capital Markets Day Webcast that it had just taken "250 top advisors from another company".[47]

70 On 8 July 2016 (by which time 232 agents had terminated their agency agreements with PACS), Peter gave 14-days' notice of termination of his agreements with PACS.[48] Peter also stated that his last day with PACS would be 22 July 2016. In his defence, Peter asserted that before 8 July 2016, he had not made any decision to leave PACS to become a consultant with Aviva and that he never intended to join the independent FA entity owned by Aviva.[49]

71 On 12 July 2016, PACS terminated Peter's Agency Agreement on the ground that Peter had breached the Non-Solicitation Clause (see [39] above).[50] Peter's Field Manager Agreement was automatically terminated forthwith upon the termination of Peter's Agency Agreement, pursuant to cl 11(a) of the former.

PACS had to deal with Orphan Agents and Orphan Policies

72 Some of the agents, whose Tier 2 and/or Tier 3 ALs had terminated their agency agreements with PACS, stayed on with PACS. PACS had to re-assign these agents ("Orphan Agents" or "Orphan ALs") to either form new agency groups or join other agency groups within PACS. The re-assignment exercise was completed by around October 2016.

73 As for the policies that were previously sold by the agents who had terminated their agreements with PACS ("Orphan Policies"), the policyholders were left with no agents to service them. PACS re-assigned the Orphan Policies to the Orphan Agents and to other agents from other agency groups (collectively, "New Servicing Agents"). With effect from October 2016, PACS paid the New Servicing Agents an allowance as an incentive for servicing the Orphan Policies.

The Distribution Advisory Agreement with Aviva

74 On 23 July 2016, Aviva, Peter and PTOMC entered into a Distribution Advisory Agreement ("DAA").[51] Under the DAA:

(a) PTOMC was the exclusive provider of certain services to Aviva's wholly owned subsidiary, AFA, for a period of 10 years from 23 July 2016. These services included:

(i) providing strategic direction and assisting in the development of business plans to grow AFA;

(ii) providing group training sessions to AFA's representatives;

(iii) providing strategic advice and know-how to Aviva on recruitment. All recruitment of representatives by AFA would be referred to PTOMC for advice and recommendation, and Aviva was to ensure that AFA abided by PTOMC's recommendations; and

(iv) providing strategic advice to Aviva on how to increase Aviva's market share through AFA and to improve its competitiveness in the market.

AFA is a financial institution regulated by the MAS and licensed to advise on life policies, among other things. It was first incorporated on 26 June 2000 and changed its name to AFA on 10 June 2016.[52]

(b) PTOMC was to engage Peter to perform the services. At all times, Peter had to be the sole legal and beneficial shareholder, sole director and a key employee of PTOMC. Peter guaranteed PTOMC's due performance of its obligations.

(c) PTOMC could not perform engagements for other companies without AFA's prior written approval.

(d) Aviva was to pay the following fees ("Aviva Payments") to PTOMC:

(i) a signing on bonus;

(ii) monthly fees;

(iii) an annual bonus; and/or

(iv) a franchise bonus.

75 On the same day that the DAA was signed, Peter received (through PTOMC) the first part of the sign-on bonus of S$9m.[53]

76 For the period from 1 June 2016 to 20 June 2017, PTOMC received a total of S$7,796,496 from AFA.[54]

77 Between September 2016 and January 2018, PTOMC paid Peter S$5.7m in the form of salary payments and payment of dividends.

The parties' claims and counterclaims

PACS' claims against Peter

78 PACS' claims against Peter are as follows:

(a) From around April 2016, Peter took preparatory steps to leave PACS and to bring with him other agents in PTO to join a competitor of PACS, Aviva and/or AFA ("Preparatory Steps"), including having discussions with Aviva on procuring agents in PTO to leave PACS to join Aviva and/or AFA.[55]

(b) Between May and June 2016, Peter solicited agents in PTO to leave PACS and join AFA (the "Acts of Solicitation").[56]

(c) The Preparatory Steps and Acts of Solicitation were in breach of

(i) Peter's express contractual obligations under his Agency Agreement and his Field Manager Agreement;[57]

(ii) Peter's implied contractual obligations under his Field Manager Agreement;[58] and

(iii) Peter's fiduciary duties owed to PACS.[59]

(d) Peter is liable to PACS for damages suffered as a result of his breach of contractual and/or fiduciary obligations. In the alternative, Peter is liable to account for all profits made by him or PTOMC (as his alter ego) in relation to his breach of his fiduciary duties.[60]

PACS' claims against PTOMC

79 PACS' claims against PTOMC are as follows:

(a) PTOMC dishonestly assisted Peter in relation to his breaches of fiduciary duties by:[61]

(i) participating in discussions with Aviva regarding a long-term business partnership with Aviva, when Peter was still contracted to PACS; and

(ii) receiving the benefits of the above partnership by entering into the DAA.

(b) PTOMC is liable to PACS for damages, alternatively, an account of all benefits received by PTOMC as of result of its dishonest assistance.

Peter's counterclaims against PACS

80 Peter's counterclaims against PACS are as follows:

(a) PACS' termination of Peter's Agency Agreement was invalid and in breach of the Agency Agreement, and PACS is liable for loss and damages suffered by Peter.[62]

(b) PACS wrongfully induced one or more of the Attendee ALs to breach their confidential obligations under their NDAs, and PACS is liable for loss and damages suffered by Peter.[63]

(c) PACS breached its equitable duty of confidence to Peter by disclosing the confidential information obtained from one or more of the Attendee ALs, to third parties, and is liable to Peter for loss and damage suffered by Peter.[64]

(d) PACS and one or more of the Attendee ALs wrongfully, and with the intention of injuring Peter and/or causing loss to Peter by unlawful means, conspired to communicate the confidential information obtained from the Attendee ALs to third parties, thereby causing Peter to suffer loss and damage.[65]

The issues

81 The issues in respect of PACS' claims are as follows:

(a) Whether Peter carried out the Preparatory Steps and Acts of Solicitation?

(b) If the answer to (a) is "yes", whether the Preparatory Steps and/or Acts of Solicitation were in breach of any (i) contractual obligations, and/or (ii) fiduciary duties, which Peter owed to PACS? In turn, this issue depended on what were the contractual obligations and/or fiduciary duties that were owed by Peter to PACS.

(c) If Peter did breach fiduciary duties owed to PACS, whether PTOMC dishonestly assisted Peter in the breaches?

(d) If any of the breaches are proved, what are the losses that PACS has suffered? If Peter did breach fiduciary duties, whether Peter is liable to account for profits made by him or PTOMC (as his alter ego) in relation to his breach of his fiduciary duties?

82 The issues in respect of PACS' claims against PTOMC are as follows:

(a) Whether PTOMC dishonestly assisted Peter in his breaches of fiduciary duties?

(b) If so, whether PTOMC is liable to PACS for damages, alternatively whether PTOMC is liable to account to PACS for the benefits received by PTOMC?

83 The issues in respect of Peter's counterclaim are as follows:

(a) Whether PACS' termination of Peter's Agency was valid?

(b) Whether PACS wrongfully induced one or more of the Attendee ALs to breach their confidential obligations under their NDAs, and if so, what losses is PACS liable to Peter for?

(c) Whether PACS breached its equitable duty of confidence to Peter by disclosing the confidential information obtained from one or more of the Attendee ALs, to third parties, and if so, what damages is PACS liable to Peter for?

(d) Whether PACS conspired with one or more of the Attendee ALs to injure Peter, thereby causing him to suffer loss and damage, and if so, what loss and damage has Peter suffered?

Whether Peter carried out the Preparatory Steps and Acts of Solicitation

Preparatory Steps

84 PACS' pleaded case is that the Preparatory Steps included having discussions with Aviva on an arrangement which would involve:

(a) Peter procuring PACS' agents in PTO to leave PACS to join Aviva and/or its subsidiary FA firm; and

(b) Peter joining and/or working with Aviva and/or its subsidiary FA firm to train and manage the agents joining Aviva and/or its subsidiary FA firm.

PACS also pleaded that as part of such discussions, Aviva provided Peter with a draft letter of intent to engage in exclusive negotiations towards appointment as President of Aviva's subsidiary and a draft President Agreement (see [56] above).[66]

85 Peter's case, in summary, is that his exploratory discussions with Aviva began because some senior ALs approached him to help them find options for an independent FA model.[67] According to Peter, these senior ALs told him that they were close to a decision to leave PACS for various reasons, including unhappiness at changes introduced by PACS' new leadership. Peter claims that these discussions with Aviva did not involve any of the arrangements set out at [84] above.

86 In my view, whether Peter's discussions with Aviva started because some senior ALs in PTO requested his help to find options for an independent FA model, is not the issue. The issue is whether Peter's discussions with Aviva

involved the arrangements set out at [84] above. In my judgment, the answer to this question is a clear "Yes".

87 The facts relating to Peter's discussions with Aviva are not in dispute. On 21 April 2016, Aviva sent Peter draft documents relating to the appointment of (a) a President, (b) Advisors, and (c) Advisor Managers, of Aviva's subsidiary (see [56]–[58] above). Peter testified that he had not discussed details of how his involvement with Aviva will be like, and that Aviva had simply sent him the draft documents for his consideration and to "keep the conversation going".[68] I reject Peter's assertions.

88 The contents of the draft documents speak for themselves. They show that by April 2016, Peter was already involved in discussions with Aviva on his and PTO's potential move to join Aviva. In my view, it is unbelievable that Aviva would have sent those draft documents to Peter if they had not discussed the matters contained in the drafts. In this regard, the following matters are telling:

(a) The draft letter of intent relating to the proposed appointment as President required the appointee to furnish documents providing *2015* income and production information of the appointee *and the agents to be appointed as advisers*, as well as any adverse market conduct issue or complaints relating to them.[69]

(b) The draft letter of intent relating to the proposed appointment as Advisor also required the appointee to furnish documents providing *2015* income and production information and information on adverse market conduct issues or complaints.

(c) The draft President Agreement contained a first year APE sales target of S$50m. As PACS submitted, based on the average annual production of a PTO agent in Prudential for the years 2014 and 2015,[70] the new Aviva firm would have to commence with a base of 232 to 246 agents to achieve this first year APE sales target of S$50m. This target closely mirrored the sales target of S$55.5m in the DAA (subsequently entered into by Aviva, Peter and PTOMC), which contemplated that AFA would commence from a base of 250 agents. Peter testified that this was a reasonable target given the 200 to 300 agents that would follow him to AFA.[71]

89 I find that Peter did carry out the Preparatory Steps, *ie*, that he did discuss with Aviva an arrangement involving him (a) procuring PACS' agents in PTO to leave PACS to join Aviva and/or its subsidiary FA firm, and (b) joining and/or working with Aviva and/or its subsidiary FA firm to train and manage these agents.

Acts of Solicitation

90 PACS' pleaded case with respect to the Acts of Solicitation is that on various occasions in around May and June 2016, Peter carried out various acts of direct or indirect solicitation of PACS' agents in PTO for and/or on behalf of AFA:[72]

(a) In meetings held in Singapore and Guangzhou, on at least six occasions in May and June 2016, Peter expressly and directly solicited and enticed and/or attempted to solicit and entice the Attendee ALs to leave PACS to join AFA.[73]

(b) On at least five occasions in May and June 2016, in Singapore and Guangzhou, Peter asked and/or encouraged the Attendee ALs to persuade PACS' other agents in PTO to leave PACS and join AFA.[74]

91 Peter does not dispute having the meetings with the Attendee ALs or that the move to AFA was discussed during these meetings. However, he denies soliciting agents in PTO to leave PACS to join AFA. In essence, Peter's case is as follows:[75]

(a) The intention was for Peter and the ALs in PTO to "explore and discuss" their collective options together in order to make a properly informed decision; he did not act for or on behalf of AFA in his discussions with the ALs.

(b) The Guangzhou trip was for ALs who had already decided that they wanted to leave PACS.

(c) Peter provided his views on how ALs may respond if certain questions were raised by their Tier 1 agents, concerning the move to an independent financial agency; these views were expressed only to Attendee ALs and not directed at any Tier 1 agent.

(d) The ALs who decided to join AFA arranged to meet privately with AFA's representatives to discuss their personal financial packages; he was not involved in these negotiations.

92 I reject Peter's claim and find that he did carry out the Acts of Solicitation, *ie*, that he did solicit the Attendee ALs to leave PACS to join AFA and that he did ask and/or encourage the Attendee ALs to persuade PACS' other agents in PTO to leave PACS and join AFA.

93 First, the evidence shows that Peter's role could not have been as innocent as he claimed.

(a) As mentioned at [88(c)] above, there were discussions in April 2016 for a first year APE sales target of S$50m. Based on the average annual production of a PTO agent in Prudential for the years 2014 and 2015,[76] the new Aviva firm would have to commence with a base of 232 to 246 agents to achieve this first year APE sales target of S$50m.

(b) According to Peter, during his meeting with Aviva in May 2016, Aviva agreed in-principle to Peter joining it as a consultant to help in setting up and developing the FA model.[77] Sometime after that meeting, Aviva sent template draft contracts for agents and ALs to Peter.

(c) A draft consultancy agreement dated 31 May 2016 contemplated that Peter would be providing his services to Aviva through a private limited company that was to be incorporated.[78] Peter also testified that he had instructed lawyers in May 2016 to draft an agreement between Aviva and Peter in relation to the receipt of business allowance from Aviva.[79]

(d) Peter continued to engage with Aviva to discuss the template contracts for agents and ALs up to around mid-late May 2016.[80] Email correspondences between Peter and Aviva in May 2016 confirm that Peter was negotiating the Advisor and Advisor Manager contracts with Aviva.[81] Peter also confirmed that there were further drafts of these contracts arising from his meetings with Aviva's CEO from 28 May 2016 to 9 June 2016, which he claimed to have destroyed. Peter told the

Attendee ALs that he had put in significant effort to review and negotiate the terms of their agreements with Aviva, and even falsely asserted that he was legally trained.[82]

(e) Peter asked the ALs in PTO to provide him with information on their and their agents' projected earnings based on their past performance in PACS, so that he could compute the budget required for the Aviva transition package.[83]

The above evidence shows that Peter's plan to move to Aviva involved him bringing PACS' agents in PTO with him to Aviva. It stands to reason that Peter would be taking steps to solicit (directly or indirectly) PACS' agents in PTO to leave PACS to join Aviva.

94 Second, the evidence shows that pursuant to the DAA, Aviva agreed to pay PTOMC a sign-on bonus that was tied to Peter having secured the mass exodus of over 200 of PACS' ALs and agents in PTO to join AFA. Such an arrangement made it necessary for Peter to solicit PACS' agents to join AFA.

(a) The draft consultancy agreement dated 31 May 2016 provided that Aviva would pay PTOMC a total sign-on bonus of $13.8m.[84] Aviva was entitled to clawback the entire amount if the agreement was terminated within three years, and 60% if the agreement was terminated within the fourth year. Aviva was entitled to terminate the agreement immediately if AFA failed to meet at least 70% of its business plan,[85] which meant that if this happened, Aviva could clawback 60% of the sign-on bonus.

(b) In the final draft consultancy agreement dated 27 June 2016, the total sign-on bonus was increased to $15.3m.[86] However, the clawback provision was watered down. If Aviva terminated the agreement on the ground that AFA's performance failed to meet the agreed targets, Peter merely had to agree not to participate in the financial service industry from the time of termination of the agreement until 31 July 2020, and there would be no clawback. This revised clawback provision remained unchanged in the DAA.

95 PACS submitted that the reason for the difference in the clawback provisions was the exodus of more than 200 agents in PTO from PACS to AFA which took place after the 31 May 2016 draft agreement and before the 27 June 2016 draft agreement. I agree with PACS. The inference is irresistible. I reject Peter's denial that there was such a link between the sign-on bonus and the exodus of agents from PACS to AFA. Peter claimed that the sign-on bonus was tied to the services that he would provide, the restrictions to be imposed on him, the value that he would bring to Aviva and the income he could have earned if he had stayed on in PACS.[87] However, this does not explain why the clawback for AFA's failure to meet performance targets was changed from 60% (before the mass exodus of PACS' agents to AFA) to zero (after the mass exodus of PACS' agents to AFA).

96 Third, it is clear that Aviva viewed Peter as the key-man under the DAA. Aviva was entitled to terminate the DAA if Peter was no longer (a) the sole legal and beneficial shareholder of PTOMC, or (b) the sole director of PTOMC, or (c) a key employee of PTOMC and was not actively involved in the provision of the services under the DAA.[88] Given Peter's success with PTO, it is more

likely than not that the understanding was that Peter would try to bring over at least a substantial number of PACS' agents in PTO to join AFA.

97 Fourth, Peter informed the Attendee ALs that he told Aviva that he would leave PACS to join AFA only if Aviva gave him a budget "for the entire organisation" and that a budget for only three-quarters of the organisation would not be enough because then he would have to "pump up 25%".[89] Clearly, Peter was negotiating with Aviva on the basis that he would bring PACS' agents in PTO over with him to join AFA.

98 Fifth, I agree with PACS that Peter sought to convince the agents in PTO that they should no longer remain with PACS by painting a false picture of a bleak future if they continued to stay in PACS. Peter also extolled the advantages of joining AFA.

