



JURISK!

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Risk Management Quarterly

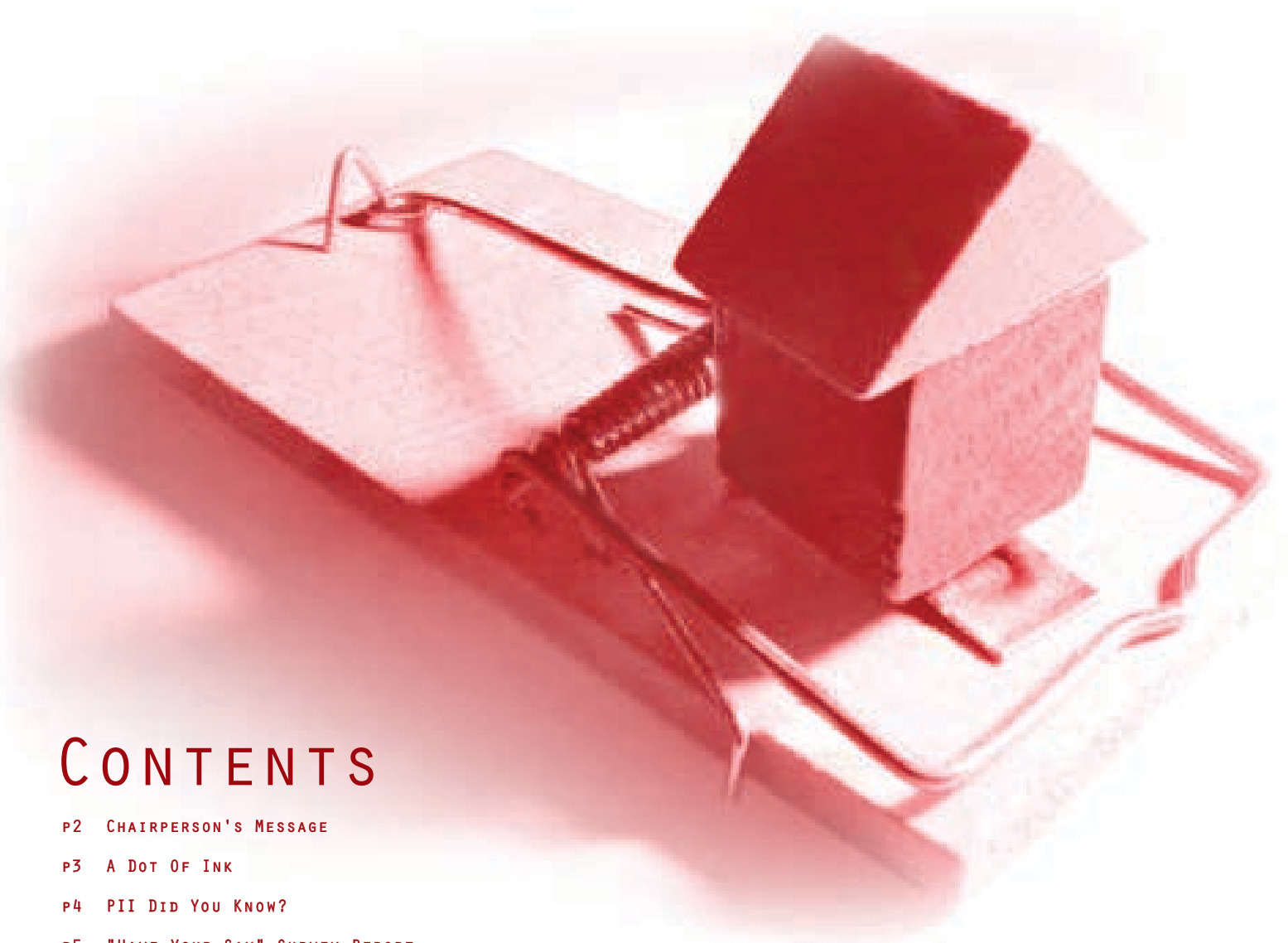
A quarterly publication of Professional Indemnity Insurance Committee, Bar Council Malaysia

NATURE OF CLAIMS UNVEILED:

CAUSE: CONVEYANCING
SUB-CAUSATION: VARIOUS

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Chairperson's Message

TAKING CHARGE OF YOUR CONVEYANCING PRACTICE

The number of claims stemming from conveyancing cases is increasing day by day. It is a statistic of the Scheme that we can do lesser with. We just need to know how to do so and how to equip ourselves to tackle the various problems associated with a conveyancing matter. There are various sub-causes that contribute to conveyancing-based claims, but the more pressing ones are the following:

1 Identity Fraud

Conmen, fraudsters, imposters – however we choose to label them – have proven time and again that they will go out of the way in constructing newer, better and more updated cons to beguile even the best of us. More often than not, most of these scams can be caught when early warning signs are picked up. Vigilance is key. Coupled with an intensive background check and identity search, fraudsters can be singled out.

2 Improper Land Search

Lawyers adopting a shortcut approach by not conducting requisite land searches on the careless assumption that the title is clear are only opening themselves up to a lot of trouble. Land search is a fundamental step in any conveyancing transaction and this process must never be skipped.

3 Forged Acknowledgement of Payment of Stamp Duty Fraud

Some Members are already victims of these forgeries. Members are urged to conduct online verification of all stamp certificates and all impressions indicating the payment of stamp duty made by digital franking. For more information on this matter, please refer to the following Bar Council Circulars: Circular No

085/2012 dated 24 Apr 2012, Circular No 151/2012 dated 11 Jul 2012, Circular No 164/2012 dated 30 Jul 2012 and Circular No 179/2012 dated 14 Aug 2012. See Page 20 for more details.

This is why we have dedicated this issue to conveyancing claims. We have case studies to help lawyers learn from mistakes that are commonly made. We have also included key areas of concern that every conveyancer should pay extra attention to in each and every conveyancing case.

But the most important advice that can be given is this: do not embark in conveyancing practice as an “easy” way to make money. Beware that there are many pitfalls an untrained lawyer can make. Do not do it unless you have been trained and have the requisite skill sets and do not rely completely on your support staff!!!!

And if you are in conveyancing practice, do you use our Checklists? The Practice Area CD-ROM Checklist is specially catered for conveyancing, as well as litigation practice. These checklists come in both long and short form and act as an *aide-memoire* to practitioners, ensuring that every step is followed. We urge you to use a fresh checklist for each and every case you conduct.

As always, we appreciate any views, feedback or comments you may have. Contact details of the Professional Indemnity Insurance and Risk Management (PII & RM) Department's Officers are on Page 20. We would be happy to address any issues or concerns that you may have.

Ragunath Kesavan
PII Committee Chairperson, Bar Council

Inside This Issue...

... we deal with the pressing issue that is the alarming increase in conveyancing based claims. As our Chairperson clearly outlines in his Editorial, there are many risky pitfalls that conveyancing practitioners have to maneuver on a daily basis. We hope the case studies on Page 8 will serve as eye openers, whilst the Best Practices article on page 11 serves as a stepping stone for practitioners to begin solidifying a sturdier risk management program.

