

HCA 1957/2019

[2019] HKCFI 2773

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

ACTION NO. 1957 OF 2019

BETWEEN

SECRETARY FOR JUSTICE

1st Plaintiff

COMMISSIONER OF POLICE (SUING
ON HIS OWN BEHALF AND ON
BEHALF OF ALL OTHER POLICE
OFFICERS AND AUXILIARY
OFFICERS AS DEFINED IN THE
POLICE FORCE ORDINANCE, CAP
232)

2nd Plaintiff

and

PERSONS UNLAWFULLY AND
WILFULLY CONDUCTING
THEMSELVES IN ANY OF THE ACTS
PROHIBITED UNDER PARAGRAPH
1(A), (B) OR (C) OF THE
INDORSEMENT OF CLAIM

Defendants

Before: Hon Coleman J in Chambers (Open to Public)

Date of Hearing: 8 November 2019

Date of Ruling: 8 November 2019

RULING

Introduction

1. On 25 October 2019, and as amended and re-amended on 28 October and 1 November 2019, Chow J granted an interim injunction (“Injunction Order”) which was to remain in force up to and including today, 8 November 2019. This is, therefore, the hearing of the *inter partes* summons issued seeking continuation of the Injunction Order.

2. The 1st and 2nd plaintiffs to these proceedings are, respectively, the Secretary for Justice (“SJ”) and the Commissioner of Police (suing on his own behalf and on behalf of all other police officers and auxiliary officers as defined in the Police Force Ordinance Cap 232).

3. The defendants are identified on the writ and the Injunction Order as “Persons unlawfully and wilfully conducting themselves in any of the acts prohibited under paragraph 1(a), (b) or (c) of the Indorsement of Claim”. Essentially those paragraphs are reflected in paragraph 1(a), (b) and (c) of the Injunction Order.

4. Those paragraphs restrain the defendants and each of them, whether acting by themselves, their servants or agents, or otherwise howsoever, from doing any of the following acts:

(a) using, publishing, communicating or disclosing to any other person the personal data of and concerning any Police Officer(s) and/or their spouses and/or their respective family members (namely parents, children or siblings), including but not limited to their name, job title, residential address, office address, school address, email address, date of birth, telephone number, Hong Kong Identity Card number or identification number of any other official identity documents, Facebook Account ID, Instagram Account ID, car plate number, and any photograph of the Police Officer(s) and/or their spouses and/or their respective family members (namely parents, children or siblings) (“Personal Data”), intended or likely to intimidate, molest, harass, threaten, pester or interfere with any Police Officer(s) and/or their spouses and/or their respective family members (namely parents, children or siblings), without the consent of the Police Officer(s) and/or their family member(s) (as the case may be) concerned;

(b) intimidating, molesting, harassing, threatening, pestering or interfering with any Police Officer(s) and/or their spouses and/or their respective family members (namely parents, children or siblings);

(c) assisting, causing, cancelling, procuring, instigating, inciting, aiding, abetting or authorizing others to commit any of the aforesaid acts or participate in any of the aforesaid acts.

5. Such activities are sometimes referred to as “doxxing”, and it is essentially a form of cyber-bullying.

6. Under paragraph 2 of the Injunction Order, service has been effected on the defendants by publishing the injunction papers on the websites of the HKSAR Government and the Police. It can also be noted that the terms of the Injunction Order were widely reported in various media.

7. The identification of the defendants on the writ and the Injunction Order by use of a description, without naming any individual, has been approved in earlier cases. Where it is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of proceedings as will enable him to be heard, it is a requirement to adopt a description for the mode of service as can reasonably give rise to an expectation that the proceedings will come to that person’s attention. I am satisfied that this case is one where the formulation of the defendants as adopted is appropriate for those purposes.

8. No one within the description of the defendants has appeared at this hearing to seek any variation or discharge of the Injunction Order, or to oppose the *inter partes* summons.

9. However, by summons dated 5 November 2019, the Hong Kong Journalists Association (“HKJA”) has applied for the Injunction Order to be varied by including the following terms:

(a) Paragraph 1 of the Order does not prohibit any lawful act(s) which are done solely for the purpose of a “news activity” as defined in section 61 of the Personal Data (Privacy) Ordinance Cap 486 (“PDPO”); and

(b) Paragraph 1(a) of the Order does not prohibit the disclosure of Personal Data to a data user whose business, or part of whose business, consists of a “news activity” where the requirements of section 61(2)(b) of the PDPO are satisfied.

