

RISKmanagement QUARTERLY



Volume 2
Issue 3 Sept 2006

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A quarterly publication of Professional Indemnity Insurance Committee, Malaysian Bar Council in collaboration with Jardine Lloyd Thompson Sdn Bhd (JLT Malaysia)

<http://www.myPII.com.my>

Editorial

PII 2007: A New Beginning

We are pleased to inform members that the terms of the Master Policy for our Professional Indemnity Scheme for 2007 has been successfully negotiated and concluded. The Bar Council agreed to the terms on 19 August 2006.

The change that we have spoken about in the past year or so has finally come to fruition; the excessive and exorbitant loading imposed on members by the insurer upon notification (regardless of whether there is merit or not) is no more. The No Claims Bonus structure has also been removed. Nevertheless, the PII Committee, mindful of the effect this will have on the majority of members have ensured that there are caps in place in order to not overly burden members.

I would like to re-emphasise to members that they should not view the removal of No Claims Bonus as a negative thing. Firstly, we are the only Scheme with such a structure in place. Secondly, when we obtained the No Claims Bonus structure in 2003, the primary premium was increased for all firms irrespective of loss experience. Next, having 7 – 8 of our fellow lawyers being driven out of practice every year is unacceptable. Lastly, having 750 out of 3,954 firms pay approximately 50% - 60% of the premium pool is not a good thing. This means our scheme is not working, it is not serving the purpose that it was set up for in 1992.

Therefore, I am hopeful that members will embrace this change. See it as a positive move forward. The Malaysian Bar is finally in possession of a scheme that will not only protect the public, but also provide sufficient workable insurance cover to its members. Firms now need not fear notifying insurers of potential claims; they may rest easy in the knowledge that if ever a claim against them materialised, they will not be loaded, until and when, the insurers have paid out on the claim. More importantly, we will have an equitable scheme, not one where a minority of firms are single-handedly subsidising discounts to a majority of firms simply to make up our premium pool.

We now also have Echelon Claims Consultant Sdn Bhd, a specialised Third Party Administrator dedicated solely to the claims administration of the Malaysian Bar's PII Scheme. Crawford & Company have already begun the systemic transfer of the 2001 – 2005 claims files to Echelon and this should be completed by the end of this year. With the ongoing audits of the files that commenced in March 2006 and Echelon monitoring the 2006 claims (and back-year claims that have been transferred), the Bar Council, will now have a clearer, more accurate picture of our claims history.

Therefore, as our PII Scheme is presently in transition, there will be more changes to come. In time, we should be able to self-insure: make our own rules and make our own decisions. The work for these changes has already begun: we have consultants looking into the viability of self-insurance for the Malaysian Bar; we have spoken to Bank Negara and everything looks positive.

As always, we appreciate any views, feedback and comments from members. Please do write in to the PII & RM Department or me. We would be happy to address any issues or concerns that you may have.

Ragunath Kesavan
Secretary
Bar Council

Dealing With Complaints

This article was prepared by AFP Consulting's risk management team and first appeared in the Law Society Gazette, the weekly journal of the Law Society of England and Wales. It was then reprinted in "The Alexander Forbes Guide to Risk Management for Solicitors" booklet. Please note that we have adapted this article to be in line with the Malaysian legal profession.



Look not to eliminating risk but making informed choices about it.

Frank Maher

This article looks at how to handle complaints, and ways to try and prevent them turning into negligence claims.

The first step for any practice is to allocate a main point of contact who will act as the complaints co-ordinator. This individual could also manage the claims notification procedure within the firm. However, within some practices it may be beneficial to separate this function. If the practice is relatively small, one co-ordinator should be sufficient. However, larger practices may need to appoint a representative within each department to oversee all complaints from disaffected clients in the first instance. Once the grievance is deemed valid, these representatives should then report it to the main complaints co-ordinator.

Secondly, ensure staff know what to do when a complaint comes in and to whom all complaints should be referred. There should be a clear reporting procedure which all members of the practice understand and know how to implement.

Your firm should also maintain a central register of complaints outlining when the allegation arose and how it occurred. This central register is a source of information which will help you see exactly where the high risk areas of the practice are.