We have also included our final report on the “Have Your Say” Survey that we conducted over a 12-month period beginning July 2011 and ending June 2012. Although reception and responses could have been better, we do note that the results garnered are adequate for the PII Committee to develop the PII Scheme and risk management program further and to better suit the “Today” lawyer. The results of the Survey can be found on Page 5.

Apart from the standard questionnaire found on the Survey, many Members also took the time to fill in their personal comments. We'd like these Members to know that the Department has looked through all comments and will take them into consideration when we plan our risk management program for the coming year.

We hope you enjoy this issue. Happy reading!

The Jurisk! Team

a dot of
what do you think?

PII Premiums Reduced!

Did you know that the 2013 PII premium has gone down by 5%? The premium for 2013 PII is now RM1,140 per lawyer as announced in Circular 154/2012 entitled "Reduction in Professional Indemnity Insurance Base Premium for 2013". Bar Council obtained the reduction on the basis that the the Bar's claims statistics have been reduced to a manageable level.

The Scheme, now in its 20th year running, has gone through many changes and challenges. With the aggressive dissemination of risk management information through publication and workshops, we hope Members will take advantage of the available tools and utilise them in your practices.

Are you aware of the full range of risk management tools that can be used in your law practice that is produced by Bar Council? The PII & RM Department is continuously looking to improve and produce new risk management tools for the legal community. Your views and comments are very much appreciated. Send us your thoughts by fax at 03- 2031 6124 or email pirm@malaysianbar.org.my.

Past Event's Summary

21 June 2012: **Risk Management for Staff, KL**

The workshop was attended by 79 participants ranging from clerks, paralegals, office managers and lawyers themselves. Participants left positive feedback on the workshop with most expressing the effective approach by the speakers in addressing work issues.

Upcoming Events

18 Oct 2012: **Getting Started! Workshop, KL**

The next workshop is scheduled to be held at Bar Council Secretariat. The workshop consists of five sessions complete with Q&A, workshop materials, lunch and refreshments, interact with speakers and a chance to network with other Members.

1 Nov 2012: **Risk Management For Staff, KL**

A full day workshop for staff and personnel of law firms that will take place at Bar Council Secretariat.

To take advantage of the early bird promotion or if you would like to know more about the risk management workshops, call the department at 03-2032 4511.

"HAVE YOUR SAY" SURVEY WERE YOU PART OF IT?

The idea of the survey was to capture Members' response on PII and risk management. Although the survey managed to capture 320 responses from Members, it is still a small number compared to the 14,700 Members of the Bar.

If you would like to read the compiled feedback from the "Have Your Say" survey, it is available on Page 5 of this issue. Here are a few selected comments and our response on risk management tools:

- (a) ***"Risk management workshops/seminars/briefings and Getting Started! should be conducted in other states to enable lawyers from outside of Klang Valley to attend and acquire the useful information."***

We have tried in the past to organise workshops through the assistance of the respective State Bars but this was met with poor response. However, if there are requests from the State Bar, we will try to accommodate as much as we can. In the meantime, join us at the *Getting Started!* workshop on 18 Oct 2012 at Bar Council Secretariat.

- (b) ***"The department should consider holding a brief to newly admitted Members regarding their function and role in this high risk profession."***

This issue is addressed at the 'Ethics and Professional Standards Course' before they enter the profession and attendees are given a complimentary Start Kit. Members are encouraged to attend the Continuing Professional Development (CPD) courses endorsed by Bar Council to improve the standards of the profession and stay up-to-date with the latest in the legal profession.

- (c) ***"More improvement and publication needed to increase awareness."***

We are continuously looking for ways to expand the list of risk management tools to assist lawyers in their practice. Look out for new risk management tools that will be introduced next year.

- (d) ***"Jurisk! via the mail is very helpful and creates awareness on the work done by the department."***

Thank you. If you would like to read any of our past issues, do visit www.praktis.com.my and click on the Jurisk! icon.

- (e) ***"Very useful and effective. If possible, publish Jurisk! often."***

Jurisk! has increased its pages w.e.f. March 2012 from 12 to 16 pages to cater the demand by Members for more information on risk management in the legal profession. Nevertheless, this suggestion will be taken into consideration.

On behalf of the PII Committee, we would like to take this opportunity to thank Members who took the time to take part in the "Have Your Say" survey.

TARGETING RISKS.

CREATING SOLUTIONS.

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

...your Base Excess will be increased in three instances?

Base Excess is the amount the Insured Practice (IP) will have to pay before the Insurers are liable to indemnify the IP, up to the IP's mandatory limit of indemnity. The Base Excess is applied to each and every claim, and it will be channelled to the disbursements of defence costs, and/or damages. Base Excess differs from firm to firm, and it is determined on the number of lawyers in the firm. Your firm's Base Excess is expressly stipulated in Item 9 of the firm's Schedule of the Certificate of Insurance (COI).

Notwithstanding Item 9 above, Clause 11 COI provides for the Base Excess to be altered to the amounts specified below in the event that a claim arises out of any of the following three instances:

1. Clause 11(a) COI, 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 transaction.

*However the Base Excess [Item 9] shall apply in the event you had obtained written waivers from the clients.
[See Addendum 1 on Page 18]*

2. Clause 11(b) COI, Conveyancing – RM50,000 minimum in respect of conveyancing of land and/or buildings.

However the Base Excess shall apply in the event 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.

3. Clause 11(c) COI, Dishonesty of Partner – RM20,000 multiplied by the number of principals subject to a minimum of RM30,000 and maximum of RM250,000 per Firm in respect of misconduct of principals.

Illustration I

Jarred & Associates is a law firm with nine lawyers. Their Base Excess is RM55,000. The Firm represented Alice in her bid to purchase a house. The Firm prepared the relevant documents to affect the said Sale and Purchase. The Firm then represented Gold Investment Bank, the financier that Alice chose to obtain her housing loan from; the Firm assisted in preparing the loan disbursement agreement.

The Firm failed to execute the relevant transfer documents within the allotted timeframe expressed in the Sale and Purchase Agreement. By this time, Alice had already paid the required deposit and the Bank had disbursed the loan amount. Because the transfer was not affected in time, the Vendor decided not to pursue the transaction. Both Alice and Gold Investment Bank sued the Firm for loss.

Because the Firm acted for more than one party in the conveyancing of land and/or buildings, the amount of their base excess for this one claim will increase to RM100,000 or twice their original Base Excess amount whichever is the higher, which in this case is RM110,000.

Their Base Excess will remain however, if the Firm can show that Alice signed a letter of acknowledgement. This letter of acknowledgement is to be executed by the Purchaser/Borrower (Alice) in situations where the solicitor (the Firm), acts for the Purchaser/Borrower (Alice) in the Sale and Purchase, and the Financial Institution (Gold Investment Bank) in the financing. Although these transactions relate to same matter, they should be treated as separate transactions; hence the need for the waiver by the Purchaser/Borrower to attest that her Solicitor is also acting for the Financier.

Illustration II

Wilhelm & Co is a 3-lawyer firm and their Base Excess is RM25,000. They represented Tony, the owner of a piece of land, in his bid to sell the property. After the transaction was completed and the property transferred to the purchaser, the Firm was approached by the true owner, who claimed that the Firm had represented a fraudster "Tony". The real Tony sued the Firm to recover his loss.