10. The HKJA applies as a party who may be affected by the Injunction Order. But it does not seek to be joined as a named defendant nor other party to this action as such.

11. The plaintiffs oppose such a variation, primarily on the basis that the proposed provision is unnecessary and such a broad exemption would very likely be open to abuse

by defendants.

The Claim

12. The SJ pursues a claim of public nuisance, on behalf of the public at large.
13. The Commissioner is bringing personal claims of harassment/intimidation on his own behalf and as a representative on behalf of all police officers in the Hong Kong police force.
14. Both claims arise out of factual background which is well known, and supported by the affirmation evidence of relevant offices, and the exhibits to their affirmations. In short, since June 2019, doxxing activities against police officers have become increasingly common. Approaching 2,600 police officers and their family members, including young children, have been subject to doxxing through the unauthorized and extensive leaking of their personal information on the Internet and across various other electronic platforms, social media, instant messages and mobile applications.
15. The main platform for such doxxing is a group called @Dadfindboy on the Telegram application, having over 180,000 members as of late October 2019 and nearly 200,000 members as of 3 November 2019. The personal information wrongfully leaked include: photographs of police officers with family, friends and associates; full names; contact information, including personal mobile phone numbers and email addresses and other social media accounts; residential addresses; Hong Kong ID card numbers; car registration plate numbers; and personal particulars of family members.
16. This has led to serious and persistent cyber-bullying, spreading of hate messages, incitements or statements and threats that there will be revenge, injury or even killing. These matters are not limited to police officers, but extend family members including children. The exhibits to the affirmation evidence in this case make for some deeply unattractive and at times disturbing reading.

Applicable Legal Principles

17. On an application for an interlocutory injunction, it is not the occasion for the Court to adjudicate finally on the rights and obligations of the parties. Instead, well-settled principles apply. The Court has to see whether there are serious issues to be tried, whether damages would be an adequate remedy for either side, and if damages would not be adequate, where the balance of convenience lies in terms of whether or not to grant an interim injunction pending the trial of the matter. It is also possible to take into the balancing exercise the interests of the general public even if they are not represented.

18. Where an injunction is sought to restrain wrongful acts which are threatened or imminent, it is necessary for the applicant to show that what the defendant is threatening and intending to do will cause imminent and substantial harm. The required degree of probability of future injury depends on the relevant circumstances.

19. I also accept that the Court's jurisdiction to grant an interlocutory injunction is not confined to restraining unlawful conduct. Ultimately, the overriding test, which is set out in section 21L of the High Court Ordinance Cap 4, is whether it appears to the Court to be "just or convenient" to grant the injunction sought. It seems to me that there can be circumstances where it is just and convenient to make an injunction even against purely innocent parties so as to stop their facilitation of wrongdoing.

20. An applicant seeking to restrain public nuisance must establish:

(a) a state of affairs which endangers the lives, safety, health, property or comfort of the public, or obstructs the public in the exercise or enjoyment of any right that is common to members of the public;

(b) an act or omission committed by the defendants that is causative of particular injury which is of a foreseeable type; and

(c) the defendant knew or ought reasonably to have known that his act or omission would result in the likely consequence of a nuisance hazard presenting a real risk of harm to the public.

21. It is settled that an interest in land is not an essential element of the tort of public nuisance.

22. The tort of harassment under common law, as recognized in Hong Kong, relates ordinarily to a course of conduct by a person by words or action directly or through third parties, sufficiently repetitive in nature that that person ought reasonably to know would cause worry, emotional distress or annoyance to another person. The mental element required is being reckless as to whether the victim would suffer injury from the conduct. Damage to the victim is necessary to constitute the complete tort. Harassment can result in a range of reactions, extending from physical injury at one end of the scale to mere humiliation at the other. The correct balance has to be struck in the particular circumstances. Anxiety is capable of constituting damage, and financial loss would also be recoverable.

23. Insofar as it might be argued, and has been argued in other cases, that the tort of harassment is not recognized in Hong Kong law, I disagree. In any event, it is at least

sufficiently seriously arguable that such a tort does exist as would justify proceeding on that basis when considering the potential grant of interlocutory relief.

