HCA 2007/2019
[2019] HKCFI 2809

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

ACTION NO 2007 OF 2019

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BETWEEN

| | |
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| SECRETARY FOR JUSTICE | Plaintiff |
| and | |
| PERSONS UNLAWFULLY AND WILFULLY CONDUCTING THEMSELVES IN ANY OF THE ACTS PROHIBITED UNDER PARAGRAPH 1(a) AND (b) OF THE INDORSEMENT OF CLAIM | Defendants |
| and | |
| THE INTERNET SOCIETY OF HONG KONG LIMITED | Interested Party |

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Before: Hon Coleman J in Chambers (Open to Public)
Date of Hearing: 15 November 2019
Date of Judgment: 15 November 2019

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J U D G M E N T

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***Introduction***

1. On 31 October 2019, I made an interim Order ("Order") on the *ex parte* application of the Secretary for Justice ("SJ"), acting in her

role as the guardian of the public interest. The Order was to remain in force up to and including today, 15 November 2019 (unless otherwise varied or discharged beforehand). This is the hearing of the *inter partes* summons dated 4 November 2019, which seeks continuation of the interim Order until trial or further order.

2. The Order was made against defendants – in accordance with settled authority, properly described by activity, rather than by name – being "Persons unlawfully and wilfully conducting themselves in any of the acts prohibited under paragraph 1(a) and (b) of the indorsement of claim". Those paragraphs are reflected in the same numbered paragraphs of the Order under which it was ordered that:

> (1) The Defendants and each of them, whether acting by themselves, their servants or agents, or otherwise howsoever, be restrained from doing any of the following acts:
>
> (a) Wilfully disseminating, circulating, publishing or re-publishing on any Internet-based platform or medium (including but not limited to LIHKG and Telegram) any material or information that promotes, encourages or incites the use or threat of violence, intended or likely to cause:
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> (i) bodily injury to any person unlawfully within Hong Kong, or
>
> (ii) damage to any property unlawfully within Hong Kong.
>
> (b) Assisting, causing, counselling, procuring, instigating, inciting, aiding, abetting or authorising others to commit any of the aforesaid acts and participate in any of the aforesaid acts.

3. No defendant falling within that description has appeared this morning with a view to seeking any variation or discharge of the Order, or to oppose its continuation until trial or further order.

4. However, by summons dated 11 November 2019, The Internet Society of Hong Kong Limited ("ISOC") seeks the discharge of the Order or the variation of it in such terms as the Court may see fit.

5. Where there is no defendant seeking to contest the Order or its particular terms, it is perhaps helpful to have another party who can present an "adverse" point of view. At the very least, that will assist the Court in testing whether any Order should be continued, and if so what would be the appropriate terms.

6. Mr Victor Dawes, SC, Mr Jonathan Chang and Mr Martin Ho, instructed by the Department of Justice, appear for the plaintiff. Mr Nigel Kat, SC, Mr Benson Tsoi and Mr Simon Young, instructed by Daly & Associates, appear for the ISOC.

7. Against the extraordinary civil unrest in the last few days, it might be asked whether this was a good time for anyone to be apparently seeking to limit any step which might usefully attempt to curtail the escalating violence and vandalism. But, perhaps these are precisely the circumstances in which the Court must be most vigilant to ensure that the court process is used only appropriately, fairly and properly, and with the integrity which the law demands and the people of Hong Kong are entitled to expect.

8. This is my decision on the cross applications, which I am able to reach today with reasons because I have had the benefit of relatively full written submissions from the parties provided earlier, in addition their oral submissions made today.

***Factual Background***

9. The relevant factual background is well known. The unrest in Hong Kong, spoken to in the police affidavit which leads the application, is not in issue.

10. Since June 2019, a sizeable number of members of the public have resorted to the use of violence and vandalism, supposedly as a way to express dissatisfaction towards the proposed extradition amendment bill (since withdrawn), the Government, the Police, and other persons holding political or social views contrary to their own.

11. Instances of unlawful and criminal activities include, but are not limited to, very serious criminal damage to property, offences against the person, riot, and arson. This past week has only shown an escalation in such unlawful and criminal activities. That escalation is in line with previous signs of and even declared intent by violent "protestors" to escalate the degree of violence and vandalism being used.

12. I put the word "protesters" in quotation marks, lest it be thought that such unlawful and criminal activity is a legitimate form of "protest" in favour of or against any particular viewpoint. In my view, it is not. To point this out is obviously not the solution to current unrest, but to ignore this fact does no service to wider attempts which must be made to solve the current problems.

13. Nor, incidentally, do I think much of the phrase "pro-democracy activists" beloved of some members of the media, including the international media. The level of violence and destruction now on show in Hong Kong cannot properly be described as a promotion of democracy; rather, it approaches anarchy. Persons who commit such crimes are simply, and properly described as, "criminals". Criminal activity does not cease to be criminal activity simply because the actor believes himself or herself to be acting for a particular, perhaps higher, cause.

14. As has been previously remarked, the promotion and maintenance of the rule of law is not sensibly or rationally pursued by repeated and escalating breaches of the law. Indeed, it is difficult to see how anyone could reasonably or rationally believe that extreme acts of violence and vandalism can further the cause of ensuring the continuation of the core values enshrined in Hong Kong law. Those core values, and the fundamental rights and freedoms, guaranteed by the Basic Law and the Hong Kong Bill of Rights, together connote the broad concept of quality of life and respect for others. Those core values are not protected or demonstrated by the wanton cause or risk of injury and significant property damage to others, or by inciting and encouraging persons to act in that way.

15. Concern is often expressed, rightly or wrongly, at the perceived erosion of civil and human rights in Hong Kong. Reference is made to bullets and batons, the excessive use of which by definition have no proper place in Hong Kong. But civil society – which envisages the protection and exercise of human rights by persons at the same time protecting and respecting the rights of others – will not be maintained,

and is certainly not built, by a barrage of bricks and bombs and burning barricades.

