HCA 855/2023
[2023] HKCFI 1950

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 855 OF 2023

BETWEEN

SECRETARY FOR JUSTICE	Plaintiff
and	
PERSONS CONDUCTING THEMSELVES IN ANY OF THE ACTS PROHIBITED UNDER PARAGRAPH 1(a), (b), (c) OR (d) OF THE INDORSEMENT OF CLAIM	Defendants

Before: Hon Anthony Chan J in Chambers
Date of Hearing: 21 July 2023
Date of Decision: 28 July 2023

D E C I S I O N

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1. This is the application of the Secretary for Justice ("SJ"), acting as guardian of public interest, for an interlocutory injunction in aid

of criminal law to prohibit 4 categories of acts ("4 Acts") set out in the Summons filed on 5 June 2023. The 4 Acts relate to the song widely known as "Glory to Hong Kong"[1] ("Song").

Introduction

2. In light of the public interest in these matters, it should be made quite clear that the order sought by the SJ does not enjoin lawful activities, nor does it constitute a blanket ban of the Song. Three of the 4 Acts constitute serious criminal offences which undermine national security (arguably, so does the 4th Act). I have no doubt that Hong Kong people are generally law abiding and would not even contemplate the commission of a serious criminal offence.

3. It should also be made clear that, although it is understandable that some people of Hong Kong may be concerned that the Injunction would make an inroad to their freedom of expression, in truth it is not intended to do so for the simple reason that the 4 Acts are criminal or unlawful activities. However, part of the task of the Court is to ascertain whether unintended restriction on freedom of expression may result if the Injunction is granted.

4. It should once again be pointed out that there is no absolute freedom of expression. Just as no one is free to defame another, the right to free expression is always confined within legal limits. Commission of a crime goes outside such limits.

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[1] "願榮光歸香港".

The role of the Court

5. Pursuant to Articles 3 and 8 of the Law of the People's Republic of China on Safeguarding National Security in Hong Kong Special Administrative Region ("NSL 3 and 8"), the Court has the duties to "effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with this Law and other relevant laws" (NSL 3) (emphasis added).

6. It may be said that such duties of the Court naturally arise from the importance of national security. National security goes to the stability and prosperity of Hong Kong, the core interests of Hong Kong people. The Court would accord significant weight to matters of national security.

7. On the other hand, the Court must apply the law, which had been augmented by the enactment of NSL. In particular, NSL 4 also imposes a duty on authorities (including the Court) acting to safeguard national security to ensure that human rights "shall be respected and protected"[2].

8. It is never an easy decision to make in balancing the important countervailing interests of society. It is a task which this Court must discharge to the best of its ability bearing in mind the guidance of the Court of Final Appeal in *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, [29] : "… the legislative intention is for the NSL to operate in tandem with the laws of the HKSAR, seeking 'convergence, compatibility and complementarity' with local laws …".

[2]See *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, [14], [26]-[27] and [29].

Issues

9. The central issue before the Court is whether the exceptional jurisdiction of the Court in granting an interlocutory injunction in aid of criminal law should be exercised, taking into account its unusually extensive reaches. To resolve this issue, the Court is required to look into and take into the balance a number of sub-issues.

10. The main sub-issues include whether the Injunction: (1) will be effective or of utility in aid of the criminal law; (2) may conflict with the criminal law for which purpose it is sought to be granted; and (3) is sufficiently certain in its terms and is proportionate due to the potential intrusion to the right to free expression.

Material facts

11. The facts are set out in an affidavit of Superintendent Margaret Wong filed on 5 June 2023 and an affirmation of Chief Inspector Billy Chan dated 13 July 2023. I shall summarize the material as follows.

12. In August 2019, amidst the violent protests in Hong Kong, which were mobilized via internet platforms, the Song first emerged in the form of a video publicly accessible on YouTube. The link to that video was in turn posted on an online discussion forum which was one of the platforms where strategies for public order events were discussed. The Song was described as an "army song"[3] and an "anthem". The post received much support and comments advocating the separation of Hong Kong from the PRC were aroused.

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[3]"軍歌".

13. Shortly thereafter, variations of the Song emerged on YouTube which attracted a large number of views and comments, some of which advocated the separation of Hong Kong from the PRC.