24. The tort of intimidation relates to an unlawful threat made with intention to cause harm to the claimant with that threat, and damage occurring to the claimant. The requirement for damage may be satisfied if it can be shown that the plaintiff suffered mental distress or other emotional damage.

The SJ's role

25. Before applying the law to the facts, and deciding whether or not the plaintiffs have satisfied the necessary test for the grant of injunctive relief along the lines which they seek, another point can be canvassed relating to the role of the SJ.

26. I have already noted that the Court can take into account the interest of the public, even if the general public is not represented at the hearing. In this case, the general public is in effect represented. That is because the SJ brings this application for the public at large, in her role as “guardian of the public”.

27. There may be a significant number of people who see some irony in the invocation of that role, if there were to be a perception that role is used in a way limited to protecting only, or primarily, police officers and their families. I think I can take judicial notice of the fact that there have been expressions of concern by a significant number of people that some police officers, rather than protecting the public, have either (a) failed to come to the protection of the public or (b) even on occasions may have made victims of some members of the public.

28. But, first, I do not think it would be right to presume that the SJ, and those in her Department of Justice, are not taking the appropriate steps to investigate and if necessary follow up on allegations of improper police conduct. There are also other established channels through which complaints can be pursued, even if the perception is at times that they are slow.

29. Secondly, that would misunderstand the effects of doxxing, which extend far beyond the immediate targets. This has been expressly recognized recently by the Court of Appeal in *Junior Police Officers' Association of the Hong Kong Police Force v Electoral Affairs Commission* [2019] HKCA 1197 at [19]. The Court stated:

“The damage of widespread doxxing goes well beyond the victims. It seriously endangers our society as a whole. For it will instil chilling effect on our society when many individuals or targeted groups or sectors of the public are intimidated into silence or suppressed to express their opinion openly and honestly or conduct their affairs or pursue their life in the way they wanted for fear of being victimized by doxxing. If doxxing practices are not curtailed, the fire of distrust, fear and hatred ignited by them will soon consume the public confidence in the law and order of

the community, leading to disintegration of our society.”

30. Hence, the SJ properly represents the public, the members of Hong Kong society or community as a whole, when making an application of this nature.

31. Nevertheless, where such concerns about some police tactics have been expressed, it is all the more important to remember that the law gives certain rights to, but places certain obligations upon, all members of society. Any person exercising their own rights and freedoms must simultaneously have respect for the rights of others, and for the protection of public order, or of public health or morals. Those objectives are specifically identified in Article 16 of the Hong Kong Bill of Rights.

32. It is also a truism, which is to say that it is so obviously true it ought not to need discussion or repetition, that “two wrongs do not make a right”. Hence, even if there is a genuine basis, about which I make no comment, to form a valid opinion that some members of the police force have conducted themselves in a way which does no credit to the force, that opinion cannot justify a reaction by behaviour of the sort which gives rise to this application.

33. The maintenance and promotion of the rule of law cannot sensibly or rationally be pursued by repeated and escalating breaches of the law. Seeking to preserve and uphold the core values which are guaranteed to us in Hong Kong by the law cannot sensibly or rationally be pursued by the blatant disregard of those core values. In my view, a view which is shared by the Court of Appeal as already indicated, doxxing incitement and encouragement to harassment and intimidation do constitute disregard of those core values.

34. Some people may express a concern that the court is being asked to deal with a political crisis which should be resolved through political processes. Previously, some commentators have pointed out that people turn to the courts to air grievances and seek relief if they feel that they cannot air grievances or seek relief through a political process, and they do so even on questions which may be seen to be essentially political questions. The point is usually made in the context of the exponential growth in challenges brought by way of judicial review of executive or departmental decisions. But the point may not be limited simply to those types of application.

35. Of course, it is not the court’s role to deal with political questions. The court is always concerned with legal questions, and it provides legal answers on the basis of the evidence and law relevant to those questions. But legal questions sometimes arise from otherwise apparently political circumstances, and from matters which have other socio-economic context. The court does not avoid considering and answering legal matters simply because

they arise in a political or socio-economic context. That would be to abrogate the very duty imposed on the members of the independent judiciary which Hong Kong enjoys, and which independence is guaranteed under the Basic Law in the clearest of terms.

