IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR

(COMMERCIAL DIVISION)

IN THE FEDERAL TERRITORY OF MALAYSIA

ORIGINATING SUMMONS NO: WA-24IP-3-02/2017

BETWEEN

LA KAFFA INTERNATIONAL CO. LTD. … PLAINTIFF

AND

LOOB HOLDINGS SDN. BHD.
(Co. No. 9055299-P) … DEFENDANT

(Heard together with)

IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR

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ORIGINATING SUMMONS NO: WA-24IP-6-03/2017

BETWEEN

LOOB HOLDING SDN. BHD. … PLAINTIFF
(Co. No. 9055299-P)

AND

LA KAFFA INTERNATIONAL CO. LTD. … DEFENDANT

JUDGMENT

(Applications for interim injunctions pending disposal of arbitration)

A. Introduction

1. This is a dispute regarding "*Chatime*" bubble-tea franchise (**Chatime Franchise**) between La Kaffa International Co. Ltd. (**La Kaffa**) and Loob Holding Sdn. Bhd. (**Loob**) which led to arbitration in Singapore International Arbitration Centre (**Singapore Arbitral Proceedings**).

2. Pending the disposal of Singapore Arbitral Proceedings, La Kaffa and Loob filed applications for interim injunctions under s 11(1) of Arbitration Act 2005 (**AA**). Both applications are heard together and raise the following issues:

   (1) whether Loob, its directors (including their spouses and immediate family members) and employees should be restrained from, among others, carrying on business which is identical or similar to Chatime Franchise business. This question concerns an interpretation of s 27(1) of the Franchise Act 1998 (**FA**);

   (2) whether Loob, its directors and employees should be enjoined from interfering with La Kaffa's rights and obligations as "*Master Franchisee*" to render operations consultancy to Chatime "*Franchised Stores*" (**Chatime Franchisees**) under Article 17(IV) of the "*Regional Exclusive Representation Agreement*" dated 15.10.2013 between La Kaffa and Loob (**RERA**);

(3) whether Loob, its directors (including their spouses and immediate family members) and employees should be injuncted from, among others, disclosing, using and converting confidential information procured from La Kaffa (**La Kaffa's Confidential Information**) during the term of the following agreements between the parties –

(a) "*Regional Exclusive Distribution Cooperation Agreement*" dated 1.6.2011 (**REDCA**); and
(b) RERA.

The construction of s 26(1) FA will be relevant to the above issue;

(4) whether Loob, its directors and employees should be restrained from passing off La Kaffa's goodwill and reputation in Chatime Franchise (**La Kaffa's Goodwill**);

(5) whether Loob, its directors and employees should be compelled to return to La Kaffa –

(a) all materials related to Chatime's trade marks (defined as "*Logo*" in Article 1 RERA) (**Chatime Materials**); and
(b) all proprietary information belonging to La Kaffa (**La Kaffa's Proprietary Information**); and

(6) whether La Kaffa should be restrained from taking any action which has the effect of interfering with Loob's "*Tealive*" business.

B. Background

3. La Kaffa is a limited liability company established in 2004 under the laws of the Republic of China (**Taiwan**) with a principal place of business in Taiwan. La Kaffa is listed on the Taipei Exchange.

4. Loob is a private limited company incorporated in Malaysia.

5. La Kaffa (as a foreign person) has been approved by the Registrar of Franchise under s 54(2) FA to sell Chatime Franchise in Malaysia.

6. La Kaffa and Loob first entered into REDCA which provided that, among others, La Kaffa as the franchisor, agreed for Loob to be the Master Franchisee of Chatime Franchise in Malaysia. La Kaffa and Loob subsequently entered into RERA which superseded REDCA [Article 2(VI) RERA].

7. La Kaffa alleged that Loob had breached RERA (**Loob's Alleged Breaches**) by, among others –

   (1) Loob's failure to purchase all raw materials from La Kaffa as required by Article 7 RERA;

   (2) Loob failed to allow La Kaffa to inspect and/or audit, among others, Loob's accounts, books and records; and

   (3) Loob's failure to pay for raw materials purchased from La Kaffa.

8. In accordance with Article 18(II) RERA, La Kaffa's then solicitors in Singapore gave a Notice of Arbitration dated 28.10.2016 to Loob and commenced Singapore Arbitral Proceedings based on Loob's Alleged Breaches (**La Kaffa's Arbitral Claim**). Loob gave notice of a counterclaim in Singapore Arbitral Proceedings that La Kaffa had breached RERA (**Loob's Arbitral Counterclaim**).

9. La Kaffa terminated RERA by way of a notice dated 5.1.2017 (**La Kaffa's Termination Notice**) to, among others, Mr. Bryan Loo Woi Lip (**Mr. Loo**). Mr. Loo is Loob's Managing Director.

10. After the termination of RERA, Loob started its Tealive franchise business (**Tealive Franchise**). 161 Chatime Franchisees "*converted*" to be Tealive Franchisees.

11. In Originating Summons No. WA-24IP-3-02/2017 filed by La Kaffa against Loob (**La Kaffa's Suit**), La Kaffa prayed for the following orders, among others, pursuant to s 11 AA and/or the court's inherent jurisdiction:

    (1) an injunction to restrain Loob, its directors (including their spouses and immediate family members) and employees from, among others, carrying on business which is identical or similar to Chatime Franchise business (**La Kaffa's 1st Prayer**);

    (2) an injunction to enjoin Loob, its directors and employees from interfering with La Kaffa's rights and obligations as Master Franchisee to render operations consultancy to Chatime Franchisees under Article 17(IV) RERA (**La Kaffa's 2nd Prayer**);

(3) an injunction to restrain Loob, its directors (including their spouses and immediate family members) and employees from, among others, disclosing, using and converting La Kaffa's Confidential Information (**La Kaffa's 3rd Prayer**);

(4) an injunction to prohibit Loob, its directors and employees from passing off La Kaffa's Goodwill (**La Kaffa's 4th Prayer**); and

(5) a mandatory injunction to compel Loob, its directors and employees to return to La Kaffa –

(a) Chatime Materials; and
(b) La Kaffa's Proprietary Information

(**La Kaffa's 5th Prayer**).

12. Loob filed Originating Summons No. WA-24IP-6-03/2017 against Loob (**Loob's Suit**) for an interim injunction to restrain La Kaffa, its directors, employees and agents from taking any action which has the effect of interfering with Tealive Franchise business (**Loob's Prayer**).

C. Applicable law

13. Article 18(1) RERA provided that "*all questions with respect to the construction of [RERA] and the rights and liabilities of the Parties shall be governed by the laws of Singapore*".

14. Both parties had not given any affidavit evidence regarding Singaporean law which is applicable in La Kaffa's Suit and Loob's Suit (**2 Suits**). In such a situation, the court shall apply a rule of Private International Law which presumes that Singaporean law is the same as Malaysian law. This is clear from the following High Court cases:

    (1) VC George J's (as he then was) judgments in **Elders Keep v Luen Mei Plastic Industries Sdn Bhd** [1989] 2 CLJ 1005, at 1008, and **European Profiles Ltd v Sentinel Steel (M) Sdn Bhd** [1993] 4 CLJ 577, at 582-583;

    (2) the decision of Lim Chong Fong JC (as he then was) in **Sutures (M) Sdn Bhd v Worldwide Holdings Bhd & Ors** [2015] 8 MLJ 659, at 672-673; and

    (3) **Portcullis Trustnet (Singapore) Pte Ltd v George Pathmanathan a/l Micheal Gandhi Nathan** [2017] MLJU 223, at paragraphs 144 and 145.