(a) Peter informed the Attendee ALs that PACS was seriously considering starting a FA distribution channel,[90] thereby implying that the tied agency force in PACS would soon have to also compete with the new FA agents. Peter admitted on the stand that he failed to mention to the Attendee ALs that PACS' senior management had already confirmed that PACS had no intention of starting a FA distribution channer.[91] Peter also admitted that he had conveyed untruths to two of his ALs at a meeting on 16 May 2016 about PACS starting a FA distribution channel.[92]

(b) Peter admitted that he had exaggerated to the agents in PTO on more than one occasion about PACS' likely downfall upon the departure of Peter and PTO from PACS, with the intention of persuading them that their future would be bleak if they remained in PACS.[93]

(c) Peter admitted to persuading the agents in PTO to leave PACS to join AFA, by telling them that those who remained with PACS would not be assigned to service the Orphan Policies, and therefore there would be little benefit for them to stay on with PACS after Peter and the rest of the agents in PTO left PACS.[94]

(d) Peter emphasised the fact that Aviva did not have any bancassurance or tied agency distribution channels that AFA would have to compete with, and that agents joining AFA would be able to sell a wider range of products.[95] Peter represented that as he would be in Aviva's product committee, he would be able to ensure that they had products in AFA that were easy to sell.[96] Peter also represented that the agents could be three to four times more productive at an independent FA firm like AFA.[97] Peter also asserted that by moving to AFA, the PTO brand could be monetised and may be worth $400m.[98]

(e) Peter further claimed that he would have significant control and influence over Aviva's senior management, that he would sit on the Aviva board of directors, that the choice of the CEO in AFA was under his control and that they would have enough leverage over Aviva in about seven to ten years' time to strong-arm Aviva into giving AFA another "super bonus" by threatening to sell products of other insurers.[99]

(f) Peter claimed that the terms of the AFA agreements were better than those of PACS or other independent FA firms.[100]

99 Sixth, I agree with PACS that Peter used the financial offerings from Aviva to entice agents in PTO to leave PACS to join AFA. To this end, Peter told the Attendee ALs the following:

(a) Aviva had given him a budget of up to $100m to set up a competing FA firm owned by Aviva, of which $50m would be distributed to agents in PTO who moved over with him to join AFA. Peter also told the Attendee ALs to tell other agents who expressed interest in moving to AFA, that there was a budget of $100m.[101]

(b) Under the transition package offered by Aviva, agents who joined AFA could obtain 50% of the total transition allowance (a component of the Aviva transition package) upfront. The total transition allowance comprised payments to be made to the agents over a 36-month period, subject to various validation targets. Peter admitted that this would have been a huge incentive for PACS' agents to join AFA.[102] Peter also assured the Attendee ALs that the validation targets were easily attainable as they would be only about 75% of the production level that most of them had achieved in 2015.[103] Peter described the situation as one where Aviva was simply "throw[ing] money" at the agents.[104]

(c) The Attendee ALs would be reimbursed upfront for (i) incentives that they had qualified for in PACS but which PACS would not have to pay once they left PACS, and (ii) any monies that PACS would clawback from them if they left PACS.[105] The Attendee AL's "senior agent allowance" for the next 12 months would also be doubled.[106]

(d) Only the first batch joining AFA would receive the Aviva transition package; subsequent batches may not receive the Loyalty Bonus (a component of the Aviva transition package) or similar transition packages.[107]

100 Seventh, Peter told the Attendee ALs the following (which Peter admitted under cross-examination to be lies) in order to induce the ALs and agents to "jump on the bandwagon as soon as possible":[108]

(a) MAS was "very supportive" of the planned move to Aviva and that 200 agents who moved to Aviva would receive their clearances within two to three weeks because MAS was "committed" to pre-clear 200 applications. Clearance from MAS (commonly referred to as "RNF" clearance) was required before the agents could start working with AFA and the process would normally take six to eight weeks. Peter admitted that in fact, he had not spoken to MAS on these matters.

(b) The MAS "current chief", who was a former colleague of Aviva's CEO, had told the latter "I'll help you. Don't worry, submit all these to us." In truth, there was no such arrangement with MAS.

101 Eighth, Peter addressed the Attendee AL's concerns about losing their customer base by assuring them that a budget had been allocated for them to service their customers in AFA and that he would provide them with access to PACS' customer database.[109] Peter admitted under cross-examination that he had in mind the spreadsheets containing PACS' customer information that PACS had provided to him for purposes of PTO's telemarketing campaign.[110] Peter also coached the Attendee ALs to explain to their customers that their move to AFA was to enable them to sell more competitive products, so as to assure their customers that they would be getting a better deal.[111]

102 Ninth, Peter coached the Attendee ALs on how to persuade their agents to leave PACS and join AFA.

(a) Peter told the Attendee ALs that they should tell their agents that he had a budget of $100m to bring the whole of PTO over to AFA.[112]

(b) Peter explained the details of Aviva's transition package for agents to the Attendee ALs so that the Attendee ALs could share the information with their agents and be able to answer questions on the same.[113] Peter also told the Attendee ALs to assure the agents in PTO who were on the Management Associate Programme ("MAP") scheme that they would be reimbursed the sums that PACS might clawback under the MAP scheme if they left PACS.[114] Under the MAP scheme, agents with no prior experience in the insurance industry were given a fixed monthly allowance for a specified period, subject to certain conditions.[115]

(c) To encourage the agents to move to AFA as part of the first batch, Peter instructed the Attendee ALs to explain to their agents (who were undecided about leaving) that they would miss out on the loyalty bonus component in the transition package.[116]

(d) Peter told the Attendee ALs that they were to emphasise to their agents that he would definitely resign from PACS.[117] He also told the Attendee ALs that they should use their own departures from PACS as a tool to persuade their agents (who might be undecided) to join AFA.[118]

103 Tenth, Peter spoke to agents, who were undecided, to address their concerns about moving to AFA.[119] This included arranging a private session with the agents who were under one of the Attendee ALs, Wendy, who had told Peter that her agents were not keen to move.[120] Peter admitted under cross-

examination that he was attempting to convert the unconvinced at the meeting with Wendy's agents.[121]

104 Eleventh, Peter took active steps to conceal the move to AFA from PACS. His actions were more consistent with someone who was covering his acts of solicitation than someone who was simply helping the ALs in PTO explore their options.

(a) Peter made the Attendee ALs sign the NDAs and threatened them that they would suffer the consequences if they leaked information about the move to AFA.[122] The NDAs provided that in the event of breach by the Attendee ALs, Peter would be entitled to "equitable relief … estimated at S$50 millions [*sic*] …".[123] Peter also warned the Attendee ALs that any whistleblowing attempt would backfire and result in the whistle blower being terminated by PACS.[124]

(b) Peter instructed the agents in PTO to put up appearances in a bid to mislead senior executives who were visiting from PACS' London headquarters.[125]

(c) Peter continued to convey false impressions to PACS' senior management that he was not leaving PACS. In late May 2016, he told PACS' CAO that he was not going anywhere, and on 26 May 2016, he told PACS' CEO that he "had no intention now to leave [PACS]" (see [59] above). On 4 June 2016, he told the senior management representative of PCA in Hong Kong that he would meet his managers on 16 June 2016 to affirm "support and continuity" for PACS (see [65] above). Even when the mass exodus of agents started on 15 June 2016, Peter was pretending to be disturbed by the exodus, claiming that his

senior agents were not leaving but that he could not hold on to the junior ones who were apparently going to different places (see [66] above). In response to a request to meet for an "important meeting", Peter told PACS' CEO on 1 July 2016 that he "will probably go for long leave".[126] On the stand, Peter agreed that he was still being "indirect"; he did not want to convey his decision to leave PACS and join a competitor.[127]

(d) Peter made plans to go on a trip from 9 to 15 June 2016 so that PACS' CEO would not be able to meet him before the mass exodus started.[128] He also gave instructions for the access rights to PTO's office to be removed on 15 June 2016 with respect to PACS' CAO and the Business Development Manager who was assigned to look after PTO, just in case documents relating to the move to Aviva were left lying around in the PTO office.[129]

(e) Peter also instructed the ALs in PTO to bring their agents on a four-day trip to Bangkok, sponsored by Aviva, on 15 June 2016, and to play games with their agents during the trip that would involve their phones being taken away. Peter admitted that this was to prevent PACS from contacting the agents and getting them to change their minds about leaving PACS.[130]

105 Twelfth, Peter coordinated and controlled the mass exodus of agents in PTO to AFA. He instructed the ALs in PTO to ask their agents to sign three undated documents – a template resignation letter, a transition allowance letter and the AFA representative agreement – which were to be handed back to him by 9 June 2016.[131] The "resignation letter" was technically a notice of termination of the Agency Agreement. Peter admitted that he asked for these

letters to be undated because he would decide when to submit the letters to PACS.[132]

106 The evidence leaves me in no doubt that every step taken by Peter was taken because he was soliciting the Attendee ALs to leave PACS to join AFA and/or asking the Attendee ALs to persuade PACS' other agents in PTO to leave PACS and join AFA.

What were the contractual obligations owed by Peter?

107 In its closing submissions, PACS claims that:

(a) Peter was contractually bound by the Non-Solicitation Clause (see [39] above).[133]

(b) Peter was contractually bound to conduct his insurance business with integrity and honesty.[134]

(c) It was an implied term of Peter's Field Manager Agreement and subsequent appointments as a GAM and a Master GAM that Peter owed a duty not to conduct himself in a manner calculated and/or likely to destroy or seriously damage the relationship of confidence and trust between him and PACS.[135]

Whether Peter was contractually bound by the Non-Solicitation Clause

108 Peter's Agency Agreement and Field Manager Agreement did not contain any non-solicitation clause. However, the September 2010 AI sought to impose the Non-Solicitation Clause (see [39] above). The Non-Solicitation Clause states as follows:

> 5 NON-SOLICITATION
>
> 5.1 The Prudential Financial Consultant shall not at any time during the continuance of his/her Adviser/Financial Consultant Agreement and for a period of twenty-four (24) months after the termination of his/her Adviser Financial Consultant Agreement for whatever reason directly or indirectly and whether in his/her own behalf or on behalf of or in association with others or otherwise in any capacity whatever:
>
> (a) canvass or solicit the custom of or endeavour to entice any Customer away from the Company or induce any Customer to cancel any product provided by the Company to the Customer or allow such product to lapse; and
>
> (b) employ or endeavour to entice away from the Company any person who is an employee, officer, agent, Financial Consultant or manager of the Company as at the date his/her Adviser/Financial Consultant Agreement is terminated.

The present case concerns the restraint in (b) only.

109 PACS' case is that Peter was obliged to comply with the September 2010 AI pursuant to the terms of his (a) Field Manager Agreement, and (b) Agency Agreement.

Peter's Field Manager Agreement

110 PACS submitted that Peter was obliged to comply with the September 2010 AI pursuant to the following terms of his Field Manager Agreement:[136]

(a) clause 3(c), which required Peter to

> … manage the agents and any corporate manager or field manager working under him in a manner consistent with such instructions as may be notified in writing from time to time by [PACS] …[137]

(b) clause 5, which required Peter to

> … observe and comply with [PACS'] rules, regulations and agency instructions which are currently in force …[138]

(c) clause 7, which required Peter to

> … observe and comply with all notices, directives, guidelines and requirements, whether statutory governmental regulatory or otherwise, that may apply to him from time to time as a field manager …[139]

111 Peter argued that the September 2010 AI did not fall within the scope of cl 7 of his Field Manager Agreement because the scope of cl 7 was limited to statutory guidelines and requirements. Peter submitted that the word "otherwise" in cl 7 should be construed *ejusdem generis*. Peter also referred to the fact that the header for cl 7 was "Statutory Requirements". I agree with Peter. The language in cl 7 showed that it was intended to apply to statutory guidelines and requirements. This conclusion is also supported by the fact that cl 5 of the Field Manager Agreement had expressly required Peter to comply with "agency instructions". There was no reason for cl 7 to also apply to agency instructions. In my view, the September 2010 AI did not fall within the scope of cl 7.

112 It cannot be disputed that the September 2010 AI was an instruction that fell within the scope of cll 3(c) and 5 of Peter's Field Manager Agreement. However, that is not the end of the matter. Clearly, the September 2010 AI purported to amend the terms of Peter's Field Manager Agreement by adding the Non-Solicitation Clause to the Agreement. It is doubtful that cl 3 can be said to permit of such an amendment. Clause 3 refers to Peter's duty to manage the agents under him in a manner consistent with instructions given by PACS. His own obligation to comply with PACS' instructions is governed by cl 5.

113 In any event, the more important question is whether cll 3(c) and/or 5 permit PACS to make such an amendment unilaterally. Understandably, Peter submitted cll 3(c) and 5 did not permit PACS to do so, and I agree.

114 First, cl 13(a) of Peter's Field Manager Agreement expressly required any variation or modification of any of the terms of the Agreement to be in writing and signed by the parties to the Agreement. Clause 13(a) provided as follows:[140]

> Save for the unilateral right of [PACS] to amend the attached Schedule pursuant to Clauses 2(a) and (b) and the unilateral right of [PACS] to amend its rules, regulations and agency instructions on the subject matter of this Agreement pursuant to Clause 5, no variation or modification of any of the terms of this Agreement by either party shall be valid unless made in writing and signed by the parties hereto.

The Schedule and cll 2(a) and (b) dealt with the amounts to be paid by PACS to its field managers for their services.[141]

115 There was nothing in the Agreement that permitted PACS to amend the terms of the Agreement other than in the manner provided in cl 13(a). Nothing in cll 3(c) or 5 detracted from the requirement in cl 13(a) that any amendment to the terms of the Agreement had to be in writing and signed by the parties. It is also significant that cl 13(a) drew a clear distinction between the amendment of "rules, regulations and agency instructions pursuant to Clause 5" (which PACS could amend unilaterally) and "variations or modifications of any of the terms" of the Agreement (which had to be in writing and signed by PACS and Peter). In my judgment, cll 3(c) and 5 must be read in a manner that is consistent with cl 13(a), *ie*, that cll 3(c) and 5 do not permit PACS to unilaterally amend the terms of Peter's Field Manager Agreement via the September 2010 AI in contravention of cl 13(a).

116 It may have been convenient to PACS to use the September 2010 AI to unilaterally amend the terms of its agreements with its numerous agents, including Peter's Field Manager Agreement. However, PACS' convenience could not override the clear requirements in cl 13(a).

117 Second, I agree with Peter that he did not accept or agree to the Non-Solicitation Clause. The agency force in PACS (including Peter) had objected to the September 2010 AI, describing the contents as "unreasonable and something we cannot adhere to".[142]

118 Third, PACS' own conduct showed that there was no mutual intention to incorporate the Non-Solicitation Clause as a term of Peter's Field Manager Agreement. PACS' response to the objection raised by the agency force was that "the other items in the AI was just to tighten what is already found in your agency agreements".[143] The "other items" included the Non-Solicitation Clause. Peter's Field Manager Agreement did not have any non-solicitation clause. I agree with Peter that PACS' response shows that PACS did not intend the Non-Solicitation Clause to apply to agents whose agreements did not already contain any such clause. This conclusion is also supported by the fact that the terms and conditions in the September 2010 AI expressly stated that the AI "applies to all Prudential Financial Consultants" and that "Prudential Financial Consultants shall refer to all person who have signed the Adviser/Financial Agreement".[144] As Peter pointed out, the Adviser Agreement (which replaced the Agency Agreement) contained a non-solicitation clause.[145] The Agency Agreement that Peter signed did not.

119 Fourth, read in context, cll 3(c) and 5 deal with Peter's conduct during the currency of his Field Manager Agreement. As Peter submitted, the Non-

Solicitation Clause included a restraint against solicitation for a period of 24 months after Peter's Agreement was terminated. This shows that cll 3(c) and 5 were meant for administrative or operational matters and were never meant to be used for the purpose of unilaterally amending the terms of the Agreement.

120 In conclusion, the Non-Solicitation Clause did not become a term of Peter's Field Manager Agreement.

121 I note that in its closing submissions, PACS made submission on waiver and estoppel but those submission were in connection with cl 15(c) of Peter's Field Management Agreement and not cl 13(a).[146] Clause 15(c) deals with the making and delivery of notices, demands and other communications required to be given or made under the Agreement. In any event, waiver and estoppel have not been pleaded, whether in connection with cl 13(a) or cl 15(c) of Peter's Field Manager Agreement.

Peter's Agency Agreement

122 In the original version of Peter's Agency Agreement:

(a) clause 5 required Peter to "observe and comply with [PACS'] current rules and regulations from time to time in force";[147] and

(b) clause 7 required Peter to "observe and comply with all guidelines and requirements, whether statutory governmental regulatory or otherwise, that may apply to him".[148]

Neither clause referred to agency instructions.

123 As stated earlier, the March 1998 AI enclosed an addendum, which sought to amend certain clauses in the Agency Agreements (see [34] above). In particular, the addendum purported to:[149]

(a) amend cl 5 by requiring agents to observe and comply with "agency instructions" in addition to "rules" and "regulations" (as provided in the original version of cl 5); and

(b) amend cl 7 by requiring agents to observe and comply with "notices" and "directives" in addition to "guidelines" and "requirements" (as provided in the original version of cl 7).

124 PACS submitted that Peter was obliged to comply with the September 2010 AI pursuant to cll 5 and 7 of his Agency Agreement, *both in their original and amended forms*. However, Peter submitted that:

(a) the March 1998 AI could not unilaterally amend his Agency Agreement; and

(b) even if the March 1998 AI did amend his Agency Agreement,

(i) cl 7 of his Agency Agreement did not apply to the September 2010 A; and/or

(ii) the September 2010 AI could not unilaterally amend his Agency Agreement.

125 Peter argued that neither the March 1998 AI nor the September 2010 AI complied with cl 16(a) of his Agency Agreement, which provided as follows:[150]

> Save for the unilateral right of [PACS] to amend the Schedules pursuant to Clauses 2(a) and (b), no variation or modification

> of any of the terms of this Agreement by either party shall be valid unless made in writing and signed by the parties hereto.

The Schedules and cll 2(a) and (b) dealt with the amounts to be paid by PACS to its agents for their services.[151]

126 I have some doubts as to whether the March 1988 AI was effective to amend cll 5 and 7 of Peter's Agency Agreement. However, it is not necessary for me to decide this because even if it was, I agree with Peter (for reasons similar to those discussed earlier in the context of Peter's Field Manager Agreement) that:

(a) the September 2010 AI did not fall within the scope of cl 7 of Peter's Agency Agreement; and

(b) the September 2010 AI could not unilaterally amend the terms of Peter's Agency Agreement in contravention of cl 16(a) of the Agreement.

