



JURISK!

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Risk Management Newsletter

A biannual publication of Professional Indemnity Insurance Committee, Bar Council Malaysia

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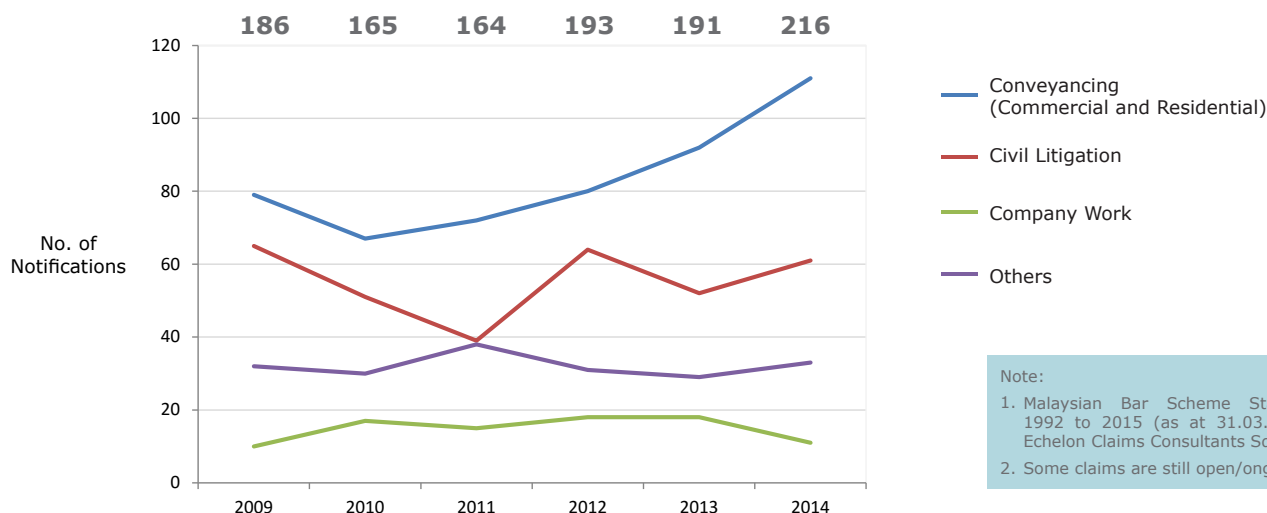
The Humble Checklist:
**YOUR MOST
POWERFUL TOOL**

Working Together for a Better Scheme

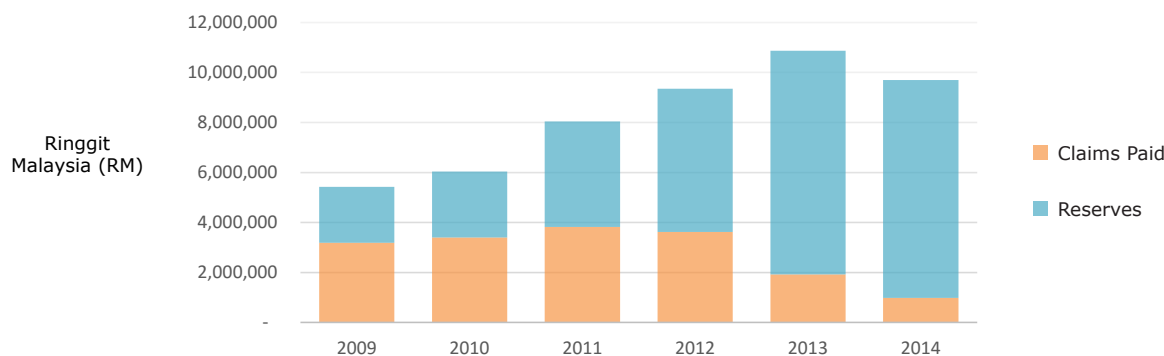
We would like to wish you a Happy New Year and may the coming year bring joy and happiness! This is a time when the Bar Council's Professional Indemnity Insurance ("PII") Committee pays extra attention to the managing of the Scheme for the future, taking in current trends, collating the past year's data and having more dialogues with the Scheme's stakeholders. One thing remains the same however, and that is our shared responsibility towards the Scheme.

The statistics on claims are not too good although it is still manageable. Despite our efforts, claims have continued to rise and what it means in real terms is that we are looking at a premium hike if we do not manage our risks within the profession. A snap shot of the breakdown in claims in accordance with practice area is as follows:

Total Notifications by Areas of Practice



Costs Incurred by Insurer



Most of the conveyancing claims could have been avoided if Members took more effort to manage their risks. Most of the Insured Practices ("IP") facing claims DO NOT USE any form of checklists. Many do not even know that we have prepared specific checklists for conveyancing.

The Scheme receives many notifications from conveyancing-related claims and this has propelled the PII Committee to do our best to educate lawyers on the many pitfalls in conveyancing that even the most seasoned lawyers can fall into. There are many practice tools to utilise, that will help all conveyancing practitioners be more wary of trips and traps in conveyancing practice.

The following are the conveyancing checklists that we have developed:

1. Sub-Sale of Property with title (For Purchaser)
2. Sub-Sale of Property with title (For Vendor)
3. Sub-Sale of Property without title (For Purchaser)
4. Sub-Sale of Property without title (For Vendor)

There are two versions available for each checklist; there are the "Step-By-Step" versions with long-form checklists that lists the procedures in detail and there are "Snapshot Checklists" versions of the same. The former format is extremely useful for young and new practitioners and beneficial two-ways: it will aide their training in the law of conveyancing, as well as provide Legal Assistants and Partners with an easy to refer guide of where their conveyancing clerks are in each conveyancing file.

The Snapshot Checklists are a condensed version of the step-by-step guide; adequate and sufficient enough to provide the basic overview and assists the conveyancer to ensure no step goes amiss. These and other practice areas checklists can be downloaded for free from **www.praktis.com.my** in either PDF or MS Word format.

It must be your Firm's standard operating procedure for every conveyancing file which is opened to have a checklist on its front cover!! Using and maintaining each checklist for each file is good risk management practice. If a Firm is unfortunate enough to be sued, and if the Firm can provide the Insurer proof of good risk management practices, their Base Excess will not be increased. Proper and evident use of these checklists can aide in reinstating a Firm's original Base Excess.

Risk Aware! – Diagnose Your Firm's Risk Management Health

In 2016 we will be embarking on a *Risk Aware!* Initiative that will see a team made up of various individuals from the Malaysian Bar's PII Scheme visiting and sitting-in with law firm Partners, Legal Assistants, Managers and staff to conduct an overview of their risk management practices.

We would only look at processes and not the individual files and therefore there is no worry of any breach of solicitor-client privilege. This will be followed by a session on how the Firm can better its risk management practices.

The *Risk Aware!* Initiative hopes to reach out to as many Firms as possible. We hope you take this opportunity to open up your offices to our Team, as this exercise will be most beneficial. More information on this initiative can be found on page 4.

Practice Mentors

We also intend to set up a loose panel of senior lawyers who can assist other Members who would need a sounding board or advice. This would be limited to general advice only and would not be opinions on any specific matter or file.

This initiative requires the approval of Bar Council and if everything is in order we should be able to launch it before the end of the first quarter of 2016.

2016 Premiums

We are at year two of our second three-year agreement with the Insurer and part of that agreement was the surety of stabilised premiums for the same duration. We have managed to maintain within the band of no increase or decrease in premium. However, the same cannot be promised for future renewals.

Continue to be vigilant and detailed oriented in your practice, and develop good risk management practices to avoid the possibility of being sued. Although the Scheme offers us protection, we must collectively do our best to maintain it. The Scheme relies heavily on Members and the way we run and manage our practices.

I wish to reiterate, the PII Committee has many recourses for Members that are in an unfortunate position of a claim. Please do contact us or the PII and Risk Management Department at 03-2032 4511 or email pirm@malaysianbar.org.my with your problems and grievances. It remains an important responsibility of the Committee to continuously ensure that Members always have alternative solutions available.

Ragunath Kesavan

Chairperson

PII Committee

Email: ragunath@kesavan.com.my

Telephone: 03-2095 2299

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what do you think?

Dear Members,

Inside this Issue ...

... checklists take centre stage! Often times, it is not ignorance of the law or ill intent that causes negligence in your practice, as you already have the knowledge and the know-how. The problem lies in there being multiple streams of information and just too many case files being juggled at the same time. It is just a matter of time before a solid mistake and/or oversight happens. This will, in turn, lead to dire consequences — a claim against your firm.

A simple, unassuming tool that can change the way you conduct your daily affairs, both in terms of office management and handling of case files, is the humble checklist. Using checklists in the more routine aspects of your work can help ensure that no steps are missed. Having a checklist instils confidence in your work and helps in the event of a claim made against you or your firm.

This issue of *Jurisk!* highlights a variety of case studies of actual claims from the Malaysian Bar's Mandatory Professional Indemnity Insurance ("PII") Scheme. The claims highlighted stem from conveyancing files, hence they are a convenient way to accentuate to Members how the practice of conveyancing law can be.

Our centre spread contains an "all-you-need-to-know" feature about checklists. If you have never made a checklist for your firm, or if you have never used one before, this is the perfect starting point to get you well on your way. Checklists can make you a more effective, efficient lawyer, and sets the path for you to be a prudent practitioner!

We hope this issue of *Jurisk!* is helpful to you. We are always looking for better content to serve the everyday lawyer in this publication. If you have any thoughts or ideas on future content that you would like to share with us, please contact us at the PII and Risk Management Department. You can find our contact details on **page 32**.

Happy reading!

The *Jurisk!* Team

The Risk Aware! Initiative

Have you ever wondered if you have **suitable risk management** in place?

Did you know you should be **cross checking** documents, receipts, instructions etc before making out a payment?

Do you have **procedures** for running a conveyancing file, handling litigation matters, meeting clients, handling accounts etc?

Does your firm use **checklists**?

Start the year by ensuring your firm has adequate risk management. The PII Committee encourages Members to open up their firms for a visit from our team to assess the procedures (or none) that are in place in your firm. The aim is very straightforward, to identify ways to improve your firm's procedures, and to help you minimise any possibility of a claim made against you.