15. In addition to the application of above rule of Private International Law, the 2 Suits concern the interpretation of Malaysian statutes [including s 11(1) AA and certain provisions of FA]. Hence, I have no hesitation in applying Malaysian law in the 2 Suits.

D. <u>Court's power under s 11(1) AA</u>

16. Section 11(1) AA provides as follows:

"*Arbitration agreement and* ***interim measures by High Court***

11(1) ***A party may,*** *before or* ***during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for****:*

(a) security for costs;

(b) discovery of documents and interrogatories;

(c) ***giving of evidence by affidavit****;*

(d) appointment of a receiver;

(e) securing the amount in dispute;

(f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;

(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(h) ***an interim injunction or any other interim measure****.*"

(emphasis added).

17. In La Kaffa's Suit, La Kaffa applied to this court to invoke its inherent jurisdiction. I cannot rely on the court's inherent jurisdiction to decide the 2 Suits due to the following reasons:

(1) the following decisions of our apex court have decided that there cannot be a resort to the court's inherent jurisdiction in light of a clear statutory provision in this case, namely s 11(1) AA -

(a) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in **Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors** [1988] 1 MLJ 178, at 181; and

(b) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court case of **Majlis Agama Islam Selangor v Bong Boon Chuen** [2009] 6 MLJ 307, at 320; and

(2) s 8 AA embodies a "*minimalist*" approach by our courts as explained by David Wong JCA in the Court of Appeal case of **Capping Corp Ltd & Ors v Aquawalk Sdn Bhd & Ors** [2013] 6 MLJ 579, at 588-589. Section 8 AA has been amended by the Arbitration (Amendment) Act 2011 and now reads as follows:

> "***No court shall intervene in matters governed by [AA] except where so provided in [AA].***"
>
> (emphasis added).

In view of s 8 AA, the court can only exercise powers conferred by s 11(1) AA without invoking its inherent jurisdiction – please see **Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd** [2015] 5 CLJ 652, at paragraph 46. The Court of Appeal has affirmed the decision in **Bumi Armada Navigation**.

18. I am of the following view regarding s 11(1) AA:

(1) the court has a discretion to grant any interim measure. This is clear from the word "*may*" in s 11(1) AA. The exercise of judicial discretion to grant interim measures under s 11(1) AA is dependent on the particular evidence adduced in court. Accordingly, judgments on whether the court has granted interim measures under s 11(1) AA or otherwise, are purely illustrative and have no binding effect. I refer to Mahadev Shankar JCA's judgment in the Court of Appeal case of **Structural Concrete Sdn Bhd v Wing Tiek Holdings Bhd** [1997] 1 CLJ 300, at 306, as follows -

> "*Exercises of judicial discretion are not judicial precedent because they are only authority for the facts of the particular case*.";

(2) regarding the court's discretionary power to grant interim injunctions under s 11(1)(h) AA, Zulkefli Makinuddin CJ (Malaya) (as he then was) delivered the following judgment of the Federal Court in **AV Asia Sdn Bhd v Measat Broadcast Network System Sdn Bhd** [2014] 3 MLJ 61, at paragraphs 5 and 16 -

> "*5. … **The appellant sought an interim injunction to restrain the respondent from relying or using the confidential information forming the subject matter of the dispute. Although the matter in dispute between the parties is in arbitration, the High Court action having been stayed, s 11 [AA] entitles the appellant to seek injunctive relief pending the determination of the arbitration**.*
>
> *…*
>
> *16. **Based on the above two cited case authorities, we are of the view it is clear that a clause in a contract stipulating that injunctive***

relief "may" or "shall" be the appropriate remedy where damages may not be appropriate or where there is irreparable harm does not mean that such relief will be granted as of right. The party seeking to secure equitable relief of such a nature must still satisfy a court of law that the pre-requisites for granting injunctive relief are prevalent. A court is free to exercise its jurisdiction and ultimately the discretion whether to grant or to dismiss an application for injunctive relief notwithstanding the attempts by the parties to a contract to oust that jurisdiction and discretion."

(emphasis added).

The following statutory provisions, where appropriate, may apply in respect of the exercise of the court's discretion to grant interim injunctions under s 11(1)(h) AA -

(a) ss 50, 51(1), 53, 54 and 55 of the Specific Relief Act 1950 (**SRA**) regarding temporary and not perpetual injunctions [the court can only grant temporary and not perpetual injunctions under s 11(1)(h) AA - please see sub-paragraph (5) below]; and

(b) O 29 r 1 of Rules of Court 2012 (**RC**);

(3) the court may grant interim measures "*before*" the commencement of arbitral proceedings - please see **Bumi Armada Navigation**, at paragraph 39;

(4) the court may grant interim measures before or during an "*international arbitration*" [as understood in s 2(1)(a) to (c) and s 2(2)(a) AA] - please see s 11(3) AA;

(5) the court may only grant interim and not permanent relief. Please see the following High Court decisions -

(a) Mary Lim Thiam Suan J's (as she then was) judgment in **Metrod (Singapore) Pte Ltd v GEP II Beteiligungs Gmbh & Anor** [2013] MLJU 602, at paragraph 16; and

(b) **Bumi Armada Navigation**, at sub-paragraph 47(c);

(6) the court may only grant interim measures which may support, assist, aid or facilitate the arbitration - **Metrod** and **Bumi Armada Navigation** [at sub-paragraph 47(d)];

(7) in granting interim measures, the court should not decide on the merits of the dispute which should only be decided by the arbitral tribunal as agreed by the parties. This is clear from the following High Court cases -

(a) Mary Lim Thiam Suan J's (as she then was) decision in **Jayapadu Oil & Gas Sdn Bhd v Chersonese Oil Sdn Bhd** [2014] 1 LNS 972; and

(b) **Bumi Armada Navigation**, at paragraphs 49 and 50.

Despite the court's restraint from deciding on the merits of the dispute, the court nevertheless has to assess whether an applicant for interim relief has met the necessary threshold for such an interim remedy as laid down by case law - **Bumi Armada Navigation**, at paragraph 51.

As the court cannot make a final pronouncement of the merits of the dispute under s 11(1) AA, the parties are not bound or estopped in the arbitral proceedings by the court's decision under s 11(1) AA - **Bumi Armada Navigation**, at sub-paragraph 90(a);

(8) before granting any interim measure, the court may require an applicant to furnish the necessary undertaking to court. This is because if the court grants interim measure to a plaintiff under s 11(1) AA and if subsequently the arbitral tribunal rules against the plaintiff, the defendant who is subject to the interim measure, should be entitled to apply to the court to enforce the plaintiff's undertaking to pay damages for all loss suffered by the defendant as a result of the interim measure.

