



JURISKI!

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● **Risk Management Quarterly**

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CONVEYANCING AS IT IS!

Conveyancing Practice.....pitfalls to avoid!!!!

This issue of *Jurisk!* is focused on conveyancing and we are highlighting major areas of concern to conveyancers and providing you with tips and guidance to reduce or mitigate risks!

In a standard conveyancing transaction, there are often more than two parties involved and skilful multiple tasking is required to track and complete the transaction. We have close to 4,500 law firms in Malaysia and we can safely say that at least 90% or more firms do some form of conveyancing as part of their multi discipline practice.

In a routine conveyancing relating to property, lawyers would be acting for the vendor or the purchaser, and then proceeding in the case of the purchaser to sometimes also act for the financier. Bulk conveyancing may involve acting for the purchasers or the developer in a housing development project subject to the usual compliance with Bar Council regulations.

The risk involved in conveyancing is high because a lot of matters are beyond the control of the lawyer much more than in litigation. The dependence on Land Office for searches, Stamp Duty Office for adjudication is just an example of authorities that a lawyer has to deal with in conveyancing. Further, in respect of most of these works, some lawyers rely heavily on their clerks, or third parties to ensure completion. Tight time lines and over reliance on clerks may result in slip ups!

There has also been a marked increase in identity theft fraud in recent years and members have to be extremely careful if you are relying on third parties to introduce clients or seeking assistance in carrying out work for the practice.

Members are advised to refer to 'Conveyancing: Best Practices' in *Jurisk!* September 2012 and 'Don't be a Victim of Identity Fraud' in *Jurisk!* December 2009 to assist in reducing risk relating to identity fraud.

As we need to keep a tight rein on timelines and tasks, it is essential that every conveyancing file opened must have some form of checklist to ensure all the necessary tasks are completed. Our Professional Indemnity Insurance ("PII") and Risk Management Department has developed a Practice Area Checklist for conveyancing that is available for free by downloading from www.praktis.com.my.

In all if not most PII Schemes, conveyancing practice has always had the highest percentage of notifications and claims. The pattern is also similar in Malaysia. We are taking this opportunity in this issue to highlight risk areas in conveyancing and proposals to reduce the risks.

1. Proper and sufficient risk management procedures in place

In view of the high risk or high loss nature of conveyancing, our insurance policy impose a minimum Base Excess of RM50,000 in respect of conveyancing of land and/or building. Did you know this? (Clause 11(b) of the 2013 Certificate of Insurance ("COI"))

However, if you have an adequate risk management procedure in place, the usual Base Excess applies.

What is an adequate risk management procedure? Checklists, tight control of files, carrying own identity checks, conduct at least 2 land searches, lodge caveats and manage time lines.

2. Circular No 36/2005 on Letter of Acknowledgement in Conveyancing Matters dated 11 May 2005

If you are acting for a purchaser and the financier in a conveyancing transaction, please comply with the requirement in this circular. Where there is a conflict of interest in respect of conveyancing matters, RM100,000 or 2 times the Base Excess, whichever is the higher subject to a maximum of RM300,000 will be imposed. (Clause 11(a) of the 2013 COI)

The circular is reproduced at page 22 for your information.

Stay up to date with practice issues, emerging risks and refer to Bar Council circulars issued from time to time.

The PII and Risk Management Department has practice tools which can be used for handling conveyancing matters. The practice tools are:

- (a) *Jurisk!* – a quarterly risk management newsletter delivered for free to all Members and can also be downloaded from our websites. It is now in its 9th year of publication and has been the Bar's main platform to disseminate information on risk management to our Members.
- (b) Practice Area Checklist – the checklist acts as a concise and comprehensive guide on areas of conveyancing and litigation. Download the checklist from www.praktis.com.my.

There are also risk management workshops for lawyers who intend to or recently set up new firms (Getting Started!) and if you have no time to train your staff, we have workshops tailored for them (Risk Management for Staff). Our workshop speakers address issues on conveyancing from handling of files, the risks involved, best practices and others.

If you would like to know more about PII or risk management, contact the PII and Risk Management Department at the contact details provided on page 24. We also appreciate any views, feedback or comments you may have and will be happy to address any concerns forwarded to us.

Lastly but most importantly, please do not embark into ANY form of conveyancing work UNLESS you have sufficient knowledge or expertise as it can be a costly and harrowing experience if you make a mistake because you are ignorant or over reliant on your clerk.

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Dear Members,

There are many potential pitfalls in a lawyer's everyday work. It can be something as simple as not running a conflict check, or improper or no file management. A minor mistake can have a major impact later on. More often than not, the mistake will not be known until a claim comes knocking at your door!

In this issue of *Jurisk!*, we are focusing on conveyancing practice. We hope this issue will encourage you to adopt proper risk management in your practice. We have included some tips that you can start with.

Mistakes can be minimised with proper care. It is never too late to start adopting best practices as they can only be good for your firm.

Members with queries and comments on professional indemnity insurance and risk management can contact the Department by telephone at 03-2032 4511 or by email at pirm@malaysianbar.org.my.

Happy reading!

The *Jurisk!* Team

Risk Management For Staff Workshop

The Risk Management for Staff Workshop initiated in 2010, covers communication, law firm accounts, office administration, and file and time management. The Workshop has been attended by office managers, paralegals, clerks as well as a few Members of the Bar and pupils in chambers.

The main aim of the Workshop is to help law firm staff improve themselves in their daily job requirements. In addition, the Workshop exposes the risks emanating from the staff's daily routines, and highlights pitfalls to avoid, and offers workable strategies to keep in place. If you have no time to train your staff, send them to our one-day workshop and our speakers will do the rest.