We urge Members to participate in this programme as it will benefit your firm to identify any hidden risks. The **Risk Aware!** initiative which aims to reach as many Members will start in 2016 at no cost to our Members. Upon completion of the assessment, a report and suggested improvements will be provided to the Firm.

What we will look at:

- Procedures on handling files, accounts etc
- Overall supervision of staff
- Communication with client, the other party's solicitor, third parties etc
- Use of technology
- Others

If you are interested to participate in the **Risk Aware!** initiative, contact the PII and Risk Management Department.

It's all about helping our Members improve their practice!

MALAYSIAN BAR
Mandatory PII SCHEME
**DID YOU
KNOW?**

...that your Base Excess will be increased to specific amounts in these three situations?

Clause 10 of the 2015 Certificate of Insurance ("COI") states the following:

The Base Excess specified in Item 9 of the Schedule shall be increased to the amounts specified below in the event of any **claim** arising out of the following circumstances or events:

(a) Conflict of Interest:

RM100,000 or 2 times the Base Excess whichever is the higher subject to a maximum of RM300,000 where **you** have acted for more than one party to a transaction in respect of conveyancing of land and/or buildings otherwise than in accordance with Bar Council's Rules and Rulings as amended from time to time on conflict of interest, applicable at the time of the transaction.

However the Base Excess shall apply in the event **you** had obtained written waivers from the clients.

(b) Conveyancing Base Excess:

RM50,000 minimum in respect of conveyancing of land and/or buildings.

However the Base Excess shall apply if:

- (i) **you** had in place an implemented risk management programme at the time of the act, error or omission giving rise to the **claim** was committed; or
- (ii) it is adjudged by the Court that there is no civil liability arising from the **claim** against the **Firm**; or
- (iii) the claimant unconditionally withdraws the **claim** against the **Firm**.

(c) Dishonesty of Partner:

RM20,000 multiplied by the number of **principles** subject to a minimum of RM30,000 and a maximum of RM250,000 per **Firm** in respect of **misconduct** of **principals**.

Do note that in the 2015 COI, the Clause on Base Excess is Clause 10 whilst in previous years, the Base Excess is addressed in Clause 11.

(a) Conflict of Interest

To briefly illustrate this sub-clause, let's take Firm XYZ of five lawyers that carries a regular Base Excess of RM35,000. If a suit is brought against the Firm stemming from the Firm having acted in conflict of interest, Insurers will apply the increased Base Excess of RM100,000 (as this is the higher amount compared to twice their Base Excess) UNLESS the Firm provides written waivers from the clients.

In application it simply means if the Firm is found liable to pay damages of RM150,000 and the Firm cannot provide the written waivers, then the Firm will have to pay RM100,000 towards the damages awarded and Insurers will pay the balance RM50,000 plus defence cost incurred. Same will apply in the event of a settlement.

Therefore, it is very important for Firms to steer clear of representing two or more parties whose interests are in conflict in ANY transaction. Maintaining clear and conscionable loyalties to two masters is never achievable.

Chapter 6 of the Rules and Rulings of the Bar Council on Conflict of Interest disallows this practice for good reason. If however, both parties insist on the same representation, then the Firm should ensure that all parties agree and understand the impact before signing the waivers.





(b) Conveyancing Base Excess

Using Firm XYZ again as an example, should a suit be filed against the Firm where the claim arises from a conveyance of land and/or building, the Firm's Base Excess will be increased to minimum RM50,000.

If however, the Firm can provide the Insurers a write up with supporting documents, eg how the Firm manages their conveyancing files, number of conveyancing staff, distribution of work and duties, their experience, the supervision and monitoring of their work, the checklists to guide the conveyancers and the staff, KIV system to monitor the dates etc; all of these would go towards showing the risk management initiatives and processes that the Firm had in place at the time the act, error or omission giving rise to the claim was committed. Insurers will seek independent advice and once satisfied the Firm's original Base Excess will be reinstated.

In practice if the Firm is found liable to pay damages of RM150,000 and the Firm did not submit the above documents to have their original Base Excess reinstated, then the Firm will have to pay RM50,000 towards the damages awarded and Insurers will pay the balance of RM100,000 plus defence cost incurred. Same will apply in the event of a settlement.

The reason for Conveyancing-based claims to be singled out under Clause 10 is because of how relatively straightforward and procedural this area of law is, and by implementing checklists, controls and adopting a standard practice method to all conveyancing files, risks of mistakes and oversight can be eradicated. Suits filed against Firms for conveyancing matters stem from lawyers skipping what would otherwise be basic steps that must be done in conveyancing but the lawyer chose a shortcut instead!

Among others, they fail to conduct the initial land search, and sometimes the land search prior to registration, proper identity checks are skipped, and caveats are not lodged.

(c) Dishonesty of Partner

The increased Base Excess stated in Clause 10(c) of the 2015 COI will apply once the Insurer has agreed towards cover for 'innocent Partner(s)' when there is a claim arising out of dishonesty of Partner(s). However the Limit of Indemnity applicable will be RM350,000 or the Firm's Mandatory Limit whichever is lower.

To illustrate Clause 10(c), let's look at two different scenarios:

Scenario 1: Firm OP is a two-person partnership, which means their Base Excess is RM20,000 and Mandatory Limit of Indemnity is RM300,000. In a successful suit against Firm OP, where one partner was found to have carried out a dishonest act of siphoning money (misconduct), cover will only be provided to the other partner ("innocent Partner"). In addition, the Firm's Base Excess is now automatically increased to RM40,000 for this claim and no changes to the Firm's Limit of Indemnity.

Scenario 2: For a four-person partnership (Firm QRST), their Base Excess is RM30,500 with a Mandatory Limit of Indemnity at RM400,000. In a situation similar to the above suit, cover will only be provided to the remaining three "innocent Partners". Since Firm QRST has four partners, the Firm will have to pay an increased Base Excess of RM80,000, and the Insurer will only cover the remainder, up to RM350,000 for this claim.

NB: Under the Mandatory PII Scheme, cover is always subject to terms, exclusions, limitations and conditions of the relevant Certificate of Insurance.

The Bahasa Malaysia translation on page 20 relating to the Master Policy, Certificate of Insurance and illustrative examples is for guidance only. In the event of inconsistency between the English version and the Bahasa Malaysia version, the English version will prevail.

Getting Things Right

One Checklist at a Time

by Shafiq Sobri, Jardine Lloyd Thompson Sdn Bhd

Who would have thought a simple surgical checklist could save many lives during major operations? The surgical checklist, devised by the World Health Organisation "WHO" in 2009 was tested in eight cities around the world and the results were startling; the usage of checklists reduced inpatient deaths by more than 40% and surgical complications by more than a third during major operations. With a history of great success in minimising risks, checklists could also be an effective risk management tool for lawyers.

The use of checklist among lawyers is not new. In fact, most lawyers would have their checklists ready before they open new files or take on new tasks, especially for conveyancing matters where most procedures are quite straight forward. For these reasons, Bar Council has produced conveyancing checklists which could assist lawyers to be on the ball in their day-to-day conveyancing work. It should be noted that these checklists are only a guide on standard procedures and processes in the relevant practice areas. These checklists are not conclusive and should be used judiciously and tailored according to lawyers' specific requirements for each file.

Clause 10(b) of the 2015 Certificate of Insurance ("COI") states that the Base Excess for claims involving conveyancing matters will be increased to RM50,000 minimum. Nonetheless, the Firm's original Base Excess will apply if the Insured Practice ("IP") can show that it had sufficient risk management processes in place at the time the act, error or omission giving rise to the claim was committed. The PII Did You Know? segment on page 5 has further details on this clause.

We explore a few case studies in which the IPs were successfully sued by their clients and/or other third parties, for damages incurred from malpractice or negligence in conveyancing matters. The Insurer, in accordance with Clause 10(b) increased their respective Base Excesses, meaning that all the IPs in the following cases had to bear a larger portion of the liability, that is unless they could prove to the Insurer that they had adequate risk management practices and protocols in place.

The most demonstrative way an IP can show their adherence to sound risk management practice is to evidence to the Insurer the proper usage of checklists for each and every conveyancing file. As a further guide, IPs may also include and explain the following risk management processes in their write-ups to the Insurer to get their Base Excess reinstated:

- Identity checks on vendor and purchaser.
- Conflict of interest checks before opening conveyancing files.
- Implementation of a centralised diary system to track important dates.
- When the client is briefed of the full terms in the Sale and Purchase Agreement ("SPA").
- The time of lodging of caveats after client signs the SPA and makes a deposit.
- Implementation of a proper supervisory system between lawyers and conveyancing clerks.
- A lawyer witnessing attestations on conveyancing documents.
- Partners (or Sole Proprietor) running through conveyancing files prior to signing off.

The following case studies are actual past claims of the Malaysian Bar Professional Indemnity Insurance Scheme. All names and places have been changed to protect the respective identities.

DON'T LET THE GRASS GROW UNDER YOUR FEET

Fred appointed Messrs Doo and Co ("IP") to discharge his condominium from Bank ABC upon the settlement of his property loan with the said bank. The bank forwarded the relevant documents to the IP for that purpose.

Three months later, Bank X initiated a bankruptcy proceeding against Fred to recover the judgment sum owed by him to the bank. Fred decided to refinance the property with Bank Z in order to pay the judgment sum. However, he was informed by the loan officer at Bank Z that the refinancing could not be done since the property was still charged to Bank ABC.

Astounded with the news, Fred decided to conduct his own land search. He discovered that his condominium was still charged to Bank ABC despite the fact that he had already settled the loan with Bank ABC and had already paid full legal fees to the IP to discharge the property.

Subsequently, Fred was declared bankrupt due to his failure to settle the judgment sum to Bank X. Fred sued the IP alleging negligence on the part of the IP's for failing to discharge the property. He further alleges that the IP's negligence made him lose the chance to refinance his property and pay the judgment sum to Bank X.