16. There is abundant evidence that the use of internet-based platforms or media, such as discussion forums and social media platforms, have played a significant role in intensifying the situation by inciting "protesters" to resort to violence. This is in part because of the anonymous and instantaneous nature in communication as well as its wide accessibility. The prevalence of the use of weapons of increasingly destructive power coincides with the widespread circulation of online posts promoting their use. The correlation between calls on the internet and other media platforms to cause damage or do injury and the subsequent acts of damage and injury is stark. If one wants to use the word "chilling", it can be properly applied in that context.

17. It is important to record that the use of such weapons, the cause of serious bodily injury and the serious property damage is occurring to a significant number of members of the community, both individual and corporate. It is not limited to targeting police officers, though they have been the subject of some such attacks in particular. The property damage is widespread. Extreme intolerance is being shown to anyone who does not share the same view.

18. Online discussions, advocating attacks against persons including police officers, include how to inflict deadly injury by use of knives, with infographics depicting the most efficient way to cause a fatal attack or at least lasting serious injury. Since July 2019, there have been online tutorials on the production and use of petrol bombs, since which their use during events of public disorder have increased significantly.

On 13 October 2019 alone, over 20 petrol bombs were thrown in quick succession at the Mongkok Police Station. This past week it seems the number thrown has far exceeded that. Online discussions on the making of explosives have also coincided with the largest seizure of explosives in Hong Kong on 20 July 2019, and the detonation of a remote-controlled bomb apparently targeting approaching police officers on 13 October 2019. Online posts also incite protesters to damage government property (including traffic lights) and also shop premises of entities perceived by the protesters as being supportive of the Government or the police or with Mainland China ties.

19. Those who physically engage in criminal acts on Hong Kong streets might be arrested on the spot, and subject to prosecution in the criminal courts. However, the SJ makes this application to target the incitement and promotion of the use or threat of violence online by those hiding behind the scenes.

***The Application***

20. The SJ pursues a claim of public nuisance on behalf of the public at large, in her role as guardian of the public interest. She also seeks injunctive relief in aid of the criminal law.

21. As regards the tort of public nuisance, the SJ can take action on behalf of the public to restrain public nuisance. She can do so where there is a state of affairs which endangers the lives, safety, health, property or comfort of the public, or which obstructs the public in the exercise or enjoyment of any right that is common to members of the public. It is necessary for the SJ to demonstrate that the act or omission committed by the defendants is causative of the particular injury which is

of a foreseeable type, and that the defendant knew or ought reasonably to have known that the acts or omissions would result in the likely consequence of a public hazard presenting a real risk of harm to the public.

22. Well-settled principles apply to consideration of the grant of an interim injunction. The Court looks to see whether there are serious issues to be tried, whether damages would be an adequate remedy for either side, and where the balance of convenience lies. In this context, it is to be remembered that if the grant of the order would amount to the grant of the relief sought in the action, the Court will be particularly cautious before granting an interim injunction.

23. Where a prohibitory injunction is binding on the defendant and third parties with notice and enforceable by penal sanction, including committal, the terms of the injunction must always be expressed with precision and clarity. Whether an injunction is interim or final, it must be expressed in clear and precise terms so that the defendant knows exactly what he must do or not do. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute. There must be a clear boundary line between what is prohibited and what is not. The injunction must also be sufficiently certain to identify persons who are included and those who are not.

24. Hence, bearing in mind the degree of certainty required where there is a possibility of contempt proceedings, the precision and clarity of language is relevant both to a decision whether or not to grant

an injunction and to the drafting of an injunction when in principle the decision has been made to grant it.

25. The principles applicable for the grant of an injunction against wrongful acts which are threatened or imminent, called a *quia timet* injunction, are also well-settled. Such injunctions can be granted where it is reasonably certain 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 all the circumstances, but the greater the prejudice caused by the apprehended injury, the more readily the Court will intervene. Even absent an express threat, a defendant's actions may indicate that he intends to act unlawfully, particularly where a defendant has stated that it is within his rights to do the particular acts complained against.

26. The ultimate test, under 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.

27. On the evidence which demonstrates widespread incitement of the use of violence to target different sectors of society, I am satisfied that there is at least a serious issue to be tried that those online materials have created a state of affairs endangering the lives, safety, health, property or comfort of the public as a whole. Further, as with the instances of doxxing the subject of other recent court cases, the potential damage goes to a far broader group than just those the apparent immediate targets of the violence or vandalism incited.

28. I also accept that the relevant damage caused is not quantifiable, so that it is clear that an award of damages is not an adequate remedy.

29. As to potential injustice to the defendants resulting from their being restrained from carrying out the acts in question, it should be noted that those acts are for the most part breaches of the criminal law, so offences prohibited by law even without any injunction. It is difficult to see any real prejudice suffered by defendants in being restrained from committing or inciting the commission of criminal offences. It is also difficult to envisage any scenario where the defendants are legally entitled to conduct such illegal and unlawful acts.

30. Mr Dawes accepts, and I must also take into account, the potential impact on freedom of speech and freedom of expression, as well as the freedom and privacy of communication. But, such freedoms are simply not absolute. They have to be balanced against other freedoms, and other persons' rights and freedoms, which may be countervailing considerations. The question is always one of balance. In my view, the Court may – and, in an appropriate case, should – impose some limitation on freedom of expression where the value of free expression is outweighed by the risks engendered by allowing freedom of expression.

31. This requires a consideration of proportionality, which is to be assessed having regard to the nature and form of exercise of such rights. An appropriate restriction which seeks to prevent the kind of violence and vandalism now suffered in Hong Kong is in my view likely to be proportionate, but I will return to this question below.

32. Hence, subject to the points raised by the ISOC's applications (which go not only to the drafting of any injunction after an in principle decision has been made to grant it, but also to the decision itself on whether to grant an injunction), I would be wholly satisfied the balance of convenience lies in favour of continuing the injunction in an appropriate form.