Clause 11(b) will apply as this is a conveyancing matter. The Firm's Base Excess will increase to RM50,000. However, pursuant to the proviso of Clause 11(b) COI, if Wilhelm & Co can provide the Insurers with documentary evidence describing 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, their original Base Excess of RM25,000 will apply.

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

The translation on Page 14 relating to the Master Policy, Certificate of Insurance and the 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.

(((survey **have your say** report)))

(((Introduction)))

In July 2011 the PII & RM Department embarked on what would be a 12-month long survey to engage Malaysian Bar Members to provide feedback on the various aspects of the PII Scheme and the risk management programme that goes hand-in-hand with it.

The Department's aim was to generate as many responses as it could. The feedback, responses and comments mined from a survey of this proportion will assist the Department as well as the PII Committee in cultivating a road map for the future direction of the Scheme. Among others, the results of the Survey will be used to:

1. Gauge the level of awareness Members have of the PII Scheme;
2. Determine areas of concern so that improvements could be tailored;
3. Cull feedback on chasms in the Department's on-going risk management programme in order to further develop it; and
4. Measure Members' perception of the service levels of the Department as well as the Scheme's Broker.

(((Dissemination)))

The Department envisioned this Survey to be the biggest one ever conducted. To fulfil that vision, we had to ensure that the Survey reached out to every Member of the Bar. The following were the various ways and means the Department had utilised in guaranteeing maximum coverage of the Survey:

- a. Mailing out hard-copies with Jurisk! June 2011;
- b. Email of soft copies via Bar Council Circular No 294/2011 dated 15 Dec 2011;
- c. Face-to-face contact during the Malaysian Bar AGM and KL Bar AGM;
- d. Onsite visit to Kuala Lumpur Court;
- e. Distribution at Risk Management Workshops; and
- f. State Bar Secretariats;

(((Feedback and Responses)))

A full year after beginning the Survey and despite every effort to engage Members, the Department ONLY received 320 completed Surveys from Members. Although this marks this campaign as the best survey conducted by the Department in terms of number of responses received, it still pales when compared to the total number of Members registered with Bar Council.

When viewed from the wide angle, this translates to only 2.3% of the Malaysian Bar that have responded to the Survey.

(((Conclusion)))

We have tabulated the findings of the survey, the results of which are on the following pages. Among other things that we can conclude from the Survey is that Members generally do not understand the terms of the policy until they are faced with a claim.

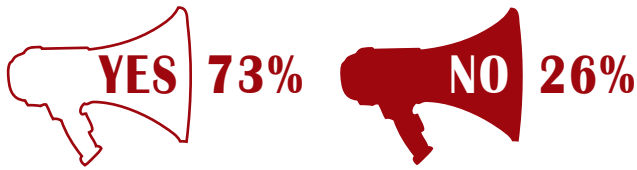
Even when faced with a claim, they do not know what to do or where to seek advice from. There are still many Members who are under the assumption that notifying a claim involves loading immediately. THIS IS NOT THE CASE. And it has not been since the Scheme was revamped in 2007.

Many Members are also unaware that Bar Council has a dedicated helpline with three full time officers manning a dedicated Department. Members are free to contact them directly with any PII or RM query at 03-2032 4511.

We have also produced a wide range of publication, practice tools and workshops that are designed to aid the busy lawyer - and yet we find that many Members are still unaware of our RM products.

We urge all Members to take the time to read the findings of the Survey. Members will come to know more about the Scheme and the various tools and services we have to offer. Please see the findings on pages 6 and 7.

Q1 Do You Know What Your PII Premium Is?



The PII premium rate per lawyer for 2011 and 2012 is RM1,200. For 2013, the PII Committee has concluded negotiations with the Insurer and succeeded in securing a 5% reduction in premium rate for 2013. The new rate for the 2013 PII is RM1,140 per lawyer. For more information of the terms and conditions of the 2013 PII Scheme, please read Bar Council Circular No 154/2012 dated 17 July 2012.

Q2: Did You Know That Claims' Loading Is Only Imposed When Insurers Pay Out A Claim IE Towards Damages And/or Defence Costs?



Q3: Do You Know That There Is No Additional Cost For Notifying A Circumstance Or Claim?



Prior to 2007, claims' loading was imposed even when Member's merely notify the Brokers of a circumstance that may lead to a claim. That has since been abolished and at present, claims' loading is only imposed when the Insurer makes payment towards the Insured Party's defence costs and/or damages.

Q4: Was The Broker Helpful With Your Queries And/Or Claim Notification (If Applicable)?



The Scheme's broker, Jardine Lloyd Thompson Sdn. Bhd. (JLT) has a complete internal department solely

designated to manage the Malaysian Bar Professional Indemnity Insurance Scheme. Their managers and staff are always available to answer queries from Members. If you have any questions or comments regarding the Scheme, feel free to contact them at:

Suite 10.2, 10th Floor, Faber Imperial Court
21A, Jalan Sultan Ismail 50250 Kuala Lumpur
Tel: 03-2723 3388 Fax: 03-2723 3301

Q5: Are You Familiar With Bar Council's Risk Management Programme?



The PII & RM Department makes continuous efforts to reach all Members through publications and events highlighted via email and post. To make sure you receive Bar Council notifications via email, call Bar Council's Communications Officer Ms Ruhil Razak at 03-2050 2021 to update your email address.

Q6: Have You Heard Of The *Getting Started!* Workshop?



Q7: Have You Or Your Staff Attended Any Of Our Workshops/Seminars/Briefings?



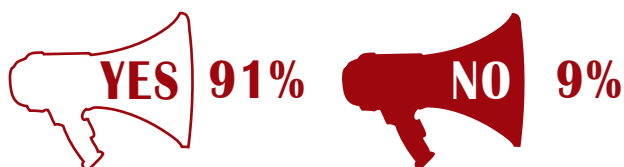
The Department's *Getting Started!* workshop is a full day event tailor-made for members thinking of setting up firms, who have just established new firms, needing a refresher, or joining a partnership. Held annually at the Bar Council Secretariat, it covers everything from the Fundamentals of Legal Practice, Accounting, Taxation as well as Conveyancing and Litigation Practices.

The Risk Management For Staff workshop is the second flagship risk management event organised by the Department. It is our only event that focuses primarily on the staff and legal personnel of law firms. The workshop is structured to help improve staff performances by instilling a risk aware attitude into their day-to-day responsibilities. The event is in its 4th year and so far over 300 law firm staff have attended the Workshop.

Q8: Have You Been Receiving Jurisk! In The Mail?



Q9: If Yes, Do You Find It Useful?



Jurisk! is a risk management newsletter published four times a year and is mailed out to all Members in the months of March, June, September and December. Each issue is packed with highlights of the Scheme, ways and means to shore up a practice's risk management culture and useful tips and advice provided through case studies and Scheme statistics. Do contact the Department if you have not been receiving your copy. Back copies of all issues can be downloaded from the following websites:

www.praktis.com.my
www.malaysianbar.org.my

Q10: Do You Know We Have Various Practice Tools Including Booklets?



