**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2021] SGCA 96**

Civil Appeal No 47 of 2020, and Summonses Nos 72 and 98 of 2020

Between

The Online Citizen Pte Ltd

… *Appellant/Applicant*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons No 118 of 2020

Between

The Online Citizen Pte Ltd

… *Applicant*

And

Attorney-General

… *Respondent*

Civil Appeal No 52 of 2020 and Summons No 97 of 2020

Between

Singapore Democratic Party

… *Appellant/Applicant*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons No 15 of 2020

Between

Singapore Democratic Party

… *Applicant*

And

Attorney-General

… *Respondent*

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# JUDGMENT

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[Constitutional Law] — [Fundamental liberties] — [Freedom of speech]
[Statutory Interpretation] — [Constitutional provisions]
[Statutory Interpretation] — [Construction of statute]



Version No 3: 16 Jun 2022 (11:20 hrs)

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# The Online Citizen Pte Ltd
# v
# Attorney-General and another appeal and other matters

**[2021] SGCA 96**

Court of Appeal — Civil Appeals Nos 47 and 52 of 2020, and Summonses Nos 72, 97 and 98 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Tay Yong Kwang JCA and Steven Chong JCA
17 September 2020, 21 December 2020

8 October 2021 Judgment reserved.

**Sundaresh Menon CJ (delivering the judgment of the court):**

## Introduction

1 The appellants in these appeals are The Online Citizen Pte Ltd ("TOC") and the Singapore Democratic Party ("SDP"). They were issued Correction Directions ("CDs") under s 11 of the Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) ("the POFMA"), requiring them to insert correction notices at the top of certain articles and Facebook posts that they had published online. Their respective applications under s 19 of the POFMA to the Minister for Home Affairs (in TOC's case) and the Minister for Manpower (in SDP's case) to cancel the CDs were unsuccessful. They then each commenced proceedings in the High Court under s 17 of the POFMA to set aside the CDs.

2 The appellants' respective applications to set aside the CDs were both dismissed by the High Court. In so doing, however, the High Court arrived at conflicting decisions on the question of on whom the burden of proof lies in proceedings to set aside a CD under s 17 of the POFMA. The appellants now appeal against the decisions of the High Court. They have also raised questions pertaining to the constitutionality of the POFMA: specifically, whether, and if so, the extent to which, the POFMA impinges on the right to freedom of speech conferred by Art 14(1)(*a*) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution", which expression also denotes, where applicable, the corresponding predecessor version of the Constitution as it currently stands).

3 The present appeals provide the first opportunity for this court to consider the interpretation and application of the POFMA, which came into force on 2 October 2019, as well as its constitutionality. We set out below the brief factual background to the appeals before framing the issues in dispute. It should be noted that the version of the POFMA that we are concerned with for the purposes of these appeals is the POFMA as it stood prior to the amendments introduced by the Supreme Court of Judicature (Amendment) Act 2019 (Act 40 of 2019), which came into effect on 2 January 2021. Pursuant to those amendments, proceedings to set aside a CD under s 17 of the POFMA are now to be brought in, specifically, the General Division of the High Court, and all the references to the "High Court" in the provisions of the POFMA that are cited in this judgment now read as the "General Division of the High Court" instead.

## Background

4 The appellant in CA/CA 47/2020 ("CA 47") is TOC. It is the local news agency behind the eponymous website, The Online Citizen, and is owned and



Version No 3: 16 Jun 2022 (11:20 hrs)

controlled by its chief editor, Mr Xu Yuan Chen @ Terry Xu. TOC's appeal is against the decision of Belinda Ang Saw Ean J (as she then was) in *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 ("*TOC v AG*"). In the rest of this judgment, we refer to CA 47 as "the TOC appeal" where appropriate to the context.

5 The appellant in CA/CA 52/2020 ("CA 52") is SDP, a non-profit political association. SDP's appeal is against the decision of Ang Cheng Hock J in *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 ("*SDP v AG*"). We refer to CA 52 hereafter as "the SDP appeal" where appropriate to the context.

6 Given the sequence of the events which led to the issuance of the CDs to SDP and TOC, we set out the facts relating to the SDP appeal first, before turning to the facts of the TOC appeal.

### *CA 52: The SDP appeal*

*The article and Facebook posts published by SDP*

7 On 8 June 2019, SDP published an online article titled "SDP Population Policy: Hire S'poreans First, Retrench S'poreans Last" ("the SDP Article"). The article stated that SDP had launched its "alternative population and immigration policy". This was aimed at reforming the Government's prevailing policy, which, in SDP's view, allowed too many foreign workers to work in Singapore, and, consequently, displaced "local PMETs" (meaning professionals, managers, executives and technicians). The article stated that one of SDP's proposals was to launch a points-based system for foreign PMETs wishing to work in Singapore, and that this would help to ensure that firms were not hiring



Version No 3: 16 Jun 2022 (11:20 hrs)

foreigners based solely on their willingness to accept lower wages. The SDP Article then went on to state:

> *The SDP's proposal comes amidst a rising proportion of Singapore PMETs getting retrenched.* Such a trend is partly the result of hundreds of local companies continuing to discriminate against local workers. [emphasis added]

8 Some months later, on 30 November 2019 at 11.06am, SDP published a post on Facebook ("the November Facebook post"). The post advocated the need for more protection of Singaporeans in the labour market who were being or had been "displaced from their PMET jobs by foreign employees", and contained a hyperlink to the SDP Article after the text. The post was accompanied by an image bearing SDP's logo, with the lines:

> LOCAL PMET UNEMPLOYMENT Has Increased
>
> The number of FOREIGN PMETS HAS ALSO INCREASED
>
> Coincidence? We think not.

9 On 2 December 2019 at 9.18pm, SDP published a sponsored post on Facebook that was paid for by SDP's vice-chairman, John Tan Liang Joo. The text of this post ("the December Facebook post") was substantially similar to that of the November Facebook post, and the post likewise contained a hyperlink to the SDP Article. In addition, the post was accompanied by a graphical illustration that sought to depict decreasing "[l]ocal PMET employment" and increasing "[f]oreign PMET employment". The interpretation of this graphical illustration – specifically, the meaning of the term "[l]ocal" therein – is a matter in dispute in the SDP appeal, and we elaborate further on this aspect of the post in our subsequent analysis.



Version No 3: 16 Jun 2022 (11:20 hrs)

*The CDs issued to SDP*

10 On 14 December 2019, three CDs were issued to SDP pursuant to s 11 of the POFMA on the authority of the Minister for Manpower. We refer to these CDs collectively as "the SDP CDs" hereafter where appropriate to the context. The first CD ("SDP CD-1") was directed at the SDP Article. The other two CDs ("SDP CD-2" and "SDP CD-3") pertained to the November Facebook post and the December Facebook post respectively. In respect of these three publications, two false statements of fact – termed "subject statements" for the purposes of Part 3 of the POFMA (see s 10(1)(*a*) of the POFMA) – were identified by the Minister for Manpower:

(a) SDP CD-1 identified the subject statement that was said to have arisen from the SDP Article as the statement that "*Local PMET retrenchment has been increasing*" [emphasis added] ("the first subject statement"). Because the November Facebook post and the December Facebook post both contained a hyperlink to the SDP Article, SDP CD-2 and the second half of SDP CD-3 (which was that part of SDP CD-3 that was directed at the hyperlink to the SDP Article in the December Facebook post) were also issued on the basis of this subject statement.

(b) SDP CD-3 identified an additional subject statement that pertained only to the December Facebook post. This was the statement that "*Local PMET employment has gone down*" [emphasis added] ("the second subject statement"), and it formed the basis for the first half of SDP CD-3.

11 The SDP CDs directed SDP to insert correction notices at the top of the SDP Article, the November Facebook post and the December Facebook post by no later than 4.00pm on 15 December 2019. SDP complied with all three CDs



Version No 3: 16 Jun 2022 (11:20 hrs)

(*SDP v AG* at [6]). The wording of each correction notice was similar. The correction notices in SDP CD-1 (in respect of the SDP Article) and SDP CD-2 (in respect of the November Facebook post) both read as follows:

> CORRECTION NOTICE:
>
> *This post contains a false statement of fact.* There is no rising trend of local PMET retrenchment. Local PMET employment has in fact increased consistently and continues to do so today. For the correct facts, click here: https://www.gov.sg/factually/content/corrections-on-falsehoods-posted-by-SDP
>
> [underlining in original; emphasis added in italics]

12 As for the correction notice in SDP CD-3 in respect of the December Facebook post, it stated:

> CORRECTION NOTICE:
>
> *This post contains false statements of fact.* Local PMET employment has in fact increased consistently and continues to do so today. There is no rising trend of local PMET retrenchment. For the correct facts, click here: https://www.gov.sg/factually/content/corrections-on-falsehoods-posted-by-SDP
>
> [underlining in original; emphasis added in italics]

*The cancellation application and the appeal against the SDP CDs*

13 On 3 January 2020, SDP applied to the Minister for Manpower to cancel the SDP CDs pursuant to s 19 of the POFMA. On 6 January 2020, the Minister for Manpower rejected the application. On 8 January 2020, SDP filed HC/OS 15/2020 ("OS 15") in the High Court to set aside the SDP CDs under s 17 of the POFMA.

