

PAPER 10

**BASELINE STUDY ON VENDOR'S DISCLOSURE
AND OWNER'S TITLE ASSURANCE
COMPENSATION LAW IN MALAYSIA**

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ABSTRACT

The concept of “caveat emptor” (let the buyer be aware) and bona fide purchaser for value are challenges faced by sub-sale residential landed property purchasers and original registered proprietor of real property in Malaysia. In considering the viability of introduction of vendor disclosure law, title insurance fund and title insurance in Malaysia, comparative study and interviews with stakeholders were also conducted. The research concludes that awareness of information disclosure should be highlighted and the jurisdiction of the tribunal should extend to include dispute on disclosure information in sub-sale property. The land registration process needs to be strengthened to avoid fraud in view of the complications and the challenges in the implementation of the title insurance fund and title insurance.

EXECUTIVE SUMMARY

1.0 RESEARCH PROBLEM

Fraud in real estate transactions is likely as old as real estate transactions themselves. Fraud comes in many forms such as forged in land title; forgery of signatures; fraudulent execution of the victim's signature on an instrument of mortgage and many others. Therefore, being a home or land buyer is a risky proposition. In Malaysia, the statistics from Royal Malaysian Police reveals that in 2006, there were 80 cases of land scams reported with losses amounting to RM 4,874,567.30 whereas in 2007, the data until October shows that 49 cases were reported with losses amounting to RM 10,402,559.00. More recently, according to the Office of the Federal Territories Director of Lands and Mines, from 2005 to May 2012, a total of 730 cases of land fraud and forgery were recorded with Sabah topping the list with 154 cases, followed by Selangor with 106 cases and Penang with 55 cases. More recently, as reported by Utusan Malaysia, in the first five months of 2016, PDRM received 151 reports involving land fraud with losses exceeding RM30 million. The number shows a sharp increase from 2015, which recorded 90 cases with losses amounting to RM20 million. According to the statistics, Selangor is the State where land fraud is most prevalent, with 43 victims followed by 33 victims in Johor. Land is a source of wealth and has continued to be a root of social, ethnic, cultural and religious conflict from time immemorial. Thus, as society evolved, an effective and comprehensive land system is needed in order to meet the changing needs of the world societies and prevent fraud in real estate transactions.

As regards to fraud and misrepresentation in house purchase, Malaysia generally follows the British "caveat emptor" (let the buyer be aware) principle—the parties involved in the transaction do not owe any duty to look after the interest of the other party to the transaction i.e. the buyer takes care of himself. The parties are deemed to be knowledgeable and able to take care of their respective interests. This stance was reflected in the case of *Richard Curtis & Co v Khatijah bte Abdul Majid* (2006) whereby the High Court held that following the doctrine of "caveat emptor", the purchaser was at fault for failing to inspect the size of the subject matter (land) of the contract. The doctrine of "caveat emptor" requires a buyer to be cautious and should take the precaution to protect

his interest. Despite the stringent application of “caveat emptor” doctrine, there is general lack of awareness on the part of the buyers to inspect any defect on the property or hire professional inspectors to conduct thorough inspection of the property before Sale and Purchase Agreement (SPA) is signed. Regarding the doctrine of “caveat emptor”, the development of common law in other countries for decades have imposed duties on sellers of real estate, particularly residential real estate such as homes, to disclose to the buyer any material facts known to the seller affecting the value or desirability of the real estate being sold. In jurisdictions like Australia and United States, duty of disclosure of the part of the vendor is provided in written statutes. This has not been done in Malaysia. As in other countries, Malaysians can subscribe to home insurance policies to protect themselves when they face occurrence like flood, lightning, burglary or theft, among others, but sadly, not many people are aware of the existence of such insurance policy and it is considered as a luxury for those who could not afford it.

On the lack of compensation towards the original proprietors whose land have been passed to *bona fide* purchaser for value, the concept of indefeasibility of title is provided under section 340 of the Malaysian National Land Code (hereinafter referred to as the NLC). Section 340(1) provides the general framework of indefeasibility whereby according to this section, the proprietor in whose favor registration has been effected will obtain an indefeasible title to or interest in the land. However, it must be read within the context of Section 340(2) of the Code, which provides that in the case of registration acquired by way of fraud, misrepresentation or forgery, the title shall not be indefeasible. As regards to fraud, section 340(2)(a) stipulates that the title or interest obtained to be defeasible where the proprietor or his agent is a party or privy to the fraud. Meanwhile, for forgery, section 340(2)(b) provides for the title or interest so acquired by the proprietor or transferee immediately to the forgery to be defeasible and liable to be set aside. This is so irrespective of whether the said proprietor or transferee acted in good faith in acquiring the title or interest. This is because there is no similar requirement, as in the case of fraud, that he must also be a party or privy to the forgery. In these circumstances, where the title or interest is subsequently transferred, section 340(3)(a) provides that the subsequent proprietor or transferee will similarly obtain a defeasible title or interest. Also under section 340(3)(b), any interest subsequently granted out of a title which is defeasible under section 340(2)(a) and (b) will attract the same