In reviewing the IP's risk management processes to determine if their original Base Excess should be reinstated, the Insurer found the following:



The checklists that were used by the IP did not include details for due dates or deadlines in respect of the next item that the IP was supposed to follow up.



The IP did not maintain a "Keep in View" ("KIV") system to track of important dates and urgent matters.



The checklists were too generic. The IP adapted the sub-sale financing checklist into the checklists for properties purchased from the developers as well as for discharge of charge without any modifications.



Certain checklists employed by the IP for other conveyancing files were not complete nor comprehensive. For instance, the checklist in a sale and purchase transaction where the vendor or purchaser is a company, it did not contain the requirement for board of directors' and/or shareholders' resolution and other need for corporate documents.

ALWAYS BE ON YOUR TOES

Chuckie, a partner at Messrs Finster and Associates ("IP") acted for Tommy, the purchaser in a sale and purchase of a property. The property was charged to Bank ABC as a security for the loan extended to Angelica, the vendor in the transaction.

Bank ABC issued a redemption statement to Chuckie which clearly stated that the redemption sum should be forwarded to the bank directly. Chuckie was also handling other conveyancing matters for different clients at that time and only realised that the deadline to forward the redemption sum to the bank

was about to expire in three days, and this too only after Tommy reminded him about it.

Due to time shortage, Chuckie decided to deposit the cheque for the redemption sum from Tommy's financier bank directly to Angelica's loan account with Bank ABC. Unbeknown to Chuckie, Angelica's loan account with Bank ABC had a unique feature which allowed her to withdraw money from the loan account. Angelica made several withdrawals from the account after the cheque was cleared and as a result, the redemption sum was not enough to redeem the property from Bank ABC.

Chuckie only discovered the fact after he was notified by Bank ABC that the property was up for auction due to the non-payment of redemption sum. Devastated with the news, Tommy decided to sue for losses due to Chuckie's negligence.

In reviewing the IP's risk management processes to determine if their original Base Excess should be reinstated, the Insurer found the following:



Although the IP used checklists for all conveyancing files, the checklists were not fully utilised. The checklists only had the "date done" section and did not have the "due date" section. There was also no evidence from the checklists that the IP monitored crucial due dates and deadlines.



The checklist and the redemption statement specifically provided that the redemption sum should be forwarded directly to the bank. Despite this requirement, the IP forwarded the cheque for the redemption sum directly to the vendor.

TO REST IN PEACE

Tina, a sole proprietor of Messrs Belcher & Co. ("IP") was instructed by Teddy, her good friend who was terminally ill to convey a few properties owned by him to his family members. Teddy had two families from two separate marriages and due to his complicated relationships with his families he decided to do away with writing a will.

Tina advised Teddy that he should at least sign a retainer agreement to avoid complications in the future. Nonetheless, Teddy brushed off the idea and proceeded to sign the transfer and assignment forms. He advised Tina on the intended recipients and instructed her to only get them to sign the forms after his death. He further instructed Tina to secure the titles to the properties from his only son from his first marriage and to date the forms a few days before his death.

Teddy passed away ten months later and per his instructions, Tina proceeded to secure the titles from Teddy's son and called all recipients to brief them about Teddy's wishes and instructions. All recipients from both families did not object the arrangement and signed the forms. Nevertheless, the acceptance and agreement of such arrangements were not confirmed in writing between the recipients then. Tina backdated the forms to a month before Teddy's death as per his instruction and proceeded with the presentations to the land office.

To her surprise, the land office rejected the presentations and informed Tina that Teddy's second wife and her daughter had lodged a private caveat on three properties which were meant to be transferred to Teddy's first family. While trying to resolve the problem with both families, Tina was served with a writ from Teddy's second wife alleging her of conspiring with Teddy's first family to defraud her rightful entitlement to the properties.



In reviewing the IP's risk management processes to determine if their original Base Excess should be reinstated, the Insurer found the following:



The IP used conveyancing checklists diligently and ensured that deadlines and all prerequisites for each matter were fully met. The checklists were also in accordance with the basic conveyancing checklist suggested by Bar Council.



Nonetheless there were no written agreements, letter of authorisation nor a retainer agreement to prove that the IP had indeed acted on the advice of the deceased, or that the recipients agreed to such arrangements.



The backdating of documents was also considered unethical as it gave a false impression that the documents were executed prior to Teddy's death.

LEAVE NO STONE UNTURNED

Messrs Turner and Associates ("IP") was the panel lawyer for Bank ABC and handled commercial loan transactions for the bank. In 2013, Cosmo Property Pty Ltd ("Cosmo") approached the bank to get a commercial loan of RM1,700,000. The loan will be secured by an office building owned by Cosmo. Timmy, a partner of the IP prepared the loan agreement and vetted through the relevant documents from Cosmo. Once the documents were in order, Timmy instructed the bank to release the money to Cosmo.

After the loan was released to Cosmo, Timmy received a phone call from one of Cosmo's directors saying that the company had never applied for any loan from Bank ABC. The directors of Cosmo did not even execute the loan documents nor passed a board of directors' resolution to accept the loan from Bank ABC!

Astounded with the revelation, the IP contacted the solicitor who represented Cosmo in the transaction. It was later discovered that the solicitor represented Cosmo was defrauded by two imposters purporting to be the directors of Cosmo. The imposters presented fake identity cards bearing the same names as the directors of Cosmo. The board of director's resolution provided by the imposters was also forged.

The directors filed an injunction to prevent Bank ABC and the IP from charging the company's property for the loan granted to the imposters. As a result, Bank ABC suffered losses and sued the IP for negligence.



In reviewing the IP's risk management processes to determine if their original Base Excess should be reinstated, the Insurer found the following:



The checklists used by the IP were comprehensive and according to the basic conveyancing checklist suggested by Bar Council.



As per the requirement in the checklist, the IP requested a confirmation from Cosmo's company secretary to verify its corporate information.



The checklist used by the IP for this particular file did not have any requirement to secure a confirmation from the company secretary on the genuineness of the board of director's resolution. Nonetheless, the IP could have taken one step further by securing such confirmation to ensure the authenticity of the board of director's resolution provided to them.

ALWAYS DO THE SPADEWORK



Messrs Korra and Associates (“IP”) was named as the Third Defendant in a writ filed by a Claimant who claimed that the IP was involved in a conspiracy to defeat the execution of an arbitration award against the First Defendant.

It all started when the IP acted for the Second Defendant to purchase a few properties from the First Defendant. However, it was not known to either the IP or the Second Defendant that the Claimant was awarded with damages from an arbitration proceeding between the Claimant and the First Defendant.

A few years earlier, the Claimant obtained an arbitration award of RM1,000,000 in relation to a land dispute with the First Defendant. The Claimant made an application to the High Court to enforce the arbitral award against the First Defendant and it was allowed.

However, before the Claimant could enforce the award, the First Defendant sold a few parcels of land which were not recorded in the audited accounts to the Second Defendant. The Claimant alleged that the disposal of lands will affect their ability to recover the damages under the arbitral award. The Claimant filed a writ and alleged that the First Defendant, the Second Defendant and the IP had conspired to dissipate the lands in order to defeat the arbitral award granted to the Claimant.

Note: The land which the Second Defendant purchased from the First Defendant was never part of the land dispute.

In reviewing the IP’s risk management processes to determine if their original Base Excess should be reinstated, the Insurer found the following:



The checklist employed by the IP for their conveyancing files were very comprehensive and in accordance with the basic conveyancing checklist suggested by Bar Council.



The checklist included critical timelines such as date of the SPA, completion date of the SPA, submission of real property gains tax returns with the Inland Revenue Board, payment of the differential sum for the purchaser, receipt of the redemption statement from the Vendor’s financier, release of the redemption sum to the Vendor’s financier, release of the loan sum by the Purchaser’s financier and payment of the balance purchase price to the Vendor.



From the checklists, the Insurer was able to ascertain that the IP was diligent and cautious in the manner they had handled the transaction since the IP kept track of crucial dates and processes.

WHEN IT RAINS IT POURS

Danny Fenton of Messrs Fenton and Co ("IP") acted for Jasmine, the purchaser in a conveyancing transaction to prepare the SPA. The vendor, Maddie was not represented but was assisted by her daughter and son-in-law. After the deposit was paid to Maddie, Danny proceeded to present the Memorandum of Transfer to the land office.

After the Memorandum of Transfer was successfully presented, Maddie through her new solicitor elected to terminate the SPA and forfeit the deposit. Maddie's solicitor also demanded Danny to return the title to Maddie and threatened to lodge a complaint against Danny with the Disciplinary Board should he fail to comply with the demand.

Jasmine insisted to continue on with the transaction and requested Danny to forward the balance purchase price to Maddie's solicitor to complete the transaction. The balance purchase price was returned back. Jasmine intended to challenge the termination and instructed Danny to file a writ for specific performance.

Maddie, who was persistent with the termination decided to file a writ against Danny and the IP. Maddie alleged, inter alia, that Danny represented both the vendor and purchaser in the transaction. She also alleged that Danny breached the SPA for the failure to return the title and other relevant documents after the termination of SPA and in bad faith, presented the title for transfer without informing her despite the knowledge that the SPA had been terminated.



In reviewing the IP's risk management processes to determine if their original Base Excess should be reinstated, the Insurer found the following:



The IP diligently used a comprehensive checklist.



The checklist clearly stated that the IP only acted on behalf of Jasmine, the purchaser.



The IP also kept track of all important dates of all processes in the transaction and as such was able to demonstrate that the presentation of the Memorandum of Transfer was not done in bad faith since they only received the termination notice from the vendor after it was presented at the land office.

PRESENT HERE BUT NOT THERE



Messrs Wakeman and Carbuckle ("IP") represented the purchaser, Sheldon to prepare the SPA for a residential property. The Vendor, Tremorton Pty Ltd ("Tremorton") was unrepresented. Two months after the execution of the SPA, Sheldon discovered that the property was being auctioned off by Bank ABC.

Sheldon filed a writ against the IP claiming damages and alleged that the IP breached the duty of care by misrepresenting and advising him that the property was free from encumbrances. He also alleged that the IP failed to make proper land searches and failed to lodge a private caveat to secure his interest.