The main complaints co-ordinator should also ensure all grievance files are re-evaluated at least every six months. This way it is easy to see where your risks lie, whether it be by department or by type of work undertaken. Once these risks are identified you can take steps to revise your risk management procedures as necessary.

All complaints need to be dealt with promptly and thoroughly. Do not procrastinate in the hope that the problem will go away, it will not. At this stage it may be necessary to notify your professional indemnity insurers and let them know that you might be hit with a negligence claim rather than having them find out after it has been made.

When attempting to resolve a complaint, write to the client with comprehensive details of the complaint and inform the client what you will be doing to resolve the matter. Let them know when they can expect to hear from you, within a realistic period of time.

Once the complaint is resolved, write to the client again, informing them that the matter is closed. In your letter, state a period of time, say, two weeks, for them to get back to you if they are not satisfied with the outcome.

The above shows how good complaints management forms an integral part of a practice's risk management procedures. Not only does it show your insurer that you have a good grasp of the problems facing your firm, the information gathered or recorded can go some way to preventing future mistakes.

GUIDE TO PROPOSAL FORM 2007 PROFESSIONAL INDEMNITY INSURANCE

PAGE	QUESTION	REMARKS																
Page 1	Question 1 DETAILS OF FIRM	(a) Indicate the name of the Firm as approved by the Bar Council via their "letter of no objection" (b) Indicate date the Name of Firm was approved unconditionally by the BC. (c) Indicate latest correspondence address of the Main Office. (d) Indicate latest telephone numbers, facsimile and the Firm's e-mail address of the Main Office.																
Page 1	Question 2 (a) DETAILS OF LEGAL PRACTITIONERS	Please state name of each and every (1) Sole Proprietor/Partner (2) Consultant (3) Legal Assistant Other staff/personnel e.g. pupils in chamber, interns, office manager, clerical, secretarial, despatch, etc. are to be part of the headcount in Question 3. <div>Note: Please list the name of every legal practitioner who is currently with the Firm.</div>																
Page 2	Question 2 (b) INFORMATION ON PREVIOUS FIRM	You <i>NEED</i> to <i>REPEAT</i> the names indicated in Question 2(a) IF the legal practitioner was from another firm and JOINED your Firm AFTER 1 January 2002. Include details of the legal practitioner's previous firm, date joined and left and also the designation/status (e.g. partner, legal assistant, etc) whilst he/she was at that previous firm.																
Page 2	Question 3 NON-ADMITTED STAFF	Indicate the number of staff on payroll excluding the names from Question 2 (a). <div>Note: All staff who are NOT legal practitioners</div>																
Page 2	Question 4 GROSS ANNUAL LEGAL FEES	Please provide information based on the Gross Annual Legal Fees billed the last Financial Year (2005) and the estimate for the Current Year (2006).																
Page 3	Question 5 NATURE OF WORK	Please provide a breakdown of the Fees based on the type of work that your firm is doing. <table><tr><td>(a) <u>Company Work</u> X 100%</td><td>(e) <u>Taxation</u> X 100%</td></tr><tr><td>Total Gross Annual Legal Fees</td><td>Total Gross Annual Legal Fees</td></tr><tr><td>(b) <u>Insolvency Work</u> X 100%</td><td>(f) <u>Civil Litigation</u> X 100%</td></tr><tr><td>Total Gross Annual Legal Fees</td><td>Total Gross Annual Legal Fees</td></tr><tr><td>(c) <u>Conveyancing Commercial</u> X 100%</td><td>(g) <u>Criminal Litigation</u> X 100%</td></tr><tr><td>Total Gross Annual Legal Fees</td><td>Total Gross Annual Legal Fees</td></tr><tr><td>(d) <u>Conveyancing Residential</u> X 100%</td><td>(h) <u>All other work</u> X 100%</td></tr><tr><td>Total Gross Annual Legal Fees</td><td>Total Gross Annual Legal Fees</td></tr></table> <p>(Please describe 'All other work')</p> <div>Note: If you are a new firm, please complete based on estimates for the type of work you expect to do.</div>	(a) <u>Company Work</u> X 100%	(e) <u>Taxation</u> X 100%	Total Gross Annual Legal Fees	Total Gross Annual Legal Fees	(b) <u>Insolvency Work</u> X 100%	(f) <u>Civil Litigation</u> X 100%	Total Gross Annual Legal Fees	Total Gross Annual Legal Fees	(c) <u>Conveyancing Commercial</u> X 100%	(g) <u>Criminal Litigation</u> X 100%	Total Gross Annual Legal Fees	Total Gross Annual Legal Fees	(d) <u>Conveyancing Residential</u> X 100%	(h) <u>All other work</u> X 100%	Total Gross Annual Legal Fees	Total Gross Annual Legal Fees
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Total Gross Annual Legal Fees	Total Gross Annual Legal Fees																	
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(d) <u>Conveyancing Residential</u> X 100%	(h) <u>All other work</u> X 100%																	
Total Gross Annual Legal Fees	Total Gross Annual Legal Fees																	