33. The Court also has jurisdiction to grant an injunction, including an interim injunction, in aid of the criminal law. The guiding principles have been canvassed in *MTR Corporation Ltd* [2019] HKCFI 2160 at [18], and *City of London Corp v Bovis Construction Ltd* [1992] 3 All ER 697, at 714g-j. They include that: (1) the jurisdiction is to be invoked and exercised exceptionally and with great caution; (2) there must certainly be something more than mere infringement of the criminal law before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of an area; and (3) the essential foundation for the exercise of the Court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law, but the need to draw the inference that the defendants' unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them.

34. Mr Dawes accepts that the typical case in which this jurisdiction is exercised is one in which a criminal penalty has in practice proved hopelessly inadequate to enforce compliance, but submits that the Court's jurisdiction to grant an injunction in aid of the criminal law is not so confined. He says, and I accept, the essential question is whether the Court is satisfied that despite the existence of the criminal law, the grant

of a civil injunction is necessary and effective in curtailing the criminal conduct.

35. I accept that the present situation of widespread violence and vandalism in Hong Kong is substantially more than a mere instance of infringement of the criminal law. Such criminal conduct is being encouraged, promoted and incited on a large scale through internet-based platforms and media, where the mode of communication is anonymous, instantaneous, and easily accessible. People engaged in such conduct are either ignorant of, or ostensibly ignoring, the fact that it may amount to the common law offence of incitement.

36. I accept, therefore, there is also a pressing social need to curtail such conduct for the benefit of the Hong Kong general public. Again subject to the points raised by ISOC's application (which go not only to the drafting of any injunction after an in principle decision has been made to grant it, but also to the decision itself on whether to grant an injunction), this might be done by an injunction in an appropriate form, which might also take account of the balancing exercise and matters of proportionality which I have canvassed already and will return to below.

37. As to the form of order, and by reference to a proportionality analysis, Mr Dawes submits that the form of the Order which he asks to be continued is appropriate. He says that there is sufficient legal certainty in the terms of the proposed order because the injunction sought targets only and specifically at publications on the internet that promote, encourage or incite the use or threat of violence that is intended or likely to cause bodily injury or property damage unlawfully in Hong Kong. He says the injunction sought is rationally connected with the objectives

stated in Article 16 of the Hong Kong Bill of Rights, which include respect for the rights of others and the protection of public order (order public), or of public health or morals. He says the restrictions are no more than necessary to accomplish the legitimate aim, because they target only specific forms and content of expression that incite the use or threat of violence, where those acts are in themselves unlawful or constitute a public nuisance. He also says that the collective interest of the Hong Kong public in the grant of the injunction outweighs the potential encroachment into freedom of speech or expression of the individuals affected.

38. It is convenient to consider these matters, namely reaching a conclusion as to whether or not in principle to grant injunctive relief, and if so the precise drafting of such an injunction, in the context of the matters raised by ISOC on its application. That consideration will encompass applicable legal principles in addition to those already canvassed above (though I shall have all legal principles in mind throughout, in reaching my decision). There might be cases, and this might be one, in which the ultimate decision whether or not to grant injunctive relief depends upon the possibility or not of drafting an injunction in sufficiently clear and precise terms.

***The ISOC Application***

39. I accept that ISOC is a legal person which represents its constituent members as persons potentially affected by an injunction, so as to give proper locus for it to apply to the Court to discharge or vary the Order. ISOC has over 1,890 members who work in the development, operation and use of internet-connected and internet-based applications, platforms and media, which disseminate material and information for all

purposes, including commercial, social and entertainment, both in private and open to the public.

40. ISOC's application seeks the discharge of the Order or variation of its terms. Discharge is the primary goal, but I think it can also be said that a significant part of the thrust of the application is as to variation. This is because Mr Kat says that the application does not seek to argue that, in certain extreme circumstances and drawn in clear and precise terms, an injunction might not be granted restraining persons who intentionally publish material which incites violence or who knowingly republish that material for that purpose. To put it more plainly, Mr Kat accepts that an injunction might be granted in certain circumstances if its terms are clear and precise.

41. What Mr Kat submits is that the Order in its current form goes beyond that legitimate aim, and has far-reaching effects on the freedom of communication in, to and from Hong Kong and on the ability of ISOC's members and the internet community to operate the internet and use it to do their work, free of the fear of committal. Hence the thrust of the application is directed towards the "chilling effect" of the possibility of committal for automatic unknowing and innocent publication and for publications made for a lawful purpose, as well as the impossibility of compliance for internet service providers ("ISPs"), platform operators, application developers, their directors and for many internet users.

42. Mr Kat's key submissions are that: (1) the Order is uncertain in its ambit as to the persons and conduct to be restrained; (2) on its face, the Order is over-broad, catching all acts of dissemination, publication,

re-publication etc, regardless of knowledge of the information and material or the context or purpose of that act, where the effect is to put all internet intermediaries and innocent users in breach or possible breach; (3) the Order is not shown to be necessary for the enforcement of the criminal law or that it will be effective, nor has it been shown that it would be effective to prevent the tort of public nuisance; (4) in so far as the Order was sought or may have been granted for the purposes of education (or a political purpose) that purpose is not the function of the Courts under the Basic Law; (5) on constitutional grounds, the evidence before the Court does not justify the restrictions in the Order on the correct four-stage proportionality analysis; (6) on the *ex parte* application, there was a failure to make full, frank and fair material disclosure of the law and facts, including the category of persons impacted, the likely "chilling effect" on third parties, or the effectiveness of current police action on the internet.

43. The submissions are to be considered against the background relating to the work conducted by the individual members of ISOC. Their work is on the digital and internet side of ISPs, in government and quasi-governmental bodies, and in other corporate bodies large and small. Others work as individuals and in newsgroups. They are responsible for the uploading, establishment and maintenance of internet platforms and media, including applications (apps) and websites, and for the uploading to those websites and platforms the information and material comprising their content.