14. In September 2019, the Song was released on major online music platforms. By 1 June 2023, there were no less than 9 videos of the Song on YouTube. They had attracted 6 million views and over 200,000 "likes". A search on YouTube of the Song revealed that there were 19 other channels publishing different variations of the Song. Each of the videos on the channels is capable of being "shared". It is of course not possible to know how many of the viewers harboured ill intention or how many were mere curious "net surfers".

15. There can be little doubt that the Song was used and used effectively by people with intention to incite secession and/or sedition. The Song was sung by protesters in at least 413 public order events between 2019 and 2022 during some of which "Hong Kong independence" or other seditious slogans were chanted. On some occasions, violence, vandalism, unlawful occupation of public roads, putting up barricades to obstruct traffic and attacks of police officers took place whilst the Song was sung.

16. Equally, there can be little doubt that the Song was designed to arouse anti-establishment sentiment and belief in the separation of Hong Kong from the PRC. This is evident from the comments attracted by the Song, the description of it as an anthem of Hong Kong, the use of the Song in public order events, as well as some of its lyrics. In particular, the

reference in the lyrics to "liberate Hong Kong, revolution of our time"[4] had been held by the Court to be capable of inciting secession[5].

17. Various versions of the Song available on YouTube are entitled "Hong Kong National Anthem"[6]. There is reasonable ground to believe that the existence of these videos had contributed to the playing of the Song erroneously as the national anthem in international sports events. Such incidents were highly embarrassing and no doubt hurtful to many people of Hong Kong.

18. The evidence is that the Song remains freely available on the internet and prevalent. Ironically, the publicity over this application has apparently generated additional interest in the Song.

19. There has been a small number of arrests and successful prosecutions in relation to unlawful use of the Song :

(1) On 26 July 2021, a man was suspected of replacing the audio part of a section of a video recording the Olympic award ceremony of Cheung Ka-long where the national anthem was played with an audio of the Song and posted the doctored video on YouTube. He was arrested and charged with, *inter alia*, insulting the national anthem, contrary to s.7 of the National Anthem Ordinance (Instrument A405). He was convicted of the charge after trial on 5 July 2023. He was subsequently sentenced to 3 months of imprisonment;

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[4]"光復香港 時代革命".

[5]See *HKSAR v Tong Ying Kit* [2021] HKCFI 2200, [34] and [140]-[141].

[6]And/or "香港國歌".

(2) On 21 November 2022, a man was arrested for publishing a number of seditious articles online, including re-posting a video about the Song being played as the national anthem for Hong Kong during a Rugby event in South Korea, with an expression of appreciation to South Korea for "recognizing the national anthem of Hong Kong". He was subsequently charged with "doing an act or acts with seditious intent", contrary to ss.9 and 10 of the Crimes Ordinance, Cap 200. He pleaded guilty to the charge and was sentenced to 8 months' imprisonment;

(3) On 28 March 2023, a woman was arrested for publishing a number of seditious articles online including re-posting (a) 2 videos about the Song being played as the national anthem of Hong Kong during the said Rugby event in South Korea, with an expression of appreciation to South Korea for "recognizing the national anthem of Hong Kong"; and (b) a video about the playing of the Song as the national anthem of Hong Kong during the Asian Classic Powerlifting Championship. She was charged with similar offence as the second case above. She pleaded guilty to the charge and was sentenced to 4 months' imprisonment.

20. One of the reasons, if not the prime reason, for the small number of cases brought before the Court, is the difficulty and time required for investigation, eg, many of the people who disseminate the Song used pseudo-names.

Injunction sought

21. Against the above backdrop, the SJ seeks an interlocutory injunction in the following terms:

> "1. Until trial or further order of the Court, there be an injunction restraining the Defendants and each of them, whether acting by themselves, their servants or agents, or otherwise howsoever, from doing any of the following acts:-
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> (a) Broadcasting, performing, printing, publishing, selling, offering for sale, distributing, disseminating, displaying or reproducing in any way including on the internet and/or any media accessible online and/or any internet-based platform or medium, the song commonly known as "願榮光歸香港" or "Glory to Hong Kong" ("**Song**"), whether its melody or lyrics or in combination, (i) with the intent of and in circumstances capable of inciting others to commit secession, contrary to Article 21 of The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, or (ii) with a seditious intention as defined in section 9 of the Crimes Ordinance (Cap. 200); and in particular to advocate the separation of the Hong Kong Special Administrative Region ("**HKSAR**") from the People's Republic of China;
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> (b) Broadcasting, performing, printing, publishing, selling, offering for sale, distributing, disseminating, displaying or reproducing in any way including on the internet and/or any media accessible online and/or any internet-based platform or medium, the Song, whether its melody or lyrics or in combination, in such a way: (i) as to be likely to be mistaken as the national anthem insofar as the HKSAR is concerned; or (ii) as to suggest that the HKSAR is an independent state and has a national anthem of her own; with intent to insult the national anthem, contrary to section 7 of the National Anthem Ordinance (Instrument A405); or
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> (c) Assisting, causing, procuring, inciting, aiding, abetting others to commit or participate in any of the acts as set out in paragraph l(a) or l(b); or
>
> (d) Knowingly authorizing, permitting or allowing others to commit any of the acts or participate in any of the acts as set out in paragraph l(a) or l(b).