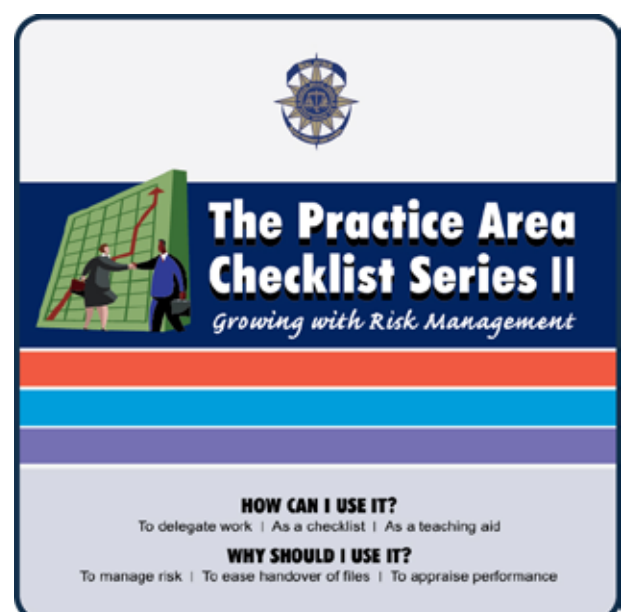
The Department will be organising the Risk Management for Staff Workshop on 21 Nov 2013 at Raja Aziz Addruse Auditorium, Bar Council Secretariat, Kuala Lumpur.

Standard rate for the workshop is RM100 and early bird rate is RM70 if payment is received by Friday, 8 Nov 2013.

If you would like to pre-register for the workshop, please contact the Department as soon as possible.

We encourage early registration in order to avoid disappointment as seats are limited, and sell out fast.

MINIMISE RISKS - USE RISK MANAGEMENT PRACTICE TOOLS



An aide memoire to help you in conveyancing and litigation.

Conveyancing Gone Bad

All names in the case studies are fictitious.

Claim 1: Duty of Care

In 1996, Andrew (Purchaser) purchased a piece of land in Selangor from Gilbert (Vendor) for RM300,000. Gilbert introduced Andrew to Rick & Co; and Andrew appointed Rick & Co to prepare the Sale and Purchase Agreement ("SPA").

Years later the state government acquires the land for development. At this time Andrew discovers that he is not the owner of the whole piece of land, in fact he only owns half of an undivided share of that land. Andrew sues both Gilbert and Rick & Co.

The Claim & the Court's Decision

Andrew's suit was for return of all the monies he had paid for the land. He argued that the SPA entered with Gilbert was void pursuant to s22 of the Contracts Act 1950 ("the Act"). He further argued that pursuant to s66 of the Act, he should be refunded the whole purchase price. In short Andrew wanted the SPA to be declared null and void as the state government had only compensated him RM215,000 for the half undivided share of the land.

Against Rick & Co, Andrew alleged that they failed to advise him on the legal status of the land and the fact that he was only purchasing half of an undivided share; he further alleged the firm had not conducted proper searches hence failing to protect his interest.

The slight twist here is that Rick & Co had also acted for Gilbert when he had purchased the land from the previous owner.

The court decided that Andrew's claim for restitution was untenable as there wasn't a total failure of consideration. Andrew was the registered owner of his half, although undivided; and he had received his share of the compensation from the state government. However since Andrew had proven that he had purchased the whole land but had only become owner of half, Gilbert was ordered to refund Andrew half the purchase price paid. *The court further ordered that Rick & Co was to indemnify Gilbert to the extent that Gilbert had to pay Andrew.*

Nuts & Bolts

It transpired during evidence that Rick & Co had relied on only one land search, the one carried out by them when they acted for Gilbert years earlier when he had purchased the land. Years later when Gilbert sold the land to Andrew and Rick & Co acted for Andrew as the Purchaser, they DID NOT conduct a new land search!



Best Practices

1. Conduct at least two searches for every SPA. One before preparing the SPA and another just before releasing the monies to the vendor.
2. Conduct a new search for every transaction to establish current ownership and status.
3. Request and sight original copies of the previous SPA, the title, identification cards and any other relevant documents to establish ownership and land status; make copies for your file.
4. ALWAYS cross check the land/title search results with the particulars in your file.
5. Use the conveyancing checklist and guidelines issued by Bar Council.



Claim 2: When the SPA and Memorandum of Transfer Differs

ABC Bank granted a credit facility of RM3.5 million to Z (the Purchaser/Borrower) to finance Z's purchase of an industrial land. At the time the facility was granted, Z had not signed the SPA, hence one of the conditions precedent in the Letter of Offer is that prior to disbursement of the facility, Z must provide ABC Bank a stamped SPA.

Z subsequently signed the SPA with the Vendor for RM3.5 million and gave the SPA to ABC Bank. ABC Bank then appointed the firm Hanim & Co to prepare the security documentation; upon completion and following Hanim & Co's advice, ABC Bank released the loan of RM3.5 million to the Vendor.

Shortly after the disbursement, Z defaulted on his loan to ABC Bank. In the process of recovering the loan ABC Bank found a 'discrepancy' between the SPA and and Memorandum of Transfer ("MOT"), in the SPA the land value was stated as RM3.5 million whereas in the stamped MOT it was RM1.2 million. Further, ABC Bank discovered that the land search provided by Hanim & Co was incorrect as the land was not converted for industrial use and the land office receipt was a forgery.

At this stage ABC Bank commissioned a valuation report which showed the value of the land to be RM1.2 million, on the assumption the land was converted to 'industrial' use and all premiums for the conversion were paid. Hanim & Co claimed that the purchase price in the SPA was based on a valuation report provided by Z.

The land was later auctioned and ABC Bank managed to sell the land at RM950,000.

What went wrong?