44. Amongst the members of ISOC who are the deponents in support of its application are a cartoonist, who uploads cartoons for public consumption, and a commentator who publishes news and

comment on Facebook, and circulates to others, including overseas and international newspapers who republish.

45. As Mr Kat identifies in this context, ISOC and its members are engaged as participating in and ensuring the free flow of information to the public, directly via the conventional press, where it has frequently been recognised that the maintenance of free flow of information to the press is of fundamental importance.

46. It is a fact that operators of "many-to-many" and other "user-generated-content platforms" do not create or provide content. They cannot know the content in advance of its circulating (unless it is specifically drawn to their attention). Given the massive volume of content, instantaneous censorship of content is impossible. It is further pointed out that members of ISOC have no control on how readers interpret the information circulating on their platforms. Hence, it is said that members (as well as other similar organisations in Hong Kong who operate similar platforms) may thus be in breach of the Order without intending to be so, or even without knowing of the offending content.

47. Mr Kat challenges the injunction firstly on the basis that it is not clear as to who is a defendant, because (he says) it is circular, purporting to fix all persons who unlawfully carry out the conduct prohibited as defendants. I think this challenge is misplaced. This form of description of defendants has been approved in numerous previous cases, and it is a description which turns upon an activity rather than a name, where naming individual defendants is not possible. In *Billion Star Development Limited v Wong Tak Chuen* [2013] 2 HKLRD 714, at [70]-[74], the Court of Appeal held that there was no

valid reason why Hong Kong should not adopt the practice endorsed elsewhere, when the circumstances of the case demand legal redress of a plaintiff's interest against a large number of unidentified persons by way of injunctive relief. It was also noted that the Court has to be vigilant in a number of respects: (a) the proper description of the unnamed defendants should be sufficiently certain so as to identify both those who are included and those who are not; (b) the Court must be satisfied that the nomenclature of defendants in such a manner would not prejudice the rights of those potentially affected by whatever orders the Court may make from being notified about the court proceedings and from appearing in court to defend their rights if they so wish; (c) proper directions must be given for proper service of the proceedings and notification to those who may be affected of the timeframe for joining in as named parties and to put forward their defences; and (d) if no one comes forward to resist the application of the plaintiff against a group of unnamed defendants, the Court should consider whether caveats similar to those in Order 15 rule 12(3) to (6) should be built into any relief it may grant (including order of costs) other than orders for injunctive relief.

48. In my view, the description adopted in this case is appropriate. If a person has unlawfully performed a prohibited act as described, he is a defendant. If in future he unlawfully performs a prohibited act as described, he becomes a defendant. On either basis, he falls within the terms of the description of defendant. It is open to that person to seek to be joined as a named defendant, and to take such part in defence of the proceedings as he sees fit.

49. Mr Kat submits that the conduct prohibited is not limited to the authors of the material sought be prohibited or to those individuals

that deliberately publish or republish such material on the Internet. Further, "publication" is traditionally an extremely broad term, in both the criminal and civil law spheres. In the context of the tort of defamation, whilst no intention is required for publication, defences turn on knowledge and fault. Similarly, incitement at common law requires an intent that the criminal act concerned be carried out.

50. So, says Mr Kat, the terms of the existing Order are not sufficient to enable the developer, operator or even the user of an internet platform to know clearly whether he is subject to committal as a defendant or third-party knowing the terms of the order, if he develops, operates or maintains an ISP or a platform which automatically publishes such content without his knowledge, or without knowledge of its "likely" consequences. The difficulty, he says, is exemplified by the fact that a private individual who views such content and forwards it privately to another person, without more or even with a warning not to follow an express or implied message in the content, will not know whether he is a defendant or otherwise in breach.

51. But, first, the injunction is obviously not intended to be limited to the author of the offending material, and such a limitation would make little sense in the circumstances. It is the wide dissemination of the material that offends and it matters not whether the publishing was by an original author or by others.

52. Secondly, I do not think it realistic to suggest that a person will not know that he might fall foul of the Order and be subject to committal proceedings. It does not seem to me to matter whether the publication is made publicly or made privately. The point is that if

information or material is sent, publicly or privately, with the purpose, that is it is intended, to incite persons to whom it is sent to commit violence in Hong Kong, the sender will know that he is doing something which amounts to a breach.

53. Mr Kat submits that knowledge is a required element for both the criminal offence of incitement and for the tort of public nuisance. It is also required in the overriding human rights jurisprudence on the lawful restriction of free speech. So, he says, by not including express specific requirements of knowledge of both the quality of the material and that the publication itself is intended to cause the bodily injury or damage, or knowing that the likely consequence of the publication is the bodily injury or damage, the injunction catches unwitting or unintended *bona fide* posters and those who post for a legitimate purpose to one or more people.

54. Mr Kat notes that the stated intention behind seeking the Order was to target the publication of material on the internet that encourages or incites the use of threat of violence, which publication is intended or likely unlawfully to cause bodily injury or damage to property. But he says the wording of the Order sought and granted goes further than that, when it might have been crafted in simple ways to include the requisite knowledge elements.

55. In response, Mr Dawes emphasises that a person would be caught by the Order only if (a) he *wilfully* publishes on an internet-based platform any material that promotes, encourages or incites the use or threat of violence, *and* (b) that such publication is *intended or likely* to cause bodily injury or damage to property unlawfully within Hong Kong.

He says those qualifications protect those "innocent" individuals who (a) did not intend to publish materials online to incite violence, or (b) did not know that their publication would have the likely effect of inciting violence.

56. Mr Dawes also relies on the settled principle to be found, for example, in *Kao, Lee & Yip v Koo Hoi Yan* (2009) 12 HKCFAR 830 at [45], that a party would be found in breach of a court order and liable to be cited for contempt if, and only if, (a) he knew of the facts which are said to make his act or omission a contempt, and (b) such act or omission was not accidental.