Page 3	Question 6 CLAIMS EXPERIENCE	<p>(a) Please confirm the claims history of <i>BOTH the Firm and ALL</i> the legal practitioner named in Question 2 including any previous notifications to Insurers.</p> <p>(b) Same</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: When completing this Question please note the following: -</p> <ul style="list-style-type: none"> ▪ If YES is ticked for (a) and/or (b), please provide details for each claim or threatened claim. ▪ Please declare the claims experience even if the claim was described in the 2006 Proposal Form or previously notified to Insurers. ▪ Please declare claims against your Firm and/or any of the legal practitioners named in Question 2. ▪ Please declare claims against any of the legal practitioners at his/her previous firm. ▪ The DECLARATION requires the firm to obtain WRITTEN CONFIRMATION from each legal practitioner named in this Form that he/she is aware and responsible for the accuracy of the answers. </div>
Page 3	Question 7 NOTIFIABLE CIRCUMSTANCES	<p>To declare any circumstances that the Firm/Legal practitioners may be aware of and which may give rise to a claim. This includes any circumstance against the legal practitioner, any predecessor/principal/consultant/professional assistant, or the legal practitioner's previous firm and/or the firm's predecessor.</p> <div style="border: 1px solid black; padding: 5px;"> <p>Please refer to the Note in Question 6 as a guide to complete this question. The same criteria apply to Notifiable Circumstances.</p> </div>
Page 4	Question 8 TOP-UP QUOTATIONS	<p>Complete this question if you wish to obtain quotations for Top-Up insurance.</p>
Page 4	DECLARATION	<p>EXCEPT for sole proprietorships, any one Partner/Principal may sign the Proposal Form on the Firm's behalf. However, ALL parties named in the Proposal Form must ensure that they are aware of all information stated in the Proposal Form.</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: Prior to signing the Declaration, the Partner/Principal signing should obtain WRITTEN CONFIRMATION from each of the persons named in Questions 2(a) and 2(b) for the answers to Questions 6 and 7. Subsequent claims of ignorance or inaccuracy with regard to the answers in the completed Proposal Form will not be accepted as all legal practitioners/partners are deemed to have sighted and declared the requisite information. Insurers reserve the right to <u>deny any claim</u> that is notified AFTER submission of the Proposal Form if it is established that you were aware of the claim/circumstance on or before the date when the Proposal Form was received by Insurers.</p> </div>
Page 4	EXECUTION OF PROPOSAL FORM	<p>Please ensure that the Proposal Form is signed by the Sole Proprietor/a Partner of the firm ensuring the following information is CLEARLY STATED:-</p> <ul style="list-style-type: none"> ▪ Full name of the signatory ▪ Date Proposal Form is signed ▪ Firm stamp must be legible



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CASE STUDY

CONVEYANCING: SALE & PURCHASE AGREEMENTS

SEARCHES



*Without a struggle,
there can be no
progress.*

Frederick Douglass

The Facts

In early January 2005, Firm A was engaged by a walk-in client, G. G informed Firm A that he had found the home of his dreams and had managed to negotiate a reasonable price of RM800,000 for the property. He now needed the firm to handle the Sale and Purchase documentation for him; he provided Firm A with the Vendor's details.