Case law has recognised certain exceptional circumstances wherein the court may exercise its discretion to dispense with a party's necessary undertaking when the court grants interim measures; and

(9) after the court has granted any interim measure under s 11(1) AA, parties are entitled to apply to court to vary or discharge the interim relief - **Bumi Armada Navigation**, at sub-paragraph 90(b).

E. Court's approach in 2 Suits

19. Based on the nature and scope of the court's power under s 11(1) AA (please see the above paragraph 18) -

    (1) this court may only grant interim measures which may support, assist, aid or facilitate the Singapore Arbitral Proceedings;

    (2) I will not decide on the merits of La Kaffa's Arbitral Claim or Loob's Arbitral Counterclaim. Nothing in this judgment shall affect the integrity of the Singapore Arbitral Proceedings;

    (3) the party applying for any interim measure in the 2 Suits, should generally provide the necessary undertaking to court. There is no exceptional circumstance in the 2 Suits to dispense with the necessary undertaking to court for interim measures sought from the court; and

    (4) if any interim measure is ordered in the 2 Suits, both parties have the liberty to apply to court to vary or discharge the interim measure and to enforce the relevant undertaking to court.

F. La Kaffa's 5th Prayer

20. I will start with La Kaffa's 5th Prayer because it is not disputed that Loob had accepted La Kaffa's termination of RERA. Loob only alleged that La Kaffa had wrongfully terminated RERA. Furthermore, Loob has commenced its Tealive Franchise and has stopped using Chatime Materials.

21. A preponderance of Malaysian cases has decided that a plaintiff for an interlocutory mandatory injunction should satisfy the court that the plaintiff has an unusually strong and clear case against the defendant (not merely to raise a *bona fide* and serious question to be tried). Suffice it for me to refer to the following decisions:

    (1) Syed Agil Barakbah SCJ's judgment in the Supreme Court case of **Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd** [1987] 2 MLJ 192, at 193-194;

    (2) the decision of Lamin Mohd. Yunus FCJ (as he then was) in the Federal Court in **Karuppannan s/o Chellapan v Balakrishnen s/o Subban** [1994] 4 CLJ 479, at 487; and

    (3) **Chin Wai Hong & Anor v Lim Guan Hoe & Anor** [2014] 5 AMR 427, at paragraph 23.

22. I am satisfied that La Kaffa has an unusually strong and clear case for this court to grant an interim mandatory injunction to compel Loob to return Chatime Materials and La Kaffa's Proprietary Information to La Kaffa. This is because upon La Kaffa's termination of RERA, Articles 13(IV) and 17(II)(e) RERA require Loob to return Chatime Materials and La Kaffa's Proprietary Information to La Kaffa.

23. At the hearing of the 2 Suits, Loob's learned lead counsel, Dato' Loh Siew Cheang, rightly conceded to La Kaffa's 5th Prayer. Hence, La Kaffa's 5th Prayer is granted.

24. I have not overlooked Article 13(IV) RERA which provides that upon the termination of RERA, La Kaffa may request in writing for Loob to destroy Chatime Materials at Loob's own cost. I did not grant any mandatory injunction to compel Loob to destroy Chatime Materials because such an order is final in effect and is therefore beyond the scope of s 11(1) AA [please see the above sub-paragraph 18(5)].

G. La Kaffa's 4th Prayer

25. Mr. Khoo Guan Huat (**Mr. Khoo**), learned lead counsel for La Kaffa, has contended that Loob has committed the tort of passing off when Loob's Tealive Franchise business rides on La Kaffa's Goodwill. Alternatively, Mr. Khoo submitted that Loob has committed the tort of inverse passing off by converting beverages made up of La Kaffa's Proprietary Information and passes those beverages as Loob's Tealive beverages. Reliance has been placed on LP Thean JA's judgment in the Singapore Court of Appeal case of **Tessensohn t/a Clea Professional Image Consultants v John Robert Powers School Inc & Ors** [1994] 3 SLR 308 regarding the tort of inverse passing off.

26. I am not able to grant La Kaffa's 4th Prayer because I fail to see how any interim measure pursuant to La Kaffa's 4th Prayer may support, assist, aid or facilitate the Singapore Arbitral Proceedings. In any event, if it is true that Loob has committed either the tort of passing off or the tort of inverse passing off, La Kaffa can easily file a suit against Loob and seek final relief

(not interim measures) based on either of those torts. There is therefore no prejudice to La Kaffa by the court's refusal of La Kaffa's 4th Prayer.

H. La Kaffa's 1st to 3rd Prayers

27. La Kaffa's 1st to 3rd Prayers concern interim prohibitory injunctions. As such, I will discuss La Kaffa's 1st to 3rd Prayers together.

H(1). Relevant considerations regarding interim restraining injunctions

28. In deciding how the court may exercise its discretion to grant an interim prohibitory injunction, the following considerations are relevant:

    (1) whether a plaintiff has satisfied the court that there is at least a *bona fide* and serious question to be tried in respect of the plaintiff's cause of action against the defendant - please see the Supreme Court's judgment delivered by Mohd. Jemuri Serjan CJ (Borneo) in **Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors** [1995] 1 MLJ 241, at 253. If a plaintiff cannot satisfy the court that there is at least a *bona fide* and serious issue to be tried in respect of the plaintiff's cause of action against the defendant, the court shall refuse to grant an interim restraining injunction on this ground alone; and

    (2) if a plaintiff satisfies the court that there is at least a *bona fide* and serious question to be tried –

(a) whether damages constitute an adequate remedy for the plaintiff. If damages are a sufficient relief for the plaintiff, the court may refuse to give an interim prohibitory injunction - please see the decision of Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of **Associated Tractors Sdn Bhd v Chan Boon Heng & Anor** [1990] 1 CLJ (Rep) 30, at 32;

(b) if damages do not constitute an adequate remedy for the plaintiff, whether the "*balance of convenience*" (some cases use the phrase "*balance of justice*") lies in favour of the grant or refusal of an interim restraining injunction. If the balance of convenience is not in favour of the grant of an interim prohibitory injunction, the interim prohibitory injunction should be refused on this ground alone - **Alor Janggus Soon Seng Trading**, at p. 266; and

(c) if the balance of convenience is in favour of granting an interim restraining injunction, is there any policy or equitable consideration which militates against the grant of an interim restraining injunction? [please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of **Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors** [1995] 1 MLJ 193, at 206-207].

Even if a plaintiff has satisfied the court -

(i) of the existence of a *bona fide* and serious issue to be tried;

(ii) damages are not an adequate remedy; and

(iii) the balance of convenience lies in favour of a grant of an interim restraining injunction

- the court may still exercise its discretion to refuse an interim prohibitory injunction on policy or equitable ground.