Hanim & Co, who also prepared the SPA, said that she was instructed by Z to state a lower sale price of RM1.2 million in the MOT; and that the reason given by Z is that they wanted to pay a reduced stamp duty.

ABC Bank sued Hanim & Co for fraud and negligence. The panel solicitor appointed to defend Hanim & Co advised that the claim should be settled on the following grounds:-

1. Hanim and Co as the lawyer representing Z in the SPA and representing ABC Bank in loan transaction failed to inform the Bank of the said variation in price/value.
2. Hanim & Co's appointment letter clearly required the firm to ensure all pre-disbursement conditions were met but they had failed to ensure that the land was converted to industrial use. Despite that Hanim & Co had given their advice to ABC Bank that their interest was protected.
3. Further the panel solicitor discovered that when the Vendor received the RM3.5 million from ABC Bank, the Vendor refunded 'the balance' to Z. This evidence if produced in Court would have been fatal to Hanim & Co's defence.

The Insurers settled the case out of court and Hanim & Co was imposed with an increased penalty excess of RM50,000 pursuant to Clause 11(b) of the Certificate of Insurance.



Best Practices

1. Do not deflate or inflate the SPA price and ensure the same value is reflected in the MOT.
2. Do not get involved in any side deals involving the Vendor and Purchaser.
3. If you suspect the transaction is not genuine, do not take on the file.



Claim 3: Who is Mr Seller?

Mr Stone and Mr Willis appointed Ben & Co to act for Mr Willis in the sale of his land. Mr Stone introduced himself as the land broker acting for Mr Willis; and informed Ben & Co that they have a potential Purchaser. Ben & Co informed parties that he will act for Mr Willis if he could produce the original title to the property. This was later provided to Ben & Co.

Ben & Co then wrote to the Purchaser's solicitor stating that he acts for Mr Willis and commented on the draft SPA. The parties signed the SPA (now called SPA1) and a deposit was paid by the Purchaser to Ben & Co, who later released the deposit to third parties on the instructions of Mr Willis.

A month later, the Purchaser discovered that Mr Willis had entered into another agreement (SPA2) to sell the same land to Purchaser 2.

The Purchaser also discovered that Mr Willis's NRIC number in SPA1 and SPA2 are different and that Mr Willis was represented by a different solicitor in SPA2. Later in a meeting held at the Purchaser's office, Mr Willis confessed that he was not the real landowner and that his real name is Murphy.

The Purchaser then sued Ben & Co for breach of warranty of authority as Ben & Co was, at all material times, acting for a fraudster and not the real landowner.

The panel lawyer appointed to defend Ben & Co in the Suit advised settlement on the following grounds:-

1. The case of *Lau Tek Sen @ Lau Beng Chong & 3 ors. v SK Song* [1995] 2 CLJ 425 is the authority on solicitor's breach of warranty; and this case is very much against Ben and Co.
2. Further, in *Yonge v Toynbee* [1908-10] All ER 204, a claimant suing on such a breach of warranty need not demonstrate mala fide on the part of the defendant.
3. There was no clause in the SPA or any confirmation from the Purchaser's solicitor that allowed Ben & Co to release the deposit monies to the third parties.



Best Practices

1. If you receive instructions to release funds held by your firm to third parties especially parties not involved in the transaction, your alarm bells should start ringing!
2. Satisfy yourself that you are acting for the real owner of the land, besides the title there are other documents you can ask to sight as proof of ownership.
3. Do not provide a warranty on behalf of a client until you are fully satisfied who you are representing.

Claim 4: The Devil is in the Details

B (the Purchaser) appointed the firm of Sparrow & Co to represent him in the purchase of a property from D (the Vendor). Prior to Sparrow & Co's appointment, B and D had agreed among themselves the terms and conditions of the transaction.

B provided all documents he received from D to Sparrow & Co with instructions to prepare the SPA. The SPA was later signed and the property duly transferred to B.

B later discovered the actual size of the property is smaller than the size stated in the SPA. Sparrow & Co upon checking their file realised that they had prepared the SPA using the details in the property agent's letter and not the details in the land title. Upon this discovery Sparrow & Co did not advise B of the options available.

However since B's purchase price was based on the size of the property, he sued the D to recover the excess purchase price paid but lost the suit. Following that outcome, B sent a notice to Sparrow & Co alleging that the firm was negligent in preparing the SPA.

Sparrow & Co notified Insurers and requested Insurers' consent to amicably settle the dispute. Sparrow & Co admitted that they were negligent as they had not ascertained and followed the size of the property as stated in the title document. They concluded that their error caused B to overpay for the property.

The panel lawyer appointed to advise Insurers and assist Sparrow & Co agreed that it would be better to settle the dispute on the following grounds:-

1. That Sparrow & Co owed a duty to B to ensure that the details in the title document matched that in the SPA.
2. Further when they discovered the discrepancy in the size they should have immediately advised B so that B could make an informed decision whether to proceed with the purchase.
3. That B as the buyer was also responsible to check what they are buying and their failure to do so was a factor that could be used to negotiate an early settlement at a reasonable sum.

The calculation of the per square feet price showed that B overpaid RM 400,000 for the property and B demanded that sum from Sparrow & Co. The Insurers settled the case out of court for half that sum.



Best Practices

1. Check that every detail of your official land search and those in the land title matches that in the SPA. There must be no discrepancy.
2. Notify your Insurers as early as possible as this will allow parties to negotiate an early and reasonable settlement.

To Do of Conveyancing

There is no one way in dealing with risks. It is best to find ways and avoid any risks.



