#### HCA 1936/2021

[2023] HKCFI 2377

### IN THE HIGH COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

### COURT OF FIRST INSTANCE

ACTION NO 1936 OF 2021

BETWEEN

LEUNG KAM CHUNG KENNETH Plaintiff

and

COMMISSIONER OF POLICE Defendant

##### Before: Hon Au-Yeung J in Chambers

Date of Hearing: 5 September 2023

Date of Decision: 19 September 2023

## D E C I S I O N

1. *INTRODUCTION*
2. There are three summonses before me:
3. the Defendant’s Summons dated 4 January 2023 (“**Anonymity Summons**”), seeking an order that the 3 police officers who prepared witness statements in these proceedings (collectively the “**Concerned Officers**”) be granted anonymity, including their names, ranks, and unique identification numbers (“**UIs**”), throughout these proceedings and be referred to as “Police Officer A”, “Police Officer B”, and “Police Officer C” respectively at any hearing or any document to be filed in the Registry in these proceedings; alternatively, no report by any member of the public (including the media) on these proceedings shall directly or indirectly identify the Concerned Officers;
4. the Plaintiff’s Summons dated 14 February 2023 (“**FBP Summons**”), seeking further and better particulars of the Defence; and
5. the Defendant’s Summons dated 25 August 2023 (“**Replacement Summons**”), seeking leave to replace the witness statements of Police Officer A, Police Officer B, and Police Officer C by those with correct redactions (“**Replaced Witness Statements**”).
6. In his written submissions, the Plaintiff made four preliminary representations, including a serious allegation that the Defendant has submitted false statements to the Court and has thereby committed perjury.
7. At the hearing, I indicated to the parties the allegations of making false statement and perjury are matters that should be dealt with at the trial.
8. I wish to add that those allegations are targeted at pleas in the Defence that cannot be summarily determined in the present interlocutory applications. In any event, because the disposal of these three Summonses will not turn on the resolution of these allegations, none of them will be addressed in this decision.
9. *BACKGROUND*
10. In 2019, a series of public order events took place throughout Hong Kong.
11. In this action, the Plaintiff sustained damage as a result of a fire outbreak allegedly caused by two tear gas submunitions shot into his clinic‑cum-residence (“**Premises**”) by police officer(s) operating along Austin Avenue, Tsim Sha Tsui in the morning of 18 November 2019 following the occurrence of public order events. He claims against the Defendant for loss and damage of HK$6,721,161. The Defendant denies the claim.
12. Pleadings have closed by 14 April 2022. Three witness statements of the Concerned Officers respectively were filed by the Defendant on 30 December 2022, with redactions over materials which may reveal their personal particulars (“**Original Witness Statements**”).
13. On 4 January 2023, the Defendant took out the Anonymity Summons.
14. This was followed by the Plaintiff taking out the FBP Summons on 14 February 2023, without setting out his request by letter beforehand in compliance with Order 18 rule 12(6).
15. On 25 August 2023, the Defendant took out the Replacement Summons to “rectify” some errors in the redaction and labelling of the Concerned Officers and other officers in the Original WSs.
16. *THE ANONYMITY SUMMONS*
17. At the hearing, Ms Jolie Chao, counsel for the Defendant, indicates that the Defendant’s primary position is to obtain the anonymity order. If the Court is not minded to do so, the Defendant will rely on his fallback position to seek a gagging order that Ms Chao confirms shall last indefinitely.
18. In the supporting affidavit made by the Chief Inspector of Cyber Security of the Hong Kong Police Force involved in investigating into doxxing activities against police officers since the social unrest in 2019 filed on 4 January 2023, the following are raised in support of this application:
19. Since 2019, there has been general doxxing against police officers and their family members;
20. In view of these activities, the Court of First Instance granted an injunction order against doxxing of police officers and their family members on 25 October 2019 in HCA 1957/2019. This injunction (with amendments thereafter) remains in force (“**Doxxing Injunction**”);
21. Notwithstanding the Doxxing Injunction, there have been continuing doxxing activities against police officers and their family members;
22. As a result of general doxxing and unauthorised use or disclosure of personal data, some of the doxxed police officers and their family members were subject to violence, intimidation, harassment, and private nuisance;
23. Based on the evidence placed before this Court, some police officers even suffered physical injury at least as recent as 2021; and
24. After hearing these events and having regard to the sensitive nature of the allegations made by the Plaintiff, the Concerned Officers are worried that their life, safety, and welfare, and that of their family members are at risk. This is so despite, as of this stage, none of them was found having been doxxed on the internet or social media.
25. Given the sensitive nature of the contextual background of the events leading up to this Action (ie social unrest in 2019 and the use of tear gas submunitions, which allegedly resulted in the fire at the Premises) and the Plaintiff’s serious allegations of, amongst others, “malicious intent” on the part of the Concerned Officers, Ms Chao submits that this is likely to attract attention of the media leading to further doxxing, resulting in a high and real risk of danger to the Concerned Officers and/or their family members’ lives and/or safety.
26. Mr Leung, on the other hand, submits that there is no good reason for an anonymity order to be granted. This is because:
27. there is no necessity, given that the legislative amendments to the Personal Data (Privacy) Ordinance, Cap 486 (“**PDPO**”) have enhanced the penalty against doxxing behaviour; and
28. the name, rank, and the kind of responsibilities carried out by the Concerned Officers and the instructions they gave are crucial matters that are directly relevant to the issues in this Action.

