

## **Land Scams Involving the Power of Attorney in Land Dealings in Malaysia**

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### **ABSTRACT**

The Power of Attorney (PA) is a legal instrument or document that is created by the landowner (the Donor) in favour of the recipient of the PA (the Donee) as the Donor's attorney in land transactions. The recent statistics for 2009 – 2013 issued by the Commercial Crime Investigation Department (CCID), Royal Malaysia Police (RMP) indicate that the misuse of PA in land transactions is the most common *modus operandi* used in land scam incidents. A huge increase in land scam cases using the PA is very alarming primarily because such incidents could potentially compromise the security and legal ownership of registered lands. Thus, this paper attempts to analyse land scams involving the PA and to make some recommendations or suggestions that could prevent the occurrence of these cases in the future. The study will also scrutinise the provisions of the Power of Attorney Act 1949 in order to determine whether such a statute could provide some solution to this problem. The paper is largely based on socio-legal study that adopts a qualitative approach. It also involves semi-structured interviews with the Registrar, Land Administrator as well as officers at land offices in addition to literature review and content analysis. The study concludes that fraudsters employ several methods in land scam incidents using the PA. It is further observed that the Power of Attorney Act 1949 is currently very much deficient in handling or tackling such a crime in the country.

*Keywords:* Land Scam, Fraud, the Power of Attorney, the Power of Attorney Act 1949, Proposed Solution

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### **INTRODUCTION**

Land scam is hardly a novel issue in the land administration system in Malaysia. Statistics from the Commercial Crime Investigation Department of the Royal

Malaysia Police showed a total of 832 cases of fraudulent land transactions between 2005 and December 2013. This startling figure on land scams has triggered uneasiness among registered proprietors since the ownership of their precious lands may easily change hands without notice. Studies have demonstrated that the preponderant causes of such incidents are largely related to the owners' weakness, selfishness and greed. Additionally, the endless increase in land prices as well as the prevailing maladministration at land offices across the country are contributory factors to this predicament. (Othman, 2008; Shaari, 2009; Ismail, 2009; Ismail, 2011; Wu & Chung, 2011; Harun, Hassim & Hamid, 2013).

Land scams involving the use of the Power of Attorney (PA) in particular, have been found to be profoundly worrying because such incidents are likely to have a detrimental impact on the reputation and standing of the Malaysian judiciary. This is mainly due to the fact that any PA ought to be registered with the High Court first before it could be registered at land office to become valid and enforceable. The current standard operating procedure at almost all of the land offices throughout the country is that the officers in charge will simply accept any PA submitted to them so long as such document bears the signatures of the landowner (the donor) and the recipient of the PA (the donee), is noticeably witnessed by a Commissioner for Oaths or qualified lawyers and has been duly registered at the High Court. The validity of such PA will

not be queried or disputed by land officers when there appears to be an official seal of the High Court affixed to it (Othman, 2008; Ismail, 2011). This indicates that officers at land offices are neither properly nor adequately trained to detect defects on any instruments submitted to them as they will merely register transactions in land that are accompanied with PA without examining or even questioning the legality of the PA. In relation to this, it is submitted that land scams involving the use of PA in the country should be seriously dealt with and tackled before this problem becomes more serious in the future.

## RESEARCH METHODOLOGY

This is a socio-legal study that adopts a qualitative approach. Data was collected through semi-structured interviews with the Registrar of Titles, Land Administrators as well as land officers in certain states, which recorded a significant increase in fraudulent land cases based on recent police statistics. The study then seeks to analyse and identify the pervasive methods of land scam involving the PA in the country. It is pertinent to highlight that the study is largely based on doctrinal research methodology as it is primarily concerned with critical analysis of the existing rules and procedures that are likely to govern the use of the PA in Malaysia. As such, the paper will critically examine relevant provisions of the Power of the Attorney Act 1949, decided cases as well as the secondary sources that include text books, scholarly articles from refereed journals and seminar

papers presented at international or local conferences. Apart from that, reference will be made to newspaper articles, periodicals and information gathered from reliable websites that reflect current developments on the subject matter. Last but not least, the study will propose potential recommendations and solutions that could perhaps curtail or even eradicate the occurrence of land scams involving the use of the PA in the country.