Conflicts are Everywhere

- You may be acting for a friend or family member in some matters, put relationship aside and ask yourself:
 - would this affect the matter?
 - can it affect your judgement?
 - is there a direct interest to you/firm?
- Does your firm have a conflicts checking system?
 - Keep a database of all clients with their details.
 - Run a conflicts check with all (legal and support) staff of the firm.
 - Make sure to include any new staff of your firm in case they had prior dealing with the potential client.
 - When you have taken up the matter, inform the staff members and include it in the client's database.
- Obtain a written waiver if you are acting for purchaser and financier.



Verify Identities

- Request for a second set of identification (ie latest utility bills of the property, driving licence, etc) to affirm the identity and/or ownership of the land/property.
- Make sure relevant parties involved in the S&P Agreement is present and signs the documents in your presence.
- Do a search with relevant authorities, ie National Department of Registration, foreign embassies.
- Confirm particulars in the identification produced are the same as in search results.
- Always have sight of the original identification documents. Should you receive a temporary identification document, ensure to run proper checks with the relevant authorities.

Communication is Key

- At the initial meeting with the client, make sure the client understands the job scope that you will be handling for the client.
- Prepare a retainer letter listing the work scope of you work for the client.
- Have written confirmation before executing any verbal or third party instructions.
- Keep your client informed on the progress of the matter at relevant stages.

Checklist in Conveyancing

- Conduct proper searches on the land:
 - on status of land and whether it is possible to change with the consent of the state government
 - ownership of land – when taking up the matter and before releasing the monies
- Do a caveat to protect the interest of your client.
- Confirm the ownership of the land and your client. Run an identity check:
 - identification card
 - second verification: driving licence, utility bills, etc
 - seek authority, embassy, etc
- Use *Bar Council's Practice Area Checklist* CD-ROM for Conveyancing.

Conveyancing - Mimpi Buruk

Nama-nama dalam kajian kes ini adalah rekaan semata-mata.

Tuntutan 1: Kewajipan Berjaga-jaga

Pada tahun 1996, Andrew (Pembeli) membeli sebidang tanah di Selangor daripada Gilbert (Penjual) dengan harga RM300,000. Gilbert memperkenalkan Andrew kepada Rick & Co; dan Andrew melantik Rick & Co untuk menyediakan Perjanjian Jual Beli ("PJB").

Beberapa tahun kemudian kerajaan negeri mengambil tanah tersebut bagi tujuan pembangunan. Pada ketika inilah Andrew mendapati bahawa dia bukanlah pemilik keseluruhan tanah tersebut, sebaliknya hanya memiliki separuh daripada bahagian tanah yang tidak dibahagikan itu. Andrew mengemukakan saman terhadap kedua-dua Gilbert dan Rick & Co.

Tuntutan & Keputusan Mahkamah

SamanyangdikemukakanAndrewadalahuntukmendapatkan kembali semua wang yang telah dibayar untuk pembelian tanah itu. Andrew berhujah bahawa PJB yang ditandatangani bersama-sama Gilbert adalah tidak sah menurut S22 Akta Kontrak 1950 ("Akta tersebut"). Hujahnya lagi, selaras dengan S66 Akta tersebut, keseluruhan harga belian harus dibayar balik kepadanya. Dengan kata lain, Andrew mahu PJB itu diisytiharkan batal dan tidak sah kerana kerajaan negeri hanya memberi pampasan sebanyak RM215,000 bagi separuh daripada tanah yang tidak dibahagikan itu.

Andrew mendakwa Rick & Co telah gagal untuk menasihatinya mengenai status tanah itu dan hakikat bahawa dia hanya pemilik separuh daripada bahagian tanah yang tidak dibahagikan; dia juga mendakwa firma tidak melakukan carian tanah yang sewajarnya sehingga gagal untuk melindungi kepentingannya.

Ironiknya, Rick & Co juga telah bertindak bagi pihak Gilbert semasa dia membeli tanah tersebut dari pemilik sebelum ini.

Mahkamah memutuskan bahawa tuntutan restitusi oleh Andrew tidak dapat dipertahankan kerana tidak ada kegagalan balasan secara mutlak. Andrew adalah pemilik berdaftar sebahagian daripada tanah itu, walaupun tanah itu adalah tanah yang tidak dibahagikan, dan dia telah menerima pampasan daripada kerajaan negeri bagi bahagian tanah yang dimilikinya. Walau bagaimanapun, Gilbert telah diarahkan oleh mahkamah untuk membayar balik separuh daripada keseluruhan harga belian tanah itu kepada Andrew kerana Andrew berjaya membuktikan kepada Mahkamah bahawa dia telah membeli keseluruhan tanah itu tetapi hanya memiliki separuh daripada tanah tersebut. Mahkamah turut memerintahkan Rick & Co untuk menanggung rugi Gilbert setakat mana Gilbert harus membayar Andrew.

Terungkai Cerita

Semasa keterangan di mahkamah, didapati Rick & Co telah bergantung kepada hanya satu carian tanah sahaja, iaitu carian yang dilakukan oleh mereka semasa bertindak bagi pihak Gilbert beberapa tahun yang lalu semasa dia membeli tanah itu. Beberapa tahun kemudian semasa Gilbert menjual tanah kepada Andrew, Rick & Co bertindak pula bagi pihak Andrew sebagai Pembeli, dan mereka TIDAK menjalankan carian tanah yang baru.



Amalan Terbaik

1. Melakukan sekurang-kurangnya dua carian untuk setiap PJB. Satu sebelum menyediakan SPA dan satu lagi sebelum melepaskan wang kepada penjual.
2. Menjalankan carian yang baru bagi setiap transaksi untuk mengenalpasti pemilikan semasa dan status.
3. Minta dan lihatlah salinan asal PJB terdahulu, hakmilik, kad pengenalan dan mana-mana dokumen lain yang berkaitan untuk mengenalpasti pemilikan dan status tanah; buatlah salinan untuk fail anda.
4. SENTIASA lakukan semakan silang hasil carian tanah/ carian hakmilik dengan butiran di dalam fail anda.
5. Gunakan senarai semak pemindahhakan dan garis panduan yang dikeluarkan oleh Majlis Peguam.



