**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2019] SGHC 111**

Originating Summons No 510 of 2018
(Summons No 2196 of 2018)

In the matter of Order 52 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)

And

In the matter of an application by the Attorney-General for an order of committal for contempt of court

And

In the matter of Sections 3(1)(*a*) and 10(1) of the Administration of Justice (Protection) Act 2016 (No 19 of 2016)

Between

The Attorney-General

… *Applicant*

And

Wham Kwok Han Jolovan

… *Respondent*

Originating Summons No 537 of 2018
(Summons No 2192 of 2018)

In the matter of Order 52 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)

And

In the matter of an application by the Attorney-General for an order of committal for contempt of court

And

In the matter of Sections 3(1)(*a*) and 10(1) of the Administration of Justice (Protection) Act 2016 (No 19 of 2016)

Between

The Attorney-General

… *Applicant*

And

Tan Liang Joo John

… *Respondent*

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# JUDGMENT ON SENTENCE

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[Contempt of Court] — [Sentencing]

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# Attorney-General
# v
# Wham Kwok Han Jolovan and another matter

**[2019] SGHC 111**

High Court — Originating Summonses Nos 510 and 537 of 2018 (Summonses Nos 2196 and 2192 of 2018)
Woo Bih Li J
20 March 2019

29 April 2019 Judgment reserved.

**Woo Bih Li J:**

1 In Originating Summons No 510 of 2018, Summons No 2196 of 2018, Wham Kwok Han Jolovan ("Wham") was convicted on 9 October 2018 for the offence of contempt by scandalising the court ("scandalising contempt") under s 3(1)(*a*) of the Administration of Justice (Protection) Act 2016 (Act 19 of 2016) ("the Act"). In Originating Summons No 537 of 2018, Summons No 2192 of 2018, Tan Liang Joo John ("Tan") was also convicted on 9 October 2018 for scandalising contempt under the same provision. Wham and Tan are collectively referred to as "the Respondents".

2 The circumstances as to how the Respondents respectively committed scandalising contempt are set out in my judgment dated 9 October 2018 (*Attorney-General v Wham Kwok Han Jolovan and another matter* [2018] SGHC 222 ("*Wham Kwok Han Jolovan*")). The conduct that was scandalising

contempt pertained to the Respondents' respective posts on their Facebook profiles (referred to as "Wham's post" and "Tan's post" respectively).

3 On 20 March 2019, I heard the parties on the appropriate sentences for Wham and Tan respectively, and reserved judgment.

## Appropriate sentence for Wham

4 I address first the issue of the appropriate sentence for Wham.

### *Parties' arguments*

5 In summary, the Attorney-General ("the AG") submitted that the appropriate sentence for Wham is a fine in the range of $10,000 to $15,000, with two to three weeks' imprisonment in default. The AG also submitted that the court should order Wham to publish a notice to apologise for his post, and this order should be made subject to conditions including one that Wham's post be removed forthwith. Should the court decline to order Wham to publish a notice to apologise, the AG was still seeking a separate order for Wham to remove his post forthwith.

6 On the other hand, Wham submitted that the appropriate sentence is a fine in the range of $4,000 to $6,000, with one week's imprisonment in default. Wham also submitted that the court should neither order him to publish a notice to apologise for his post nor order him to remove his post forthwith.

*The AG's arguments*

(1) Sentence

7 The AG contended that cases on scandalising contempt at common law remain relevant as sentencing precedents for the offence of scandalising contempt under s 3(1)(*a*) of the Act. In particular, the AG argued that the case of *Au Wai Pang v Attorney-General* [2016] 1 SLR 992 ("*Au Wai Pang*") provides the most useful reference point for determining the appropriate sentence for Wham.[1] Like the contemnor in *Au Wai Pang* who had created and published his contemptuous article on the Internet, *ie*, his blog, Wham had published his post on the Internet (on his Facebook profile), a medium through which such material can be spread quickly and widely.

8 The AG, however, argued that Wham's culpability was higher and his conduct was more egregious than the culpability and conduct of the contemnor in *Au Wai Pang*, upon whom a fine of $8,000 had been imposed.[2] The AG argued that Wham's post was an indiscriminate attack on the entire Singapore judiciary, while the contemptuous article in *Au Wai Pang* had only been directed at specific members of the Singapore judiciary.[3] The AG also contended that Wham's post, while ostensibly about proceedings in Malaysia, "was really a sly dig at the Singapore courts".[4]

9 The AG also submitted that Wham showed an utter lack of remorse, in that as at the hearing on the appropriate sentence for Wham, he had neither

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1 See AG's Submissions on Sentence and Costs against Wham ("AG's WS-W") at para 22.

2 See AG's WS-W at para 23.

3 See AG's WS-W at para 24.

4 See AG's WS-W at para 29.

removed his post from his Facebook profile nor apologised.[5] The AG further argued that in so doing, Wham showed a blatant disregard for the finding of this court that he committed scandalising contempt.[6] The AG submitted Wham's lack of contrition as a substantial aggravating factor in this case.[7] In contrast, the AG argued that the contemnor in *Au Wai Pang* had demonstrated remorse in removing his contemptuous article from his blog after the court granted leave to the AG to apply for an order of committal against him, and in apologising.[8]

10 The AG also argued that the potential extent of dissemination of Wham's post was greater than that of the contemptuous article in *Au Wai Pang* due to the extended period of time for which Wham's post remained online.[9] The AG further contended that the extent of dissemination of Wham's post was further amplified by two further posts that Wham published on his Facebook profile on 8 October 2018 and 9 October 2018 respectively.[10] The AG submitted that each of these further posts appeared on its face to be for the purposes of informing the public of the status/outcome of the proceedings against Wham for scandalising contempt, but each also included a republication of the contemptuous content of Wham's post.

(2) Notice to apologise

11 Next, the AG submitted that the court should also order Wham to publish a notice to apologise for his post, pursuant to s 12(3) of the Act.[11] In the written

5 See AG's WS-W at paras 26, 28.

6 See Notes of Arguments ("NAs") at p 2 lines 19–21.

7 See AG's WS-W at para 28.

8 See AG's WS-W at para 25.

9 See AG's WS-W at para 26.

10 See AG's WS-W at para 27.

11 See AG's WS-W at paras 30, 32.

submissions to the court, the AG annexed a draft notice for the apology. The AG argued that this order should be made subject to certain conditions, including that:[12]

(a) Wham's post be removed forthwith;

(b) any and all republication of Wham's post in whole or in part be removed;

(c) the notice to apologise remain published for as long as Wham's post was online;

(d) Wham accepted that his post wrongfully alleged that the Singapore courts lacked integrity and were not impartial;

(e) Wham undertook not to republish his post or any part of it in any form or medium; and

(f) Wham undertook not to put up any posts, or do any other act, that amounted to contempt of court in future.

The AG submitted that these conditions included the usual and natural expressions of an apology.[13]

12 The AG submitted that ordering Wham to publish a notice to apologise is necessary because he has failed to remove his post or apologise for it.[14] The AG argued that in so far as it is necessary to purge scandalising contempt, such an order would be appropriate.[15]

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12 See AG's WS-W at para 32, Annex.