14 OS 15 was heard by Ang Cheng Hock J on 16 and 17 January 2020. His judgment in *SDP v AG* dismissing SDP's application to set aside the SDP CDs



Version No 3: 16 Jun 2022 (11:20 hrs)

was issued on 5 February 2020. We summarise the decision in *SDP v AG* together with the decision in *TOC v AG* later in this judgment.

***CA 47: The TOC appeal***

15 At about the time that OS 15 was being heard, the events that formed the background to the TOC appeal were unfolding.

16 On 16 January 2020, a Malaysian non-governmental organisation known as Lawyers for Liberty ("LFL") published a press statement titled "Disclosure of the brutal & unlawful hanging methods in Changi Prison – brutal kicks inflicted to snap prisoners' necks". The press statement (which we refer to hereafter as "the LFL press statement" where appropriate to the context) claimed that officers from the Singapore Prison Service ("SPS") had been instructed to utilise a "brutal and unlawful" method to execute prisoners on death row, and disclosed the specifics of this alleged execution method based on information purportedly given by an anonymous SPS officer who had served in Changi Prison's execution chamber (*TOC v AG* at [5]).

17 On the same day, TOC published an article titled "M'sian human rights group alleges 'brutal, unlawful' state execution process in Changi Prison" ("the TOC Article"), repeating most of the claims made in the LFL press statement. The TOC Article directly quoted the LFL press statement on six points of detail pertaining to this alleged unlawful execution method, which was said to be adopted "whenever the rope breaks during a hanging, which happens from time to time", and which apparently involved prison officers kicking the back of the prisoner's neck to break it in a manner that would be consistent with death being caused by hanging (*TOC v AG* at [6]). The TOC Article noted that LFL had cited "an unnamed former [SPS] officer's account" as its source of information,



Version No 3: 16 Jun 2022 (11:20 hrs)

and ended with the statement that TOC had contacted the Ministry of Home Affairs ("MHA") for comments on the allegations.

18 On 22 January 2020, a CD ("the TOC CD") was issued to TOC pursuant to s 11 of the POFMA on the authority of the Minister for Home Affairs. It identified the subject statement (that is to say, the false statement of fact) that arose from the TOC Article as consisting of the following claims *made by LFL* as to the existence and details of the alleged "brutal and unlawful" execution method employed at Changi Prison:

> … [P]rison officers were instructed to carry out the following brutal procedure whenever the rope breaks during a hanging, which happens from time to time.
>
> a) The prison officer is instructed to pull the rope around the neck of the prisoner towards him.
>
> b) Meanwhile, another prison officer will apply pressure by pulling the body in the opposite direction.
>
> c) The first officer must then kick the back of the neck of the prisoner with great force in order to break it.
>
> d) The officers are told to kick the back of the neck because that would be consistent with death by hanging.
>
> e) The officers are told not to kick more than 2 times, so that there will be no tell-tale marks in case there is an autopsy.
>
> f) Strict orders are also given not to divulge the above to other prison staff not involved in executions. …

19 TOC was required to insert the following correction notice at the top of the TOC Article by no later than 8.00am on 23 January 2020:

> CORRECTION NOTICE:
>
> *This article contains false statements of fact made by Lawyers for Liberty.* The Singapore Prison Service does not use any of the steps in the alleged procedure for judicial executions. For the correct facts, click here:



Version No 3: 16 Jun 2022 (11:20 hrs)

> https://www.gov.sg/article/factually-clarifications-on-falsehoods-posted-by-lawyers-for-liberty
>
> [underlining in original; emphasis added in italics]

20 On the same day that the TOC CD was issued (22 January 2020), TOC applied to the Minister for Home Affairs under s 19 of the POFMA to cancel the CD on the ground that the TOC Article did not purport to affirm the authenticity of the claims made in the LFL press statement. TOC's cancellation application was rejected by the Minister for Home Affairs on 24 January 2020. On 28 January 2020, TOC filed HC/OS 118/2020 ("OS 118") in the High Court to set aside the TOC CD under s 17 of the POFMA.

## The decisions below

### *The decision in* SDP v AG

21 In *SDP v AG*, Ang Cheng Hock J held that in proceedings to set aside a CD under s 17 of the POFMA, the burden was on the Minister on whose authority the CD was issued ("the Minister", which expression shall also denote, where applicable, the Minister on whose authority a Stop Communication Direction under s 12 of the POFMA is issued) to show that the CD ought to be maintained (*SDP v AG* at [44]). Ang J based his conclusion on three principal reasons. First, because the right to freedom of speech was the "starting point" under Art 14 of the Constitution, it was incumbent on any person acting to restrict that freedom to demonstrate that it could lawfully be curtailed. Ang J considered that this was supported by s 103(1) of the Evidence Act (Cap 97, 1997 Rev Ed), which provided, in essence, that a party who desired a court to give judgment as to any legal right or liability that depended on the existence of particular facts which he asserted bore the burden of proving those facts (*SDP v AG* at [37]). Second, Ang J emphasised the fact that r 5(1) of the Supreme Court of Judicature (Protection from Online Falsehoods and Manipulation)



Version No 3: 16 Jun 2022 (11:20 hrs)

Rules 2019 ("the POFMA Rules") provided that an appeal to the High Court under s 17 of the POFMA was to be "by way of rehearing". He took this to mean that the Minister's determination that there was a false statement of fact which had to be acted against had no evidential weight, and the court had to determine the point without regard to what the Minister had decided (*SDP v AG* at [38]). Third, Ang J pointed to the "clear information asymmetry" between the maker of a statement (or other material) that was said to be or to give rise to a false statement of fact (a "statement-maker") on the one hand and the Minister on the other. In his view, this raised the question whether Parliament could have intended to place such an onerous burden on the statement-maker, who "often ha[d] to contend with far more limited resources", to prove the truth of the statement (*SDP v AG* at [39]–[40]). Having regard to these points, Ang J rejected the contention by the Attorney-General ("the AG") that the structure of the POFMA, and of s 17 in particular, was such as to place the burden on the statement-maker to show that the CD being challenged should be set aside. He held, instead, that it fell upon the Minister to show that the CD ought to be maintained (*SDP v AG* at [36] and [44]). As to the standard of proof, however, he rejected SDP's submission that the criminal standard of proof should apply, and ruled that the applicable standard was proof on the balance of probabilities (*SDP v AG* at [45]–[49]).

22 In relation to each of the SDP CDs, Ang J noted that two issues would have to be decided: (a) first, whether the subject statements identified in these CDs were in fact made on a proper interpretation of the relevant publication; and (b) if they were in fact made, whether they were true or false (*SDP v AG* at [22]).

23 As a preliminary point, Ang J rejected SDP's submission that the SDP Article fell outside the ambit of the POFMA because it had been published for



Version No 3: 16 Jun 2022 (11:20 hrs)

the first time prior to the coming into force of the Act (*SDP v AG* at [51]–[52]). He pointed out that the SDP Article had been communicated again to the public by the hyperlinks to it in the November Facebook post and the December Facebook post, both of which were published after the POFMA's entry into force, and held that there was therefore no issue of any retrospective application of the Act.

24 Turning to the substantive issues relating to SDP CD-1, the first concerned the interpretation of the relevant portion of the SDP Article that was said to give rise to the first subject statement. Ang J rejected SDP's contention that the subject statement to be gleaned from this portion of the SDP Article was that "there [was] a rising trend of *Singaporean* (as opposed to 'local', which would include Singapore Permanent Residents ('SPRs')) PMETs retrenched ***relative to all retrenched locals***" [emphasis in original in italics; emphasis added in bold italics] (*SDP v AG* at [65]). He pointed out that SDP had claimed that the SDP Article was based on (among other material) an article titled "PMETs make up rising share of retrenched locals" which was published in *The Straits Times* on 15 March 2019 ("the 15 March 2019 Straits Times article"). Since that article had expressly defined the word "locals" in the context of the phrase "locals … who were retrenched" to mean *both* Singaporeans *and* Singapore Permanent Residents ("SPRs"), SDP could not now contend that the SDP Article should be interpreted as referring only to Singaporeans, and not to both Singaporeans and SPRs (*SDP v AG* at [74]). As for SDP's submission that the phrase "rising proportion of Singapore PMETs getting retrenched" in the SDP Article meant that "the proportion of Singaporean PMETs retrenched *as a share of all locals retrenched* … ha[d] been increasing" [emphasis in original in italics] (*SDP v AG* at [65]), Ang J found this "problematic" because the SDP Article "[did] not itself say what the 'rising proportion of Singapore PMETs



Version No 3: 16 Jun 2022 (11:20 hrs)

getting retrenched' [was] a proportion of"; furthermore, the concept of proportion espoused by SDP "[did] not cohere with the message conveyed by the entirety of the SDP Article" (*SDP v AG* at [77]–[78]).