127 The Non-Solicitation Clause therefore did not become a term of Peter's Agency Agreement.

128 In its closing submissions, PACS also made submissions on waiver and estoppel but only in connection with the amendments to cll 5 and 7 of Peter's Agency Agreement introduced by the *March 1998 AI*.[152] Waiver and/or estoppel has not been pleaded in connection with the need for the *September 2010 AI* to comply with cl 16(a) of Peter's Agency Agreement.

Whether the Non-Solicitation Clause is enforceable in any event

129 Peter submitted that even if the Non-Solicitation Clause did become a term of his Field Manager Agreement and/or Agency Agreement, it is unenforceable in any event. It should be noted that the present case involves only the restriction against solicitation *during the currency* of Peter's Agency Agreement.

130 The law is not in dispute. A non-solicitation clause is a restraint of trade provision and as such, is unenforceable unless it:

(a) protects a legitimate proprietary interest; and

(b) is reasonable by reference to the interests of the parties and to the interests of the public.

See *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663 ("*Man Financial*") at [70], [75]–[77] and [79].

Whether PACS had a legitimate proprietary interest to protect

131 The maintenance of a stable, trained workforce is a legitimate proprietary interest that the employer is entitled to protect via a non-solicitation clause (even in the absence of protectable confidences): *Man Financial* at [121]. PACS' case is that the Non-Solicitation Clause was justified because of the need to maintain a stable, trained workforce.

132 Peter submitted that the proprietary interest in maintaining a stable workforce is limited to an employed workforce and does not apply to the present case where PACS' agents were independent contractors.[153]

133 Peter relied on *Cactus Imaging Pty Limited v Glenn Peters* [2006] NSWSC 717 ("*Cactus Imaging*"). That case concerned, among other things, a restraint against the solicitation of the plaintiff's employees for a period of 12 months. The New South Wales Supreme Court expressed the following view (at [56]):

> … Another consideration is that it is within the capacity of an employer to ensure the stability of its workforce by offering key staff long term contracts of employment, so that solicitation of staff with such contracts would constitute the tort of inducing breach of contract … It is difficult to see why, as a matter of policy, an employer who wishes to maintain flexibility in its labour force by engaging staff on contracts terminable on relatively short notice on either side, should at the same time be entitled to insist on maintaining stability by a covenant of the type in question here.

134 Peter submitted that PACS does not have a legitimate proprietary interest in maintaining a stable workforce for the following reasons:[154]

(a) PACS structured its agency force to emphasise flexibility, not stability, pointing to the fact that an agent needs to give only 14-days' notice of termination of his agreement, regardless of seniority;

(b) PACS' agency force experienced high churn; there was no stability to maintain;

(c) PACS' employees and agency force had completely different benefits and responsibilities; and

(d) PACS had already protected its interests by (i) paying its agents only when sales are generated, and (ii) having a commission structure that was payable over six years such that agents who leave would forfeit any unpaid commissions.

135 I disagree with Peter's submissions. There is no good reason to restrict the proprietary interest in maintaining a stable workforce to an employed workforce. In my view, it matters not whether the workforce comprises employees or independent contractors such as agents. What matters is the reliance on the workforce and the disruption that an unstable workforce would cause to the business. Here, PACS relied primarily on its agency force to sell its policies. Clearly, allowing Peter to solicit agents in PTO to defect to a competitor could adversely impact PACS' business. The reasons relied on by Peter (as set out above) cannot mean that PACS therefore has no proprietary interest in maintaining a stable, trained agency force.

Whether the Non-Solicitation Clause satisfied the twin tests of reasonableness

136 The Non-Solicitation Clause must satisfy the twin tests of reasonableness, *ie*, it must be reasonable by reference to the interest of the parties and the interest of the public. In this regard, the protection that PACS sought by way of the non-solicitation clause must go no further than necessary to protect its legitimate proprietary interest.

Interest of the public

137 Peter's first submission was that the Non-Solicitation Clause was unreasonable by reference to the interest of the public because it restricted PACS' entire agency force regardless of the seniority of the agents. Peter relied on *Powerdrive Pte Ltd v Loh Kin Yong Philip and others* [2019] 3 SLR 399 ("*Powerdrive*"), which concerned a clause restraining employees from working for a rival company and/or direct competitor for two years after termination of employment. The High Court found the clause to be unreasonable in the interest

of the public because it applied to all employees regardless of seniority and was therefore too wide (at [25]–[38]).

138 I disagree with Peter. In my view, it was not unreasonable for PACS to seek to restrict all agents, regardless of seniority, from soliciting other agents to leave PACS. After all, every agent (regardless of his seniority) is capable of soliciting other agents to leave PACS.

139 Peter also argued that the Non-Solicitation Clause goes beyond what the industry considers necessary in the public's interest. Peter argued that the LIA Guidelines on the Use of Sign-on Incentives in the recruitment of Financial Advisory Representatives dated 14 March 2018 ("LIA MU 72/18")[155] recognised mass recruitments, *ie*, the recruitment of 30 or more representatives from the same insurer or FA firm within a 60-day period tracked on a rolling basis. In my view, Peter's reliance on LIA MU 72/18 is incorrect. LIA MU 71/18 recognised that insurers may offer migration packages to recruit agents and set out principles to be followed so that the offer of migration packages is done in a reasonable manner that does not undermine the professionalism of the industry or adversely affect the interests of consumers. This is an entirely different scenario from the present case. An insurer owes no duty not to solicit agents from another insurer. This does not mean that an insurer cannot contractually bind its senior agents to not solicit its other agents to join a competitor.

140 Finally, Peter argued that the Non-Solicitation Clause is unreasonable because it is not limited to mass solicitation; the loss of one new agent would breach the clause even though it would have no impact on the stability of PACS'

agency force. I do not think the Non-Solicitation Clause is unreasonable for this reason alone.

Interest of the parties

141 Under the Non-Solicitation Clause, Peter could not "employ or endeavour to entice away from [PACS] any person who is an employee, officer, Financial Consultant or manager" of PACS during the currency of his agreements with PACS and for a period of 24 months after the termination of the agreements (see [39] above).

142 Peter's first submission was that the restriction for the period of 24 months after termination of Peter's agreements with PACS was unreasonable. Peter pointed out that, as shown in the minutes of PACS' CEO Council Meeting on 12 October 2010, PACS itself had acknowledged that the 24-month period was too long and would be shortened to one year.[156] However, I agree with PACS that since its case against Peter is that Peter breached the Non-Solicitation Clause during the currency of his agreements with PACS, the question of the reasonableness of the 24-month period does not arise (see *Salomon Alliance Management Pte Ltd v Pang Chee Kuan* [2019] 4 SLR 577 at [110]).

143 Peter's second submission was that the restriction that Peter shall not "endeavour to entice" was unreasonable. Peter relied on *Austin Knight (UK) Ltd v Hinds* [1994] FSR 52 ("*Austin Knight*"). In that case, the defendant (an ex-employee of the plaintiff) was subject to a covenant that she "will not …. solicit, interfere with or endeavour to entice away … from the company … [any] customer of … the company …". Peter submitted that the UK High Court held that the covenant not to "endeavour to entice away" was unreasonably wide as

it could apply to situations outside the "usual meaning of soliciting".[157] In my view, Peter's submission is an inaccurate representation of what was decided in *Austin Knight*.

144 In *Austin Knight*, the defendant found a post with another company operating in the same field as the plaintiff. Former customers of the plaintiff approached the defendant and asked if she could continue to handle their accounts. The relevant passage from Vinelott J's judgment is as follows:

> … [The plaintiff's lawyer] nonetheless submitted that by submitting an offer or making a presentation to a former customer, even one who had approached her or her employers, or who put out work for tender, amounted either to soliciting or endeavouring to entice away the customer. *That is not I think, comprehended in the usual meaning of soliciting*, and as regards endeavouring to entice a customer away, if [the plaintiff's lawyer's] submission were well founded the covenant would amount to a covenant not to deal with customers of [the plaintiff], even customers with whom [the defendant] had never dealt with while an employee of [the plaintiff] and with whose relationship with [the plaintiff] she was wholly unaware. On that construction, the covenant would amount in substance to a contract without territorial limit not to take employment in the field in which she had been previously employed and would plainly be an unreasonable restraint. [emphasis added]

145 What Vinelott J said was that the *plaintiff's lawyer's submission* (which suggested that responding to a former customer, who approached the defendant, amounted to either soliciting or endeavouring to entice away the customer) was "not … comprehended in the usual meaning of soliciting". Vinelott J went on to hold that if *the plaintiff's lawyer's submission* was correct, the covenant against endeavouring to entice a customer away would be an unreasonable restraint because it would amount in substance to a "contract without territorial limit not to take employment in the filed in which [the defendant] had been previously employed". Clearly, Vinelott J did not decide that the phrase "endeavour to entice away" was unreasonably wide as it could apply to

situations outside the "usual meaning of soliciting", as Peter has submitted. In my judgment, the mere use of the phrase "endeavour to entice away" in the Non-Solicitation Clause could not be said to be unreasonable.

146 Peter's third submission was that the Non-Solicitation Clause was unreasonable because it restrained solicitation of *all* employees, officers, agents, Financial Consultants or managers regardless of seniority or Peter's influence over the individuals.[158] Peter referred to four cases – *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 ("*Lek Gwee Noi*"), *TSC Europe (UK) Ltd v Massey* [1999] IRLR 22 ("*TSC Europe*"), *Kearney v Crepaldi & Ors* [2006] NSWSC 23 ("*Kearney*") and *Aussie Home Loans Ltd v X Inc Services Pty Ltd* [2005] NSWSC 285 ("*Aussie Home Loans*").

(a) In *Lek Gwee Noi*, a non-solicitation covenant was held to be unreasonable because it prohibited the plaintiff from taking away from the defendant the business of *any* customer of the defendant, including those who became customers of the defendant *after* the plaintiff's employment had ended (at [110]).

(b) In *TSC Europe*, the non-solicitation clause prohibited solicitation of any employee without reference to his or her importance to the business and whether or not he or she has any knowledge or experience in relation to the plaintiff's technical fields of activity *and* applied to employees who commenced their employment with the plaintiff after the defendant (ex-employee) had left the company. The court found that it was the "combined effect of these two vices" that was critical and that the consequence was that the restrictive covenant was more than was reasonably necessary to protect the legitimate interests of the plaintiff (at [50] and [58]).

(c) In *Kearney*, the non-solicitation clause was held to be unreasonable because it encompassed all employees regardless of seniority or duration of their employment, and also all employees who had left the company before the defendants' employment ceased (at [83]).

(d) *Aussie Home Loans* concerned a prohibition against solicitation of the employees or contractors of the first plaintiff. The court found that the restraint against solicitation of employees of any description was too wide to be enforceable (at [31]). As for the solicitation of contractors, the court found that the restraint was not reasonable because (i) it applied to persons who became contractors after the third defendant's employment was terminated (at [32]), and (ii) in any event, it applied to contractors in other states and territories with whom the third defendant could not be expected to have had dealings and for whose supervision he could not be expected to have been responsible (at [35]).

147 In *Lek Gwee Noi* and *TSC Europe*, a key factor was the fact that the restrictions extended to the solicitation of persons who became customers/employees of the company after the defendant had left the company. In *Kearney*, a key factor was the fact that the restriction against soliciting extended to employees of the company who had left before the defendant's employment ceased. In the present case, the Non-Solicitation Clause restrained solicitation of persons who were employees/agents of PACS as at the date that Peter's agreements with PACS were terminated.

148 The decision in *Aussie Home Loans* has to be looked at in context. There, the interest that the first plaintiff was said to be entitled to protect by way of the

non-solicitation clause was the confidential information which the ex-employee was said to have about the relations between the first plaintiff (which was in the business of providing and arranging retail and business mortgage finance) and its loan writing employees/contractors (see [26], [32]–[33] and [35] of the judgment). In the present case, the relevant interest that PACS seeks to protect through the Non-Solicitation Clause is its interest to maintain a stable, trained workforce. The reasonableness of the Non-Solicitation Clause has to be tested against the protection of this interest.

149 The four cases that Peter referred to are distinguishable on the facts. The question whether the Non-Solicitation Clause is unreasonable (because it applies to all employees/agents) has to be determined based on the facts in the present case. In my view, PACS' interest in maintaining a stable, trained workforce relates primarily to its agency force. In this regard, it is in my view not unreasonable for the Non-Solicitation Clause to prohibit the solicitation of all agents regardless of seniority. Surely, the loss of its agents (regardless of seniority) to a competitor will adversely affect PACS' business. The protection of PACS' interest must include the need to protect against solicitation of all its agents.

150 That said, the Non-Solicitation Clause also applies to the solicitation of any "employee" or "officer" of PACS. In my view, the Non-Solicitation Clause is too wide in so far as it applies to any employee or officer of PACS. Such a restraint goes further than necessary to protect PACS' interest which is primarily the protection of its agency force. However, I agree with PACS that the Non-Solicitation Clause can be saved by applying the doctrine of severance and running a "blue pencil" through the words "employee" and "officer". The

following three prerequisites for severance (*Lek Gwee Noi* at [155]) are satisfied in this case:

(a) The unenforceable provision must be capable of being removed without adding to or modifying the wording of what remains with the remainder continuing to make grammatical sense.

(b) The remaining contractual terms must continue to be supported by adequate consideration.

(c) The severance must not change the fundamental character of the contract between the parties.

151 Finally, in his defence, Peter also pleaded that the Non-Solicitation Clause (see [39] above) only prohibits him from soliciting any person who is "an employee, officer, agent, Financial Consultant or manager of [PACS] as at the date [Peter's Agency Agreement] is terminated".[159]

152 PACS submitted that the reference to the date of termination only applies in respect of the restraint during the 24-month period after the termination of Peter's Agency Agreement. A literal reading of the Non-Solicitation Clause supports Peter's interpretation. However, PACS' interpretation makes better commercial sense. The Non-Solicitation Clause seeks to restrain Peter from soliciting both before and after his Agency Agreement is terminated. Peter's interpretation is illogical because it means that an existing agent can solicit other agents without breaching the Non-Solicitation Clause so long as the agents who are solicited terminate their Agency Agreements before the soliciting agent terminates his Agency Agreement.

Conclusion regarding the Non-Solicitation Clause

153 In my judgment, the Non-Solicitation Clause was reasonable and enforceable, at least in so far as it prohibited solicitation during the currency of Peter's Agency Agreement. However, it did not apply to Peter because it did not become a term of Peter's Field Manager Agreement or Agency Agreement (see [120] and [127] above). PACS' claim based on the Non-Solicitation Clause therefore fails.

Peter's duty to conduct his business with integrity and honesty

154 PACS pleaded[160] that Peter breached cl 18(a)(i) of Peter's Agency Agreement, which provided that Peter shall "conduct his insurance business with integrity and honesty".[161] PACS submitted that cl 18(a)(i) required Peter (while he was contracted with PACS) to deal with and serve PACS in good faith and with undivided interest and not to do anything during the pendency of his Agency Agreement which may harm PACS.[162]

155 PACS relied on *AXA China Region Insurance Co Ltd & Anor v Pacific Century Insurance Co Ltd & Ors* [2003] 3 HKC 1 ("*AXA China*"). In that case, of 327 AXA agents who resigned in December 2000, 259 joined the first defendant ("PCI"). The second to tenth defendants were former senior agents of AXA who joined PCI after terminating their agency contracts with AXA. Many of AXA's policyholders who were serviced by those agents surrendered their AXA policies and switched to PCI policies. AXA noticed that prior to the termination of the agency, an unusually large amount of printouts of AXA's client information had been effected from AXA's computer system by the individual defendants who had access to the client data. AXA sought an injunction, delivery up order and disclosure order against the defendants in

respect of the client data, which was confidential information belonging to AXA. AXA's case against the individual defendants was based on the duty of fidelity in respect of their agency with AXA.

156 The Hong Kong Court granted AXA's application. The court found that the individual defendants owed an implied duty of fidelity to AXA during the currency of their agency and held that this duty required them to "serve their principal, AXA, with good faith and undivided interest and [they] should not do anything which may harm AXA, not at least during the currency of the agency" (at [79]).

157 I agree with the analysis of the scope of the duty of fidelity in *AXA China*. In my view, that analysis is equally applicable to Peter's duty to conduct his insurance business with integrity and honesty. Therefore, I find that Peter's duty under cl 18(a)(i) of this Agency Agreement required him to serve PACS with good faith and undivided interest and that the duty meant that he should not do anything, during the currency of the agency, which may harm PACS. In my judgment, this duty included a duty not to solicit PACS' agents (during the currency of Peter's Agency Agreement) to join a competitor.

158 Peter submitted that cl 18(a)(i) regulated Peter's conduct with clients and potential clients and had no connection with non-solicitation obligations.[163] I disagree. Peter owed a duty to PACS not to do anything which may harm PACS during the currency of his agency. In my view, it is illogical to restrict the duty not to harm PACS to Peter's conduct with clients and potential clients but not to his conduct with PACS' agents, in particular those within PTO.

159 Peter also argued that the insurance industry accepts and even regulates poaching activities. In my view, this has nothing to do with the question as to whether Peter's duty of fidelity meant that he owed an obligation not to solicit PACS' agents (during the currency of his agency) to join a competitor. An insurance company owes no duty of fidelity to another insurance company.

Whether Peter owed implied duties of mutual trust and confidence to PACS

160 PACS pleaded that it was

> … an implied term of Peter's Field Manager Agreement and subsequent appointment as Tier 3 GAM (and thereafter Tier 3 Master GAM) that he owed PACS a duty not to conduct himself in a manner calculated and/or likely to destroy or seriously damage the relationship of confidence and trust between him and [PACS] (for example, by not enticing or attempting to entice [PACS'] ALs and agents in PTO to leave [PACS] and join a competitor firm).[164]

161 As can be seen, PACS' pleaded case refers to an implied term in Peter's Field Manager Agreement and "subsequent appointment" as GAM and Master GAM. In its closing submissions, PACS submitted that the term should be implied into Peter's Field Manager Agreement and "his subsequent agreements with [PACS] appointing him as GAM and Master GAM of PTO".[165]

162 Peter argued that a term cannot be implied into a mere appointment and that PACS has not pleaded or identified the GAM and Master GAM agreements with respect to which the proposed term is to be implied. Peter also pointed to the fact that the endorsement of claim in the writ described PACS' claim against Peter for breach of contract refers only to Peter's Agency Agreement and Field Manager Agreement. Peter submitted that therefore the only question for the Court is whether the proposed term can be implied into Peter's Field Manager

Agreement; otherwise, he would be prejudiced because he has not led evidence on facts relevant to the construction of any other agreements (apart from the Field Manager Agreement) since they were not identified by PACS.