13 See NAs at p 25 lines 20–22.

14 See AG's WS-W at para 31.

13 In this regard, the AG was essentially contending that in general, the court should order a contemnor to publish a notice to apologise under s 12(3) as long as he refused to apologise/remove his contemptuous publication. The AG argued that there was no indication that the court is only to make such an order in exceptional cases.[16] Instead, the AG argued that the relevant provisions, ss 12(2) to 12(5) of the Act (set out at [40] below), have a common thread showing that the purpose of making such an order is to purge the contempt of the contemnor.[17] The AG submitted that there is a *public* interest in purging such contempt of court, which is unlike the private right of an individual not to be defamed where the remedy could be to increase the damages and penalties.[18] The AG also argued that there was no reason why the court should tolerate the contempt of court being left unpurged, like in this case, with Wham's post remaining on his Facebook profile, and that the natural consequence of a finding of scandalising contempt should be that Wham be ordered to remove his post forthwith.[19]

14 In line with the purpose of purging contempt, the AG further contended that the focus of s 12(3) is the efficacy of the notice to apologise in purging the said contempt.[20] The AG thus argued that the court should order Wham to publish the notice to apologise in the same manner as that in which he had published the contemptuous publication, so as to inform the same target audience that the contempt has been purged.[21]

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15 See NAs at p 15 lines 22–23.

16 See NAs at p 16 lines 17–19.

17 See NAs at p 16 lines 24–28.

18 See NAs at p 19 lines 26–29, p 22 lines 9–15.

19 See NAs at p 29 lines 21–23, p 34 lines 29–31, p 35 lines 1–4.

20 See NAs at p 26 lines 4–5.

21 See NAs at p 23 lines 12–22.

15 However, the AG did not refer to any parliamentary debates or case authority, including from foreign jurisdictions, to assist the court in determining when it should order a contemnor to apologise.[22]

16 The AG also submitted that the purpose of ordering a contemnor to publish a notice to apologise is not to extract a genuine apology from him.[23] The AG submitted that s 12(3) would be rendered otiose if the court took a view that an apology must be genuine.[24]

17 The AG also stated that should the court order Wham to publish a notice to apologise for his post and he thereafter refused to do so, this would be considered an act of contempt of court.[25]

(3) Removal of Wham's post

18 It was during the hearing on sentence that the AG submitted that should the court decline to order Wham to publish a notice to apologise for his post, the AG was still seeking a separate order for Wham to remove his post forthwith. The AG relied on s 9(*d*) of the Act to argue that the court had the inherent power to issue an injunction to restrain what the AG seemed to refer to interchangeably as: (i) Wham's "continuing contempt" in "publishing" his post, (ii) Wham's continuing contempt in not removing his post, or (iii) the "continuing publication" of the post.[26] The AG contended that such an injunction would be a prohibitory injunction and not a mandatory injunction.[27]

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22 See NAs at p 21 lines 22–26.

23 See *eg*, NAs at p 16 lines 29–30.

24 See *eg*, NAs at p 17 lines 23–26.

25 See NAs at p 23 lines 23–27.

26 See NAs at p 27 lines 8–14, p 28 lines 4–6, p 65 lines 3–5.

27 See *eg*, NAs at p 33 lines 22–24.

19 As with the notice to apologise, the AG submitted that such an injunction is necessary to purge Wham's scandalising contempt.[28]

20 However, the AG did not refer to any parliamentary debates or case authority, including from foreign jurisdictions, to assist the court in determining when it should order a contemnor to remove his contemptuous publication.[29] Instead, the AG drew an analogy to defamation cases. Referring the court to *Chin Bay Ching v Merchant Ventures Pte Ltd* [2005] 3 SLR(R) 142 ("*Chin Bay Ching*") at [23], the AG argued that a court would issue a prohibitory injunction as a matter of course.

*Wham's arguments*

(1) Sentence

21 With regard to the appropriate sentence, Wham did not dispute that *Au Wai Pang* is an appropriate reference point for sentencing.[30] However, he contended that his conduct was less egregious than the contemnor's in *Au Wai Pang* and argued that his sentence should be much lower than the latter's.

22 First, Wham argued that his post was more general and superficial than the contemptuous article in *Au Wai Pang*, which had been far more detailed, acerbic, calculated and insidious, and had alleged grave misconduct on the part of key figures in the Singapore judiciary.[31] Wham submitted that the court should also consider his subjective intention in publishing his post.[32] In his

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28 See NAs at p 29 lines 3–4.

29 See NAs at p 31 lines 3–14.

30 See Wham's Submissions on Sentence and Costs ("Wham's Submissions") at para 10.

31 Wham's Submissions at paras 11–13.

32 See NAs at p 37 lines 1–4.

submissions on liability, Wham had submitted that his intention had been to compare the judicial philosophies of the courts in Singapore and Malaysia (see *Wham Kwok Han Jolovan* at [84]).

23 Second, Wham argued that the extent of dissemination of his post was much less than that of the contemptuous article in *Au Wai Pang*,[33] because the average reasonable person was unlikely to take Wham's post with the same degree of seriousness and credibility as he would have taken the contemptuous article in *Au Wai Pang*.[34] Wham submitted that he never held himself out as a professional journalist, blogger, commentator or authoritative news source, while the contemnor in *Au Wai Pang* was a well-known Internet blogger with far greater influence and reach than Wham on Internet mediums.[35]

24 Third, Wham argued that his post being on his Facebook profile was "ephemeral".[36] He contended that the contemptuous article in *Au Wai Pang* would have been a more enduring form of publication and would have commanded a far greater degree of a reader's attention.

25 Wham further argued that an overly harsh sentence imposed upon him would have a chilling effect on public discourse and constructive public discussion in Singapore.[37] Wham also submitted that he is a first-time offender.[38]

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33 See Wham's Submissions at para 14.

34 See Wham's Submissions at paras 15, 17.

35 Wham's Submissions at paras 16–17.

36 See Wham's Submissions at para 18.

37 Wham's Submissions at para 21.

38 Wham's Submissions at para 22.

(2) Notice to apologise

26 In relation to an order for him to publish a notice to apologise for his post, Wham argued that the court should only make such an order under s 12(3) of the Act in very exceptional circumstances (see the case of *Chin Bay Ching* ([20] *supra*) set in the defamation context at [25]), and the present case did not comprise such exceptional circumstances.[39] Wham argued that such an order would be manifestly excessive and disproportionate, and would go beyond punishing his objective culpability and seek to "polic[e] his subjective intentions".[40] Wham contended that it went against the very nature and purpose of an apology to compel a contemnor to apologise (see *Chin Bay Ching* at [25]).[41]

27 Wham also argued that the notice to apologise as sought by the AG went beyond requiring him to apologise for his post.[42] Wham further submitted that s 12(3) did not provide the court with the powers to make an order to publish a notice to apologise subject to some of the conditions that the AG was seeking (see [11] above).[43]

(3) Removal of Wham's post

28 As for the separate order the AG was seeking for Wham to remove his post, Wham submitted that such an order was a mandatory injunction and that it was rare for the court to issue such a mandatory injunction.[44]

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39 See Wham's Submissions at paras 27–28.

40 Wham's Submissions at para 29.

41 See Wham's Submissions at paras 24, 26.

42 Wham's Submissions at para 31.

43 Wham's Submissions at paras 32–33.

44 See NAs at p 52 lines 16–17.

***Decision***

29 I reproduce the statement in Wham's post:

> Malaysia's judges are more independent than Singapore's for cases with political implications. Will be interesting to see what happens to this challenge.

