

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

MISCELLANEOUS PROCEEDINGS NO. 1274 OF 2021

IN THE MATTER of an application by the Secretary for
Justice for leave to apply for an Order of Committal
and
IN THE MATTER of civil proceedings in
HCA 2007/2019

BETWEEN

SECRETARY FOR JUSTICE

Plaintiff

and

HO WAI PAN (何惠彬)

Defendant

Before: Hon Coleman J in Court

Date of Hearing: 27 April 2022

Date of Decision: 27 April 2022

D E C I S I O N

A. Introduction

1. The Defendant (“Mr Ho”) admits that he acted in contempt of court, in breaching an injunction order made by me dated 31 October 2019. This hearing is to hear mitigation and to sentence him for that contempt.

A 2. The contempt occurred in May 2020. It is now almost two
B years later. The *ex parte* application for leave to bring committal
C proceedings was made on 2 September 2021. I granted leave on
D 6 September 2021. The reasons for the passage of such a long time
E before the *ex parte* application needs to be considered, as that delay may
impact the approach now taken by the Court.

F 3. The first return date of 14 December 2021 was re-fixed after
G Mr Ho sought Legal Aid (triggering an automatic stay of proceedings).
H The hearing was re-fixed for 14 January 2022. In the interim, though an
I acknowledgement of service was filed, it did not give any clear indication
J as to Mr Ho's intended stance. It was only on 13 January 2022 that
K Mr Ho wrote to the Court, indicating for the first time his intention to
admit liability for contempt.

L 4. Although Mr Ho previously appeared at the hearing on
M 14 January 2022 acting in person, Mr Ho has appeared in Court today
N represented by Mr Mike HY Lam of Counsel. The Plaintiff ("SJ") is
O represented by Mr Jonathan Kwan and Mr Ivan Suen of Counsel. This
hearing has been conducted with the advantage of the skeleton
submissions previously filed by Counsel for Mr Ho and the SJ.

P 5. This is my Decision.

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R ***B. Injunction Order Breached***

S 6. On 31 October 2019, the SJ, as guardian of the public
T interest, applied *ex parte* in HCA 2007/2019 for an interim injunction
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against persons unlawfully and wilfully conducting themselves in any of the acts prohibited of:

- (1) wilfully disseminating, circulating, publishing or re-publishing on any internet-based platform or medium any material or information that promotes, encourages or incites the use or threat of violence, intended or likely to cause (i) unlawful bodily injury to any person within Hong Kong or (ii) unlawful damage to any property within Hong Kong;
- (2) assisting, causing, counselling, procuring, instigating, inciting, aiding, abetting or authorising others to commit any of the aforesaid acts or participate in any of the aforesaid acts.

7. On the same date, 31 October 2019, I granted an interim injunction order in those terms (“Incitement Injunction”). The grant of the Incitement Injunction was widely reported in the mass media, including in English and Chinese newspapers with wide circulation in Hong Kong, major radio and television service providers and various sources on the internet.

8. On 4 November 2019, the SJ made an *inter partes* application for continuation of the Incitement Injunction. That application was heard on 15 November 2019, and I made an order continuing the Incitement Injunction in slightly amended terms (“Return Date Order”). My Judgment dated 15 November 2019 and the Return Date Order were widely reported in the local media.

9. The Incitement Injunction (as amended) was served on the defendants to that action by way of substituted service, by publishing a

A copy of the Incitement Injunction on the web page of the Hong Kong
B Police Force as well as that of the Government of the Hong Kong Special
C Administrative Region.

D **C. The Breach Comprising the Contempt**

E 10. The delineation of Mr Ho’s breach is to be found set out in
F the Statement of Facts used to seek leave to bring these committal
G proceedings, and from which the following is essentially taken.

H 11. During a cyber patrol by the Cyber Security and Technology
I Crime Bureau of the Police on 25 May 2020, the Police found a Facebook
J post posted at around 9:28pm on 22 May 2020 on the Facebook Page of
K Mr Ho (“Facebook Post”). It read “襯任醉醉地同你地講 你唔敢
L 出手打鳩差佬（第日係打鳩國安） 就註定比班仆街食住 而家冇人
M 同你地講道理呀 而家講拳頭 你敢搞正佢 就有出路 眼前選擇
N 得兩個：你條命 同埋香港” (English translation: “Taking the
O opportunity of being a bit drunk, (let me) tell you guys. If you dare not
P take the action and fucking beat the cops up (it would be fucking beating
Q the national security agency in future), you are doomed to be under the
R control of the bastards. Nowadays no one will talk reason with you guys;
S nowadays, fists do the talking. If you dare to mess with them, there will
T be a way out. There are only two options before (your) eyes: your life
U and Hong Kong”).

R 12. The Facebook Post was, *prima facie*, abusive and for the
S purpose of promoting, encouraging or inciting the use of violence against
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police officers, and officers and/or personnel of the (then yet to be established) National Security Agency.

13. At the time of the cyber patrol, the status of the Facebook Post, as shown by a “Globe” icon underneath the account name and next to the time stamp, was “Public” (i.e. the Facebook Post was publicly accessible by anyone with connection to the internet). The Facebook Post was liked, shared and responded to by various Facebook users.