25 We pause here to highlight that Ang J's belief that SDP had drawn a distinction between "*Singaporean[s]* (as opposed to 'local[s]', which would include Singapore Permanent Residents ('SPRs'))" [emphasis in original] (*SDP v AG* at [65]) for the purposes of the SDP Article was, with respect, mistaken. In its written case for CA 52, although SDP took the position that the term "Singaporeans", as used in the SDP Article, was "unambiguously a reference to Singapore citizens, as against 'foreigners', which in context unambiguously mean[t] non Singapore citizens, including Singapore Permanent Residents", it also expressly stated that "the … claim that the SDP Article was referring only to 'Singaporeans' and not to 'locals', which, in [Ang J's] view, would include both Singaporean[s] and SPRs[,] … *was not made in respect of the SDP Article*" [emphasis added]. SDP further clarified that a distinction was drawn between "Singaporeans" and "locals' (meaning "both Singaporean[s] and SPRs") only in respect of the December Facebook post. We return to this later in our analysis of that post and the second subject statement.

26 Although Ang J rejected SDP's interpretation of the relevant portion of the SDP Article, he did not accept the AG's primary interpretation of that portion of the article either. The AG's primary interpretation was that the relevant portion of the SDP Article gave rise to the subject statement that "local PMET retrenchment ha[d] been increasing, *in absolute numerical terms*" [emphasis in original] (*SDP v AG* at [64]). Ang J held that this interpretation was incorrect as it ignored the fact that the relevant portion of the SDP Article referred to "a rising *proportion* of Singapore PMETs getting retrenched" [emphasis added] (*SDP v AG* at [80]–[84]). He found, instead, that the AG's



Version No 3: 16 Jun 2022 (11:20 hrs)

alternative interpretation of that portion of the article – namely, that it gave rise to the subject statement that "the proportion of retrenched local PMETs as *compared to* ***all local PMETs*** ha[d] been rising" [emphasis in original in italics; emphasis added in bold italics] (*SDP v AG* at [64]) – was a reasonable interpretation (*SDP v AG* at [88]). In view of the Ministry of Manpower ("MOM") statistics adduced in evidence by the AG showing that there had in fact been a *decrease* in the number of retrenched local PMETs per 1,000 local PMET employees from 2015 to 2018, the veracity of which was not challenged by SDP, Ang J held that the AG had discharged the burden of proving that the first subject statement, as understood according to the AG's alternative interpretation of the relevant portion of the SDP Article, was false on the balance of probabilities (*SDP v AG* at [100]). There was therefore no basis to set aside SDP CD-1 (*SDP v AG* at [101]).

27 Given that the subject statement that Ang J found had arisen from the SDP Article – that is to say, the first subject statement as understood according to the AG's alternative interpretation of the relevant portion of the article – was likewise made by the November Facebook post and the December Facebook post because of the inclusion of a hyperlink to the article in these two posts, SDP CD-2 and SDP CD-3 (in so far as the latter pertained to the article) were upheld as well (*SDP v AG* at [109] and [112] respectively).

28 In relation to the second subject statement that "[l]ocal PMET employment has gone down", which was said to have arisen from the graphical illustration in the December Facebook post and which formed the basis for the first half of SDP CD-3, Ang J found that this subject statement was precisely the message that a reasonable reader would take away from the graphical illustration, which featured a downward-pointing curve representing "[l]ocal PMET employment" juxtaposed with an upward-pointing curve representing



Version No 3: 16 Jun 2022 (11:20 hrs)

"[f]oreign PMET employment" (*SDP v AG* at [117]). He rejected SDP's argument that the graphical illustration, and the December Facebook post as a whole, "would lead a reasonable reader to believe that the *proportion* of *Singaporean* (and not local) PMET employment ha[d] decreased" [emphasis in original] (*SDP v AG* at [114]). He explained that since what the Minister for Manpower had taken issue with in relation to the December Facebook post was the graphical illustration that it contained, attention had to be focused on the meaning that the graphical illustration would convey to a reasonable reader. In that regard, there was "simply *nothing* in [the graphical] illustration itself" [emphasis in original] to give rise to the inference that it referred to "a *proportion* of Singaporean PMETs" [emphasis in original] because, unlike the SDP Article, it did not use the word "proportion" (*SDP v AG* at [115]). Ang J also considered that SDP's "attempt … to disaggregate 'Singaporean' and 'local' PMETs" by excluding SPRs from the ambit of the term "Singaporean" was "problematic" (*SDP v AG* at [116]). He accepted that the term "Singaporean" was used in the December Facebook post, but was of the view that a reasonable reader of the post would nonetheless understand the phrase "[l]ocal PMET employment" in the graphical illustration to be a reference to the employment rates of *both* Singaporean PMETs *and* SPR PMETs as that was the category of PMETs featured in the official data published by the MOM on "local PMET" employment, and SDP could not point to any official data or statistics which disaggregated the terms "Singaporean" and "local" in the way that it contended (*SDP v AG* v [116]).

29 In view of the MOM data that was adduced in evidence by the AG, Ang J held that the second subject statement had been shown to be false. The MOM data showed an increase in the number of local PMETs employed from 2015 to 2018 both in terms of absolute numbers and also as a proportion of all local



Version No 3: 16 Jun 2022 (11:20 hrs)

employment, and its veracity was not disputed by SDP (*SDP v AG* at [120] and [124]). Accordingly, there was no basis to set aside SDP CD-3 in so far as it pertained to the December Facebook post (*SDP v AG* at [125]). As there were no grounds for setting aside any of the SDP CDs, OS 15 was dismissed (*SDP v AG* v [126] and [129]).

### *The decision in* TOC v AG

30 On 19 February 2020, two weeks after the release of the judgment in *SDP v AG*, Belinda Ang Saw Ean J released her decision in *TOC v AG* dismissing TOC's application in OS 118 to set aside the TOC CD. Importantly, as we highlighted earlier (see [2] above), a point of direct conflict between the two decisions was the question of which party bore the burden of proof in an application to set aside a CD under s 17 of the POFMA.

31 In OS 118, TOC did not take a position on the truth of the subject statement identified in the TOC CD and therefore did not seek to argue that that statement was "true", which was a ground for setting aside a CD under s 17(5)(*b*) of the POFMA. In the circumstances, the aforesaid question on the burden of proof in an application under s 17 of the POFMA would not, in fact, have impacted the outcome of OS 118. Nonetheless, Belinda Ang J considered the approach taken in *SDP v AG* to this question and came to a different view, holding that, on a true construction of the statutory language, the burden of proof was on the *statement-maker* to establish one or more of the grounds listed in s 17(5) of the POFMA for setting aside a CD (*TOC v AG* at [20]). She reasoned that an application to set aside a CD under s 17 of the POFMA was not so much an appeal against the issuance of the CD, as an appeal against the Minister's decision to reject an application to cancel or vary the CD under s 19 of the POFMA (*TOC v AG* at [24]). In line with this, s 17(5) framed the legal elements



Version No 3: 16 Jun 2022 (11:20 hrs)

that had to be fulfilled before a CD could be set aside in terms of the *positive* case that the statement-maker had to meet. It followed that the onus was on the statement-maker to establish that it was entitled to have the CD set aside on any of the grounds stipulated in s 17(5) (*TOC v AG* at [27]). Indeed, if TOC were right that the legal burden of proof was on the Minister to persuade the court not to set aside the CD, that would entail reading into s 17 a statutory presumption in favour of the statement-maker, when there was no basis at all for doing so (*TOC v AG* at [30]).

32 Belinda Ang J also disagreed with Ang Cheng Hock J's view in *SDP v AG* that the issuance of a CD amounted to a constraint on the right to freedom of speech conferred by Art 14(1) of the Constitution. She considered that the nature of the speech targeted by the POFMA was not among the categories of speech protected by Art 14, in that the right to free speech pertained to the communication of information rather than *mis*information (*TOC v AG* at [35]). In any case, the issuance of a CD did not inhibit free speech because the statement-maker would be able to maintain the original text of the published material, subject to a notification directing readers to the truth (*TOC v AG* at [36]). Belinda Ang J further noted that the concern of information asymmetry highlighted by Ang Cheng Hock J was not one that Parliament had articulated, and was therefore not an appropriate consideration in construing the POFMA (*TOC v AG* at [43]). Besides, the problem of information asymmetry could be mitigated by shifting the evidential burden to the AG once the statement-maker was able to adduce *prima facie* evidence of the truth of the statement that was the subject of the CD being challenged (*TOC v AG* at [44]).