163 I agree with Peter. PACS' pleaded case is confined to the implication of the proposed term in Peter's Field Manager Agreement only.

164 PACS' case in its closing submissions was that the proposed term should be implied on the specific facts of this case.[166] The test for the implication of terms *in fact* is well established: *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [101]. First, a gap in the contract must have arisen because both parties did not contemplate the gap. Second, it must be necessary in the business or commercial sense to imply a term in order to give the contract efficacy. Third, the proposed term must be one which the parties, recognising the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract.

165 The reference point for the implication of a term is at the time of contracting; the parties' subsequent conduct is only relevant if waiver or estoppel are relied on: *Sembcorp Marine* at [127]. Thus, with respect to the question as to whether the proposed term should be implied in this case, the parties' conduct subsequent to the date of Peter's Field Manager Agreement (*ie*, 1 February 2001) are irrelevant. Essentially, the facts relied on by PACS to support the implication of the proposed term relate to Peter's obligations as an AL under his Field Manager Agreement. These include the obligations to recruit new agents for PACS, manage the agents, take all reasonable action to ensure

that the agents comply with the terms of their respective agency agreements (which include exclusively promoting the sales of PACS' products).[167]

166 The proposed term is pleaded as a duty not to destroy or seriously damage the relationship of confidence and trust between PACS and Peter. PACS has pleaded the non-solicitation obligation as an "example" of the proposed term. It is therefore clear that the proposed term that PACS seeks to imply is one that encompasses a non-solicitation obligation. It is important to bear this in mind when applying the *Sembcorp Marine* test to the proposed term.

167 I agree with Peter that the proposed term does not satisfy the *Sembcorp Marine* test. First, I agree with Peter that the existence of a non-compete clause in Peter's Agency Agreement showed that PACS had restraint of trade clauses in mind when it entered into the Field Manager Agreement with Peter. The proposed term, as pleaded, was in substance a restraint of trade clause since it encompassed a non-solicitation obligation. In my view, it is unlikely that PACS would have contemplated non-compete obligations but not non-solicitation obligations. It is more likely that PACS contemplated but chose not to deal with the issue of non-solicitation obligations in Peter's Agency Agreement. This meant that PACS would also have had non-solicitation obligations in mind when it subsequently entered into the Field Manager Agreement with Peter.

168 I also agreed with Peter that it was not necessary to imply the proposed term in order to give the Field Manager Agreement efficacy. Clearly, the Field Manager Agreement could operate without a non-solicitation obligation.

169 Finally, I agree with Peter that the parties would not have responded "Oh, of course!" had the proposed term been put to them at the time of the

contract. This is amply supported by the strong objections by the agency force to the non-solicitation clause in the September 2010 AI, which sought to impose a non-solicitation obligation; the agency force had described the contents of the September 2010 AI as "unreasonable and something we cannot adhere to".[168]

170 I therefore find that the proposed term cannot be implied into Peter's Field Manager Agreement. PACS' claim based on the alleged implied term therefore fails.

Whether Peter owed fiduciary duties to PACS

171 As the Court of Appeal explained in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club*") at [42]–[43]:

> (a) A fiduciary is not subject to fiduciary obligations because he is a fiduciary; instead, it is because he is subject to such obligations and rules that he is a fiduciary for those purposes.
>
> (b) While there are settled categories of fiduciary relationships – such as the relationship of a trustee-beneficiary, director-company, solicitor-client, between partners – it does not mean that all such relationships are invariably fiduciary relationships. In these relationships, there is a strong, but rebuttable, presumption that fiduciary duties are owed. Equally, fiduciary relationships are not limited only to the settled categories. Fiduciary duties may be owed even if the relationship between the parties is not one of the settled categories, provided that the circumstances justify the imposition of such duties.

(c) Whether the parties are in a fiduciary relationship depends, ultimately, on the nature of their relationship and is not simply a question of whether their relationship can be shoe-horned into one of the settled categories or into a non-settled category.

(d) A fiduciary relationship arises when someone has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence, or where the relationship gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal.

172 PACS pleaded that Peter was a fiduciary and owed PACS various fiduciary duties.[169] PACS' case is that (a) Peter's relationship with PACS was that of agent and principal, which is an established category of fiduciary relationships, and (b) the specific facts and circumstances of this case gave rise to a fiduciary relationship.[170]

Whether Peter's relationship with PACS fell within the established agent-principal relationship

173 PACS first submitted that by virtue of Peter's role as PACS' "tied agent and AL", he fell within an established category of fiduciary relationship as between "insurance agent/AL and insurer (as principal)".[171]

174 As PACS' "tied agent", Peter could "sell" only PACS' policies. Although one commonly refers to insurance agents "selling" the insurer's policies, in truth, insurance agents are canvassing agents who canvass for offers to purchase PACS' policies. They have no authority to accept any such offer and bind PACS to issue a policy. An interested client would make an offer to

purchase a policy by making an application to PACS for the policy to be issued. The application would contain all the relevant details required by PACS. PACS could accept the offer and issue the policy, reject the offer or make a counteroffer (*eg*, by offering a policy for a lower insured sum or at a higher premium).

175 As an AL, Peter's role was to manage, supervise and train a team of agents (which included other ALs).

176 Peter submitted that he fell outside the established categories of fiduciary relationships. He argued that he transacted with PACS as an independent contractor, as provided in his Agency and Field Manager Agreements.[172] Peter relied on *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited* [2007] FCA 963 ("*Citigroup*"). The central issue in that case was whether the terms of a letter of engagement, under which an investment bank was retained by a large public company to advise on a proposed takeover, excluded the existence of any fiduciary relationship between the investment bank and its client. The engagement letter expressly provided that Citigroup was engaged "as an independent contractor and not in any other capacity including as a fiduciary". The Federal Court of Australia held (at [324]) that the plain meaning was that Citigroup was retained solely as an independent contractor and not as a fiduciary. The court went on to state that the engagement of Citigroup as "an independent contractor and not in any other capacity" suggested that the parties "had in mind the distinction between independent contractors and employees or agents" and that these words also "point against the assumption of any fiduciary capacity".

177 It is clear that the focus of the provision found in the engagement letter in *Citigroup* was that the Citigroup was engaged as "an independent contractor and not in any other capacity". It is also clear that the words "and not in any other capacity" influenced the Federal Court's view in *Citigroup*.

178 The relevant clauses in Peter's Agency Agreement and Field Manager Agreement have a different focus. The clauses in both agreements are similar and state as follows:[173]

> Nothing in this Agreement shall imply, constitute or deemed to constitute a relationship of employer and employee between [PACS] and the [Agent/Field Manager] and the [Agent/Field Manager] shall bear all responsibilities and enjoy all privileges hereunder as an independent and self-employed person.

Here, the focus is on the fact that the relationship between Peter and PACS was not one of employment. The headings of the clauses are consistent with this – the headings state "Not An Employee". There is no reason, in principle, why Peter could not be in a legal relationship of agent and principal with PACS just because he was an independent contractor.

179 PACS submitted that the relationship between an insurance agent and the insurer is a legal relationship of agent and principal, which is an established fiduciary relationship,[174] PACS relied on *AXA China* (discussed at [155]–[156] above). In my view, *AXA China* is not authority for the general proposition that the relationship of an insurance agent and the insurer is a legal relationship of agent and principal. As stated earlier, in *AXA China*, AXA (the insurer) sought an injunction order against the individual defendants based on a duty of fidelity in respect of their agency with AXA. The court concluded (at [85]) that there was a serious legal issue to be tried as to whether the individual defendants would be in breach of their duty of fidelity to AXA. This conclusion rested on

the court's view that the duty of fidelity was an *implied term* in the agents' contracts and that this implied term meant that they were to serve AXA "with good faith and undivided interest and should not do anything which may harm AXA, not at least during the currency of the agency" (at [69] and [79]).

180 With respect, the judgment in *AXA China* did not analyse whether or to what extent the relationship between the insurance agents and the insurers could be said to give rise to a legal relationship of agent and principal. It was also not necessary for the court to do so given the court's view that the duty of fidelity was an implied term of the agents' contracts.

181 I agree with Peter that his role as tied agent and AL did not give rise to any legal relationship of agent and principal with PACS. Each agent in PACS operates his own business for his own account, subject to the terms of his agreements with PACS. As an AL, Peter too operated his own business and managed the agents in PTO for his own account. He was not managing the agents in PTO on behalf of PACS. Peter controlled how he managed and trained the agents in PTO, subject of course to his CEDLI obligations, which arose from guidelines issued by LIA, *ie*, LIA MU 59/15 (guidelines on competency requirements for agents and supervisors) and LIA MU 65/15 (Span of Control Guidelines) (see [11]–[14] above). PACS gave incentives to its ALs to improve the performance of their respective units. However, this did not make Peter an agent of PACS for the purposes of managing the agents in Peter's group. The fact that Peter was a tied agent did not affect how Peter managed the agents in PTO. The relationship between Peter (as AL) and PACS was one between two principals.

182 There is one aspect of the relationship between an insurance agent and PACS, which gives rise to a legal agent-principal relationship. In my view, when explaining PACS' policies to potential clients and assessing the suitability of the policies for the client, the insurance agent would be acting as PACS' agent in the legal sense. His representations to the client could bind PACS. However, this aspect of the relationship is not relevant in the instant case.

Whether the facts give rise to a fiduciary relationship

183 PACS submitted that a fiduciary relationship between Peter and PACS arose on the specific facts and circumstances. PACS relied on the fact that, as Master GAM, Peter undertook to act for/on behalf of Prudential to manage its 500 agents (including ALs) in PTO and to grow the business brought in by PTO.[175] PACS argued that this gave rise to a relationship of mutual trust and confidence and a legitimate expectation on the part of PACS that Peter will not utilise his position in such a way which is adverse to Prudential's interests.

184 Peter and PTOMC submitted that the court should be extremely slow to find a fiduciary relationship outside the established categories of such relationships. They argued that the facts do not give rise to a fiduciary relationship because Peter's relationship with PACS was a commercial, arm's length and equal relationship and that he did not undertake to act solely in the interests of PACS, to the exclusion of his own.

185 As the Court of Appeal held in *Turf Club* (see [171] above), whether the parties are in a fiduciary relationship depends, ultimately, on the nature of their relationship – a fiduciary relationship arises when someone has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence, or where the relationship gives rise

to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal. It is therefore crucial to understand the nature of Peter's relationship (as a Master GAM) with PACS.

186 It is clear that PTO was important to PACS. PTO was the largest agency group in PACS, contributing approximately 10% of PACS' entire agency force sales production measured in APE. Agents in PTO were also generally more productive in terms of the amount of APE generated per agent as compared to PACS' overall agency force. PACS came up with the Master GAM scheme in 2011 so that Tier 2 ALs in PTO who had to be promoted to Tier 3 GALs or GAMS (because the size of PTO had exceeded the Span of Control Guidelines) did not have to move out of PTO after they were promoted and could remain in PTO (see [40] above).

187 PACS regarded Peter as being central to the growth of PTO. At the material time, Peter was a (in fact, the only) Master GAM in PACS. The importance of Peter and PTO to PACS was confirmed again in 2015 when PACS entered into the Pegasus Agreement with Peter. The Pegasus Agreement was meant specifically for Peter and was intended to incentivise him to remain with PACS and grow PTO (see [51] above).

188 However, it is important to bear in mind that each agent and each agency group or unit operated as an independent business. An agent or AL could choose to work as little or as hard as he wanted to. At the material time, PTO was an alliance comprising Peter (in his capacity as a Master GAM and a GAM) and other GAMs. Each of these other GAMs could have operated independently. They opted to remain as part of PTO for business reasons. There was synergy

in being part of a larger group, they were able to use Peter's Professional Advisory Management System ("PAMS") and they benefited from Peter's training and leadership. PAMS was a franchise system that provided "a platform to recruit, supervise and train professional financial services advisers from rookie to management level".[176] Peter had developed a recruitment selection process (which he called BASE Camp) and it appears that he was very successful with recruiting agents. Having the various GAMs remain as part of PTO under Peter's leadership did benefit PACS because the agents under Peter's leadership performed better. However, whether the other GAMs remained in PTO was a decision that each GAM made for himself for business reasons.

189 PTO too operated as an independent business. As Master GAM, Peter continued to manage the other GAMs in PTO, but without CEDLI responsibility. PACS had little involvement in the management of PTO. Peter decided how he would run and manage PTO, including how to conduct recruitment drives, how he would train the agents in PTO and how roadshows should be organised. As a Master GAM, Peter was free to buy, or lease from a third party, his own office space for PTO. As a Master GAM, Peter was also paid a business allowance by PACS and he had complete discretion as to the allocation of the funds to the other GAMs in PTO.

190 In my judgment, the nature of Peter's relationship with PACS under the above circumstances does not call for the imposition of fiduciary duties. The GAMs chose to join PTO and Peter managed PTO as an independent business. I agree with Peter that PACS did not entrust him with the management and control of the agents in PTO. Peter's relationship with PACS did not rise beyond that of a purely commercial relationship. They were not in a relationship of

mutual trust and confidence that would give rise to a legitimate expectation on PACS' part that Peter would not utilise his position as Master GAM to act in a way adverse to PACS' interests. As the Court of Appeal cautioned in *Turf Club* (at [45]), courts "will, and should, be slow in imposing fiduciary obligations on parties to a purely commercial relationship because it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party". Both Peter and PACS were "commercial parties capable of advancing and protecting their own business" (see *Turf Club*, at [45]).

Conclusion on Peter's fiduciary duties

191 I find that Peter did not owe any fiduciary duties as pleaded by PACS. First, the relationship between Peter (as tied agent and AL) and PACS was not a legal relationship of agent-principal. Therefore, it did not fall within an established category of fiduciary relationships. Second, the circumstances surrounding Peter's role as Master GAM of PTO did not give rise to a relationship of mutual trust and confidence such as to give rise to fiduciary obligations. Peter's relationship with PACS was a purely commercial relationship, entered into between two experienced parties.

192 PACS' claim against Peter for breach of fiduciary duties therefore fails.

Whether the Preparatory Steps and/or Acts of Solicitation breached Peter's contractual obligations and/or fiduciary duties

193 I have found that Peter did carry out the Preparatory Steps and Acts of Solicitations (see [89] and [92] above). I have also found that Peter owed a *contractual* obligation to conduct his insurance business with integrity and honesty pursuant to cl 18(a)(i) of his Agency Agreement, which required him to serve PACS with good faith and undivided interest and that the duty included

a duty not to solicit PACS' agents (during the currency of Peter's Agency Agreement) to join a competitor (see [157] above).

194 In my judgment, the Preparatory Steps and Acts of Solicitation breached Peter's contractual obligation under cl 18(a)(i) of his Agency Agreement.

195 In his defence, Peter pleaded that PACS had waived his breaches of contract.[177] Peter alleged that:

(a) From at least early June 2016, PACS had known about the Acts of Solicitation and that Peter and a significant number of agents in PTO had decided to leave PACS to join a third-party independent FA firm.

(b) PACS had an obligation and/or duty to immediately or within a short time, remind Peter of his obligations and require him to disclose all facts and information pertaining to his dealings with Aviva and the intended move to AFA, and to require Peter to immediately cease all acts amounting to such breaches.

(c) By keeping silent about Peter's dealings with Aviva and the agents in PTO, and by engaging Peter throughout June to mid-July 2016 as if it was "business as usual", PACS had waived and/or released Peter in respect of his breaches.

196 Peter submitted that PACS would have waived its rights to bring the present claim if PACS had made a representation that it elected not to object to Peter's breaches (waiver by election), or that PACS communicated an intention to forebear on exercising its rights in respect of Peter's breaches (waiver by estoppel).[178] Peter submitted that although mere silence will not normally

suffice, PACS' silence in this case was sufficient because PACS had a duty to speak. Peter relied on *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") in which the Court of Appeal held (at [58]) that mere silence will not normally amount to an unequivocal representation but in circumstances, particularly where there is a duty to speak, mere silence may amount to such a representation.

197 Peter argued that:[179]

(a) if PACS believed that Peter was doing something wrongful, it had a duty to speak up and put an end to such conduct, such duty arising from the obligation of mutual trust and confidence between PACS and Peter;

(b) if PACS expected to suffer losses from PTO's departure, it had an obligation to mitigate such damage and this entailed an attempt to warn or stop Peter; and

(c) PACS' "business-as-usual" approach led Peter to believe that he was entitled to act as he did.

198 I agree with PACS that Peter's defence of waiver must fail. Peter had actively concealed the move to AFA from PACS (see [104] above). PACS' senior management heard rumours and spoke to Peter but Peter repeatedly said that he was not leaving PACS and even pretended to be disturbed by the exodus of agents. As the Court of Appeal said in *Audi Construction* (at [61]):

> … The expression "duty to speak" does not refer to a legal duty as such, but to circumstances in which a failure to speak would lead a reasonable party to think that the other party has elected between two inconsistent rights or will forbear to enforce a particular right in the future, as the case may be. We emphasise

> that this is not the subjective assessment of the other party but an objective assessment made by reference to how a reasonable person apprised of the relevant facts would view the silence in the circumstances, though unsurprisingly, the parties' relationship and the applicable law which governs it will be a critical focus of the court's assessment of whether those circumstances exist.