The IP admitted that the SPA contained a recital which mentioned that the property was free from encumbrances. Nonetheless, upon realising that mistake the IP decided to rectify the SPA manually and made a remark that the property was charged to Bank ABC. The SPA also had a clause regarding the redemption of the property. The land search done by the IP also confirmed the position

of the property being charged to Bank ABC at the time.

Since Sheldon was not a Malaysian citizen, consent from the State Authority was needed before the presentation could be made. The IP faced some difficulties in obtaining the consent since Tremorton did not provide the quit rent and assessment receipts for the properties. The IP also could not lodge a private caveat since Sheldon did not provide sufficient funds for that purpose. Nevertheless, the IP decided to lodge a caveat using their money first pending receipt of funds from Sheldon.

Since the consent could not be obtained on time, the redemption sum could not be forwarded to Bank ABC. Bank ABC decided to exercise their right and auction off the property. The IP informed Sheldon that he could exercise his right and terminate the SPA at that point. Nonetheless Sheldon kept mum and did not give any instructions to the IP. Only after the property was successfully auctioned off, the IP received a writ from Sheldon.

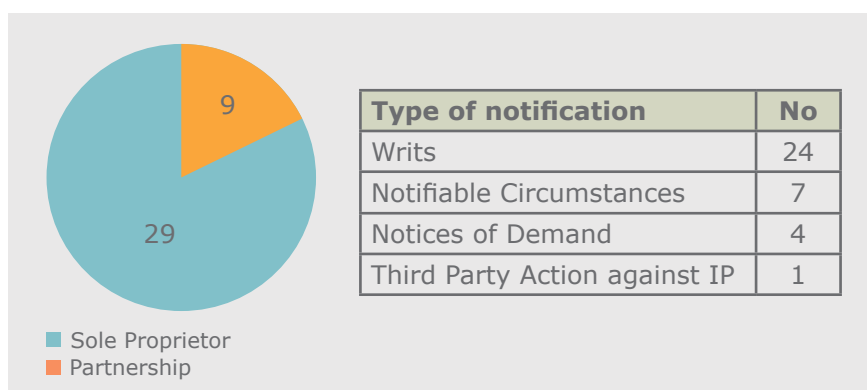
In reviewing the IP's risk management processes to determine if their original Base Excess should be reinstated, the Insurer found the following:

- ❗ The conveyancing checklists employed by the IP were general and not tailored to this specific transaction. The IP should have taken additional steps to obtain the consent from the State Authority.
- ✅ The checklist stated that the vendor, although unrepresented, should be responsible to secure the consent from the State Authority. This step should have been fulfilled at the time of the execution of the SPA. However, since both parties signed the consent form on the day the SPA was executed, the exemption is accepted.
- ❗ Although the IP manually rectified the SPA to ensure it correctly reflected the position of the property being charged to Bank ABC, the IP failed to rectify and amend the other duplicates of the SPA.
- ✅ The caveat was not lodged immediately or soon after the SPA was executed. The checklist employed by the IP provided that the caveat will only be lodged after the client has paid the relevant bills, and before sending the SPA for stamping. Although the purchaser did not provide sufficient funds for the caveat, the IP still managed to file a caveat on the property to protect the purchaser's interest by using their own money.

Claims Alert

In 2014, we received 73 notifications on residential conveyancing. Out of this figure, 36 notifications were reported under the sub-cause of “acted in breach of conveyancing practice”.

Compared to 2013, there were only 14 notifications under this sub-cause from the total of 51 notifications on residential conveyancing. The types of notifications are distributed as follows:



Highest claim amount	RM2,210,123.60
Highest mandatory limit of indemnity	RM1,200,000
IPs that submitted risk management write-ups to the Insurer for base excess reinstatement	3
IPs that managed to get the base excess reinstated (Base excess reinstatement is fully explained in page 5, with case study illustrations on page 7)	9
IPs that have top-up insurance	6
Highest top-up limit	RM14,350,000

* Claims' statistics as at October 2015.

Source: Malaysian Bar PII Scheme Statistics 1992-2015 (as at 31.03.2015), Echelon Claims Consultant Sdn Bhd

Among the causes/contentions for notifications under this sub-cause are:

- Failure to conclude conveyancing transactions within stipulated time.
- Failure to follow client's advice and instruction when drafting the Sale and Purchase Agreement ("SPA").
- Failure to explain the terms and conditions of the SPA clearly to the client.
- Failure to ensure that the full purchase price has been paid before transferring the property to purchaser.
- Failure to ascertain the bankruptcy status of the vendor.
- Failure to ensure the status of land/property in the transaction.
- Failure to comply with the terms and conditions of the SPA.

With notifications on conveyancing matters on the rise, it would be prudent for IPs to bolster their risk management processes in the firm. Having a sound risk management process in the firm would enable the IPs to hold the aces and prevent their practice from being susceptible to claims in this area of practice.

For a refresher, the following best practice tips may assist lawyers to improve their risk management processes when handling conveyancing files.

Communication is key

- Explain the terms and conditions of SPA clearly to clients. Ensure that clients fully understand the terms and conditions stipulated in the agreement to avoid disputes in the future.
- Keep notes of conversations and communications with clients and document the discussions in a letter/email to clients.
- Always confirm clients' instructions in writing. Keep photocopies of all correspondences in the file for easy reference.
- Always take time to discuss and communicate with clients to ensure important information and instructions are not overlooked or missed out.

Clear supervision and guidance are necessary

- Always supervise and guide conveyancing clerks who are assigned to handle clients' files. Ensure that they understand the scope of their work and only work with clients within the permissible authority from partners.
- Although delegation of work to clerks may improve productivity, try not to over-rely on clerks to complete the whole transaction. Even the most experienced clerks may overlook certain details or miss out on the correct conveyancing procedures.

Keep the office diary handy

- A central office diary or a "Keep In View" system will greatly help lawyers keep tabs on crucial deadlines or due dates.
- Always check the updated dates in the office diary to ensure they are entered correctly. Missing out on deadlines can be costly!

Why the Need for Checklists?

No matter how skilled you and your staff may be, well-thought out checklists will help in improving results and minimising mistakes.

- ✓ Provides visible achievable targets
- ✓ Final objective of the project is clear
- ✓ Defines an individuals' scope and responsibility
- ✓ Provides consistent results
- ✓ Provides a step-by-step guide
- ✓ Eliminates mistakes and errors
- ✓ Keeps one from going off-course
- ✓ Increases efficiency and productivity
- ✓ Reduces time wastage
- ✓ Easiest tool to adapt to
- ✓ File audits and reviews done quicker

THE SKINNY ON CHECKLISTS

How Do I Make My Own Checklists?

While the content of your case work may be unique, you'll find steps that are repeated over and over again. Anything that is done repetitively in this manner is ideal for checklist usage.

1. Choose a procedure to make a list from
2. List how the procedure is currently handled
3. Conduct evaluation of the current practice
4. Develop the checklist
5. Keep each point clear and concise
6. Avoid being too detailed and/or too vague or imprecise
7. There is no need to spell out every single step
8. Make sure the more critical and important steps are listed
9. Test the completed checklist in a real-world scenario

Putting Your Checklists To Good Use

Lawyers are known to juggle many things at once, and interruptions are common in a law firm. Use of a checklist can help you pick up easily where you last left off.

- ✓ If there is a checklist for a procedure, use it!
- ✓ Make all checklists available to all relevant staff/lawyers.
- ✓ Carry out random spot checks to ensure proper use of checklists by staff/lawyers.
- ✓ Be flexible in allowing usage of both soft and hard copies of checklists.
- ✓ Train incoming staff on importance of using checklists.
- ✓ Always be open to ideas from staff to improve checklists.

Types of Checklists You Can Use Everyday

Practice Areas

- ☒ Conveyancing Practice
 - Sub-Sale of Property with title (For Purchaser)
 - Sub-Sale of Property with title (For Vendor)
 - Sub-Sale of Property without title (For Purchaser)
 - Sub-Sale of Property without title: (For Vendor)
- ☒ General litigation
- ☒ Will writing
- ☒ Bankruptcy
- ☒ Incorporation
- ☒ Commercial Lease
- ☒ Residential Lease
- ☒ Criminal Procedure
- ☒ Sentencing Procedure
- ☒ Winding Up

Law Firm Management

- ☒ 100 Point Identity Checklist
- ☒ Meeting and engaging a new client
- ☒ Communication protocols
- ☒ Opening and closing case files
- ☒ Trial preparation
- ☒ Managing your Firm's finances
- ☒ Accounts Receivable and Accounts Payable
- ☒ Hiring and training staff
- ☒ Conflicts' screening
- ☒ Delegate effectively
- ☒ Manage your practice
- ☒ Market your practice

A Funny Lawyer's CHECKLIST to Start the New Year!

No	Item	Ways to improve	I've done it!
1.	Spend time with family and friends.	10 minutes isn't enough! Make them take me to lunch or dinner.	☐
2.	Read a book.	With a good cuppa and relaxing environment. Journals don't count!	☐
3.	Go to a park.	Run, or power walk... or maybe just walk. Hey, I made it to the park!	☐
4.	Picnic with family or friends.	I will make the suggestion, they bring the food and stuff.	☐
5.	Try a new outdoor sport.	Perhaps fishing or sailing or water skiing or rock climbing or...? As long as I don't break my bones.	☐
6.	Eat proper food.	Reduce the sambal in my nasi lemak (and perhaps the nasi), but more anchovies and cucumber. And definitely more H ² O.	☐
7.	Exercise more.	Add another push-up to the 1 push-up daily, lift hands higher than shoulder and try to bend down until my back actually bends!	☐
8.	Diarise important dates.	ALWAYS update office central diary, set reminders for everything (note: tell secretary to remind me of my wife's birthday and anniversary and to put sticky notes on my table).	☐
9.	Put things in order.	Proper filing for EVERYTHING at the office. 1. don't let that uncollected bill of RM5,000 happen again!! 2. look out for receipts in drawer, for tax rebate.	☐
10.	Work on my life.	I need a checklist for everything to make sure I did everything!!!	☐



The Malaysian Bar Mandatory Professional Indemnity Insurance ("PII") Scheme was developed to offer equal protection to all Members. It is compulsory in nature, to ensure not only the protection of Members, but to also accord some degree of security to the general public.