36. As an aside, I do not think any judicial officer in Hong Kong requires anyone, whether from in Hong Kong or beyond, to tell him or her how to perform his or her role as part of the independent judiciary. Nor will any judicial officer lose sight of the fact that, whilst the judiciary is one of the three powers recognised under the doctrine of the 'separation of powers', it is precisely the independence of the judiciary, guaranteed under the Basic Law, which confirms its separation from the other two powers of the legislature and the executive.

37. So it may be that matters relating to what underpins the current social unrest in Hong Kong need to be dealt with, perhaps can only be dealt with, through political means. But that is not what gives rise to the application now before this Court.

38. Rather, as already stated, the application relates to activities which are capable of constituting, and which the plaintiffs argue do constitute, the actionable torts of public nuisance, harassment and/or intimidation. Those are matters for the simple application of legal principles to the evidence.

Analysis

39. On the evidence, I am satisfied that there is at least a serious issue to be tried that the widespread doxxing activities have created a state of affairs in society which endangers the lives, safety, health, property or comfort of the public as a whole. There is at least a serious issue to be tried that, left unchecked, public confidence in law and order will be significantly eroded.

40. On the evidence, I am also satisfied that there is at least a serious issue to be tried on the claims in harassment and/or intimidation. Doxxing activities and the resulting harassment and intimidation have caused worry, mental distress and annoyance. At least some of the messages appear to constitute unlawful threats to safety and well-being, manifesting the intention of the senders to cause intimidation or fear of harm. Not least where that intention is apparent, the wrongdoers ought reasonably to have known that the wrong actions would cause those consequences.

41. I also accept the damage caused by public nuisance is not quantifiable, and that damage from the acts of harassment and/or intimidation are also difficult to quantify. As such an award of damages could not be an adequate remedy.

42. On the other side of the consideration, any prejudice which might be suffered by the defendant seems unlikely where the restrained acts would constitute wrongful behaviour. I accept the submission that it is difficult to envisage any scenario where the defendants are legally entitled to conduct the doxxing activities, or the resultant harassment or intimidation, against other members of society.

43. Whilst the Injunction Order may have the effect of restricting certain fundamental rights, including the right to freedom of speech or freedom of expression as guaranteed by Article 27 of the Basic law, there may be other relevant freedoms and rights which come into the consideration. Those other relevant freedoms and rights will include the rights of police officers and their family members to respect and privacy, as well as the need to maintain public order.

44. It is, therefore right, to consider the question of proportionality by reference to the nature and form of exercise of such rights, and whether they are being conducted in a form or manner which significantly affects the rights of others or poses risks to public order. In each case, the court has to perform a balancing and weighing act to ascertain which rights or freedoms predominate in the particular case.

45. I am wholly satisfied that the balance of convenience is strongly in favour of granting the injunction.

46. In saying so, it seems to me there is clear utility in the grant of the Injunction Order. First, the Injunction Order has already been brought to the attention of significant numbers of people, including defendants or would-be defendants. Further, any doxxing activity where the target is a police officer or his or her family member would be an activity where the target is known to the person conducting the wrongful acts. There is also some evidence that the making of the interim Injunction Order may have resulted in a material and meaningful drop in the number of doxxing posts, at least for some period of time. Though it may not be connected, I am informed today that the @dadfindboy platform has been taken down by the administrator.

47. There is also clear utility in the reminder of the risks to the maintenance and the application of the rule of law in Hong Kong.

48. I shall, therefore, continue the Injunction Order, except with the removal of the reference to “interfere” in paragraphs 1(a) and (b). I do not think that word is sufficiently precise for this type of order.

HKJA Summons

49. The HKJA's summons seeks variations to the Injunction Order in effect to provide a "media exemption" to journalists and news agencies. It is supported by an affirmation from the chairperson of the HKJA.

50. I note that the chairperson of the HKJA has specifically stated that the HKJA does not support or condone acts of doxxing of police officers or their family members, that it is understood that serious concerns arise from this unacceptable practice, and that the HKJA does not seek to prevent police officers from obtaining necessary legal protection against such acts. The chairperson also notes that senior members of the police force have confirmed that the injunction does not target reporters carrying out professional and lawful reporting.