Q11: Do You Know That We Have Litigation- And Conveyancing- Specific Checklists Available?



The Department is proud of its internally produced tools for the daily lawyer. Aside from Jurisk!, other notable products the Department has produced include the following:

1. **Best Practice Guides** – Consisting of four books on *Setting Up Practice*, *Accounting For Lawyers*, *Time Management* and *Law Practice Management*.
2. **File Transfer Checklist** – The checklist aides a lawyer-to-lawyer file transfer transaction, ensuring key steps are not missed when the file passes hands.
3. **Practice Alerts** – Aimed at keeping Members updated on emerging risks and new practice traps, these Alerts are circulated via email and even published in Jurisk!
4. **Practice Area Checklist CD-ROM** – A must-have for every conveyancer and litigator, these checklists come in both full and condensed form in minute detail that guarantees to ease the user's path as each case progresses. A handy resource once printed and appended onto the front of each of your conveyancing and litigation files.
5. **Risk Management Calendar** – Published annually, these are not your standard tabletop calendars as they come packed with handy resources, KIV on pertinent Bar Council dates as well as contact details of the legal community at your fingertips.

Q12: Do You Know We Have Our Own Website?



Q13: Have You Contacted The PII & RM Department?



The PII and RM Department launched its own website in 2011: www.praktis.com.my. We urge all Members to visit the site frequently as many of your questions regarding the Scheme can be found there. Alternatively, you can always contact the Department directly at:

Suite 4.04A Wisma Maran, 28 Medan Pasar,
 50050 Kuala Lumpur
 Tel: 03-2032 4511 Fax: 03-2031 6124
 Email: pirm@malaysianbar.org.my

Conveyancing Claims -

Introduction

Conveyancing practice is an area of law with the highest percentage of practitioners in Malaysia. Due to its relatively straightforward, albeit highly procedural-intensive, shorter time commitment and the abundance of clients it is an approachable area of law.

Plan A

Since there are many more conveyancing practices compared to litigators and commercial lawyers, conveyancing practices have produced the highest number of complaints received by Bar Council from the general public, the highest number of PII claims and the highest Disciplinary Board actions.

Case Study No.1

Gelding & Partners, the Insured Practice (IP), was involved in a long-term representation with their client, Chris. Chris sought the IP's legal services in his bid to purchase a piece of residential property. Chris had been in contact with the owner of the property, Ross, and had even discussed and confirmed the sale price before bringing the IP into the picture.

During the meeting between the IP, Chris and Ross, Ross produced a temporary Identification Card (IC) as proof of identity, claiming that his original IC was lost. Based on the identification information provided, the IP drew up the Sale and Purchase Agreement (SPA). Ross however, did not append his signature onto the SPA; instead, he used his thumb impression. Chris then transferred a requisite 10% deposit into Ross' named bank account. A month after the above transpired, Chris and the IP discovered that "Ross" was not the true owner of the property and that the true

owner had recently passed away. By this time, the fraudster had disappeared with Chris' 10% deposit. Upon checking with the Bank, they also discovered that the account was opened in the name of the true owner fraudulently. The Bank made a mistake in issuing the fraudster with a bank account without proper verification of his identity as the bank was unable to proof that they too had conducted the requisite identification verification.

Chris made a police report against the fraudster. He then filed a suit against his lawyer, the IP, as well as the bank in question. In their defence, the IP sought to apportion blame on Chris, concluding that Chris himself had verified the fraudster to be the owner. The Court found that the IP was negligent as IP failed to safeguard the interests of Chris by conducting all reasonable searches and identity verifications.

Case Study No.2

Michael & Co (the IP) was approached by another law firm, Phil & Partners to assist in a sale and purchase transaction whereby Michael & Co would represent the vendor, Mary, who was unrepresented at the time. It was a sale and purchase transaction to transfer Mary's property to Phil and Partner's client, General Holdings Berhad. Phil & Partners had wanted to avoid a conflict and they also wanted Mary to be represented.

The IP agreed to represent Mary who was a foreign national who had been living in Malaysia for a long time. The IP only saw Mary once, when she had come into their office to sign the Sale and Purchase agreement. Representatives of Michael & Co and General Holdings Berhad were also at the meeting. The IP sighted Mary's travel documents ie passport and visa and verified her identity. The IP proceeded to explain to Mary the salient terms of

the SPA and obtained her verbal confirmation to sell the property to General Holdings Berhad. Mary confirmed so, and proceeded to sign the Memorandum of Transfer and SPA.

Two year later, the IP receives a suit from the true owner who claimed that she was the actual owner of the property. The True Owner claimed that the IP had acted negligently when they failed to perform proper identification of the fraudster. The true owner established ownership of the property.

In his judgement over the case, the judge prescribed that even though there was no relationship between the IP and the true owner, solicitors still do owe a duty of care to the true landowners ie solicitors should conduct reasonable checks on their client's identity.

Case Studies

In light of this, we have come to realise the grievousness of this issue. Whilst we cannot provide a complete list of wrong doings, we can provide broad-stroke remedial actions for Members to take on immediately into your practice and to keep reapplying them into each and every conveyancing matter.



Case Study No.3

Gooding and Associates, the IP in this matter represented the purchaser, Ready Credit Sdn Bhd, in the sale and purchase of a piece of commercial land from the vendor, Gus. The IP was then sued by the original owner of the property, Ben, who claimed that he was duped into transferring the property when he had no intentions of doing so.

The problem began when the original owner of the property, Ben, was asked by his brother Gus, to help him out financially – Gus had wanted to use the property as collateral to secure a loan from a financial institution. Ben agreed to assist his brother in this matter. Gus handed Ben many documents to sign. Blindly trusting Gus, Ben signed the documents not knowing that they were in actual fact Memorandum of Transfers assigning Gus the ownership of the property.

The IP then came into the picture when he was sought by the Buyer, Ready Credit Sdn Bhd to handle the Sale and

Purchase of the property from the Vendor, Gus. The IP was instructed to include several conditions to the standard SPA that were out of the ordinary. Among others, was a condition that permitted the Vendor, Gus, to repurchase the property at a purchase price that involved very high interest rates. Secondly, there was also a delay in the completion of the MOT not because of any technical issues, but because the Buyers themselves instructed the IP to do so even though they had already paid the full purchase price to Gus. Thirdly, the purchase price was paid in full in cash to Gus.

When the case was eventually heard, the Judge concluded that the SPA was in actual fact a ruse that was masking as a money lending agreement. The Judge also concluded that if the IP had paid attention to the three signs ie the unconscionably high and illegal money lending rate clause, the delay in completing the MOT and the handover of cash even without the completion of the MOT he would have picked up the signs of an illegal money lending transaction.

Case Study No.4

The IP represented Mike in a sale and purchase transaction of a piece of land valued at RM500,000. During the proceedings, the IP and their client Mike negotiated and conferred only with Allen, who claimed to have Power of Attorney to make the necessary decisions on behalf of the owner of the land, Sam.

Mike was very interested in acquiring the land and to do so by paying the Vendor in a full cash settlement. Mike forwarded RM300,000 to his lawyer, the IP. The IP was supposed to have forwarded the money to Allen once the SPA was signed.