33 On the substantive issues, TOC advanced two arguments in reliance on s 17(5)(*b*) of the POFMA. First, TOC contended that the subject statement identified in the TOC CD was not a "statement of fact" because it was neither a



Version No 3: 16 Jun 2022 (11:20 hrs)

fact nor an opinion, but rather, a hearsay report of the allegations made by LFL in its press statement. This argument was rejected by Belinda Ang J. She held that for the purposes of s 17 of the POFMA, there existed only two categories of statements: facts and opinions. Notwithstanding that a statement-maker might have no personal knowledge about the truth of a statement and might thus be unable to testify to its veracity, a hearsay statement could nonetheless still be or communicate a statement of fact, as was evident from s 11(4) of the POFMA (*TOC v AG* at [48]). Furthermore, the finding of a "statement of fact" as defined in s 2(2)(*a*) of the POFMA did not depend on the outcome of a verification procedure or fact-finding exercise. Thus, even though the subject statement identified in the TOC CD had yet to be verified by the MHA, this did not prevent it from being a "statement of fact" within the meaning of s 2(2)(*a*) of the POFMA (*TOC v AG* at [49]).

34 TOC's second argument, flowing from its first argument, was that the subject statement identified in the TOC CD was a *true* statement of fact because it was simply a statement that *LFL had made the allegations reported in the TOC Article*, which statement was true. This argument, which Belinda Ang J referred to as the "reporting defence" (*TOC v AG* at [52]), was similarly rejected. Belinda Ang J noted that this argument implicitly relied on TOC's *reinterpretation* of the subject statement identified in the TOC CD to include its own *reporting* of the allegations by LFL (as reproduced in the TOC Article) which constituted the subject statement. It was, however, no longer open to TOC to contest the parameters of the subject statement because it had conceded during the hearing of OS 118 that the relevant subject statement was the one identified in the TOC CD (*TOC v AG* at [55]), and that subject statement consisted *solely* of the allegations by LFL which had been reproduced in the



Version No 3: 16 Jun 2022 (11:20 hrs)

TOC Article. In any case, s 11(4) of the POFMA foreclosed the viability of a reporting defence (*TOC v AG* at [56]).

35 Belinda Ang J held that since the burden fell on TOC to prove the truth of the subject statement identified in the TOC CD, and since it had not produced any evidence in that regard as it did not take any position on the truth of that statement, this would have sufficed for TOC's application in OS 118 to be dismissed (*TOC v AG* at [58]–[59]). The AG had, in any case, also adduced an affidavit by the Deputy Director (Operations Management) of the SPS, Mr Ong Pee Eng ("Mr Ong"), who deposed that the SPS had never applied the execution procedure alleged by LFL nor instructed its officers to apply it in the course of an execution. Belinda Ang J considered that there was no reason to doubt Mr Ong's evidence. She therefore dismissed TOC's application to set aside the TOC CD (*TOC v AG* at [60]).

**The appellants' further applications on appeal**

36 On 16 March 2020, TOC filed CA 47 against Belinda Ang J's decision in *TOC v AG*. Slightly over a week later, SDP filed CA 52 on 25 March 2020 against Ang Cheng Hock J's decision in *SDP v AG*. Subsequently, on 18 June 2020, TOC filed CA/SUM 72/2020 ("SUM 72") for leave to adduce further evidence for use in CA 47. The further evidence consisted of two affidavits filed by a Malaysian lawyer, Mr Zaid Bin Abd Malek ("Mr Zaid"), that would purportedly demonstrate the truth of the allegations by LFL (as reproduced in the TOC Article) which constituted the subject statement identified in the TOC CD. These affidavits attested to Mr Zaid's receipt of information from a former SPS officer about the "'brutal, unlawful' state execution process" that was the subject of the TOC Article. By the time of the hearing of these appeals, however, counsel for TOC, Mr Eugene Singarah Thuraisingam ("Mr Thuraisingam"),



Version No 3: 16 Jun 2022 (11:20 hrs)

accepted that the focus of TOC's arguments on appeal (as we elaborate further below) was no longer on proving the truth of the aforesaid allegations by LFL. We thus make no order on SUM 72.

37 On 15 September 2020, shortly after the parties exchanged their written submissions, SDP filed CA/SUM 97/2020 ("SUM 97") for leave to raise additional grounds in support of its appeal in CA 52. Specifically, SDP sought leave to argue that certain provisions of the POFMA, and, consequently, the SDP CDs, were unconstitutional for inconsistency with the right to freedom of speech conferred by Art 14(1)(*a*) of the Constitution. SUM 97 was filed in view of HC/OS 856/2020 ("OS 856"), another set of proceedings commenced by SDP under s 17 of the POFMA to set aside a CD issued to it on 4 July 2020 by the Minister for National Development. In OS 856, SDP had argued that the POFMA was unconstitutional. Following a query from the judge hearing OS 856 as to whether SDP would be raising that argument in CA 52, SDP made a formal application to this court by way of SUM 97 for leave to do so. We allowed this application at the hearing of these appeals on 17 September 2020, and directed the parties to file supplemental cases on the constitutional point after the hearing.

38 At the hearing of these appeals, TOC indicated that it would be aligning itself with some of SDP's constitutional arguments, and, in consequence, undertook to file an application for leave to have those arguments considered in respect of its appeal. TOC duly filed CA/SUM 98/2020 on 18 September 2020. For the record, we allow this application.



Version No 3: 16 Jun 2022 (11:20 hrs)

**The appellants' arguments on appeal**

39 In these appeals, both SDP and TOC submit that the burden of proof in applications to set aside CDs under s 17 of the POFMA should lie on the AG, and that it should fall on the AG to justify the issuance of the CD(s) in question. It should not fall on the statement-maker to show that the CD(s) in question ought *not* to have been issued.

40 In the SDP appeal, SDP submits that Ang Cheng Hock J was correct to recognise that the first subject statement, upon which SDP CD-1, SDP CD-2 and the second half of SDP CD-3 were based, did *not* arise from the AG's primary interpretation of the relevant portion of the SDP Article, but contends that he erred in going on to find that these CDs could nonetheless be justified based on the AG's *alternative* interpretation of that portion of the article. As for the second subject statement, which was said to have arisen from the graphical illustration in the December Facebook post and which formed the basis for the first half of SDP CD-3, SDP submits that the only reasonable interpretation of the graphical illustration is that in depicting a decrease in "[l]ocal PMET employment", it was referring to the employment of *Singaporean* PMETs only. Since the MOM data adduced by the AG went towards showing that PMET employment among *both Singaporeans and SPRs* was on the rise, the second subject statement had not been shown to be untrue.

41 TOC's main argument in its appeal is that the TOC Article, interpreted contextually, did not present LFL's allegations about the "brutal and unlawful" execution method purportedly employed by the SPS at Changi Prison as a statement of fact. TOC repeats its submission in the court below that the subject statement identified in the TOC CD was simply an even-handed report on the allegations made by LFL about the contingency execution protocols that were



Version No 3: 16 Jun 2022 (11:20 hrs)

said to be adopted at Changi Prison. Applying this interpretation, the subject statement was true given that LFL had indeed made such allegations in its press statement, which was all that the TOC Article was reporting. As we mentioned at [36] above, although TOC earlier filed SUM 72 for leave to admit further evidence in its appeal in a bid to prove the truth of LFL's allegations, by the time of the hearing before us, this was, as Mr Thuraisingam accepted, no longer the focus of TOC's arguments on appeal.

42 Finally, as regards the constitutional challenge to the POFMA, SDP argues that portions of Part 3 of this Act are unconstitutional to the extent that they purport to limit the right to freedom of speech on grounds other than those set out in Art 14(2)(*a*) of the Constitution. This is also the main argument made by TOC on the constitutional issue, although it goes further and submits that, as a result, the whole of Part 3 of the POFMA (among other provisions in the Act), and, consequently, the POFMA in its entirety, is unconstitutional. In the alternative, TOC contends that: (a) at the very least, part of the definition of the term "false" in s 2(2)(*b*) of the POFMA should be struck down as being contrary to the right to freedom of speech; and (b) in the event that this court affirms the constitutionality of the POFMA, a requirement of proportionality should be read into the assessment of "public interest" as defined in s 4 of the Act.

**The issues to be determined**

43 From the foregoing, the common legal issues in the present appeals are these:

(a) the constitutionality of Part 3 of the POFMA and the provisions thereunder;



Version No 3: 16 Jun 2022 (11:20 hrs)

(b) the applicable approach in determining whether a Part 3 Direction (that is to say, a CD or a Stop Communication Direction: see the definition of the term "Part 3 Direction" in s 2(1) of the POFMA) may be set aside under s 17 of the POFMA, including (but not limited to) the relevant principles governing the interpretation of the subject statement(s) identified in a Part 3 Direction; and

(c) the burden and standard of proof in applications to set aside Part 3 Directions under s 17 of the POFMA.