2. Without limiting the generality of paragraph 1, the injunction as set out in paragraph 1 covers:

   (a) The publications set out in the Schedule hereunder; and

   (b) Any adaptation of the Song, the melody and/or lyrics of which are substantially the same as the Song;

3. An order that the Defendants and each of them shall take such action forthwith to cause any of the acts as set out in paragraph 1 to cease;

4. This Order does not prohibit any lawful act(s) which are done in or outside Hong Kong for the purpose of news activity which means any journalistic activity and includes:

   (a) The—

      (i) gathering of news;

      (ii) preparation or compiling of articles, programmes or other publications concerning news; or

      (iii) observations on news or current affairs,

   for the purpose of dissemination to the public; or

   (b) The dissemination to the public of—

      (i) any article or programme or other publication of or concerning news; or

      (ii) observations on news or current affairs;

5. Leave be granted to the Plaintiff to serve this Order on the Defendants by way of substituted service by (a) publishing a copy of the sealed Order on the webpages of the Hong Kong Police Force, the Department of Justice and the Government of the HKSAR ("**Government**"); (b) exhibiting securely at a conspicuous place that is accessible by the public at the Wan Chai Division Report Room, No. 1 Arsenal Street, Wanchai, Hong Kong a notice containing the QR code linking to this Order; and (c) issuing a press release by the Government in which the three aforesaid webpages are set out and the QR code linking to this Order is provided;"

22. The Schedule referred to in para 2 of the proposed injunction contains 32 versions of the Song in video form. It should be pointed out that 2 of the versions consist of music only, with one of them having "singable subtitles".

23. The 4 Acts are set out in para 1(a) to (d) of the Injunction.

The Offences

24. Three substantive offences are engaged in the Injunction, namely, (1) NSL 21; (2) s.10 of the Crimes Ordinance, Cap 200 ("Cap 200"); and (3) s.7 of the National Anthem Ordinance (Instrument A405) ("A405").

25. NSL 21 has to be read with NSL 20 which provided for the offence of "secession" :

> "Article 20 A person who organises, plans, commits or participates in any of the following acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification shall be guilty of an offence:
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> (1) separating the Hong Kong Special Administrative Region or any other part of the People's Republic of China from the People's Republic of China;
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> (2) altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People's Republic of China; or
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> (3) surrendering the Hong Kong Special Administrative Region or any other part of the People's Republic of China to a foreign country.
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> A person who is a principal offender or a person who commits an offence of a grave nature shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; a person

who actively participates in the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years; and other participants shall be sentenced to fixed-term imprisonment of not more than three years, short-term detention or restriction.

Article 21 A person who incites, assists in, abets or provides pecuniary or other financial assistance or property for the commission by other persons of the offence under Article 20 of this Law shall be guilty of an offence. If the circumstances of the offence committed by a person are of a serious nature, the person shall be sentenced to fixed-term imprisonment of not less than five years but not more than ten years; if the circumstances of the offence committed by a person are of a minor nature, the person shall be sentenced to fixed-term imprisonment of not more than five years, short-term detention or restriction."

26. Section 9(1) of Cap 200 (which is referred to in para 1(a) of the Injunction) defined "seditious intention" :

"**9. Seditious intention**

(1) A seditious intention is an intention—

(a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty's dominions or of any territory under Her Majesty's protection as by law established; or

(b) to excite Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or

(d) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or

(e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or

(f) to incite persons to violence; or

(g) to counsel disobedience to law or to any lawful order."