Tuntutan 2: Apabila PJB dan Memorandum Pemindahan Berbeza

Bank ABC telah meluluskan kemudahan kredit sebanyak RM3.5 juta kepada Z (Pembeli/Peminjam) bagi tujuan pembiayaan pembelian tanah perindustrian. Sewaktu kemudahan itu diluluskan, Z tidak menandatangani PJB, justeru itu salah satu syarat dalam Surat Tawaran adalah bahawa Z hendaklah mengemukakan PJB berselem kepada Bank ABC sebelum pembayaran kemudahan dibuat.

Z kemudiannya menandatangani PJB berjumlah RM3.5 juta bersama-sama Penjual dan mengemukakan PJB kepada Bank ABC. Bank ABC melantik Hanim & Co untuk menyediakan dokumentasi keselamatan; setelah penyempurnaan dan menuruti seperti yang telah dinasihatkan oleh Hanim & Co, Bank ABC melepaskan bayaran pinjaman sebanyak RM3.5 juta kepada Penjual.

Tidak lama selepas pembayaran, Z telah memungkirkan pinjaman daripada Bank ABC. Dalam proses menebus pinjaman, Bank ABC mendapati terdapat 'percanggahan' di antara PJB dan Memorandum Pemindahan ("MOT"), nilai tanah telah dinyatakan di dalam PJB adalah bagi jumlah sebanyak RM3.5 juta manakala pada MOT yang disetem jumlahnya adalah sebanyak RM1.2 juta. Seterusnya, Bank ABC mendapati bahawa carian tanah yang diberikan oleh Hanim & Co adalah tidak betul kerana tanah itu tidak ditukar untuk kegunaan industri dan penerimaan pejabat tanah telah dipalsukan.

Ketika ini Bank ABC melali seorang penilai tanah telah membuat penilaian terhadap tanah tersebut dan laporan penilaian menunjukkan nilai tanah adalah sebanyak RM1.2 juta, dengan andaian tanah itu telah ditukar kepada 'tanah industri' dan semua premium bagi tujuan penukaran kegunaan tanah telah dibayar. Hanim & Co menyatakan bahawa harga belian di dalam PJB itu adalah berdasarkan laporan penilaian yang diberikan oleh Z.

Dalam sebuah lelongan, Bank ABC berjaya menjual tanah tersebut pada harga RM950,000.

Di Manakah Silapnya?

Hanim & Co, yang juga telah menyediakan PJB, menyatakan bahawa dia telah diarahkan oleh Z untuk meletakkan harga jualan yang lebih rendah iaitu RM1.2 juta pada MOT tersebut, dan alasan yang diberikan oleh Z agar duti setem yang perlu dibayar dapat dikurangkan.

Bank ABC mengemukakan saman terhadap Hanim & Co kerana fraud dan kecuai. Peguam panel yang dilantik bagi mewakili Hanim & Co menasihatkan agar tuntutan itu diselesaikan tanpa penglibatan mahkamah berdasarkan alasan-alasan yang berikut:-

1. Hanim and Co sebagai peguam yang mewakili Z di PJB dan mewakili Bank ABC dalam urusan pinjaman telah gagal untuk memaklumkan kepada Bank ABC tentang perubahan harga/nilai PJB tersebut.
2. Surat perlantikan Hanim & Co dengan jelas memerlukan firma untuk memastikan segala syarat-syarat sebelum pengeluaran dipenuhi tetapi mereka telah gagal untuk memastikan bahawa tanah itu telah ditukar kepada kegunaan industri. Namun, Hanim & Co telah memberikan nasihat kepada Bank ABC bahawa kepentingan mereka telah dilindungi.
3. Seterusnya, peguam panel mendapati bahawa semasa Penjual menerima RM3.5 juta daripada Bank ABC, Penjual telah mengembalikan 'baki' kepada Z. Bukti ini jika dikemukakan di Mahkamah akan menamatkan pembelaan Hanim & Co.

Syarikat Insurans menyelesaikan kes itu di luar mahkamah dan *excess penalty* sebanyak RM50,000 telah dikenakan terhadap Hanim & Co selaras dengan Fasal 11 (b) dalam *Certificate of Insurance*.



Amalan Terbaik

1. Jangan mengurangkan atau menaikkan harga PJB dan pastikan nilai adalah sama seperti yang terdapat dalam MOT.
2. Jangan terlibat dalam mana-mana tawaran sampingan yang melibatkan Penjual dan Pembeli.
3. Jika anda mengesyaki transaksi yang tidak tulen, lebih baik anda menarik diri daripada mewakili mana-mana pihak.



Tuntutan 3 : Siapakah Penjual?

Encik Stone dan Encik Willis telah melantik Ben & Co untuk mewakili Encik Willis dalam penjualan tanahnya. Encik Stone memperkenalkan dirinya sebagai broker tanah yang bertindak bagi pihak Encik Willis dan dimaklumkan Ben & Co bahawa mereka mempunyai pembeli yang berpotensi. Ben & Co memaklumkan kepada kedua-dua pihak bahawa dia bersetuju untuk bertindak untuk Encik Willis seandainya dia mengemukakan geran tanah asal hartanah tersebut. Dokumen itu kemudiannya dikemukakan kepada Ben & Co.

Ben & Co kemudiannya menulis kepada peguam Pembeli dan menyatakan bahawa dia bertindak bagi Encik Willis dan mengulas mengenai draf PJB. Pihak-pihak menandatangani PJB (kini dikenali sebagai PJB1) dan deposit telah dibayar oleh Pembeli kepada Ben & Co, yang kemudiannya melepaskan deposit tersebut kepada pihak ketiga atas arahan Encik Willis.