H(2). Construction of ss 26(1) and 27(1) FA

29. It is clear that FA applies to RERA by virtue of s 3(1) read with s 3(2)(a)(i) and s 3(2)(b) FA. I reproduce below s 3 FA:

> "*3(1)* ***This Act applies throughout Malaysia to the sale and operation of any franchise in Malaysia****.*
>
> *(2)* ***The sale and operation of a franchise is deemed to be in Malaysia where*** *-*
>
> *(a)* ***an offer to sell or buy a franchise*** *-*
>
> *(i)* ***is made in Malaysia and accepted within or outside Malaysia****; or*
> *(ii) is made outside Malaysia and accepted within or outside Malaysia;* ***and***
>
> *(b)* ***the franchised business is operated or will be operating in Malaysia****.*
>
> *(3)* ***Nothing in this Act shall affect the provisions of any other written laws, but if there is any conflict between the provisions of this Act and the provisions of the other written laws, the provisions of this Act shall prevail****.*"

(emphasis added).

30. Mr. Khoo advances the following submission in support of La Kaffa's 1st to 3rd Prayers based on ss 26(1), 27(1) and 28(1) FA:

(1) s 27(1) FA restrains Loob, its directors (including their spouses and immediate family members) and employees from, among others, carrying on business which is identical or similar to Chatime Franchise business;

(2) under s 26(1) FA, Loob, its directors (including their spouses and immediate family members) and employees are enjoined from, among others, disclosing, using and converting La Kaffa's Confidential Information;

(3) according to s 28(1) FA, any condition, stipulation or provision in RERA which waives compliance with ss 26(1) or 27(1) FA is void; and

(4) reliance was placed on the decision of Mary Lim JC (as she then was) in the High Court in **Noraimi Alias v Rangkaian Hotel Seri Malaysia Sdn Bhd** [2009] 9 CLJ 815 which had been affirmed by KN Segara JCA in the Court of Appeal [2011] 1 LNS 1918.

31. Sections 26, 27, 28(1) and 39(1) FA provide as follows:

"***Confidential information***

26(1) ***A franchisee shall give a written guarantee to a franchisor that the franchisee, including its directors, the spouses and immediate***

family of the directors, and his employees shall not disclose to any person any information contained in the operation manual or obtained while undergoing training organized by the franchisor during the franchise term and for two years after the expiration or earlier termination of the franchise agreement*.*

(2) ***The franchisee, including its directors, the spouses and immediate family of the directors, and his employees shall comply with the terms of the written guarantee given under subsection (1)****.*

(3) ***A person who fails to comply with subsection (1) or (2) commits an offence****.*

Prohibition against similar business

27(1) ***A franchisee shall give a written guarantee to a franchisor that the franchisee, including its directors, the spouses and immediate family of the directors, and his employees shall not carry on any other business similar to the franchised business operated by the franchisee during the franchise term and for two years after the expiration or earlier termination of the franchise agreement****.*

(2) ***The franchisee, including its directors, the spouses and immediate family of the directors, and his employees shall comply with the terms of the written guarantee given under subsection (1)****.*

(3) ***A person who fails to comply with subsection (1) or (2) commits an offence****.*

Waivers void

28(1) ***Any condition, stipulation or provision in a franchise agreement purporting to bind a franchisor or a franchisee to waive compliance with any provision of this Act is void****.*

General penalty

39(1) ***A person who commits an offence under this Act for which no penalty is expressly provided shall, on conviction, be liable*** –

(a) if such person is a body corporate, to a fine of not less than ten thousand ringgit and not more than fifty thousand ringgit, and for a second or subsequent offence, to a fine of not less than twenty thousand ringgit and not more than one hundred thousand ringgit; or

(b) if such person is not a body corporate, to a fine of not less than five thousand ringgit and not more than twenty-five thousand ringgit or to imprisonment for a term not exceeding six months, and for a second or subsequent offence, to a fine of not less than ten thousand ringgit and not more than fifty thousand ringgit or to imprisonment for a term not exceeding one year."

(emphasis added).

32. Firstly, **Noraimi Alias** concerned a franchise agreement which did not comply with ss 32 and 34 FA. Section 32 FA provides that a franchisor commits an offence if the franchisor refuses to renew or extend a franchise agreement without compensating a franchisee. Section 34(1) FA concerns a franchisee's right to extend a franchise agreement. **Noraimi Alias** is clearly distinguishable from this case and does not concern ss 26(1) and 27(1) FA.

33. I am not able to trace the genesis of ss 26(1) and 27(1) FA. There is no franchise legislation in the United Kingdom (**UK**), Singapore, Australia and New Zealand. Canadian states have franchise legislation but there is no

provision in those legislation which is similar to ss 26(1) and 27(1) FA. Part 436 of the United States of America's Code of Federal Regulations (made by the Federal Trade Commission) has no provision equivalent to ss 26(1) and 27(1) FA.

34. I am of the following view regarding ss 26(1) and 27(1) FA:

(1) ss 26(1) and 27(1) FA provide that a franchisee "*shall*" give written guarantees as provided in those statutory provisions to a franchisor (**Guarantees**). Sections 26(1) and 27(1) FA do not incorporate the Guarantees into franchise agreements. If Parliament has intended for ss 26(1) and 27(1) FA to incorporate the Guarantees into franchise agreements, Parliament would have expressly provided for such an incorporation in ss 26(1) and 27(1) FA. It is to be noted that the legislature has amended ss 26(1) and 27(1) FA by way of Franchise (Amendment) Act 2012 (**Act A1442**). Parliament could have easily expanded the scope of ss 26(1) and 27(1) FA and incorporate the Guarantees into franchise agreements by way of Act A1442 but Parliament did not choose to do so;

(2) if I have accepted Mr. Khoo's contention that the Guarantees have been incorporated into RERA –

(a) Loob's directors,
(b) spouses and immediate family of Loob's directors and
(c) Loob's employees

(**Related Parties**)

shall commit an offence under –

(i) s 26(2) read with s 26(3) FA; **and/or**
(ii) s 27(2) read with s 27(3) FA

if the Related Parties do not comply with the Guarantees (**Related Parties' Breach**). As ss 26(3) and 27(3) FA do not expressly provide for any penalty for the Related Parties' Breach, s 39(1)(a) and (b) FA (which provide for a general penalty) shall apply to the Related Parties' Breach.

It is trite law in statutory interpretation that if there are two or more constructions of a statutory provision which has penal consequences, the court should adopt a strict interpretation in favour of the person who may be liable to penal consequences - please see the Viscount Dilhorne's judgment in the Privy Council in **Liew Sai Wah v Public Prosecutor** [1968] 2 MLJ 1, at 2, an appeal against a judgment of the Federal Court from Singapore. As non-compliance with ss 26(2) and 27(2) FA has penal consequences under ss 26(3) and 27(3) FA read with s 39(1)(a) and (b) FA for the Related Parties, I adopt a construction of ss 26(1) and 27(1) FA in favour of the Related Parties, namely the Guarantees are not incorporated into RERA solely by reason of ss 26(1) and 27(1) FA;

(3) s 28(1) FA does not apply in the 2 Suits because there is no provision in RERA which purports to bind La Kaffa or Loob to waive compliance with any provision in FA; and

(4) alternatively, even if it is assumed that ss 26(1) and 27(1) FA have incorporated the Guarantees into RERA, the court is not bound by the Guarantees to grant interim injunctions under s 11(1)(h) AA. This is because the court still retains a discretion to grant any interim relief under s 11(1) AA - please see the Federal Court's judgment in **AV Asia**, at paragraph 16 (the court is not bound by a contractual provision that damages are not an adequate remedy). If the court grants interim injunctions merely because of the Guarantees which have been incorporated into RERA, the court would have abdicated its judicial duty and function under s 11(1)(h) AA, ss 50, 51(1), 53, 54 and 55 SRA as well as O 29 r 1 RC (**Judicial Duty**) to decide on whether interim injunctions should be ordered or otherwise.