consequence. However, where the subsequent proprietor or transferee acts in good faith and gives valuable consideration for the title or interest in question, section 340(3) proviso confers protection on such a subsequent proprietor or transferee such that his title or interest will be indefeasible. In effect, section 340 provides for what is called the concept of deferred indefeasibility. In response to the weakness of the Torrens system that disadvantage the original owners when title have passed to innocent third party, title assurance compensation system was introduced in several jurisdictions such as Singapore, Canada and Australia. In Malaysia, title assurance fund has not been legislated to offer protection towards consumers against unscrupulous individuals. Besides, the electronic or computerized land administration systems in Malaysia have been battling with weaknesses such as security risks, issues concerning the software and manpower as well as hacking and incorrect records. This poses the risk for electronic fraud and forgery to flourish. Apart from that, title insurance is a rarity in Malaysia.

It is submitted that the shortfall of the legal protection and mechanism on vendor's disclosure and title assurance compensation has allowed the fraudsters to continue taking advantage of the lacunae in the current legal system for their personal gains.

2.0 OBJECTIVES OF RESEARCH

The study aims to:

- i. Examine the vendor's duty to disclose information regarding the condition of the sub-sale residential landed property (legal obligation to disclose, the form of the disclosure statement, time for disclosure, effect of failure to disclose as well as remedies and penalties available in the case of non-disclosure),
- ii. Analyse Section 340 of the National Land Code 1965 (hereinafter referred to as the NLC), the electronic land administration system; the mechanism of title assurance fund and title insurance as optional sources to compensate parties (original registered proprietor and bona fide purchaser) aggrieved by land administration system.

- iii. Identify the challenges in the introduction of vendor's duty to disclose in a sub-sale of residential landed property, title assurance fund and title insurance.
- iv. Analyse the viability of introduction of vendor disclosure law, title assurance fund and title insurance in Malaysia and the possible alternatives to reduce the weakness of the current legal regime.

3.0 METHODOLOGY

The research questions are addressed by employing an embedded case-study approach involving literature review, in-depth interviews, and focus group discussions. Section 340 of the NLC and decided cases on indefeasibility of title in Malaysia were analysed. In addition, the seller's disclosure obligation in Malaysia and selected jurisdictions, i.e. Singapore, the United States and Australia was analysed. A comparison of the key features of each relevant jurisdictions including the timing of disclosure, the form of disclosure, the content of the disclosure (what must be disclosed) and remedies available for failure to comply with the obligations was made. As for the title assurance compensation fund—funding of the fund, conditions for claim, assessment of compensation, limits of claim and limitation period — a comparative study with the laws in Singapore, Australia and Canada was made. A comparative analysis on title insurance and homeowner's insurance with relevant jurisdictions such as the United Kingdom, United States and Australia was also conducted. The comparative study is also important for bench-marking purpose. As regards to the safety and security of electronic land administration, reference to the systems in Singapore, Canada and New Zealand is made.

In-depth interviews and field visits were conducted in the northern (Perak), central (Selangor, Kuala Lumpur, Putrajaya), southern (Johore Bahru), eastern (Terengganu) regions and East Malaysia (Sabah and Sarawak). The in-depth interviews are made in order to seek feedback pertaining to the issue of vendor's duty of disclosure of information and title assurance title from stakeholders, including officers from land offices, real estate agents, surveyors, valuers, bankers, property vendors, representatives from consumer associations and commercial crime division of the police force pertaining

to their concerns, challenges and any difficulties experienced by stakeholders and to obtain comments about the guiding principles suggested in the research. This information was used to assess whether reform of the current law and policy is necessary.

4.0 MAJOR FINDINGS

4.2 Vendor Disclosure Law

Vendor disclosure law refers to statutory provision, which obligates the vendor/ seller of a real property to fill in disclosure statement and serve it to the prospective buyer prior to the signing of the contract. In United States and Australian jurisdictions, the law was introduced to remove the harshness created by the doctrine of “caveat emptor” which disadvantages the buyer when the seller conceals defect regarding the property, unless fraud or misrepresentation can be proven. Vendor disclosure law was also introduced to increase consumer protection in the sale of real property. In addition to the usual duty of the buyer to inspect the property, vendor disclosure law also compels the seller to be responsible.

In Malaysia, sub-sale of residential properties is often plagued with the issue of defect and poor condition of the property, which was not discovered prior to the closing of the sale and purchase agreement. Nonetheless, the buyer is left uncompensated because most of the contracts are on “as is” basis and the strict compliance of “caveat emptor” doctrine which tend to blame the purchaser for failing to inspect the property thoroughly.