The practice of law has become increasingly complex, and to top it off, competition has become even stronger. This greatly increases the responsibility of the profession as a whole. The Scheme provides adequate coverage for Members. However, there will be times when your Firm's Mandatory Limit is insufficient to accommodate certain exposures. There will be instances as well, where your Firm decides that a higher coverage will be best to put minds at ease.

Bar Council only regulates and oversees the Bar's Mandatory PII. Any additional coverage, or Top-up Insurance, will have to be purchased separately. Any payment, maintenance and notification that is required to the Top-up Insurer is between the purchasing Member and their Top-up Insurer. Bar Council, through the PII Committee will not intervene should there be a dispute between parties.

Bar Council does not have a list of Top-up Insurers nor does it provide endorsement to any Insurer to provide Top-up to our Members. Members are free to choose from the open market, and make the best decision they can with all the information they have.

Top-Up Insurance Your Additional Risk Transfer Tool

How does Top-Up Insurance Work?

In our Scheme, when a claim is notified to the Insurer, their first step is to establish policy liability under the Mandatory Policy. Should the Mandatory Policy cover the claim, any amount payable by the Mandatory Insurer will only be to the amount of your Firm's Mandatory Limit of Indemnity.

If your firm's Mandatory Limit is insufficient to meet the claim, the additional amount has to be met by your Firm. However, if your Firm has purchased Top-up Insurance, this additional amount will be met by the Top-up policy insurer, up to the limit of the Top-up insurance purchased.

Some things to keep in mind:

1. Top-up insurance can be bought on a pro-rated basis.
2. It is important that any Top-up insurance you obtain is follow-form of the Scheme's Mandatory Policy and wording, in that, the terms and conditions (coverage) are identical to your Mandatory Policy's terms and conditions.
3. If you have purchased Top-up insurance, the Top-up Insurer must be notified separately of any claims. This is to ensure that you do not breach your Top-up Insurer's policy conditions, which may negatively affect your coverage.
4. Always keep your Top-up Insurer updated of your claim.
5. Certain types of Top-up policies may have exclusions which could affect your claim.
6. Bar Council does not endorse any particular insurer/broker for the purchase of Top-up insurance.
7. Prepare a checklist or procedure on how to manage a claim or potential claim, and make sure to include details of both your Mandatory and Top-up Insurer in the contact details. Be aware and take note of the notification period.

Both the Mandatory and Top-up Insurer need to be notified of a claim or potential claim, and any update to the claim.

TAHUKAH ANDA?

...*Base Excess* anda akan meningkat kepada jumlah yang tertentu dalam tiga keadaan?

Fasal 10 daripada Sijil Insurans ("COI") 2015 menyatakan sebagai berikut:

The Base Excess specified in Item 9 of the Schedule shall be increased to the amounts specified below in the event of any **claim** arising out of the following circumstances or events:

- (a) Conflict of Interest:
RM100,000 or 2 times the Base Excess whichever is the higher subject to a maximum of RM300,000 where **you** have acted for more than one party to a transaction in respect of conveyancing of land and/or buildings otherwise than in accordance with Bar Council's Rules and Rulings as amended from time to time on conflict of interest, applicable at the time of the transaction.

However the Base Excess shall apply in the event **you** had obtained written waivers from the clients.

- (b) Conveyancing Base Excess:
RM50,000 minimum in respect of conveyancing of land and/or buildings.

However the Base Excess shall apply if:

- (i) **you** had in place an implemented risk management programme at the time of the act, error or omission giving rise to the **claim** was committed; or
(ii) it is adjudged by the Court that there is no civil liability arising from the **claim** against the **Firm**; or
(iii) the claimant unconditionally withdraws the **claim** against the **Firm**.

- (c) Dishonesty of Partner:
RM20,000 multiplied by the number of **principles** subject to a minimum of RM30,000 and a maximum of RM250,000 per **Firm** in respect of **misconduct** of **principals**.

Nota: Dalam COI 2015, Fasal mengenai *Base Excess* adalah Fasal 10, manakala pada tahun-tahun sebelumnya adalah Fasal 11.

(a) Konflik Kepentingan (*Conflict of Interest*)

Untuk menggambarkan secara ringkas sub fasal ini, mari kita lihat Firma XYZ yang mempunyai lima peguam dengan *Base Excess* tetap RM35,000. Jika Firma disaman kerana telah bertindak dalam keadaan yang menimbulkan konflik kepentingan, Syarikat Insurans akan mengenakan *Base Excess* yang lebih tinggi iaitu RM100,000 (kerana ini adalah jumlah yang lebih tinggi berbanding dengan mengenakan dua kali ganda *Base Excess* mereka) KECUALI jika Firma menyediakan pengecualian bertulis daripada klien.

Sekiranya digunakan, ini bermakna jika sesebuah Firma didapati bertanggungjawab untuk membayar ganti rugi sebanyak RM150,000 dan Firma itu tidak boleh memberikan pengecualian bertulis, maka Firma perlu membayar RM100,000 terhadap ganti rugi yang diawardkan dan Syarikat Insurans akan membayar baki RM50,000 termasuk menanggung kos pembelaan. Sekiranya tuntutan itu mencapai satu penyelesaian, yang sama akan dikenakan.

Oleh itu, adalah sangat penting bagi Firma untuk tidak mewakili dua atau lebih pihak yang kepentingannya bercanggah dalam SEBARANG urusan niaga. Mengekalkan kesetiaan yang jelas dan tidak berat sebelah kepada dua tuan tidak pernah dicapai.

Rules and Rulings of the Bar Council ada menyebut mengenai Konflik Kepentingan dalam Bab 6, dimana amalan ini tidak dibenarkan untuk sebab yang baik. Walau bagaimanapun, jika kedua-dua pihak meminta perwakilan yang sama, maka Firma itu perlu memastikan semua pihak bersetuju dan memahami kesannya sebelum menandatangani pengecualian.



(b) *Base Excess Pemindahhakan (Conveyancing Base Excess)*

Dengan menggunakan Firma XYZ sekali lagi sebagai contoh, sekiranya saman difailkan terhadap Firma di mana tuntutan timbul daripada pemindahhakan tanah dan/atau bangunan, *Base Excess* Firma itu akan meningkat kepada RM50,000 minimum.

Walau bagaimanapun, sekiranya Firma itu boleh mengemukakan kepada Syarikat Insurans ulasan yang disokong dengan dokumen, contohnya bagaimana Firma menguruskan fail pemindahhakan mereka, bilangan kakitangan pemindahhakan, pengagihan kerja dan tugas, pengalaman, pengawasan dan pemantauan kerja mereka, senarai semak yang dirujuk oleh peguam pemindahhakan dan kakitangan, sistem SDP untuk memantau tarikh dan lain-lain; dimana semua ini bertujuan untuk menunjukkan inisiatif pengurusan risiko dan proses yang diambil Firma itu sewaktu tindakan, kesilapan atau ketinggalan yang menyebabkan berlakunya tuntutan itu. Syarikat Insurans akan mendapatkan nasihat bebas dan setelah berpuas hati, *Base Excess* asal Firma itu akan dikenakan semula.

Sekiranya digunakan, ini bermakna jika Firma itu didapati bertanggungjawab untuk membayar ganti rugi sebanyak RM150,000 dan Firma tidak mengemukakan dokumen di atas untuk mendapatkan kembali *Base Excess* asal mereka semula, maka Firma itu perlu membayar RM50,000 terhadap ganti rugi yang diberikan dan Syarikat Insurans akan membayar baki RM100,000 termasuk menanggung kos pembelaan. Sekiranya perkara itu mencapai satu penyelesaian, yang sama akan dikenakan.

Sebab tuntutan berkaitan pemindahhakan dibincangkan secara khusus di bawah Fasal 10 adalah kerana bidang undang-undang ini agak mudah dan sangat berprosedur, dan dengan menggunakan senarai semak, mengawal dan menerimapakai kaedah amalan standard untuk semua fail pemindahhakan, risiko kesilapan dan kelalaian boleh dielakkan. Saman yang difailkan terhadap Firma bagi perkara-perkara pemindahhakan berpunca dari peguam tidak melakukan apa yang sepatutnya menjadi langkah-langkah asas yang perlu dilakukan dalam pemindahhakan, sebaliknya peguam telah memilih jalan pintas!

Antara lain, kegagalan untuk menjalankan carian tanah awal, dan kadang-kadang carian tanah sebelum pendaftaran, pemeriksaan identiti yang secukupnya dilangkau dan kaveat tidak dibuat.

(c) *Ketidakjujuran Rakan (Dishonesty of Partner)*

Base Excess yang dinaikkan seperti yang dinyatakan dalam Fasal 10(c) COI 2015 akan dikenakan apabila Syarikat Insurans telah bersetuju untuk memberi perlindungan kepada "Rakan-rakan yang tidak bersalah" apabila terdapat tuntutan yang timbul daripada Ketidakjujuran Rakan kongsi. Walau bagaimanapun, Had Indemniti hanya setakat RM350,000 atau Had Mandatori Firma yang mana lebih rendah.

Bagi menggambarkan Fasal 10(c), mari kita lihat dua senario yang berbeza:

Senario 1: Firma OP adalah perkongsian antara dua orang, ini bermakna *Base Excess* Firma ini adalah RM20,000 dan Had Indemniti Mandatori adalah RM300,000. Dalam saman yang berjaya terhadap Firma OP, di mana salah seorang Rakan Kongsi itu didapati telah melakukan satu perbuatan yang tidak jujur dengan menyalahgunakan wang (salah laku), perlindungan hanya akan diberikan kepada Rakan Kongsi yang lagi satu ("Rakan yang tidak bersalah"). *Base Excess* bagi Firma itu juga akan meningkat secara automatik kepada RM40,000 bagi tuntutan ini dan tiada sebarang perubahan kepada Had Indemniti Firma.