35. Based on the above construction of ss 26(1) and 27(1) FA, the Guarantees are not incorporated into RERA. In this case, Loob did not provide the Guarantees to La Kaffa. Accordingly, there is no serious question to be tried in respect of whether Loob has breached ss 26(1) and 27(1) FA.

H(3). <u>Are there "*special cases*" for interim prohibitory injunctions?</u>

36. Mr. Khoo submits that there are "*special exceptions*" to **American Cyanamid's** principles whereby if there is a *prima facie* case of a breach of a non-compete contractual clause, breach of confidential information and tort of passing off (or tort of inverse passing off), the court should grant interim prohibitory injunctions (**Contention regarding Special Category of Cases**). In support of the Contention regarding Special Category of

Cases, Mr. Khoo relied on, among others, Lord Denning MR's judgments in the English Court of Appeal cases of **Fellowes & Anor v Fisher** [1975] 2 All ER 829 and **Office Overload Ltd v Gunn** [1977] FSR 39.

37. I am not able to accede to the Contention regarding Special Category of Cases. My reasons are as follows:

(1) **AV Asia** concerned a breach of confidential information and yet, the Court of Appeal and Federal Court affirmed the High Court's dismissal of an application for an interim injunction to restrain the breach of confidential information. If the Contention regarding Special Category of Cases is founded, an interim prohibitory injunction should have been granted in **AV Asia** upon *prima facie* proof of breach of confidential information;

(2) the Contention regarding Special Category of Cases is not provided by any written law, be it AA, SRA or RC;

(3) as explained in the above sub-paragraph 18(1), whether the court grants any interim relief in a particular case depends on the exercise of the court's discretion which will be based on the particular evidence adduced in that case. In view of the exercise of judicial discretion to grant interim measures or otherwise, there should not be any special category of cases; and

(4) an acceptance of the Contention regarding Special Category of Cases will be tantamount to an abdication of Judicial Duty.

H(4). Is there a *bona fide* and serious question to be tried?

38. Based on the affidavits and exhibits adduced by La Kaffa, I am satisfied that La Kaffa has raised the following 4 *bona fide* and serious issues to be tried in the Singapore Arbitral Proceedings:

    (1) whether Loob has breached Article 15(I), (IV) and (V) RERA by carrying on Tealive Franchise business which is similar to Chatime Franchise business;

    (2) whether Loob has breached Article 17(IV) RERA by interfering with La Kaffa's rights and obligations as Master Franchisee to render operations consultancy to Chatime Franchisees;

    (3) whether Loob has breached Article 16(I) and (III) RERA by, among others, using and converting La Kaffa's Confidential Information; and

    (4) whether Loob has breached an obligation in Equity to La Kaffa by, among others, using and converting La Kaffa's Confidential Information.

H(5). Whether damages are an adequate remedy for La Kaffa

39. I am of the view that damages are an adequate remedy for La Kaffa. On this ground alone, La Kaffa's 1st to 3rd Prayers should be declined. This decision is premised on the following reasons:

    (1) the following provisions in RERA have expressly provided for a monetary remedy in the event of any breach of RERA by Loob -

(a) Article 15(IV) RERA has stated that if Loob breaches the non-compete clause in Article 15 RERA, Loob "*shall*" pay the following sums to La Kaffa -

(i) US$10,000.00 as "*punitive penalty*" for each breach of Article 15 RERA; and
(ii) all "*gains*" derived by Loob from breach of Article 15 RERA;

(b) according to Article 16(II) RERA, Loob "*shall*" pay to La Kaffa the following sums for breach of an obligation of confidentiality in Article 16 RERA –

(i) US$100,000.00 as "*punitive penalty*"; and
(ii) the "*entire gain*" derived by Loob from breach of Article 16 RERA;

(c) under Article 2(IV) RERA, Loob had guaranteed a certain sum (**Guaranteed Sum**) to be paid to La Kaffa based on "*Gross Monthly Sales*". If Loob fails to meet the Guaranteed Sum, Loob "*shall*" pay to La Kaffa royalty under Article 10(II) RERA which will be calculated in a stipulated manner;

(d) Loob "*shall*" pay to La Kaffa a franchise fee of US$1,450,000.00 by way of specified annual instalments from 30.11.2013 up to 30.6.2020;

(e) Loob "*shall*" pay to La Kaffa a penalty of US$10,000.00 for each breach of Article 7(1) RERA (Loob's failure to purchase raw materials from La Kaffa); and

(f) pursuant to Article 10(IV) RERA, if La Kaffa's audit discloses that Gross Monthly Sales exceed the amount reported by Loob by an amount equal to or more than 3%, Loob "*shall*" pay to La Kaffa 2.5% of the difference and shall bear the cost of the audit;

(2) any loss which may be suffered by La Kaffa due to -

(a) Loob's breach of non-compete contractual clause;
(b) Loob's breach of confidential information; and
(c) tort of passing off (or tort of inverse passing off) committed by Loob

- may be assessed and paid by Loob to La Kaffa in the form of damages; and

(3) La Kaffa (not Loob) bears the evidential onus to satisfy the court that the remedy of damages is not an adequate remedy - please see the Court of Appeal's judgment delivered by Ahmad Fairuz JCA (as he then was) in **Gerak Indera Sdn Bhd v Farlim Properties Sdn Bhd** [1997] 3 MLJ 90, at 99. La Kaffa has failed to discharge the evidential burden to persuade the court that damages are not a sufficient relief in this case.

40. As damages are a sufficient remedy for La Kaffa, I exercise my discretion under s 11(1)(h) AA to grant an interim mandatory injunction to compel Loob to serve on La Kaffa's solicitors an affidavit containing Loob's Gross Monthly Sales and an account of profits from Tealive Franchise business on the tenth day of every calendar month from the date of this order until disposal of Singapore Arbitral Proceedings. Such an interim measure is given pursuant to La Kaffa's prayer for "*further or other orders*" as this court deems fit and proper to grant - please see the judgment of Salleh Abas FJ (as he then was) in the Federal Court case of **Lim Eng Kay v Jaafar Mohamed Said** [1982] CLJ (Rep) 190, at 198.

The above interim order is made to support, assist, aid or facilitate the Singapore Arbitral Proceedings. It is to be noted that the court may order the giving of evidence by affidavit under s 11(1)(c) AA. The above interim measure is made subject to La Kaffa's undertaking to the court to use the information given by Loob only for the purpose of Singapore Arbitral Proceedings.

H(6). <u>Where does balance of convenience lie?</u>

41. According to **Alor Janggus Soon Seng Trading Sdn Bhd**, at p. 270-271, where the balance of convenience lies depends on which proposed court order carries a lower risk of injustice. If the granting of an interim restraining injunction carries a lower risk of injustice than a refusal of the interim restraining injunction, the balance of convenience lies in favour of granting the interim restraining injunction. Conversely, if the granting of an interim prohibitory injunction carries a higher risk of injustice than a refusal

of the interim prohibitory injunction, the balance of convenience lies against the granting of the interim prohibitory injunction.