### **LAND SCAM BY THE POWER OF ATTORNEY (PA)**

The Malaysian Powers of Attorney Act 1949 does not provide a definition of a PA. In New South Wales, the Power of Attorney Act 2003 defines 'attorney' in relation to a power of PA in section 3 referring to a person to whom the power is given. The Oxford Dictionary of Law (1995) defines the phrase 'Power of Attorney' as 'permission granted by the donor to the donee to act on the former's behalf'. In relation to this, the PA, which is an instrument of power of appointment, may either be made generally or for specific purposes only, and such power that is conferred upon the donee may either be revoked or is irrevocable. In general, any PA will remain valid and enforceable as long as it is not cancelled by the donor. In *R Thangaratnam d/o Vythilingam v Vinayagamoorthy a/l Rajaratnam & Ors* [2008] 3 MLJ 61, the appellant was the registered proprietor of a piece of land, and vide a letter dated 23 December 1983, the appellant had authorised her son (the

first respondents) to transfer the land to his name. The appellant then executed a power of attorney in Sri Lanka in favour of the first respondent and the PA was registered in the High Court of Malaya on 12 June 1984. However, on 19 March 1984, the first respondent transferred the land to the second respondent as trustee for the third respondent who was the son of the first respondent and the grandson of the appellant. As a result of the transfer, the third respondent became the beneficial registered proprietor of the land. The appellant nonetheless asserted that she had not permitted the first respondent to transfer the land to the third respondent and sought an order compelling the second respondent to retransfer the land to her. It was ruled that the letter dated December 23, 1983 had authorised the first respondent to transfer the land to him and the power of attorney (PA) was merely a tool to implement the transfer. Therefore, the first respondent was legally entitled to transfer the land to anyone he nominated.

### **MODUS OPERANDI OF FRAUDULENT LAND SCAM BY THE PA**

Finding from interviews conducted by the researcher with officers and staffs at land offices and the Department of Land and Mines (PTG) regarding land scams using the PA indicated that the following as the *modus operandi*:

- (a) Use of the PA that has already expired and cancelled, or where the donor or the donee has already passed

away (Wan Mohd Anuar Wan Endut, Azran Amin Mazlan, interviews on 14 April 2013; Mohd Saufi Abdul Rahman, interviews on 22 April 2013). The status of such PA has been described in section 5 of the Powers of Attorney Act 1949 that provides any instruments executed by using the PA will no longer be valid when written notice of revocation of the PA by the Donor or renunciation of the PA by the Donee has been deposited with appropriate land office, or when either the Donor or the Donee is dead or insane, or when the Donor is declared bankrupt.

In *Jamaliah bt Haji Mahsudi Suing on Her Behalf and As Administratrix of the Estate of Salamah bte Hj Ali & Ors v Sivam a/l Munsamy & Anor* [1995] 5 MLJ 250, the ownership of a piece land was transferred to the second defendant by using a PA, which was found to be defective as one of the Donors had died three years prior to the granting of the PA. The court ruled that since the transfer of the land in favour of the second defendant was affected by means of a fundamentally flawed PA, the transfer would also be similarly flawed and ineffective. Almost a similar incident occurred in *Mohd Salim Said & Ors v Pheng Kee Tang & Anor and another Appeal* [2014] 6 CLJ 485. In this case, the court ruled that since the PA that was used to transfer the disputed land was a forged document due to the fact that the Donors and Donee were no longer alive when the PA was created, the instrument of

transfer purportedly signed by the deceased was a void instrument being a document of transfer that bore a forged signature.

(b) Forged PA. These cases occurred through applications for lost individual document of titles (grants), forged instruments of transfers and charge documents. Further, there are also cases where a PA seems to be properly registered with the High Court but unfortunately the PA turns out to be a forged document (Shahrul Natasha Halid, interviews on 19 June 2013; Muhammad Faisal A. Razak interviews on 4 July 4 2013; Nurul Aishah Mohamadon, interviews on 17 October 2013). The falsification of a PA document occurs when a person (a fraudster) uses forged PA for the transfer of land to himself or others without the knowledge of the registered owner of the land (Whaley & Likwomik, 2008).

In the landmark case of *Tan Yin Hong v Tan Sian Sang & Ors* [2010] 2 MLJ 12 the appellant was the registered owner of the land, which was charged to the third respondent bank as a security for loans made in favour of the second respondent. The first respondent had executed the charges in favour of the third respondent bank under a forged PA as the appellant had never signed the PA. It was decided by the Federal Court since it was never disputed that the charges created against the appellant were based on a forged PA and thus, the charges were liable to be set aside by the appellant.

In the case of *Peace Park Resort Sdn Bhd v Credit Sdn Bhd & Ors* [2010] 1 LNS 1139, a sale and purchase agreement of a piece of land was concluded between the plaintiff and the first defendant on 23 March 2006. Unknown to the aforesaid contracting parties, the second defendant had previously sold the land under a PA on 5 July 2005. The first defendant claimed that he had neither given the PA nor received any purchase price from the second defendant. It was ruled that the second defendant had fabricated the PA by making a testimony with lawyers who were not legally registered with the Bar Council.