As G had been recommended to Firm A by friends; he stated that he was happy to leave the whole matter in Firm A's hands.

Firm A immediately contacted the Vendor to obtain details of the property. The Vendor verbally informed Firm A that the property was charged to Bank N.

Two weeks later, having obtained all the necessary documents from the Vendor, Firm A telephoned G to inform him that the Sale and Purchase Agreement (SPA) was prepared and the Vendor was ready to execute the SPA.

At the end of January, both Vendor and G met at Firm A's offices to sign the SPA. G paid a 10% deposit to the Vendor. Dates of completion were established, and as soon as Firm A provided G with a stamped copy of the SPA, G could apply for his housing loan.

At the time of the signing of the SPA, Firm A informed G that the said property was charged to Bank N for

the vendor's housing loan but this would not unduly affect and/ or delay the transaction. However, they failed to mention to G that the Vendor verbally relayed this information. They also did not advise G of any other encumbrances or restrictions on the said property. In fact, Firm A had failed to conduct a title search on the property prior to advising G to execute.

The Delay

Firm A only conducted a title search of the property in February 2005. This is when Firm A discovered that a third party had entered a caveat on the property. Firm A, however, did not immediately inform G.

A month later, Firm A wrote to inform G about the entry of the caveat and advised G to make an application to remove the caveat.

In the meantime, G was informed by a friend that the vendor had absconded with the 10% deposit.

Implications

Due to the presence of the third party caveat, G was unable to complete the SPA and purchase his dream home. G is now claiming from Firm A the deposit that he has lost and for damages arising out of the failed transaction. G is alleging that Firm A was negligent in failing to protect his interest and discharge their duties as his solicitors.

TRAPS THAT TRIP

The failure of lawyers to conduct title searches is one of the main causes of conveyancing claims.

In Firm A's case,

- ✗ *They failed to carry out a title search prior to execution of the SPA by G to ascertain whether the property which G intended to purchase was free of encumbrances, other than as disclosed by the vendor.*
- ✗ *Had they conducted the search prior to the signing of the SPA, the third party caveat would have been discovered, and Firm A would have been able to prevent G from paying the 10% deposit and signing the SPA.*
- ✗ *They failed to inform G immediately of the caveat entered on the title by a third party.*



Challenges are what make life interesting; overcoming them is what makes life meaningful.

Joshua J. Marine

TOOLS FOR THOUGHT

When conducting a title search, you should:

- ◆ Ensure that your Firm conducts searches at all important points of a conveyancing transaction, for example, prior to execution of SPA, prior to presentation of Transfer or Charge;
- ◆ Realise that various Registers/ Records need to be looked at for searches (Presentation Book, Caveat Book, Title, Prohibitory Orders)*;
- ◆ Ensure that the staff entrusted with the search job is trained and does not employ short cuts;
- ◆ Not assume, without reading the search, that it does not raise any issues for the client (therefore missing, for example, a judgment registered on title or a bylaw contravention notice);
- ◆ Read the search carefully and thoroughly (to avoid missing, for example, a “flag” such as a notation of “miscellaneous notes” that indicates a further search is required);
- ◆ Read the search and always keep clients informed of any developments in writing, you should not assume on behalf of the client that whatever is noted on title will not be an issue for him/ her;
- ◆ Not wait until the last minute to read the search and report to the client, leaving the client with insufficient time to deal with any issues that might arise. Delay on your part may limit your client's options.

Finally, firms should make it a policy to conduct a minimum of 2 searches:

- (i) At the inception/prior to signing of documents, and
 - (ii) Before presentation/completion of a transaction,
- regardless of whether the client has requested for it. It is your duty to protect the client.

* The practice of manual searches should be continued until and when the nationwide automation exercise by all Land Offices are completed.

IDENTIFICATION FACTOR

An important aspect in conveyancing is identification of the parties involved in a sale and purchase transaction.

We encounter many conveyancing claims in the Scheme involving impersonators and fraudsters. Some of these fraudsters have such elaborate plans in place that, with the help of various parties, unsuspecting lawyers can be easily be drawn into their plan.

Although such claims can be successfully defended, it may take years before a legal firm is freed from litigation, so it is better to try and avoid being drawn into litigation at all.