44 In the SDP appeal, these further issues arise:

(a) In relation to the first subject statement, which was the subject statement identified in SDP CD-1, SDP CD-2 and the second half of SDP CD-3:

(i) the proper interpretation of the sentence in the SDP Article that is said to give rise to the first subject statement;

(ii) whether the first subject statement was made or contained in the SDP Article; and

(iii) if it was, whether it was a false statement of fact. (This issue would not arise if the first subject statement was not in fact made or contained in the SDP Article as SDP CD-1, SDP CD-2 and the second half of SDP CD-3 may then be set aside under s 17(5)(*a*) of the POFMA on the ground that the first subject statement was not "communicated in Singapore".)

(b) In relation to the second subject statement, which was the subject statement identified in the first half of SDP CD-3:



Version No 3: 16 Jun 2022 (11:20 hrs)

(i) whether this subject statement reasonably arose from the December Facebook post; and

(ii) if it did, whether it was a false statement of fact. (Similarly, this would not be a live issue if the second subject statement did not reasonably arise from the December Facebook post as the first half of SDP CD-3 may then be aside under s 17(5)(*a*) of the POFMA on the ground that the second subject statement was not "communicated in Singapore".)

45 Where the TOC appeal is concerned, we will consider whether the subject statement identified in the TOC CD is a statement of fact arising from the TOC Article, or whether the TOC Article should instead properly be understood as doing no more than reporting the fact that LFL had made the allegations reproduced in the article, and if so, what the legal significance of this is.

## The constitutionality of Part 3 of the POFMA

### *Whether the constitutionality of the POFMA may be challenged in proceedings under s 17*

46 We begin with the constitutionality of Part 3 of the POFMA and the provisions thereunder. Before we examine the substance of the parties' arguments on this issue, we briefly consider the AG's submission that proceedings under s 17 of the POFMA are not the correct or appropriate means of challenging the constitutionality of this Act (whether in whole or in part) or of any Part 3 Directions issued thereunder. Section 17 of the POFMA states:

> **Appeals to High Court**
>
> **17.**—(1) A person to whom a Part 3 Direction is issued may appeal to the High Court against the Direction.



Version No 3: 16 Jun 2022 (11:20 hrs)

> (2) No appeal may be made to the High Court by any person unless the person has first applied to the Minister mentioned in section 19 to vary or cancel the Part 3 Direction under that section, and the Minister refused the application whether in whole or in part.
>
> (3) An appeal may only be made to the High Court within such period as may be prescribed by Rules of Court.
>
> (4) The High Court must hear and determine any such appeal and may either confirm the Part 3 Direction or set it aside.
>
> (5) The High Court may only set aside a Part 3 Direction on any of the following grounds on an appeal:
>
> > (*a*) the person did not communicate in Singapore the subject statement;
> >
> > (*b*) the subject statement is not a statement of fact, or is a true statement of fact;
> >
> > (*c*) it is not technically possible to comply with the Direction.
>
> (6) A Part 3 Direction that is the subject of an appeal under subsection (1) remains in effect despite the appeal, and only ceases to have effect if it is set aside by the High Court or the Court of Appeal on appeal from the High Court, or if it expires or is cancelled under section 19.
>
> …

47 The AG contends that because the power of the High Court under s 17 of the POFMA is confined to either confirming or setting aside the Part 3 Direction complained of on the limited grounds set out in s 17(5), the High Court has no power to consider or grant any other relief. As against this, SDP contends that the issue of constitutionality is a "threshold issue", and that if the provisions of the POFMA on which a CD (or, as the case may be, a Stop Communication Direction) is based are invalid, the CD (or Stop Communication Direction) would "fall away".

48 With respect, we disagree with the AG's argument on this point. If there is substance to the constitutionality concerns raised by SDP and TOC, then it would undermine the very basis on which the SDP CDs and the TOC CD were



Version No 3: 16 Jun 2022 (11:20 hrs)

issued. To put it another way, if the relevant provisions of the POFMA are in fact invalid for inconsistency with the Constitution, then any Part 3 Direction issued thereunder would be void and of no legal effect. In the circumstances, it is not at all evident to us how we can avoid the issue and undertake a blinkered analysis confined to the grounds for setting aside a Part 3 Direction under s 17(5) of the POFMA. Furthermore, this is the first case to come before us concerning the interpretation and application of the POFMA, and, thus, there is considerable public benefit in assessing its constitutionality. This is also in line with the approach taken in other cases involving (whether directly or indirectly) a challenge to the constitutionality of legislation. For instance, in *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*"), which concerned the police's actions in dispersing a protest on the basis that an offence of public nuisance under the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) was being committed, despite there not having been a direct constitutional challenge to the validity of that Act, the High Court addressed (at [41]–[56]) the applicants' allegations that their Art 14 rights to freedom of speech and/or assembly had been violated by what was alleged to be arbitrary police conduct in dispersing the protest. In contrast to *Chee Siok Chin*, the substantive point on the constitutionality of Part 3 of the POFMA was argued in detail in the written submissions tendered to us. We therefore consider ourselves bound to address SDP's and TOC's arguments on this point.

### *The parties' arguments on constitutionality*

49 Article 14 of the Constitution, which sets out (among other rights) the right to freedom of speech, states:

> **Freedom of speech, assembly and association**
>
> **14.**—(1) Subject to clauses (2) and (3) —



Version No 3: 16 Jun 2022 (11:20 hrs)

> (*a*) every citizen of Singapore has the right to freedom of speech and expression;
>
> …
>
> (2) Parliament may by law impose —
>
> (*a*) on the rights conferred by clause (1)(*a*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, *public order* or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
>
> …
>
> …
>
> [emphasis added]

50 As we mentioned at [42] above, SDP argues that portions of Part 3 of the POFMA are unconstitutional to the extent that they purport to limit the right to freedom of speech on grounds other than those set out in Art 14(2)(*a*) of the Constitution. Its principal argument proceeds as follows. Under s 10(1)(*b*) of the POFMA (which falls within Part 3 of the Act), a Part 3 Direction may be issued if the Minister considers that doing so would be "in the public interest". The expression "in the public interest" is defined in s 4 of the POFMA in the following terms:

> **Meaning of 'in the public interest'**
>
> **4.** For the purposes of this Act and without limiting the generality of the expression, it is in the public interest to do anything if the doing of that thing is necessary or expedient —
>
> (*a*) in the interest of the security of Singapore or any part of Singapore;
>
> (*b*) to protect public health or public finances, or to secure public safety or public tranquillity;
>
> (*c*) in the interest of friendly relations of Singapore with other countries;
>
> (*d*) to prevent any influence of the outcome of an election to the office of President, a general election of Members



Version No 3: 16 Jun 2022 (11:20 hrs)

> of Parliament, a by-election of a Member of Parliament, or a referendum;
>
> (*e*) to prevent incitement of feelings of enmity, hatred or ill-will between different groups of persons;
>
> (*f*) to prevent a diminution of public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board.

51 SDP contends that the "public interest" identified in s 4 of the POFMA is distinct from and wider than "public order", which is one of the grounds set out in Art 14(2)(*a*) of the Constitution as a permitted basis for derogating from the right to freedom of speech conferred by Art 14(1)(*a*). Specifically, Part 3 of the POFMA is said to be unconstitutional in that it purports to limit free speech on the basis of the "public interest" identified in ss 4(*d*) and 4(*f*). These concern, respectively, the prevention of any influence of the outcome of an election to public office or a referendum; and the prevention of a diminution of public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State or a statutory board. It is said that these facets of "public interest" do not come within the ambit of "public order" in Art 14(2)(*a*) of the Constitution.

52 TOC goes further and argues that the whole of Part 3 of the POFMA is contrary to Art 14 of the Constitution, and that, given the centrality of Part 3 to the POFMA as a whole, this Act ought to be struck down in its entirety as unconstitutional (see [42] above). Separately, in support of (among other arguments) its argument that "[the] issuance of a Part 3 CD is a *prima facie* constrain [*sic*] on free speech", TOC emphasises the severity of the consequences arising from an "online location" (as defined in s 2(1) of the POFMA) being declared as a "declared online location" under s 32 of the POFMA. These consequences are set out in ss 33, 34, 36 and 37, which provide



Version No 3: 16 Jun 2022 (11:20 hrs)

that, among other things, once an online location becomes a "declared online location": (a) an internet service provider or internet intermediary may be ordered to disable access to that online location by end-users in Singapore on pain of a substantial fine (see ss 33(3)–33(4) and ss 34(3)–34(5) of the POFMA in relation to, respectively, internet service providers and internet intermediaries); (b) no financial or other material benefit as an inducement or reward for operating the declared online location may be derived (see s 36(1) of the POFMA); and (c) service providers and digital advertising intermediaries must not communicate paid content in Singapore on the declared online location (see s 37 of the POFMA).