*Sentence*

30 Under s 12(1)(*a*) of the Act, a person who commits contempt of court, which includes scandalising contempt under s 3(1)(*a*), shall be liable to be punished with a fine not exceeding $100,000 or with imprisonment for a term not exceeding three years or with both.

31 The sentencing guidelines for the offence of scandalising contempt were summarised by the Court of Appeal in *Shadrake Alan v Attorney-General* [2011] 3 SLR 778 at [147]:

> Some of the more common sentencing guidelines or factors in the context of contempt proceedings include the following: the culpability of the contemnor; the nature and gravity of the contempt (see, *eg*, [*Attorney-General v Tan Liang Joo John and others* [2009] 2 SLR(R) 1132 ("*Tan Liang Joo John*")] at [31]); the seriousness of the occasion on which the contempt was committed (see, *eg*, *Tan Liang Joo John* at [31]); the number of contemptuous statements made (see, *eg*, [*Attorney-General v Zimmerman Fred and others* [1985-1986] SLR(R) 476] at [51] and [*Attorney-General v Hertzberg Daniel and others* [2009] 1 SLR(R) 1103 ("*Hertzberg*")] at [59]); the type and extent of dissemination of the contemptuous statements; the importance of deterring would-be contemnors from following suit (see, *eg*, *Tan Liang Joo John* at [31]); whether the contemnor is a repeat offender (see, *eg*, *Hertzberg* at [59]); and whether or not the contemnor was remorseful (this particular factor being embodied paradigmatically in a sincere apology (see, *eg*, *Hertzberg* at [59] and *Tan Liang Joo John* at [39])). However, the categories of guidelines or factors are obviously not closed and much would depend, in the final analysis, on the precise facts and context concerned.

32 I make two preliminary points. First, Wham might not have held himself out as a professional journalist, blogger, commentator or authoritative news source, but he did submit that he was a social activist (see *Wham Kwok Han Jolovan* at [83]). It was not Wham's case that he had, or would have had, little or no influence and reach through his Facebook profile.

33 Second, I do not accept the AG's submission that the extent of dissemination of Wham's post was further amplified by the two further posts that Wham published on his Facebook profile on 8 October 2018 and 9 October 2018 respectively (see [10] above). While Wham republished the contemptuous content of Wham's post in these two further posts, it appears to me that these further posts were for the purposes of informing the public of the status/outcome of the proceedings against him for scandalising contempt.

34 In this case, I accept that *Au Wai Pang* serves as a useful reference for determining the appropriate sentence for Wham, since the contemptuous material in *Au Wai Pang* had also been published on the Internet.

35 In *Au Wai Pang*, the contemnor was a first-time offender for scandalising contempt. Likewise, this is the first time that Wham is convicted for scandalising contempt.

36 However, I am of the view that Wham's culpability and the gravity of his scandalising contempt were clearly less than the culpability of the contemnor in *Au Wai Pang* and the gravity of that scandalising contempt. Wham's post contained a bare statement impugning the integrity and impartiality of Singapore's judges (see *Wham Kwok Han Jolovan* at [96]). In great contrast, the contemptuous article in *Au Wai Pang* was 16 paragraphs long and was by far a more targeted and detailed attack on certain members of the judiciary. The

entire thrust of the article was to allege, with specificity, certain vested and improper interests on the part of these members (see *Au Wai Pang* at [48]). These allegations were also carefully crafted to take the form of insinuations as opposed to express views, thereby making the article even more insidious (see *Au Wai Pang* at [48], [54]).

37 On the other hand, Wham did not show any remorse for his post as he refused to remove it from his Facebook profile and refused to apologise for his post even after conviction. In *Au Wai Pang*, the contemnor apparently removed his contemptuous article from his blog after the court granted leave to the AG to apply for an order of committal against him. The contemnor there also apologised (see *Au Wai Pang* at [10]).

38 In *Au Wai Pang*, the contemnor was sentenced to a fine of $8,000.

39 In my view, a sentence of a fine of $5,000, with one week's imprisonment in default, would be appropriate for Wham for the offence of scandalising contempt under s 3(1)(*a*) of the Act in the circumstances. The fine is to be paid within eight days from and including the date of this judgment.

*Notice to apologise*

40 In addition to any punishment imposed under s 12(1) of the Act, the court may also make an order under s 12(3) that a contemnor publish a notice to apologise for his contemptuous publication. The relevant provisions in relation to an apology are ss 12(2) to 12(5) which state:

> **Punishment for contempt of court**
>
> …
>
> (2) In addition to any punishment imposed under subsection (1), where a person has committed contempt in

> relation to the proceedings before a court, the court may refuse to hear the person until the contempt is purged or the person submits to the order or direction of the court or an apology is made to the satisfaction of the court.
>
> (3) In addition to any punishment imposed under subsection (1), the court may, on its own motion or on application by the applicant in the contempt proceedings, make an order that the person who has committed contempt must publish such notice, and in such manner, as the court thinks necessary to apologise for the contemptuous publication.
>
> (4) An order under subsection (3) may be made subject to such exceptions or conditions (including the duration for which the notification must be made accessible to members of the public) as may be specified in the order.
>
> (5) Despite subsection (1), the court may discharge the person who has committed contempt or remit the punishment or any part of it on his or her purging of the contempt, submission to the order or direction of the court or on apology being made to the satisfaction of the court.
>
> …

41 Where a contemnor refuses to purge his contempt, whether in refusing to apologise or in refusing to remove his contemptuous publication, a question may arise as to whether the court should make an order under s 12(3) for him to publish a notice to apologise. It is clear that the purpose of making such an order is not to extract a sincere apology from such a contemnor since if he were sincere about it, he need not be compelled to apologise. The question then is under what circumstances the court should make such an order.

42 I do not agree with the AG's submission that there should be a general approach to order a contemnor to publish a notice to apologise to purge his contempt if he failed to do so voluntarily. Just because the court now has the power to make such an order under s 12(3) does not mean that the court should generally exercise it as long as the contemnor does not apologise.

43 Seen in this light, whilst purging the contempt of a contemnor may be one of the intended effects of an order under s 12(3), I do not think that the overriding concern of s 12(3) is to purge such contempt. Prior to the Act, there did not seem to have been a need for a contemnor to purge his scandalising contempt by apologising for it. The AG did not refer the court to the parliamentary debates to show that Parliament considered that there was such a necessity when enacting the Act, or that Parliament generally intended for a contemnor to purge his scandalising contempt by apologising for it.

44 After all, a contemnor's failure to purge his scandalising contempt, which also evidences his lack of remorse, is a factor the court takes into account when sentencing him.

45 In so far as a notice to apologise published in the same manner as the contemptuous publication may be efficacious in informing that target audience that the contemptuous publication is scandalising contempt, this has to be weighed against the factor that the contemnor has refused to purge his scandalising contempt. It seems meaningless to order a contemnor to apologise when the apology would not be sincere.

46 Furthermore, if a contemnor refused to publish a notice to apologise as ordered by the court, he might further be liable for an act of contempt of court, and more time and resources may have to be spent to commence proceedings against him again. This may result in a disproportionate use of such time and resources as compared with the original offence.