(c) Fake Court Seal and Forged Signature. There were cases where PA had been fabricated by using fake court seal and forged signatures of either the Land Administrator or the Court Registrar (Kamarilah Shukorini Ismail, interviews on 23 April, 2013; Rokiah Draman, interviews on 14 May 2013). Therefore, it is submitted that during the presentation of important documents such as the PA or memorandum of transfers, these documents should be carefully and meticulously reviewed by officers at land offices. It is not disputed that there are many land transactions at land offices every day and the officers are merely required to examine whether such documents do comply with the statutory requirements of the National Land Code 1965, without the need to ascertain their authenticity. Further, officers at

land offices are now required to process any registration of land transfers within one day (previously the standard operating procedure was 30 days). For this reason, it is submitted that those who are directly involved with daily operation and administration of land dealings at land offices throughout the country should be more careful in performing and discharging their duties so as to prevent and avoid the potential of executing land transactions and related matters that are effected by using forged documents including PA. Ain (2008) argued that the clash of priority between the need to register and safety requirement was among the main factors that led to the lack of thorough and comprehensive verification of documents submitted to the land offices.

Land scam cases involving the PA were also reported in local newspapers. Various methods are used by scammers including the use of forged documents such as memorandum of transfer of land and charged documents (Tariq, 2014), fabrication of statement in PA (Wahid, 2011) and the use of forged PA in land transactions to third parties without the knowledge of the registered proprietor of the land (Adlan, 2012).

Most of the times, the registered landowners would only realise the occurrence of land scams when they make payment of quit rents or conduct land searches at land offices. In certain cases,

they would only come to know about such incidents upon the receipt of notification letters about transfers of their lands from land administrators, or even court order and letters from lawyers asking them to vacate their land (Mohd Zahir Abdullah, interviews on 25 February 2014).

### **OVERVIEW OF THE POWERS OF ATTORNEY ACT 1949**

The Powers of Attorney Act (the Act) was specifically enacted to regulate matters relating to the PA. This specific piece of legislation is very short and brief comprising 15 sections and two schedules. Form I of the First Schedule relates to authentication of a power of attorney executed by an individual, while Form II of the same schedule is for authentication of a power of attorney executed by a company or corporation. As for the Second Schedule in the Act, it provides for the abolition or repeal of the previous ordinances and enactments on the PA. Under the National Land Code 1965 (the NLC), related provisions on documents, procedures and investigations of the PA are explicitly stipulated in sections 309 to 311. The Act gives more focus on procedural matters that ought to be complied so as to render any PA as valid and enforceable in law. In relation to this, it is argued that among the inherent weaknesses of the Act is its failure to define in definite term certain important terms such as 'donor', 'donee' as well as statutory powers conferred by any PA. Further, the Act does not provide a specific format that must be followed for the creation of a PA.

On the contrary, the Act gives a strong emphasis on authentication of a PA as it mandates the execution of any instrument purporting to create a PA in West Malaysia should be carried out either before a Magistrate, Justice of Peace, Land Administrator, Notary Public, Commissioner for Oaths, advocate and solicitor or bank officer carrying on the business of banking in Peninsular Malaysia and incorporated under local laws (section 3(1) (a) of the Act). Apart from that, any PA can be executed outside Peninsular Malaysia provided that it is authenticated by a Notary Public, Commissioner for Oaths, judge, Magistrate, British Consul or Vice-Consul, representative of the Britannic Majesty, Consular Officer of Malaysia, Malaysian Pilgrimage Commissioner for a PA executed in Saudi Arabia or advocate and solicitor of the Supreme Court in Singapore or Singaporean bank officer where the PA is executed in Singapore (section 3(1) (b) of the Act).

In addition, the Act does not statutorily mandate the donor and the donee to be physically present during the signing of the PA. The parties to the PA are also not required to understand substance of the PA and its implications. It is apparent that the presence of both donor and donee during the execution of the PA is very crucial in verifying and authenticating the true identities of the parties involved in the PA as it can eliminate any possibility of fraud or forgery. Further, by virtue of section 157A (1) and (3) of the NLC, any acts performed by a donee shall be regarded to be equally

valid and enforceable like those performed by the donor himself. According to Fara Wahida (interviews on 28 June 2013), the proprietor of the land often does not understand the legal implications of a PA, even more if the PA is written in English. In *Tan Pui Sim v Tan Chong Ton @ Tan Boon Seng* [2013] 1 LNS 912, the defendant, who had signed a power of attorney claimed that he did not understand its contents as it was prepared in English. In relation to this, it was proposed that it should be the responsibility of the lawyer to describe the essence of the PA so that both the donor and the donee have a clear understanding of the implications of such a document (Willmott & White, 2008). Muhammad Faisal (interviews on 4 July 2013) argued that lack of knowledge is among the major contributing factor for the occurrence of land scam through PA, in particular when it involves an elderly person.