Past studies have highlighted that consumers conduct limited pre-purchase information search including when buying for expensive goods such as house. The house is the most important durable goods in the household and requires high involvement as well as complex decision-making. Buying a house highly involves the consumer, as this decision binds their economic resources in the long run. It offers a rich variety of price and quality, are complex and relatively well known to consumers. In most cases, consumers consider several possibilities, compare them and ultimately make a selection. Prior information search and research is vital because buying a house involves a certain amount of

perceived risk, especially since it represents large financial obligations. There are various factors that house buyers consider before they make purchase. As for financial factor, the price of the house, the ability to obtain loan and payment term are important considerations. Besides, factors such as family life cycle and location are also vital. Apart from that, the condition of the property is also a vital element in determining house buyer's purchasing intention. Most consumers give special attention on the house features such as house design, building quality, interior and exterior designs, or finishing. Besides, living space such as the size of kitchen, bathroom, bedroom, living hall and other rooms available in the house are also considered as important aspect on the property conditions. Additionally, the environment of the housing area is important and comprises of several important factors such as the condition of the neighborhood, attractiveness of the area, quality of neighboring houses, type of neighboring houses, density of housing, wooded area or tree coverage, slope or topography of the land, attractive views, open space, vacant sites, traffic noise and pollution, security from crime, quality of schools etc.

The source of information related to the product purchase can be internal (memory) or external (environment). In both instances, information can be acquired by coincidental find and/or intentional search. The search is influenced by several factors divided into three categories: situational determinants, product determinants and consumer characteristics. For a complicated product such as a house, the information stemming solely from a seller is generally inadequate. There is a widespread concern not only about the quality of construction of many of houses and apartments, but also about the exposure to prohibitively expensive repairs of those who have had the misfortune to become the owners of houses or apartments that are fundamentally defective. Therefore, it is important for the prospective buyer to conduct thorough search and inspection before the signing of the sale and purchase agreement (SPA). Unfortunately, consumers generally have a very limited knowledge about houses and the buying process. For instance, in a survey conducted by Ratchatakulpat, Miller and Marchant (2009) towards 376 property buyers in Queensland, Australia, it was found that construction quality and house conditions are ranked last as factors that influence residential real estate purchase decisions. The most important factor considered by the respondents is maintenance and interior design (mean 5.750), followed by borrowing and affordability (mean 5.706) and good area or neighbourhood (mean 5.702). Affluence and quality only scores mean of

4.666 while features score the mean of 4.241. A study by Razak et al. (2013) towards 30 property buyers in Setia Alam, Selangor Malaysia, found that pricing is the most important factor for house purchase. According to the survey result, majority of the respondents strongly agree that the price of the property is an important factor to be considered before making decision to buy a property, which the score is 53.3% or 16 respondents. Then, 6.7% from the total respondents are neutral about the statement, 40.0% or 12 respondents agree that the price of the property is an important factor to be considered before making decision to buy a property. It means that most of the respondents feel that before making decision to purchase, they will look for property with the most competitive and reasonable price. As regards to the structural soundness of the property, only 33% of the respondents strongly agree that it is an important factor, 53.3% agree with the statement, 10.0% of the respondents are neutral while 3.3% disagree with the statement. This indicates that structural soundness and built quality is a secondary factor less important than pricing, which is a paramount consideration of house purchase in the eyes of purchasers.

Buyers usually seek the help of real estate agents in the search for a house and some buyers rely heavily on their agent in selecting a home. Agents and buyers also rely heavily on the seller and seller's agent in responding to inquiries regarding the condition of the house. In the purchase of a sub-sale residential house, the transaction is impacted by the doctrine of "caveat emptor", placing a burden on buyers to fend for themselves in discovering defects. The idea is that buyers take responsibility for the condition of the items they purchase, and should examine them before purchase. The law tends to favour sellers. This law has been explained by Yusof Mohamed J in *Wei Tah Construction Co. Sb. v Law Wun Ing* (1981) 2 MLJ 159. When dismissing the plaintiff's claim to avoid a contract on the grounds of mistake or non-disclosure of material facts i.e. patent defects of quality, the High Court observed that patent defects are discoverable by inspection and ordinary vigilance on the part of the purchaser. The rule under "caveat emptor" emphasises that a purchaser should make inspection and inquiry as to the condition of the sub-sale residential house, which he is proposing to buy. The judge stressed that if he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition; and, although as a general rule a vendor must deliver

property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection. It is very obvious in the present case that the plaintiff had chosen not to inspect the land before executing the transfer with the 1st defendant in view of his other considerations in making a quick profit and in this regard he cannot now complain on discovering the defects after his venture has failed.

Similarly, in *Karupannan a/l Chellapan v Chong Lee Chin* [2000] MLJU 438, Abdul Hamid Embong J held that the proposition in law is that there is no fiduciary relationship between a vendor and purchaser. Thus, an uncommunicative or taciturn vendor cannot be faulted if he failed to disclose any patent defect such as the window protrusions found in the instant case. As discussed earlier, the judge held that the purchaser (plaintiff) knew that the said building stood next to an empty lot. As a local he must have foreseen that there would be future development in Brincang and the likelihood that the adjacent empty lot would also be developed. He could easily have his solicitor to enquire from the local authority on the future plan of the adjacent vacant lot, but failed to do so. He however chose not to enquire about the window protrusions, which to the discerning purchaser would show that they had trespassed into the adjacent land. The maxim “caveat emptor” requires that the buyer be cautious, as the risk is his and not that of the seller.

