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## JLPW LEGAL NEWS ALERT

### COUNTERPARTY SOLICITORS' PERSONAL LIABILITY FOR COSTS OF COURT PROCEEDINGS



A Solicitor's personal liability for costs has always been a sensitive subject and seldom discussed. Rarer still is an award of costs of court proceedings against the counterparty's solicitors. The good news is, it is not entirely impossible.

In the Australian case of **Lemoto v Able Technical Pty Ltd v 2 Ors [2005] NSWCA 153** – the court of appeal considered and applied Myers Elman [1940] AC 282, that the Court has jurisdiction to order costs against a solicitor for the costs of his client **and sometimes those of the opposite party** (paragraph 85). The procedures in determining application for wasted costs as set out in **Ridehalgh v Horsfield [1994] Ch 205** was also followed (paragraph 92). The court of appeal also held that the Australian Legal Profession Act, section 198M provides that the court may make either a repayment order or an indemnity order (paragraph 130).

In **Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others [2004]**, the Privy Council ruled:

- Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties litigate claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether, in all the circumstances, it is just to make the order.
- Generally the discretion will not be exercised against "pure funders".
- Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. In such cases he is **"the real party"** to the litigation.

Australian cases are persuasive in Malaysian courts and where a solicitor acts for an insolvent client in a case without a justifiable cause of action in the hope of getting his fees paid, he may well be held liable for the successful party's costs where his client loses and he is "the real party" to the litigation.

#### LITIGATION PRACTICE GROUP

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## CLAMBERING UP THE WALLS OF PRIVACY The New PDPA And The Legal Peephole

By now, news about the coming into force of the Personal Data Protection Act 2010 (“**PDPA**”) and the deadline for registration on 14 February 2014 is widely known. To recap, the PDPA Rules of Thumb are as follows:

- In order to collect or process personal data, you need consent of data subject
- You need to keep data subjects informed of how you use personal data (for this, you need a easy to understand and clear privacy policy)
- Personal data collected and processed has to be kept secure
- You must destroy personal data that is no longer necessary
- Data subjects must be able to access their personal data
- Non-compliance attracts a fine (up to RM500,000) and/or imprisonment (up to 3 years)

The other really useful, helpful, and perhaps “juicy” tip about the PDPA is that where you need to process highly sensitive personal data, it is best done with sound legal advice.

Section 4 of the PDPA defines sensitive personal data to include any personal data consisting of information as to the physical or mental health or condition of a data subject, his political opinions, his religious beliefs or other beliefs of a similar nature, the commission or alleged commission by him of any offence or any other personal data as the Minister may determine. Section 40 of the PDPA further provides that **a data user shall not process any sensitive personal data of a data subject except in accordance certain conditions, including:**

- (a) the data subject has given his explicit consent;
- (b) processing is necessary for a few reasons, including:
  - (i) to perform a right or obligation imposed by law in connection with data user’s employment;
  - (ii) to protect the vital interests of the data subject or another person;
  - (iii) for medical purposes and is undertaken by a healthcare professional or a person who owes a duty of confidentiality equivalent to that of a healthcare professional;
  - (iv) **for the purpose of, or in connection with, any legal proceedings;**
  - (v) **for the purpose of obtaining legal advice;**
  - (vi) **for the purposes of establishing, exercising or defending legal rights;**
  - (vii) for the administration of justice;
  - (viii) for the exercise of any functions conferred on any person by or under any written law; or
  - (ix) for any other purposes as the Minister thinks fit; or
- (c) the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

A person who contravenes the above commits an offence and shall, on conviction, be liable to a fine not exceeding two hundred thousand ringgit and/or to imprisonment for a term not exceeding two years.

In other words, where all else fails and you are unable to obtain the explicit consent of the data subject when processing highly sensitive data, consulting a privacy law specialist will help you clamber up the walls of privacy!