47 In *Re Ouellet (Nos 1 and 2)* (1977) 72 DLR (3d) 95 at 100, Tremblay CJQ (in the Quebec Court of Appeal) was of the view that it was not useful to compel the contemnor in question to apologise. He said:

> As to the sentence, the order of probation includes the obligation by the appellant to present apologies. It is evident that if he does it, the appellant will not do it willingly. With respect to the contrary opinion, I am not at all convinced that it is useful to impose this obligation on the appellant. Forced apologies are humiliating for the person uttering them. Moreover, in the present case, they would not mean anything to persons concerned, except maybe to tickle their ego and they would not in any way better the administration of justice in Canada. Finally, if the appellant persisted in refusing to apologize, the Superior Court and, maybe the Court of Appeal, would have to devote to this case time which would be better employed for more important cases for the people of Canada. I would therefore strike out the order of probation forcing him to apologize.

48 As there is no general rule that the court should order a contemnor to publish a notice to apologise for his contemptuous publication, the court will have to consider the facts of each case before deciding whether to make such an order.

49 The AG did not raise any specific circumstance to warrant ordering Wham to publish a notice to apologise besides the general arguments made. In the circumstances of this case, I do not think that it is necessary to make an order that Wham publish a notice to apologise for his post pursuant to s 12(3). His refusal to apologise would be and was taken into account in determining the appropriate sentence for him.

50 The Respondents are the first individuals against whom proceedings were commenced for scandalising contempt under s 3(1)(*a*) of the Act. It is premature for this court to set out the circumstances under which a court should order a contemnor to publish a notice to apologise for his contemptuous publication pursuant to s 12(3).

51 Given that I find it unnecessary to order Wham to publish a notice to apologise for his post, there is no further question of imposing conditions in respect of the order.

*Removal of Wham's post*

52 It appears that the court has the power to order Wham to remove his post from his Facebook profile, although this power may not be explicitly stated in s 9(*d*) of the Act. Section 9(*d*) states:

> **Inherent power of court**
>
> **9.** Nothing in this Act limits or affects the inherent powers of a court, including but not limited to —
>
> …
>
> (*d*) the power of the High Court or the Court of Appeal to issue an injunction including but not limited to an interim injunction to restrain a contempt of court; and
>
> …

53 I am of the view that "an interim injunction to restrain a contempt of court" relates to a *prohibitory* injunction, and not a *mandatory* injunction. I have my doubts with the AG's submission that an order for Wham to remove his post would be a prohibitory injunction. It seems to me that an order for Wham to remove his post would be a mandatory injunction.

54 Be that as it may, s 9(*d*) seems to include a mandatory injunction. After all, it refers to the power to issue "an injunction". This is wide enough to encompass both a prohibitory injunction as well as a mandatory injunction. The next clause, "including but not limited to an interim injunction to restrain a contempt of court", provides only an illustration of the kind of injunction that may be issued. The question then is under what circumstances the court should

issue a mandatory injunction for a contemnor to remove his contemptuous publication which is still accessible to the public at large.

55 In so far as the AG submitted that ordering Wham to remove his post is necessary to purge his scandalising contempt, similar considerations as those mentioned at [42]–[48] above apply. I do not think that there should be a general approach to order a contemnor to remove his contemptuous publication to purge his contempt if he failed to do so voluntarily. Again, a contemnor's failure to purge his scandalising contempt, which also evidences his lack of remorse, is a factor the court takes into account when sentencing him. Moreover, if a contemnor refused to remove his contemptuous publication as ordered by the court, more time and resources may have to be spent to commence proceedings against him again, resulting in a disproportionate use of such time and resources as compared with the original offence.

56 The court will have to consider the facts of each case before deciding whether to issue a mandatory injunction for a contemnor to remove his contemptuous publication.

57 I observe that the Minister for Law, Mr K Shanmugam, had made a remark in the parliamentary debates, albeit in relation to the power of the AG to give a non-publication direction under s 13 of the Act. The Minister remarked that "[a contemptuous or an allegedly contemptuous] article could be there for weeks by which point in time, there is no point taking it down anyway" (*Singapore Parliamentary Debates, Official Report* (15 August 2016) vol 94).[45] The Minister was referring to a contemptuous or an allegedly contemptuous article that had been published online publicly and the need to act quickly in

[45] AG's BOA against Wham (for liability) at Tab 11, p 97.

certain situations to require that the publication be taken down. His point was that if there were no avenue to act quickly, it would be pointless to act later.

58 This brings me to another point the AG stressed, that Wham's post has remained on his Facebook profile for several months, thus suggesting that this scandalising contempt is continuing and should be dealt with. However, this submission had assumed that Wham's post would retain whatever significance it originally had. The reality is that such a post would ordinarily recede into the background with the passage of time unless attention was drawn to it by some other development.

59 The AG did not raise any specific circumstance to warrant ordering Wham to remove his post besides the general arguments made. In the circumstances of this case, I do not think that it is necessary to issue a mandatory injunction for Wham to remove his post. His refusal to remove it would be and was taken into account in determining the appropriate sentence for him. Moreover, as mentioned, given that Wham's post has been published on his Facebook profile since 27 April 2018, which is about a year ago, his post would ordinarily have receded into the background on his Facebook profile.

60 As in the case of making an order for a contemnor to publish a notice to apologise for his contemptuous publication, it is premature for this court, at this point, to set out the circumstances under which a court should issue a mandatory injunction for a contemnor to remove his contemptuous publication.

**Appropriate sentence for Tan**

61 I proceed to address the issue of the appropriate sentence for Tan.

***Parties' arguments***

62 In summary, the AG submitted that, in view of an antecedent, the appropriate sentence for Tan should not be less than the sentence imposed upon him for his previous conviction for scandalising contempt, *ie*, it should not be less than 15 days' imprisonment. In the written submissions to the court and at the hearing on the appropriate sentence for Tan, the AG also submitted that the court should order Tan to publish a notice to apologise for his post, and order him to remove his post forthwith. However, at the hearing on sentence, Tan said that he would remove his post from his Facebook profile. I understand from the letter Tan's counsel later sent to the court dated 21 March 2019 that Tan's post has been removed. I will elaborate later on why Tan eventually decided, at the hearing, to remove his post (see [76] below).

63 In Tan's written submissions to the court dated 30 October 2018, he had submitted that the appropriate sentence is not more than three days' imprisonment.[46] He did not ask for a fine. His written submissions gave the impression that he did not suggest a fine because of his antecedent. In his written submissions, Tan also submitted that this court should neither order him to publish a notice to apologise for his post nor order him to remove his post forthwith.

64 However, during the hearing, Tan explained that he had made a submission for a short custodial sentence instead of a fine primarily because being sentenced to a fine of not less than $2,000 would disqualify him from being a Member of Parliament. As Tan was seeking to persuade the court to impose a custodial sentence instead of a fine, he also offered to remove his post from his Facebook profile, as mentioned above. In the course of the hearing,

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46 Tan's Submissions on Sentence and Costs ("Tan's Submissions") at para 4.

Tan also submitted that the appropriate sentence for him is seven days' imprisonment instead. I will elaborate on these points below (see [73]–[77] below).

65 In the light of the above, I will begin by setting out Tan's arguments in his written submissions to the court, and then his arguments at the hearing, before I set out the AG's arguments.