Peter knew of his own wrongdoings and actively concealed the same from PACS. I cannot see how PACS can be said to have had a duty to speak in such circumstances. PACS' silence could not possibly have led Peter to think that it had elected between two inconsistent rights or that it will forbear to enforce its rights against Peter in the future.

199 I also agree with PACS that in any event, Peter has not pleaded any facts giving rise to any detrimental reliance on his part, or any facts that made it inequitable for him to rely on any alleged representation by PACS.

200 The issue of a breach of fiduciary duties does not arise since I have found that Peter did not owe any fiduciary duties to PACS.

PACS' claim against PTOMC for dishonest assistance

201 To establish dishonest assistance, PACS has to prove that PTOMC rendered assistance towards the breach of fiduciary duties and that the assistance rendered by PTOMC was dishonest: *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*GRZ III*") at [20].

202 I have found that Peter did not owe, and therefore did not breach, any fiduciary duties. Accordingly, PACS' claim against PTOMC for dishonest assistance fails.

203 Given the above conclusion, it is not necessary for me to deal with the question as to whether PTOMC had in fact assisted Peter. However, as substantive submissions were made on this question, I shall deal with them.

204 PACS' pleaded case against PTOMC is that PTOMC dishonestly assisted Peter in his breaches of fiduciary duties as follows:

(a) From on or around 1 June 2016, PTOMC participated in the discussions with Aviva.[180]

(b) By entering into the DAA, PTOMC was the corporate vehicle used to acquire the Aviva Payments and the benefits arising from the long-term partnership with Aviva under the DAA (the "Aviva Long-term Business Partnership").

205 PTOMC denied that it participated in the discussions with PACS.[181] Peter claimed that he incorporated PTOMC to cover the south-east Asia market and that it had "nothing to do with any discussions with Aviva".[182] Peter denied that PTOMC was set up for the purposes of entering into the DAA.[183] I reject Peter's claim. I find that Peter incorporated PTOMC on 1 June 2016 for the purpose of entering into the DAA and that therefore, after its incorporation, PTOMC would have participated (through Peter, as its sole shareholder and director) in discussions with Aviva. The evidence is compelling:

(a) Peter's evidence that Aviva spoke to him about using a company to sign the DAA, in the first week of June 2016, cannot be correct. A draft consultancy agreement that Aviva sent to Peter on 31 May 2016 contemplated that Peter would be providing his services to Aviva

through a private limited company that was to be incorporated.[184] There must have been discussions before 31 May 2016 about this.

(b) On 1 June 2016, Peter incorporated PTOMC and PTOMC signed the DAA on 23 July 2016. PTOMC's incorporation could not have been a mere coincidence.

(c) PTOMC had no other business other than the services under the DAA until after 30 June 2017.[185] Peter claimed that since incorporation, PTOMC had acted as a consultant to a number of clients.[186] However, these other "clients" were all companies that were set up after 30 June 2017 and that belonged to Peter or that he had influence over.[187]

206 PTOMC also denied that it was the corporate vehicle used to acquire the Aviva Payments and the benefits from the Aviva Long-term Business Partnership. PTOMC submitted that its entry into the DAA and its receipt of the Aviva Payments had no causal significance to the Acts of Solicitation. PTOMC argued that the Aviva Payments are consideration for services rendered and are not tied to or payments for any of PACS' agents joining AFA.

207 PACS relied on *Innovative Corp Pte Ltd v Ow Chun Ming and another* [2020] 3 SLR 943 ("*Innovative*"). In that case, a joint venture agreement identified the plaintiff as the developer for a construction project for the Fong Yun Thai Association ("FYTA"). The joint venture agreement, which was never executed formally, referred to the parties' intention "to enter into a joint venture". Subsequently, the 1st defendant became a joint venture partner of the plaintiff, with a 50% share in the proceeds of the project. The 1st defendant also became a 50% shareholder and director of the plaintiff. Acting on the 1st defendant's advice, the plaintiff began negotiating with FYTA for a more

comprehensive joint venture agreement. Several drafts of the revised joint venture agreement were exchanged but none were actually executed.

208 Relations between FYTA and the plaintiff soured and FYTA called for a fresh tender for the project. The 1st defendant successfully tendered for the project without the plaintiff and he subsequently incorporated the 2nd defendant as the vehicle to carry out the project. He also resigned as a director of the plaintiff. The plaintiff sued the 1st defendant for breach of director's duties by diverting the maturing business opportunity from the plaintiff, and for inducing a breach of the contract between FYTA and the plaintiff. The plaintiff sued the 2nd defendant for knowing receipt of the diverted opportunity and for dishonestly assisting the 1st defendant in the breach of his duties.

209 The Court found that project was a maturing business opportunity and that the 1st defendant breached his fiduciary duties by acquiring the corporate opportunity of the plaintiff for himself and thus became a constructive trustee for the plaintiff in respect of the fruits of the opportunity to participate in the project (at [93], [123] and [129]). The 1st defendant breached the trust by retaining the project for himself and the 2nd defendant (at [129]).

210 The Court concluded that it was immaterial that the plaintiff had already lost the opportunity to participate as developer of the project before the 2nd defendant was incorporated (at [131]). The Court found that the 2nd defendant had assisted the 1st defendant in his breach of trust by subsequently carrying out the development of the project (at [131]). The Court also found that the 2nd defendant possessed actual knowledge of matters that made its assistance dishonest by imputing the knowledge of the 1st defendant (who was the controlling mind and will of the 2nd defendant) to the 2nd defendant (at [133]).

211 PACS submitted that the present case is analogous to *Innovative* and that Peter's purpose for incorporating PTOMC and getting PTOMC to sign the DAA was to facilitate Peter's receipt of payments from Aviva for services rendered by him personally and in an attempt to distance himself from Aviva.[188] By entering into the DAA and being the corporate vehicle through which Peter received the Aviva Payments and/or the Aviva Long-term Business Partnership, PTOMC assisted in Peter's breach by enabling him to receive the fruits of his breach of fiduciary duties without him being directly linked to Aviva.

212 I agree with PTOMC that *Innovative* is distinguishable and that the facts of the present case do not support PACS' case that PTOMC assisted Peter in the Acts of Solicitation. In *Innovative*, the 1st defendant was a constructive trustee for the plaintiff in respect of the fruits of the opportunity to participate in the project; he breached the trust by retaining the project for himself and the 2nd defendant. Understandably, the Court found that the 2nd defendant had assisted in the continuing diversion of the opportunity by carrying on with the project. In the present case, all that can be said is that the Acts of Solicitation led to the exodus of agents leaving PACS to join AFA and culminated in the DAA. In my view, it cannot be said that the DAA itself had any causal significance to the Acts of Solicitation.

What are the losses suffered by PACS?

213 I have found that Peter owed no fiduciary duties in connection with his role in managing the agents in PTO, as Master GAM of PTO (see [191] above). Peter's liability is only for breach of contract. I have also found that Peter breached his contractual obligations by carrying out the Preparatory Steps and the Acts of Solicitation (see [194] above).

214 PACS claims that the Preparatory Steps and the Acts of Solicitation caused a total of 23 of PACS' ALs (excluding Peter) (the "Departed ALs") and 221 of PACS' Tier 1 agents (the "Departed Agents") in PTO to terminate their respective agency agreements with PACS.[189] All 244 agents (the "Departed ALs and Agents") are identified in the schedule to the statement of claim.

215 PACS' pleads two heads of loss and damage:[190]

(a) PACS' loss of profits as a result of the mass departure of the Departed ALs and Agents; and

(b) PACS' loss of profits as a result of the drop in the productivity of its ALs and agents (who were from PTO) in the period from May to October 2016.

216 Damages for breach of contract are ordinarily assessed in terms of the claimant's expectation loss, which refers to the value of the benefit that the claimant would have obtained but for the breach of contract: *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd* [2016] 2 SLR 1056 at [24]. The question that arises is what is the counterfactual (in which the breach would not have occurred) against which the damages are to be assessed?

217 With respect to its claim for loss of profits, PACS submitted that the appropriate counterfactual for this head of damages is one in which:[191]

(a) Peter remained with PACS until his retirement (as defined in the Pegasus Agreement); and

(b) PTO remained intact following Peter's retirement and continued to generate profits for PACS.

Under the Pegasus Agreement, Peter would be considered to have retired if he terminated his agency agreement with PACS and did not join a competitor or otherwise compete with PACS for one year.[192] Based on the above counterfactual, PACS claims $2,345,772,625 as its loss of business value due to the departure of the Departed ALs and Agents.[193]

218 As stated earlier, the Pegasus Agreement was for an initial term of six years and was subject to renewal for another six years. PACS submitted two alternative counterfactuals for its loss of profits claim:

(a) The first alternative counterfactual is one in which Peter remains with PACS until 2025, and PTO ceases to exist after Peter's departure. This is premised on the fact that (i) 2025 coincides with Peter's "possible retirement age" of 60, and (ii) the Pegasus Agreement contained an option to extend the agreement for a further six years after 2019. PACS claims $252,615,964 as its loss in this scenario.[194]

(b) The second alternative counterfactual is one in which Peter remained with PACS until the end of 2019 when the initial six-year term of the Pegasus Agreement expired, and PTO ceased to exist after Peter's departure. The Pegasus Agreement provided it would terminate if the parties do not agree on the terms for its renewal.[195] PACS claims $102,503,406 as its loss in this scenario.[196]

219 PACS' counterfactuals assume that Peter would have stayed on with PACS if he had not carried out the Acts of Solicitation. Peter disputes this. According to Peter, the appropriate counterfactual is one in which he would have left PACS even without the Acts of Solicitation.

220 With respect to its claim for loss of productivity, PACS claims:

(a) $2,2729,971 due to the loss of productivity of the Departed ALs and Agents during the period from May 2016 to their respective departure dates;[197] and

(b) $2,324,010 due to the loss of productivity of the Orphan Agents and Orphan ALs during the period from May 2016 to October 2016.[198]

PACS' computations of these losses are also premised on a counterfactual in which Peter stays on with PACS, instead of leaving.

Issues relating to PACS' claims for loss and damage

221 The issues are:

(a) Whether Peter's Acts of Solicitation caused the Departed ALs and Departed Agents to leave PACS?

(b) What is the appropriate counterfactual?

(c) The computation of damages for PACS' loss of profits claim.

(d) The computation of damages for PACS' claim for loss of productivity of the Departed ALs and Agents.

(e) The computation of damages for PACS' claim for loss of productivity of the Orphan Agents and Orphan ALs.

Whether the Acts of Solicitation caused the Departed ALs and Agents to leave PACS?

222 The Departed ALs and Agents gave notice of termination of their respective agreements with PACS on different dates between 10 June 2016 and 27 February 2017.[199] The table below sets out the distribution of the Departed ALs and Departed Agents by the dates of their notices of termination.

	Date of notice of termination	**Number of agents**
Departed ALs (total: 23)	15 June 2016	1
	20 June 2016	2
	27 June 2016	2
	28 June 2016	15
	29 June 2016	3
Departed Agents (total: 221)	10 June 2016	1
	15 June 2016	137
	16 June 2016	42
	17 June 2016	15
	20–23 June 2016	9
	1–7 July 2016	6
	11 – 25 July 2016	6
	3 – 23 August 2016	2
	2 September 2016	1
	24-27 February 2017	2

223 PACS' accepted that it must show that Peter's Acts of Solicitation caused the mass exodus of the 244 Departed ALs and Agents.[200] PACS submitted that it is sufficient for PACS to demonstrate that Peter orchestrated the opportunity for PACS' agents to leave *on masse* and that Peter's creation of an enticing opportunity for mass migrations was itself a powerful act of solicitation.[201] I disagree with PACS' submissions.

224 "Solicitation" in the context of the prohibition of the solicitation of either employees or clients, simply means "to ask", "to call for", "to make a request", "to petition", "to entreat", "to persuade", or "to prefer a request": *Tan Wee Fong v Denieru Tatsu F&B Holdings (S) Pte Ltd* [2010] 2 SLR 298 at [24].

225 However, solicitation requires some positive act. Merely creating the opportunity (no matter how enticing) cannot amount to solicitation.

226 In the present case, the Acts of Solicitation were positive acts taken by Peter. I have found that through these acts, Peter did solicit the Attendee ALs and, through them, PACS' other agents in PTO to leave PACS to join AFA (see [92] above). That said, the number of agents who left PACS, as a result of the Acts of Solicitation, has a direct bearing on the amount of damages that PACS can claim. Peter is correct in his submission that PACS must still show that the Acts of Solicitation caused each of the Departed ALs and Agents to leave PACS.[202]

227 PACS submitted that there is no explanation for the mass exodus other than the Acts of Solicitation. PACS relied on *QBE Management Services (UK) Ltd v Dymoke* [2012] EWHC 80 ("*QBE*"). In that case, the 1st to 3rd defendants resigned from employment with the claimant to commence a start-up business

with the 4th defendant. Over the next three months, another eight employees of the claimant resigned to join the 4th defendant. It was unusual for the claimant to lose so many employees in such a short space of time. On the question of proof of causation, the court held (at [273]) that the "correct approach is not to look simply at the individual breaches seriatim or in isolation, but to have regard to the totality of conduct complained of and ask whether the cumulative effect there is such as to have caused loss, damage or disadvantage to the Claimant".

228 I agree that the court has to consider the whole matter holistically. However, PACS' submission merely draws a causative link between the Acts of Solicitation and the "mass exodus". It glosses over and begs the question as to whether each of the 244 of Departed ALs and Agents should be treated as part of the "mass exodus". PACS has to show some causative link between the Acts of Solicitation and each of the Departed ALs and Agents.

229 Peter negotiated with Aviva for the transition packages for the agents in PTO to join him at AFA. In addition, Peter, as PACS described it, orchestrated the mass exodus. In my judgment, these facts support a very strong inference that the Departed ALs and Agents left PACS as a result of the Acts of Solicitation if:

(a) they were part of PTO;

(b) they left PACS to join AFA; and

(c) they gave notice of termination between 15 June 2015 and 8 July 2016.

With respect to any of the Departed AL and Agents who do not satisfy these three criterion, PACS would need to adduce other evidence to prove that they left because of the Acts of Solicitation

230 The date 15 June 2015 is relevant because Peter testified that the plan was for the agents who were leaving PACS to do so on or around the same day; Peter referred to this date as the "press button" date.[203] After consulting his "feng shui" master, it was decided that the "press button" date would be 15 June 2016.[204] Aviva knew that the "press button" date would be 15 June 2016, a few days before that date.[205]As for the date 8 July 2016, this was the date that Peter gave his notice of termination. In my view, it is reasonable to use this date as the cut-off date for purposes of drawing the inference referred to in [229] above, since Peter decided when to submit the notices of termination of the agents he had solicited (see [105] above).

231 The 244 Departed ALs and Agents comprised 23 Departed ALs and 221 Departed Agents. Of these, 23 Departed ALs and 201 Departed Agents satisfy all three criterion set out in [229] above,[206] *ie*, they were from PTO, they left PACS to join AFA and they gave their notices of termination between 15 June 2016 and 8 July 2016. I therefore find that these 23 Departed ALs and 201 Departed Agents left PACS because of the Acts of Solicitation.

232 Of the remaining 20 Departed Agents:

(a) Three left PACS to join AFA and gave their notices of termination between 15 June 2016 and 8 July 2016, but were not part of PTO.[207] However, I agree with PACS that there is other evidence that shows that these three agents had left because of the Acts of Solicitation. According to Peter's own testimony, these three agents were included in

the list of agents whose information had been obtained for the purpose of negotiating their transition packages with Aviva.[208] I find that these three agents left PACS as a result of the Acts of Solicitation.

(b) Six did not join AFA after leaving PACS.[209] As there is no other evidence that shows a causative link to the Acts of Solicitation, I find that PACS has not proved that these six Departed Agents left PACS because of the Acts of Solicitation.

(c) Twelve (including one of the six referred to in (b) above) gave their notices of termination outside of the period from 15 June 2016 to 8 July 2016.[210] As there is no other evidence that shows a causative link to the Acts of Solicitation, I find that PACS has not proved that these 12 Departed Agents left PACS because of the Acts of Solicitation.

233 PACS sought to rely on the fact that the notices of termination given by all the Departed ALs and Agents were identical. However, as Peter pointed out, there was nothing significant in this fact as the notices were based on a PTO template that was generally available to any agents in PTO who wanted to leave PACS. Further, some of the Departed Agents did not use the PTO template.[211]

234 In conclusion, I find that PACS has proved that 23 Departed ALs and 204 Departed Agents left PACs as a result of the Acts of Solicitation (see [231] and [232(a)] above).[212] PACS' claims in connection with the remaining 17 Departed Agents therefore fails.

The appropriate counterfactual assuming no Acts of Solicitation

235 PACS' claim is for the loss of profits it could have earned *if Peter did not leave PACS and PTO had remained intact*. This claim is premised on PACS' counterfactual in which,

(a) Peter would have remained with PACS and continued to manage and operate PTO; and

(b) Peter would have left PACS:

(i) in 2019 (after which PTO would have ceased to exist); or

(ii) in 2025 (after which PTO would have ceased to exist); or

(iii) upon his retirement as defined in the Pegasus Agreement (after which PTO would have continued to persist into perpetuity).

236 PACS submitted that but for the Acts of Solicitation, Peter would likely have stayed with PACS because he was incentivised to do so.[213] Apart from the benefits that he received as a Tier 3 AL and Master GAM, Peter stood to receive additional substantial pay-outs under the Pegasus Agreement (see [50]–[52] above). Under that Agreement, Peter was projected to receive between $6.2m to $15.9m (see [52] above). Part of the payment was to be made over a ten-year period on condition that Peter remained a Tier 3 Master GAM with PACS or upon Peter's death or retirement (as defined in the Pegasus Agreement (see [217] above).[214]

237 The link between the Acts of Solicitation and whether Peter would have stayed with PACS is indirect. Essentially, PACS' case is that:

(a) without the Acts of Solicitation, the mass exodus of the Departed ALs and Agents and the deal with Aviva would not have happened; and

(b) without mass exodus of the Departed ALs and Agents and the deal with Aviva, Peter would have had no reason to give up his financial incentives at PACS and would therefore have stayed with PACS.