14. As of 25 May 2020, the following responses from other Facebook users as well as the Putative Respondent’s replies were found below the Facebook Post:

Other Facebook users’ responses	English translation	Mr Ho’s replies	English translation
不要比機會廢柴政府 DQ (Made at around 11:30pm on 22 May 2020)	Don’t give the good-for-nothing government a chance to <i>DQ</i>	唔係今日就聽日架喇 (Made at around 11:44pm on 22 May 2020)	If it’s not today, it’s tomorrow
難得天耀踢走左民建聯, 你做埋個任期佢啦, 唔好咁快比位人入 (Made at around 11:52pm on 22 May 2020)	Since for once Tin Yiu has kicked out the Democratic Alliance for Betterment of Hong Kong, please continue your service up to the end of the term. Don’t leave an opening for others so soon.		
醉醉咁好喇, 唔好太醉 🍷🍷🍷	Being a bit drunk is fine, don’t be too drunk	A photo with several glasses of liquid of unknown	

(Made at around 10:41pm on 22 May 2020)		nature (Made at around 11:43pm on 22 May 2020)	
最後飲晒? 😊 其實我唔飲酒嘅, 但睇落呢幾杯嘢好似好甜好好飲咁 😊 (Made at around 11:45pm on 22 May 2020)	(Did you) drank it all in the end? 😊 Actually I don't drink alcohol, but these few glasses looked very sweet and very tasty 😊	A photo with several glasses of liquid of unknown nature (Made at around 1:14am on 23 May 2020)	
同一 set 嘢嚟架嘞, set 嘢攤咗咁耐無飲, 定係真係飲醉咗出兩次 post 呀? 😊 保重呀, Ben 兄 🤝😊 (Made at around 1:18am on 23 May 2020)	It was the same <i>set</i> of stuff. Had the <i>set</i> of stuff been left there that long without being drunk, or you were drunk and published the <i>post</i> twice? 😊 Take care, Brother <i>Ben</i> 🤝😊	/	
黑暗時代 (Made at around 11:28pm on 22 May 2020)	Dark age		
香港改名做香港市, 遲下直頭廢埋海關, 大陸哩衝晒落嚟。 (Made at around 1:22pm on 23 May 2020)	Rename Hong Kong as Hong Kong City, the Customs will be abolished later, the hicks from the Mainland will swarm here.		

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<p>回歸之後係 中共國～越管 越黑暗 (Made at around 9:46pm on 22 May 2020)</p>	<p>After the handover, it has become Chinese Communist Country~ the ruling has becoming darker and darker</p>		
<p>d po 啦陣間又 話你煽動， 真正香港人 唔使講都會咁 做！ (Made at around 9:43pm on 22 May 2020)</p>	<p><i>d po</i> please, you will be accused of incitement. Real Hong Kong people will do that without being told!</p>	<p>驚條鐵咩 唔係今日就 聽日㗎啦 (Made at around 11:43pm on 22 May 2020)</p>	<p>Don't friggling worry. If it's not today, it's tomorrow.</p>
<p>你叫人打自己 又唔打呀☺? (Made at around 5:21pm on 24 May 2020)</p>	<p>You told others to do the beating yet you won't do the beating yourself ☺?</p>	<p>/</p>	

15. At the time it remained posted and available to the public, the Facebook Post attracted a degree of publicity. As of 27 May 2020, the Facebook Page of Mr Ho, on which the Facebook Post had been made, had attracted over 3674 “likes” and 3939 “followers”. The Facebook Post was responded to by other Facebook users and Mr Ho 17 times, was shared with others 1 time, and had attracted a total of 156 counts of “like”, “care” and “love”. The status of the Facebook Post remained “Public” and was still publicly accessible by anyone with connection to the internet.

16. As shown in the screen shots preserved on 27 May 2020, the following additional responses from other Facebook users were found below the Facebook Post:

Other Facebook users' responses	English translation	Mr Ho's replies
請議員親自做示範 (Made at around 10:04am on 27 May 2020)	Councillor, please give a demonstration yourself.	/
你打咗先講啦廢柴，得把闊口！話你戀鳩都唔怕你𩶛 (Made at around 9:38pm on 25 May 2020)	Talk after you have done the beating, loser, (you are) all fucking talk and no action! (I am) calling you fucking dumb without scared if you would be angry	/
重有兩樣可以，送死同送子彈 🙄🙄🙄 (Made at around 8:28pm on 25 May 2020)	There are two more (things) which can be (done), sending (oneself) to die and sending bullets.	/

17. According to the Police's investigation on 25 May 2020, the profile section of the Facebook Page indicated that the person represented and promoted by the Facebook Page was the District Councillor of the Tin Yiu Constituency in Yuen Long. It also provided his background information, including his education background (graduated from Lingnan University), political affiliation (Neighbourhood and Worker's Service Centre (街坊工友服務處), a grassroots organization established

A for the protection of workers' rights and to perform general community
B outreach, a mobile phone number and email address.

C 18. The Police's investigation revealed that the information was
D consistent with the background information of Mr Ho, including the
E mobile phone number and email address.

F 19. The Police's further investigation on 27 May 2020 revealed
G that photos and posts concerning the political or other activities of Mr Ho
H were from time to time published on the Facebook Page.

I 20. On 26 May 2020, the Department of Justice ("DoJ") wrote
J to Mr Ho ("Letter"), pointing out that the Facebook Post was, on its face,
K in breach of the Incitement Injunction and requesting him to remove the
Facebook Post within the next 7 days.