*Tan's arguments*

(1) Written submissions to the court

66 As mentioned, in Tan's written submissions, he had submitted that the appropriate sentence for him is not more than three days' imprisonment. (I will discuss at [77] below how at the hearing, this submission changed to seven days' imprisonment.)

67 Tan submitted that his post was a single sentence which in itself did not bear the elements of a scandalising statement, but only took on such a scandalising character when read in conjunction with its extraneous reference to Wham's post, which was similarly a couple of sentences.[47] Tan added that this "extraneous reference" took the form of a link to Wham's Facebook profile and not a link directly to Wham's post.[48] Tan also submitted that pending the determination of the proceedings against Wham for scandalising contempt, Wham's post could not have been said to be scandalising contempt.[49]

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47 See Tan's Submissions at para 10.

48 Tan's Submissions at para 10.

49 See Tan's Submissions at para 14.

68 In his written submissions, Tan had not disputed that he was just as culpable as Wham, in so far as Tan's post gained its contemptuous character from Wham's post.[50] (This position changed at the hearing (see [77] below).) Tan had then aligned himself with Wham's submissions on Wham's culpability (see [21]–[24] above).[51] Tan emphasised that Tan's post being on his Facebook profile was "ephemeral".[52] He contended that the contemptuous article in *Au Wai Pang*, for example, would have been a more enduring form of publication and would have commanded a far greater degree of a reader's attention than a post on a Facebook profile, much less Tan's post containing a single sentence.[53]

69 Further, Tan argued that his scandalising contempt in this case was much less egregious than that for his previous conviction in *Tan Liang Joo John* ([31] *supra*). For his previous conviction, Tan was found liable for scandalising contempt at common law on 24 November 2008 and was sentenced to 15 days' imprisonment (see *Tan Liang Joo John* at [5]). Consequently, Tan argued that the sentence of 15 days' imprisonment imposed upon him previously should not be the starting point for determining the appropriate sentence for him in this case.[54] In his written submissions, Tan described his scandalising contempt leading to his previous conviction to be "a deliberate scheme designed to publicly, and spectacularly, impugn the integrity of the Singapore courts".[55] I note that this was not Tan's case before the High Court in *Tan Liang Joo John*, where for one, Tan had claimed that his conduct was in the spirit of fair criticism (see *Tan Liang Joo John* at [6], [25]).

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50 See Tan's Submissions at para 11.

51 See Tan's Submissions at para 11.

52 See Tan's Submissions at para 13.

53 See Tan's Submissions at para 13.

54 See Tan's Submissions at para 16.

55 See Tan's Submissions at para 17.

70 Tan thus submitted that his culpability in the present case was on the opposite end of the spectrum from that in *Tan Liang Joo John*.[56] He submitted that his post was "not a pointed, scurrilous insult striking at the foundations of justice", nor was it "meticulously planned as to ensure maximum impact and press coverage".[57]

71 Like Wham, Tan further argued that an overly harsh sentence imposed upon him would have a chilling effect on public discourse and constructive public discussion in Singapore.[58]

72 As for Tan's written submissions that this court should neither order him to publish a notice to apologise for his post nor order him to remove it, he made similar arguments as Wham (see [26]–[27] above).[59]

(2) Oral submissions at the hearing

73 At the hearing, I questioned Tan's counsel as to why Tan had submitted that a short custodial sentence is appropriate instead of a fine. It was only then that Tan gave two reasons for this submission for a custodial sentence.[60] It was unclear why these two reasons were not stated earlier in Tan's written submissions to the court dated 30 October 2018.

74 The first reason that Tan gave was that he would be "better off" financially serving a custodial sentence instead of paying a fine.[61] This reason

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56 Tan's Submissions at para 20.

57 Tan's Submissions at para 20.

58 Tan's Submissions at para 23.

59 See Tan's Submissions at paras 28–31, 33–34, 36.

60 See NAs at p 38 lines 16–17.

61 See NAs at p 39 lines 1–3.

did not seem to hold water. If Tan did not pay a fine and thus served a default custodial sentence, he would be in the same position financially as if no fine were imposed. Tan then focused on his second reason instead.[62]

75 Tan's second reason was that being sentenced to a fine of not less than $2,000 would disqualify him from being a Member of Parliament.[63] Consequently, whilst Tan agreed that he could not "pick and choose" the sentence that he wanted, he asked for the court's indulgence to sentence him to a short custodial term instead of a fine of not less than $2,000.[64] Tan contended that justice would be done in this case if he were sentenced to a short custodial term, and that he was not asking for leniency as a custodial sentence is generally perceived as being more severe than a fine.[65] He submitted that greater injustice would result if he were sentenced to a fine of not less than $2,000.[66] This greater injustice was with regard to the additional harshness and suffering for him that a normal person would not incur.[67]

76 It was in the course of making his submissions during the hearing that Tan's counsel took further instructions and informed the court that Tan would remove his post from his Facebook profile after the hearing that day. Tan's counsel made it clear that Tan's change in position was just to put his counsel in a "better position to ask the Court for some compassion", and was not conditional upon the court sentencing Tan to a custodial term.[68] Tan's counsel

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62 See NAs at p 39 line 17.

63 See NAs at p 39 lines 17–19, p 60 line 5.

64 See NAs at p 68 lines 13–19.

65 See NAs at p 44 lines 13–14, p 66 lines 9–12.

66 See NAs at p 44 lines 14–15.

67 See NAs at p 39 lines 27–29.

68 See NAs at p 46 lines 11–13, 21–25.

stated that the fact that Tan had not offered to remove his post earlier was a factor that the court could take into account in sentencing.[69] Tan also submitted that he would still not apologise because he had no intention of scandalising the court.[70]

77 In the course of the hearing, Tan submitted that the court should consider his subjective intention in publishing his post, and that was to criticise the AG.[71] Tan then also submitted that he was less culpable than Wham,[72] in contrast to Tan's position in his written submissions (see [68] above). However, taking into account his antecedent, Tan accepted that the appropriate sentence for him should be similar to that for Wham save that Tan was asking for the custodial sentence to be imposed without first being sentenced to pay a fine.[73] Consequently, at the hearing, Tan submitted that the appropriate sentence for him is seven days' imprisonment instead.[74] I noted that a sentence of seven days' imprisonment was the default sentence that Wham was seeking if the court were to impose a fine in the range of $4,000 to $6,000 upon Wham.

(3) Further submissions after the hearing

78 After the hearing, Tan's counsel sent a letter to the court dated 20 March 2019, submitting further authorities and arguing that they supported the new

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69 See NAs at p 46 lines 26–28.

70 See NAs at p 46 lines 4–5.

71 See NAs at p 37 lines 1–4, 12–13.

72 See NAs at p 48 line 14.

73 See NAs at p 48 lines 21–26.

74 See NAs at p 49 lines 1–5. Tan submitted at the hearing on sentence that the appropriate sentence for him is seven days' imprisonment. In the letter Tan's counsel sent to the court dated 20 March 2019 after the hearing, it was instead stated that Tan's counsel had made the argument that Tan should be sentenced to a short custodial sentence of three to seven days (see para 2).

submissions Tan had made during the hearing. Tan cited the High Court case of *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 ("*Low Meng Chay*") and the District Court case of *Public Prosecutor v Amzad Hossen Shajidul Haque* [2016] SGDC 220 ("*Amzad Hossen Shajidul Haque*"). Tan submitted that courts have imposed upon an offender a custodial sentence when a fine would be unusually harsh and thus unjust given his particular circumstances.[75]

79 As mentioned, Tan's counsel sent another letter to the court dated 21 March 2019 to inform the court that as at the evening of 20 March 2019, Tan's post was removed from his Facebook profile.