*C1. Relevant Legal Principles or Anonymity Order*

1. In our legal system, open administration of justice (including the identification of the parties to the proceedings) is the norm. It is a fundamental principle which is intrinsically important and should be generally upheld by the court. Any departure from that principle in any given case must be justified by reference to the specific facts and circumstances of the case in question. A central consideration is whether the due administration of justice requires the principle of open administration of justice to be compromised. In each case, the court must conduct a balancing exercise to determine whether to depart from the principle of open administration of justice: *TSL v Commissioner of Police* [2021] HKCFI 564, §22, Chow J (as Chow JA then was); *Asia Television Ltd v Communications Authority* [2013] 2 HKLRD 354, *per* Cheung CJHC (as the Chief Justice then was) at §§19-36.
2. In the specific context of an application for an anonymity order, further guidance can be found in the judgment of the Court of Appeal in *Re BU* [2012] 4 HKLRD 417, where a torture claimant who wished to challenge the Secretary for Security’s refusal to rescind a deportation order made against him sought an anonymity order regarding his identity. The following principles are relevant for the present purpose:
3. *per* Cheung CJHC (as the Chief Justice then was) -

“[10] The starting point and general rule, both in theory and in practice, is that judicial proceedings are held in public and the parties are named in judgments. Article 10 of the Hong Kong Bill of Rights, which is based on article 14.1 of the International Covenant on Civil and Political Rights (‘ICCPR’), specifically provides that everyone shall be entitled to ‘a fair and *public* hearing’ by a competent, independent and impartial tribunal established by law. The article goes on to set out the circumstances under which the press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society; or when the interest of the private lives of the parties so requires; or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[11] In practice, the matter is governed by Practice Directions 25.1 and 25.2. When proceedings are held in chambers not open to the public, the press and the public are excluded from attending. Reporting of the proceedings, including the naming of the parties involved, is also restricted.

[12] Secondly, the court’s jurisdiction to make an anonymity order to restrict publication of a person named in its proceedings is not in doubt: *R (Kambadzi)*, para 6 *per* Lord Hope of Craighead DPSC. It overlaps with, but is not entirely the same as, the court’s power to hear proceedings in chambers not open to the public (with its entailing restriction on reporting) described in the preceding paragraph. Indeed an anonymity order is very often required in a piece of litigation where the trial or other hearings will be held in open court or in chambers open to the public with no restriction on reporting (save for the anonymity order).

