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Update

The relationship between insurance companies and their agents

A view from Pàdraig Walsh and Matthew Durham

The relationship between insurance companies and their agents is generally considered to be one of agency and not employment. Local trade practice would support this. We are often asked to advise on such matters. There appear to be few cases on point. One recent case is *Leung Suk Fong v Prudential Assurance Co Limited [2011] HKEC 1297*. In this article we consider the case and related issues that can arise in practice.

Key points

- Insurance companies should regularly review the contractual arrangements and working practices as regards their agents.
- Among the template agreements that insurance companies use are employment and agency agreements. It is important that human resources personnel of insurance companies have in place rigorous controls on the use of these different documents in order to avoid the provisions of one inadvertently creeping into the other. For example, if procedures for the control and approval of employment type benefits (such as annual leave, maternity leave, pension contributions) creep into an agreement there is a higher risk that an employment relationship could exist.
- Insurance companies also need to ensure that their internal training promotes an understanding of the difference between employment and agency in this context and of the need to be vigilant in maintaining a distinction between the two.
- Particular care needs to be taken in situations where an agency agreement is an exclusive one. If the exclusivity is combined with elements of control and integration within an organisation there is a higher risk that an employment relationship could exist.

– The nature of the relationship is likely to have an important bearing on the enforceability of some of the restrictive covenants that an insurance company may wish to impose post-termination. This can raise difficult issues and requires good legal advice.
– Termination provisions in an agency agreement would normally be similar to those in general commercial contracts with individuals; employment type summary termination provisions (such as gross misconduct and wilful neglect) should normally be avoided.

Facts

Prudential (the company) is a well known insurance company. The claimant was one of its agents. Her engagement had been pursuant to an agency agreement (the agreement) that expressly provided the relationship was not one of employment, nor was it a contract of service.

On the agreement coming to an end the claimant made a claim against the company with the Minor Employment Claims Adjudication Board (the Board) for certain employee entitlements on the basis that she was an employee. The claimant's claim failed on the basis that the Board considered she was an agent. The claimant appealed to the High Court.

Decision

Such appeals should normally raise a point of law. The claimant's appeal raised a question of fact; namely, whether she was an employee. In any event, the judge agreed with the Board's assessment that the relationship between the company and the claimant was one of agency. The claimant's appeal was dismissed.

The judge quoted from the important case of *Poon Chau Nam v Yim Siu Cheung [2007] 2 HKC 135* (a decision of the Court of Final Appeal of Hong Kong):

"The modern approach to the question whether one person is another's employee is therefore to examine all the features of their relationship against the background of the indicia developed in the case law with a view to deciding whether, as a matter of overall impression, the relationship is one of employment … It involves a nuanced and not a mechanistic approach …"

Applying such an approach, the judge looked at the characteristics of the claimant's relationship with the company. These pointed to the relationship being one of agency and included the following:

– Extent of control: the claimant controlled her workloads and the company placed no restriction on where, when, how and how often she worked. That the company required the claimant to attend training, achieve sales targets and use the company's corporate policies, products and marketing leaflets was necessary for the claimant to meet the standard required of the company's agents; these aspects of the relationship did not constitute control over the claimant as an employee. The claimant also never had to raise the issue of holiday entitlement with the company.
– Income and expenses: the claimant received no monthly salary from the company. Her income in this regard was the commission that she made on selling the company's products. The claimant paid a fee to the company for the use of shared secretarial services. She paid her own travel expenses.
– Part of the company's organisation: while the claimant may have been an integral part of the company's organisation this was not decisive.
– Provision of office and equipment: while the company provided an office and related paraphernalia for the claimant's use this was for the claimant's and other agents' convenience when they attended the company's office to work. This was not the claimant's principal place of work.
– Taxation: in her tax return the claimant was not described as an employee. The contribution by the company to the claimant's occupational retirement scheme was not decisive.

Comment

One of the most interesting comments in the proceedings before the Board was its observation that from a traditional perspective there is no employment relationship between insurance companies and their agents. In this case no finding was made on this point. That insurance agents are commonly regarded as freelance agents is supported by comments made by some judges in English[1] and Hong Kong[2] cases.

The relationship between an insurance company and an insurance agent is determined by its individual circumstances, the courts applying a contextual and overall approach. There is no trade practice recognised at law in Hong Kong that usurps this approach.

In the industry it is widely perceived that insurance agents are freelance agents and not employees. The correctness of this view is rarely tested in the courts in Hong Kong, which is something of a testament to commercial reality. The dearth of case law is not altogether surprising.

In this particular case the court was referred to three previous cases that involved disputes arising out of the relationship between insurance companies and their agents[3]. No finding of employment or trade practice was

[1] Massey v Crown Life Insurance Co [1978] 1 WLR 676
[2] Re Ngan Wai Chung, HCB 26182/2002
[3] Zurich Life Insurance Co Ltd v Pang Man Yiu, DCCJ 2465/2007; New York Life Insurance Worldwide Ltd v Li Sum Ming, DCCJ 3686/2008; and Re Ngan Wai Chung (at footnote 2)

made in the three cases, although these issues were not considered in detail.

We are often asked to advise on the nature of the relationship between an insurance company and its agents. In our experience it is rare for either party to litigate the point. This suggests that the perceived practice in the market is generally understood.

Further information
If you would like further information on any issue raised in this update please contact:

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Further advice should be taken before relying on the contents of this summary.