The above cases not only depict the stringent application of “caveat emptor” doctrine in Malaysian courts but also portray that despite the importance of conducting inspection of the property, time and time again, purchasers failed to do so to protect themselves. This proves that there is general lack of awareness on the part of the purchasers on the impact of the doctrine of “caveat emptor” and the negative effect of not conducting a proper inspection.

The above reflects that despite house condition being a vital factor for consumers, there are also other fundamental factors such as pricing, availability of loan facility and repayment term. In Malaysia, it can be said that the general awareness on the right of house buyers is quite high as regards to house buyers’ claims for interest as result of late delivery of the property by the developers. This is based on the official statistics from the Tribunal for Homebuyers’ Claim, up until September 2014, 37,635 cases have been filed,

out of which, 37,388 have been resolved. These figures reveal an impressive 99% resolution. In 2016 only, 1,416 cases were registered with the Tribunal and 1,167 cases were solved within that year. Although the statistics is on the issue of house buyers' claim of interest as a result of late delivery of the property by developers, however, it shows the readiness of the house buyers to claim for their rights in a rightful forum.

On the sufficiency of the information available through title search in Malaysia, when compared to Hong Kong, Singapore, Victoria, Ontario and the United States, available information upon title search in Malaysia is rather inadequate. While some other countries require unpaid taxes, notice of intention to acquire the land and notice of unauthorized building work to be registered in the land title, Malaysia's land law regime does not require so. In comparison with other selected jurisdictions as discussed earlier, the information regime in the United States provides the most comprehensive information. Although other jurisdictions unveil more information upon title search, it is argued that vendor disclosure information law appears to be necessary because title search alone does not provide details as to the conditions of the property, the building or property layout plan, built materials, architectural and engineering details of the property etc. It is suggested that the title search in Malaysia should include more information regarding the residential house.

In the absence of disclosure laws in Malaysia, currently there is only the valuers' report upon the purchasers' application for a bank loan and this research analyses whether such report could give a clear picture on the actual condition of the sub-sale property. It should be noted however, such valuation upon application of bank loan is only made after the sale and purchase agreement is being made, whereby the valuation report is made after the purchaser had made up his mind in purchasing the property and is bound by the agreement. Nevertheless, it should also be noted that such a report may not be secured by a purchaser who does not use the bank loan service, where in majority cases such service is not obtained by purchasers. On the adequacy of the information unveiled through valuers' valuation report in an application for bank loan, where the cost of the report is already being paid by the purchaser, it can be said that some information is indeed provided in the report. That includes land size and dimension; specific location or position of lot (end, intermediate and comer lot); street name; location of the housing

estate; mukim; district; and state. The textual data needed include type of building, number of bedroom and bathroom; type of construction and building finishes; and building age and state of repairs. However, as compared to the home surveyors whose inspection report provides the buyer the information regarding the condition of the property and its systems in greater detail, valuation report is focused on the market price of the property. In Malaysia, a typical valuation report would provide the photos of the main entrance of the subject property, the view of the subject block, the living room, bedroom(s), kitchen and bathroom(s). As for the valuation summary section, it contains of the information of the bank client, the loan applicant, the purpose of valuation which is financing, the subject of the valuation, the address, type of property, tenure of the property, market value, floor area and date of valuation. As regards to the conditions of the property, typically a valuation report will describe the built materials for the accommodation i.e. bedrooms, living halls, kitchen, bathrooms, ceiling etc. Besides, the report also states the essential public utilities connection with the property. Nowhere that the report discloses technical issues on the structures or latent defects that are not visible through visual inspection. This is because the role of a valuer is to estimate the value of the property rather than inspecting the structural conditions and technical issues.

Hence, this study concludes that while valuation report reveals some information on built materials of the property, the availability of water and electrical system and photos of the accommodations, like the buyer, a valuer too has no means to discover defects as he also relies on his bare eyes to conduct the inspection. It can be concluded that valuation report only supplies limited information as to the true conditions of the property, hence it is not a feasible alternative to vendor disclosure law. Though a building surveyor's service can be obtained, it would add on to the cost of the sale and purchase transaction.

On whether home insurance policy can be an alternative to remedy the purchasers' disappointment over the sub-sale residential house as a result of non-vendor disclosure law, despite its importance, its pricing and restrictive availability especially in disaster-prone areas is a prohibitive factor, which hinders people from subscribing it. Besides, issues such as exclusions from coverage for wear and tear, deterioration, inherent vice, latent defect, and mechanical breakdown, homeowner's insurance coverage disputes and

broad exclusions also contradict with the notion of consumer protection and empowerment.

In foreign jurisdictions like the United States and Australia, vendor disclosure creates a balance between consumer protection of the seller and impose responsibility on the seller as not to mislead and lie to the buyer. Nonetheless, the Malaysian policy makers should consider the adverse effects of vendor disclosure law such as the difficulty to distinguish a patent from latent defect, the status of vendor disclosure statement as warranty, the complexity of vendor disclosure statement that could not be easily understood by laymen, cost burden on the seller to hire home inspector or to obtain information from various government agencies for the purpose of complying with the disclosure duty, difficulty in determining the actual knowledge of the seller of the defect and the problem of defect on off-site conditions. Knowledge on the negative effects of vendor disclosure law, as suffered by other jurisdictions, should always be considered in creating a workable framework of vendor disclosure law in Malaysia.

