MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Hamid Sultan Abu Backer, JCA; Dr. Badariah Sahamid, JCA; Rhodzariah Bujang, JCA

La Kaffa International Co Ltd v Loob Holding Sdn Bhd

Citation: [2018] MYCA 208 **Suit Number:** Civil Appeal No. W-02(IM)(IPCV)-1261-07/2017

Date of Judgment: 05 July 2018

Litigation & court procedure – Application for a stay of a prohibitory injunction pending the disposal of an application for leave to appeal at the Federal Court – Absence of averment in the supporting affidavit that there was indeed an application for leave to appeal at the Federal Court – Whether the absence of pending proceedings before the Federal Court fatal to the application for a stay

Litigation & court procedure – Stay application – Discretionary powers of the court – Whether the court ought to favour a person who by conduct was perceived to have breached the contractual obligation as well as statutory obligation – Whether a stay application before the Court of Appeal against its own decision could be granted on a nugatory principle – Whether the stay would give rise to any actual prejudice – Whether the court should be slow in granting a stay in a case involving self-induced misconduct (breach of contract as well as statute) and criminal element

JUDGMENT

[1] The respondent/ Loob applies to stay our judgment related to a prohibitory injunction granted on appeal on 27-06-2018, where we have delivered our written grounds. The stay is sought pending the disposal of the respondent's application for leave to appeal at the Federal Court against our orders. However, the affidavit does not aver that there is indeed an application for leave to appeal at the Federal Court. *Prima facie*-this is fatal to the application for a stay as there is no proceeding pending in the Federal Court to grant a stay.

[2] The prohibitory injunction was essentially to stop Loob from operating a competing or similar business of La Kaffa (CHATIME) franchise. To appreciate my grounds in the proper perspective, our judgment dated 27-06-2018 must be read together with this judgment.

[3] What is important to note in this case is that both under the Franchise Agreement between the

parties as well as the **Franchise Act 1998**, Loob by statute as well as under the contract is prohibited from operating a similar business in competition to CHATIME business. In the instant case, quite in an unusual manner and in gross disregard to the contractual obligations as well as the statutory obligation, Loob in an 'overnight' maneuver had changed the name of CHATIME to TEALIVE and operating in the same premise as well as with staff, etc. The basic fact in the instant case is not in dispute.

[4] In seeking a stay, Loob is relying on the special circumstances rule and pleads as follows:

> "23. I am advised by the Respondent's solicitors and verily believe that based on La Kaffa's allegation against Loob, if La Kaffa seeks to enforce the COA Order against the Loob, the said enforcement will:
>
> 23.1 immediately result in the ceasing of the operations of the 'Tealive' business currently being operated by 179 outlets spread nationwide including 22 outlets at the petrol stations; and
>
> 23.2 result in the eventual closure of all 179 'Tealive' outlets as all these outlets exclusively sell and market 'Tealive' products."

[5] In response to Loob's plea, the learned counsel for La Kaffa *inter alia* submits as follows:

> "8. We submit that the Court of Appeal had rightly and duly taken into consideration the factual circumstances of Loob's overnight wholesale duplication of the "CHATIME" system, with outlets merely being renamed practically overnight. This Honourable Court has taken this into account at Paragraph 40 of the Written Grounds of Judgment-and conversely that the High Court had materially failed to consider the same. This position has been amply supported, and this can be seen in among others:
>
> (a) Numerous media statements made by Loob on the rebrand confirming the intent for TEALIVE to adopt the same business and concept;
>
> (b) Replication of vast majority of items between the TEALIVE menu and CHATIME menu; and
>
> (c) Same outlets, team and layout.
>
> 9. As explained in La Kaffa's Affidavit in Reply, the TEALIVE duplication even goes so far as retaining the purple background for signage at the outlets-see Paragraph 33 of La Kaffa's Affidavit in Reply."

[6] I have read the application as well as the affidavits and the submissions of the learned counsel. After much consideration to the submission of the learned counsel from Loob, I take the view that the application must be dismissed. My reasons *inter alia* are as follows:

(a) It is trite that an order for stay is discretionary in nature and the court ought not lean in favour

of a person who by conduct is perceived to have breached the contractual obligation as well as statutory obligation with knowledge that he is likely to cause loss to the other person. [Emphasis added]. [See s.418, **Penal Code**].

(b) A stay application before the Court of Appeal against its own decision is not purely granted on a nugatory principle. In addition the threshold for stay is high in contrast to a stay under section 44 of the **Courts of Judicature Act 1964**.