Senario 2: Untuk perkongsian empat orang (Firma QRST), *Base Excess* Firma adalah RM30,500 dengan Had Indemniti Mandatori sebanyak RM400,000. Dalam keadaan yang sama seperti di atas, perlindungan akan hanya diberikan kepada tiga "Rakan-rakan yang tidak bersalah". Memandangkan Firm QRST mempunyai empat Rakan Kongsi, Firma perlu membayar peningkatan *Base Excess* sebanyak RM80,000, dan Syarikat Insurans hanya akan membayar sehingga maksimum RM350,000 sahaja bagi tuntutan ini.

Nota: Di bawah Skim Mandatori PII, perlindungan adalah tertakluk kepada terma, pengecualian, had dan syarat-syarat *Certificate of Insurance*.

Terjemahan berkaitan 'Master Policy', 'Certificate of Insurance' dan contoh ilustrasi adalah sebagai panduan sahaja, dan sekiranya terdapat perbezaan antara Bahasa Inggeris dan terjemahan Bahasa Malaysia, versi Bahasa Inggeris akan digunakan.



Laksanakan dengan Betul Senarai Semak untuk Setiap Perkara

Oleh Shafiq Sobri, Jardine Lloyd Thompson Sdn Bhd (versi Bahasa Inggeris)

Siapa sangka senarai semak pembedahan yang mudah boleh menyelamatkan banyak nyawa semasa pembedahan besar dijalankan? Senarai semak pembedahan direka oleh Pertubuhan Kesihatan Sedunia ("WHO") pada tahun 2009 telah diuji di lapan bandar raya di seluruh dunia dan hasilnya mengejutkan; penggunaan senarai semak mengurangkan kematian pesakit lebih daripada 40% dan komplikasi sewaktu pembedahan lebih daripada satu pertiga sewaktu pembedahan besar. Dengan sejarah kejayaan yang besar dalam mengurangkan risiko, senarai semak juga boleh digunakan sebagai alat untuk mengurus risiko peguam dengan berkesan.

Penggunaan senarai semak di kalangan peguam bukan baru. Malah kebanyakan peguam sepatutnya mempunyai senarai semak yang tersedia sebelum mereka membuka fail baru atau mengambil tugas-tugas baru, terutamanya bagi perkara-perkara berkaitan pemindahhakan di mana kebanyakan prosedur adalah agak lurus. Untuk sebab-sebab ini, Majlis Peguam telah menghasilkan senarai semak pemindahhakan yang boleh membantu peguam untuk menjalankan kerja sehari-hari pemindahhakan mereka. Perlu diingatkan bahawa senarai semak ini hanya sebagai panduan mengenai prosedur standard dan proses dalam bidang amalan yang berkaitan. Tiada sebarang penetapan khusus bagi sesuatu senarai semak dan harus digunakan secara bijaksana dengan penyesuaian mengikut keperluan khusus bagi setiap fail peguam.

Fasal 10(b) daripada Sijil Insurans ("COI") 2015 memperuntukkan bahawa *Base Excess* untuk tuntutan yang melibatkan perkara-perkara pemindahhakan akan dinaikkan kepada RM50,000 minimum. Namun begitu, *Base Excess* asal Firma akan dikekalkan sekiranya Amalan Yang Diinsuranskan ("IP") boleh menunjukkan bahawa terdapat proses pengurusan risiko sewaktu tindakan, kesilapan atau ketinggalan yang menyebabkan tuntutan itu berlaku. Segmen PII Tahukah Anda? di halaman 20 mempunyai maklumat lanjut mengenai fasal ini.

Kami meneroka beberapa kajian kes di mana IP telah berjaya disaman oleh klien dan/atau pihak ketiga yang lain, untuk ganti rugi yang dialami kerana penyelewengan atau kecuai dalam perkara berkaitan pemindahhakan. Syarikat Insurans menaikkan *Base Excess* setiap IP dengan mengikut Fasal 10(b). Ini bermaksud semua IP dalam hal yang berikut terpaksa menanggung bahagian yang lebih besar daripada liabiliti, terkecuali jika mereka dapat membuktikan kepada Syarikat Insurans yang mereka mempunyai amalan pengurusan risiko yang mencukupi dan protokol yang berkaitan.

Cara yang paling demonstratif IP boleh menunjukkan kefahaman amalan pengurusan risiko adalah dengan membuktikan kepada Syarikat Insurans penggunaan senarai semak dengan betul bagi tiap-tiap fail pemindahhakan. Sebagai panduan lanjut, IP juga boleh memasukkan dan menjelaskan proses pengurusan risiko berikut kepada Syarikat Insurans bagi mendapatkan semula *Base Excess* asal:

- Pemeriksaan identiti terhadap penjual dan pembeli.
- Pemeriksaan konflik kepentingan sebelum membuka fail pemindahhakan.
- Pelaksanaan sistem diari berpusat untuk mengesan tarikh-tarikh penting.
- Bila klien diberikan penjelasan penuh mengenai syarat-syarat Perjanjian Jual-Beli ("SPA").
- Bila kaveat dilakukan, contoh selepas klien menandatangani SPA dan membayar deposit.
- Bila carian tanah dilakukan, contoh sejurus sebelum menandatangani SPA dan melepaskan wang kepada penjual.
- Pelaksanaan sistem pengawasan yang sewajarnya antara peguam dan kerani pemindahhakan.
- Peguam menyaksikan pengakusaksian pada dokumen pemindahhakan.
- Rakan-rakan Kongsi (atau pemilik tunggal) memeriksa fail pemindahhakan sebelum ditandatangani.

Kajian kes berikut adalah tuntutan sebenar yang lepas daripada Skim Insurans Indemniti Profesional Bar Malaysia. Semua nama dan tempat telah diubah untuk melindungi identiti masing-masing.

JANGAN TUNGU LAMA-LAMA

Fred melantik Tetuan Doo dan Co ("IP") untuk melaksanakan pelepasan kondominiumnya dari Bank ABC setelah pinjaman dengan bank tersebut selesai. Pihak bank telah mengemukakan dokumen-dokumen yang berkaitan dengan IP bagi tujuan tersebut.

Tiga bulan kemudian, Bank X memulakan prosiding kebangkrapan terhadap Fred untuk mendapatkan kembali jumlah penghakiman yang dihutang olehnya kepada pihak bank. Fred membuat keputusan untuk membuat pembiayaan semula hartanahnya dengan Bank Z untuk membayar jumlah penghakiman tersebut. Walau bagaimanapun, beliau dimaklumkan oleh pegawai pinjaman di Bank Z bahawa pembiayaan semula tidak dapat dilakukan kerana hartanah itu masih dicaj kepada Bank ABC.

Terkejut dengan berita itu, Fred memutuskan untuk menjalankan sendiri carian tanah. Beliau mendapati bahawa kondominium beliau masih dicaj kepada Bank ABC walaupun pada hakikatnya pinjaman dengan Bank ABC sudah diselesaikan dan bayaran penuh yuran guaman kepada IP telah dibuat untuk hal ini.

Selepas itu, Fred telah diisytiharkan mufliis kerana gagal menyelesaikan sepenuhnya jumlah penghakiman kepada Bank X. Fred menyaman IP dengan dakwaan kecuai di pihak IP kerana gagal melepaskan hartanah tersebut. Beliau juga mendakwa bahawa kecuai IP menyebabkan dia kehilangan peluang untuk membuat pembiayaan semula hartanahnya dan membayar jumlah penghakiman kepada Bank X.

Dalam mengkaji proses pengurusan risiko IP bagi menentukan jika *Base Excess* asal mereka boleh dikekalkan semula, Syarikat Insurans mendapati berikut:



Senarai-senarai semak yang digunakan oleh IP tidak mempunyai maklumat untuk tarikh matang atau tarikh akhir berkenaan dengan perkara-perkara susulan yang perlu dilakukan oleh IP.



IP tidak mempunyai sistem "Simpan Dalam Perhatian" ("SDP") untuk mengesan tarikh penting dan perkara-perkara yang mustahak.



Senarai-senarai semak terlalu generik. IP menyesuaikan senarai semak pembiayaan sub-jualan ke dalam senarai semak bagi hartanah yang dibeli daripada pemaju dan juga untuk pelepasan tanpa sebarang pengubahsuaian.



Senarai-senarai semak tertentu yang digunakan oleh IP untuk pemindahhakan fail tidak lengkap dan tidak menyeluruh. Sebagai contoh, senarai semak untuk transaksi jual beli dimana penjual atau pembeli merupakan sebuah syarikat, tidak disebut tentang keperluan resolusi lembaga pengarah/resolusi pemegang saham dan keperluan dokumen korporat lain.

PERINGATAN YANG BERHARGA

Chuckie, rakan kongsi di Tetuan Finster and Associates ("IP") mewakili Tommy, pembeli dalam urusan jual-beli hartanah. Ketika itu hartanah tersebut masih dicaj kepada Bank ABC sebagai cagaran bagi pinjaman yang diberikan kepada Angelica, penjual dalam transaksi ini.

Bank ABC mengeluarkan penyata penebusan kepada Chuckie yang dengan jelas menyatakan bahawa jumlah penebusan perlu diserahkan terus kepada bank. Chuckie turut menguruskan fail pemindahhakan lain untuk klien yang berbeza pada masa yang sama dan hanya menyedari bahawa tarikh akhir untuk menyerahkan jumlah penebusan ke bank akan tamat tempoh dalam masa tiga hari; dan ini juga hanya selepas diingatkan oleh Tommy.

Oleh kerana kesuntukan masa, Chuckie memutuskan untuk menandatangani cek bagi jumlah wang penebusan dari bank pembiaya Tommy terus ke akaun pinjaman Angelica dengan Bank ABC. Tanpa diketahui Chuckie, akaun pinjaman Angelica dengan Bank ABC mempunyai ciri-ciri unik yang membenarkannya untuk mengeluarkan wang dari akaun pinjaman. Angelica membuat beberapa pengeluaran dari akaun tersebut selepas cek lulus. Hasilnya jumlah penebusan yang tidak mencukupi untuk menebus hartanah dari Bank ABC.