L 21. On 29 May 2020, at around 12:04, a photo of the Letter was
M posted on the Facebook Page ("2nd Facebook Post"), with the words
N "[律政司送禮上門] 上星期個 post(唔貼 link 喇,想睇嘅自己搵)講出
O 呢個社會嘅現況,表明個人嘅理解,我已經避而不作判斷同選擇,都
P 被指違反禁制令。有人可能會覺得我 on9, 講到啲野咁白,明嘅人
Q 唔駛講,唔明嘅人講完都唔會明,拎自己較飛好唔抵。但請記住,
R 大多數人仲喺迷茫、失望、無力之中,有啲說話始終要有人講。公開
S 呢封信,話比大家知,post 我可能會 del,但香港人內心嘅諗法,點鐘
T 都鐘唔走。即管繼續打壓香港人,即管繼續傷害香港,終有一日,
U 香港人無懼任何刑罰,唔怕送頭,政權.....(費事又違反禁制令,自己
V 填充啦)" (English translation: "[A gift delivered to the doorstep by the

A Department of Justice] The *post* of last week ((I) won't post the *link* here,
B if (you) want to see (it), search for yourself) talked about the present
C situation of this society and made clear of my personal understanding. I
D had already avoided making judgments and choices, but I was still
E accused of breaching the injunction order. Some people may think that I
F am *on9* (dumb), putting it so baldly. Those who can understand don't
G need (my) telling. Those who can't understand won't get it even after
H (my) telling. It isn't worth putting myself at risk (homophone). But
I please remember, most people are still confused, disappointed and feeling
J helpless. Someone has got to say something after all. (I) made this
K letter public to let you know that I may *del* (delete) the *post*. But no
L move can remove the thoughts inside the hearts of Hong Kong people.
M Go ahead and keep on suppressing Hong Kong people; go ahead and keep
N on hurting Hong Kong. Someday, Hong Kong people will not fear any
O punishment, will not fear sending (their) heads, the regime..... (Don't
P want to breach the injunction again, fill in the blank yourself)".

M 22. On or around 30 May 2020, Mr Ho confirmed to the DoJ by M
N way of letter and an email at around 11:08pm that he had deleted the N
O Facebook Post. As per the Police's checking on 31 May 2020, the O
P Facebook Post was accessible at around 2am and it was subsequently P
found to have been removed upon further checking at around 8am.

Q 23. The Police's investigation revealed that Mr Ho has been an Q
R active internet user and had regularly browsed various online news media. R
S He has been sharing information released by the Government (e.g. Chief S
T Executive's press release) and news reports by various Local Media T
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A including, *inter alia*, “MingPao”, “Apple Daily” and “hk01” and
B “Wenweipo” on his Facebook Page from time to time.

C 24. The Police’s investigation also revealed that under the “Page
D transparency” section of the Facebook Page, the words “Hong Kong (4)”
E appeared under the column of “People who manage this Page”. This
F shows that 4 Facebook accounts have the right to manage the Facebook
G Page and that the primary location of the user(s) of all these 4 accounts
H was in Hong Kong. As explained under the “What is the Page
I Transparency section on Facebook Pages?” heading in the “Help Center”
J of Facebook, information shown in the “Page Transparency” section
K includes “the number of people who manage the Page in each country”.
L No further information of those 4 accounts was available.

K 25. Under the “Manage Page Settings” heading in the “Help
L Center” of Facebook, the types of roles for persons who manage pages
M such as the Facebook Page were explained. Of the roles, only two
N (“Admin” and “Editor”) were authorized to “create and delete posts as the
O Page”. The authorization to create posts and delete posts were outlined
P as a single function.

P ***D. The Delay***

Q 26. In *Secretary for Justice v Sung Ho Tak Edward* [2022]
R HKCFI 227, I commented on the long period of delay in that case.
S There, the relevant breach was not sought to be brought back to this Court
T until almost 2 years after the date of the breach. I described that (at §27)
U as “more than just disappointing”. At §§28-30, I stated:
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28. By nearly 2 years after the date of the breach, committed in the midst of the deep social unrest, that social unrest had largely calmed down. Of course, I do not say that it is improper to bring these contempt proceedings (or else I would not have granted leave). But it might be said that pursuing the contempt so long after the event, well after the fraught social situation at the time of the Incitement Injunction has calmed down, risks unhelpfully raking over the embers.

29. Further, I think the Court is entitled to expect actions which are said to be clear breaches of Court orders to be brought to the attention of the Court within a fairly short time, if the matter is to be pursued at all. Court orders are not advisory; they mandate what must be done or not done. In a case such as the present, the Court itself is unlikely to be aware of any specific details of breaches of the Court’s order. The Court relies on one of the parties to the proceedings – here the SJ, who sought and obtained the injunction – to bring the matter to the attention of the Court timeously, so that the Court is in a position to enforce its order through contempt proceedings and orders for committal if necessary.

30. Significant delay is almost bound to frustrate the Court’s ability properly to police its own orders. The value of late steps may well be less than the value of steps taken timeously. Enforcement steps which are considered to be necessary, appropriate and proportionate if taken within weeks or months of the breach of the order may no longer be considered either necessary or appropriate or proportionate if only pursued years later.