(c) Further, I take the view that the appellant's submission that La Kaffa can be compensated with an order for damages to be contemptuous in nature when a statute strictly prohibits them from operating business in that manner and there is a criminal element to it as well as attracts sections in the Penal Code related to cheats. The said section 27 of the **Franchise Act 1998** reads as follows:

> **"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** [Emphasis added].
>
> (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."

(d) The judge had taken an oath to preserve, protect and defend the Constitution. In consequence, it will be against the rule of law to disregard a statutory protection in favour of La Kaffa. The cases that Loob was relying did not deal with instances where there was a perceived breach of a statute. The cases relied on by Loob are as follows:

(i) **Chen Hing v Export-Import Bank of Malaysia Bhd** [2016] 7 CLJ 475;

(ii) **Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd** [2003] 4 CLJ 1;

(iii) **Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd** [2002] 3 CLJ 380;

(iv) **Jagdis Singh Banta Singh v Outlet Rank (M) Sdn Bhd** [2013] 3 CLJ 47;

(v) **Lai Soon Onn v Chew Fei Meng and other appeals** [2018] MLJU 627;

(vi) **Government of Malaysia v Jasanusa Sdn Bhd** [1995] 2 CLJ 701.

(e) Learned counsel of Loob says that La Kaffa will not suffer any prejudice. In my view, there is

actual prejudice as La Kaffa based on the contract as well as a statute is entitled to sustain the rule of law in uncompromising terms. The position may be different if there was no statutory support in favour of La Kaffa. The distinction in jurisprudence is not one of an apple and orange but a marble and pumpkin.

(f) As I said earlier, the granting of an order for stay is discretionary in nature and the Court of Appeal must be slow in granting a stay when:

(i) Loob by their own act was purportedly in breach of contract as well as statute and have expanded the business or continuing the business. It is a case of self-induced misconduct. Special circumstances jurisprudence relied by Loob will not be applicable in a case of self-induced misconduct. In **Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd** [2002] 3 CLJ 380, the Court of Appeal on the facts of the case held that, fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, etc. will not fall under the special circumstances rule.

(ii) Loob's strongest point canvassed before us was that the business is ongoing and has expanded, etc. However, they have not produced case laws to support that these grounds are sufficient to seek a stay that too upon the final decision of the Court of appeal where there is no right of appeal to the Federal Court except upon a successful leave to appeal application. However, the learned counsel for La Kaffa on this issue says:

"17. Additionally, we submit that a consideration of paramount importance is that all of Loob's purported special circumstances, were ones of their own making. Loob converted 161 outlets into overwhelmingly similar "TEALIVE" outlets despite warning of their post-termination non-compete obligations. They chose to replicate the menu, and adopt the same team, location, same layout, same feel and concept.

18. In essence, Loob set out on a mission to create, as far as possible, their own purported special circumstances-clearly attempting to present the Court with a presupposed *'fait accompli'* with regard alleged effects that would be occasioned to 3rd parties as a result of the prohibitory interim injunction orders. This, all despite knowing it faced opposition from La Kaffa, as clearly stated in its solicitor's letter dated 26.01.2017 and with the filing of the OS on 17.02.2017-all ahead of Loob's launch of TEALIVE on 18.02.2017.

19. Loob's excuse is essentially this: Loob set out to gobble as much as possible with a 'rebrand', and in doing so subsumed a vast majority of the CHATIME outlets. However, because Loob set out to be the biggest there is-Loob attests that it has impact on a large number of 3rd parties, and presupposes that having set out to be the biggest there is, that it is too big to close. This is so manifestly flawed and unjust, when by every account, it all leads back to the same consideration. Firstly, Loob is surely large and able enough to manage; and secondly, that they cannot take benefit of their own choices in the operation of a business so similar that they knew or ought to have known could be subject of an injunction.

20. The contemptibleness of this situation is expressed in *Jian Tools for Sales Inc. v Roderick Manhattan Grp Ltd* [1995] FSR 924 by Knox J (in respect of an interim injunction application) in the following terms:

> *"An important feature of, if not a better name for, What the Court is called upon to do at this stage is to strike the appropriate balance between the injustice involved in denying the plaintiffs an injunction at this stage, should they turn out at trial to be entitled to a permanent injunction, and the injustice involved in granting an injunction against the defendants at this stage should they succeed in showing at trial that no injunction should be granted. The conception of justice should, in my view, include considerations outside those which can be measured in economic terms. Walton J. took a similar factor specifically into consideration in granting an interlocutory injunction in Hymac Ltd v Priest man Brothers Ltd [1978] RPC 495, a case where the name in dispute was 580 in relation to excavators. He said at page 500:*
>
> *I think that there is special reason connected with convenience which it is necessary I ought to take into account and that is this. I cannot believe that this is a case where the defendants have not acted with their eyes fully open throughout. I cannot think that with an organisation of their size and reputation somebody on their side must not have said when names for this new machines were being discussed 'If we use 580, will not the plaintiffs object?*
>
> *He went on to give reasons why this should have been so and continued:*
>
> *If that question was asked, as I think it must have been, the defendants must thereafter have gone on knowing the risks involved. They therefore in my view cannot complain if they play with fire in that way and get burned.*
>
> *Similarly, I consider here that the defendants took the calculated risk in adopting "BusinessPlan Builder" in the same typographical format as Jian's mark."*

21. In a similar vein, in Minnesota Mining [1992] RPC 331, Aldous J held:

> *"I accept Mr Ren nicks' evidence that if an injunction is granted, it is likely that Ren nicks (UK) will cease to trade. However, that will be the decision of Rennicks Manufacturing. They have at all times financed Rennicks (UK) and could provide further finance if they thought it right. If Rennicks (UK) did cease to trade, then 13 employees would probably be made redundant. However, all but two of them were employed after Rennicks (UK) knew of the patent and the stated intention of the plaintiffs to litigate, and therefore they must have known of the possibility of an injunction being granted. In effect, Rennicks (UK) have expanded their business from two employees operating from private premises, aware of the risks that they took."*

22. The observations by *Minnesota Mining* above, came in respect of a stay application

pending appeal of a permanent injunction. It is submitted that those same considerations can be applied here, but are amplified given that this relates to an interim injunction where a necessity of immediate restraint has already been made out."

(iii) As it stands, there is no application for leave to appeal to the Federal Court. In consequence, the order for stay ordinarily cannot be granted more so when there is a criminal element as mentioned earlier.

(iv) Loob application for stay in principle is a matter for the Federal Court to consider and the Court of Appeal should not be seen lending support for the leave application itself, when by its judgment had taken cognizance of the undisputed facts that Loob is operating a business in breach of statutory protection given to La Kaffa which attracts a criminal sanction. The proper order to be made if the high threshold for stay is not satisfied is to dismiss the application. The dismissal *per se* will not be a bar for Loob to seek a stay in the Federal Court.

[7] For reasons stated above, the application is dismissed with costs and *en passant* state as follows:

(a) Courts should not lend its hand to persons who on the face of record are seen to be cheats.

(b) In India, such category of persons are called 420's. The terminology originates from the **Indian Penal Code** section 418, 420 and many other sections. Our provisions are similar. For example, our section 418 states:

"418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by a legal contract, to protect, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both."

(c) 420's flourish well in compromised governments with assistance of compromised Judiciary. The 420's existence in actual fact will compromise the rule of law as well as the concept of accountability, transparency and good governance. The lack of these virtues promote corrupt practices which ultimately affects the nation and its wealth. A judge by His Oath of Office ought to take cognizance of 420's *at limine*.

(d) Perceived 420's in all sectors inclusive of the Government as well as the judiciary, has brought supreme shame to the rule of law in many countries.

(e) In this time and era, the court must arise to ensure perceived 420's are not provided with discretionary order even in civil cases of this nature, that too at the Court of Appeal stage.

I hereby order so, with a note that my learned sister Justice Badariah binti Sahamid JCA supports my decision and my learned sister Justice Rhodzariah binti Bujang JCA dissents. By agreement of parties, we ordered costs of RM15,000.00 against Loob.

Dated: 05 July 2018

sgd

DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER
Judge
Court of Appeal
Malaysia.

JUDGMENT OF DATUK RHODZARIAH BINTI BUJANG

[1] On the 27/6/2018, YA Datuk Dr Haji Hamid Sultan bin Abu Backer, and YA Datuk Dr Badariah binti Sahamid and I delivered a unanimous decision granting a prohibitory injunction against the respondent for operating its drink stall business under the name 'Tealive' which was in direct competition with that operated by the appellant under the name 'Chatime'. The respondent was the appellant's former franchise holder of the said Chatime business. The respondent had applied to stay that prohibitory order pending its leave to appeal against the court's decision to the Federal Court which was allowed by YA Datuk Dr Haji Hamid Sultan bin Abu Backer and YA Datuk Dr. Badariah binti Sahamid but which I respectfully disagreed. My reasons for doing so are these:

(i) In my considered view there is indeed a special circumstance as envisaged by the Federal Court in **Kosma Palm Oil Mill Sdn Bhd & ors v Koperasi Serbausaha Makmur Bhd** (2009) 4 CLJ 1 for allowing an interim stay and that is the undisputed fact that if the injunction is not stayed pending the leave application, all 179 outlets of Tealive in Malaysia would have to cease operation and all 1171 of the respondent's employees working with Tealive would be out of jobs. This scenario is not just a mere "fear of losing business, customers, suppliers and goodwill" as stated by this court in **Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd** (2002) 3 CLJ 380 but a real ramification from disallowing the stay. The hardship and inconvenience, in other words, will not just be suffered by the respondent being the wrongdoer as found by this court and which should not be a valid consideration for granting a stay but to innocent third parties - its employees and their families which numbered more than a thousand. This includes the owners of the premises where Tealive operates and with whom the respondent had entered tenancy agreements with.

(ii) There would be no prejudice to the appellant if stay is granted because the transgression of its right by the respondents would adequately be compensated by damages. Infact the High Court had already ordered the respondent to affirm an affidavit every month to state the amount of gross monthly sales from Tealive and if the appellant wins in the arbitration proceeding still pending in Singapore between the parties, all profits from the Tealive business would go to the appellant.

(iii) The full grounds of judgment of this court by YA Datuk Hamid Sultan bin Abu Backer was ready at the time of its delivery and therefore there would not be any delay in the hearing of the motion for leave. So the interim stay would very likely be for a relatively short period but yet the hardship and inconvenience caused to these innocent third parties, particularly the employees and their families, would simply be too great.

[2] In saying all of the above, I am fully aware that at the time of the hearing of this application, the respondent has yet to file their motion for leave to appeal in the Federal Court but I could not hold that fact against them because when the decision was delivered on 27/6/2018, the respondents was directed to file this application for stay (if it so wished) within two days from the said date and we also fixed a date for its hearing, that is 4/7/2018. An extract from the court management system of the summary of the court proceeding on 27/6/2018 is reproduced below.

Date/ Proceeding Type	**Minute**	**Result**	**Method of Disposal**
27 Jun 2018 Keputusan	KORAM: YA DATUK DR HAJI HAMID SULTAN BIN ABU BACKER, HMR YA DATUK DR BADARIAH BINTI SAHAMID, HMR YA DATO RHODZARIAH BINTI BUJANG, HMR Case is fixed for decision. KES BERKAITAN RAYUAN NO. W-02(IM) (IPCV)-1275-07/2017	Decision (Unanimous). Appeal 1261 is allowed under prayer 1(a), 1(b) and 1(c) of the application. The High Court's order is varied to include these prayers. Appeal 1275 is dismissed. Costs of RM 30,000 here and below for both appeals subject to allocator. Deposits to be refunded. If the respondent/ Loob wishes to file a motion for stay, the respondent/ Loob is given 2 days to file in the motion and the other 2 days for the appellant/ La Kaffa to reply to that motion. The hearing of the motion is fixed on 4.7.2018.	Rayuan Dibenarkan

Therefore the respondent was merely following the directive given and the timelines set by the court in filing the application for stay of the court order.

[3] Thus, in these circumstances I would allow the interim stay as prayed for but it is of course conditional upon the filing of the motion for leave to appeal to the Federal Court.

Date: 5 July 2018

signed

RHODZARIAH BINTI BUJANG
Judge
Court of Appeal
Malaysia

COUNSEL

For the Appellant: Mr. Khoo Guan Huat [with Kwan Will Sen, Melissa Long and Alyshea Low], Messrs. Skrine, Advocates & Solicitors, Tingkat 8, Wisma UOA Damansara, 50, Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur

For the Respondent: Dato' Loh Siew Cheang [with Cindy Goh Joo Seong, Yap Mong Jay, Keong Ming Wai and Lim Kuan], Messrs Cheang & Ariff, Advocates & Solicitors, 39 Court @ Loke Mansion, 273A Jalan Medan Tuanku, 50300 Kuala Lumpur

LEGISLATION REFERRED TO:

Courts of Judicature Act 1964, Section 44

Franchise Act 1998, Section 27

Indian Penal Code, Sections 418, 420

Penal Code, Section 418

JUDGMENTS REFERRED TO:

Chen Hing v Export-Import Bank of Malaysia Bhd [2016] 7 CLJ 475

Government of Malaysia v Jasanusa Sdn Bhd [1995] 2 CLJ 701

Jagdis Singh Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 3 CLJ 47

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1

Lai Soon Onn v Chew Fei Meng and Other Appeals [2018] MLJU 627

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 CLJ 380