53 In the alternative, TOC argues that:

> (a) at the very least, the phrase "whether wholly or in part, and whether on its own or …" in s 2(2)(*b*) of the POFMA, which provides that a statement of fact is false if it is "false or misleading, *whether wholly or in part, and whether on its own or* in the context in which it appears" [emphasis added], ought to be struck down as being contrary to Art 14 of the Constitution; and
>
> (b) in the event that we affirm the constitutionality of the POFMA, a requirement of proportionality ought to be read into s 4 of the Act so as to strike a proper balance between the right to freedom of speech on the one hand and the public interest in protecting against online falsehoods on the other.

54 In response, the AG contends that *false* speech does not even attract any protection under Art 14(1)(*a*) of the Constitution, and, consequently, the issuance of a Part 3 Direction under the POFMA, which Direction is, by definition, targeted at a *false* statement of fact, would not constitute a restriction



Version No 3: 16 Jun 2022 (11:20 hrs)

on the right to free speech conferred by Art 14(1)(*a*). In any event, any restrictions that might be imposed on this right by Part 3 of the POFMA are consistent with the derogations from free speech permitted by Art 14(2)(*a*) of the Constitution.

***The applicable analytical framework***

55 While individuals should be afforded the full measure of their fundamental liberties under the Constitution (as recognised by the Privy Council in *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 at [23]), it is uncontroversial that the right to freedom of speech under Art 14(1)(*a*) may be restricted in the wider interests identified in Art 14(2)(*a*), which include the interest of public order. In *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 ("*Jolovan Wham*"), we set out (at [29]–[32]) the following three-step framework for determining whether a legislation impermissibly derogates from Art 14 ("the *Jolovan Wham* framework"):

(a) First, the court must assess whether the legislation in question does indeed derogate from or restrict any of the rights conferred by Art 14.

(b) Second, if the legislation is found to derogate from or restrict any of the Art 14 rights, the court should then determine whether Parliament had considered the derogation or restriction to be "necessary or expedient" in the interests of one or more of the enumerated purposes set out in Art 14(2) as the permitted grounds for derogating from or restricting these rights.

(c) Third, the court must examine whether, objectively, the derogation from or restriction of the Art 14 right in question falls within



Version No 3: 16 Jun 2022 (11:20 hrs)

any of the purposes enumerated in Art 14(2)(*a*). This is to be assessed by considering whether there is a *nexus* between the purpose of the legislation and one or more of the permitted grounds for derogation or restriction under the relevant limb of Art 14(2).

56 Before we apply the *Jolovan Wham* framework to Part 3 of the POFMA, we first consider the logically anterior question of whether statements that have been identified by the Minister as subject statements – that is to say, as *false* statements of fact (see the definition of the term "subject statement" in s 10(1)(*a*) of the POFMA) – for the purposes of Part 3 of the POFMA enjoy any protection under Art 14(1)(*a*) of the Constitution.

***Whether statements that have been identified as subject statements enjoy any protection under Art 14(1)(a) of the Constitution***

57 Article 14(1)(*a*) of the Constitution confers on every Singapore citizen the right to freedom of speech and expression. There is a tendency to assume, as SDP has in its appeal, that any type of speech is constitutionally protected under Art 14(1)(*a*), including speech that has been identified as a subject statement for the purposes of Part 3 of the POFMA.

58 In *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing*") at [283], and in the minority judgment in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 ("*Ting Choon Meng*") at [117], it was observed that the interest in encouraging the "competition of ideas in the marketplace", which is generally seen as the basis underlying the right to freedom of speech, arguably might not apply to *false* statements. As this court noted in *Review Publishing* at [283] (citing *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 ("*Reynolds*") at 238 *per* Lord Hobhouse of Woodborough), "[s]uch statements



Version No 3: 16 Jun 2022 (11:20 hrs)

are (by definition) inaccurate and society does not derive any value from their publication as 'there is no interest in being misinformed'". Similar observations were made in the minority judgment in *Ting Choon Meng* in relation to s 15 of the version of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed) that was in force as at 31 May 2015 ("the May 2015 version of the POHA"), which allows a person who is the subject of a false statement of fact to obtain an order to prevent or stop the publication of the statement. In assessing the constitutionality of this provision (a point that was not material to the decision of the majority), the minority judgment stated:

> 115 Put simply, *false speech, which has been proven as a matter of fact to be false in a court of law, can contribute little to the marketplace of ideas or to advances in knowledge for the benefit of society as a whole*. This is wholly different and removed from the propagation of ideas or beliefs, which may not immediately be able to be objectively discerned to be true or false, and which through an open dialogue, can then be determined by society as a whole to be 'true'.
>
> 116 The value of free speech depends ultimately on its nature, how it is used, where it occurs and whether it contains an assertion of fact that has been proven to be a falsehood.
>
> 117 In my judgment, *there is little, if any, value in allowing the continued propagation of free speech which has been determined by a court to be false, without the concurrent notification that such speech is false and/or … a direction to the true facts.* ***Such false speech cannot be justified as free speech which should be protected on the basis of any of the theoretical justifications underpinning the liberty of persons relating to free speech***. Therefore, *without even reaching the inquiry as to the nature of the State's interest in regulating such speech, s 15 [of the May 2015 version of the POHA] cannot be said to be unconstitutional because* ***the nature of the speech to which an order made pursuant to s 15 would apply is not protected under Art 14(1) of the Constitution***.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

59 Unlike orders under s 15 of the May 2015 version of the POHA, which are made only upon a *judicial determination* of the falsity of the statement in



Version No 3: 16 Jun 2022 (11:20 hrs)

question, a Part 3 Direction under the POFMA is issued in respect of a statement that *the Minister* has determined to be a false statement of fact. The recipient of a Part 3 Direction must comply with the Direction even prior to any court proceedings that may be brought to challenge the Minister's issuance of the Direction. The question then is whether speech that is *considered by the Minister* to constitute a false statement of fact, but that has yet to be proven to be so in a court of law, is nonetheless protected from restriction by Art 14(1)(*a*) of the Constitution.

60 The AG submits that a falsehood remains a falsehood even before a judicial determination of its falsity, and, therefore, a statement that has been identified by the Minister as a false statement of fact (that is to say, as a subject statement) cannot come within the protection conferred by Art 14(1)(*a*) of the Constitution. With respect, this is incorrect. What the AG's submission amounts to is that a statement is a false statement of fact *because the Minister has identified it to be so* in exercising his powers under Part 3 of the POFMA. We regard this as untenable. The Minister may, after all, be mistaken. Truth and falsehood are ultimately matters to be determined by a court based on the evidence.

61 We think it is more appropriate to characterise the Minister's action in issuing a Part 3 Direction under s 10 of the POFMA as the exercise of a power to identify statements of fact that he regards as false, and to act upon that belief in the interest of arresting their swift online spread. The Minister's assessment that a false statement of fact has been made is unquestionably, and, indeed, uncontroversially, *subject to a final determination by the court* as to whether or not it is correct. This is precisely the subject of the procedure for setting aside a Part 3 Direction under s 17 of the POFMA. In our judgment, a statement that has been identified by the Minister as a false statement of fact under Part 3 of



Version No 3: 16 Jun 2022 (11:20 hrs)

the POFMA nonetheless continues to enjoy protection under Art 14(1)(*a*) of the Constitution, at least until it has been *judicially determined* to be indeed a false statement of fact. It follows that the issuance of a Part 3 Direction, which must be complied with once it is issued, is an exercise of state power against speech that remains constitutionally protected speech pending a judicial determination as to whether or not it constitutes a false statement of fact. The constitutionality of a Part 3 Direction therefore falls to be scrutinised under Art 14. Having disposed of this preliminary point, we turn to the first step under the *Jolovan Wham* framework, which is to examine whether the issuance of a Part 3 Direction has such an effect that it entails restricting the right to free speech of the communicator of a subject statement under Art 14(1)(*a*) of the Constitution.

### *Whether the issuance of a Part 3 Direction restricts the right to freedom of speech of the communicator of a subject statement*

62 We begin our analysis of this issue by outlining the impact of a Part 3 Direction on the communicator of the subject statement identified in the Direction. Section 11 of the POFMA explains the nature of a CD, as well as the obligations that it places upon the communicator of the subject statement identified therein, as follows:

> **Correction Direction**
>
> **11.**—(1) A Correction Direction is one issued to a person who communicated the subject statement in Singapore, requiring the person to communicate in Singapore in the specified form and manner, to a specified person or description of persons (if any), and by the specified time, a notice (called in this Part a correction notice) that contains one or both of the following:
>
> (*a*) a statement, in such terms as may be specified, that the subject statement is false, or that the specified material contains a false statement of fact;
>
> (*b*) a specified statement of fact, or a reference to a specified location where the specified statement of fact may be found, or both.