57. Mr Dawes says those points also fully address Mr Kat's submission that paragraph 1(b) of the Order is over-broad. Mr Dawes submits that accessory liability under that paragraph would only be established if a person "assists, causes, counsels, procures, instigates, incites, aids, and abets or authorizes" another to do an act prohibited in paragraph 1(a) of the Order, when those plainly required the accessory to have knowledge that the person whom they assist is in contravention of the restraint.

58. Hence, Mr Dawes accepts that a platform operator who assists in the publication of information (in the sense of allowing posts to be made on its platform, without even knowing the fact of the publication or the contents of the publication) cannot be said to be in breach of the Order in the first place.

59. I agree. But, with the benefit of more mature consideration, and that of further submissions from the parties including on behalf of the

SJ, I think that the wording of the Order can be tweaked to make more plain the points dealt with above, by adopting wording linking publication to its purpose. That will also assist meeting the concern stated to arise either from (a) the sending of private messages or (b) an inability to know how any particular receiver of the message will understand its content.

60. As to necessity, enforceability and effectiveness Mr Kat places these points, in my view correctly, in the context of the consideration of whether or not this particular Order meets the requirements of being in an "exceptional case". But, it is necessary not to confuse matters of necessity, enforceability and effectiveness.

61. Dealing with necessity, as Mr Kat points out, the authorities in effect speak of a matter of last resort; only then, will the Court be satisfied of necessity. That is certainly so in respect of an order made in support of the criminal law, though I think exceptionality may be less relevant in a case seeking to protect people from a public nuisance.

62. As to effectiveness, it is trite that whether or not an order can be effectively enforced is a question which is highly relevant in the Court's exercise of its discretion in deciding whether or not to grant an injunction in the particular case.

63. Here, says Mr Kat, ISOC's evidence shows that it is impossible at the 'macro' level to police all the internet and the media concerned for such content, and that it is impossible for ISPs and individual platform operators to monitor and censor content, or for republishing to be eliminated. He also complains that the SJ's evidence

failed to include evidence in the public domain to that effect, including prior statements from ISOC itself.

64. But, in what seems to me to be potentially contradictory submissions, Mr Kat goes on to point out that since 2014 the police have been arresting individuals for criminal online speech and activity in increasing numbers, for each form of mischief for which the SJ seeks the Order. On the back of that point, he says that the Order cannot be said to be necessary or the last resort as required. But I do not think the relatively small number of arrests since 2014 comes close to demonstrating that there is a realistic possibility of dealing in the short term with the massive increase in this kind of activity which is now so prevalent.

65. Though I will return to the matter of alleged non-disclosure below, I am also not persuaded that there was any non-disclosure in this respect. The materials produced in support of the application on 31 October 2019 made perfectly clear that the nature of the order sought was unusual, and that it arose in circumstances fundamentally different from any previously existing. It was implicit in the very nature of the application for a civil injunction in aid of the criminal law that there are criminal offences for which persons might be, or might in the past have been, investigated and prosecuted. The precise number in very different circumstances in previous years seems to me to be immaterial to my consideration on 31 October 2019, or today.

66. No false impression was created, in circumstances where the police's ability to detect and prosecute such crimes must necessarily be limited by practical matters such as cost and manpower. Indeed, it

might be said that the threat of possible police investigation and prosecution has provided little, if any, deterrent to many of those persons who have used the internet and other media to incite the use of violence to cause injury or property damage.

67. On the other hand, evidence filed for this hearing suggests that the Order may have had some effect in reducing the number of posts, at least on a daily average basis since 31 October 2019. Even making allowances for the potential weakness in statistics, this points to some effectiveness.

68. However, the recent evidence also sets out that new messages inciting bodily injury and property damage are still observed on major social media platforms, with specific persons and property identified as targets. Real life damage soon followed. There have also been recent posts teaching netizens how to make various weapons and body protection. This tends to point to a continuing need for the Order.

69. Mr Kat then suggests that the affidavit evidence for the SJ, and Mr Dawes' written submissions, both identify the injunction is being sought for an improper purpose, namely the use of the Court's powers to educate internet users as to the law governing publication and speech on the internet. Mr Kat says that it is not the constitutional function of the Court to educate or to make or implement the laws of the HKSAR, which functions are the task of the CE and the Government, as executive authorities under Articles 48(2) and 64 of the Basic Law. He says the task of the Courts is to adjudicate cases in accordance with the law, as provided by Article 84.

70. I am afraid I fundamentally disagree with Mr Kat's submission in this respect. First, there is simply no reference to education in Articles 48(2) and 64 of the Basic Law, which articles essentially require the Government to implement laws and identify that the Government is itself bound by the law. Of course, Mr Kat is correct insofar as he says that it is the task of the Court to adjudicate cases in accordance with the law. But it is a settled principle of the common law system that the law is frequently developed through judicial decisions and the principle of *stare decisis* or precedent. Frequently, statutes are interpreted and explained by court decisions. It also seems to me to be part of the principle of transparent and open justice that the law, and its application to various given sets of factual circumstances, is interpreted and explained not just to the parties to any individual action but to the public at large. Judgments are required to be reasoned, so that the result is explained. Each day, numerous decisions are uploaded onto the Judiciary website for that purpose, amongst others.

71. There is nothing inappropriate in Judges, as persons amongst those charged with upholding the law and the rule of law, identifying in their decisions what the rule of law means in practice, and what is or is not lawful in any situation. If there is a misconception that a person can exercise what he sees to be his rights without any consideration of his own corresponding obligations or responsibilities, or that he can exercise his rights without regard to the rights of others, then Judges are well-placed to remove that misconception. It is part of their job to do so.

72. The next points taken by Mr Kat fall under what he calls constitutional grounds. He refers to freedom of speech of the press and

publication and the freedom of privacy of communications under Articles 27 and 30 of the Basic Law and Article 16 of the Hong Kong Bill of Rights. When such freedoms are engaged, he submits that the conventional balance of convenience test is not applicable, because the Court's balancing exercise is not conventional when particular weight is to be given to the right at issue against any competing constitutional or lesser rights or obligations.