27. Section 10(1) and (2) of Cap 200 created the offences :

"**10. Offences**

(1) Any person who—

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or

(b) utters any seditious words; or

(c) prints, publishes, sells, offers for sale, distributes, displays or reproduces any seditious publication; or

(d) imports any seditious publication, unless he has no reason to believe that it is seditious,

shall be guilty of an offence and shall be liable for a first offence to a fine at level 2 and to imprisonment for 2 years, and for a subsequent offence to imprisonment for 3 years; and any seditious publication shall be forfeited to the Crown.

(2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and shall be liable for a first offence to a fine at level 1 and to imprisonment for 1 year, and for a subsequent offence to imprisonment for 2 years; and such publication shall be forfeited to the Crown."

28. It should be noted that under s.11(1) of Cap 200, prosecution of an offence under s.10 has to be brought within 6 months after the commission of the offence.

29. Section 7 of A405 created 4 offences. It appears that the relevant ones covered by the Injunction are s.7(4) and possibly s.7(2) :

> "(2) A person commits an offence if the person publicly and intentionally insults the national anthem in any way.
>
> …
>
> (4) A person commits an offence if, with intent to insult the national anthem, the person intentionally publishes the insulting in any way of the national anthem."

30. Section 7(7) of A405 provided that proceedings for an offence under s.7 may only be commenced within 1 year after the offence is discovered by or comes to the notice of the Commissioner of Police or within 2 years after the commission of the offence, whichever is the earlier.

31. Under the terms of the Injunction, NSL 21 and the s.10 (Cap 200) offences are engaged under para 1(a). Para 1(b) of the Injunction covers s.7 offence(s).

32. In addition to the substantive offences, by para 1(c) the Injunction also covers accessory offences. In simple terms, they involve aiding and abetting others to commit the acts under para 1(a) and (b).

33. At the hearing, Mr Yu SC, who appeared with Mr Chang SC and Ms Cheung PGC for the SJ, clarified that the prohibition under para 1(d) of the Injunction is intended to cover breaches of the Injunction: "knowingly authorizing, permitting or allowing others to commit any of the acts or participate in any of the acts as set out in para 1(a) and (b) [of the Injunction]".

Scope of the Injunction

34. The Defendants to these proceedings are described as "Persons conducting themselves in any of the [4 Acts]". I agree with Mr Chan SC, who appeared with Mr Ho as *amici curiae* (friends of the Court), that the Injunction is intended to be *contra mundum* (against the world). Otherwise, the Injunction cannot have the effect of enjoining future publication of the Song with intention to incite secession and/or sedition.

35. However, in the Writ of this action, the address of the Defendants is referred as "unknown location within Hong Kong". It thus appears that the injunction would apply to everyone in Hong Kong. Mr Yu had confirmed that at the hearing.

36. Whilst it cannot be doubted that the Court has the power to grant an injunction *contra mundum* pursuant to s.21L of the High Court Ordinance, Cap 4 (there is agreement between Mr Chan and Mr Yu on this point), it is an exceptional course for the Court to take (even for an injunction applying "only" to everyone in Hong Kong) and one which the Court would only take with circumspection.

37. An injunction c*ontra mundum* is exceptional because the Court acts *in personam* as a general rule, and final injunctions would only bind the parties to the proceedings[7]. In other words, for an injunction *contra mundum*, the Court is asked to go outside the general rule and the normal protection provided to a defendant who may be subject to an injunction may be compromised, eg, it is "a fundamental principle of

[7]See *Re Persons Formerly Known as Winch* [2021] EMPL 20, [31].

justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard"[8].

38. I agree with Mr Chan that in light of the potential impact of the Injunction on everyone in Hong Kong regardless of whether or not he or she is a party to these proceedings, the Court must place great emphasis on safeguarding the fundamental rights of third parties who may be adversely affected.

39. As submitted by Mr Yu, the way in which the Injunction may apply to people who are not currently conducting themselves in any of the 3 Acts prohibited under para 1(a) to (c), ie, "newcomers", is that the newcomers, once they knowingly breach the Injunction, are both aware of the proceedings and make themselves a party: *Barking and Dagenham LBC v Persons Unknown*[9] and *South Cambridgeshire District Council v Gammell*[10].

40. It is probably alarming to many that once a newcomer has breached the Injunction he would find himself liable to criminal prosecution as well as contempt proceedings over the same act.