*The AG's arguments*

80 Despite the new position taken by Tan at the hearing, the AG maintained the position that the appropriate sentence for Tan should not be less than 15 days' imprisonment, *ie*, irrespective of the personal consequences to Tan in relation to whether he would be qualified to stand for election as a Member of Parliament.

81 The AG's primary submission was that Tan is a repeat offender.[76] The AG thus argued that Tan was recalcitrant and the custodial threshold is crossed in this case.[77] Whilst the AG recognised that Tan's present offence was less serious than his antecedent,[78] the AG submitted that the nature of both offences were similar.[79] In both offences, Tan was also involved in disseminating the

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75 See letter to the court from Tan's counsel dated 20 March 2019 at para 4(a).

76 See AG's Submissions on Sentence and Costs against Tan ("AG's WS-T") at paras 2, 26.

77 See AG's WS-T at para 27.

78 See NAs at p 10 lines 1–10.

79 See AG's WS-T at para 27.

contemptuous allegation online.[80] The AG thus submitted that there is a strong need for specific deterrence in this case and this would not be achieved if Tan received a sentence more lenient than that imposed upon him previously.[81]

82 The AG submitted that Tan was just as culpable as Wham, because Tan's post aligned itself with and affirmed as true what Wham said in his post.[82] The AG submitted that Tan intended to and did attack the Singapore courts.[83] The AG further argued that Tan endorsed Wham's post after proceedings against Wham had been commenced for scandalising contempt, and with full knowledge that Wham's post unjustifiably scandalised the Singapore judiciary.[84]

83 The AG argued that like Wham, Tan showed an utter lack of remorse, in that as at the hearing on the appropriate sentence for Tan, he had neither removed his post from his Facebook profile nor apologised.[85] The AG further argued that in so doing, Tan showed a blatant disregard for the finding of this court that he committed scandalising contempt.[86] The AG submitted Tan's lack of contrition as a substantial aggravating factor in this case.[87]

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80 See NAs at p 12 lines 26–29.

81 See AG's WS-T at para 27.

82 See AG's WS-T at para 23.

83 See NAs at p 57 lines 16–17.

84 See AG's WS-T at para 23.

85 See AG's WS-T at paras 24–25.

86 See NAs at p 2 lines 19–21.

87 See AG's WS-T at para 25.

84 The AG also argued that the potential extent of dissemination of Tan's post was significant due to the extended period of time for which it remained online.[88]

85 In response to Tan's arguments at the hearing on the personal consequences to him if a fine of not less than $2,000 were to be imposed, the AG submitted that it would be unprincipled for Tan to "pick and choose" the sentence he wanted, or for the court to then "tweak" the sentence to suit him.[89] In this regard, the AG referred the court to the High Court case of *Stansilas Fabian Kester v Public Prosecutor* [2017] 5 SLR 755 ("*Stansilas Fabian Kester*"). The AG further contended that even if Tan were asking for a more severe sentence of a custodial term rather than a fine, he was effectively asking for a sentence which was more favourable to him.[90]

86 As in the case in relation to Wham, the AG had also submitted that the court should also order Tan to publish a notice to apologise for his post, pursuant to s 12(3) of the Act, with the order made subject to similar conditions as those sought in relation to Wham including one that Tan's post be removed forthwith (see [11] above).[91] The AG had similarly submitted that such an order is necessary because as at the hearing on sentence, Tan had failed to remove his post or apologise for it.[92] However, as mentioned (at [62] and [76] above), at the hearing on sentence, Tan said he would remove his post from his Facebook profile. Tan's counsel has also informed the court that Tan's post was removed after the hearing (see [79] above).

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88 See AG's WS-T at para 24.

89 See NAs at p 61 lines 4–11, p 63 lines 26–28.

90 See NAs at p 68 lines 11–14.

91 See AG's WS-T at paras 28, 30, Annex.

92 See AG's WS-T at para 29.

***Decision***

87 I reproduce the statement in Tan's post:

> By charging Jolovan for scandalising the judiciary, the AGC only confirms what he said was true.

*Sentence*

88 I make three preliminary points. First, a court is not bound to sentence a person to imprisonment just because both the applicant and the respondent submit that the appropriate sentence is a custodial one.

89 Second, I do not consider Tan to be more culpable for publishing his post *after* proceedings against Wham had been commenced for scandalising contempt (see [82] above). After all, Tan's post was about those proceedings. Also, at that point, it was not yet determined that Wham was guilty of scandalising contempt.

90 Third, I reject Tan's characterisation of his post in itself not bearing the elements of scandalising contempt and that the reference to Wham's post was "extraneous" (see [67] above). This was not Tan's case before the court in his submissions on liability. The words "the AGC only confirms what he said was true" in Tan's post were intertwined with and repeated what Wham said in Wham's post (*Wham Kwok Han Jolovan* at [115]).

91 I address Tan's culpability next. I observe that Tan was directly criticising the AG for commencing proceedings against Wham for scandalising contempt, and Tan's attack on the Singapore courts was less direct. Given this particular factual matrix, I am of the view that Tan was less culpable than Wham.

92 On the other hand, as with Wham, Tan did not show any remorse for his post. Tan refused to apologise for his post even after conviction, and as at the hearing on sentence, he had not removed his post from his Facebook profile. To be clear, whilst Tan removed his post after the hearing on sentence and on the same day, this was not a reflection of remorse for his post. Tan's counsel made it clear at the hearing that Tan's decision to remove his post was just to put his counsel in a "better position to ask the Court for some compassion" (see [76] above); it is a separate question whether Tan's decision assisted his submission for a custodial sentence and I will come to this later.

93 This is not the first time that Tan is convicted for scandalising contempt, but it is Wham's first.

94 Briefly, Tan was previously found liable for scandalising contempt (at common law) on 24 November 2008 because he wore a T-shirt imprinted with a picture of a kangaroo dressed in a judge's gown, within and in the vicinity of the Supreme Court on two occasions when an assessment of damages hearing was being held, and distributed similar T-shirts in the Supreme Court (see *Tan Liang Joo John* at [30]). Tan was, at that time, also involved in or acquiesced in posting a photograph on the Singapore Democratic Party website, of him and his two co-respondents wearing these T-shirts and standing outside the main entrance of the Supreme Court building. The High Court concluded that the conduct of Tan and his co-respondents communicated to an average member of the public their conviction that the Singapore courts were "kangaroo courts" (see *Tan Liang Joo John* at [28]). In sentencing Tan to 15 days' imprisonment, the High Court also took into account the fact that Tan refused to apologise and was particularly recalcitrant (*Tan Liang Joo John* at [40]–[41]).

95 While Tan has again committed scandalising contempt, the nature of his previous contempt in 2008 was very different from the nature of his contempt on the present occasion in relation to his post. It may have been that both offences involved some element of publication of the contemptuous allegation online, namely, one aspect of Tan's previous contempt in 2008, and the very nature of Tan's present contempt in relation to his post. However, this alone is insufficient to equate the two offences. Tan's culpability and the gravity of his contempt then were obviously much more than his culpability and the gravity of his contempt on the present occasion. I thus reject the AG's attempt to equate the two very different acts in terms of culpability and gravity.