Five months went by and whenever Mike made contact with the IP to identify the holdup in the transaction, he was

given the cold shoulder. Discouraged that his own solicitors were doing more harm, Mike sought legal representation from another law firm who then demanded from the IP the return of Mike's RM300,000 deposit.

At this stage the IP confessed to Mike and his new solicitors that they had in fact forwarded the money to Allen who has since disappeared. The IP did so without consent from Mike. It was then revealed that Allen's Power of Attorney was fake and that the real owner of the land had put a caveat on the title negating any possible transfers. Mike was unable to retrieve his deposit. He then sued the IP.

Case Study No.5

The IP in this matter, Herald & Co, represented Donald in a sale and purchase transaction of a two adjoining pieces of land. Donald wished to purchase the land for manufacturing purposes. Prior to agreeing to the transaction, Donald visited the site and was aware that each piece of land contained a building complete with tenants.

Donald did not meet with any lawyers of Herald & Co, he instead dealt directly with its senior conveyancing clerk, Adam. Adam was also the agent who brokered the deal between Donald and the vendors. After Donald was satisfied with the property and agreed to the purchase price, Adam the clerk prepared and passed Donald the transfer documents and SPA to sign. Upon signing and initialling all pages, Donald returned all documents to Adam for processing.

Sometime after the successful transfer, Donald realised that the properties did not come with vacant possession. Upon review of his copy of the SPA, Donald realised that four additional pages were inserted which did not carry his initials. The IP was confronted by Donald and their senior partner admitted to negligently allowing their conveyancing clerk, Adam, to oversee the entire transaction without the supervision of any lawyer.

The additional pages of the SPA contained provisions giving right to the current tenants to continue their occupancy of the buildings for a further three years at a fixed rental, as well as a clause providing the tenants the option and priority to continue the occupancy after the time frame lapses.

Case Study No.6

The IP, Peter & Associates represented Tom in the sale and purchase of a three-storeyed shop house for RM1,000,000. Tom paid the requisite 10% deposit of RM100,000 to the vendor via the IP. In order to finance the balance RM900,000, Tom applied for, and was offered a loan by Gold Bank. Gold Bank subsequently hired the IP as well, to represent them and to prepare the necessary documentation to facilitate the loan agreement.

The IP completed the SPA as well as the loan agreements. Three months after these documents were signed and due to be finalised, the IP came to the realisation that they had failed to follow up on the notice of assessment of stamp

duty which was yet to be issued by the Collector of Stamp Duty. Knowing that their client's "plus-one month" time frame was nearing the end, the IP contacted the vendor to plead for a time extension.

Because of the IP's failure in keeping the deadline, Gold Bank retracted their offer to finance Tom's loan. Subsequently, the Vendor voided the agreement and retained the deposit. Only on Tom's pleadings with the Vendor personally did they decide to continue with the sale, albeit at a higher price. Tom then sued the IP for failing to keep his interest intact.





Conveyancing: Best Practices

There are many traps that trip in conveyancing practice, but in this article we attempt to distinguish them into four main categories: Conflict, Identity, Land Searches and Managing Client's Interest. These appear to be very broadstroke groupings, but are in essence, the many pitfalls that can stumble a conveyancer.

Cutting Out Conflict

Determine early on which party to the conveyancing matter you are or will be acting for.



A. Sale and Purchase between a Developer and Purchaser:

If you are acting for the Developer, and the Purchaser is unrepresented, make it known to the Purchaser that you are not allowed to act for the him/her and that you do not represent them in any capacity. This extends to cover a Developer's marketing strategy advertising "Free SPA Fees" or "Free Legal Fees" to potential customers.

Explain to them that the sale and purchase agreement and instruments of transfer can be scrutinised by their solicitor if they have representation. If the Purchaser however chooses to remain unrepresented, the Purchaser must sign a waiver showing that he/she does not intend to engage an Advocate and Solicitor.

B. Sub-Sale and Purchase between an Individual/Company Vendor and Purchaser:

Again, be mindful of which party is your client and keep in mind to notify the other party that your representation only extends to your client.

Frequently asked questions to the above:

1. What must a solicitor do when acting for the Purchaser and the Vendor remains unrepresented?

- The Purchaser's solicitor must include a clause into the SPA stating that the Vendor has chosen not to be represented.

- The Purchaser's solicitor can witness the Vendor's signature
- The Purchaser's solicitors can explain the clauses of the SPA to the vendor but must be cautious when doing so as explaining what the clauses mean must not be confused with advising the unrepresented Vendor.

2. When representing a Purchaser, can you represent the Vendor in the discharge of charge or receipt of reassignment?

Yes. As this is a separate transaction, in essence you will be acting for the Vendor's financier even though the fees will be paid ultimately, by the Vendor.

3. When representing the Purchaser, can you represent the Purchaser's financier that will be financing the very same property you are representing the Purchaser to acquire?

Yes. Again, as this is a separate transaction, you can represent the Purchaser's financier although you will need to obtain a Letter of Acknowledgment [See Page 4 PII Did You Know and also refer to Addendum on Page 18].

Establishing Identities

Play Who's Who Perfectly!



As fraud and identity theft is becoming a rampant statistic to the Scheme's Claims portfolio and in particular conveyancing claims, Members are encouraged to pay more attention to what used to be, straightforward procedures. There are many ways in which a fraudster

can "take over" a person's identity examples of which are provided below. We have proposed some measures (not exhaustive and may not always apply) to minimise the potential of being duped by fraudsters:

WHAT THE FRAUDSTER MAY DO:	WHAT YOU SHOULD LOOK OUT FOR:
<p>Provide a genuine-looking, but fake NRIC. The fake NRIC will contain the fraudster's picture, but with the name and address of the true owner of the land whose name is reflected on the property's title.</p> <p>Also, instead of producing a fake NRIC, alternative to this is providing a fake temporary NRIC claiming that they had lost their original document.</p>	<p>Scrutinise the NRIC and the temporary NRIC to ensure the full name, IC number and house address are correct and is the information appearing in the title.</p> <p>Always ask for a secondary photo ID. Most simple fraudsters will only have one fake photo ID available. Request for a driver's licence as a backup.</p>
<p>If the fraudster is a foreign national or represents themselves as foreign nationals, they will provide a fake passport.</p> <p>Alternatively, they will even provide a passport with a different serial number as reflected on the land title claiming the original to be lost or stolen.</p>	<p>Scrutinise the details of the passport. If another passport is produced with differing serial numbers, contact the relevant High Commission or Embassy to verify the travel document.</p> <p>Again, where possible, request for a secondary photo ID.</p>
<p>Provides a Power of Attorney alleging that the true owner has granted them the power to dispose of the property.</p>	<p>Check the validity of the Power of Attorney:</p> <ul style="list-style-type: none"> - Has it been witnessed correctly and duly stamped? - Every Power of Attorney has to be lodged with the High Court so contact the Registrar to establish its validity with them.

Go One Step Further

With Identification



Prior to signing the SPA, ask the owner of the property to provide the following:

- Bills and receipts for water, electricity and sewerage for the last three months, and
- Bills and receipts for Quit Rent and Assessment from City Hall or town Municipality for the last three years

This exercise will benefit you two-fold:

1. Your identity check of the true owner of the land is further solidified, as the original receipts will most likely be in the possession of the true owners.
2. You will ascertain that there are no arrears (unpaid bills) for any of the utilities/services that will later cause problems and become a burden to the Purchaser.