42. I have no hesitation to find that the balance of convenience lies heavily against the granting of interim restraining injunctions in La Kaffa's favour. This is because the granting of interim prohibitory injunctions in La Kaffa's favour carries a much higher risk of injustice than a refusal of those interim prohibitory injunctions. Such a decision is premised on the following evidence and reasons:

(1) if -

(a) La Kaffa is not given interim restraining injunctions,
(b) La Kaffa's Arbitral Claim is allowed by the arbitral tribunal and
(c) Loob's Counterclaim is dismissed by the arbitral tribunal,

damages are an adequate remedy for La Kaffa (please see the above paragraph 39). Furthermore, Loob is compelled by an interim mandatory injunction to serve on La Kaffa's solicitors an affidavit containing Loob's Gross Monthly Sales and an account of profits from Tealive Franchise business on the tenth day of every calendar month from the date of this order until disposal of Singapore Arbitral Proceedings (please see the above paragraph 40). With this information from Loob, in the event the Singapore Arbitral Proceedings are resolved in La Kaffa's favour, the arbitral tribunal can proceed expeditiously to –

(i) assess damages payable by Loob to La Kaffa for all loss suffered by La Kaffa (**Assessment of Damages**); or

(ii) ascertain the profits for which Loob shall account to La Kaffa (**Account of Profits**)

(depending on whether La Kaffa would elect for an Assessment of Damages or an Account of Profits).

It is clear from the above that there is only a low risk of injustice to La Kaffa if the court refuses La Kaffa's 1st to 3rd Prayers; and

(2) if -

(a) the court grants interim prohibitory injunctions to restrain Loob from continuing Tealive Franchise business,
(b) La Kaffa's Arbitral Claim is dismissed by the arbitral tribunal and
(c) if Loob's Counterclaim is allowed by the arbitral tribunal

the interim prohibitory injunctions ordered against Loob will carry a much higher risk of injustice to Loob and various third parties as follows -

(i) Loob has to cease immediately Tealive Franchise business. There is no certainty that the Singapore Arbitral Proceedings will be concluded expeditiously. At the time of hearing of the 2 Suits, the arbitrator for the Singapore Arbitral Proceedings had yet to be appointed. In fact, La Kaffa has changed its Singapore solicitors

for the Singapore Arbitral Proceedings. Consequently, Loob will suffer irreparable prejudice if Loob is restrained from carrying out Tealive Franchise business pending the protracted disposal of the Singapore Arbitral Proceedings;

(ii) the following third parties will be adversely affected by interim restraining injunctions awarded against Loob -

(iia) 161 Tealive Franchisees have to close shop immediately;

(iib) the livelihood of about 800 employees of Loob and 161 Tealive Franchisees (**Tealive Employees**) will be jeopardised;

(iic) the families and dependants of Tealive Employees;

(iid) the suppliers and contractors of Loob and 161 Tealive Franchisees;

(iie) the bankers and creditors of Loob and 161 Tealive Franchisees; and

(iif) the landlords of the office and business premises of Loob and 161 Tealive Franchisees; and

(iii) La Kaffa is a foreign company with no proof of assets in Malaysia. If Loob enforces La Kaffa's undertaking to this court to pay damages (in respect of interim restraining injunctions against Loob) and if the court orders damages to be paid by La Kaffa to

Loob (**Malaysian Court Order on Damages**), Loob may face problems in Taiwan regarding the enforcement of a Malaysian Court Order on Damages.

H(7). Has La Kaffa acted inequitably?

43. It is clear that the court may refuse to grant the equitable remedy of an interim injunction if a plaintiff is guilty of inequitable conduct. This is clear from the following cases:

    (1) the judgment of Alauddin Mohd. Sheriff JCA (as he then was) in the Court of Appeal case of **Timbermaster Timber Complex (Sabah) Sdn Bhd v Top Origin Sdn Bhd** [2002] 1 CLJ 566, at 573; and

    (2) the High Court judgment given by Low Hop Bing J (as he then was) in **Natseven TV Sdn Bhd v Television New Zealand Ltd** [2001] 4 AMR 4648, at 4666.

44. Section 54(j) SRA provides that an injunction cannot be granted "*when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the court*". It was decided by Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of **Keet Gerald Francis Noel John**, at p. 206, that s 54 SRA only applies to perpetual (not temporary) injunctions. However, the following 2 Supreme Court decisions have applied s 54 SRA in the context of interim injunctions:

(1) the judgments of Salleh Abas LP (at p. 20) and Eusoffe Abdoolcader SCJ (at p. 50) in **Government of Malaysia v Lim Kit Siang, United Engineers (M) Bhd v Lim Kit Siang** [1988] 2 MLJ 12; and

(2) Seah SCJ's decision in **Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia** [1988] 1 MLJ 302*,* at 303.

In **Dato' Mohd Zaini bin Mohd Ariff v Alliance Bank Malaysia Bhd** [2015] 1 MLRH 87, at paragraphs 36-52, I have followed the above 2 Supreme Court decisions, Desai J's judgment in the Indian Supreme Court case of **Cotton Corporation of India Ltd v United Industrial Bank Ltd & Ors** AIR 1983 SC 1272, at 1275 and 1279-1280 [s 41 of the Indian Specific Relief Act 1963 is similar (not identical) to our s 54 SRA] and applied s 54 SRA in respect of interim restraining injunctions.

45. I am of the view that La Kaffa has been guilty of inequitable conduct within the meaning of case law and/or s 54(j) SRA which disentitles La Kaffa from applying for interim prohibitory injunctions sought for in La Kaffa's 1st to 3rd Prayers. This decision is based on the following evidence and reasons:

(1) despite having given a Notice of Arbitration on 28.10.2016 (based on, among others, Loob's Alleged Breaches), 3 weeks later, on 18.11.2016 La Kaffa gave Loob an award, "*Chatime Best International Partner of the Year*"! This award was given in Taiwan in the presence of all the "*global partners*" of La Kaffa;

(2) on 30.12.2016, on behalf of La Kaffa, Mr. Amos Liu (**Mr. Liu**) sent a "*without prejudice*" email to "*remind*" Loob to pay a total of US$713,273.72 before 5.1.2017. This email had been exhibited in Mr. Chen Zhao's affidavit affirmed on 17.2.2017 in support of La Kaffa's Suit (court enc. no. 3). As such, La Kaffa has waived the "*without prejudice*" privilege attached to Mr. Liu's email dated 30.12.2016 - please see the Singapore Court of Appeal's judgment in **Lim Tjoen Kong v A-B Chew Investments Pte Ltd** [1991] 3 MLJ 4, at 8-9, delivered by Chan Sek Keong J (as he then was).