…

[15] Thirdly, it has to be appreciated, however, that when such an order is made and the principle of open justice is thereby compromised, third parties’ (particularly the media’s) right to freedom of expression guaranteed under article 16 of the Hong Kong Bill of Rights, which includes freedom to seek, receive and impart information, is necessarily curtailed. The right to freedom of expression is not absolute. It may be restricted for respect of the rights or reputation of others or for the protection of national security or of public order, or of public health or morals: article 16(3).

[16] Fourthly, different rights are therefore in play. As a very general statement, the right to life and the freedom from torture [etc] should, of course, take precedence over the right to freedom of expression and the freedom of the press. As Lord Rodger of Earlsferry JSC observed in Re Guardian News & Media Ltd, para.27, “a newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed”. But that is so only when stated in very general terms. Much will depend on the circumstances of each case. A remote risk of danger to life or safety may well not be sufficient to justify the curtailment of the freedom of the press to name the parties involved in court proceedings held publicly in Hong Kong. As Lord Hope pointed out in *R (Kambadzi) v Secretary of State for the Home Department*, para.6, it is no longer the case that all asylum seekers as a class are entitled to anonymity in our courts. The making of such an order has to be justified.

[17] Finally, each application must therefore be examined on its own facts and issues…”

(emphasis added)

(2) *per* Stock VP (as he then was) -

“[31] … In determining what the interests of justice require, the court should bear in mind the relevant competing components of that interest in such cases.

[32] On the one hand is the vital importance to the rule of law of open justice and, in this regard, I am attracted by the argument of counsel in *In Re Guardian* (para 13 above) at p 701, that publicity is a powerful deterrent to abuse of power; that it deters perjury; that open proceedings are a discipline upon the conduct of tribunals (and, it might be added, upon the conduct of advocates) and that it promotes public confidence in the impartiality, efficiency and fairness of the system. It is not only a possible deterrence to the making of false assertions but may lead to the disclosure of relevant evidence supportive of a particular case. Almost a century ago, it was described by Lord Shaw in *Scott v Scott* [1913] AC 417 at 473 as ‘a sound and very sacred part of the administration of justice.’ And so it remains.

[33] Yet the basis upon which the courts are occasionally compelled to retreat from wholly open justice is the same consideration, namely, the due administration of justice; for if it be shown that disclosure of information carries with it a substantial risk to the administration of justice, the court is likely to exercise its discretion to preserve confidentiality to the extent necessary. There are many circumstances which have over time been identified as permitting of or indeed requiring confidentiality – for example, to protect the interests of children or patients; where there is shown a need to preserve secret technical processes; where publicity would defeat the object of the hearing (see ‘The Law of Human Rights’ Clayton and Tomlinson 2d ed., Chapter 11); blackmail cases, since disclosure of the identity of a witness is likely to prejudice the administration of justice by discouraging victims from coming forward (*ibid*., p 1403); and where it is shown that a witness or party is at risk of harm from third parties. Quite apart from the reluctance of a court to lend itself, by sanctioning publicity, to the risk of such harm, the failure to protect a party in an instant case from the risk of harm jeopardises the administration of justice in that case by deterring that party from pursuing the case either at all or freely and in other cases by deterring putative parties from pursuing their rights in the courts.

[34] Given the importance of open justice and the ease with which allegations may be made, there is a burden on an applicant to justify the making of an anonymity order. It is not justified by the mere *ipse dixit* of the applicant…”

(underline added)