238 In Peter's counterfactual,[215]

(a) he would have negotiated with Aviva and given his notice of termination on 8 July 2016;

(b) he would have solicited the Departed ALs and Agents to join him as soon as it was legally permissible for him to do so (in this case, this would have been after his notice period expired on 22 July 2016, since the Non-Solicitation Clause did not apply to him); and

(c) the 23 Departed ALs and 204 Departed Agents would have left PACS to join him.

Based on Peter's counterfactual, PTO would have ceased to exist upon Peter's departure.

239 Peter submitted that PACS is not entitled to assert a counterfactual in which he would have stayed with PACS because this has not been pleaded. PACS has not even pleaded the Pegasus Agreement, which PACS relies upon for its counterfactual. On the pleadings, Peter had left PACS. PACS' counterfactual asserts a different fact (*ie*, that Peter would have remained with PACS). I agree with Peter that it was necessary for PACS to plead this factual

assertion so that Peter would know the case that he had to meet and not be taken by surprise.

240 In my view, Peter's counterfactual is the appropriate counterfactual that applies in this case.

241 Given the conclusion above, it is unnecessary for me to deal with the question as to whether, on the evidence, Peter would have remained with PACS if he had not carried out the Acts of Solicitation, and if so, for how long. However, I would add that, in my view, PACS' claim for loss of profits beyond the initial six-year term of the Pegasus Agreement was too speculative. The central plank in PACS' submission that Peter would have stayed with PACS was that he would have been incentivised, financially, to do so, and the Pegasus Agreement played a prominent role in this regard. However, the Pegasus Agreement was subject to renewal after the first six years and any such renewal was to be on terms *to be agreed*. PACS has the burden of proving, on a balance of probabilities, that Peter and PACS would have reached agreement on the terms for the renewal of the Pegasus Agreement. On the evidence before me, PACS has not discharged its burden of proof. It is true that Peter would have lost any deferred amounts under the Pegasus Agreement if it was not renewed after the initial six-year term unless Peter "retired" (*ie*, not participate in any kind of business for a year). Even so, whether Peter would have agreed to a renewal would still depend on the terms that PACS would have been prepared to offer. Peter also had the option of receiving payment of the deferred amount by "retiring" instead of renewing the Pegasus Agreement.

242 PACS' scenario in which PTO persists in perpetuity is even more speculative. Again, PACS bears the burden of proving that Peter would have

groomed a new generation of leaders capable of replacing him in PTO, before his retirement. Peter was clearly central to the success of PTO. Even leaving aside the question as to when Peter would have retired, nothing in the evidence before me gives any indication of the likelihood that Peter could have groomed a new generation of leaders capable of replacing him in PTO, before his retirement.

Computation of damages for PACS' loss of profits claim

243 The appropriate counterfactual in this case (see [238] above) means that the 23 Departed ALs and 204 Departed Agents would still have given their notices of termination and left PACS to join Peter. The difference in this counterfactual (compared to what actually happened) is that the 23 Departed ALs and 204 Departed Agents would have given their notices of termination at a later time, after 22 July 2016. I agree with Peter that PACS' loss would be the profits that PACS could have earned from the *23 Departed ALs and 204 Departed Agents*.

244 In the present case, Peter started holding his meetings with the Attendee ALs from May 2016. There is evidence that by 9 May 2016, Peter had started talking to the ALs about moving to Aviva.[216] The 23 Departed ALs and 204 Departed Agents started giving their notices of termination from 15 June 2016 (*ie*, just over five weeks later) and the last notice of termination was given three weeks thereafter on 7 July 2016. All 23 Departed ALs and 204 Departed Agents would have left PACS after the expiry of 14 days from the dates of their notices of termination.

245 In the counterfactual, the same events would have played out except that they would have started on 23 July 2016 (instead of May 2016). In other words,

(a) Peter would have started holding his meetings with the Attendee ALs from 23 July 2016; and

(b) the 23 Departed ALs and 204 Departed Agents would have given their notices of termination (over a three-week period) starting from about five weeks later and they would have left PACS after the expiry of 14 days from the dates of their notices of termination.

246 In the counterfactual, the 23 Departed ALs and 204 Departed Agents would have carried on performing their services as usual for PACS until 23 July 2016, after which their performance would mirror what actually happened from May 2016 in this case. Consequently, PACS' loss with respect to the 23 Departed ALs and 204 Departed Agents would be the profits that PACS could have earned from them for the period between 9 May 2016 and 23 July 2016 ("Loss Period"). The amount of loss of profits depends on (a) the amount of sales that the 23 Departed ALs and 204 Departed Agents could have made during the Loss Period, and (b) the profit margin to be applied to these sales.

Computation of sales that the 23 Departed ALs and 204 Departed Agents could have made during the Loss Period

247 PACS' quantum expert, Mr Richard Boulton ("Boulton") had computed the sales that the Departed ALs and Agents could have made in 2016. He categorised them into cohorts:[217]

(a) ALs who were promoted before 2016:[218] Boulton computed the 2016 sales for this cohort based on the individual AL's average full year sales since promotion. Peter's quantum expert, Mr Chris Osborne ("Osborne"), took the view that the 2015 sales were the best estimator

of the likely 2016 sales, based on his back-testing analysis. Boulton found that Osborne's back testing analysis did not establish that, historically, prior sales were an accurate predictor of subsequent year's sales; there were flaws and variances. In my view, Boulton's approach of using the AL's average full year sales since promotion should be adopted; I see no reason why it cannot provide a reliable estimate for the 2016 sales.

(b) ALs who were promoted in 2016:[219] Boulton computed the 2016 sales for this cohort based on 45% of the individual AL's average full year sales as Tier 1 Agents. The pre-2016 sales for this cohort of ALs comprises sales made when they were Tier 1 Agents. It is common ground that ALs' direct sales after promotion are lower than when they were Tier 1 Agents. Thus, it is necessary to discount the sales that were made as Tier 1 Agents. Boulton applied a 55% reduction based on the average reduction in sales by *all* ALs in PTO who were promoted from 2012 to 2015. Osborne proposed a 67% reduction based on the average reduction in sales by ten Departed ALs who were promoted in the period from 2012 to 2015. I accept Boulton's 55% reduction. In my view, using the average reduction in sales of all ALs in PTO is fairer and likely to be more accurate.

(c) Agents who joined PACS before 2015:[220] Boulton computed the 2016 sales for this cohort based on the individual agent's average full year sales up to 2015. Osborne's view was that the 2016 sales should be computed based on the 2015 sales. The issue here is similar to that discussed under (a) above. I accept Boulton's approach.

(d) Agents who joined PACS in 2015 and who had generated sales:[221] Boulton computed the 2016 sales for this cohort based on the individual agent's 2015 sales. Osborne agreed with this approach.

(e) Agents who joined PACS in 2015 but who had not generated sales, and agents who joined PACS in 2016:[222] Boulton computed the 2016 sales for this cohort based on the average sales of new agents who join PTO. Osborne agreed with this approach.

248 I agree with the approach taken by Boulton in categorising the cohorts as set out above, as well as the approach taken in each of the categories. The same approaches should be used to compute the sales that the 23 Departed ALs and 204 Agents could have made *in 2016*, before pro-rating the same to arrive at the sales for the Loss Period.

The profit margin

249 The sales by the 23 Departed ALs and 204 Departed Agents would have comprised a mix of different types of policies and the profit margin for each type of policy would be different. Thus, the profit margin to be applied to the sales that each of these agents could have made depends on (a) the mix of products that each agent could have sold, and (b) the profit margin for each product.

250 In calculating the loss arising from the departures of the Departed ALs and Agents, Boulton had calculated a weighted average of each of the Departed ALs and Agents' profit margin depending on their product mix in 2015.[223] This seems to me to be a reasonable approach which should be applied in calculating

the profit margin with respect to the 23 Departed ALs and 204 Departed Agents for the Loss Period.

251 As for the profit margin for each of the products, Boulton had relied on the conclusions of PACS' actuarial expert, Mr Larry Rubin ("Rubin"). Rubin determined the profitability of the products in the form of New Business Profit ("NBP"), in accordance with the definition of value of new business established in Principle 8 of the European Embedded Value ("EEV") principles promulgated by the CFO Forum (April 2016) ("CFO Forum").[224] EEV is an actuarial methodology for valuing business, which is based on the principles promulgated by the CFO Forum. The calculation of NBP for a particular new business product is the value of the cash flows over the term of the policy based on different assumptions discounted at the discount rate back to day zero of the policy.[225]

252 I note the following about Rubin's report.

(a) Rubin used a software called Prophet that PACS used to determine the profitability of the different products within the range of products sold through PTO agents.[226] Peter's actuarial expert, Mr Malcolm Berryman ("Berryman"), did not review this software or its output for its correctness but acknowledged the Prophet software as a well-established brand in this market.[227]

(b) Rubin identified the 22 highest NBP products sold by the PTO agents in 2015 and 2016, which represented 90% of NBP.[228] He assessed the profitability of those products on a range of assumptions.[229]

(c) Rubin used the result for the 22 products to extrapolate to the remaining products marketed by PACS during 2015 and 2016.[230] He also mapped 91 products marketed by PACS in 2017 and 2018 to the 132 similar products marketed in 2015 and 2016 based on similar product descriptions, specifications and target market.[231] For present purposes, we are concerned only with the profitability of the products marketed by PACS through PTO agents in 2016.

(d) Rubin used a risk discount rate ("RDR") computed by Boulton.[232]

253 In his expert report, Berryman concluded as follows:

(a) It is not appropriate to use NBP and NBP margins (*ie*, NBP in percentage terms) for the purposes of calculating the loss of profits in this case without adjustments to reflect the risks that are inherent in these products and the uncertainties surrounding the volume, mix and profit margin of business written into the future.[233]

(b) Allowance for the risks and uncertainties can be approximated by the use of an adjustment to the RDR.[234]

254 In his oral testimony, Berryman noted that EEV is a methodology involving discounted cash flows and best estimate assumptions. He confirmed that he did not have a problem with the approach; his problem was with the recognition of the risks that may arise in future.[235]

255 As PACS submitted, Rubin accepts that there are uncertainties associated with projecting future profits. The difference between Rubin's and

Berryman's views lies in the appropriate approach to take to address these uncertainties. Rubin's approach is to ensure that the assumptions adopted in calculating BNP represent the best central estimate of future events based on the best available information.[236] A central estimate is not free of uncertainty; it is central in the sense that future events are equally likely to push the assumed figure up as it would down.[237] PACS also noted that this approach is consistent with Boulton's view about the need for a central estimate where the risks of cash flows is about variability which "can be upside or downside".[238] Osborne had agreed with Boulton's view.[239]

256 On the other hand, Berryman chose not to prepare his own actuarial assumptions; according to him, a third set of assumptions (in addition to PACS' and Rubin's assumptions) "would not have helped".[240] Berryman confirmed that he had no issues with PACS' or Rubin's assumptions, and did not perform a detailed examination of Rubin's assumptions because it would not be a "useful use of time and money"; his issue was with the RDR.[241] Boulton was of the view that risks issues should not be considered in the RDR analysis but in arriving at the central estimate of cash flows.[242] Osborne agreed.[243] In any event, Berryman also accepted that he was not an expert in calculating the appropriate RDR and stated that the analysis done by Boulton to determine his discount rate "seemed a perfectly logical analysis".[244]

257 As stated in [252(d)] above, Rubin used the RDR computed by Boulton. Boulton applied a discount rate of 6% to discount the future profits that would be generated by the Departed ALs and Agents back to present day value. He arrived at a discount rate of 6% using the Capital Asset Pricing Model to estimate the cost of equity of a company based on its exposure to systematic risks that the market would factor in.[245] Boulton explained that[246]

> … the heart of this calculation is the equity market risk premium. That's derived from what – investors need to invest in equities, and the value of almost all equities is entirely almost forward-looking. It resides in future cash flows. So the discount rate I have is derived from the market for forward-looking estimates of value.

258 Boulton's calculations were based on comparisons to other insurance companies with comparable risks. Osborne did not challenge Boulton's methodology or calculations but commented that the discount rate for PACS cannot be applied to PTO because PACS' market value is backed by assets whereas the value of PTO lies in its future business (and is therefore riskier).[247] Osborne suggested that comparisons with comparable companies which had more of a bias towards new business would be more appropriate.[248] Boulton pointed out that there was no difference in terms of systematic risk and Osborne did not produce any evidence to rebut that. Ultimately, however, Osborne did not provide any alternative discount rate.[249]

259 I see no reason not to accept Boulton's calculation of the discount rate.

260 Based on the evidence before me, I accept Rubin's computations of the profitability of the products marketed by PACS through PTO agents. In my view, his analysis is more complete.

261 Boulton is to compute PACS' loss of profits arising from sales that the 23 Departed ALs and 204 Departed Agents would have made during the Loss Period, using (a) his approach as stated in [248] above, (b) his weighted average approach as set out in [250], and (c) the NBP calculated by Rubin.

Computation of damages for PACS' claim for loss of productivity of the 23 Departed ALs and 204 Departed Agents

262 PACS submitted that but for the Acts of Solicitation, PTO would not have suffered a fall in productivity, starting from May 2016 when Peter first announced his intention to move to Aviva.[250] Boulton quantified the loss of productivity at $2,729,971. This computation is premised on PACS' counterfactual that but for the Acts of Solicitation, Peter would have stayed with PACS.

263 However, the appropriate counterfactual is one in which Peter left PACS and was free to solicit the 23 Departed ALs and 204 Departed Agents after 22 July 2016. This means that PACS would have suffered the loss of productivity of these 23 Departed ALs and 204 Departed Agents anyway, even without the Acts of Solicitation. In the circumstances, PACS has suffered no loss under this head of damages. PACS' claim for loss of productivity of the 23 Departed ALs and 204 Departed Agents is dismissed.

Computation of damages for PACS' claim for loss of productivity of the Orphan Agents and Orphan ALs

264 PACS' submitted that the mass exodus (brought about by the Acts of Solicitation) resulted in many Orphan Agents and Orphan ALs:[251]

(a) having to be physically relocated from PTO's premises at 51 Cuppage Road;

(b) being denied access to the PAMS system; and

(c) having to be reassigned as they had lost their Tier 2 and/or Tier 3 ALs.

Boulton quantified PACS' loss at S$2,324,010.

265 PACS' claim for loss of productivity of the Orphan ALs and Orphan Agents is premised on its counterfactual that, but for the Acts of Solicitation, Peter would have stayed with PACS. However, the appropriate counterfactual is one in which Peter left PACS and the 23 Departed ALs and 204 Departed Agents left PACS to join Peter.

266 In the circumstances, PACS has not proved its loss because PACS would have suffered the loss in productivity of the Orphan ALs and Orphan Agents anyway. Accordingly, I dismiss PACS' claim for loss in productivity of the Orphan ALs and Orphan Agents.

Peter's counterclaim against PACS for wrongful termination

267 I have found that Peter had carried out the Acts of Solicitation and that these acts breached his contractual obligation under cl 18(a)(i) of his Agency Agreement. PACS has pleaded this breach as one of the defences to Peter's counterclaim for wrongful termination.[252] PACS is entitled to rely on this breach in support of its termination of Peter's Agency Agreement. Peter's counterclaim against PACS for wrongful termination is therefore dismissed.

Peter's counterclaim against PACS for inducing breach of contract

268 Peter's case is that by procuring information on matters discussed between Peter and the Attendee ALs during internal meetings (including the meetings referred to at [90(a)] above) (the "Confidential Information") from one or more of the Attendee ALs, PACS induced the said Attendee ALs to breach their confidential obligations owing to Peter under the NDAs signed by the

Attendee ALs.[253] Peter's evidence was that each of the Attendee ALs entered into an NDA at various times between 16 Mary 2016 and 28 June 2016.[254]

269 Peter's counterclaim did not identify the Attendee ALs whom PACS was alleged to have induced to breach their NDAs. In response to requests by PACS for particulars, Peter identified Mr Andrew Chuah ("Andrew"), Royston and Wendy. However, in his AEIC, Peter identified only Royston and Wendy.[255] Therefore, Peter's case is that PACS wrongfully induced Royston and Wendy to breach their respective NDAs.

270 The law is not in dispute. An act of inducement is not by itself actionable. The plaintiff must show that (i) the procurer acted with the requisite knowledge of the existence of the contract (although knowledge of the precise terms is not necessary), and (ii) the procurer intended to interfere with its performance. It is not sufficient that the resulting breach was a mere natural consequence of the defendant's conduct. The contract in question must also be a valid one. See *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune*") at [17].

Whether the NDAs were valid

271 In the present case, PACS claims that the NDAs (including those signed by Royston and Wendy) are void and not enforceable because they are illegal.

272 The two traditional categories of illegal contracts are (a) contracts that are prohibited (expressly or impliedly) by statute and (b) contracts that are prohibited under an established head of common law public policy; such contracts are void and not enforceable and cannot be "saved" by any balancing or other process: *Ochroid Trading Ltd and another v Chua Siok Lui (trading as*

VIE Import & Export) and another [2018] 1 SLR 363 ("*Ochroid*") at [22]; *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 ("*Ting Siew May*") at [27]. The established heads of public policy at common law which would render a contract unenforceable, include contracts to commit a crime, tort or fraud: *Ochroid* at [29]. Although the categories of illegality at common law are not closed, the courts will not readily add new categories: *Ochroid* at [30].

273 There is another category of contracts illegal at common law, which are not statutorily illegal nor contrary to one of the established heads of common law public policy. Such contracts are in themselves not unlawful but were made, at the time the contracts were entered into, with the intention of one or both parties of using the contracts for the commission of a legal wrong or carrying out unlawful conduct: *Ochroid* at [31]; *Ting Siew May* at [77]. The application of the doctrine of illegality to this particular category of contracts is subject to the (limiting) principle of proportionality: *Ochroid* at [39]; *Ting Siew May* at [77]. The defence of illegality, in this category of contracts, should be rejected if disallowing the claim on the ground of illegality would lead to a disproportionate result: *Ochroid* at [37]; *Ting Siew May* at [66].