73. I do not agree with such an analysis. The balance of convenience test remains applicable, albeit the matters taken into consideration in assessing the right balance may include matters to be given particular weight because of the nature of the rights or obligations arising. In deciding whichever course – in the choice between the grant or refusal of injunctive relief – seems likely to cause the least irremediable prejudice to one party or the other, due recognition and effect can be given to any fundamental rights. That is not the removal of the balancing exercise, but the identification of the proper matters to be taken into that balancing exercise, and the recognition that some matters attract greater weight than others. Hence, the balance will take into account for example the principle that any restriction on the fundamental freedom of expression has to be justified and proportionate.

74. As to the four-stage proportionality test to determine justification of the proposed particular intrusion into fundamental rights, I accept the full and correct test is set out in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, and that it requires all four stages to be explicitly adopted. As set out by the Court of Final Appeal at [134]-[135], the test is to ask (1) whether the intrusive measure pursues a legitimate aim; (2) if so, whether it is rationally connected with

advancing that aim; (3) whether the measure is no more than necessary for that purpose; and (4) whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

75. The need for the addition of a fourth stage, when previously the test of proportionality was only a three-step enquiry, was explained by the CFA. Essentially, the court accepted as logically compelling proper recognition being given to a meaningful distinction drawn between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is or is not disproportionate to the likely benefits of the impugned measure.

76. Against this test of proportionality, Mr Kat says that the Court now has evidence before it as to who such individuals may be outside the authors of the material, and the burdens which might be imposed on them. As indicated, he says the individuals include "innocent disseminators" such as ISPs and forum operators, news organisations (mainstream and online) and those who contribute to them, operators of game and social websites, website owners, and even those individuals who send private emails for legitimate non-incitement purposes.

77. So, Mr Kat submits, the burden of the Order is to require them to self-sensor so as not to transfer information or material including

that which is unknown to them and that which they may honestly believe does not incite violence. He says this is precisely the unacceptably harsh burden which the CFA requires the court to take into account at the end of the balancing exercise.

78. In my view, the four-stage test is to be approached as follows in the current circumstances.

79. As to the first stage, the legitimate aim is to remove or reduce the publication of material on the internet the purpose of which is to promote, encourage or incite the use or threat of violence which is intended or likely to cause bodily injury or property damage to others unlawfully in Hong Kong. Because I have accepted that an appropriate element is to make clear the purpose, that meets any concern arising from publication by "innocent" disseminators or publishers. If a person knows that the publication or republication of material is intended or likely to cause injury or damage, or if that is its purpose, that person cannot claim to be "innocent".

80. As to the second stage, there is a rational connection with that legitimate aim when the injunction is sought to safeguard various rights of the wider public, and to restrain offences against the person and offences of criminal damage.

81. As to the third stage, the Court is concerned to consider whether some less onerous alternative is available without unreasonably impairing the objective, and the Court adopts a standard relative to the objective pursued because the cogency of the justification required for interfering with a right will be proportionate to its perceived importance

and the extent of the interference. Whilst I accept Mr Kat's submission that it is necessary for me to consider and protect the free and speedy circulation of information on the internet for its benefits to society at large, Mr Kat also acknowledges that restraining deliberate speech inciting the commission of unlawful acts may be no more than necessary in furtherance of the legitimate aim. Properly drafted, I think the injunction would meet the requirement that the intrusion is minimal or no more than necessary. I have already rejected the submission that the evidence does not show why speech and activity, if criminal, cannot be dealt with by the police just as it deals with other forms of criminal speech. I think it misses the point if focus is simply on the ability of the police to detect crime, as this injunction is sought for the wider purpose of seeking to curtail a public nuisance and to assist with the curtailment or deterrence of criminal activity the manner and extent of which threatens society as a whole.

82. Indeed, it seems to me to be inconsistent and unfair for ISOC to suggest that the police are perfectly able to track and arrest all persons who might incite violence on the internet or other media platforms, when it is a significant plank of ISOC's own argument that monitoring everything that happens on the internet or on social media is a practical impossibility even for those who operate it. In those circumstances, it is not a surprise that Mr Kat has not put forward what might be a significantly less intrusive and equally effective measure available to the police, by way of an alternative, other than eventually to suggest a prosecution of a person with secondary liability. For myself, I do not see a less intrusive measure which could have been used without unacceptably compromising the objective.

83. I turn to deal with the fourth stage. It is right to acknowledge that the right of free speech is constitutionally guaranteed, and is a freedom which has been rightly greatly valued in our society. I also accept that where the media can be described as the public watchdog, it might be said that the ones with the greatest need for the constitutionally vital freedom are the organs of the media. This is why it is often recognised to be of fundamental importance, including for the purposes of maintaining the free flow of information to the press.

84. But if the immediate point for consideration is the free flow of information *to* the press, I cannot see why the press would want to have information flowing *to* it if that information is inciting violence and which is intended to or likely to cause injury to a person or property damage. If the immediate point for consideration is the free flow of information *from* the press, I also cannot see why the press would want to have information flowing *from* it if that information is inciting violence and which is intended to or likely to cause injury to a person or property damage.

85. Mr Kat draws analogous assistance from the principles in cases relating to defamation. He referred me to *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366, in which the CFA analysed the defence of innocent dissemination as a common law doctrine developed to mitigate the harshness of the strict publication rule in defamation cases. As Mr Kat says, the CFA took great care with the proportionality exercise, recognising the nature of internet intermediaries and, notwithstanding the considerable speed and power of the internet, applied the sensible rule (for defamation purposes) that while a

many-to-many platform is a publisher, its operators should not be liable for statements of which they had no knowledge.