Land Searches

Two Is Always Good

Conduct the first land search prior to the execution of the SPA, whilst advising the Purchaser NOT to pay a deposit to the Vendor until you are satisfied that the title is clear. Do not rely on any land searches conducted by any other party other than the members of your own firm or a delegatee ie an office despatch.

When reviewing the results of the searches pay attention to:

- The purported **Vendor** is the actual registered owner of the land;
- Determine the **category of land** use ie building (commercial or residential), industrial or agriculture;
- Ascertained the **acreage of land**;
- Determine if the land is **freehold or leasehold**; if it is leasehold, how many years are remaining;



- Existence of any **express condition** i.e. "To be used only for residential purposes only";
- Existence of any **restrictions in interest** ie are there any requirements for State's consent to transfer the title; and
- Existence of any **encumbrances**, ie are there any pre-existing caveats that can negate any possible transfers.

As there may be a delay between the first land search and the signing of the SPA, conduct the second land search just prior to the transfer as in cases of fraud, the true owner may have promised the land for sale to several prospects.

Client's Interest

Safeguard At All Times



Personally Attend To The Client

Ensure that the lawyer in charge of the file personally meets the client/s and is present at all critical junctures of the transaction, in particular, the signing of the SPA. A solicitor cannot sign as witness to the SPA if he was not present to witness his client's signature. The prevailing practice in conveyancing law firms of allowing their staff to oversee conveyancing matters cannot be tolerated. Lawyers must always make it a point to oversee each case and have full control of its proceedings.

Lodge A Caveat

Do so preferably as soon as the SPA is executed and the Purchaser pays the Vendor a deposit towards the SPA. The lodgement of the caveat on the property pending the presentation for the transfer of ownership should be done to safeguard the clients' interest on the property, and this should be conducted according to the terms and conditions of the SPA.

Dealing With Fellow Lawyers

If you are dealing with another lawyer you have not had prior transactions with, be cautious as there have been a number of complaints received by Bar Council of fraudsters purporting to be the branch-partner of reputable law firms.

Managing Deadlines

It is no secret that almost every step of conveyancing procedures is captioned by a deadline. Do not put your client's interest, time and money at stake by taking shortcuts or forgetting completely. We encourage Members to use the Practice Area Checklist CD-ROM and place a hard copy on every Conveyancing file.

SKIM MANDATORI PII
BADAN PEGUAM MALAYSIA
**TAHUKAH
ANDA?**

...Base Excess akan meningkat dalam tiga keadaan?

Base Excess adalah jumlah yang perlu dibayar oleh Amalan yang Diinsuranskan (IP) sebelum Penanggung Insurans menanggung rugi IP, sehingga *mandatory limit of indemnity* IP. *Base Excess* digunakan bagi setiap tuntutan, dan disalurkan kepada kos pembelaan, dan/atau kerugian. *Base Excess* berbeza bagi setiap Firma, dan ia adalah berdasarkan bilangan peguam yang dinamakan dalam Firma. *Base Excess* anda dinyatakan dalam Perkara 9 *Schedule Certificate of Insurance* (COI).

Walau bagaimanapun, Perkara 9 boleh berubah sekiranya IP terlibat dalam tuntutan yang timbul dari mana-mana tiga keadaan dibawah mengikut keperluan Klausula 11 COI mengenai *Base Excess*.

1. Clause 11(a) COI, 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 transaction.

However the Base Excess [Item 9] shall apply in the event you had obtained written waivers from the clients.

[See Addendum 1 on Page 18]

2. Clause 11(b) COI, Conveyancing – RM50,000 minimum in respect of conveyancing of land and/or buildings.

However the Base Excess shall apply in the event 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.

3. Clause 11(c) COI, Dishonesty of Partner – RM20,000 multiplied by the number of principals subject to a minimum of RM30,000 and maximum of RM250,000 per Firm in respect of misconduct of principals.

Ilustrasi I

Jarred & Associates merupakan Firma guaman dengan sembilan orang peguam. *Base Excess* mereka adalah RM55,000. Firma mewakili Alice untuk membeli sebuah rumah. Firma menyediakan dokumen-dokumen yang berkaitan untuk Perjanjian Jual dan Beli. Firma kemudian mewakili Gold Investment Bank, pembiaya pilihan Alice untuk mendapatkan pinjaman perumahan; Firma membantu dalam menyediakan perjanjian pengeluaran pinjaman.

Firma tersebut gagal melaksanakan dokumen pemindahan yang berkenaan dalam tempoh yang ditetapkan seperti yang dinyatakan dalam Perjanjian Jual dan Beli. Pada masa ini, deposit yang diperlukan telah dibayar oleh Alice dan Bank telah mengeluarkan jumlah pinjaman. Disebabkan urusan pemindahan tidak berjalan dalam masa yang ditetapkan, Penjual memutuskan untuk tidak meneruskan urusan niaga. Kedua-dua Alice dan Gold Investment Bank menyaman Firma untuk kerugian masing-masing.

Oleh kerana Firma bertindak bagi lebih daripada satu pihak dalam urusan pemindahhakkan tanah dan/atau bangunan, jumlah *Base Excess* mereka untuk satu tuntutan ini sahaja meningkat kepada RM100,000 atau dua kali jumlah *Base Excess* mereka yang mana lebih tinggi. Dalam hal ini, menjadi RM110,000.

Base Excess mereka akan kekal bagaimanapun, jika Firma boleh membuktikan bahawa Alice menandatangani surat akuan. Surat akuan perlu disempurnakan oleh Pembeli/Peminjam (Alice) dalam situasi di mana peguam (Firma), bertindak untuk Pembeli/Peminjam (Alice) dalam urusan Jual dan Beli, dan Institusi Kewangan (Gold Investment Bank) sebagai pembiaya. Walaupun urusan niaga ini berkaitan dengan perkara yang sama, mereka perlu dilayan sebagai transaksi yang berasingan, justeru keperluan untuk pengecualian oleh Pembeli/Peminjam untuk membuktikan bahawa Peguam beliau juga bertindak untuk Pembiaya.

Ilustrasi II

Wilhelm & Co adalah sebuah firma dengan 3 peguam dan *Base Excess* mereka adalah RM25,000. Mereka mewakili Tony, pemilik sebidang tanah, dalam usaha untuk menjual hartanahnya. Selepas transaksi itu selesai dan hartanah dipindahkan kepada Pemilik baru, Firma itu telah didatangi oleh Pemilik sebenar, yang mendakwa bahawa Firma telah mewakili seorang penipu, "Tony". Pemilik sebenar menyaman Firma untuk mendapat ganti rugi.

Klausula 11(b) akan digunakan kerana ini adalah urusan pemindahhakkan. *Base Excess* Firma itu akan meningkat kepada RM50,000. Walau bagaimanapun, menurut proviso Klausula 11 (b) COI, jika Wilhelm & Co boleh memberikan bukti dokumen kepada Penanggung Insurans menerangkan inisiatif pengurusan risiko dan proses yang Firma telah lakukan ketika berlakunya perbuatan, ralat atau kesilapan yang membawa kepada tuntutan tersebut, *Base Excess* asal mereka sebanyak RM25,000 akan dikenakan.