*C2. Application of the Legal Principles*

1. In the present case, Ms Chao accepts that generally judicial proceedings should be held in public. However, for the reasons referred to in §§12-13 above, she submits there are good reasons for the Court to exercise its discretion to make an anonymity order.
2. I bear in mind that we are here dealing with defence witnesses as opposed to “a party”. However these witnesses bear a public duty. The alleged mis-use of their power is the subject matter of this action. There must all the more be good reasons before there can be departure from the principle of open justice.
3. The ranks and UIs of the Concerned Officers, the kind of responsibilities they carried and the instructions they gave are crucial matters that are directly relevant to the issues in this Action, for example whether the Defendant (and/or any police officers) acted negligently (or intentionally) in firing two tear gas submunitions shot into the Premises. The information is also necessary for testing the credibility of their evidence.
4. In exercising any discretion, I have taken into account the follow matters: -
5. First and foremost, there is no evidence showing any real risk of danger that is personally posed to the Concerned Officers and/or their family members. At best, the Defendant can only show that there is general risks of violence, intimidation, harrassment and private nuisance being posed to police officers and their family as a result of doxxing and unauthorised use or disclosure of personal data.
6. As fairly accepted by Ms Chao, none of the Concerned Officers have at this stage been subject to doxxing based on record on the internet or social media.
7. As matters stand, even for real risks of physical injury on the part of police officers and their family, the latest event demonstrating such risk relied on by the Defendant was an unfortunate incident that took place over 2 years ago on 1 July 2021 when a uniformed police officer was stabbed.
8. Hence, at best the Defendant is only able to show there exists what Cheung CJHC (as the Chief Justice then was) referred to as “remote risk of danger to life or safety” in *Re Bu*. This is plainly insufficient on the part of the Defendant to discharge his burden of showing the necessity of the anonymity order sought.
9. Their situation is far removed from the torture claimants who are at risk of torture and murder with the consent or acquiescence of the police and or the state.
10. Secondly, the Doxing Injunction is in force to protect the police officers. It restrains any person from doing any of the following acts:
11. using, publishing, communicating or disclosing without consent to any other person the personal data, intended or likely to intimidate, molest, harass, threaten, pester or interfere with any police officer or his/her family members;
12. intimidating, molesting, harassing, threatening, pestering or interfering with any police officer or his/her family members; and
13. assisting, causing, counselling, procuring, instigating, inciting, aiding, abetting or authorising others to commit any of the above acts or participate in any of the above acts.
14. Based on the latest statistics disclosed in the 1st affidavit of Tsang, merely 4 additional police officers were doxxed or had their personal data used or disclosed without authorisation over the one-year period of November 2021 to November 2022.
15. Indeed, even Ms Chao accepts that it remains possible to commit the culprits who violate the Doxxing Injunction for contempt of court. See for example *Secretary for Justice v Lee Pak Nap* (李柏納) [2023] HKCFI 1972.
16. Thirdly, section 64 of PDPO introduced in 2021 criminalize doxxing behaviour and imposes a fine of $1,000,000 and 5 years’ imprisonment on conviction on indictment.
17. There can be no base to suggest that the Doxxing Injunction and the provisions of PDPO do not provide adequate protection to the Concerned Officers.
18. For these reasons, I decline to grant the anonymity order sought. Having failed the threshold question of necessity, I need not discuss any further whether it is necessary for the fair disposal of the case to disclose the personal identifiers of the Concerned Officers as per Mr Leung’s submissions.
19. By parity of reasoning, the Defendant has similarly failed to show any necessity to impose any restriction on the disclosure of the identities of the Concerned Officers by way of a gagging order. I therefore decline to grant the gagging order sought.
20. *REPLACEMENT SUMMONS*
21. At the hearing, Ms Chao confirmed that the Replacement Summons stands or falls with my decision on the Anonymity Summons because the Replaced Witness Statements are merely the amended version of the Original Witness Statements with correct redactions.
22. I therefore dismiss the Replacement Summons. I further direct that the Defendant shall, within 14 days from the date of this decision, file and serve an unredacted version of the Original Witness Statements showing the personal identifiers of the Concerned Officers.
23. *FBP SUMMONS*
24. The Plaintiff’s Request for Further and Better Particulars (“**FBP Request**”) of the Defence is contained in a home-made “Summons/ Skeleton Submission” dated 14 February 2023 as exhibited in his affirmation of even date.
25. The Defendant refuses to answer any of the FBP Request. In gist, Ms Chao submits that the FBP Request is convoluted, and none of the requests therein fall within the proper purview of a request for FBP under Order 18 rule 12.