The interviews conducted by the researchers with the Association of Valuers, Property Managers, Estate Agents and Property Consultants in the Private Sector Malaysia (PEPS) and consumer associations indicate firstly, that vendor disclosure law should be encouraged, as it would be helpful in assisting valuers, in coming up with a more accurate value during valuation of the property. It would make their job easier. Secondly, in terms of practicality, it would be difficult if vendor disclosure law were to include too detailed items where a vendor should disclose. It is suggested that items of disclosure should be limited to items, which are more objective in nature (one which can be ascertained objectively) as opposed to subjective items (one which differs from one person to another based on perceptions). Thirdly, it would not be an easy task as both the industry players and the public would need to be educated as in practice, majority purchasers are not keen in securing information as to the condition of the property intended to be purchased, unlike in foreign jurisdictions. As regards to damages claims, as result of a breach of vendor's duty to disclose, the association voiced their concern as to the challenge in determining the value of damages as it would not be easy to determine the value.

This study suggests at the very least, if vendor disclosure law is not made mandatory in Malaysia, awareness of the purchasers (on the importance to check for defects) and vendors (not to mislead or fraudulently make untrue statements) must be established during the negotiation process in a sale and purchase of a sub-sale residential house. At the very least, even though there is absence of mandatory law to oblige the vendor to disclose the condition of the intended sub-sale residential house, intended purchasers would be alerted on the items that are relevant to be asked to the vendor, estate agents and also areas which are to be inspected. This is to a certain extent to reduce the negative implication of the existing “caveat emptor” concept that is being applied in Malaysia.

It is highly recommended that lawyers and estate agents should incorporate a checklist on the condition of the property, which should be taken note by both the vendors and purchasers upon the negotiation of the sale and purchase of the sub-sale residential house. Hence, such an initiative would be materialize if the Bar Council and the Association of Valuers, Property Managers, Estate Agents and Property Consultants in the Private Sector Malaysia (PEPS) play an important role to educate and emphasis its importance to their members.

Alternatively, in the event where some kind of vendor disclosure statement is made mandatory, it is viewed that due to the less stringent procedures and friendly nature of the alternative dispute resolution, a tribunal concept could be an option of forum to hear disputes pertaining to disputes on disclosure information or statements made by vendor. Based on observation of the dispute resolution in selected jurisdictions pertaining to vendor disclosure, in many jurisdictions, adversarial system of filing a civil suit against the vendor who fails in his duty to provide full and frank disclosure is in place. For instance, section 765.55 of the Illinois Residential Real Property Act 1994 provides that if the seller fails or refuses to provide the disclosure document prior to the conveyance of the residential real property, the buyer shall have the right to terminate the contract. A person who knowingly violates or fails to perform any duty prescribed by any provision of this Act or who discloses any information on the Residential Real Property Disclosure Report that he knows to be false shall be liable in the amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party. This indicates that court is the avenue to reach legal solution in vendor disclosure breach.

Similarly, in California, once possession occurs, the purchaser must bring the vendor to court if problem is discovered later on the property. In Canada, various judgments indicate that the court is the proper forum to resolve dispute involving vendor disclosure in Canada. However, it should be noted that issue of complexity in determining among others, the knowledge of the vendor and amount of damages which has been explained earlier, alternative dispute mechanism could be a viable option to reduce the tension in addressing these issues and to facilitate the application of such law on vendor disclosure information (if such law is to be introduced).

By contrast, ADR mechanism is available in Australia. In Australian Capital Territory, the Australian Capital Territory's Civil and Administrative Tribunal Act 2008 empowers the Tribunal to hear and determine civil dispute where the amount of claim is not more than \$25,000 [section 18 of the Civil and Administrative Tribunal Act 2008].

The scope of vendor disclosure law comes under damages application as section 19 of the Australian Capital Territory's Civil Law (Sale of Residential Property) Act 2003 stipulates that the person who prepared the statement or report is liable to compensate the buyer for the loss or expense, if the statement or report is false or misleading in a material particular or is otherwise prepared without the exercise of reasonable skill and care. Meanwhile, in Tasmania, Division 4 of the Property Agents and Land Transactions Act 2005 establishes a Tribunal to hear complaint on matters provided under the Act. Vendor disclosure law is one of matters covered by the Act under Division 2 - Disclosure of information by vendors of land.

In realization of case backlogs, delays and financial burden in litigation process in Malaysian courts, this study suggests that settlement through courts may not be a proper and effective forum with regard to vendor disclosure dispute. It is further suggested that alternative dispute resolution (ADR) mechanism through Tribunal should be adopted in Malaysia to resolve buyer and seller dispute on vendor disclosure in timely and non-expensive manner. However, it must be noted that the Tribunal for Homebuyers Claims does not have jurisdiction to hear and determine case for sub-sale of properties. Section 16N(2) of the Housing Development (Control and Licensing) Act 1966 provides the jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action

arising from the sale and purchase agreement entered into between the homebuyer and the housing developer. Unfortunately, the Tribunal for Consumer Claims also has no jurisdiction to hear dispute in the nature of vendor disclosure. Section 99 (1)(b) of the Consumer Protection Act 1999 clearly stipulates that the Tribunal has no jurisdiction to hear dispute concerning title to any land, or any estate or interest in land. Sub-sale of house is definitely within the scope of limitation placed under section 99(1)(b).