274 PACS' pleaded case is that the NDAs fall into the last category of illegal contracts, *ie*, contracts entered into for an unlawful purpose. PACS' case is that the NDAs are "void and/or unenforceable for illegality as they were entered into with the object of deceiving [PACS] and concealing, or attempting to deceive and conceal news and evidence of [Peter's] Acts of Solicitation … in breach of his contractual and fiduciary obligations owed to [PACS]".[256]

275 Peter submitted that the object of the NDAs was not for the purpose of facilitating the deception on PACS because Peter did not owe PACS any

relevant contractual or fiduciary obligations.[257] I reject this submission; I have found that Peter did owe PACS contractual obligations and that the Acts of Solicitation breached these obligations.

276 I agree with PACS that the evidence shows that the NDAs were entered into for the purpose of deceiving PACS and concealing Peter's breaches of contractual obligations that were owed to PACS. Peter made the Attendee ALs sign the NDAs and threatened them that they would suffer the consequences if they leaked information about the move to AFA (see [104] above).

277 I also agree with PACS that the NDAs fall within the category of contracts that are illegal at common law because they were entered into for an unlawful purpose. Allowing Peter to enforce the NDAs would be tantamount to condoning his breaches of contract. As the Court of Appeal said in *Ting Siew May* (at [46]) "the court will not permit the "guilty party" to benefit from his own (here, legal) wrong as this would be an affront to public policy. As a matter of public interest, the court should not appear to reward or condone a breach of the law…".

278 With respect to the balancing exercise based on proportionality, the Court of Appeal in *Ting Siew May* stated as follows (at [70]–[71]):

> 70 We would summarise the general factors which the courts should look at in assessing proportionality in the context of contracts entered into with the object of committing an illegal act as including the following: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim.
>
> 71 It should be emphasised that this is not necessarily a conclusive list of factors and, more importantly, that these

> factors should not be applied in a rigid or mechanistic fashion. Rather, these factors should be applied to each individual case, and weighed and considered by the court in the context of the particular facts of that case itself. All this underscores the very *fact-centric* nature of the inquiry that has to be undertaken by the court in this regard. This is not perhaps entirely satisfactory when viewed from a strictly theoretical perspective but is, in our view, only to be expected in the *practical* context in which the *application* of the law to the relevant *facts* is involved (and in which the inherently difficult concept of public policy (see above at [33]–[35]) is also involved). [emphasis in original]

279 It is clear that striking down the NDAs for illegality in this case does not lead to a disproportionate result. Peter should not be permitted to use the NDAs to conceal his wrongful acts. In fact, upholding the NDAs would (a) stifle whistleblowing, (b) undermine the principle that the court will permit a guilty party to benefit from his own wrong, and (c) lead to Royston and Wendy (and other Attendee ALs) not being able to perform their own contractual obligations of integrity and honesty under their respective Agency Agreements.

280 It cannot be the law that Peter should be allowed to bring a claim against PACS that is founded on the NDAs the purpose of which was to conceal his very own breaches of duties owed to PACS. Allowing such a claim would make a mockery of the law.

PACS' knowledge of the NDAs and PACS' acts of inducement

281 PACS, through Philip, would have known of the NDAs, or had reason to believe that the NDAs existed, by 2 June 2016. Philip admitted that by then, he had "heard unverified rumours that Peter had made the agents and ALs in PTO sign some kind of confidentiality agreement and they were all afraid to speak to anyone else in PACS".[258] By 23 June 2016, Philip clearly knew of the NDAs. Royston had sent Philip a screenshot of Peter's message to the "Managers Chat 2016" group reminding them that they "have signed the

confidentiality clauses with PTO and … have to keep everything [they] discuss in PTO confidential".[259] Philip asked Royston whether he had "a copy of the confidentiality agreement" and Royston said "No".[260]

282 PACS submitted that it was not obvious to Philip that the NDAs would purport to prevent PACS' own agents from whistleblowing.[261] I do not accept this submission. Philip's own evidence is as follows:

(a) One Mr Lee Kok Pang ("Kok Pang"), a former employee of PACS, had informed Philip that one of his contacts in PTO (whom he did not identify but referred to as "Venus") had audio recordings of what was happening within PTO but was reluctant to share the same with PACS as she recalled signing a confidentiality agreement with Peter and was afraid of the consequences.[262] "Venus" was actually Wendy.

(b) During his meetings with Royston, William and three other agents on 2 June 2016 and 16 June 2016, "they were very afraid of even speaking to [Philip]" and asked Philip to keep their conversations secret.[263]

(c) Philip asked Royston for a copy of the NDA to enable PACS to seek legal advice on whether the NDA was valid, as Philip thought that any attempt to prevent a person from whistleblowing was illegitimate.[264]

283 It is clear from Philip's evidence that he had reason to believe that Royston's and Wendy's NDAs prevented them from whistleblowing. That was why Royston and Wendy were afraid to speak to Philip or share their recordings with PACS. Further, the fact that Philip wanted to take legal advice on whether Royston's NDA was valid shows that Philip was aware that the NDA purported

to prohibit whistleblowing. The fact that Philip did not know then who "Venus" was, did not matter; it was sufficient that he knew she was an agent in PTO. In my view, Philip (and therefore, PACS) was aware of the nature of the NDA. As was held in *Tribune*, knowledge of the precise terms is not necessary (see [270] above).

284 It is also clear that PACS did ask Royston for his recordings of the meetings that he attended with the other Attendee ALs. Philip's evidence is that on 16 June 2016, he asked Royston if Royston was willing to share his audio recordings with PACS; Royston sent the audio file to Philip by way of a google drive link.[265] Philip's colleagues were unable to download the audio file and on 27 June 2016, Philip asked Royston to provide copies of the audio recordings in a thumb drive and Royston did so.[266] If Royston's NDA was valid, Philip's acts would have amounted to an act of inducement.

285 As for Wendy, Peter's case is that PACS worked with Kok Pang to persuade Wendy to release the Confidential Information to PACS.[267]

286 Kok Pang testified as follows:[268]

(a) In around end-May 2016, Wendy told him that she had recorded some of the meetings held by Peter where he spoke on his plans to move PTO to Aviva. On around 31 May 2016, he met Philip and mentioned about PTO leaving PACS. Philip told him that if he had some evidence, PACS may need his help.

(b) On around 7 July 2016, Philip asked him what evidence he had of PTO's intended departure. Kok Pang then asked Wendy if she was willing to share her audio recordings with PACS; Wendy was concerned

about an NDA that she had signed. Kok Pang raised Wendy's concerns to Philip and one of PACS' in-house lawyers said that Wendy should seek separate independent legal advice.

(c) Kok Pang arranged for Wendy to see a lawyer recommended by PACS' solicitors. After obtaining legal advice, Wendy shared her audio recordings with PACS, passing them to PACS' solicitors through her lawyer.

287 In my view, even if Wendy's NDA was valid, the evidence does not show that PACS carried out any positive act to induce Wendy to breach her NDA by sharing her audio recordings with PACS.

PACS' defence of justification

288 I would add that I agree with PACS that even if PACS can be said to have induced Royston and Wendy to breach their respective NDAs, PACS has committed no actionable wrong because its conduct was justified in the circumstances of this case.[269]

289 In *Edwin Hill & Partners v First National Finance Corp plc* [1998] 3 All ER 801, the defendants provided a loan, secured by a legal charge, to a property developer to enable him to develop a property. The developer engaged the plaintiffs as architects but was unable to get the development started. The developer was unable to repay the loan. The defendant agreed to finance the development themselves instead of exercising their power of sale but as a condition of their becoming involved in the development, they insisted that the developer should dismiss the plaintiffs as architects for the development. The defendants considered that this was necessary if the

development was to be successfully marketed. The developer terminated his contract with the plaintiffs. The plaintiffs sued the defendants alleging that they had unlawfully procured the developer to breach his contract with the plaintiffs.

290 The plaintiffs claim was dismissed at first instance on the ground that the defendants' interference with the plaintiffs' contract with the developer was justified. The Court of Appeal dismissed the appeal, holding that if a defendant had an equal or superior legal right which would justify him in interfering with the plaintiff's contractual rights with a third party, he would not be liable to the plaintiff if instead of exercising his strict legal rights he reached an accommodation with the third party which had the effect of interfering with the contract between the plaintiff and the third party. The Court of Appeal found that on the facts, the defendants' right to receive payment of principal and interest on the loan to the developer was a superior right which justified their interference with the plaintiff' contract with the developer. The Court noted that had the defendants exercised their rights as legal mortgagees to sell the property to appoint a receiver, the plaintiffs' contract with the developer would necessarily have come to an end.

291 PACS submitted that PACS had a legal right to be informed by Royston and Wendy of Peter's misconduct because Royston and Wendy owed duties to PACS (under their respective Agency Agreements) to engage in honest conduct. PACS submitted that this right is equal or superior to any right that Peter may have against Royston and Wendy. I agree with PACS. Royston and Wendy would be in breach of their Agency Agreements with PACS if they did not inform PACS about Peter's wrongful acts. In my view, PACS' rights under its Agency Agreements with Royston and Wendy were at least equal to Peter's rights against them under their NDAs.

Conclusion on Peter's counterclaim

292 Peter's counterclaim for inducement of breach of contract is therefore dismissed.

Peter's counterclaim against PACS for breach of confidence

293 Peter claims that PACS was aware or ought reasonably to have known that the Confidential Information that it obtained from Royston and Wendy was confidential and proprietary to Peter, and that PACS breached its equitable duty of confidence owed to Peter by using the Confidential Information to "contrive a version of events, which it published and continue to publish at paragraphs 15 to 19 of the [statement of claim] …".[270] Paragraphs 15 to 19 of the statement of claim set out some of the details of what transpired and/or was said during the meetings that Peter had with the Attendee ALs in May and June 2016.

294 In *I-Admin (Singapore) Pte Ltd v Hong Ying Ting* [2020] 1 SLR 1130 ("*I-Admin*") the Court of Appeal set out the approach to be taken in relation to breach of confidence claims as follows (at [61]):

> (a) The court should first consider whether the information in question "has the necessary quality of confidence about it" and if it has been "imparted in circumstances importing an obligation of confidence".
>
> (b) Upon the satisfaction of the above prerequisites, an action for breach of confidence is presumed. This might be displaced where, for instance, the defendant came across the information by accident or was unaware of its confidential nature or believed there to be a strong public

interest in disclosing it. Whatever the explanation, the burden will be on *the defendant* to prove that its conscience was unaffected.

295 Peter's pleaded case is that the Confidential Information was confidential in nature by virtue of the NDAs signed by the Attendee ALs.[271] I have concluded that the NDAs are illegal and unenforceable. For this reason, Peter's claim for breach of confidence fails.

Peter's counterclaim against PACS for conspiracy to injure

296 Peter has to prove that:

(a) there was a combination between PACS and one or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to him by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) he suffered loss as a result of the conspiracy.

See *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112].

297 In his counterclaim, Peter pleaded that "[PACS] and one or more of the Attendee ALs" conspired against him.[272] In his further and better particulars, Peter identified the Attendee ALs as Andrew, Royston and Wendy.[273] However, in his AEIC, Peter alleged that "PACS conspired with PCA and Wendy and

separately with Royston" to injure him.[274] Andrew no longer featured in the alleged conspiracy to injure. As for Peter's reference to PCA in the AEIC, that is irrelevant because his pleaded case does not involve PCA. The alleged conspirators are therefore PACS, Royston and Wendy.

298 I agree with PACS that Peter has failed to prove his claim for conspiracy to injure.

299 Peter's pleaded case is that the conspirators agreed to do the following acts:[275]

> (a) Royston and Wendy would disclose the Confidential Information to PACS; and
>
> (b) PACS would use the Confidential Information "to contrive a version of events which it published at paragraphs 15 to 19 of the [statement of claim] in support of its claims against [Peter]".

300 Peter has failed to prove an agreement between PACS and Royston and/or Wendy to use the Confidential Information "to contrive a version of events which it published at paragraphs 15 to 19 of the [statement of claim]". Peter has not even proved any agreement as to how the audio recordings were to be used. Royston and Wendy may have given their audio recordings to PACS knowing that PACS could (or even would) use the audio recordings against Peter. However, Peter has not proved that they agreed with PACS that PACS would use the audio recordings to "contrive a version of events … in support of its claim against [Peter]".

301 As Peter has failed to prove the agreement to carry out the alleged acts, the question of the requisite intention to cause injury by those acts does not arise.

302 Further, Peter has failed to prove that the alleged acts were unlawful. Peter's pleaded case is that:

(a) PACS owed an equitable duty of confidence to Peter by virtue of its knowledge that the Confidential Information was confidential in nature by virtue of the NDAs;[276]

(b) Royston and Wendy owed a duty of confidence to Peter by virtue of their NDAs;[277] and

(c) the misuse of the Confidential Information was a breach of the duties of confidence owed by PACS, Royston and Wendy to Peter.[278]

303 I have found that the NDAs are unenforceable. It follows that PACS, Royston and Wendy did not owe any duty of confidence to Peter by virtue of the NDAs.

304 I also agree with PACS that Peter has not proved that he has suffered any actionable loss or damage. Peter has pleaded that he suffered the following losses:[279]

(a) the cost of objecting to and resisting PACS' use of the Confidential Information;

(b) the cost of managing and defending the present action by PACS; and

(c) "such other losses or liabilities (including reputational loss) which [Peter] had incurred and may incur as a result of [PACS'] use of the Confidential in [the present action]".

305 As PACS submitted, Peter has not identified what loss he has suffered, or produced any evidence of the loss he has suffered, as a result of his having to object to and resist PACS' use of the Confidential Information, apart from the time and costs spent on these proceedings.

306 I turn next to Peter's claim that he suffered loss because he incurred costs of managing and defending the present action. In his AEIC, Peter referred to the "additional legal costs in defending" the present action.[280] In his closing submissions, Peter referred to the fact that he has "incurred legal costs in defending the present Suit".[281] In his AEIC, Peter also referred to the cost of "[his] time fighting this matter".[282]

307 PACS relied on *Singapore Shooting Association and others v Singapore Rifle Association* [2020] 1 SLR 395 ("*Singapore Shooting Association*"). In that case, the Court of Appeal held that legal fees incurred in investigating, detecting, unravelling and/or mitigating a conspiracy cannot constitute actionable loss or damage in the tort of unlawful means conspiracy if they are in substance the sort of expenses that would be incurred in preparation for litigation, and so would be recoverable as costs in any action that may be brought: at [92].

308 I agree with PACS that *Singapore Shooting Association* applies to the present case. The legal costs incurred by Peter and any additional legal costs that he may have incurred in investigating, detecting, unravelling and/or

mitigating the alleged conspiracy do not constitute actionable loss or damage for purposes of Peter's counterclaim for conspiracy to injure. Peter has not shown that he incurred any legal costs that were not incurred in preparation for the litigation.

309 I also agree with PACS that the time that Peter spent fighting this action does not constitute actionable loss or damage for purposes of his counterclaim for conspiracy to injure. No authority to the contrary has been cited to me. Peter's pleaded case is that the conspiracy involved PACS using the Confidential Information "to contrive a version of events … in support of its claim against [Peter]". In other words, the alleged conspiracy only served to support PACS' claim against Peter. Peter would necessarily have had to spend time defending the claim against him in any event, no different from any defendant to an action.

310 Finally, with respect to Peter's claim that he suffered losses including reputational loss, Peter has not identified any other loss except for reputational loss. Peter cannot claim for damages for injury to reputation under his claim for conspiracy to injure. Claims for injury to reputation should be made by way of an action for defamation: *McGregor on Damages* (James Edelman, Jason Varuhas & Simon Colton gen ed) (Sweet & Maxwell, 20th Ed, 2019) at para 48-025.

311 I therefore dismiss Peter's counterclaim for conspiracy to injure.

Conclusion

312 Peter carried out the Preparatory Steps and Acts of Solicitation. However,

(a) Peter was, and is, not bound by the Non-Solicitation Clause (see [153] above);

(b) there was no implied term in his Field Manager Agreement that includes a duty not to entice or attempt to entice PACS' ALs and agents in PTO to leave PACS and join a competitor firm (see [170] above);

(c) Peter's role as a tied agent and AL did not give rise to any legal relationship of agent and principal with PACS that is relevant in this case and therefore did not fall within an established category of fiduciary relationship (see [191] above); and

(d) Peter's role as Master GAM of PTO did not give rise to fiduciary obligations in connection with the management of the agents in PTO (see [191]) above.

313 PACS' claims for breach of the Non-Solicitation Clause, breach of the implied term in Peter's Field Manager Agreement and breach of fiduciary duties are therefore dismissed (see [153], [170] and [192] above).

314 As PACS has failed in its claim against Peter for breach of fiduciary duties, PACS' claim against PTOMC for dishonest assistance is also dismissed (see [202] above).

315 Peter had a contractual obligation under his Agency Agreement to conduct his insurance business with integrity and honesty. This obligation required Peter to serve PACS with good faith and undivided interest; Peter should not do anything, during the currency of the agency, which may harm PACS. This duty included a duty not to solicit PACS' agents (during the

currency of Peter's Agency Agreement) to join a competitor (see [157] above). The Preparatory Steps and Acts of Solicitation breached Peter's contractual obligation under his Agency Agreement (see [194] above).

316 Twenty-three Departed ALs and 204 Departed Agents left PACS as a result of the Acts of Solicitation (see [234] above). PACS' claims for loss suffered in respect of the remaining 17 Departed Agents are dismissed.

317 The appropriate counterfactual for the purposes of assessing PACS' loss is one in which (a) Peter would have negotiated with Aviva and given his notice of termination on 8 July 2016, (b) he would have solicitated the Departed ALs and Agents to join him as soon as it was legally permissible for him to do so (*ie*, after 22 July 2016), (c) the 23 Departed ALs and 204 Departed Agents would have left PACS to join him, and (d) PTO would have ceased to exist after Peter's departure (see [238] and [240] above).