Pemindahhakkan – Amalan Terbaik

Terdapat banyak perangkap dalam amalan pemindahhakkan, dalam artikel ini kami cuba menghuraikan kepada empat kategori utama: konflik, identiti, carian tanah dan pengurusan kepentingan klien. Kategori-kategori ini kelihatan sangat luas, tetapi pada dasarnya, merupakan perangkap yang boleh membebankan peguam pemindahhakkan.

Mengelak Konflik

Tentukan dari awal pihak yang akan anda wakili untuk pemindahhakkan.



A. Jual Beli antara Pemaju dan Pembeli:

Jika anda bertindak untuk Pemaju, dan Pembeli tidak diwakili, pastikan Pembeli faham dan diberitahu bahawa anda tidak dibenarkan untuk bertindak untuknya dan anda tidak mewakilinya dalam sebarang transaksi. Ini diperluaskan agar dilindungi daripada strategi pengiklanan pemasaran Pemaju yang menjanji "Yuran SPA Percuma" atau "Yuran Guaman Percuma" kepada bakal pelanggan mereka.

Terangkan kepada mereka bahawa perjanjian jual beli dan instrumen pemindahan boleh diteliti oleh peguam yang mewakili mereka. Bagaimanapun sekiranya Pembeli memilih untuk tidak diwakili oleh mana-mana peguam, Pembeli mesti menandatangani surat penepian yang menunjukkan bahawa dia tidak berniat untuk menggunakan khidmat seorang peguam.

B. Sub-Jual Beli antara Penjual Individu/Syarikat dan Pembeli:

Ingatan, ambil perhatian terhadap pihak yang menjadi klien dan perlu ingat untuk memberitahu pihak lain bahawa representasi anda hanya untuk klien anda.

Soalan yang sering ditanya:

1. Apakah yang perlu dilakukan oleh peguam apabila bertindak bagi pihak Pembeli dan pihak Penjual tidak diwakili?

- Peguam Pembeli perlu masukkan klausa dalam SPA yang menyatakan bahawa Penjual telah memilih untuk tidak diwakili.
- Peguam Pembeli boleh menyaksikan penurunan tandatangan oleh Penjual.
- Peguam Pembeli boleh menerangkan kepada Penjual klausa dalam SPA tetapi perlu berhati-hati dalam penjelasannya agar tidak dikelirukan sebagai menasihati Penjual.

2. Bolehkah anda mewakili Penjual dalam pelepasan gadaian atau suratcara penerimaan dan penyerahhakkan semula, ketika mewakili Pembeli?

Ya. Kerana ini adalah transaksi yang berasingan, pada dasarnya anda akan bertindak untuk Pembiaya kepada Penjual walaupun yuran dibayar oleh Penjual.

3. Apabila mewakili Pembeli, bolehkah anda mewakili Pembiaya bagi Pembeli yang akan membiayai harta yang sama untuk Pembeli?

Ya. Ini juga adalah urusan niaga yang berasingan, anda boleh mewakili Pembiaya bagi Pembeli tetapi anda perlu mendapatkan Surat Perakuan.

[Lihat mukasurat 14 dan 18]

Mewujudkan Identiti

Siapa Lebih Sempurna!



Memandangkan penipuan dan kecurian identiti menjadi statistik yang semakin menular kepada portfolio Tuntutan Skim dan dalam tuntutan pemindahhakan tertentu, adalah digalakkan untuk memberi perhatian yang lebih kepada prosedur yang dahulunya sangat mudah.

Terdapat pelbagai cara di mana pelaku boleh "mengambil alih" identiti seseorang seperti contoh yang dipaparkan dibawah. Beberapa cadangan langkah pencegahan (tidak menyeluruh dan tidak semestinya sesuai) untuk meminimumkan potensi ditipu oleh penipu:

APA YANG MUNGKIN DILAKUKAN OLEH PENIPU:	APA YANG ANDA PERLU AMBIL PERHATIAN:
<p>Menunjukkan kad pengenalan (KP) palsu yang kelihatan tulen. KP palsu akan mengandungi gambar penipu, tetapi dengan nama dan alamat pemilik sebenar tanah yang namanya ditunjukkan pada geran tanah.</p> <p>Penipu juga boleh menunjukkan KP sementara yang palsu dengan alasan kehilangan KP asal.</p>	<p>Teliti KP dan KP sementara untuk memastikan nama penuh, nombor KP dan alamat rumah adalah betul dan sama seperti yang terdapat dalam geran tanah.</p> <p>Minta tanda pengenalan berfoto lain. Penipu biasanya mempunyai hanya satu tanda pengenalan berfoto yang palsu. Lesen memandu boleh dirujuk sebagai sokongan.</p>
<p>Jika penipu adalah warganegara asing atau mewakili diri mereka sebagai warga asing, mereka akan menyediakan pasport palsu.</p> <p>Selain itu, mereka juga akan menyediakan pasport dengan nombor siri yang berbeza daripada yang ditunjukkan pada geran tanah dengan mendakwa kehilangan yang asal.</p>	<p>Teliti butiran pasport. Sekiranya pasport dengan nombor siri yang berbeza diamati, hubungi Suruhanjaya Tinggi atau Kedutaan yang berkaitan untuk pengesahan dokumen perjalanan.</p>
<p>Mengemukakan Surat Kuasa Wakil (Power of Attorney) mendakwa bahawa pemilik sebenar telah memberikan mereka kuasa untuk mengurus hartanah itu.</p>	<p>Periksa kesahihan Surat Kuasa Wakil:</p> <ul style="list-style-type: none"> - Sudahkah disaksikan dengan betul dan dicap seperti yang sepatutnya? - Setiap Surat Kuasa Wakil diserahkan kepada Mahkamah Tinggi untuk simpanan; hubungi Pegawai Pendaftaran untuk membuat pengesahan.

Tambahkan Satu Langkah

Untuk Pengenalpastian



Sebelum menandatangani SPA, minta pemilik harta itu untuk menyediakan yang berikut:

- Bil dan resit untuk air, elektrik dan pembetulan bagi tiga bulan yang lalu, dan
- Bil dan resit daripada Dewan Bandaraya atau Majlis Perbandaran bagi tiga tahun yang lepas

Langkah ini akan memberi manfaat kepada anda kerana:

1. Pemeriksaan identiti sebenar pemilik tanah itu diperkukuhkan lagi.
2. Memastikan bahawa tiada tunggakan bagi mana-mana utiliti yang boleh menjadi masalah dan membebaskan Pembeli di kemudian hari.

Carian Tanah

Sebaiknya Dua Kali

Jalankan carian tanah pertama sebelum pelaksanaan SPA dan nasihati Pembeli agar TIDAK membayar deposit kepada Penjual sehingga anda berpuas hati dengan status tanah itu. Jangan bergantung kepada carian yang dijalankan oleh mana-mana pihak lain selain daripada kakitangan firma sendiri atau wakil firma seperti budak penghantar pejabat.