Ms. Loo Chee Leng (on behalf of Loob) sent an email at 9.56 am, 4.1.2017 to La Kaffa and requested for a breakdown of the demanded sum of US$713,273.72 so as to expedite Loob's consideration of that sum. At 9.11 pm, 4.1.2017, Mr. Liu sent an email to Loob and stated that Loob should pay US$644,536.32 (instead of US$713,273.72) to La Kaffa. On the very next day, 5.1.2017, La Kaffa's Termination Notice was served personally on Mr. Loo by La Kaffa's Vice-President, Mr. Hank Wang Han Pin (**Mr. Wang**).

I find La Kaffa's above conduct to be inequitable. After La Kaffa had corrected its monetary demand at **9.11 pm, 4.1.2017** (through Mr. Liu's email), La Kaffa should have given a reasonable extension of time (beyond the initial 5.1.2017 dateline) for Loob to pay US$644,536.32 (**Extension of Time**). There would not be any prejudice to La Kaffa due to an Extension of Time because La Kaffa's Arbitral Claim was already on foot;

(3) after La Kaffa had served a Notice of Arbitration, there were "*without prejudice*" negotiations between La Kaffa and Loob to resolve the dispute. Mr. Loo's affidavit affirmed on 22.3.2016 (court enc. no. 14) had alluded to these "*without prejudice*" negotiations and had exhibited an exchange of text messages between Mr. Loo and Mr. Wang (**Text Messages**). La Kaffa had not objected to such evidence and had therefore waived the right to object to its admissibility - **Lim Tjoen Kong**.

Mr. Wang intimated to Mr. Loo that La Kaffa wished to invite Loob to participate in a Chatime Master Franchisees meeting in Australia which was scheduled to be held sometime in February 2017 (**Proposed Meeting in Australia**). In the Text Messages, Mr. Wang expressly stated that he would like to deliver personally the invitation for the Proposed Meeting in Australia (**Invitation**) on Mr. Loo on 5.1.2017.

In the meeting on 5.1.2017, instead of handing over the Invitation, Mr. Wang handed La Kaffa's Termination Notice personally to Mr. Loo. Paragraph 22 of Mr. Wang's affidavit affirmed on 4.5.2017 (court enc. no. 22) stated as follows -

(a) the meeting on 5.1.2027 was "*originally*" meant for La Kaffa to invite Loob to attend the Proposed Meeting in Australia;

(b) at the beginning of the meeting on 5.1.2027, La Kaffa was "*still open to amicably settling the disputes that had arisen*" and to invite Loob to the Proposed Meeting in Australia; and

(c) after discussing for over an hour to resolve the dispute, "*no remedy was indicated, shown or proposed by*" Loob to La Kaffa's "*reasonable satisfaction*". Consequently, La Kaffa was left with no choice but to terminate RERA "*in order to preserve the quality*" of Chatime Franchise.

I am not able to accept Mr. Wang's above explanation. This is because firstly, La Kaffa's Termination Notice contained 10 detailed paragraphs which could only mean that La Kaffa's Termination Notice had been prepared well in advance before the meeting on 5.1.2017. Secondly, the court would refer below to documents which showed La Kaffa's pre-meditated intention to terminate RERA on 5.1.2017.

It is La Kaffa's prerogative to terminate RERA. Having said that, I find that La Kaffa's Termination Notice had been handed to Loob on 5.1.2017 by way of a subterfuge. Such an inequitable conduct on La Kaffa's part would disentitle La Kaffa to the equitable relief of interim restraining injunctions;

(4) Encik Muhammad Naim Zulkifli (**Encik Naim**) is from Strategic Public Relations Sdn. Bhd. (**SPRSB**), a public relations company. SPRSB had been appointed by La Kaffa to act for La Kaffa. On 30.12.2016, before La Kaffa's Termination Notice, Encik Naim sent an "*email blast*"

with the subject "*[Media Announcement] La Kaffa International Co. Ltd. to announce the entry of several new international brands*". This email -

(a) stated that La Kaffa would visit Malaysia to announce the entry of several new international brands into Malaysia; and

(b) requested the recipients of the email to "*save*" the date of 6.1.2017 and SPRSB would send a formal invitation by 3.1.2017.

Encik Naim's email was sent when RERA was still enforceable. Furthermore, Encik Naim's email had been sent without Loob's knowledge. Article 2(I) RERA clearly provided that La Kaffa granted to Loob, among others, an "*exclusive franchise to sell Chatime products*". La Kaffa had seemingly breached Article 2(I) RERA by causing the transmission of Encik Naim's email. Additionally or alternatively, Encik Naim's email showed that La Kaffa had not acted in good faith towards Loob as required by RERA;

(5) La Kaffa sent a notice dated 5.1.2017 to Chatime Franchisees which stated, among others, La Kaffa had terminated RERA and consequently, all of Chatime sub-franchise agreements "*shall be null and void*".

Firstly, such a notice was sent on the very same day as La Kaffa's Termination Notice and clearly evidenced La Kaffa's pre-meditated and inequitable conduct in respect of the termination of RERA [please see the above sub-paragraph (3)]. More importantly, Article 17(IV)

RERA had provided that upon the termination of RERA, La Kaffa or "*a third party assigned by*" La Kaffa "*shall assume*" Loob's obligations in rendering operations consultancy to Chatime Franchisees. By stating that Chatime sub-franchise agreements "*shall be null and void*" in the above notice, La Kaffa had breached Article 17(IV) RERA;

(6) SPRSB issued a press release dated 6.1.2017 on behalf of La Kaffa. This press release stated, among others –

(a) La Kaffa had terminated RERA "*due to disagreement in direction in its business operations*"; and

(b) "*With immediate effect*", La Kaffa would "*officially take over*" the Malaysian Chatime Franchise business operation and development.

The above press release demonstrated La Kaffa's inequitable conduct in the following manner -

(i) upon the termination of RERA, Article 13(IV) RERA provided for 45 calendar days for Loob to return Chatime Materials and La Kaffa's Proprietary Information. Upon the termination of RERA, La Kaffa was not entitled under RERA to take over immediately Chatime Franchise business from Loob; and

(ii) La Kaffa had relied on Loob's Alleged Breaches to institute the Singapore Arbitral Proceedings. La Kaffa's Termination Notice had been sent based on various breaches of RERA by Loob.

When La Kaffa's press release stated that RERA was terminated "*due to disagreement in direction in its business operations*", La Kaffa had been less than honest; and

(7) La Kaffa sent a notice dated 5.1.2017 to "*shopping mall owners*" and stated, among others, all the agreements between Loob and the shopping mall owners regarding Chatime franchise business "*shall be null and void*". Such a statement was wrong and showed La Kaffa's inequitable conduct.

H(8). <u>Cases cited by Mr. Khoo</u>

46. In support of La Kaffa's 1st to 3rd Prayers, Mr. Khoo had relied on an impressive array of cases from UK and Republic of Ireland. With respect, all these cases can be explained on the ground that the courts in those cases have exercised their discretion to grant or refuse interlocutory restraining injunctions based on the particular evidence adduced in those cases. Furthermore, all the cases cited by Mr. Khoo can be distinguished from this matter on one or more of the following 3 grounds:

(1) damages are an adequate remedy for La Kaffa - please see the above paragraph 39;

(2) the balance of convenience lies heavily in favour of a refusal of La Kaffa's 1st to 3rd Prayers - please see the above paragraph 42; **and/or**

(3) La Kaffa had been guilty of inequitable conduct which disentitled La Kaffa from seeking the equitable remedy of interim restraining injunctions - please see the above paragraph 45.