318 Peter is liable to PACS for the profits that PACS could have earned from the 23 Departed ALs and 204 Departed Agents for the Loss Period (*ie*, between 9 May 2016 and 23 July 2016) (see [246] above).

319 Boulton is to compute the amount of PACS' loss using (a) his approach in computing the sales that the 23 Departed ALs and 204 Departed Agents could have made in 2016 and pro rating the sales to the Loss Period, (b) his weighted average approach, and (c) the NBP calculated by Rubin (see [261] above). Parties are at liberty to apply for further directions in this regard, if necessary.

320 PACS' claims for loss of productivity of (a) the 23 Departed ALs and 204 Departed Agents, and (b) the Orphan ALs and Orphan Agents, are dismissed (see [263] and [266] above).

321 Peter's counterclaim against PACS for wrongful termination of his Agency Agreement is dismissed (see [267] above).

322 Peter's counterclaim against PACS for inducement of breach of contract is dismissed (see [292] above).

323 Peter's counterclaim against PACS for breach of confidence is dismissed (see [295] above).

324 Peter's counterclaim against PACS for conspiracy to injure is dismissed (see [311] above).

325 I will hear parties on costs.

Chua Lee Ming
Judge of the High Court

K. Muralidharan Pillai *SC*, Paul Tan, Luo Qinghui, Jared Kok, Andrea Tan, Tao Tao and Joey Ng (Rajah & Tann Singapore LLP) for the plaintiff;
Thio Shen Yi *SC*, Niklas Wong, Nanthini Vijayakumar and Nguyen Vu Lan (TSMP Law Corporation) for the first defendant;
Nicholas Poon (Breakpoint LLC) for the second defendant.

[1] Agreed Bundle, vol 10 ("10 AB"), at pp 6478–6502.
[2] Plaintiff's Supplementary Bundle of Documents ("PSBOD"), at pp 326–344.
[3] 10 AB 6503–6506, at paras 7–8.
[4] 10 AB 6592–6600.
[5] 10 AB 6626–6629.
[6] 10 AB 6664–6670.
[7] Notes of Evidence ("NE"), 2 August 2019, at 21:3–6.
[8] 1 AB 84.
[9] 1 AB 87.
[10] 1 AB 51.
[11] Plaintiff's Bundle of Documents, vol 4 ("4 PBOD"), at pp 2203–2206.
[12] 1 AB 53–59.
[13] 1 AB 113–114.
[14] 4 PB 2207–2212.
[15] 1 AB 115–124.
[16] 1 AB 125–130.
[17] 1 AB 131–133.
[18] 1 AB 134–138.
[19] 1 AB 326–327.
[20] 1 AB 139–142.
[21] 1 AB 155–160.
[22] Lim Wei Ping's AEIC, at para 8.
[23] 1 AB 145–154.
[24] Liauw Lee Jiat's Affidavit of Evidence-in-Chief ("AEIC"), at pp 41–42.
[25] Philip's AEIC, at para 50.
[26] 1 AB 442.
[27] 1 AB 433–435.
[28] 8 AB 4910–4940.
[29] 8 AB 4927–4928.
[30] 8 AB 4911–4926.
[31] 8 AB 4932–4939.
[32] 8 AB 4929–4931.
[33] 8 AB 4941–4974.
[34] 8 AB 4964–4965.
[35] 8 AB 4943–4957.
[36] 8 AB 4966–4968.
[37] 8 AB 4958–4963.
[38] Peter's AEIC, at para 495.
[39] Peter's AEIC, at paras 496–497.
[40] 3 PBOD 1974.
[41] 6 AB 3889–3892.
[42] 3 PBOD 1979.
[43] NE, 30 July 2019, at 11:10–14.
[44] 1 AB 517.
[45] 3 PBOD 1985.
[46] 12 AB 7282.
[47] Exhibit P-31, at 3:18–23.

48 1 AB 191.
49 Peter's Defence and Counterclaim (Amendment No 5) ("D&CC (No 5)"), at para 23(k).
50 1 AB 193–195.
51 6 AB 3893–3927.
52 12 AB 7408.
53 Exhibit P55.
54 10 AB 6338; NE, 12 September 2019, at 137:6–138:9.
55 Statement of Claim (Amendment No 5) ("SOC (No 5)"), at para 15A.
56 SOC (No 5), at pp 22–28, paras 15–20.
57 SOC (No 5), at p 34, para 24.
58 SOC (No 5), at p 37, para 27C.
59 SOC (No 5), at p 35, para 27.
60 SOC (No 5), at p 43, para 28D.
61 SOC (No 5), at pp 38–43, para 28C.
62 Peter's D&CC (No 5), at p 94, paras 37–38.
63 Peter's D&CC (No 5), at pp 95–96, paras 40–41.
64 Peter's D&CC (No 5), at pp 95–98, paras 40 and 44–46.
65 Peter's D&CC (No 5), at pp 99–100, paras 46B–46E.
66 SOC (No 5), at pp 21–22, para 15B.
67 Peter's D&CC (No 5), at pp 35–38, paras 18D and 23.
68 Peter's AEIC, at paras 490–492.
69 8 AB 4927 (para 4.1(a)(B); NE, 4 September 2019, at 96:14–97:15, 103:15–19.
70 Exhibit P14.
71 NE, 5 September 2019, at 27:2–23.
72 SOC (No 5), at pp 22 and 28, paras 15 and 20.
73 SOC (No 5), at pp 22–25, paras 16–17.
74 SOC (No 5), at pp 25–28, paras 18–19 .
75 Peter's D&CC (No 5), at p 33, para 23
76 Exhibit P14.
77 Peter's AEIC, at para 494.
78 Exhibit D1-31.
79 NE, 20 September 2019, at 46:14–24.
80 Peter's AEIC, at paras 496–497.
81 8 AB 4975, 4994, 5030 and 5093.
82 Exhibit 22, s/n 1 and 8; Exhibit P-28, s/n 10; NE 10 September 2019, at 118:4–120:8 and 132:21–133:22; NE, 11 September 2019, at 22:8–24:16.
83 Exhibit P-33, s/n 1–8; NE, 11 September 2019, at 136:7–137:3.
84 Exhibit D1-31.
85 Exhibit D1-31, clause 8.2.2.
86 Exhibit D1-32; NE, 20 September 2019, at 20:19–23, 24:23–25:1.
87 NE, 17 September 2019, at 164:2–10.
88 6 AB 3909, cll 8.2.3–8.2.5.
89 Exhibit P-15, s/n 4; NE, 4 September 2019, at 117:3–25.
90 Exhibit P-13, s/n 3; Exhibit P-20, s/n 9; NE, 4 September 2019, at 156:7–158:4.
91 NE, 4 September 2019, at 156:7–158:4.

92 Exhibit P-49, s/n 4; NE, 5 September 2019, at 127:16–20.
93 Exhibit P-27, s/n 8–10; Exhibit P-28, s/n 7–8; NE, 10 September 2019, at 130:19–132:20; NE, 11 September 2019, at 64:21–65:5.
94 Exhibit P-26, s/n 10; NE, 11 September 2019, at 35:19–37:2.
95 Exhibit P-25, s/n 1–3 and 12; NE, 10 September 2019, at 151:17–154:13 and 172:8–16.
96 Exhibit P-29, s/n 2 and 5; NE, 11 September 2019, at 102:7–10.
97 Exhibit P-28, s/n 1–4; NE, 11 September 2019, at 81:21–82:7 and 83:21–84:9.
98 Exhibit P-25, s/n 6; NE, 10 September 2019, at 158:4–161:13.
99 Exhibit P-25, s/n 13–15 and 20–22; NE, 10 September 2019, at 172:17–173:24 and 200:6–17.
100 Exhibit P-22, s/n 2, 5–8, 15 and 22; Exhibit P-24, s/n 6–10 and 12–13; Exhibit P-17, s/n 7–8; NE, 5 September 2019, at 75:3–76:2, 148:4–7, 149:20–150:19 and 156:1–21; NE, 10 September 2019, at 116:23–117:17, 128:3–130:15, 134:23–135:16, 144:6–145:6, 145:13–19 and 145:25–146:18; NE, 11 September 2019, at 84:10–85:5.
101 NE, 4 September 2019, at 119:12–15.
102 NE, 10 September 2019, at 192:9–193:12.
103 Exhibit P-16, s/n 7–10; NE, 5 September 2019, at 51:17–52:4; Exhibit P-19, s/n 4–5.
104 Exhibit P-16, s/n 7; NE, 5 September 2019, at 43:14–44:9.
105 Exhibit P-16, s/n 11–12; NE, 5 September 2019, at 44:10–18 and 45:2–13; Exhibit P19, s/n 6.
106 Exhibit P-25, s/n 19; NE, 10 September 2019, at 195:4–18.
107 Exhibit P-15, s/n 1–5; NE, 4 September 2019, at 120:15–121:2 and 125:13–127:8; Exhibit P-25, s/n 24–28; Exhibit P-27, s/n 7; NE, 11 September 2019, at 63:11–20.
108 NE, 11 September 2019, at 146:12–149:15.
109 Exhibit P-17, s/n 1–3; Exhibit P-20, s/n 1, Exhibit P-38, s/n 1–3.
110 Exhibit P-38, s/n 1–3; NE, 5 September 2019, at 78:16–83:17.
111 Exhibit P-29, s/n 1; NE, 11 September 2019, at 98:2–99:2.
112 Exhibit P-15, s/n 1; NE, 4 September 2019, at 118:16–119:15.
113 Exhibit P-16, s/n 15–16; NE, 5 September 2019, at 37:18–39:8; NE, 11 September 2019, at 24:5–16.
114 Exhibit P-16, s/n 12; NE, 5 September 2019, at 45:3–49:5.
115 Exhibit P-7.
116 Exhibit P-15, s/ 1–4; NE, 4 September 2019, at 127:3–11.
117 Exhibit P-26, s/n 8–9; NE, 11 September 2019, at 35:3–16.
118 Exhibit P-25, s/n 3–5; NE, 10 September 2019, at 155:7–158:9.
119 Exhibit P-27, s/n 1–11.
120 23 PBOD 15307; Wendy's AEIC, at para 70.
121 Exhibit P-29, s/n 1–8; NE, 11 September 2019, at 106:5–24.
122 Exhibit P-32, s/n 1–8; NE, 11 September 2019, at 127:16–128:25.
123 See, *eg*, 6 AB 3876–3879.
124 Exhibit P-36, s/n 1 – 3; NE, 12 September 2019, at 2:23–5:20, 9:5–12:2 and 16:20–25.
125 Exhibit P-12, s/n 9; NE, 4 September 2019, at 52:9–53:14.
126 3 PBOD 1995.
127 NE, 12 September 2019, at 87:12–25.
128 Exhibit P-35, s/n 8.
129 Exhibit P-35, s/n 19; NE, 11 September 2019, at 154:25–157:20.

130 Exhibit P-35, s/n 12–18; NE, 11 September 2019, at 151:15–154:20.
131 Exhibit P-35, s/n 4–5; NE, 11 September 2019, at 14:14–24.
132 NE, 11 September 2019, at 150:12–151:11.
133 PACS' Closing Submissions, at paras 24–73; SOC (No 5), at pp 16–18, paras 11C–11E.
134 PACS' Closing Submissions, at paras 74–77; SOC (No 5), at p 10, para 6(g) and p 34, para 24(b).
135 PACS' Closing Submissions, at paras 78–94; SOC (No 5), at p 37, para 27B.
136 PACS' Closing Submissions, at para 24.
137 1 AB 55.
138 1 AB 55.
139 1 AB 56.
140 1 AB 58.
141 1 AB 54,
142 3 PBOD 1964 (email dated 16 September 2010 from Ken Chua).
143 3 PBOD 1963–1964 (email dated 16 September 2010 from Patrick Teow).
144 4 PBOD 2208.
145 8 PBOD 5137 – 5151 (cl 11.3 at p 5146).
146 PACS' Closing Submissions, at para 31.
147 1 AB 37.
148 1 AB 38.
149 4 PBOD 2205.
150 1 AB 40.
151 1 AB 36.
152 PACS' Closing Submissions, at paras 66–67; SOC (No 5), at p 11, para 7C.
153 Peter's Closing Submissions, at paras 60–61.
154 Peter's Closing Submissions, at para 62.
155 10 AB 6696–6700.
156 1 AB 587 (para 6.14).
157 Peter's Closing Submissions, at para 82.
158 Peter's Closing Submissions, at para 84.
159 Peter's D&CC (No 5), at p 72, para 30e.
160 SOC (No 5), at p 34, para 24c.
161 1 AB 40.
162 PACS' Closing Submissions, at para 77.
163 Peter's Closing Submissions, at para 90.
164 SOC (No 5), at p 37, para 27B.
165 PACS' Closing Submissions, at para 82.
166 PACS' Closing Submissions, at para 82.
167 PACS' Closing Submissions, at para 83.
168 3 PBOD 1964 (email dated 16 September 2010 from Ken Chua).
169 SOC (No 5), at pp 34–35, para 26.
170 PACS' Closing Submissions, at paras 109–110.
171 PACS' Closing Submissions, at para 109.
172 1 AB 39 (cl 11) and 1 AB 56 (cl 9).
173 1 AB 39 and 56.

174 PACS' Closing Submissions, at para 109, read with paras 97–98.
175 PACS' Closing Submissions, at paras 110 and 112.
176 9 AB 5789.
177 Peter's D&CC (No 5), at pp 83–86, para 32C.
178 Peter's Closing Submissions, at para 369.
179 Peter's Closing Submissions, at paras 372 373.
180 SOC (No 5), at p 38, para 28C(a) read with, at p 21, para 15A.
181 PTOMC's Defence (Amendment No 1), at p 19, para 41.
182 Peter's AEIC, at para 513; Peter's AEIC on behalf of PTOMC, at para 14.
183 NE, 12 September 2019, at 105:14–23 and 114:18–22.
184 Exhibit D1-31.
185 NE, 12 September 2019, at 137:6–138:7.
186 Peter's AEIC on behalf of PTOMC, at paras 16–25.
187 Exhibit P-43; NE, 12 September 2019, at 144:20–146:16.
188 PACS' Closing Submissions, at para 314.
189 SOC (No 5), at p 28, para 21.
190 SOC (No 5), at pp 43–44, para 29.
191 PACS' Closing Submissions, at paras 195 and 197.
192 Clause 5 of Annex A to the Pegasus Agreement (1 AB 153–154).
193 PACS' Closing Submissions, at paras 215(c)(i) and 236(c).
194 PACS' Closing Submissions, at paras 215(c)(ii) and 236(b).
195 Clause 1(b) of Annex A to the Pegasus Agreement (1 AB 152).
196 PACS' Closing Submissions, at paras 215(c)(iii) and 236(a).
197 PACS' Closing Submissions, at paras 228–229.
198 PACS' Closing Submissions, at paras 218 and 221.
199 Schedule to SOC (No 5).
200 PACS' Closing Submissions, at para 177.
201 PACS' Closing Submissions, at para 179.
202 Peter's Closing Submissions, at para 650.
203 NE, 5 September 2019, at 11:4–25; NE, 11 September 2019, at 19:21–20:4.
204 NE, 20 September 2019, at 15:23–16:1.
205 NE, 20 September 2019, at 16:2–24.
206 Schedule to SOC (No 5), at s/n 1–106, 108–137, 139–162, 164, 165, 167–171, 173, 174, 176–209 and 212–232.
207 Peter's AEIC, at para 613; PACS' Closing Submissions, at para 185; Schedule to SOC (No 5), s/n 166, 172 and 175.
208 Peter's 2nd Supplementary AEIC ("SAEIC") filed on 26 July 2019, at para 15 and pp 405, 418 and 422; Exhibit P39, s/n 9–11.
209 Peter's Closing Submissions, at para 652(d); Peter's AEIC, at paras 611–612; Schedule to SOC (No 5), s/n 107, 138, 163, 210, 211 and 233.
210 Schedule to SOC (No 5), s/n 233–244.
211 6 PBOD 3469, 3506, 3619, 3664, 3670, 3676, 3686, 3687, 3689 and 3690–3695.
212 Schedule to SOC (No 5), at s/n 1–106, 108–137, 139–162, 164—209 and 212–232.
213 PACS' Closing Submissions, at paras 195–196.
214 Clause 1(b)(i) read with cl 2, and cl 5 of Annex A to the Pegasus Agreement (1 AB 152–154).

215 Peter's Closing Submissions, at paras 416–417.
216 Royston's AEIC, at paras 72–73.
217 Exhibit PE7, at p 10 read with the Joint List (Quantum Experts) (marked as "JLQE").
218 JLQE, at s/n 9.
219 JLQE, at s/n 8.
220 JLQE, at s/n 10.
221 JLQE, at s/n 22.
222 JLQE, at s/n 23 and 24.
223 Boulton's 1st Expert Report dated 10 June 2019, at para 2.4.14 read with para 2.3.9 (Exhibit RB-2 in Boulton's AEIC sworn on 12 June 2019).
224 Rubin's Expert Report dated 7 June 2019, at para 19 (Exhibit LR-2 in Rubin's AEIC sworn on 7 June 2019).
225 Berryman's Expert Report dated 9 September 2019, at para 3.2 (Exhibit MB-2 in Berryman' 1st AEIC affirmed on 12 September 2019).
226 Rubin's Expert Report dated 7 June 2019, at para 24(b)–(e).
227 Berryman's Expert Report dated 9 September 2019, at para 1.7.
228 Rubin's Expert Report dated 7 June 2019, at para 24(a).
229 Rubin's Expert Report dated 7 June 2019, at para 24(c)–(e).
230 Rubin's Expert Report dated 7 June 2019, at para 24(f).
231 Rubin's Expert Report dated 7 June 2019, at para 24(g).
232 Rubin's Expert Report dated 7 June 2019, at para 20.
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