*Small opportunities
are often the beginning
of great enterprises.*

Demosthenes

TOOLS FOR THOUGHT

Do make sure that you:

- ◆ Obtain identification from parties involved in the transaction, whether you are acting for the Vendor or Purchaser;
- ◆ Insist on photo ID, for example, production of MyKad;
- ◆ Insist on an alternative photo ID (in addition to the initial photo ID provided), for example, driver's licence and/or credit cards;
- ◆ Keep a copy of the title documents, identification or photo ID in the client's file;
- ◆ Insist that each person produce a separate photo ID (if you're dealing with more than one client);
- ◆ Take copies of any agent or broker's IDs (if either an agent or broker is involved in the transaction). It is also prudent to meet with the broker in the presence of the Vendor and Purchaser;
- ◆ Insist on sighting the Title documents or a copy of it, whether you are acting for Vendor or Purchaser. It may also be prudent to request for utility bills as further proof;
- ◆ Conduct a title search prior to preparing the SPA, ensure the details of the Registered owner matches EXACTLY that in the ID given by the Vendor(s);
- ◆ As the lawyer in charge of the SPA, always insist on meeting with the parties personally, especially at the time of execution of SPA. As a lawyer your instincts to sniff out a scam/ problem/ note an anomaly may be better;
- ◆ Do not witness a signature if you were not present at the execution of the SPA/ documents;
- ◆ Advise your client, especially if you are acting for the Purchaser, not to sign the SPA if there are 'issues' with the title search. However, if he insists on proceeding, then advise the Purchaser clearly in writing of your advice. If necessary, ensure the deposit is held by a stakeholder pending clarification of the 'issues';
- ◆ Do NOT act for both the Vendor and the Purchaser;
- ◆ Verify the client's identity again at the point of execution of documents.

CONVEYANCING PRACTICE TIPS

DO	DON'T
<ul style="list-style-type: none"> ♦ Advise the Purchaser on the terms and conditions in the SPA, <i>including the preamble. Do not assume your client is familiar with the clauses.</i> For example, the existence of any encumbrances on the Property. ♦ Conduct a Land Search <u>prior</u> to the execution of the SPA. Advise the Purchaser <i>NOT</i> to pay a deposit to the Vendor until you are satisfied that the title is clear. Advise or notify clients immediately of the existence of any encumbrances or notices of land acquisitions, for example, Gazette Notification, Charge, caveats, restrictions in title etc. If there is a lapse of time between the Government Gazette and the actual registration of the notice with the relevant registering authority, the searches conducted will not reveal the acquisition. Therefore, apart from conducting a search in the Interim Register, the solicitors should also conduct a search or enquiry with the Collector of Land Revenue in the Land Office concerned which would have revealed the notice of land acquisition. ♦ Conduct a Search at the Official Assignee's/ Insolvency Office to ensure that the vendor is <u>not</u> a bankrupt. ♦ Lodge a Caveat preferably as soon as the SPA is executed and Purchaser pays the Vendor a deposit towards the SPA. Safeguard clients' interests on the property according to the terms and conditions in the SPA. Lodge a caveat on the property pending the presentation for the transfer of ownership. ♦ Check with City Hall or Municipality to ensure that there are no arrears of outgoings (assessment, rates, etc) and utility bills. Advise your clients to file the relevant change of ownership with the Municipality. ♦ Safeguard Original Titles Keep all original titles in a waterproof and fireproof safe. Maintain an inventory of all documents in that safe and have a signing off procedure in place for removal/ return of the titles. ♦ Acknowledge Receipt of Sensitive Documents When returning any important documents, for example, titles, to clients, the firm should obtain a written acknowledgement from the client that the document has been returned to them. ♦ Attend to Clients Personally Ensure that the Advocate and Solicitor in charge of the file personally meets the clients and is present at all critical junctures of the transaction, for example, the signing of the sale and purchase agreement. <u>DO NOT</u> leave these tasks to the firm's support staff. 	<ul style="list-style-type: none"> ♦ Act for Both Parties. Don't act as solicitor for both the Developer and Purchaser or Vendor and Purchaser in a SPA (Section 84 Legal Profession Act 1976; Rule 7 Solicitors' Remuneration Order 2005) ♦ Breach the Duty of Trust whilst holding the stakeholders sum on trust for and on behalf of the clients. ♦ Misplace or Fail to return the ORIGINAL title deed to clients that was previously given or entrusted for registration of charge on the property. ♦ Assume All Letters of Undertaking are the Same. Ensure the firm has a strict policy regarding undertakings, its best that only a Partner is allowed to give an Undertaking. ♦ Assume Your Clients are Aware of RPGT. Highlight it to them and confirm in writing if you are required to assist them in filing their RPGT. Most SPAs require the Firm to retain a portion of the sale price to pay RPGT that may be charged, do not give in to Vendor's pressure to release this fund to him/ her before obtaining the relevant clearance.