I. Is La Kaffa entitled to costs of La Kaffa's Suit?

47. O 59 rr 2(2), 3(1), (2) and 8(b) RC provide as follows:

> "***r 2(2) Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Court, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid****.*
>
> ***r 3(1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court****.*
>
> ***r 3(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs****.*
>
> ***r 8 The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account -***
>
> *…*
>
> ***(b) the conduct of all the parties, including conduct before*** *and during* ***the proceedings;*** *…*"

(emphasis added).

48. In **De Tebrau Makmur Sdn Bhd & Anor v Bank Kerjasama Rakyat Malaysia Bhd** [2017] MLJU 201, at paragraph 67, I have decided as follows:

> "*67.* ***The Court has a wide discretion under O 59 rr 2(2) and 19(1) RC to award costs for an action*** *[please see Chan Sek Keong J's (as he then was) decision in the Singapore High Court in* ***The Karting Club of Singapore v David Mak & Ors (Wee Soon Kim Anthony, Intervener)*** *[1992] 2 SLR 483, at 485].* ***The general rule is that "costs to follow the event" under O 59 r 3(2) RC, namely the Court should generally exercise its discretion to award costs of an action to the winning party*** *[please see Singapore Court of Appeal's judgment delivered by Chan Sek Keong CJ in* ***Attorney-General v Vellama d/o Marie Muthu*** *[2013] 1 SLR 439, at paragraph 15].* ***Nonetheless, O 59 r 3(2) RC (except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs) also confers discretionary power on the Court to deprive the winning party of costs of the suit, wholly or partly*** *[please see Vaughan Williams LJ's judgment in the English Court of Appeal case of* ***Bostock v Ramsey Urban District Council*** *[1900] 2 QB 616, at 625].*"

(emphasis added).

49. In view of La Kaffa's inequitable conduct as elaborated in the above paragraph 45, despite La Kaffa being partially successful in La Kaffa's Suit (La Kaffa's 5th Prayer has been allowed by the court), I exercise my discretion under O 59 rr 2(2), 3(1), (2) and 8(b) RC as follows -

(1) the general rule that "*costs to follow the event*" is not applied in La Kaffa's Suit; and

(2) La Kaffa should be wholly deprived of costs of La Kaffa's Suit. Hence, there will be no order as to costs in La Kaffa's Suit.

J. Loob's Suit

J(1). Admissibility of "*without prejudice*" communications

50. In Loob's Suit, unlike La Kaffa's Suit, Mr. Khoo had objected to "*without prejudice*" communications between the parties. La Kaffa did not waive its right to object to the admissibility of "*without prejudice*" communications in Loob's Suit.

51. Section 23 of the Evidence Act 1950 (**EA**) states as follows:

> "***In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.***"
>
> (emphasis added).

52. I uphold Mr. Khoo's objection to the admissibility of "*without prejudice*" communications based on s 23 EA and the following cases:

(1) Chang Min Tat FJ decided as follows in the Federal Court case of **Malayan Banking Bhd v Foo See Moi** [1981] 2 MLJ 17, at 18 -

"***It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached.***"

(emphasis added); and

(2) in **Mazlan Aliman & Anor v Lembaga Kemajuan Tanah Persekutuan** [2016] 1 LNS 971, at paragraph 10, Hasnah Mohammed Hashim JCA held as follows in the Court of Appeal -

"*[10]* ***The main objective of 'without prejudice' communication is that in the event the negotiations fail neither party should be able to rely upon any admission made in the course of the aforesaid negotiations.***"

(emphasis added).

J(2). <u>Loob's Prayer</u>

53. Loob's Prayer is premised on the allegation that La Kaffa had committed the tort of unlawful interference with Loob's business (**Loob's Allegation**). The tort of unlawful interference with a person's trade is first recognized in Malaysia by Zakaria Yatim J (as he then was) in the High Court case of **H & R Johnson (M) Bhd v H & R Johnson Tiles Ltd & Anor** [1995] 2 AMR 1390.

54. I am not able to grant Loob's Prayer for the following reasons:

(1) any interim measure pursuant to Loob's Prayer cannot support, assist, aid or facilitate the Singapore Arbitral Proceedings. This is because Loob's Allegation did not concern RERA or Chatime Franchise business. In fact, Loob's Allegation concerns matters which arise after the termination of RERA. If La Kaffa has unlawfully interfered with Loob's business, Loob is at liberty to commence an action against La Kaffa and seek final relief (not interim measures) based on the tort of unlawful interference with Loob's business; and

(2) damages are a sufficient remedy for Loob regarding Loob's Allegation - please see **Associated Tractors**, at p. 32.

55. In view of the above reasons, Loob's Suit is dismissed with costs.

K. Court's decision

56. Premised on the above evidence and reasons –

(1) La Kaffa's Suit is allowed with the following orders -

(a) subject to La Kaffa's undertaking to pay damages in respect of any loss suffered by Loob regarding any interim injunction granted by this court, a mandatory injunction is granted to compel Loob to -

(i) return Chatime Materials and La Kaffa's Proprietary Information to La Kaffa; and

(ii) serve an affidavit affirming, among others –

(iia) Loob's return of Chatime Materials and La Kaffa's Proprietary Information to La Kaffa; and

(iib) the fact that Loob no longer has possession, custody or control of Chatime Materials and La Kaffa's Proprietary Information. If Loob subsequently discovers or come into possession, custody or control of Chatime Materials and La Kaffa's Proprietary Information, Loob shall undertake not to use them and shall return them forthwith to La Kaffa;

(b) subject to La Kaffa's undertaking to use the information given by Loob pursuant to this sub-paragraph solely for the purpose of Singapore Arbitral Proceedings, on the tenth day of every calendar month from the date of this order until disposal of Singapore Arbitral Proceedings, a mandatory injunction is given to compel Loob to serve on La Kaffa's solicitors an affidavit containing Loob's Gross Monthly Sales and an account of profits of Tealive Franchise business;

(c) both parties shall be given liberty to apply to court to –

(i) vary or discharge the above orders; and
(ii) enforce La Kaffa's undertakings; and

(d) no order as to costs; and

(2) Loob's Suit is dismissed with costs of RM10,000.00 to be paid by Loob to La Kaffa (**Costs Sum**) and an allocatur fee of 4% is imposed on the Costs Sum.

WONG KIAN KHEONG
Judicial Commissioner
High Court (Commercial Division)
Kuala Lumpur

DATE: 29 August 2017

Counsel for La Kaffa: *Mr. Khoo Guan Huat, Mr. Kwan Will Sen, Ms. Melissa Long Lai Peng & Ms. Alyshea Low Khye Lyn (Messrs Skrine)*

Counsel for Loob: *Dato' Loh Siew Cheang, Ms. Cindy Goh Joo Seong, Mr. Yap Mong Jay, Ms. Verene Tan Yen Yi & Mr. Lim Kwan (Messrs Cheang & Ariff)*