86. I note that, at [104] of the *Fevaworks* decision, the CFA said that it is somewhat to state the obvious that the law has always required a balance to be struck between the right to freedom of expression on the one hand, and the right to have one's reputation protected against defamation on the other, the rights on both sides of that balance being constitutionally recognised in Hong Kong. I see this as a clear statement that constitutionally recognised rights can on occasions be balanced against, and may outweigh, the constitutionally recognised right to freedom of expression. As the CFA recognised at [107], the balance involves two important competing interests affecting society at large. The CFA also recognised at [108] that the power of the internet is such that it greatly magnifies what is at stake when considering how that balance should be struck.

87. After acknowledging the competing arguments at [108]-[110], the CFA stated at [111] the following points which I think are vital to the present consideration:

> "111. It is important to bear those competing social interests in mind when approaching questions such as those presently being addressed. The value of free and open many-to-many communications on discussion platforms must be recognised. The ability of Internet intermediaries to host them in good faith must not be unduly impaired by the imposition of unrealistic or overly strict standards which would make commercial operation impossible or introduce a chilling effect discouraging free and open exchanges. At the same time, a platform provider must genuinely recognise and take all reasonable steps to protect the rights and reputations of persons from being unlawfully damaged by postings published on the forum. Thus, for instance, while an Internet intermediary may not be expected to

> police or filter the many-to-many discussions hosted, it is appropriate to require prompt action to take down the offending postings upon receiving a complaint or otherwise becoming aware of them."

88. Mr Kat also places reliance on [112] of the *Fevaworks* decision. In that paragraph, the CFA noted that the evidence in that case indicated that the discourse often encountered on the respondents' Forum was of very doubtful social value, frequently involving merely vulgar abuse. It was in those circumstances that the CFA held that freedom of expression must not be devalued because it permits such low-grade exchanges.

89. But, in my view, the present case traverses very different territory. The injunction sought is not to restrain merely vulgar abuse, nor content of doubtful social value. What is sought to be restrained and curtailed can have no positive social value, as it is incitement to violence intended or likely to cause actual bodily harm and actual property damage. Perhaps, on occasions, when information is so readily transmitted from one platform to another, it is easy to lose sight of its potential effect on real-life outside the internet. But, in this case, the legitimate aim behind the injunction sought is to prevent the use of information transmitted over the internet or other media which actually will or likely will have an effect on people and things that actually exist in the real world; real people who might actually be killed or injured, real property that might actually be damaged.

90. Though the wording of any injunction order must be sufficiently clear and precise, the words used must be read with some element of common sense applied. The application of such common sense is actually evident from some of the affirmations filed for ISOC in

these proceedings. Each of the deponents sets out a description of his own internet or media activity and expresses the view that he does not think he is in breach of the Order. In my view, on that description, that common sense view is correct. There is, therefore, no need to search for potential areas of concern which the person conducting any individual activity does not really think exist.

91. But I also see no problem in requiring publishers of material to exercise some self-censorship. Self-censorship is not necessarily a bad thing. Freedoms of speech or expression or communication do not exist in a vacuum. It is a daily occurrence in ordinary life, not just life on the internet or on social media, that people do, and that people should, consider the intended or likely consequences of their actions. People do, and people should, factor those consequences into the decision whether or not to go ahead with the action. It is only responsible for any person, individual or corporate, to assess its actions and where appropriate censor them. I do not think it imposes an unacceptably harsh burden on any person for them to be asked exercise their rights and freedoms with a degree of responsibility.

92. Further, the Order does not require instantaneous censorship by platform operators of the content of all posts on that platform, nor does it impose any obligation positively to search for and filter out information or messages that may otherwise be caught by the Order. Of course, if they are put on notice of such posts, they ought to remove them if possible, so as not to attract accessory liability even though they may not be the primary infringer, as at that point they would be in a position to remove the facilitation of wrongdoing.

93. There have been numerous previous occasions when courts in many jurisdictions, not limited to common law jurisdictions, have held that the criminalisation and restriction of speech inciting violence is a justified infringement of the fundamental right to freedom of expression. Though Mr Kat has criticised the use of the words "promote" and "encourage" as somehow introducing a lack of clarity or vagueness in the terms of the Order, those words fall well within the definition of what constitutes the common law offence of incitement, which is committed when a person encourages, requests or suggests that another person should commit a crime.

94. I also accept Mr Dawes' submission that if the incitement of violence is already unlawful in the first place, it is difficult to see how the prohibition in the Order can be said to be disproportionate interference with fundamental rights.

95. I am therefore satisfied that a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, and I do not think the pursuit of the societal interest results in an unacceptably harsh burden on the individual.

***Material Non-Disclosure***

96. Mr Kat submits that the Court has been confronted with substantial material non-disclosure of both law and fact which could – he says would – have made a difference to the Court's consideration of the Order on 31 October 2019, and so contributed to that Order being made in error.

97. He reminds me of the well settled principles applicable to discharge of injunctions for non-disclosure. They include that the Court will be astute to ensure the claimant is deprived of any advantage he may have derived by his breach of duty; that some undisclosed facts will be sufficiently material to justify immediate discharge of the order without examination of the merits, though that depends on its importance; that innocence in non-disclosure, in the sense that the fact was not known or not perceived to be relevant, is an important but not decisive consideration; and that there remains a discretion to continue the order, or to grant a new one on terms, notwithstanding proof of material non-disclosure.

98. The alleged non-disclosure of law relates mainly to the failure of the SJ to draw to the Court's attention to relevant CFA authorities, being the decisions in the *Hysan* and *Fevaworks* cases.

99. But, the *Hysan* case is referenced in the case which was cited to me on 31 October 2019, and I also accept Mr Dawes' submission that in practice the third and fourth stages of the proportionality analysis often overlap, and that it is unlikely that a restriction that passes the first three stages will fail on the fourth. Further, Mr Dawes' submissions on 31 October 2019 did address the position of individual defendants in the context of the four stages, and specifically referred to the need to balance the interests of society against the impact on individuals, in language echoing that used in *Hysan*.