41. I do not believe that Mr Yu disagreed with the cautious approach to be taken by the Court given the unusual breadth of the Injunction. However, he emphasized that the ultimate test is whether it is just and convenient to grant the Injunction.

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[8] *Cameron v Hussain* [2019] 1 WLR 1471, [17].

[9] [2023] QB 295, [37] and [81].

[10] [2006] 1 WLR 658, [32].

42. The Court is fully cognizant of its duties under NSL 3 and NSL 8. I see no conflict between such duties and the duties of the Court to exercise circumspection in considering this application (see para 8 above).

43. There is another good reason for stringent scrutiny of the Injunction. If granted, it is likely to be a final order because it is unlikely that there will be any trial of this action. It is very unlikely for anyone answering the description of the Defendants to contest this Action.

44. Before turning to the law on injunction in aid of criminal law, it must be acknowledged that against the backdrop of the 2019 civil unrest, the Court had granted a number of injunctions which effectively ran *contra mundum*, eg, *SJ v Persons Unlawfully and Wilfully conducting Etc (1957/2019)* [2019] 5 HKLRD 500, which was a case of "doxxing" against police officers and their family members. However, I agree with Mr Chan that these cases serve to (a) illustrate the exceptional nature of an injunction *contra mundum* and (b) provide a clear contrast by looking at the extreme circumstances in 2019[11] and those of the present. I shall return to this point below.

Injunction in aid of criminal law

45. It should be said that plainly 3 (those covered by para 1(a) to (c) of the Injunction), if not all[12], of the Acts are criminal activities. In respect of NSL 21 and s.10 of Cap 200, these are clearly crimes which endanger national security. For s.7 of A405, it can legitimately be said that

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[11]In *SJ v Persons Unlawfully and Wilfully Conducting Themselves Etc* [2019] HKCFI 2809, [13], the Court described the level of violence and destruction seen in Hong Kong as approaching "anarchy".

[12]See para 60 below on the analysis of para 1(d) of the Injunction.

insulting the national anthem in the manner proscribed is a crime aimed at arousing emotion for the independence of Hong Kong, and thus also endangers national security.

46. Further, on 11 July 2023, pursuant to NSL 47 the Chief Executive had issued a certificate certifying that the 4 Acts involve national security. No doubt the certificate was issued by the Chief Executive on the basis of his assessment that the 4 Acts are contrary to the interests of national security. The NSL 47 certification is binding on the Court as to the matter it certifies. However, the SJ rightly acknowledged that the decision as to whether to grant the Injunction is a matter for this Court.

47. An important background in the consideration of the present issue is that the criminal law regime provided under the NSL, the Crimes Ordinance and the National Anthem Ordinance can fairly be described as extensive and robust in both their substantive provisions and the support of the enforcement agencies.

48. In particular, the enforcement of the NSL is overseen by the Office for Safeguarding National Security (NSL, Chapter V) assisted by the National Security Department of the Police. There can be no question that since the enactment of the NSL Hong Kong has returned to normality. It can thus be seen that the criminal law regime, especially the NSL, is effective. In assessing whether the Court should invoke its civil jurisdiction in aid of criminal law, this important background must be considered.

49. There is a very helpful discussion on the development of the principles on injunction in aid of criminal law by Kerr LJ in *Portsmouth City Council v Brian James Richards & Anr*[13].

50. A very substantial body of case law has been cited to the Court. I believe that paras 16 and 18 of the *amici*' skeleton Submissions (they are repeated below with modifications) had fairly encapsulated the applicable test. Insofar as there is any difference between Mr Chan and Mr Yu on this point, it is a matter of emphasis which will unlikely dictate the outcome of this application.

51. The test is one of necessity or utility: it must be shown that absent the Injunction the Defendants' illegal conduct cannot be effectively restrained. The Court must consider: (1) the effectiveness of the Injunction, ie, whether it would actually provide greater deterrence than what the criminal law already imposes; and (2) the ease of enforcement against the law-breakers. That is because any injunction must be limited to terms that are "really necessary and address serious concerns"[14].