Sebulan kemudian, Pembeli mendapati bahawa Encik Willis telah memeterai perjanjian jual beli yang lain (PJB2) untuk menjual tanah yang sama kepada Pembeli 2.

Pembeli juga mendapati bahawa nombor kad pengenalan Encik Willis dalam PJB1 dan PJB2 adalah berbeza dan bahawa Encik Willis telah diwakili oleh peguam yang berbeza dalam PJB2. Kemudian, pada mesyuarat yang diadakan di pejabat Pembeli, Encik Willis mengaku bahawa dia bukanlah tuan tanah yang sebenar dan nama sebenar beliau adalah Murphy.

Pembeli kemudiannya mengemukakan saman terhadap Ben & Co kerana telah memungkir *warranty of authority* kerana Ben & Co, pada setiap masa yang material, bertindak bagi seorang penipu yang bukanlah pemilik tanah sebenar. Peguam panel dilantik untuk pembelaan Ben & Co dalam saman tersebut telah menasihatkan penyelesaian di luar mahkamah atas alasan-alasan berikut: -

1. Dalam kes *Lau Tek Sen @ Lau Beng Chong & 3 pendorong v SK Song* [1995] 2 CLJ 425 adalah kes yang berwibawa yang merujuk kepada pemungkiran waranti oleh peguam; dan kes ini tidak menyebelahi Ben and Co.
2. Selain itu, dalam kes *Yonge v Toynbee* [1908-1910] All ER 204, pihak yang menuntut atas sebab pemungkiran waranti tidak perlu membuktikan elemen mala fide pihak defendan.
3. Tiada klausa dalam PJB atau mana-mana pengesahan daripada peguam Pembeli yang membenarkan Ben & Co untuk melepaskan wang deposit kepada mana-mana pihak ketiga.



Amalan Terbaik

1. Jika anda menerima arahan untuk melepaskan dana yang dipegang oleh firma anda kepada pihak ketiga terutamanya pihak yang tidak terlibat dalam urusan niaga, anda seharusnya lebih berhati-hati!
2. Puaskan hati anda bahawa anda bertindak bagi pemilik sebenar tanah, selain geran tanah ada dokumen lain yang anda boleh meminta untuk dikemukakan sebagai bukti pemilikan.
3. Jangan memberi jaminan kepada klien sehingga anda berpuas hati siapa sebenarnya yang anda wakili.



Tuntutan 4: The Devil is in the Details

B (Pembeli) melantik firma Sparrow & Co untuk mewakili beliau dalam pembelian harta dari D (Penjual). Sebelum pelantikan Sparrow & Co, terdapat persetujuan bersama di antara B & D tentang terma-terma dan syarat-syarat urusan niaga.

B mengemukakan segala dokumen yang diterima daripada D kepada Sparrow & Co bersama arahan untuk menyediakan PJB. PJB ini kemudiannya ditandatangani dan hartanah itu dipindahkan kepada B.

B kemudiannya mendapati saiz sebenar hartanah adalah lebih kecil daripada saiz yang dinyatakan dalam PJB. Setelah meneliti fail mereka, Sparrow & Co menyedari bahawa mereka telah menyediakan PJB berdasarkan maklumat yang dinyatakan di dalam surat agen hartanah dan bukan maklumat yang terdapat pada geran tanah tersebut. Setelah mengetahui tentang perkara itu, Sparrow & Co tidak menasihati B tentang pilihan yang tersedia.

Walau bagaimanapun, kerana harga belian yang dibayar oleh B adalah berdasarkan kepada saiz hartanah itu, dia mengemukakan saman terhadap D untuk mendapatkan semula baki harga belian yang telah dibayar tetapi gagal dalam saman itu. Berikutan keputusan itu, B menghantar notis kepada Sparrow & Co mengatakan bahawa firma itu telah cuai dalam menyediakan PJB tersebut.

Sparrow & Co memberi notifikasi kepada syarikat Insurans dan meminta kebenaran mereka untuk menyelesaikan pertikaian itu secara baik. Sparrow & Co mengakui bahawa mereka telah cuai kerana mereka tidak mengenalpasti dan mengikut saiz hartanah seperti yang dinyatakan di dalam geran tanah tersebut. Mereka menyimpulkan bahawa berikutan kesilapan mereka yang menyebabkan B telah terlebih bayar untuk hartanah itu.

Peguam panel dilantik untuk menasihati syarikat Insurans dan membantu Sparrow & Co telah bersetuju bahawa ia akan menjadi lebih baik untuk menyelesaikan pertikaian itu atas alasan berikut: -

1. Bahawa Sparrow & Co mempunyai kewajipan terhadap B untuk memastikan bahawa butir-butir dalam geran tanah adalah sepadan dengan PJB.
2. Seterusnya, apabila mereka mendapati perbezaan dalam saiz hartanah itu mereka perlu segera menasihati B agar dia boleh membuat keputusan sama ada untuk meneruskan dengan pembelian.
3. Bahawa B sebagai pembeli juga bertanggungjawab untuk memeriksa apa yang mereka beli dan kegagalan mereka untuk berbuat demikian adalah satu faktor yang boleh digunakan untuk berunding penyelesaian awal pada jumlah yang wajar.

Pengiraan harga bagi setiap kaki persegi menunjukkan bahawa B telah membayar lebih sebanyak RM400,000 bagi hartanah tersebut dan B menuntut jumlah wang itu dari Sparrow & Co. Syarikat Insurans menyelesaikan kes itu di luar mahkamah bagi separuh wang yang dituntut.