PII & RM DEPARTMENT 2006 CALENDAR

January 2006

- ✓ 19: Ethics Lecture: RM Session in Johor Bahru
- ✓ RMQ, December 2005

April 2006

- ✓ Audit of Open Claims Files: 2001 – 2005
- ✓ 13: Seminar: Risk Management for Practitioners
- ✓ 21: PII Committee Meeting
- ✓ RMQ, March 2006

July 2006

- ✓ 7: JCC Appreciation High Tea
- ✓ 20 & 27: PII Committee Meeting
- ✓ 26: Ethics Lecture: RM Session in KL
- ✓ 26: PII/ RM Briefing for Bar Secretariat
- ✓ RMQ, June 2006

October 2006

- 4: PII 2007 Roadshow @ Pahang Bar
- 5: PII 2007 Roadshow @ Kedah Bar
- 6: PII 2007 Roadshow @ Perak Bar
- 10 – 13: RM Practice Review 2006 (Johor Baru)
- 11: PII 2007 Roadshow @ KL Bar
- 13: PII 2007 Roadshow @ Selangor Bar
- 16 – 17: RM Practice Review 2006 (Penang)
- 30: Annual PII/ RM Survey 2006 ends
- RMQ, September 2006

February 2006

- ✓ 8: JLT/ PII Committee 3-Year Plan Workshop
- ✓ 15: Ethics Lecture: RM Session in KL
- ✓ 18: Ethics Lecture: RM Session in Penang
- ✓ 13 – 15 & 27: Joint Claims Committee (JCC) Hearing 2

May 2006

- ✓ Audit of Open Claims Files: 2001 – 2005
- ✓ 3: Ethics Lecture: RM Session in KL
- ✓ 19: PII Committee Meeting
- ✓ 30: JCC Hearing 4

August 2006

- ✓ 4 & 11: PII Committee Meeting
- ✓ 18 – 19: RM Practice Review 2006 (Penang)
- ✓ 22, 24 – 25: RM Practice Review 2006 (KL)
- ✓ 23: Ethics Lecture: RM Session in KL
- ✓ 28: RM Practice Review 2006 (Seremban)
- ✓ 29: RM Practice Review 2006 (Johor Baru)
- ✓ 30: RM Practice Review 2006 (KL)

November 2006

- 8: Ethics Lecture: RM Session in KL
- Seminar: Risk Management for Practitioners @ KL Bar
- Seminar: Risk Management for Practitioners @ Penang Bar
- PII 2007 Roadshow @ Negeri Sembilan Bar
- PII 2007 Roadshow @ Johor Bar
- Calendar: A to Z of Risk Management

March 2006

- ✓ Audit of Open Claims Files: 2001 – 2005
- ✓ 6: JCC Hearing 2(a)
- ✓ 17: JCC Hearing 3

June 2006

- ✓ 2: ISO 9001: 2000 Internal Audit for PII & RM Dept
- ✓ 16: PII Committee Meeting
- ✓ 15: Ethics Lecture: RM Session in Johor Bahru
- ✓ 21: Ethics Lecture: RM Session in KL