Hence, an exception for the existing tribunal to hear cases on vendor disclosure law (if such law is introduced in Malaysia) could be an option, or alternatively the scope of the existing jurisdiction of the Tribunal for Homebuyers Claims should be expanded to include cases on sub-sale property in particular, dispute on vendor disclosure information. The researchers propose that in any event, the purchaser should be given the opportunity to at least appear in the existing tribunal (either Tribunal for Consumer Claims or Tribunal for Homebuyers Claims) pertaining to disputes concerning misrepresentation or fraudulent statement made by vendor which led him to buy the sub-sale property.

4.2 Security of Title Registration, Title Assurance Fund and Title Insurance

Foreign jurisdictions often specified title assurance fund as last resort by law (South Australia, Western Australia, Tasmania and the Australian Capital Territory); and acknowledge the complications and limitations of title assurance fund. The foreign jurisdictions tend to restrict rather than to extend right to indemnity, by introducing or extending fault-based exclusions. Foreign governments have become increasingly unwillingly to indemnify for losses caused wholly or partly by fraud or negligence of agents and professionals acting for claimant, or by claimant's own want of care. In most cases, claimants must first exhaust their remedies against the person who was responsible for the loss or who has benefited by the error before claiming from the fund. The provisions creating remedies against third parties are so complex that in some cases claimants have had difficulty identifying the right person to sue, and the right remedy to pursue. The requirement to file civil suit against other defendants, even where the chances of obtaining and enforcing a judgment are remote, delays eventual recovery from

the fund and inflates the loss. The limitation period for bringing an action against the fund can expire while claimants vainly pursue litigation against 'the person primarily responsible'. The costs incurred in obtaining a judgment and attempting to execute it against a 'wrongdoer', are generally not recoverable from the fund.

Acknowledging the above constraints and limitations of title assurance fund, therefore, it is recommended that the elimination of fraud attempt should be addressed at the primary stage and to be made the focus in the land administration system. After due discussion with the officers at the Land and Mines Office in the selected states and comparative study with the foreign jurisdictions; it is clear that tightening the system of registration of title could be the most viable option to eliminate fraud. Among others, the security of the land registration and administration system should be tighten as applied in other foreign jurisdictions.

As regards to forgery of signature in authorization form, fraud by forgery of signature on the authorisation form may occur in situations where (1) the fraudulent person is provided with the authorisation form for the purpose of procuring execution by the victim. This provides the fraudulent person the opportunity to forge the victim's signature and the signature of the purported witness on the authorisation form; or (2) the witness to the signature on the authorisation form purports to witness the signature even though it was not signed in his/her presence. In this type of fraud, it will be primarily the responsibility of the subscriber obtaining client authorisation to ensure that proper client authorisation has been obtained. It is suggested that subscribers to adopt best practice guidelines dealing with obtaining client authorisation in non- face-to-face transactions and attestation procedures.

In relation to fraud by solicitor, in situations where the solicitor is an employee of a law firm who is a subscriber of the system, two measures that may be adopted by the subscriber to prevent fraud are to implement rigorous pre-employment screening techniques as well as to engage in regular monitoring of personnel. The first measure may assist in weeding out potential employees who may engage in fraudulent conduct. The second may assist in detecting fraudulent activity. The effectiveness of these measures will be dependent upon the vigilance of the subscriber in its implementation of its pre-

employment screening techniques and monitoring of employees' behaviour. Obviously these measures will not be useful in situations where the solicitor is a sole practitioner. Perhaps one way of preventing this type of fraud is for the system to implement a type of security mechanism that can act as a check on the solicitor so that the solicitor would not be able to proceed with a transaction under the system unless he/she satisfies that security check. For example, requiring all potential clients to obtain a client ID from the system and requiring the solicitor to input the client ID before the solicitor can begin a transaction.

It may also be possible to utilise technology to detect the fraud. For example, the authority could run regular audit trails to pick up unusual activities, such as single property transactions with a high turn around period or transactions where solicitors apply for loans on behalf of their clients. Since access to the system is restricted to authorised users who must use a user ID and password to use it and since certifiers must use a digital signature certificate to digitally sign instruments before they can be lodged, it should be possible to trace the fraudulent activity that is detected by the audit trails back to the fraudulent person. This way, future fraudulent activity may be prevented. The effectiveness of such a measure in detecting fraud will be dependent on the technological capabilities of the system and the audit practices of the organisation charged with detecting anomalies in the audit trails.