27. I expressly adopt and repeat those points for present purposes.

28. At the call-over hearing on 14 January 2022, I sought an explanation as to why it had taken 15 months to bring this matter to the attention of the Court. In his skeleton submissions filed for this hearing, Mr Kwan explained the SJ’s “understanding is that significant time was taken for the following matters”:

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- (1) Firstly, and primarily, time was taken for the DoJ continually to review and advise on the relevancy and sufficiency of the evidence as collected by the Police from time to time, and for the Police to conduct further investigation from time to time upon DoJ’s advice and request regarding various aspects of the case. The activity went beyond the general consideration of whether the Facebook Post was a breach of the Incitement Injunction, and into the specific merits of contempt proceedings. A significant part of the investigation centred on the sufficiency of evidence on authorship of the Facebook Post.
- (2) The particular concern arose from the “Page transparency” section, which meant that, though the Facebook Page appeared to be controlled by Mr Ho, it might be that the day-to-day use had been delegated to an extent that the true author of the Facebook Post was someone other than Mr Ho.
- (3) Though the DoJ had regarded Mr Ho as the author – which is why the Letter was sent to him – it was not regarded as being beyond doubt from an evidential perspective. Hence the need for further investigation, which was carried out in May and June 2021.
- (4) Secondly, time was taken by the Police to finalise and translate the supporting exhibits as collated from time to time. This was completed by February 2021.
- (5) Thirdly, time was taken for the DOJ to take advice from counsel, and to review and revise the draft court documents in light of the evidence collected by the Police from time to time during further investigation.

A 29. Mr Kwan submits that the lapse of time, whilst unfortunate,
B was not unreasonable and that there was no undue delay in view of the
C required preparatory work in instituting the proceedings. Further, whilst
D accepting that the lapse of time may be one factor taken into account in
E determining the appropriate sentence, he submits it is not a determinative
F or major factor. There is also the statement that, with the benefit of
G hindsight, areas for improvement and room for expedition are noted, and
H my previous observations will be borne in mind.

I 30. As to the first point, about the time taken in investigating
J and seeking advice on various matters, I would note the following:

- K (1) The Facebook Post was made on 22 May 2020.
- L (2) The Police had discovered the publication by 25 May 2020.
- M (3) The Facebook Post was immediately recognised as, at least
N *prima facie*, constituting a breach of the Incitement
O Injunction.
- P (4) The Police understandably considered that Mr Ho was the
Q author of the Facebook Page.
- R (5) As a result, the DoJ wrote to Mr Ho on 26 May 2020 (i.e. the
S Letter), pointing out that the Facebook Post was on its face
T in breach of the Incitement Order.
- U (6) The Letter was sent to Mr Ho by registered post to his postal
V address and by email to his email address.
- (7) A copy of the Letter was posted on the Facebook Page
(i.e. the 2nd Facebook Post) on 29 May 2020.
- (8) On 30 May 2020, the DoJ received an email apparently from
Mr Ho, sent from the same email address to which the DoJ

A had sent the Letter, confirming deletion of the Facebook
B Post.

C (9) Hence, the Police/DoJ had discovered the Facebook Post,
D had written to the apparent author of it demanding its
E removal, and had received a response directly from the
F apparent author confirming its removal, all within a week or
G so after the Facebook Post was made.

H (10) The deletion of the Facebook Post was made within the
I period demanded for its removal.

J 31. Whilst I note the concern arising as to the possibility that
K someone other than Mr Ho was the author of the Facebook Post, I also
L note that the most obvious straightforward step to check that point –
M namely to have asked Mr Ho himself – appears not to have been taken.
N There was also no suggestion Mr Ho had sought to conceal his identity,
O either in the original Facebook Post or his comments to other persons’
P comments, or in the 2nd Facebook Post, all of which had quite a personal
Q element to them.

R 32. Therefore, even taking into account the possible need for
S some further investigation to clear up any concern as to authorship, and to
T be confident of meeting (if necessary) the high evidential threshold, I am
U afraid I remain of the view that the 15-month delay before making the
V *ex parte* application was unacceptably long.

Whether or not that is properly to be described as “undue
delay”, the fact that there has been delay simply means that I am dealing
with the breach much later than I would have preferred, and in somewhat
different overall circumstances.

E. The SJ's Role

34. The SJ was acting in her role as guardian of the public interest when commencing the underlying proceedings HCA 2007/2019, and in pursuing the grant of the Incitement Injunction.

35. In bringing these contempt proceedings, the SJ is also acting in her role as guardian of the public interest and the administration of justice. This was a point I addressed in *Secretary for Justice v Chan Oi Yau Rio* [2020] 3 HKLRD 494 at §§51-53. There I noted that, whilst the contempt proceedings are ‘civil’ in their procedural character, the SJ is not seeking to protect the interests of the executive arm of the Government. Nor is she properly to be regarded as advancing any private interests. Rather, the SJ is seeking to uphold the rule of law and to safeguard the administration of justice.

36. I also noted that the role requires the SJ, and Counsel representing her, to endeavour to assist the Court with the sentencing process in a fair and impartial manner. I held that it is consistent with the proper approach to the procedural framework in contempt proceedings, where it is an established norm for the plaintiff (in effect, in a case such as the present, the general public represented by the SJ) to make detailed submissions to assist the Court on the appropriate penalty to be imposed on the contemnor.

37. Mr Kwan for the SJ has performed that role today and, lest it be suggested otherwise, I do not think he has over-stepped any mark.