September 2006

- ✓ 1: Annual PII/ RM Survey 2006 Begins
- ✓ 6: RM Practice Review 2006 (Melaka)
- ✓ 7: PII 2007 Roadshow @ KL Bar
- ✓ 14: RM Strategy Development Meeting with JLT
- ✓ 20: Ethics Lecture: RM Session in KL
- ✓ 26: PII 2007 Roadshow @ Kelantan Bar
- ✓ 27: PII 2007 Roadshow @ Terengganu Bar
- ✓ 27: RM Practice Review 2006 (Seremban)
- ✓ 28: PII 2007 Roadshow @ Penang Bar
- ✓ 29: PII 2007 Roadshow @ Melaka Bar
- ✓ 29: RM Practice Review 2006 (Penang)
- ✓ 30: Ethics Lecture: RM Session in Penang

December 2006

- 13: Ethics Lecture: RM Session in KL
- Practice Area Checklists

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 10 of the Schedule of Insurance 2005].

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

* This would apply equally to your 2006 policy.

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 Acknowledgement 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 Acknowledgement 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

MALAYSIAN BAR

SCHEDULE ATTACHING TO AND FORMING PART OF THE MALAYSIAN BAR PROFESSIONAL INDEMNITY INSURANCE CERTIFICATE AS PART OF MASTER POLICY NO. 92-982-04-000553

1.	CERTIFICATE	:	2005/M/ABC/0000	
2.	INSURER	:	Oriental Capital Assurance Berhad (30686 K) Bangunan Oriental Capital No.36, Jalan Ampang 50450 Kuala Lumpur (and its successors or assigns)	
3.	NAMED INSURED	:	(As per Attachment 1 to this Schedule)	
4.	THE PRACTICE	:	ABC & CO.	
5.	ADDRESS	:	XXX	
6.	PERIOD OF INSURANCE	:	12 months from 01 January 2005 at 12.01 a.m. Malaysia Time	
7.	MANDATORY LIMIT OF INDEMNITY	:	RM XXX	each and every claim (subject to sub-limit in respect of defamation and dishonesty of partners)
8.	SUB-LIMIT IN RESPECT OF DEFAMATION	:	RM 250,000.00	in the aggregate
9.	SUB-LIMIT IN RESPECT OF DISHONESTY OF PARTNERS	:	RM 250,000.00	in the aggregate
10.	BASE EXCESS	:	RM ZZZ	each and every claim (subject to Clause 6.3 of the Certificate of Insurance)
11.	PREMIUM INCLUSIVE OF 5% SERVICE TAX	:	RM XXX	
12.	STAMP DUTY	:	Paid on the Master Policy	

SIGNED:

SIGNED

For: Oriental Capital Assurance Berhad
Mohd Khalid Hassan
Authorised Signatory

The insurance is subject to the terms of the Master Policy No.92-982-04-000553, which is available for inspection at the offices of the Malaysian Bar Council. The main provisions thereof are expressed in this Certificate.

SAMPLE LETTER OF ACKNOWLEDGMENT

ATTACHMENT B

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.
3. 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.
4. The contents of this acknowledgment have been explained to me/us and I/we fully understand the same.

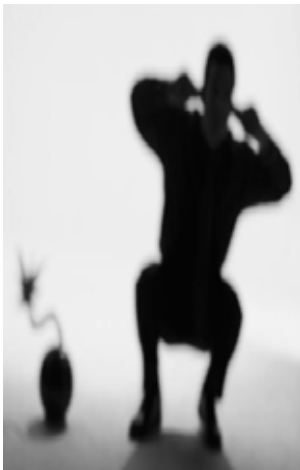
Dated

Name:

I/C:

Contingency Planning

This article was prepared by AFP Consulting's risk management team and first appeared in the Law Society Gazette, the weekly journal of the Law Society of England and Wales. It was then reprinted in "The Alexander Forbes Guide to Risk Management for Solicitors" booklet. Please note that we have adapted this article to be in line with the Malaysian legal profession.



Risk comes from not knowing what you are doing.

Warren Buffet

When the appalling floods hit much of Europe in August 2002, some law firms in Prague and Germany had to close for business. In light of this, how confident are you that your firm could continue to function should disaster strike?

Contingency plans are something that larger law firms, i.e. 20 partners plus, tend to automatically put in place, due to the nature of their business.