Meanwhile, pertaining to identity fraud, the lack of proper verification of identity of the party purporting to deal with the land is a contributing factor to the occurrence of identity fraud. Hence one measure that may be adopted to prevent identity fraud is a requirement that identity of the party purporting to deal with the land must be verified before the transaction can proceed. Such a measure was adopted in Queensland in the recent amendments to the Land Title Act 1994 (Queensland) 61. Under section 11A of the Land Title Act 1994 (Queensland) the mortgagee will have to take reasonable steps to ensure that they are dealing with the true owner of the land. Similar obligations are placed on a transferee of a registered mortgage (section 11B). Indefeasibility will not be available unless the mortgagee has taken "reasonable steps" to identify the person(s) who sign the mortgage. The verification procedures that can be adopted are sighting of the originals of certain prescribed identity documents; checking the information presented on those

documents with the relevant issuing authorities; completing a prescribed record of the documents sighted and information checked; and having the record signed by the client and the subscriber.

Unauthorised use of a certifier's digital signature certificate is another security risk that needs to be resolved. Two issues need to be considered here - first safekeeping of the digital signature certificate so as to prevent fraudulent parties from gaining access to the digital signature certificate and secondly, generating a strong enough password so that even if the fraudulent person manages to gain access to the digital signature certificate, he/she would not be able to use it because he/she lacks the password necessary to activate the digital signature certificate.

In terms of storage mechanisms for the digital signature certificate, several options are available. The simplest and most convenient option may be to store the digital signature certificate on the solicitor's hard drive. Other options include storing the digital signature certificate on a Universal Serial Bus (USB) device or a smart card. Unlike storing the digital signature certificate on the hard drive of a computer, storing the digital signature certificate on a USB drive or a smart card allows the solicitor to remove the digital signature certificate when it is not in use. The USB drive or smart card may also be stored in a secure storage, such as an office safe. However, the solicitor may lose or misplace a USB drive or smart card easier than a desktop computer. Furthermore, a fraudulent person may have greater mobility with a digital signature certificate stored on a USB drive or smart card that it could be used from other terminals.

In any event, as the possibility exists that a fraudulent party may gain access to the digital signature certificate, regardless of the storage mechanisms used, whether through theft or through the solicitor's carelessness, the password used to activate the digital signature certificate is of crucial importance. In this regard, the password chosen should be a strong, that is, a hard-to-guess password, not something that is easy for the fraudulent party to guess or crack.

Besides, it is also important to educate the certifiers on the importance of secure storage of the digital signature certificate; using strong passwords; and not sharing digital

signature certificates with other users, which may also assist in preventing this type of fraud. However it would still be the responsibility of the certifier to adopt secure storage practices and usage of strong passwords.

In addition to that, imposing duties and obligations on the solicitors to safeguard the digital signature certificate may be another method in ensuring the security of the digital signature certificate. For example, in the electronic system in New Zealand, in accordance with Rule 3.04 of the Rules of Professional Conduct for Barristers and Solicitors, a lawyer must ensure that the password for his/her digital certificate is not disclosed to anyone. The password must not be written down and must not be shared with anyone, including partners in the firm. The lawyer is also personally responsible for all instruments that are registered that have that lawyer's digital certificate. Furthermore, under the Landonline Digital Certificate User Obligations, the subscriber must protect his/her private key from any compromise and take all necessary precaution to prevent the loss of the key pair, modification, disclosure or unauthorised use of the private key. The subscriber must inform Land Information New Zealand (LINZ) immediately if he/she suspects or knows of the loss, disclosure or other compromise of his/her digital certificate.

Apart from that, encryption is another underlying technology to be used in land administration to ensure confidentiality and integrity of information. Information stored and transmitted over the network, wired or wireless, need to be encrypted to prevent unauthorized access and eventual fraudulent use of the information. The strength of encryption is determined by several factors, in which two of the main factors are the types of algorithm or cipher used, and the key length used during the encryption process.

Proposed framework for policy direction in ELAS concerning security strategies:

- i. To develop and provide a mechanism that protects the system from fraud, preserves confidentiality, accountability and integrity, and at the same time makes information available for business continuity through security policy and strategies.

- ii. To develop effective information security policy and strategies by taking into consideration the following factors:
 - a. Formal governance,
 - b. Information classification,
 - c. Access control,
 - d. Communication and operations,
 - e. Physical security,
 - f. Personnel security,
 - g. Information system acquisition, development and maintenance,
 - h. Information security incident management, and
 - i. Business continuity management

- iii. To establish a working committee that governs and establishes strategies, policies and procedures for the protection of the Critical Infrastructures and land information.

- iv. To formalize information security governance led by top management.

- v. To conduct periodic security audit and risk assessment of existing as well as newly developed system such as eLASIS or e-Tanah, for threats, vulnerabilities and impact associated to the risk on the asset.

- vi. To identify the factors that may results in ELAS risk and vulnerability such as types of fraud, malicious attacks etc. and formulate specific policies, strategies and technical resolutions in minimizing them.

- vii. To provide adequate tools for assessment and evaluation of risks and potential threats to the networks and databases.

- viii. To provide adequate tools for authentication and identification of users through Digital signature, digital authentication and PKI.