52. If the targeted act is only lightly penalised under criminal law, "it may seem wrong that the courts – civil courts – should think fit, by granting injunctions, breaches of which may attract unlimited sanctions, including imprisonment, to do what Parliament has not done"[15]. On the other hand, if the criminal sanction is far more severe than what can be expected in contempt proceedings, eg, NSL 20 carries a maximum sentence of life imprisonment, the Court will rightly query: (1) whether there is any

[13][1989] 1 CMLR 673, [38]-[61].
[14]*MTR Corp Ltd v Unknown Persons* [2019] 4 HKLRD 446, [18].
[15]*Gouriet v AG* [1978] AC 435, 481C-E.

utility in an injunction to restrain what is already a criminal act punishable by a deterrent sentence; and (2) whether it is correct as a matter of principle for a civil court to pass judgment on what is effectively a serious criminal offence, without the procedural safeguards of the criminal justice system.

53. After much careful consideration, I am unable to see a solid basis for believing that the invocation of the civil jurisdiction can assist in the enforcement of the law in question. I bear in mind Mr Yu's submission that the focus of this application is the prevention and suppression of acts and activities endangering national security.

54. I am unable to completely accept Mr Yu's submission that the Court should defer to the executives on matters of national security. It is too sweeping a statement. I fully accept that whether the 4 Acts endanger national security would best be left to the executives who may assess the risks with sensitive intelligence not available to the Court. On the other hand, the present issue is the utility of the Injunction for prevention and suppression of offences. I am unable to see why the Court is not in a proper position to make a judgement on the issue based on the evidence before it.

55. Here, the Court is asked to exercise its exceptional power which affects innocent third parties. The Court cannot abdicate its responsibilities. In my respectful view, the Court must scrutinize the material before it and decide whether the contentions are made out. The above approach is consistent with the *dicta* in *Home Secretary v Rehman*[16].

[16][2003] 1 AC, [54].

56. Six points had been advanced in the SJ's contentions on the utility of the Injunction[17] :

(1) the prevalence of the Song;

(2) the deeply entrenched emotions surrounding the Song;

(3) the common misconceptions that the Song may be broadcast etc in whichever manner one wishes with impunity;

(4) the Injunction would serve an important function of sending a message, loud and clear, to the public that there are legal consequences to the 4 Acts and they should stop forthwith;

(5) the Court is invited to take judicial notice that in the MRT and Airport Injunction cases, civil injunctions were considered to be very effective in putting large scale transgressions to an end;

(6) Internet Platform Operators ("IPOs") are only willing to remove the Song from their websites with requisite Court order.

57. The evidence contains little in terms of specificities on how the Injunction would, eg, reduce the prevalence of the Song. The Court has to bear in mind that lawful activities are not targeted, and insofar as the entrenched offenders are concerned, it is unlikely that they will be deterred by an additional injunction.

58. In respect of the misconception point, I am inclined to agree with Mr Chan that the more effective tool may be one of education. It is hoped that this Decision may serve to remedy the misconception to some

[17]Paras 39, 42, 44-45 of the SJ's skeleton arguments.

extent. The relevant criminal codes have been set out. Also, the cases of convictions. Those who are sailing close to the wind may think again if they have the belief that these are crimes without consequences.

59. In truth, the answer to much of SJ's contentions rests in effective enforcement. Whilst acknowledging the difficulties faced by the enforcement agencies on this matter, I am unable to see how the Injunction would assist. It is accepted by the SJ that any contempt proceedings will be based on the commission of at least one of the 4 Acts. Each of the Acts enjoined under paras 1(a) to (c) of the Injunction is a criminal offence.

60. As regards para 1(d), in my view apart from covering the commission of offences under paras 1(a) to (c) ("participate"), it is likely that the sub-paragraph would also capture the aiding and abetting of the commission of those offences ("knowingly authorizing, permitting or allowing"). In other words, any para 1(d) act is likely to be a crime.

61. In the premises, to enforce the Injunction, the SJ will have to prove the offence(s).

62. With regards to para 56(5) above, in those cases[18] injunctions were granted by the court in aid of applicable bye-laws which were deliberately flouted during August 2019, a period of turmoil in Hong Kong. It is to be noted that the penalties which the breaches of bye-laws attracted were insufficient to deter the unlawful activities. The present circumstances are quite different.

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[18] *MRT Corp Ltd v Unknown Persons* [2019] 4 HKLRD 446 and *Airport Authority v Persons Unlawfully and Wilfully Obstructing or Interfering with the Proper Use of the Hong Kong International Airport* [2019] HKCFI 2014.

63. Finally, in respect of para 56(6), the evidence is that the Government requires a "valid court order demonstrating [to the IPOs] … the relevant contents' violation of Hong Kong law". The contents referred to were the contents of the Song. There may be a misunderstanding here because the Injunction would not have such effect. It is targeted at the use of the Song for unlawful acts.