Chuckie hanya mengetahui perkara ini selepas dimaklumkan oleh Bank ABC bahawa hartanah itu akan dilelong kerana tiada pembayaran untuk penebusan. Tommy yang hancur dengan berita itu, mengambil keputusan untuk membuat tuntutan guaman bagi kerugian yang disebabkan oleh kecuaiannya Chuckie ini.

Dalam mengkaji proses pengurusan risiko IP bagi menentukan jika *Base Excess* asal mereka boleh dikekalkan semula, Syarikat Insurans mendapati berikut:



Walaupun IP menggunakan senarai semak untuk semua fail pemindahhakan, senarai semak tidak digunakan dengan lengkap. Senarai semak hanya mempunyai "tarikh selesai" dan tidak mempunyai "tarikh tamat tempoh". Tiada bukti yang ditemui menunjukkan IP memantau tarikh penting dan tarikh akhir.



Senarai semak dan penyata penebusan yang dibincangkan khusus menyatakan jumlah penebusan perlu dikemukakan terus kepada pihak bank. Walaupun dengan keperluan ini, IP mengemukakan cek untuk penebusan terus kepada vendor.

BERSEMADI DENGAN TENANG

Tina, pemilik tunggal Tetuan Belcher & Co ("IP") telah diarahkan oleh Teddy, kawan karibnya yang mempunyai penyakit yang membawa maut untuk menyerahkan beberapa hartanah yang dimilikinya kepada anggota keluarganya. Teddy mempunyai dua keluarga dari dua perkahwinan yang berasingan dan kerana hubungan rumit keluarga ini, dia mengambil keputusan untuk tidak menulis wasiat.

Tina menasihatkan Teddy untuk sekurang-kurangnya menandatangani perjanjian retainer untuk mengelak sebarang komplikasi di masa depan. Namun begitu, Teddy menolak cadangan tersebut dan terus menandatangani borang pemindahan dan serahhak. Teddy memberitahu Tina mengenai penerima yang dimaksudkan dan mengarah Tina untuk hanya mendapatkan tandatangan mereka pada borang selepas kematiannya. Dia juga mengarahkan Tina untuk mendapatkan hakmilik hartanah dari anak tunggal hasil daripada perkahwinan pertamanya dan meletakkan tarikh kepada beberapa hari sebelum tarikh kematiannya.

Teddy meninggal dunia sepuluh bulan kemudian dan seperti yang diarahkannya, Tina menjalankan amanahnya untuk mendapatkan hakmilik daripada anak Teddy dan memanggil semua penerima untuk memberi taklimat kepada mereka tentang kehendak dan arahan Teddy. Semua penerima daripada kedua-dua keluarga tidak membantah perjanjian dan menandatangani borang. Walau bagaimanapun, tiada sebarang persetujuan bertulis yang diperolehi daripada semua penerima untuk menerima dan bersetuju dengan urusan ini. Tina mengundur tarikh borang kepada sebulan sebelum kematian Teddy seperti yang diarahkan dan menghantar kepada pejabat tanah.

Tanpa dijangka, pejabat tanah menolak penyampaian tersebut dan memaklumkan bahawa isteri kedua Teddy dan anak perempuannya telah membuat kaveat persendirian ke atas tiga hartanah yang bertujuan untuk diberikan kepada waris pertama Teddy. Dalam cubaan Tina untuk menyelesaikan masalah dengan kedua-dua keluarga, Tina telah menerima writ dari isteri kedua Teddy mendakwanya bersubahat dengan keluarga pertama Teddy untuk menipu kelayakan yang sah terhadap hartanah tersebut.



Dalam mengkaji proses pengurusan risiko IP bagi menentukan jika *Base Excess* asal mereka boleh dikekalkan semula, Syarikat Insurans mendapati berikut:



IP menggunakan senarai semak pemindahhakan dengan teliti dan memastikan bahawa tarikh akhir dan semua prasyarat untuk setiap perkara dipatuhi sepenuhnya. Senarai-senarai semak juga mengikut senarai semak asas yang dicadangkan oleh Majlis Peguam.



Namun begitu tidak ada perjanjian bertulis, surat kebenaran atau perjanjian retainer untuk membuktikan bahawa IP melaksanakan tugasnya atas nasihat si mati, atau bahawa penerima bersetuju dengan urusan tersebut.



Mengundur tarikh dokumen juga dianggap tidak beretika kerana memberi gambaran palsu bahawa dokumen telah dilaksanakan sebelum kematian Teddy.

USAHA SEBAIK MUNGKIN

Tetuan Turner and Associates ("IP") merupakan peguam panel bagi Bank ABC dan mengendali transaksi pinjaman komersial bagi pihak bank. Pada tahun 2013, Cosmo Property Pty Ltd ("Cosmo") berjumpa dengan pihak bank untuk mendapatkan pinjaman komersial berjumlah RM1,700,000. Jaminan terhadap pinjaman itu adalah sebuah bangunan pejabat milik Cosmo. Timmy, rakan kongsi IP menyediakan perjanjian pinjaman dan memeriksa dokumen-dokumen yang berkaitan daripada Cosmo. Setelah dokumen itu didapati berada dalam susunan, Timmy mengarahkan bank untuk melepaskan wang kepada Cosmo.

Selepas pinjaman dilepaskan kepada Cosmo, Timmy menerima panggilan telefon daripada salah seorang pengarah Cosmo yang memberitahu bahawa syarikat itu tidak pernah memohon apa-apa pinjaman daripada Bank ABC. Para pengarah Cosmo tidak pernah melaksanakan dokumen pinjaman jauh sekali meluluskan resolusi lembaga pengarah untuk menerima pinjaman dari Bank ABC!

Terkejut dengan pendedahan ini, IP menghubungi peguam yang mewakili Cosmo dalam transaksi ini. Didapati bahawa peguam yang mewakil pihak Cosmo telah ditipu oleh dua orang yang menyamar sebagai pengarah Cosmo. Penyamar-penyamar tersebut mengemukakan kad pengenalan palsu yang mempunyai nama yang sama dengan pengarah Cosmo. Resolusi lembaga pengarah yang diberikan oleh penyamar juga didapati palsu.

Para pengarah memfailkan injuksi untuk menghalang Bank ABC dan IP dari menggadai harta syarikat itu bagi pinjaman yang diberikan kepada penyamar. Oleh itu, Bank ABC mengalami kerugian dan menyaman IP untuk kecuai.



Dalam mengkaji proses pengurusan risiko IP bagi menentukan jika *Base Excess* asal mereka boleh dikekalkan semula, Syarikat Insurans mendapati berikut:



Senarai semak digunakan oleh IP adalah komprehensif dan mengikut senarai semak asas yang dicadangkan oleh Majlis Peguam.



Sebagai satu keperluan dalam senarai semak, IP meminta pengesahan daripada setiausaha syarikat Cosmo untuk mengesahkan maklumat korporatnya.



Senarai semak yang digunakan oleh IP khusus untuk fail ini tidak mempunyai sebarang keperluan untuk mendapatkan pengesahan ketulenan resolusi lembaga pengarah daripada setiausaha syarikat. Walau bagaimanapun, IP boleh mengambil satu langkah ke hadapan dengan mendapatkan pengesahan tersebut untuk memastikan kesahihan resolusi lembaga pengarah yang diberikan kepada mereka.

USAHA YANG BERBALOI



Tetuan Korra and Associates ("IP") telah dinamakan sebagai Defendan Ketiga dalam writ yang difail Pihak Menuntut yang mendakwa IP terlibat dalam komplot untuk menewaskan pelaksanaan suatu award timbangtara terhadap Defendan Pertama.

Semuanya bermula apabila IP mewakili Defendan Kedua untuk membeli beberapa hartanah daripada Defendan Pertama. Walau bagaimanapun, kedua-dua IP dan Defendan Kedua tidak mengetahui bahawa Pihak Menuntut diaward gantirugi daripada satu prosiding timbangtara antara Pihak Menuntut dengan Defendan Pertama.

Beberapa tahun sebelum ini, Pihak Menuntut memperoleh award timbangtara untuk RM1,000,000 berhubung dengan pertikaian tanah dengan Defendan Pertama. Pihak Menuntut membuat permohonan kepada Mahkamah Tinggi untuk menguatkuasakan award timbangtara terhadap Defendan Pertama dan ini telah dibenarkan.

Walaupun bagaimanapun, sebelum Pihak Menuntut dapat menguatkuasakan award itu, Defendan Pertama menjual sebahagian daripada tanah yang mana tidak direkodkan dalam audit akaun kepada Defendan Kedua. Pihak Menuntut mendakwa bahawa pelupusan tanah tersebut akan mengakibatkan mereka tidak dapat menuntut gantirugi yang diberikan dibawah award timbangtara. Pihak menuntut memfailkan writ dan mendakwa Defendan Pertama, Defendan Kedua dan IP telah bersepakat untuk melepaskan tanah-tanah tersebut untuk menewaskan award timbangtara yang diberikan kepada Pihak Menuntut.

Nota: Tanah yang dibeli oleh Defendan Kedua daripada Defendan Pertama tidak pernah menjadi sebahagian daripada tanah yang dipertikai.

Dalam mengkaji proses pengurusan risiko IP bagi menentukan jika *Base Excess* asal mereka boleh dikekalkan semula, Syarikat Insurans mendapati berikut:



Senarai semak yang digunakan oleh IP untuk fail pemindahhakan mereka sangat komprehensif dan mengikut seperti yang dicadangkan oleh Majlis Peguam.



Senarai semak itu termasuk garis masa kritikal seperti tarikh SPA, tarikh selesai SPA, penyerahan pulangan cukai keuntungan hartanah kepada Lembaga Hasil Dalam Negeri, pembayaran perbezaan jumlah wang untuk pembeli, penerimaan penyata penebusan daripada bank pembiaya, pembebasan jumlah penebusan kepada pembiaya Penjual, pelepasan jumlah pinjaman oleh bank pembiaya dan pembayaran baki harga belian kepada Penjual.