- ix. To use encryption technology when storing and transmitting information over the network to prevent unauthorized access and ensure confidentiality and integrity of information.
- x. To use effective IT solutions in safeguarding against technical penetration to the network and databases such as biometric identification devices, a good encryption techniques in managing user id and password, and a Public Key Infrastructure (PKI).
- xi. To implement trust management policy and strategy on IT personnel who have direct access to databases. For instance, to certify or gazette IT personnel who can gain access to the databases through the backdoor channel similar to the role of a registrar.
- xii. To provide guidelines and requirement specifications on information security made available for any online system in order to qualify the system as a secure system under security certification and for the system to be gazetted as secured and safe to use.
- xiii. To provide training and awareness programme on the importance of security management.

Although computerized land administration system can reduce paper-based frauds and forgery, fraud can still occur through electronic means. As mentioned above, e-Tanah system was hacked and exploited by unscrupulous parties causing losses amounting to million ringgits. Although various safety measures can be taken to overcome electronic fraud (per proposed framework listed above), it is submitted that it is still appropriate to introduce title assurance compensation fund. This is because fraud is not completely eliminated with ELAS. Instead, fraud occurs in different forms in the electronic environment. Therefore, it is important that parties who lost their interests on land due to weakness/ drawback of the electronic system to be sufficiently compensated by the title assurance fund.

According to the information obtained from the Land and Mines Office of Sarawak, issuance of circular and policies on LASIS, use of standard prescribed forms and standard work process are vital in preventing fraud in the system. With regard to the security door access system of the server room in the Land and Mines Office of Sarawak, it is secured and access is limited. On-site and off-site backup are also available and title folios are equipped with security features to prevent forgery. Mirror image of the office register and owner's copy is also ensured. Besides, users of the system are given auto expiry password to control access to the system and prevent unauthorized access. To create awareness and detect abuse of the system, audit is conducted from time to time. Another measure to prevent fraud is to involve multiple officers with specific limited roles in electronic registration of land. For instance, the clerk is tasked to receive application, make data entry, instrument allocation and endorsement as well as print menu of title folio. Then, a checker is responsible to make data verification and check verification reports and endorsement text for errors. After that, the application is forwarded to the Registrar who has the duty to update the case status and register the dealing. It will then be brought to the operation manager for system validation. If there is any error, the system will notify the Registrar of the error, and the Registrar must report using Fault Report Form for trouble shooting by Operation Manager to correct the error. Such stringent processes could be a viable step to be adopted in the Peninsular Malaysia. Meanwhile in Sabah, Land Dealing Electronic Submission System (LaDess) provides online digital submission land dealing system. Among the features of the system to ensure security of land dealing and to prevent fraud are such as legal firms are required to prepare and print land dealing application forms, online land dealing status enquiry, SMS notification to customers on completed transactions, online print out of memo slip, online search on land owners' names and shares as well as registration of land clerks. Besides, LaDess is safe to use because it has a high level of security, in compliance with international standards and safe from hacking. Although there were attempts to by law firms to hack into the system and modify the information, it cannot be modified because the original document is still in the possession of the department.

As recommended by the Land and Mines Office of Sarawak, physical appearance of the registered proprietor at the Land and Mines Office can be an important innovation in the land registration system whereby fraud can be identified or traced at the initial stage. As

such the idea of title assurance fund need not arise, in view of the complications listed above. In addition, the complicated federalism system in Malaysia, led to the difficulty in addressing the methodology behind the creation of the title insurance fund, financial collection for the fund, co-operation, organisation and management of the fund. Hence, it is submitted that the stringent process of registration at the and Land and Mines Offices in addition to the criteria of compulsory attendance of registered proprietors personally during the submission of the original issue document of title and the relevant instrument of dealing is crucial. It would address and eliminate the conflict between the protection of a third party (bona fide purchaser for value) and the registered proprietor (victim) due to fraud as per section 340 of the NLC discussed earlier, as the issue of fraud would not arise in the first place.

As regards to the proposal that a title insurance could be an option to indemnify against loss or damage arising out of defects in or upon the title to real property, the researchers conclude that while the title insurance could serve that purpose, it appears to be unsuitable mechanism in Malaysia at this juncture. The low popularity, rate of subscription and general awareness of general insurance among Malaysians indicate the high possibility of low acceptance of title insurance, if it were to be introduced in Malaysia. The Malaysian land system should focus on improving the security, safety and reliability of the land registration and administration system to prevent fraud, forgery and other security risks from occurring as discussed above. Compulsion on land owners to take up title insurance indicate non-confidence, insecurity and unreliability of the land administration system and gives negative perception on the investors and the people with regard to the government's ability to provide a safe and secure land management system. Title insurance would increase the cost of land transactions in Malaysia.

5.0 SIGNIFICANCE OF THE PROJECT

The experience of other countries in incorporating vendor's disclosure law and state assurance compensation fund into their legal framework: their victories and pitfalls can provide a valuable lesson for Malaysia to mould a successful and effective consumer protection measure in real estate transactions. This research would assist in providing a

fair and equitable balance to protect the legitimate interests of the purchasers and proprietors who are exposed to the risk of losses following the inadequacy of the current legal system and those who exploit the law for their personal enrichment.