51. The chairperson identifies that there is a Code of Ethics published by the HKJA, and the Code binds all members so as to provide, amongst other things, controls and regulations for data protection and privacy protection (though those terms are not themselves specifically referred to in the Code). The chairperson also notes that all journalists are bound by the PDPO, as that ordinance applies in full to journalists except for the limited qualification set out in section 61(1).

52. For the HKJA, Mr Jin Pao SC makes his submissions against three primary observations. First, he points to the broad and non-exhaustive definition of "personal data". Secondly, he suggests that the generic description as to the prohibited effect of the use of personal data – being "intimidate, molest, harass, threaten, pester or interfere" – may leave a journalist genuinely uncertain as to whether a particular use of data, though otherwise lawful, will lead to one or more of the prohibited effects. Thirdly, he says this is compounded by the fact that a journalist may find it difficult genuinely to form a legally correct view on whether an intended use of data is likely or unlikely to have one or more of the prohibited effects.

53. As a result, Mr Pao says that the Injunction Order impacts two aspects of journalistic activity. First it may restrict the lawful day-to-day duties of journalists in the collection and use of personal data for fact verification, following leads, and getting to the bottom of the story. Persistency in journalistic activity may give rise to actions which are not welcome by the subjects of media scrutiny, and even lawful and legitimate journalistic activity is inherently likely to cause media subjects to feel pestered or interfered with, or even in some cases threatened.

54. The consequence, suggest Mr Pao, is that lawful journalistic activity may be restrained by the Injunction Order. Further, because of the risk of contempt proceedings, a journalist may simply decide not to proceed with a lawful investigation or news activity if there is a

risk, whether real or perceived, of the conduct being prohibited under the terms of the Injunction order.

55. Similarly, an informant who wishes to disclose information to the press may well, at the very least, cause a police officer to be pestered or interfered with by investigative journalism. Those activities would also be deterred by the Injunction Order, even though they are in the public interest. The evidence filed by the HKJA identifies that some journalists have reflected such concerns to the HKJA.

56. Secondly, Mr Pao says the scope of the prohibited conduct is unclear, and it is arguable the scope of the Injunction Order goes further than what should be protected under the torts of public nuisance and harassment.

57. As to the latter point, subject to the removal of the reference to interference, I have already in effect rejected it. Binding Court of Appeal authority, with which I in any event agree, has made clear that activity of the sort the subject of this complaint risks damaging the very fabric of society.

58. Mr Pao is correct that for conduct to amount to the tort of harassment it must be sufficiently grave, and that not every annoyance is actionable under this tort. But, I have also already found that the kind of conduct identified in the evidence for this application is sufficiently grave that there is at least a serious issue that it amounts to the tort of harassment.

59. Mr Pao acknowledges that freedom of expression is not absolute. But he suggests the proposed amendments are no more than necessary to uphold this right and to give effect to what is lawful under the general law and to balance freedom of expression against the right to privacy and data protection. He says it is important for members of the press to have the benefit of an upfront and explicit assurance that their lawful journalistic and reporting activities will not be inadvertently caught by the Injunction Order.

60. Mr Pao submits this can be achieved through the proposed amendments which have built-in qualifications. He accepts that if journalistic conduct falls foul of the tort of public nuisance or the tort of harassment or intimidation, or of the criminal law, the variation proposed makes it clear that this is not permitted. There is also the inclusion of the sole purpose relating to “news activity”, which is itself brought in by reference to the statutory definition in section 61 of the PDPO.

61. Mr Pao also reminds me that the PDPO was brought into law following the recommendations of the Law Reform Commission, which recognised the competing interests to personal data privacy and freedom of the press, and recommended exemptions

intended to strike a balance between them. The exemption for “informants” is recognition of the importance of disseminating information of public importance and the reliance of media on such information to uncover issues of public concern.

62. On behalf of the plaintiffs, Mr Chang submits that the plaintiffs’ position has always been that the Injunction Order would only restrain conduct that would be unlawful in nature, being conduct amounting to the torts of public nuisance, harassment and/or intimidation. The Injunction Order does not seek to restrain legitimate uses of personal data of police officers (which may include but not be limited to media reporting) if those legitimate uses are not intended nor likely to intimidate, molest, harass, threaten, pester or interfere with any police officer and their family members.