In the case of *Household Realty Corp. v Thibeault; Walsh, Greenberg and Robinson, Third Parties* [1993] OJ No.2024, Justice Binks (Ontario court) reminded all lawyers who are involved in the execution of a PA:

*'It is my opinion that any lawyer practicing in Ontario in obtaining a power of attorney has a responsibility to fully explain the nature of the document to the person executing it. The lawyers must be in a position to be able to testify, if necessary at a later date, that there was no doubt of the fact that the person giving the power was fully aware of all the consequences ...'*

In short, it must be emphasised that lawyers are expected to explain in full the power of the PA in order to ensure a donor understands the implications of the power of a PA (Rolph, 2008). Apart from that, a donee should understand his or her responsibility and able to assume the tasks entrusted to him or her by a donor under the PA (Whaley, Cull & Hull, 2010; Tilse, Wilson, White, Willmott & M Cawley, 2013).

## FINDINGS

The Act appears to be still lacking in ensuring and guaranteeing the elements of safety to the donor (landlords) in the execution of a PA and related procedures that must be complied with for such PA to be valid and enforceable in the court of law. In New South Wales, Australia, there exist two types of PA that introduced the 'General Power of Attorney' and 'Enduring Power of Attorney'. The first type of PA is commonly used for a short period of time such as when the donor goes abroad for a certain duration and the latter is usually employed when the donor loses his capacity to manage himself or herself due to physical problems like permanent disability as a result of an accident. Section 19 of the Powers of Attorney Act 2003 (NSW), which was introduced on 16 February 2004, requires any instrument for the execution of a PA to be accompanied with a certificate certifying that those who commit such testimony such as lawyers or Commissioner of Oaths to explain about the effects of PA to the donor before he or she signs the PA and to ensure the donor

really understands the impact of the PA that confers certain legal powers on the donee. It is therefore submitted that such requirements should be included in the First Schedule of the Act, in particular when it involves the elderly who often become victims of land scams. In addition, it is suggested the donee should statutorily be required to carry out his or her powers and duties in the best interest of donor. Failure to comply with such statutory duties would mean the donee is liable to be imposed with certain amount penalty as monetary compensation to the donor and any dealings that have been executed by the donee could be revoked, and subsequently a new donee may be appointed in his or her place.

Section 310(1) of the NLC statutorily requires the Registrar to review the information contained in the PA and to compare it with the original copy of the PA that is kept at the Registrar's office in order to verify the authenticity of any information stated in any instruments during the presentation process. By virtue of section 311 of the NLC, the Registrar is permitted to request a statutory declaration or other evidence upon oath or affirmation that the PA was still in force from an attorney or his principal. This power may be exercised if there arises any doubt about the validity of the PA, especially in the case where a PA can be repealed due to the death of the donor or has been declared insane or adjudged bankrupt. It is hereby submitted that the practice that has been adopted in Negeri Sembilan whereby during the presentation of any instruments under the

NLC by using a PA, such PA is mandated to be accompanied with a statutory declaration of the applicant or lawyer or attorney representing the applicant be extended and applied in other states of the country. Such a measure is perhaps effective to prevent the occurrence of fraud at land offices.

In addition, it is proposed that the PA should at least be witnessed by a lawyer, Land Administrator or Commissioner for Oaths before it can be used for any registration of land dealings. In the case of verifying the authenticity of the PA, it should be registered in the High Court and subsequently be registered at the land office. Once the PA is registered, any type of transactions may be carried out and land offices will process the transaction involving the PA without questioning the validity of the relevant PA. In addition, mutual cooperation with all embassies should be established and maintained in order to obtain samples of confirmation by a Notary Public or Commissioner of Oaths and also sample Power of Attorney from foreign countries. This will enable the registrar at the land office to make reference in the event of suspected cases of fraud and falsification of important documents such as the PA (Saidin & Abdul Rashid, 2008). Further, in order to prevent land scams involving the PA, issues relating to the lack of knowledge, experience and skills among officers and staffs at land offices ought to be properly addressed. Ain (2008) claimed that in-house trainings should be given by those who are skilled and knowledgeable in administrative and



legal works in order to expose the officers and staffs on security issues pertaining to handling documents that are purported to be registered at land offices.