64. Further, there is no reason to believe that IPOs are not aware of their duties to act within the law. In particular, they should not act in such a way to aid and abet the commission of offences by others. If the IPOs are in any doubt about the matter, they must have access to legal advice. It is therefore difficult to understand what the Injunction may add to the deterrence of the criminal law.

65. I have not overlooked Mr Yu's submission that a breach of the Injunction under para 1(d) may technically be easier to prove than the offence of aiding and abetting. The Court has not been provided with the legal analysis on this point (no criticism is intended). In any case, this application is not going to turn upon such fine distinction.

Conflict and inconsistency with relevant criminal laws

66. In my respectful view, Mr Chan had laid out a compelling submission on the potential for conflict and inconsistencies arising between what the Injunction would require of the Court in its civil enforcement jurisdiction and the substantive and procedural requirements of the NSL regime.

67. I agree that the Court must be satisfied as to the compatibility and workability of the civil process in enforcing the Injunction as regards the following features of the NSL regime: (1) prosecution of NSL offences can only be commenced with the SJ's written consent, and such charges "shall be tried on indictment" (NSL 41); (2) the presumption against bail, requiring defendants to positively establish that they will not continue to commit acts endangering national security (NSL 42); (3) the Police National Security Department is conferred specific investigatory powers in respect of offences endangering national security (NSL 43); (4) the SJ may issue a certificate directing that cases involving dangers to national security be tried in the Court of First Instance without jury by a panel of 3 judges (NSL 46); and (5) in certain circumstances, the Office for Safeguarding National Security may directly exercise jurisdiction over a case concerning an offence endangering national security (NSL 55) and in such circumstances, prosecution shall be conducted by a body designated by the Supreme People's Procuratorate and heard by a court designated by the Supreme People's Court (NSL 56), with the Criminal Procedure Law of the PRC and other related national laws to apply to the relevant procedural matters (NSL 57).

68. It is far from certain how any enforcement action in the civil domain against alleged breaches of the Injunction would operate compatibly and coherently with the above requirements and mandated procedures. For instance, a committal application under O.52 of the Rules of the High Court for what is in effect a NSL offence would *prima facie* contravene the NSL because NSL 41 mandates that prosecutions of NSL offences "shall" be tried on indictment. There is also scope for conflict or

inconsistency where the Court in its civil jurisdiction[19] is called upon to pronounce whether a party has committed acts in breach of NSL 20 (para 1(a) of the Injunction) when the same legal and factual questions would have to be determined in criminal proceedings against the same party.

69. There is another inconsistency insofar as the offences under s.10 of Cap 200 and s.7(2) and (4) of A405 are concerned. There are prescribed periods under which prosecution of these offences have to be brought[20]. There is no such limitation for contempt proceedings. Hence, it may be said that the Injunction will have the effect of overriding the prescribed periods, which is a matter for the legislature.

70. I am unable to accept as a valid answer to these concerns the SJ's submission that it is legally permissible for him to choose the enforcement means that best facilitate the protection of national security. If it is open for the SJ to enforce the Injunction with contempt proceedings (there is no suggest that the Injunction would not be enforced), these conflicts will have to be addressed.

71. With respect, similar problem rests with the SJ's submission that there should be no concern over the prospects of double jeopardy (that a contemnor may be subject to contempt proceedings as well as prosecution) since the Court has power to stay any proceedings which would constitute an abuse of its process. The power to stay proceedings is discretionary, whereas the right of a convicted person not to be subject to double jeopardy is a rule of the law.

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[19]For civil contempt, the standard of proof is the same as that applied in criminal court – beyond reasonable doubt.

[20]See paras 28 and 30 above.

72. As stated above, the Court's duties under NSL 3 and 8 are fully accepted. The issue here is not that the Court may be forgoing some tools (the power to grant interlocutory injunction) in the prevention or suppression of activities endangering national security as may be suggested in SJ's submission, but whether the deployment of the power to grant interlocutory injunction is of any utility in the prevention or suppression of such activities in light of the existing criminal law regime.

73. After much careful consideration, I am not satisfied that the Injunction is of any real utility, but I am satisfied that there is a real risk that the Injunction would conflict with the criminal law regime in terms of enforcement.