Version No 3: 16 Jun 2022 (11:20 hrs)

> (2) A Correction Direction may require the person to whom it is issued to communicate in Singapore a correction notice in a specified online location.
>
> (3) A Correction Direction may also require the person to whom it is issued to do one or both of the following:
>
> > (*a*) to communicate in Singapore the correction notice by placing it in the specified proximity to every copy of the following that is communicated by the person in Singapore:
> >
> > > (i) the false statement of fact;
> > >
> > > (ii) a substantially similar statement;
> >
> > (*b*) to publish the correction notice in the specified manner in a specified newspaper or other printed publication of Singapore.
>
> (4) A person who communicated a false statement of fact in Singapore may be issued a Correction Direction even if the person does not know or has no reason to believe that the statement is false.
>
> (5) In this section —
>
> > (*a*) 'specified' means specified in the Correction Direction; and
> >
> > (*b*) a person does not communicate a statement in Singapore merely by doing any act for the purpose of, or that is incidental to, the provision of —
> >
> > > (i) an internet intermediary service;
> > >
> > > (ii) a telecommunication service;
> > >
> > > (iii) a service of giving the public access to the internet; or
> > >
> > > (iv) a computing resource service.

63 In a similar vein, s 12 of the POFMA provides as follows in respect of a Stop Communication Direction:

> **Stop Communication Direction**
>
> **12.**—(1) A Stop Communication Direction is one issued to a person who communicated the subject statement in Singapore, requiring the person to stop communicating in Singapore the subject statement by the specified time.



Version No 3: 16 Jun 2022 (11:20 hrs)

> (2) A Stop Communication Direction may also require the person to whom it is issued to stop communicating any statement that is substantially similar to the subject statement.
>
> (3) A Stop Communication Direction may also require the person to whom it is issued to do one or both of the following:
>
> > (*a*) to communicate in Singapore a correction notice in the specified form and manner, to a specified person or description of persons (if any), and by the specified time;
> >
> > (*b*) to publish a correction notice in the specified manner in a specified newspaper or other printed publication of Singapore.
>
> (4) A person who communicated a false statement of fact in Singapore may be issued a Stop Communication Direction even if the person does not know or has no reason to believe that the statement is false.
>
> …
>
> (7) In this section —
>
> > (*a*) 'specified' means specified in the Stop Communication Direction;
> >
> > (*b*) 'stop communicating', in relation to a statement, means taking the necessary steps to ensure that the statement is no longer available on or through the internet to end-users in Singapore, including (if necessary) the removal of the statement from an online location; and
> >
> > (*c*) a person does not communicate a statement in Singapore merely by doing any act for the purpose of, or that is incidental to, the provision of —
> >
> > > (i) an internet intermediary service;
> > >
> > > (ii) a telecommunication service;
> > >
> > > (iii) a service of giving the public access to the internet; or
> > >
> > > (iv) a computing resource service.

64 It is evident that the issuance of a CD requires the communicator of the subject statement identified in the CD to communicate a correction notice "in the specified form and manner", explaining either that the subject statement is false, or that the material in respect of which the CD is issued contains a false



Version No 3: 16 Jun 2022 (11:20 hrs)

statement of fact (see s 11(1)(*a*) of the POFMA). The same applies in relation to a Stop Communication Direction where it contains a requirement that the communicator of the subject statement put up a correction notice (see s 12(3) of the POFMA). The POFMA does not prescribe the form which a correction notice must take, leaving it to the Minister to formulate the language and terms of the correction notice in each case.

65 As we highlighted earlier (see [32] above), whether the issuance of a Part 3 Direction in and of itself constitutes a restriction on the right to freedom of speech was one of the major points of divergence in the High Court decisions below. In *SDP v AG*, Ang Cheng Hock J was of the view that in an application to set aside a CD under s 17 of the POFMA, the burden of proof lay on the Minister to prove the facts warranting the issuance of the CD because "it [was] the Minister who [was] contending before the Court that the [statement-maker's] constitutional right to free speech should be constrained by the CD … and … who desire[d] [the] Court to give judgment that the [statement-maker's] rights should be curtailed" (*SDP v AG* at [37]). In other words, Ang Cheng Hock J regarded the issuance of a CD as imposing, in and of itself, a restriction on the right to free speech. In *TOC v AG*, however, Belinda Ang J differed on the legal effect of the constraint placed by a CD on the statement-maker, and considered that the issuance of a CD did not, in and of itself, restrict the statement-maker's right to free speech (*TOC v AG* at [36]–[37]):

> 36 *A Part 3 CD does not inhibit free speech because it does not prevent the statement-maker from maintaining the original text of its published material. Rather, a Part 3 CD is akin to the remedy provided under s 15(3) of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed)* [that is to say, the May 2015 version of the POHA as defined at [58] above]*, which 'does not restrict the speaker's freedom of speech' but only requires a notification and/or a direction directing readers to the truth*: see *Ting Choon Meng* at [111]. In [a] similar vein, the statement-maker's only obligation in relation to a Part 3 CD issued under the POFMA is to insert a Correction Notice within its published



Version No 3: 16 Jun 2022 (11:20 hrs)

> material, which allows viewers to compare the competing accounts of facts and make an individual assessment based on the available evidence.
>
> 37 In this regard, a Part 3 CD might be characterised as the Minister's response, consonant with Prof Thio Li-Ann's observation that a general 'right to reply' facilitates the search for truth in Thio Li-Ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at para 14.013:
>
> > … [O]ne might locate the right to reply to inaccurate or offensive statements or ideas disseminated to the public by a legally regulated medium of communication as a corrective to misinformation. It promotes observance of the principle of *audi alteram partem* (hear the other side), in service of a balanced inquiry, which is a safeguard against its antithesis, a self-satisfied ignorance. …
>
> [emphasis added]

66 The paragraph in the minority judgment in *Ting Choon Meng* which Belinda Ang J cited at [36] of *TOC v AG* (namely, *Ting Choon Meng* at [111]) explains why orders under s 15 of the May 2015 version of the POHA would *not* constrain the right to free speech at all (assuming that this right applies to *false* statements as well), and reads as follows:

> In fact, s 15 does not inhibit or prevent free speech at all or even materially limit it. *A speaker is free to speak, notwithstanding s 15, even if what he says is objectively false and even if a court of law has found it to be false. Even then, the speaker may continue to publish that falsehood.* But what s 15 does contemplate is that, in that event, the court may require him to draw attention to the falsehood if the court is of the view that it is just and equitable to do so (under s 15(3)(*b*)). Read in that light, ***s 15 does not restrict the speaker's freedom of speech, but merely constrains the publication of speech that has been proven to be false without a notification that it has been so proven and/or without a direction to where the truth may be found***. [emphasis added in italics and bold italics]

67 Although the aforesaid observations in the minority judgment in *Ting Choon Meng* were made in the context of orders granted under s 15 of the May 2015 version of the POHA, which (as we noted at [59] above) come into play



Version No 3: 16 Jun 2022 (11:20 hrs)

only after the court has determined the statement in question to be false, they nonetheless have some bearing on our assessment of the effect of a CD issued under Part 3 of the POFMA. In our judgment, the issuance of a CD does not in fact curtail the right of the communicator of the subject statement identified in the CD to continue publishing the communicated material, including the alleged falsehood. Section 11(1) of the POFMA only requires the communicator of the subject statement to put up a correction notice "in the specified form and manner" highlighting what the Minister has identified as the alleged falsehood (see [62] and [64] above). The communicator of the subject statement is not required to modify the content of the communicated material; nor is it prevented from modifying, if it so wishes, the content of that material. In short, the communicator of the subject statement remains free to speak in respect of the communicated material, save that it must also put up the specified correction notice in respect of that material.

68 That, however, is not the end of the matter. The fact that the communicator of a subject statement may, despite the issuance of a CD to it, continue to publish the communicated material (albeit subject to its also putting up the specified correction notice) indicates that its *positive* right to free speech has not been impacted. TOC contends, though, that a necessary corollary of the right to free speech is the *negative* right not to be required to speak, relying on the doctrine of compelled speech drawn from the United States' constitutional law landscape. TOC argues that the mechanism of a CD, by requiring the communicator of the subject statement identified therein to put up a correction notice, in effect compels the latter to defame itself by admitting that it has made a false statement of fact, and this too amounts to a restriction on the right to free speech.



Version No 3: 16 Jun 2022 (11:20 hrs)

69 We first consider the nature of this aspect of the right to freedom of speech, which has yet to be properly considered or recognised in our jurisprudence. As TOC has pointed out, the doctrine of compelled speech, which has its roots in the jurisprudence of the United States (where it remains good law: see *National Institute of Family & Life Advocates v Becerra* (2018) 138 S Ct 2361), seeks to protect individuals from being compelled to express views or opinions that they do not hold, contrary to the constitutional guarantee of free speech under the First Amendment to the Constitution of the United States (the "First Amendment").