Apabila mengkaji semula keputusan carian, beri perhatian kepada:

- **Penjual** yang dikatakan adalah pemilik berdaftar sebenar tanah itu;
- Pastikan **kategori kegunaan tanah** iaitu penggunaan tanah bangunan (komersial dan kediaman), perindustrian atau pertanian;
- Tentukan jika tanah tersebut adalah **pegangan bebas atau pajakan**, jika pegangan pajak, berapa baki tahun;



- Pastikan **keluasan tanah**;
- Kewujudan sebarang **syarat nyata** seperti "Hanya untuk digunakan sebagai tujuan kediaman sahaja";
- Kewujudan sebarang **sekatan kepentingan** seperti keperluan persetujuan kerajaan negeri untuk bertukar status; dan
- Kewujudan lain-lain **bebanan**, seperti terdapat kaveat yang sedia ada yang boleh menidakkan pertukaran status.

Sekiranya terdapat kelewatan antara carian tanah pertama dan menandatangani SPA, jalankan carian tanah kedua seurus sebelum transaksi pemindahan dijalankan. Dalam kes-kes penipuan, pemilik sebenar mungkin telah menjanjikan tanah untuk dijual kepada beberapa bakal pembeli.

Kepentingan Klien

Lindungi Setiap Masa



Berurusan Terus dengan Klien

Pastikan Peguam yang mengurus fail tersebut berurusan terus dengan klien dan berada di tiap urusan/transaksi kritikal, khususnya menandatangani SPA. Peguam tidak boleh menjadi saksi kepada SPA sekiranya tidak hadir untuk menyaksikan tandatangan anak guamnya. Amalan lazim yang dilakukan oleh firma pemindahhakkan dengan membenarkan staf mereka menyelia perkara berkaitan pemindahhakkan tidak boleh dibiarkan berterusan. Peguam perlu memastikan setiap kes diselia sendiri dan mempunyai kawalan penuh terhadap perkembangannya.

Mengemukakan Kaveat

Sebaik-baiknya dibuat dengan cepat bila SPA dilaksanakan dan Pembeli membayar Penjual deposit untuk SPA. Penyerahsimpanan kaveat ke atas harta sementara menunggu pemindahan pemilikan perlu dilakukan untuk melindungi kepentingan pelanggan terhadap hartanah itu, dan ini perlu dijalankan mengikut terma dan syarat dalam SPA.

Berurusan Sesama Peguam

Jika anda sedang berurusan dengan Peguam yang sebelum ini belum pernah berurusan, berhati-hati kerana terdapat sebilangan aduan yang diterima oleh Majlis Peguam dimana Peguam itu mengaku sebagai rakan kongsi dari cawangan sebuah firma yang berwibawa.

Pengurusan Tarikh Akhir

Bukan rahsia lagi bahawa hampir setiap prosedur dalam pemindahhakkan mempunyai tarikh akhir. Jangan pertaruhkan kepentingan klien, masa dan wang dengan mengambil jalan pintas atau terus melupakan langkah tertentu. Kami menggalakkan penggunaan Practice Area Checklist CD-ROM dan meletakkan salinan cetak pada setiap fail pemindahhakkan.

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 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 <input type="text"/> 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 <input type="text"/> each and every claim (subject to Clause 11 of the Certificate of Insurance)
10.	PREMIUM INCLUSIVE OF 5% OR [6%] SERVICE TAX	:	RM <input type="text"/>
11.	STAMP DUTY	:	<input type="text"/>
<div style="border: 1px solid black; padding: 5px;"> <p>SIGNED FOR : Pacific & Orient Insurance Co. Berhad S. KRISHNA MURTHIE GENERAL MANAGER Business Development, Underwriting</p> </div>			
<p>The insurance is subject to the terms of the <u>Master Policy No. 12971U7000003</u> and the Certificate of Insurance 2012</p>			

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



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Circular No 179/2012
Dated 14 Aug 2012

To Members of the Malaysian Bar

Forged Acknowledgment of Payment of Stamp Duty

Reference is made to Circular No 085/2012 dated 24 Apr 2012, Circular No 151/2012 dated 11 July 2012 and Circular No 164/2012 dated 30 July 2012.

It has been brought to the attention of the Bar Council that some Members of the Bar have been victims of forged stamps recently. Stamp duty has allegedly been paid and documents stamped by means of forged digital franks or forged stamp certificates.

Most of the incidents brought to the attention of the Bar Council have common features, the most salient of which are described below:

Case No 1

- 1.1 Firm A had purchased a banker's cheque in favour of Pemungut Duti Setem ("PDS") to pay stamp duty for a refinancing facilities agreement as the principal instrument, and for it to be stamped by means of a digital franking.
- 1.2 Subsequently, Firm A submitted the original copy of the refinancing facilities agreement to evidence that stamp duty for it had been paid, in order for a instrument to be then stamped, as a subsidiary instrument under section 4(3) of the Stamp Act 1949.
- 1.3 Firm A was then notified by the PDS that the digital frank on the facilities agreement was a forgery and that the relevant stamp duty had not been paid.
- 1.4 This incident involved a full-time stamping clerk employed by Firm A.

Case No 2

- 2.1 Firm A had purchased a banker's cheque in favour of the PDS to pay stamp duty for an instrument of transfer, and for it to be stamped by means of a stamp certificate.
- 2.2 When the instrument of transfer was presented for registration by Firm A, it was not

accepted by the land registry as the stamp certificate was incomplete in describing the transferees as "XYZ DLL" instead of "XYZ AND ABC", being the two transferees named in the instrument of transfer.

2.3 Firm A then went to the PDS to amend the stamp certificate.

2.4 The PDS informed Firm A that the stamp certificate was a forgery and that the relevant stamp duty had not been paid.

2.5 It was later discovered that the banker's cheque purchased by Firm A had been used to pay for stamp duty for instruments presented for stamping by Firm B.

2.6 Firm B had paid cash to its clerk to stamp its instruments.

Members should conduct an online verification of all stamp certificates and all impressions indicating the payment of stamp duty made by digital franking. For more details on how to do so, kindly refer to the circulars mentioned in the first paragraph above.

The police, who are investigating this matter, have recommended that any solicitor's client account cheque or any banker's cheque payable to the PDS should be presented to the PDS for payment of stamp duty within three working days of its issue, in order to reduce the risk of the cheques being matched with cash payments.

The Bar Council calls upon its Members to give their full cooperation to this three-day rule as a temporary measure until such time when stamp duty may be paid online ("ePayment"). The Bar Council has been informed by the PDS that ePayment will be implemented in September 2012.

Meanwhile, the Bar Council has appointed a team of solicitors to study the impact of this matter on the legal profession and to advise the Bar Council accordingly.

For enquiries, please do not hesitate to contact Chuah Ying Ying, Officer, by telephone at 03-2050 2106, or by email at yingying@malaysianbar.org.my.

Thank you.
Tony Woon Yeow Thong
Secretary
Malaysian Bar

Start 

Have You Got Your Kit?



All our risk management practice tools in one handy resource

For more information, contact the PI Insurance & Risk Management Department at 03-2032 4511 or email pirm@malaysianbar.org.my