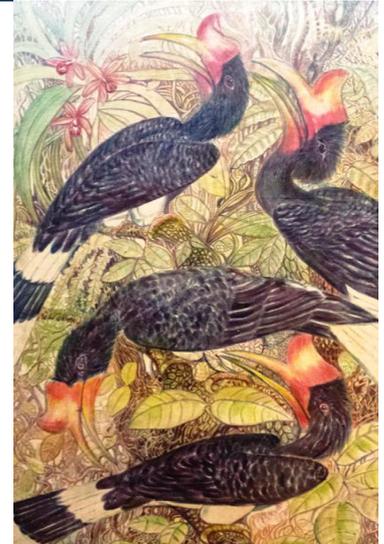
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Sarawak, Land of the Hornbills, is destined to undergo rapid economic development and transformation in the next decade. To serve our clients better, we established an affiliation in June 2013 with a Sarawak law firm run by our partner Nancy Kueh. Renamed **JLPW LEGAL**, the Sarawak office provides legal services in corporate commercial and banking transactions, employment law, litigation and conveyancing, including legal matters related to international and/or multi-jurisdictional business dealings.

Nancy and her partner Mohd Ismail were former corporate counsels for one of the largest MNC manufacturing companies in Sarawak, and are familiar with the setting up, construction and operation of manufacturing facilities in Sarawak. They are also well versed in international contracts covering sectors such as high technology industries, oil and gas, chemical and the construction industry.



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RECENT COMPETITION LAW ISSUES IN MALAYSIA



The Malaysian Competition Act 2010 (the "Act") is the first complete competition law in Malaysia. Aimed at restraining anti-competitive practices, such as cartels and collusions, and promoting a competitive market environment, and thus, enhancing consumer welfare, business practices and economic development, the Act applies to all commercial activities – both within Malaysia and transacted outside Malaysia – that have negative or anti-competitive effects in any market in Malaysia, except for those carried out by the energy, communications and multimedia sectors.

First to hit the headlines was the share swap deal between two major Malaysian airlines, Malaysia Airlines Bhd ("MAS") and AirAsia Bhd ("AirAsia"), where the Malaysia Competition Commission ("MyCC") had fined both MAS and Air Asia RM10million each for anti-competitive behavior, and AirAsia has submitted their written response to MyCC. Next to follow was Nestlé Products Sdn Bhd ("Nestlé"), who filed an individual exemption application to the MyCC to exclude its pricing policy called the "Brand Equity Protection Policy (BEPP)" from complying with the Act. The event triggered a second "market review" by the anti-competition watchdog (the first review being conducted on air transport industry), which will now be on the food processing industry. [Read more...](#)

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## WHO WE ARE

We are an internationally affiliated law firm with extensive transactional experience involving strategic investments, joint ventures, mergers and acquisitions, takeovers and takeover defence, corporate governance, banking, finance and capital markets. Our team of 47 lawyers (1 Consultant, 10 partners and 36 associates) advises on complex business transactions and dispute resolution for foreign investors, multinational companies, foreign law firms, SMEs and industrial conglomerates, public listed companies, government linked companies, commercial, investment and Islamic banks, stockbroking companies, insurance and reinsurance companies.

## OUR APPROACH

We advise on and secure our clients' relational, strategic, business and financial interests through a combination of legal expertise, transactional experience, structuring skills and industry knowledge. In cross cultural deals, our English, Chinese, Malay and Japanese language capabilities facilitate clear and open communication.

## OUR PRINCIPAL AREAS OF PRACTICE

Banking & Finance • Construction • Corporate Commercial • Corporate Finance • Corporate Governance • Employment & Human Resources • Energy, Mining & Natural Resources • Foreign Direct Investment • General Counsel Services • Information Technology • Insurance & Reinsurance • Intellectual Property Rights • Litigation & Commercial Arbitration • Mergers & Acquisitions • Takeovers & Takeover Defence • Telecommunications • Project Finance & Infrastructure • Regulatory & Takeover Defence • Regulatory Compliance • Securities & Investment Law • Strategic Advisory & Crisis Management Services • China Services Group • Indonesia Services Group • Japan Services Group • Myanmar Services Group • Vietnam Services Group • Korea Services Group • Mongolia Services Group

## OUR KEY INDUSTRY EXPERIENCE

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"Knowledge is a treasure, but practice is the key to it" — Laozi

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