*E1. Legal Principles*

1. As Bokhary JA (as he then was) held in *Aktieselskabet Dansk Skibsfinansiering v Wheelock Marden & Co Ltd & Ors* [1994] 2 HKC 264 at 269I-270C, it is the overarching objectives and functions of pleading to:
2. inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
3. prevent the other side from being taken by surprise at the trial;
4. enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
5. limit the generality of the pleadings, the claim and the evidence;
6. limit and define the issues to be tried, and as to which discovery is required; and
7. tie the hands of the party so that he cannot without leave go into any matters not included.
8. However, whether the Court will order a party to provide FBP is a matter of discretion: HKCP 2023 at §18/12/58. The Court is guided and bound by Order 18 rule 12(3B), which provides for the test for ordering FBP – whether the order is necessary for disposing fairly of the cause or matter or for saving costs. This highlights the emphasis on procedural economy, proportionality and cost-effectiveness in the post-CJR culture: *Taching Petroleum Company, Limited v Meyer Aluminium Limited* [2020] HKCA 1005 at §31.
9. The Court would refuse to order particulars where the requests concern matters of evidence, amount to cross-examination in disguise, or are beyond scope of the averments: *Nu Pharm Limited (卡士蘭有限公司) v Champ Group Limited (智盟有限公司) & Ors* [2021] HKCFI 751, §§21-24, 34-35, 44 and 46, Lok J.

*E2. Analyses of the FBP Request*

1. In the present case, the FBP Request can be categorised as (1) concerning evidence and/or amounting to cross-examination in disguise; (2) a statement of facts; and/or (3) submissions made by the Plaintiff. They are summarised in the table below:

|  |  |  |
| --- | --- | --- |
| **Nature of the Request** | **Paragraphs in FBP Requests Pages 2-12** | **Paragraphs in FBP Requests Pages 12-16** |
| Evidence and/or cross-examination in disguise | 4, 6-11, 15, 22-23, 28-29, 32-34, 44-47, 50-52 | 1-13 |
| Statement of facts | 1, 3, 13, 24, 26-27, 30, 33, 35-39, 48, 59, 60-63 | Nil |
| Submissions | 2, 5, 12, 14, 16-21, 25, 29, 31, 33, 40-43, 49, 53-58, 64-71 | 14-15 |

1. These are not legitimate reasons to seek FBP. Quite plainly, Mr Leung is unable to point to any lack of clarity on the part of the Defence, and there is in fact no lack of clarity. The FBP Request is simply not necessary for disposing fairly of the cause or matter or for saving costs. I therefore decline to order the Defendant to give particulars pursuant to the FBP Request.
2. *DISPOSITION*
3. I dismiss (1) the Anonymity Summons, (2) the FBP Summons, and (3) the Replacement Summons. I order the Defendant to file and serve an unredacted version of the Original Witness Statements within 14 days from today.
4. Costs should follow the event. I make an order *nisi* that:
5. the costs of the FBP Summons be to the Defendant, summarily assessed and granted in the sum of $120,000;
6. the costs of and occasioned by the Anonymity Summons be to the Plaintiff, summarily assessed and granted in the sum of $10,000;
7. the costs of and occasioned by the Replacement Summons be to the Plaintiff, summarily assessed and granted in the sum of $400; and
8. There shall be set off of such costs such that the Plaintiff shall pay the Defendant $109,600.
9. All the costs orders *nisi* mentioned above shall be made absolute 14 days after the date of the handing down of this Decision.
10. I thank Ms Chao for her assistance.

# (Queeny Au-Yeung)

# Judge of the Court of First Instance

# High Court

The Plaintiff appeared in person

Ms Jolie Chao, instructed by the Department of Justice, for the Defendant