74. In light of these conclusions, I shall deal with the remaining main topic more succinctly.

Freedom of expression

75. NSL 4 imposes a direct legal duty on authorities acting to safeguard national security to ensure that human rights "shall be respected and protected".

76. The SJ had rightly recognised that the right to freedom of expression is here engaged. I do not believe, as suggested by Mr Chan, that freedom of conscience under Article 32 of the Basic Law is, because (1) the Injunction is about criminal acts and there is no crime without *actus reus*; and (2) the right to freedom of conscience means "the right to be protected

from unlawful interference by the state with an individual's spiritual and moral existence": *Leung Kwok Hung v Legislative Council Secretariat*[21].

77. Freedom of expression is not absolute in nature but is nonetheless a highly important right that cannot be lawfully restricted without the requirements of legal certainty and proportionality being met. The Court must be satisfied that the proposed intrusion into the fundamental rights of Defendants and any third parties who may be affected by the Injunction is justified according to the 4-step proportionality test set out in *Hysan Development Co Ltd v Town Planning Board*[22].

78. Given that the Injunction is aimed at criminal acts but not lawful activities, I believe that the intrusion to freedom of expression here, especially to innocent third parties, is what is referred to in public law as "chilling effects"[23]. Again, I am grateful to Mr Chan for effectively formulating the chilling effects: where innocent parties not meant to be targeted by the Injunction, and conducting their lives as reasonable (not unduly sensitive) lay persons, feel nonetheless dissuaded or compelled to refrain from lawful and constitutionally protected conduct that they would otherwise wish to pursue, for fear of bearing the severe consequences of breach of the Injunction if they or others are mistaken as to the precise scope of legal prohibition.

79. Whilst I entirely accept that no chilling effect is intended behind the Injunction, it is the duty of the Court to keep in mind that there is

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[21]Unrep, HCAL 112/2004, 6 October 2004, [38].

[22](2016) 19 HKCFAR 372, [134]-[135].

[23]See, eg, *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892, [6.3(3)].

a whole spectrum of Hong Kong people of different sophistication, some may be too busy to spend the time to get to know what precisely is the scope of the Injunction and some may only learn of the Injunction from secondary source which may or may not be accurate.

80. With respect, I am unable to agree that the chilling effects may be dismissed simply because the Injunction is not aimed at lawful pursuits. It is by no means over-stretched to envisage that perfectly innocent people would distance themselves from what may be lawful acts involving the Song for fear of trespassing the Injunction which has severe consequences. Indeed, the concern of the Hong Kong Journalists Association which led to the inclusion of para 4 of the Injunction serves as an illustration of the potential chilling effects.

81. It should also be added that the Injunction is not an easy document to understand. Regrettably, that is reflected by many inaccurate reports that the Song would be banned under the Injunction.

82. On the 4-step analysis, for step (i) I accept that there is a legitimate aim in this application: the effective prevention, suppression and punishment of acts or activities endangering national security (NSL 3 and NSL 8). Had I been satisfied that the Injunction is of real utility and there exists no conflict with the criminal laws ("Qualifications"), I would accept that the Injunction is rationally connected with advancing the legitimate aim (step (ii)). But for the Qualifications, bearing in mind the fundamental importance of national security I would hold that the Injunction, formulated as best one can in a restrictive manner, is no more than necessary to achieving the legitimate aim (step (iii)).

83. In respect of step (iv) – 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 the pursuit of the societal interest results in an unacceptably harsh burden on the individual – but for the Qualifications, given the fundamental importance of national security and balancing it against the chilling effects which would be confined to the Song, I would hold that the balance here is in favour of granting the Injunction.

Disposition

84. For these reasons, I cannot be satisfied that it is just and convenient to grant the Injunction. This application is accordingly dismissed.

85. It remains for the Court to express its gratitude to counsel for their able assistance. I should mention that the Court is very pleased to see that Mr Chan and Mr Ho have upheld the best tradition of the Bar by agreeing to assist the Court as *amici* at short notice. They had, I believe, laid out before the Court all the reasonable arguments which this application engages.

(Anthony Chan)
Judge of the Court of First Instance
High Court

Mr Benjamin Yu SC, Mr Jonathan Chang SC and Ms Leona Cheung PGC, instructed by Secretary for Justice, for the Plaintiff

Mr Abraham Chan SC and Mr Martin Ho, *amici curiae*

The Defendants were not represented and did not appear