96 As mentioned, both the AG and Tan submitted that the appropriate sentence for Tan is a custodial sentence but for different reasons. Leaving aside for the time being the question of the personal consequences that might result for Tan depending on the sentence to be imposed upon him, and given my finding that Tan was less culpable than Wham but that Tan has an antecedent, I am not persuaded that a custodial sentence is appropriate for Tan. Neither am I persuaded that the sentence for Tan ought to be more severe than the sentence for Wham. Tan's antecedent should not overshadow his present offence. He was already sentenced for his previous offence and has already served that sentence. The mere existence of one antecedent for which Tan was sentenced to a custodial term does not necessarily mean that a custodial sentence is warranted for him should he commit scandalising contempt again. It is important to consider the nature of the contempt on both occasions. Where the antecedent was much more serious, it does not follow that, without more, Tan should be sentenced to a custodial term on this present occasion. Here, Tan did not repeat what he did on the previous occasion, and as mentioned, the nature of his present contempt was quite different.

97 I proceed to consider whether the court should consider the personal consequences that might result for Tan depending on the sentence to be imposed upon him.

98 The relevant portions of Arts 45(1)(*e*) and 45(2) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) state:

> **Disqualifications for membership of Parliament**
>
> **45.**—(1) Subject to this Article, a person shall not be qualified to be a Member of Parliament who —
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> …
>
> (*e*) has been convicted of an offence by a court of law in Singapore or Malaysia and sentenced to **imprisonment for a term of not less than one year** or to **a fine of not less than $2,000** and has not received a free pardon:
>
> …
>
> …
>
> (2) The disqualification of a person under clause (1)(*d*) or (*e*) may be removed by the President and shall, if not so removed, cease at the end of 5 years beginning from … as the case may be, the date on which the person convicted as mentioned in clause (1)(*e*) was released from custody or the date on which the fine mentioned in clause (1)(*e*) was imposed on such person …
>
> …
>
> [emphasis added]

99 Tan submitted that if he were sentenced to a fine of not less than $2,000, pursuant to Art 45(1)(*e*), and if he did not receive a free pardon, he would not be qualified to be a Member of Parliament for a time period of up to five years (Art 45(2)). As he was of the view that a sentence of a fine would not be less than $2,000 in his case, Tan thus argued that the appropriate sentence for him should be a custodial term of a few days.

100 It seems that under Art 45(1)(*e*), a sentence of one year's imprisonment is supposed to be the notional equivalent of a fine of $2,000 as each is a threshold for disqualification for membership of Parliament. This appears anomalous as a sentence of one year's imprisonment would appear to be obviously more severe than a fine of $2,000 in current times. The provision in Art 45(1)(*e*) was already a part of the Constitution of Singapore in force as at 9 August 1965. However, it may be that the quantum of the fine has not been reviewed to take into account inflation. Hence, the result is that for someone aspiring to be a Member of Parliament, a custodial sentence of a few days may be perceived as being more favourable to him than a $2,000 fine although the opposite perception would apply for most others.

101 I turn to consider the High Court case of *Stansilas Fabian Kester* ([85] *supra*). I find the reasoning of Sundaresh Menon CJ in *Stansilas Fabian Kester* helpful, and I reproduce his analysis at [110]–[111]:

> 110 The second argument is that an offender should not receive *punishment of a certain type* or above a certain degree because he will lose his job or face disciplinary proceedings otherwise. The argument is that the imposition of *a certain type* or degree *of punishment* will lead to *hardship or compromise the offender's future in some way* and that *this additional hardship* may and indeed should be taken into account by the sentencing court. However, *this will not often bring the offender very far.* Prof Ashworth accounts for the general lack of persuasiveness of such arguments in the following lucid fashion ([Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th Ed, 2015)] at p 194):
>
> > Is there any merit in this source of mitigation [*ie*, the effect of the crime on the offender's career]? *Once courts begin to adjust sentences for collateral consequences*, is this not a step towards the idea of wider social accounting which was rejected above? In many cases one can argue that these collateral consequences are a concomitant of the professional responsibility which the offender undertook, and therefore that they should not lead to a reduction in sentence because *the offender surely knew the implications*. Moreover, there is a

> discrimination argument here too. If collateral consequences were accepted as a regular mitigating factor, this would operate in favour of members of the professional classes and against 'common thieves' who would either be unemployed or working in jobs where a criminal record is no barrier. It would surely be wrong to support a principle which institutionalized discrimination between employed and unemployed offenders.
>
> 111 Whichever way one looks at it, *I do not regard it as relevant to sentencing.* ***A person who breaches the criminal law can expect to face the consequences that follow under the criminal law.*** Whether or not such an offender has already or may as a result suffer *other professional or contractual consequences* should not be relevant to the sentencing court.
>
> [emphasis added in italics and bold italics]

102 Menon CJ's analysis as set out above is applicable to sentencing in general. He dealt with the general argument that "imposition of *a certain type* or degree *of punishment* will lead to hardship or compromise the offender's future in some way" [emphasis added]. Menon CJ's analysis will also apply to Tan's situation.

103 I accept that as regards Tan, there is no discrimination of the kind mentioned by Prof Ashworth. However, as mentioned by Menon CJ, whichever way one looks at it, the collateral consequences are not relevant to sentencing. Menon CJ stated that "other professional or contractual consequences should not be relevant to the sentencing court". In my view, this also applies to consequences other than professional or contractual consequences such as political consequences. In other words, a person who breaches the criminal law must expect to face the consequences under the criminal law whether or not he also suffers collateral consequences. I thus reject Tan's submission in so far as he suggested that justice would not be done in this case if he were sentenced to a fine of at least $2,000 (see [75] above).

104 It may even be said that it is for any person who has political aspirations to ensure that he does not run afoul of the law. In the case of Tan, this is not his first brush with the law. Even if it could be said that he was initially unaware that his post might be scandalising contempt, it was open to him to remove his post from his Facebook profile as soon as he was aware that the AG intended to take action against him for his post. Tan could have done so as a matter of prudence and not because he necessarily agreed with the AG's perception.

105 Alternatively, as soon as the court convicted him for scandalising contempt, Tan could have immediately removed his post and apologised for it. For his own reasons, he chose not to do so. His decision to remove his post was made only during the hearing on sentence. It was an eleventh-hour manoeuvre to try and persuade the court to accede to his request not to impose a fine. As mentioned, it was not a reflection of genuine remorse.

106 Had Tan taken any of the courses of action mentioned above, then he might have avoided the continuation of proceedings against him for scandalising contempt, or he would have been in a better position to seek a fine of less than $2,000. In the circumstances, Tan is responsible for the situation he finds himself in.

107 Consequently, the personal consequences for Tan, depending on the sentence to be imposed upon him, are irrelevant to sentencing.

108 I now address the cases which Tan's counsel submitted with his letter to the court dated 20 March 2019, sent after the hearing on sentence (see [78] above).