Dari senarai semak, Syarikat Insurans telah dapat memastikan bahawa IP adalah teliti dan berhati-hati dengan cara mereka mengendalikan transaksi memandangkan IP mengawasi tarikh dan proses penting.

SUDAH JATUH DITIMPA TANGGA

Danny Fenton daripada Tetuan Fenton dan Co ("IP") mewakili Jasmine, pembeli untuk menyediakan SPA dalam transaksi pemindahhakan. Penjual, Maddie tidak diwakili tetapi telah dibantu oleh anak perempuan dan anak menantunya. Selepas deposit dibayar kepada Maddie, Danny meneruskan untuk mengemukakan Borang Pindahmilik ke pejabat tanah.

Selepas Borang Pindahmilik telah berjaya dikemukakan, Maddie melalui peguam barunya memilih untuk menamatkan SPA dan melepaskan depositnya. Peguam Maddie juga menuntut Danny mengembalikan hakmilik kepada Maddie dan mengugut akan membuat aduan dengan Lembaga Tatatertib terhadap Danny sekiranya gagal memenuhi tuntutan berkenaan.

Jasmine bertegas untuk meneruskan transaksi dan meminta Danny mengemukakan baki harga belian kepada peguam Maddie untuk melengkapkan transaksi. Walau bagaimanapun, baki harga belian dipulangkan kembali. Jasmine merancang untuk mencabar penamatan tersebut dan mengarah Danny memfailkan writ pelaksanaan spesifik.

Maddie, yang tekad dengan penamatan itu membuat keputusan untuk memfail writ terhadap Danny dan IP. Antara lain dakwaan Maddie adalah bahawa Danny mewakili kedua-dua penjual dan pembeli dalam transaksi tersebut. Beliau juga mendakwa Danny melanggar SPA kerana kegagalan untuk memulangkan hakmilik dan dokumen lain yang berkaitan selepas penamatan SPA dan dengan niat jahat, mengemukakan hakmilik untuk dipindahkan tanpa maklumannya walaupun mengetahui SPA telah ditamatkan.



Dalam mengkaji proses pengurusan risiko IP bagi menentukan jika *Base Excess* asal mereka boleh dikekalkan semula, Syarikat Insurans mendapati berikut:

- ✓ IP menggunakan senarai semak yang komprehensif dengan teliti.
- ✓ Senarai semak ini jelas menyatakan bahawa IP hanya bertindak bagi pihak Jasmine, pembeli.
- ✓ IP turut mengawasi semua tarikh-tarikh penting bagi proses-proses dalam transaksi ini, dengan itu mampu menunjukkan bahawa Borang Pindahmilik yang dikemukakan tidak dilakukan dengan niat jahat kerana mereka menerima notis penamatan daripada penjual selepas dikemukakan di pejabat tanah.

DI SINI ADA DI SANA TIADA



Tetuan Wakeman dan Carbuckle ("IP") mewakili pembeli, Sheldon untuk menyediakan SPA bagi sebuah hartanah kediaman. Penjual, Tremorton Pty Ltd ("Tremorton") tidak diwakili peguam. Dua bulan selepas pelaksanaan SPA, Sheldon mendapati bahawa hartanah itu dilelong oleh Bank ABC.

Sheldon memfailkan writ terhadap IP yang menuntut ganti rugi dan mendakwa IP melanggar kewajipan berjaga-jaga dengan memberikan gambaran yang salah dan memberi nasihat kepadanya bahawa hartanah itu bebas daripada sebarang bebanan. Beliau juga mendakwa bahawa IP gagal membuat carian tanah yang betul dan gagal untuk membuat kaveat persendirian bagi menjamin kepentingannya.

IP mengakui bahawa SPA tersebut mengandungi bahagian yang menyebut bahawa hartanah itu bebas daripada sebarang bebanan. Namun begitu apabila IP menyedari terdapat kesilapan, IP memutuskan untuk membuat pembetulan kepada SPA secara manual dan memasukkan bahagian yang mengatakan hartanah itu telah dicaj kepada Bank ABC. SPA itu juga mempunyai satu klausa mengenai penebusan hartanah itu. Pencarian tanah yang dilakukan oleh IP juga mengesahkan kedudukan

harta yang dicaj kepada Bank ABC pada masa itu.

Memandangkan Sheldon bukan warganegara Malaysia, kebenaran daripada Pihak Berkuasa Negeri diperlukan sebelum kemukaan boleh dibuat. IP menghadapi beberapa kesukaran untuk mendapatkan kebenaran kerana Tremorton tidak memberikan resit cukai tanah dan cukai pintu untuk hartanah tersebut. IP juga tidak dapat membuat kaveat persendirian kerana Sheldon tidak menyediakan wang yang mencukupi bagi maksud itu. Walau bagaimanapun, IP memutuskan untuk membuat kaveat menggunakan wang mereka terlebih dahulu sementara menunggu wang daripada Sheldon.

Oleh kerana kebenaran tidak dapat diperoleh dalam masa yang ditentukan, wang penebusan tidak dapat dikemukakan kepada Bank ABC. Bank ABC telah memilih untuk menggunakan hak mereka dan melelong hartanah itu. IP memaklumkan Sheldon bahawa dia boleh menggunakan haknya dan menamatkan SPA pada ketika itu. Namun Sheldon berdiam diri dan tidak memberikan apa-apa arahan kepada IP. Hanya selepas hartanah itu berjaya dilelong, IP menerima writ dari Sheldon.

Dalam mengkaji proses pengurusan risiko IP bagi menentukan jika *Base Excess* asal mereka boleh dikekalkan semula, Syarikat Insurans mendapati berikut:



Senarai semak pemindahhakan yang digunakan oleh IP adalah umum dan tidak khusus untuk transaksi ini. IP sepatutnya mengambil langkah-langkah tambahan untuk mendapatkan kebenaran daripada Pihak Berkuasa Negeri.



Senarai semak itu menyatakan bahawa penjual, walaupun tidak diwakili, perlu bertanggungjawab untuk mendapatkan kebenaran daripada Pihak Berkuasa Negeri. Langkah ini sepatutnya dipenuhi pada masa pelaksanaan SPA. Walau bagaimanapun kerana kedua-dua pihak telah menandatangani borang persetujuan pada hari SPA dikemukakan, pengecualian ini diterima.



Walaupun IP membuat pembetulan secara manual dalam SPA untuk memastikan kedudukan hartanah jelas dilihat sebagai dicaj kepada Bank ABC, IP gagal untuk membuat pembetulan dan meminda salinan-salinan lain SPA.



Kaveat tidak dibuat dengan serta-merta atau dalam tempoh terdekat selepas SPA dilaksanakan. Senarai semak yang digunakan oleh IP menetapkan bahawa syarat kaveat itu hanya akan dibuat selepas klien membayar bil-bil yang berkaitan, dan sebelum menghantar SPA untuk disetem. Walaupun pembeli tidak menyediakan wang yang secukupnya untuk membuat kaveat, IP masih mampu untuk memfailkan kaveat ke atas hartanah itu bagi melindungi kepentingan pembeli dengan menggunakan wang mereka sendiri.

Risk Management 2015 Highlights

The risk management initiatives for the year 2015 include website update, events' organisation and publications.

(a) **Website – www.PRAKTIS.com.my** **PRAKTIS**
MALAYSIAN BAR PROFESSIONAL LIABILITY INSURANCE SCHEME PORTAL

The PRAKTIS website houses information on PII, articles on risk management, case studies, checklists, circulars etc. With the newly installed log-in feature, Members can now view and search Bar Council circulars according to Committee, circular title or by typing a keyword in the search function.

(b) **Events**

This year the PII and Risk Management Department organised nine workshops in total, that catered approximately 300 people (practitioners and staff of legal firms).

- i. Billing & Collections in Kuala Terengganu, Terengganu (5 Feb 2015)
- ii. Billing & Collections in Alor Setar, Kedah (15 Feb 2015)
- iii. Billing & Collections in Kangar, Perlis (5 Mar 2015)
- iv. Billing & Collections in Melaka (22 May 2015)
- v. Billing & Collections in Kuala Lumpur (5 June 2015)
- vi. Billing & Collections in Kota Bharu, Kelantan (11 June 2015)
- vii. Billing & Collections in Georgetown, Penang (8 Oct 2015)
- viii. Getting Started! Express in Kangar, Perlis (31 Oct 2015)
- ix. Getting Started! in Kuala Lumpur (5 Nov 2015)

Getting Started!

This Workshop is ideal for Members who intend to set-up a new firm, recently set-up a new firm or joining a partnership. It is also suitable for lawyers who have just started practice, and is useful as a refresher course for senior lawyers.

The full-day workshop features broad and comprehensive aspects on practice and matter management, accounting and taxation, litigation and conveyancing.

The workshop is also conducted in half-day covering only two main topics – Getting Started! Express.

Risk Management for Staff

This Workshop is intended for staff of a legal firm. However, it is also suitable for lawyers of smaller firms. The workshop is tailor-made to coach staff on how to better assist lawyers. Its main objective is to cultivate good work ethics and the culture of risk awareness. Topics covered in the workshop are communication, law firm accounts, office administration, and file and time management.

Billing & Collections

The half-day workshop is suitable for practitioners of all background. Topics covered are billing "how to's", fee agreements, managing cash flows, tracking and systems, and managing client expectations.

PI INSURANCE & RISK MANAGEMENT DEPARTMENT

Bar Council Malaysia

Suite 4.03A, 4th Floor, Wisma Maran

28 Medan Pasar, 50050 Kuala Lumpur, Malaysia

Tel: 03-2032 4511 Fax: 03-2031 6124

Email: pirm@malaysianbar.org.my

BAR COUNCIL MALAYSIA

No 15, Leboh Pasar Besar

50050 Kuala Lumpur, Malaysia

Tel: 03-2050 2050

Fax: 03-2034 2825 / 2026 1313 / 2072 5818

Email: council@malaysianbar.org.my

Mysahra Shawkat Executive Officer

✉ mysahra@malaysianbar.org.my

Kumaresan Krishnan Officer

✉ kumaresan@malaysianbar.org.my

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