F. Applicable Principles for Sentencing

38. In *Secretary for Justice v Sung Tak Ho Edward* [2022] HKCFI 227, I set out the principles applicable to sentencing for contempt of the Incitement Injunction, by stating that the sentencing guidance as explained by me for contempt of the Doxxing Injunction can be adopted as applicable. That guidance can be found in *Secretary for Justice v Chan Oi Yau Riyo* [2020] 3 HKLRD 494 at §§54-63, *Secretary for Justice v Cheng Lai King* [2020] 5 HKLRD 356 at §§64-72, and *Secretary for Justice v Chan Kin Chung* [2021] 1 HKLRD 563 at §§38-45.

39. I also made plain that the lack of a doxxing element in an incitement case does not warrant more lenient sentencing options. The appropriate starting point for breach of the injunction order in an incitement case is one of an immediate custodial sentence, and one perhaps measured in months.

40. Indeed, I expressed agreement with a submission that the conduct of inciting violence online can be said to be more serious than that of doxxing. Whilst both inciting violence online and doxxing are serious matters, the threat posed by inciting violence is more direct, explicit and immediate.

41. I also stated that any attempt to distinguish circumstances between those where a contemnor appears enthusiastic for the result of his incitement, and those where the contemnor is simply “venting” in the heat of the moment without intention for inciting others to act on his words, should not be taken too far. A person who has given no thought to the logical likely or potential consequence of his words remains

A culpable, and I would not wish it to be thought that a person can be
B treated leniently merely because he has failed to form the actual intention
C which is nevertheless the logical consequence of the acts performed.
D The Court is not concerned only with the subjective intention of the
E contemnor, but with the objective potential or likely effect of the words
F used. Of course, in any given case where it is shown that the contemnor
firmly intended his incitement to result in violence, that can be taken into
account.

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H 42. Beside the degree of culpability, the Court may take into
I account various other circumstances to the extent appropriate to the case
J such as, (a) the contemnor's personal circumstances, (b) the effect of the
K contempt on the administration of justice, (c) the need to deter future or
L repeated contempt, (d) the absence or presence of prior conviction for
M contempt, (e) the contemnor's financial means, (f) whether the contemnor
N has exhibited genuine contrition and made a full and ample apology, and
of a term of imprisonment (sometimes considered as the penalty of 'last
resort').

O 43. The ultimate question for the Court when sentencing for
P contempt of a Court order is the determination of a sufficient and
Q proportionate sentence (or sanction, if that word is preferred) for the
R particular case. Just as it is said that the punishment should fit the crime,
so the sanction should fit the contempt.

G. SJ's Submissions

44. Mr Kwan submits that the present case should be approached with several additional observations made in the *Chan Oi Yau Rio* case kept in mind, being:

- (1) The era of the internet and social media gives rise to the very easy practical way by which an individual can breach an order of the court and widely disseminate information. The facility to broadcast and publish material widely makes breaches worse rather than less serious.
- (2) In considering whether the contemnor has exhibited genuine contrition and made a full and ample apology, whether the contemnor has purged his contempt and the circumstances of doing so are relevant.
- (3) It is a mitigating factor if the contempt was a one-off event, so that prior records of contempt would indicate the opposite.
- (4) It is also a mitigating factor where the contemnor indicates quickly that he or she will admit liability for contempt.

45. But it may be an aggravating feature if the contemnor knew of the consequences – namely that his conduct would constitute a breach of injunction – but still flagrantly engaged in that conduct in defiance of court.

46. With those matters in mind, Mr Kwan then submits that the Court should take into account the following factors:

- (1) Although at first blush it appears that Mr Ho may have been “venting” out of impulse, his follow-up actions could be

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taken to indicate the opposite. In other words, his
Facebook Post could be seen as intentional and measured,
and that he sought to convey a clear and specific intent – not
just to the content but also to breaching the injunction. A
cautious approach should be adopted in ascertaining whether
Mr Ho was acting out of character.

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(2) Mr Ho’s responses to comments were in just an expression
of his belief that making the Facebook Post was certain to
attract legal consequences, with a display of bravado.
Alternatively, it might be regarded as an indication that
Mr Ho had considered but thrown caution to the wind before
acting as he did.

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(3) The making of the 2nd Facebook Post – 7 days after the
offending Facebook Post – appears to have made
retrospective reference to his state of mind. This is relevant
to whether he can properly regarded as having previously
been acting on impulse. Having had ample time to
reconsider his conduct, his later actions seem to indicate the
Facebook Post had been made in intentional and measured
way. Perhaps Mr Ho thought it “worth the risk”.

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(4) The underlying threat of violence in the Facebook Post was
made against both the Police and the (then yet to be
established) National Security Department, and was
particularly serious given its timing in the wake of the
violent unrest in 2019.

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(5) Mr Ho was a figure of some public influence, having been a
District Councillor, such that the “ripple effect” caused by
his words online would have been far greater than that of the
average person. The nature of social media is such that any

A material can be compiled upon and give rise to an echo
B chamber.

C (6) There was no express indication of remorse apparent in
D Mr Ho's 1st affirmation dated 21 January 2022, nor was his
E conduct after making and removing the Facebook Post
indicative of remorse.