## CONCLUSION

Officers and staff at land offices throughout the country should be introduced and exposed to various ways and methods that have been and currently being used in land scam incidents. This is particularly significant in cases involving the use of PA so that they are aware and exercise more caution in registering any instruments for land transactions. It is without doubt that issues pertaining to land scams will become more complex and complicated in the future, in tandem with the country's rapid development towards a developed nation status and with the ever-increasing real property values. Accordingly, Land Administrator and other parties involved in land transactions should play a proactive role in tackling any possibilities to commit fraud through the use of PA.

## REFERENCES

- Adlan, N. A. (2012, Mac 21). Tauke Arowana Hadapi 21 Kes Penipuan Tanah. *Kosmo*. Retrieved from <http://www.kosmo.com.my>
- Ain, A. H. (2008). Penipuan Dalam Urusan Tanah – Kelemahan, Amalan Terbaik dan Cadangan Bagi Mengatasinya. *Jurnal INSTUN*, 1(2), 13-34.
- Harun, N., Hassim, J. Z., & Hamid, N. A. (2013). Penipuan, Rasuah dan Pencurian Maklumat Dalam Urus Niaga Tanah: Cabaran dan Penyelesaian. *Jurnal Undang-undang Malaysia KANUN*, 23(1), 159-184.
- Ismail, A. N. (2009). *Penipuan Dalam Urusan Pindah milik Tanah, Kajian Kes: Jabatan Ketua Pengarah Tanah dan Galian*. (BA Thesis) Universiti Teknologi Malaysia: Malaysia.
- Ismail, M. S. (2011). Measures Undertaken to safeguard Against Fraud In Land Dealings. *Jurnal Pentadbiran Tanah*, 1(1), 85-99.
- Othman, S. (2008). Penipuan dalam Urusan Tanah: Isu dan Penyelesaian. *Jurnal INSTUN*, 1(2), 1-12.
- Oxford Fajar. (1995). *Kamus Undang-undang Bahasa Inggeris-Bahasa Melayu Oxford Fajar*. Selangor: Oxford Fajar Sdn Bhd.
- Rolph, D. (2008). Power of Attorney and Solicitors' Liability. Retrieved October 13, 2014, from [http://www.practicepro.ca/LAWPROMag/powersofattorney\\_casebook.pdf](http://www.practicepro.ca/LAWPROMag/powersofattorney_casebook.pdf)
- Saidin, S., & Abdul Rashid, A. (2008). Hakmilik Tak Boleh Sangkal: Isu Berkaitan Interpretasi Kepada Seksyen 340, Kanun Tanah Negara 1965: Samaada Ia Hakmilik Tak Boleh Segera atau hakmilik Tak boleh Sangkal Tertunda – Penilaian Terhadap Kes Boonsom Boonyanit. *Working Paper presented at the Seminar Reduction in Land Fraud*, Hotel Grand Blue Wave, Shah Alam, Selangor.
- Shaari, M. H. (2009). *Fraud Dalam Pendaftaran HakMilik: Kajian di Pejabat Pendaftar Hak Milik Negeri Selangor, Shah Alam*. (Msc Thesis) Universiti Teknologi Malaysia: Malaysia.
- Tariq, Q. (2014, July 2). Consultant Charged With Forgery Over Land Deal. *The Star*. Retrieved from <http://www.thestar.com.my>
- Tilse, C., Wilson, J., White, B., Willmott, L., & M Cawley, A. L. (2013). Enduring Powers of Attorney: Promoting Attorney's Accountability as Substitute Decision Makers. *Australasian Journal on Ageing*, 33(3), 193-197.

- Wahid, W. (2011, June 1). Peguam Dijel 6 Tahun, Denda. *Kosmo*. Retrieved from <http://www.kosmo.com.my>
- Whaley, K. A., Cull, A., & Hull, I. (2010). *Financial Abuse, Neglect and the Power of Attorney*. Working Paper Presented at the Canadian Conference on Elder Law World Study Group on Elder Law. Toronto.
- Whaley, K. A., & Likwomik, H. (2008). *The Power Of Attorney: Its Misuse, Abuse and Fraud*. Whaley Estate Litigation. Retrieved from [www.whaleystate litigation.com](http://www.whaleystate litigation.com)
- Willmott, L., & White, B. P. (2008). Solicitors and Enduring Documents: Current Practice and Best Practice. *Journal of Law and Medicine*, 16(3), 466-487.
- Wu, T. H., & Chung, L. K. (2011). A law Which Favours Forgers?: Land Fraud in Two Torrens Jurisdiction. *Australian Property Law Journal*, 19(2), 130-154.