109 In the High Court case of *Low Meng Chay*, the appellant filed two magistrate's appeals against sentences imposed upon him for being manifestly excessive. The appellant had been sentenced for multiple offences under s 73 of the Trade Marks Act (Cap 332, 1985 Rev Ed) and under s 73 of the Trade Marks Act (Cap 332, 1992 Rev Ed) (which, amongst other things, amended the penalties attached to contraventions of s 73). Before the magistrates, the appellant had been sentenced to:

(a) in relation to the first magistrate's appeal, fines amounting to $24,000 (with 24 months' imprisonment in default) and 32 months' imprisonment; and

(b) in relation to the second magistrate's appeal, fines amounting to $66,600 (with 32 months and 23 days' imprisonment in default).

The appellant was unable to pay the fines which amounted to $90,600, and therefore faced imprisonment for an aggregate period of seven years, four months and 23 days.

110 On appeal, Yong Pung How CJ was of the view that in all the circumstances, this aggregate period was manifestly excessive, when s 73 (as amended) only provided for imprisonment for a term not exceeding five years (*Low Meng Chay* at [8]). Yong CJ was of the view that to give effect to all the default sentences would offend the totality principle and thus considered what the proper sentence should be (*Low Meng Chay* at [12]). It was against this backdrop that Yong CJ stated: "[w]hen it is unambiguously clear that a defendant cannot pay a fine … the fine should not be imposed even though the court would have preferred to impose a fine rather than a short term of

imprisonment" (*Low Meng Chay* at [13]). Consequently, Yong CJ allowed both the appellant's appeals and sentenced him to:

(a) in relation to the first magistrate's appeal, a total of 12 months' imprisonment; and

(b) in relation to the second magistrate's appeal, a total of 21 months' imprisonment.

Accordingly, this meant that the appellant was sentenced to imprisonment for an aggregate period of two years and nine months.

111 The primary concern in *Low Meng Chay* appeared to be that the appellant faced a manifestly excessive period of incarceration when all the default sentences (for not paying the fines) were given effect to. Therefore, I doubt that *Low Meng Chay* stands for a *general* proposition that so long as an individual cannot pay a fine, the court should impose upon him a custodial sentence instead. The nature of a custodial sentence is different from that of a fine, and as mentioned, a custodial sentence of a few days may be perceived as being more severe than a $2,000 fine (for most).

112 In any case, even if the holding in *Low Meng Chay* were that a fine should not be imposed upon an individual who is unable to pay one, this would not assist Tan. Tan did not submit that he would be unable to pay a fine if one were imposed upon him. Further, nowhere in *Low Meng Chay* do I find support for the wide proposition which Tan contended, *ie*, that courts have imposed upon an offender a custodial sentence just because a fine would be "unusually harsh and thus unjust" given his particular circumstances (see [78] above).

113 As for the District Court case of *Amzad Hossen Shajidul Haque*, the District Court stated that for being concerned in loading duty unpaid tobacco, the accused would have to be sentenced to a fine in the range of $29,022.45 to $38,696.60 or an imprisonment term up to three years or both (at [9]). The District Court then considered, at [11], the High Court case of *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 ("*Yap Ah Lai*") at [46], which had held that having regard to the "legislative intent" for the relevant offence and "the very heavy fines that are mandated", a custodial sentence will generally be imposed unless there is reason to believe that the offender can pay the fines. The District Court thus imposed a custodial sentence upon the accused in its case because he had no means to pay the fine (*Amzad Hossen Shajidul Haque* at [13]).

114 *Yap Ah Lai* was a case where the offender was concerned in importing uncustomed goods and thus guilty of offences under s 128F of the Customs Act (Cap 70, 2004 Rev Ed). In view of the very heavy fines mandated, Menon CJ took into account the fact that the offender was unlikely to be able to pay the fines. Accordingly, he was of the view at [18] that it would generally be inappropriate to impose a fine, with imprisonment in default, if the effect of this would be to punish those who are genuinely unable to pay. Hence, reference to the level of fines prescribed for these offences can only be of limited value in calibrating the appropriate sentence of imprisonment where imprisonment is the primary sentence instead of a fine.

115 As with *Low Meng Chay*, *Amzad Hossen Shajidul Haque* and *Yap Ah Lai* do not assist Tan where he did not submit that he would be unable to pay a fine if one were imposed upon him. Again, nowhere in *Amzad Hossen Shajidul Haque* or in *Yap Ah Lai* do I find support for the wide proposition which Tan contended, *ie*, that courts have imposed upon an offender a custodial sentence

just because a fine would be "unusually harsh and thus unjust" given his particular circumstances.

116 In this case, the custodial threshold is not crossed in the case of Tan, whose sentence should be similar to Wham's (see [96] above). Therefore, in my view, a sentence of a fine of $5,000, with one week's imprisonment in default, would be appropriate for Tan for the offence of scandalising contempt under s 3(1)(*a*) of the Act in the circumstances. The fine is to be paid within eight days from and including the date of this judgment.

*Notice to apologise*

117 As in the case in relation to Wham, I do not think that it is necessary in the circumstances of this case to make an order that Tan publish a notice to apologise for his post pursuant to s 12(3) of the Act. Given that I find it unnecessary to order Tan to publish a notice to apologise, there is also no further question of imposing conditions in respect of the order.

*Removal of Tan's post*

118 The question of ordering Tan to remove his post from his Facebook profile is academic since he has removed it.

**Conclusion**

119 In the circumstances, I sentence Wham to a fine of $5,000, with one week's imprisonment in default. The fine is to be paid within eight days from and including the date of this judgment.

120 I also sentence Tan to a fine of $5,000, with one week's imprisonment in default. The fine is also to be paid within eight days from and including the date of this judgment.

121 On the issue of costs, the AG sought against Wham costs of $8,000 and disbursements of $2,297.82, and sought against Tan costs of $5,000 and disbursements of $1,966.39, on the basis that some of the work overlapped but more work was done for the proceedings against Wham.[93] On the other hand, at the hearing on sentence, the Respondents argued that they should each pay the AG's costs fixed at $4,000 plus the respective disbursements.[94] The Respondents did not dispute the quantum for the disbursements.[95]

122 Although the AG asked for a higher amount as costs against Wham than that against Tan, the legal and factual issues in the two cases were not so different as to justify a distinction between the two on the question of costs. Accordingly, I am of the view that the costs awarded should be the same for each case.

123 I order Wham to pay the AG's costs fixed at $5,000 plus disbursements of $2,297.82. I order Tan to pay the AG's costs fixed at $5,000 plus disbursements of $1,966.39.

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93 See AG's WS-W at para 33; AG's WS-T at para 31; List of Disbursements for OS 510/2018; List of Disbursements for OS 537/2018.

94 See NAs at p 54 lines 2–7.

95 See NAs at p 65 lines 20–21.

124 For the avoidance of doubt, the time to appeal to the Court of Appeal on any issue, whether in respect of liability or sentence or otherwise, runs from today, *ie*, 29 April 2019.

Woo Bih Li
Judge

Francis Ng, SC, Senthilkumaran Sabapathy and Sheryl Janet George (Attorney-General's Chambers) for the applicant;
Eugene Singarajah Thuraisingam (Eugene Thuraisingam LLP) and Choo Zheng Xi and Priscilla Chia Wen Qi (Peter Low & Choo LLC) for the respondent in OS 510/2018;
Eugene Singarajah Thuraisingam (Eugene Thuraisingam LLP) for the respondent in OS 537/2018.