Amalan Terbaik

1. Semak setiap maklumat carian rasmi tanah dan nama di dalam hakmilik tanah sepadan dengan PJB. Pastikan tidak terdapat percanggahan maklumat.
2. Maklumkan kepada syarikat Insurans anda seawal mungkin kerana ini akan membolehkan pihak-pihak berkaitan merunding penyelesaian awal dan wajar.

Yang Sebaiknya dilakukan dalam Conveyancing

Tidak terdapat satu cara sahaja dalam berurusan dengan risiko. Adalah lebih baik untuk berhati-hati dan mengelak sebarang risiko.



Konflik ada Dimana-mana Sahaja

- Anda mungkin bertindak untuk rakan atau ahli keluarga dalam beberapa perkara, ketepikan dahulu soal pertalian dan tanya diri anda:
 - adakah ini akan memberi kesan kepada perkara itu?
 - bolehkah ia menjejaskan pertimbangan anda?
 - adakah terdapat kepentingan secara langsung kepada anda/firma?
- Adakah firma anda mempunyai sistem pemeriksaan konflik?
 - Simpan pangkalan data semua klien serta butir-butir mereka.
 - Buat semakan konflik dengan semua kakitangan (undang-undang dan sokongan) firma.
 - Pastikan untuk memasukkan mana-mana kakitangan yang baru dilantik firma anda dalam pemeriksaan ini sekiranya mereka pernah berurusan dengan klien yang berpotensi.
 - Apabila anda bersetuju mengurus sesuatu perkara, maklumkan kepada kakitangan dan masukkan ke dalam pangkalan data klien.
- Dapatkan secara bertulis, penepian (waiver) sekiranya mewakili pembeli dan pembiaya.

Komunikasi adalah Kunci

- Pada mesyuarat awal dengan klien, pastikan klien anda memahami skop kerja yang anda akan kendalikan untuknya.
- Sediakan surat *retainer* menyenaraikan skop kerja yang anda lakukan untuk klien.
- Dapatkan pengesahan bertulis sebelum melaksanakan apa-apa arahan lisan atau arahan pihak ketiga.
- Pastikan klien anda dimaklumkan mengenai perkembangan di setiap peringkat yang berkaitan.

Senarai Semak

- Menjalankan carian tanah dengan betul:
 - mengenai status tanah dan sama ada ia adalah mungkin untuk melakukan pindahmilik dengan persetujuan kerajaan negeri
 - pemilikan tanah - sewaktu mengambil perkara itu dan sebelum melepaskan wang
- Memasukkan kaveat untuk melindungi kepentingan klien anda.
- Mengesahkan pemilikan tanah dan identiti klien anda. Menjalankan pemeriksaan identiti:
 - kad pengenalan
 - pengesahan kedua: lesen memandu, bil-bil utiliti, dan lain-lain
 - mendapatkan pengesahan daripada pihak berkuasa, kedutaan, dan lain-lain
- Gunakan *Practice Area Checklist* CD-ROM Bar Council untuk Pemindahhakan.



Pengesahan Identiti

- Minta set kedua pengenalan (iaitu bil-bil utiliti terkini harta, lesen memandu, dan lain-lain) untuk mengesahkan identiti dan/atau pemilikan tanah/hartanah.
- Pastikan pihak yang berkaitan di dalam PJB hadir dan menandatangani dokumen-dokumen di hadapan anda.
- Buat carian dengan pihak berkuasa yang berkaitan seperti Jabatan Pendaftaran Negara, kedutaan-kedutaan asing dan lain-lain.
- Mengesahkan butir-butir pengenalan yang dikemukakan adalah sama seperti dalam keputusan carian.
- Sentiasa meneliti dokumen pengenalan asal. Sekiranya anda menerima dokumen pengenalan sementara, pastikan anda menjalankan pemeriksaan yang betul dengan pihak berkuasa yang berkaitan.

Addendum 1

Conveyancing practices and transactions in Malaysia involve multi-party transactions with vague demarcation of roles. As such, claims arising from conflicts of interest in Conveyancing (both Commercial and Residential transactions) are the most recurrent and expensive category of claims in the PII Scheme.

In a concerted effort to reduce such claims, the Insurers have agreed that if the firm/lawyer obtained a written waiver from the client before acting for them, the Excess applicable in the event a claim arises from Conveyancing, shall be the Base Excess [Item 9 of the Schedule of Insurance]

Circular 36/2005 was issued by Bar Council to Members on 11 May 2005. A copy of the Circular is reproduced below for your information.

Circular No: 36/2005

11 May 2005

To all Members of the Malaysian Bar

LETTER OF ACKNOWLEDGMENT IN CONVEYANCING MATTERS Professional Indemnity Mandatory Insurance Scheme 2005 *Clause 6.3(a)(i) of the Certificate of Insurance 2005*

In view of the possibility of a conflict of interest arising whenever a solicitor acts for a purchaser and the purchaser's financier in a conveyancing transaction, the Bar Council and the insurers have agreed that if the insured obtains a Letter of Acknowledgment from the Purchaser/Borrower, the Base Excess would apply in the event of a claim:

Clause 6.3(a)(i) in summary states as follows:-

- (1) (That where a claim arises against a firm/lawyer because the firm/lawyer has acted for more than one party in a conveyancing of land/building transaction and/or in contravention of the applicable Bar Council rules on Conflict of Interest, then the Base Excess [Item 10 of the Schedule of Insurance 2005] will **NOT** apply to that claim.
- (2) In such cases, the excess applicable to the claim will be minimum RM 100,000.00 or DOUBLE the Base Excess [Item 10 of the Schedule of Insurance 2005] subject to a maximum of RM 300,000.00.

The insurers have agreed that if the firm/solicitor had obtained a written waiver from the Purchaser/Borrower before conducting the transaction, then the Base Excess [Item 10 of the Schedule of Insurance 2005] **SHALL** apply if a claim arises as a result of that transaction. We have enclosed the following sample documents for your assistance.