F 47. Mr Kwan also submits that there is some doubt as to whether
G this contempt can be regarded as a one-off event, where Mr Ho has
H demonstrated through his altercations with the criminal justice system a
I propensity to publish offending and violent material on social media,
J leading to a past criminal conviction for the offence of attempted criminal
K intimidation on 25 January 2022. The circumstances of that offence
L arose from a post made on 21 March 2020, containing a close-up
M photograph of a knife with words which (in English translation) stated
N "... I now formally give notice of the sweeping action to the residents of
Tin Yiu Estate: Date: 23 March 2020 (Monday) ... Tools: get to consider
O what to bring, I have sticks, bars, knives and saws...". For that offence,
P Mr Ho was sentenced to 5 weeks' imprisonment on 8 February 2022.

Q 48. Alternatively, Mr Kwan submits that the criminal conviction
R could instead be taken into account as part of Mr Ho's personal
S circumstances when considering the appropriate sanction in this case.

T 49. As to the similarities with the *Sung Ho Tak* case, which are
U said to demonstrate the general seriousness of the present case, Mr Kwan
V submits that:

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(1) Mr Ho was the original author of the Facebook Post, which he posted on his own initiative. He did not merely re-post material authored by others.

(2) There is a clear correlation between online calls for violence and their actual implementation in the real world. While the general level of violence in Hong Kong had subsided to an extent by May 2020, it was not far removed from the period of violent unrest in 2019.

(3) Vigilantism has no place in Hong Kong irrespective of one's political stance. There is no reason why one's views, however strong, cannot be expressed in a proper, legitimate, and non-violent manner through proper channels – including through the Complaints Against Police Office.

50. I think these points are relevant to the weighing exercise and I shall keep them all in mind.

51. Mr Kwan also accepts that there are number of points which can be regarded as mitigating factors, which he also traverses in his written submissions.

H. Mr Ho's Evidence and the Mitigation Advanced

52. I record the fact that, at the call-over hearing on 14 January 2022, and as indicated by his letter the previous day, Mr Ho accepted liability for contempt of court on account of the Facebook Post.

53. Mr Ho has filed two affirmations. His first, when still acting in person, said little except to point to his financial position. As Mr Kwan points out, the 1st affirmation does not seek to explain the

A contempt, nor does it contain any clear expression of understanding of his
B wrongdoing or any remorse.

C 54. Mr Ho's 2nd (or supplemental) affirmation is dated
D 9 April 2022. In it, he explains that at the time of filing his
E 1st affirmation he was unaware that he needed to include all the mitigation
F letters and materials that he needed to rely on during the mitigation
G hearing. He also states that he was diagnosed with Covid-19 towards
H the end of his sentence for another criminal case, and was therefore
I unable to meet his lawyers until 22 March 2022. After that, he has been
liaising with his lawyers about the reference materials and mitigation
letters.

J 55. The 2nd affirmation exhibits a number of mitigation letters.
K The first is Mr Ho's own mitigation letter. He makes various points
L under numbered paragraphs as follows (in my summary of the points, but
using his headings):

M (1) 'Admission': He had planned to admit liability after
N acknowledging the case in September 2021, but was unable
O to establish the formal and proper way to do so without legal
P assistance. Therefore, he formally expressed the intention
to admit liability just in advance of the 14 January 2022
hearing.

Q (2) 'Deleted the posts upon the Plaintiff's request': After
R receiving the request to delete the relevant posts on
S 29 May 2020, and after careful reading of the Incitement
Injunction, he complied with the request on 30 May 2020.

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(3) ‘Remote chance of reoffending’: Since deletion of the post, he has not published any speech in breach of the injunction. Further, the Facebook Page has been changed to the status of “hidden” since August 2021, and is only maintained at all as evidence for another case, but will be deleted after that case.

(4) ‘Post’s content’: The Facebook Post contained no specific information nor instructions, and the theme was the question posed at the end. This indicates the content was not provocative and not a direct breach of the prohibited content prescribed by the injunction.

(5) ‘Intention of posting’: He had a unique observation of the anti-police atmosphere in 2019-2020. He thinks people were not intending in fact to take action, because they value their own peace and safety over the grievances spoken. Speeches on the internet were verbal opinion, hence the form of question, without a conclusion. Because he was drunk, and had been used to writing euphemistically, he did not express his views explicitly, and the breach of the injunction arose out of negligence.

(6) ‘Contribution to the society’: Since graduation from university in 2011, he has devoted himself to community works and serving citizens. He has been hard-working and thrifty. He saved salary for self-funded community activities and services. Since 2017, he has provided free legal consultation on employment law and mediation services. Although he left working for the community after July 2021, he has tried to work as a bridge between employers and employees. His spirit for serving the community remains, but imprisonment would inevitably

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A affect his employment, and he would lose the chance to
B serve in the human resources management industry.

C (7) ‘Appropriate scope of liability to bear’: He admits liability
D for contempt and is willing to be punished. It is extremely
E unlikely he will commit such an offence again. Against the
F past 20 months’ behaviour, imprisonment as an attempt to
G prevent another breach of the injunction has lost its meaning.
H The anti-police atmosphere has now subdued. There is no
I necessity to impose a great deterrence. His savings were
J used up when unemployed from July to August 2021. But
he can still borrow money from relatives and friends or find
another part-time job to pay fines and costs of the case. He
begs for a suspended sentence and imposed fine at a sum the
court thinks fit.

K 56. Elsewhere in the body of his 2nd affirmation, Mr Ho has
L described his activities as a District Councillor, focusing on community
M livelihood issues, especially for the elderly and low-income group.
Reference to very specific examples of activity are set out.