100. As to the *Fevaworks* case, whilst consideration of it might be useful on an analogous basis, I do not think it was a case which is directly on point or one which should have been drawn to my attention by

Mr Dawes on 31 October 2019. In my view, the *Fevaworks* case was an application in the defamation context of principles and matters well ventilated on previous occasions in other contexts. Indeed, on the key points relating to the importance of the free flow of information, they are hardly novel, and the CFA itself recognised that some of the things it stated was simply stating the obvious.

101. The alleged factual non-disclosure relates to the extent of the persons affected by the injunction, the means of compliance and the "chilling effect" of self-censorship that would necessarily result, and the previously published reasoned opposition to any such restriction.

102. Reference is also made to the knowledge of the police that they have investigated and arrested persons using the internet for purposes intended to be restrained by the injunction, so that there is in existence an alternative method available to prevent unlawful internet speech. I have already rejected this point above.

103. As to the suggestion that there was no evidence put before the Court as to how the Order would be effective, I think this was addressed in evidence and submissions on behalf of the SJ. It was specifically acknowledged that there may be suggestions that the order would be in vain as defendants may not comply with any order if they have been habitually committing serious criminal offences. But the point was made, which I accepted, that whilst certain individuals might ignore the order, that is not a reason for not making it, where it is important to remove any mistaken belief that there is no consequence in posting or re-posting such messages on the internet.

104. The "chilling effect" was acknowledged in the discussion about the infringement of freedoms of expression and communication.

105. As to the complaint that ISOC should have been given notice of the intended application to be made by the SJ on 31 October 2019, I remain satisfied that it was appropriate to have dealt with that application on an urgent *ex parte* basis. The urgency was explained by the then looming risk of escalation during the following weekend, and if notice were to be given to everyone who might be affected by the order, in practical terms that would have required notice to everyone involved in any internet service providing business and everyone using the internet in Hong Kong. In making the application *ex parte*, the SJ properly identified the likely broad points which would be raised against the making of the Order and required me to consider them. That is, of course, not to say that the Court has not benefited from the full submissions put forward by Mr Kat in his written argument and oral submissions today.

106. Overall, I do not think there was any material non-disclosure. But even had I been satisfied that there was, I would in the overall circumstances and in the exercise of my discretion have no hesitation in imposing a new Order on appropriate terms.

***Result***

107. After consideration of all these matters, and in the exercise of my discretion, I will make an order continuing the interim Order but in slightly amended or tweaked terms as follows:

(1) The Defendants and each of them, whether acting by themselves, their servants or agents, or otherwise howsoever, be restrained from doing any of the following acts:

(a) Wilfully disseminating, circulating, publishing or re-publishing on any Internet-based platform or medium (including but not limited to LIHKG and Telegram) any material or information for the purpose of promoting, encouraging or inciting the use or threat of violence, intended or likely to cause:

(i) bodily injury to any person unlawfully within Hong Kong, or

(ii) damage to any property unlawfully within Hong Kong.

(b) Wilfully assisting, causing, counselling, procuring, instigating, inciting, aiding, or abetting others to commit any of the aforesaid acts and participate in any of the aforesaid acts.

***Ancillary Matters***

108. In the Order granted on an interim basis, I permitted service on the defendants by way of substituted service through publication on the websites of the HKSAR Government and the Hong Kong Police Force. I also direct service of the Order I make today to be served in the same manner. I am satisfied that service in that manner, even without but especially with the benefit of likely inevitable further widespread reporting of this decision and the making of the Order today, is such as can reasonably be expected to bring the proceedings and the Order to the attention of the defendants.

109. I also continue the order relating to redaction of any part of the materials which reveals personal particulars of any police officer and/or their family members, and the order directing that no person may without leave of the court search for or inspect or copy the documents filed into the Registry, so as to protect the privacy of the relevant police officers and their family members whose personal details may be revealed in those documents.

[Discussion and argument on costs]

***Costs***

110. Mr Kat asks for his costs, and would wish for them to be taxed on the indemnity basis. He says he is entitled to such an order because there was a variation made to the terms of the interim order, and ISOC is a third party affected by the Order who had come to court to obtain that variation. He points to the usual situation where the costs of a third party affected by an injunction order are ordinarily ordered to be paid on an indemnity basis.

111. In so far as that submission amounts to one asking for costs to follow the event, it overlooks that the primary goal of ISOC's application in paragraph 1 of its summons was the complete discharge of the Order. Mr Kat's written outline argument also seemed to make it perfectly plain that mere variation, even to include some link of purpose with publication, would not of itself satisfy ISOC. Whilst it is correct that part of the argument related to matters of knowledge, a significant part of the argument raised many other challenges to the Order, including

constitutional challenges. The same position was taken by Mr Kat orally.

112. On my decision, and the reasons I have given, I think it right to record that ISOC's application, and the arguments put forward in support of it, have been in large part rejected. Though I have tweaked the terms of the interim order, it is not the kind of variation which ordinarily one has in mind when talking about applications for variation of injunctions. Instead, I have simply tweaked the wording in order to make more clear what I have accepted was sufficiently clear in any event. I did so in part because Mr Dawes was content that the clear existing meaning might be made more clear by some form of use of the word purpose.

113. Mr Dawes also submits that ISOC is not in the same position as most third parties affected by an order, such as banks. I acknowledge that point, though I do not think it likely determinative. More important is that rather than engaging with the SJ, or its Counsel, about the Order and any concerns, ISOC chose instead to attack the order with a full frontal assault arguing that there was no basis to make any order at all. That assault failed.

114. Looking at matters in the round, and in the exercise of the undoubted broad discretion I have in dealing with matters of costs, it seems to me that the appropriate order to make on ICOS's costs is that there be no order as to costs.

115. The SJ's own costs will be reserved.

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

Mr Victor Dawes, SC, Mr Jonathan Chang and Mr Martin Ho, instructed by the Department of Justice, for the plaintiff

The defendants were not represented and did not appear

Mr Nigel Kat, SC, Mr Benson Tsoi and Mr Simon Young, instructed by Daly & Associates, for the interested party