[a] Attachment A: sample Schedule of Insurance 2005

The highlighted area is Item 10 referred to above and it states each firm's Base Excess. This amount varies from firm to firm, so please refer to your firm's schedule to know your own applicable Base Excess and further, please refer to Clause 6.3 of the Certificate of Insurance 2005 to determine the exceptions to this Base Excess.

[b] Attachment B: sample Letter of Acknowledgment

This is the sample of the Letter of Acknowledgment that is to be executed by the Purchaser/Borrower in situations where the solicitor acts for the Purchaser/Borrower in the Sale and Purchase and the Financial Institution in the financing. Please amend the waiver accordingly to suit any other transaction where a conflict situation may arise.

Failure to have this waiver executed will result in the increased excesses as outlined in Clause 6.3(a)(i).

We would like to urge members involved in conveyancing to take note and ensure that such written acknowledgement is obtained to avoid increased excess in the event a claim is made against you.

Thank you.

Ragunath Kesavan
Chairman
Professional Indemnity Insurance Committee

Attachment A and Attachment B can be found on Page 19

Attachment A Sample Schedule of Insurance

The Base Excess of your firm is Item No. 9 as highlighted below

MALAYSIA BAR

SCHEDULE ATTACHING TO AND FORMING PART OF THE MALAYSIAN BAR
PROFESSIONAL INDEMNITY INSURANCE CERTIFICATE AS PART OF MASTER
POLICY NO. 12971U7000003

1.	CERTIFICATE NO.	:	2012/M_____/_____	
2.	INSURER	:	Pacific & Orient Insurance Co. Berhad (12557-W) 11th Floor, Wisma Bumi Raya No. 10, Jalan Raja Laut, P.O. Box 10953 5073 Kuala Lumpur (and its successors or assigns)	
3.	NAME INSURED	:	(As per Attachment 1 to this Schedule)	
4.	THE FIRM	:		
5.	ADDRESS	:	(and all branches within West Malaysia)	
6.	PERIOD OF INSURANCE	:	From 1st January 2012 to 31st December 2012 at midnight Malaysian Time	
7.	MANDATORY LIMIT OF INDEMNITY	:	RM	each and every claim (subject to sub-limit in respect of Misconduct)
8.	SUB-LIMIT IN RESPECT OF MISCONDUCT	:	RM 350,000.00	in the aggregate (subject to Firm's Mandatory Limit, whichever is lower)
9.	BASE EXCESS	:	RM	each and every claim (subject to Clause 11 of the Certificate of Insurance)
10.	PREMIUM INCLUSIVE OF 5% OR [6%] SERVICE TAX	:	RM	
11.	STAMP DUTY	:		
SIGNED FOR : Pacific & Orient Insurance Co. Berhad S. KRISHNA MURTHIE GENERAL MANAGER Business Development, Underwriting				
The insurance is subject to the terms of the <u>Master Policy No. 12971U7000003</u> and the Certificate of Insurance 2012				

Attachment B Sample Letter of Acknowledgement

Please amend the waiver accordingly.

ACKNOWLEDGMENT OF LEGAL REPRESENTATION

To: [firm of solicitors concerned]

Re: Loan/facility amount: RM.....

Financier:
Borrower(s):
Chargor(s):
Security:

I/we, the undersigned, expressly acknowledge the following:-

1. I/We am/are the abovenamed Borrower(s)/Chargor(s).
2. I/We am/are fully aware, and hereby acknowledge, that [name of firm of solicitors & address] ("the said Solicitors") are solicitors acting only for the abovenamed Financier in the above loan documentation, and that the said Solicitors are NOT representing me/us in the matter; notwithstanding that they witness or attest my/our execution of the relevant documents, or that I/we have agreed to bear their fees on behalf of the Financier, or that they may be acting (or have acted) for me/us in any other related or unrelated matter.
4. I/We have been advised, and am/are fully aware, that I/we am/are at liberty to engage separate and independent legal representation in the matter. However, I/we have chosen not to do so, while being fully aware that, should situations arise where the Financier's interest is in conflict with my/our interest, the said Solicitors' duty would be owed to the Financier and not to me/us.
5. The contents of this acknowledgment have been explained to me/us and I/we fully understand the same.

Dated

Name:
I/C:

EMAIL SCAMS AND FRAUDULENT SCHEMES BY UNAUTHORISED PERSONS

Bar Council is concerned about the growing number of reports and complaints received in relation to persons who hold themselves out as being authorised to offer legal services to the general public, or who masquerade as advocates and solicitors registered with Bar Council. Amongst the reports received are related to:

- (1) Inheritance of monies via email scam;
 - (a) Preparation of Sale and Purchase Agreements for the purpose of withdrawal of funds from the purchasers' Employees Provident Fund accounts;
 - (b) Issuance of Letter of Demand by unauthorised persons;
- (2) Misuse of a firm's particulars on unauthorised letterheads/office stationeries; and
- (3) Unauthorised individuals passing themselves off as advocates and solicitors.

We urge all Members to be wary of such scams and to verify the identity and status of the lawyer or legal firm they are dealing with by consulting the Malaysian Bar Website at <http://www.malaysianbar.org.my>, or by contacting the Bar Council Secretariat by telephone at 03-2050 2050, or by email at council@malaysianbar.org.my. Members are also advised to lodge police reports in relation to these scams and forward the reports to Bar Council for further action.

Tony Woon Yeow Thong
Secretary,
Malaysian Bar
11 May 2011

PI INSURANCE & RISK MANAGEMENT DEPARTMENT

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Targeting Risks. Creating Solutions.

HELPDESK

Contact the Professional Indemnity Insurance & Risk Management
Department with your practice queries.