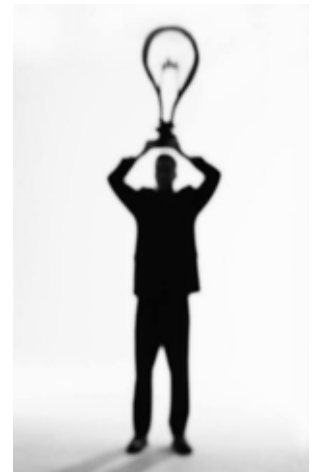
However, for smaller firms, contingency planning tends not to be at the top of their list of priorities. Understandably, most partners view the likelihood of fire or flood as minimal. Nevertheless, it is very important, and a necessary part of good risk management practice to have a "disaster recovery plan" in place.

Law firms need to make sure they have proper contingency plans in place. Below are some examples of how you should be protecting your firm against the threat of not being able to conduct your business.

- ◆ **Who's in Charge?** *Probably the most important part of contingency plan is having one person in your firm with the responsibility for letting all staff know what has happened, and what they should be doing. This person should have a list of telephone numbers of all staff kept outside the office.*
- ◆ **Files.** *Hard copies of all paper and electronic files should be kept in fireproof and waterproof cupboards and cabinets. When hit with an allegation of negligence, it will be of very little use to try the excuse that the files were damaged. Your files are always your main back-up when disputing an allegation of negligence, and failure to produce such files will most probably result in a claim.*
- ◆ **Computer Files.** *All computer systems should be properly backed-up so that if anything goes wrong with the computer, files will be current up to the previous day. For example, certain law firms have been sued for loss of documents following the World Trade Centre disaster.*
- ◆ **Offices.** *If the office is uninhabitable, you need to be able to have immediate use of an alternative location. Whether it be an archive office in another building, or even using another practice's offices or meeting rooms. A client will more than likely bring an action alleging negligence, if the completion date on a deal is delayed, regardless of the fact you had no office to work in.*

- ◆ **Supplies.** *It is important you also have access to headed paper, telephones, fax machines and computers. As we have said before, a client waiting for work to be completed is very unlikely to be satisfied with a “Sorry, we couldn’t get our hands on a fax machine to complete the deal in time” response.*
- ◆ **Office Insurance.** *Make sure your limits are adequate and that cover extends to include increased costs of working. Ensure protection is available to cover costs of restoration of documents.*

We cannot stress enough how important it is to have a disaster recovery plan in place, no matter how unlikely it might seem that disaster will strike your firm. A firm prepared for all eventualities will be looked upon far more favourably in the event of an allegation being made against it. It is up to the firm to prove it had not been negligent. If the relevant files have been destroyed for one reason or another, it will not instill confidence in the judge and you will more than likely end up paying out.



You better start swimming or sink like a stone, cause the times they are a-changing.

Bob Dylan

Brochure: Everyday Risk Management for Lawyers



Due to unforeseen circumstances, publication of “Everyday Risk Management for Lawyers” will be delayed. In its place, the PII & RM Department will be publishing a 2007 Calendar “A to Z of Risk Management” that will be sent to all members of the Bar by the end of the year.



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See us at:
www.myPII.com.my

Next edition

- **Risk Management Article**
Avoiding Claims from the
Unintended Client
- **PII/ RM Survey 2006 Results**
- **PII & RM Department:**
2007 Highlights

Disclaimer:

In compiling the information contained in this newsletter, the Malaysian Bar Council and JLT have used their best endeavours to ensure that the information is correct and current at the time of publication. We do not accept any responsibility for any error, omission or deficiency.

Material in the newsletter is intended to provide general information and should not be considered a substitute for the applicable PII Master Policy and Certificate of Insurance together with its Schedule. We strongly advise that you refer to the applicable Master Policy and Certificate for the full terms and conditions.

For more details and information, please contact PII & RM Department at 03 - 2031 3003

Footnote:

We are always looking at ways to improve this newsletter and work towards ensuring that any areas of interest which concerns Risk Management will be highlighted in this newsletter. We therefore welcome hearing from you on matters relating to this newsletter and the PII Scheme.



To exist is to change, to change is to mature, to mature is to go on creating oneself endlessly.

Henri Bergson

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