N 57. The other mitigation letters are from: (1) Mr Ho’s father;
O (2) his mother; (3) his younger brother; (4) a person who knew Mr Ho
P when affiliated to the Neighbourhood and Worker’s Service Centre;
Q (5) his current job supervisor; (6) a roommate/schoolmate from university
R days; (7) a person who joined volunteer work organised by him;
S (8) groups of residents in Tin Shui Wai; (9) his two assistants when he
was a District Councillor; and (10) a resident in Tin Shui Wai who
assisted the volunteer or free repair work provided to other residents.

A 58. I have read the various mitigation letters carefully, but I do
B not think it necessary to set out in this Decision their full contents. By
C way of broad summary only, it can be said that they speak: (1) to his
D working ethic, spending all his time on family and work; (2) to his desire
E to unite people or repair relationships, and to his acting as a bridge
F between people (including within his own family); (3) to his genuine
G intention to contribute to society, in particular the less-privileged
H members of society; (4) to his use of his own money in supporting others;
I (5) to his being frank and down-to-earth; (6) to his willingness to
J communicate with people of different political stances; and (7) to his
K desire to put past matters behind him and embark on a new life so as to
L contribute to society. There is also reference to the unexpected nature of
M the actions giving rise to the contempt in this case.

K 59. Mr Ho is now employed as a Senior Human Resources
L Manager for a food company, and he is responsible for management of
M human resources in the company. He earns around \$20,000 per month.
N His monthly bank statements, credit card records and loan records as
O student identify that he does not have much savings, and still has money
P owing to the bank.

O 60. In his submissions on behalf of Mr Ho, Mr Lam emphasises:

- P (1) Mr Ho's original intention not to contest the action once
Q made aware of these proceedings, and the guilty plea at the
R first hearing;
- S (2) that Mr Ho merely intended to spell out his question on the
T Facebook Post with his observation, frankly admitted to be
U the result of negligence;
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- (3) the deletion of the Facebook Post upon request;
- (4) the change of the Facebook Page, since August 2021, to “hidden”, together with the promise to shut down the Facebook Page after conclusion of these proceedings;
- (5) the very slim chance of re-offending with the same offence;
- (6) the significant contribution to the community, especially in Tin Shui Wai;
- (7) Mr Ho’s earlier hard work and involvement in improvement of the welfare and student life;
- (8) his planning and actual participation in activities thought to benefit the “target audience” the most; and
- (9) the inspiration given by Mr Ho to other people to make similar commitments to helping others.

61. Mr Lam refers in particular to the facts that Mr Ho has taken full responsibility for the breach, that he never tried to conceal his identity, and that he deleted the Facebook Post within the time limit set by the DoJ. As to the previous conviction, it concerned an earlier post, but the conviction was after Mr Ho formally admitted liability in the present action. Though Mr Ho cannot claim having a clear record, that is but one factor for consideration. The dedication to improve the life of others has been shown throughout by Mr Ho, both before and after he became a District Councillor.

62. Mr Lam invites the Court to consider the conduct amounting to the contempt as out of character for Mr Ho, in that the Facebook Post was not made deliberately but recklessly, meaning that it is close to being a one-off incident. He has now shown genuine remorse, and has learnt

A his lesson. Though his standing as a District Councillor at the time of
B the incident might have had an impact on many people, the “ripple effect”
C in this case might not have been as influential as in previous cases, as
D shown by the responses to the Facebook Post. Mr Lam also invites the
E Court to take into account that some of the responses to the Facebook
F Post and Mr Ho’s responses in return showed that he did not respond to
G comments that directly asked for violence. Rather, he responded to
H those expressing apparent concern about his personal health and safety.
I Further, the acceptance of liability and willingness to accept the sanction
J imposed by the Court encourages observance by others towards the
K observance of the Incitement Injunction.

I 63. Mr Lam submits that a suspended sentence would be a
J sufficient, appropriate and proportionate sentence for Mr Ho in all the
K circumstances.

L ***I. Decision on Sentence***

M 64. I start from the position that the Facebook Post was a clear
N breach of the Incitement Injunction, and Mr Ho now accepts that to be so.
O On the other hand, whilst any encouragement, promotion or containment
P of violence is unacceptable, it can fairly be said that the level of violence
Q advocated and referenced was not at the most extreme end – being
R references to “beating up” and “fists”, as opposed to, say, knives, guns or
S bombs.

T 65. Whilst there is some material which might justify a finding
U that the Facebook Post was made knowing it was possibly a breach but
V was nevertheless “worth the risk”, I am prepared to proceed on the basis –

A not least against Mr Ho’s clear acceptance of acting negligently whilst
B “drunk” – that there was not an intended or deliberate flouting of the
C authority of the Court.

D 66. I bear in mind that the offending Facebook Post was
E removed by Mr Ho from his Facebook Page quite quickly after it was
F first made, and indeed very quickly after it was demanded by the DoJ to
G be removed (the removal being well inside the given deadline). Though
H the Letter sent by the DoJ was itself posted, with some perhaps unhelpful
I comments which did little to show immediate recognition of wrongdoing
or remorse, that stance was quickly reversed by the removal of the
Facebook Post in accordance with the demands made in the Letter.

J 67. Though I think the point could have been made in rather
K more firm and clear terms, I accept that Mr Ho is now genuinely
L remorseful for his actions in relation to the Facebook Post. I accept that
M Mr Ho will by now have gained an understanding for what he did wrong
N – and, to be fair, he seems to have gained that understanding not long
after receipt of the Letter – and that he has learnt his lesson.