63. So, says Mr Chang, members of the press carrying out their duties properly have no concern to be exposed to any risk of breaching the Injunction Order, when legitimate news reporting activities are conducted by them. Proper duties would not give rise to conduct which would be covered by, or bring media personnel within, the description of the defendants.

64. Against the evidence adduced of the recent prevalence of fake journalists in Hong Kong, including online tips as to how to impersonate members of the press and the large number of fake press identification cards confiscated by police in recent months, the plaintiffs express enormous reluctance to accept the proposed variations which would likely be open to abuse by the defendants.

65. Indeed, the evidence identifies that even if the initial disclosure of personal information is for a purely legitimate reason, there remains a possibility of the disclosure being abused by the defendants. In one recent hearing in criminal proceedings, the name of an officer who it was said had been assaulted by the defendant and those proceedings was read out in court and widely reported by the media. Within two hours, the personal data of that officer and his family members were disclosed online on the @dadfindboy site, and death threats were subsequently made to the officer and his family members. This is a sad indictment of the current situation.

66. Hence, the concern is as to the effectiveness of the Injunction Order, from what Mr Chang has called “derivative” abuse of the data.

67. I note that the Code of Ethics of the Society of Professional Journalists, an organisation representing journalists in the United States, recognises that journalists should balance the public’s need for information against potential harm or discomfort, where pursuit of the news is not a licence for arrogance or undue intrusiveness. Similarly, the Code of Ethics of

the Hong Kong News Executives' Association identifies that journalists should report on the private lives of individuals only in ways that would not create unnecessary additional damage to the individuals, and that the privacy of children should be handled with particular care.

68. The competing submissions identify a significant measure of common ground. First, it is common ground that the Injunction Order is not intended to stifle genuine and lawful journalistic activities. Secondly, it is common ground that a journalist whose conduct amounts to the tort of public nuisance or harassment or intimidation or who breaks the criminal law cannot escape the consequences simply because he or she claims to be a journalist. Hence, the decision whether or not to make clear on the face of the order what is accepted to be clear in any event is probably a practical one.

69. Balancing all matters, I have come to the view that it is appropriate to grant an order in terms of paragraph 1(a) of the HKJA's summons. Lawful and proper reporting and freedom of the press, acting as a "watchdog", are important in Hong Kong. If there is the possibility that the order might have a chilling effect on lawful and proper reporting, and the way to guard against that is simply to point out on the face of the order that nothing in the order is intended to prohibit lawful acts done solely for the purpose of a "news activity" as defined in section 61 of the PDPO, I think that proviso should be included.

70. I also agree with Mr Pao's submission that the adding of the proviso may be beneficial in identifying the difference between real journalists performing lawful journalistic activity and fake journalists whose activity would not be expected to be included within the statutory definition of "news activity". Fake news activity is not news activity.

71. I acknowledge the incident which I have described as a sad indictment on our current situation. But there are other ways to seek to guard against such incidents, which do not involve or require impinging on lawful journalistic activity.

72. However, I do not think the suggested proviso in paragraph 1(b) of the summons is necessary or helpful. Simply disclosing personal data to a data user whose business consists of a "news activity" as defined in the PDPO does not seem to me to fall within the prohibited activity. Nor is there anything in the order with the proviso I have accepted would prevent a journalist lawfully accepting receiving such data if it then is to be used for lawful "news activity".

73. I express the fervent hope that journalists will carefully weigh competing considerations in publishing and in making publishing decisions. What the public is interested in is not the same as what is in the public interest. There are ways to exercise

press freedom which take proper account of the current climate, and which can reduce facilitation of docs and other despicable activities.

Costs

74. The costs of the continuation summons will be reserved. There will be no order as to costs on HKJA's summons.

(Russell Coleman)
Judge of the Court of First Instance
High Court

Mr Jonathan Chang and Mr Martin Ho, instructed by Department of Justice, for the 1st and 2nd plaintiffs

The defendants were not represented and did not appear

Mr Jin Pao, SC, Mr Albert Wong and Ms Esther Mak, instructed by Vidler & Co. Solicitors, for the Hong Kong Journalists Association