O 68. As to the timing of his admission of liability, I accept that it
P was made without great delay, before the call-over hearing and repeated
Q at that hearing, and the intended admission may have been held up by the
R absence of legal assistance at the time. The delay of the call-over
S hearing by a month was the result of an automatic statutory stay
T consequent on Mr Ho’s application for Legal Aid, and I do not think that
U should count against him. As in previous cases, I also think that it is
V somewhat unfair for the SJ to criticise Mr Ho for the time he took

A formally to acknowledge liability, when the SJ took far more than a year
B to decide to bring these proceedings even after apparently forming the
C view that there had been a clear contempt of court by an identified author
D of the Facebook Post.

E 69. As to Mr Ho's being a District Councillor at the time of the
F offending Facebook Post, that does mean (as he accepts) that he was in a
G public position of responsibility and some influence – a person who
H might be taken as an example and an opinion leader – and so he should
I have paid much closer scrutiny to the qualities and consequences of his
J actions. As I have said in other cases, he should have done so
K irrespective of whether those actions might or might not breach a court
L order. A person holding public office, with a reasonably large social
media following, ought not to have allowed his own views or his
enthusiasm for them to strayed into the forbidden territory, even (or
perhaps especially) when “drunk”.

M 70. But, it is also clear from the evidence that Mr Ho become a
N District Councillor with the intention genuinely to serve the community
O and his constituents by engaging in the kind of activities which that
P position properly entails. The various testimonials show his proper
Q approach to those activities. That is relevant to his character. Further,
R it may be said that, if Mr Ho remains in any way a person of any
S influence or as an opinion leader, his clear acceptance of liability for the
T breach and his not committing any other breach since May 2020, will
U provide a more positive example.
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A 71. I take into account the previous conviction, which was based
B on another post made by Mr Ho a few weeks before the one giving rise to
C the contempt in this case. That offence also took some time to lead to
D proceedings and a conviction, and Mr Ho has only fairly recently
E completed the sentence imposed, on 10 March 2022. I shall work on the
F assumption that that recent experience was a real reminder of the risks
G and consequences of breaking the law and breaching an injunction, and
H that Mr Ho will now not wish to behave in any way, including through his
I own negligence, as might lead to another period in prison.

H 72. As in previous cases, I have thought carefully about the
I effect of the delay in bringing these proceedings. In or soon after
J May 2020 when the Facebook Post was made, the Court would have been
K very keen not to allow it to fan the flames of a situation which was
L calming down, and the need for a strong message to others as well as
M Mr Ho would have been obvious. But, I accept that Mr Ho seems to
N have got the message, and time has moved on and the general situation in
O society now is not what it was.

N 73. In summary, in the circumstances, whilst I see no reason not
O to start from the position that this contempt should be sanctioned with an
P immediate custodial sentence, I am persuaded that a suspended sentence
Q will be sufficient, appropriate and proportionate to the contempt and the
R overall circumstances.

R 74. The period of the custodial sentence I impose is the period of
S one month, suspended for 12 months.

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J. Costs

75. There can be no dispute that the issue of costs lies in the Court's discretion, and that it is settled that the usual order in a successful committal procedure is for costs to follow the event, also usually ordered to be paid on the indemnity basis. That is the order sought by Mr Kwan on behalf of the SJ, who also seeks a summary assessment of costs totalling \$243,169.

76. In recognition of the fact that Mr Ho was granted a certificate of Legal Aid on 4 February 2022, Mr Kwan has helpfully provided an updated Statement of Costs for Summary Assessment divided between the two periods before and after that date. The total sum already mentioned of \$243,169 is divided as to \$160,050 and \$83,119 before and after 4 February 2022. Recognising also that there may be no great attraction in ordering public funds to be moved from one pocket to another, Mr Kwan invites me to make the usual order for the period before 4 February 2022.

77. But, it is common ground that it has also been accepted by me in previous cases – see, for example, the *Chan Oi Yau Riyo* case at §90 – that in some cases it may be appropriate to approach costs by requiring payment of a contribution only, rather than costs on a full indemnity basis, so as to reflect the appropriate degree of proportionality when the penalty and costs can be regarded as composite elements of the sanction and the proceedings' impact on a defendant. On that basis, Mr Lam asks me to order only a contribution to costs.

A 78. I accept the personal and financial position identified by
B Mr Ho in his evidence, subject to the updating provided by Mr Lam at the
C hearing that Mr Ho is no longer in the previous employment, but is
D engaged in various part-time employment whilst he interviews for a
E full-time position. But, where (a) he has persuaded me to permit him to
F retain his liberty (with a suspended custodial sentence), which will permit
G him to continue his employment and earnings, and (b) he has indicated
H the ability to take on part-time work and to borrow funds to pay a fine
and/or costs, it seems to me that Mr Ho is capable of making, and should
make, at least a significant contribution to costs.

I 79. In the circumstances overall, I think this is a case where the
J appropriate costs order is to order a contribution in the sum of \$100,000
K for the period before 4 February 2022, with no order as to costs after that
L date, save that there will be taxation of Mr Ho's own costs in accordance
M with the Legal Aid regulations.

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

Q Mr Jonathan Kwan and Mr Ivan Suen, instructed by Department of
R Justice, for the plaintiff

S Mr Mike HY Lam, instructed by Messrs L & W Lawyers, for the
T defendant
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