70 In support of its submissions on the doctrine of compelled speech, TOC cited the United States case of *Wooley v Maynard* 430 US 705 (1977) ("*Wooley v Maynard*"). There, a follower of the Jehovah's Witnesses was tried and convicted in the District Court of Lebanon, New Hampshire, of obscuring the state motto "Live Free or Die", which was required to be embossed on his automobile licence plates in accordance with state law. He and his wife, who was also a Jehovah's Witnesses follower, then brought an action in the District Court for the District of New Hampshire, seeking injunctive and declaratory relief against the enforcement of New Hampshire's laws in so far as they required the state motto to be displayed on automobile licence plates and made it an offence to obscure the state motto in this regard. Following a number of appeals, the case was eventually heard before the Supreme Court of the United States. Chief Justice Burger, delivering the majority opinion of the court, affirmed the proposition that "the right of freedom of thought protected by the First Amendment against state action include[d] both the right to speak freely and the right to refrain from speaking at all" (*Wooley v Maynard* at 714). He went on to classify the right to speak and the right to refrain from speaking as "complementary components of the broader concept of 'individual freedom of



Version No 3: 16 Jun 2022 (11:20 hrs)

mind'" (*Wooley v Maynard* at 714), which protected "the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable" (*Wooley v Maynard* at 715). The majority therefore held that the prohibition against obscuring the state motto on automobile licence plates was a violation of the complainants' First Amendment right to avoid becoming a courier for that motto (*Wooley v Maynard* at 717). We observe here that the majority's decision appears to be based on a violation of the complainants' right to *freedom of belief*, which is not in issue in the present appeals. Thus, strictly speaking, the majority's decision in *Wooley v Maynard* is of limited assistance to TOC's case that the POFMA violates its right to *freedom of speech* under Art 14(1)(*a*) of the Constitution, in terms of its negative right not to be compelled to advocate a position with which it disagrees.

71 The dissenting minority (consisting of Justices Rehnquist (as he then was) and Blackmun) disagreed that New Hampshire's laws forced the complainants "to proselytize, or to advocate an ideological point of view" (*Wooley v Maynard* at 720). The minority drew a distinction between *communicating* a point of view, and "*asserting as true*" [emphasis added] that same point of view (*Wooley v Maynard* at 721). The minority found that New Hampshire's laws merely required the former as regards the state motto "Live Free or Die", but did not compel the complainants to endorse it as they were free to express their disagreement with it (*Wooley v Maynard* at 722):

> … [T]here is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or Die' and that they violently disagree with the connotations of that motto. Since any implication that they affirm the motto can be so easily displaced, I cannot agree that the state statutory system for



Version No 3: 16 Jun 2022 (11:20 hrs)

> motor vehicle identification and tourist promotion may be invalidated under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto.

72 We observe that the reasoning of Justices Rehnquist and Blackmun (which we prefer to that of the majority in *Wooley v Maynard*) broadly accords with the observation in the minority judgment in *Ting Choon Meng* at [111] (see [66] above) that free speech is not inhibited, prevented or materially limited by the making of an order under s 15 of the May 2015 version of the POHA as the false statement in question may continue to be published, albeit subject to the requirement that a qualification be appended to indicate its falsity and/or where the truth may be found. Similarly, one's freedom *not* to speak so as not to be forced to advance a position with which one disagrees cannot be said to have been inhibited, prevented or materially limited if one is compelled to display that position, but retains the freedom to qualify it appropriately in an equally visible manner. As for the limits on what may reasonably be said or done for the purposes of qualifying that position in the context of a CD issued under Part 3 of the POFMA, these are set out at [77]–[78] below.

73 The negative aspect of the right to freedom of speech and expression was also accepted by the UK Supreme Court ("the UKSC") in *Lee v Ashers Baking Co Ltd and others* [2018] 3 WLR 1294 ("*Lee v Ashers*"), which concerned a claim that the owners of a bakery ("Ashers Bakery") had engaged in discrimination on the grounds of sexual orientation, religious belief or political opinion. A gay man had placed an order at Ashers Bakery for a customised cake decorated with a pro-LGBT organisation's logo alongside the caption "Support Gay Marriage". A few days after the customer placed the order, the owners of Ashers Bakery contacted him to inform him that his order could not be accepted because their shop was a Christian business and they



Version No 3: 16 Jun 2022 (11:20 hrs)

could not, in good conscience, make the cake as requested. The owners sincerely believed that the only form of marriage consistent with their religious beliefs was that between a man and a woman.

74 In delivering the opinion of the UKSC, Baroness Hale of Richmond PSC first noted that the right to *freedom of thought* protected by the United States' First Amendment applied similarly in the context of Arts 9 and 10 of the European Convention on Human Rights ("the ECHR"), which concern, respectively, the right to freedom of thought, conscience and religion, and the right to freedom of expression. The UKSC affirmed the applicability of the doctrine of compelled speech on the particular facts before it, on the ground that if Ashers Bakery were required, on pain of liability in damages, to make the cake ordered by the customer, it would be forced to express a message with which it deeply disagreed (*Lee v Ashers* at [54]). Although Ashers Bakery could not refuse to provide the cake to the customer on the basis of his homosexuality, it was entitled to refuse to do so on the basis that it would otherwise be compelled to convey a message with which it profoundly disagreed.

75 The plain text of Art 14(1) of the Constitution does not elaborate on the ambit of the right to freedom of speech. In contrast, Art 10 of the ECHR states:

> **ARTICLE 10**
>
> **Freedom of expression**
>
> 1. Everyone has the right to freedom of expression. *This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.* This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> ...
>
> [emphasis added]



Version No 3: 16 Jun 2022 (11:20 hrs)

As Baroness Hale observed in *Lee v Ashers*, "[t]he freedom not to be obliged to hold or to manifest beliefs that one does not hold" is protected by Art 10 of the ECHR (*Lee v Ashers* at [52]). This is a principle that applies not only to religious beliefs, but also to political opinions.

76 The facts in *Lee v Ashers* are quite different from those in *Wooley v Maynard*. Unlike the complainants in *Wooley v Maynard*, who were not precluded from expressing their disagreement with the New Hampshire state motto "Live Free or Die", if Ashers Bakery had been required to provide the cake decorated with the pro-gay marriage caption, it would have had to advance a message with which it profoundly disagreed, and it *did not* have the option of expressing its disagreement with that message in the same medium (namely, on the cake). Compelling Ashers Bakery to provide the cake displaying the pro-gay marriage caption in such circumstances would therefore have constituted a case of compelled speech. That said, although the factual situation in *Lee v Ashers* differs from that in *Wooley v Maynard*, the UKSC's decision, like the majority's decision in *Wooley v Maynard* (which, as we mentioned at [70] above, seems to be premised on the right to freedom of belief), appears to be based on "[t]he *freedom not to be obliged to hold or to manifest beliefs that one does not hold*" [emphasis added] that is expressly protected by Art 10 of the ECHR (*Lee v Ashers* at [52]). *Lee v Ashers* is therefore similarly of limited assistance to TOC's case that the POFMA violates the negative aspect of the constitutional right to freedom of *speech*.

77 In our judgment, if TOC is to contend successfully that the issuance of the TOC CD constitutes compelled speech, it would have to show that it was actually or effectively prevented from communicating, in an equally visible way as the correction notice it was required to put up, that the TOC CD was being challenged under s 17 of the POFMA, and that whether there were any grounds



Version No 3: 16 Jun 2022 (11:20 hrs)

for setting it aside pursuant to s 17(5) remained subject to judicial determination. However, TOC was not prevented from communicating this as long as it did so in a factually accurate manner.

78 In this regard, as we pointed out at [67] above, where a CD is issued, s 11(1) of the POFMA only requires the communicator of the subject statement identified in the CD to put up a correction notice "in the specified form and manner" highlighting what the Minister has identified as the alleged falsehood. It does not prevent the communicator of the subject statement from making clear, in a factually accurate manner, that it is challenging the CD in accordance with the relevant statutory provisions in so far as any of the grounds for setting aside the CD under s 17(5) of the POFMA might be applicable. For instance, the communicator of the subject statement may seek to argue that the subject statement is "a true statement of fact" (see s 17(5)(*b*) of the POFMA). In such circumstances, if the court finds the subject statement to be indeed a true statement of fact, the CD may be set aside pursuant to s 17(4) read with s 17(5)(*b*) of the POFMA. Conversely, if the court affirms the Minister's assessment that the subject statement is a false statement of fact, then the issuance of the CD (assuming, contrary to what we held at [67] above, that it has the effect of restricting free speech) would not have violated the right to freedom of speech of the communicator of the subject statement, given the view we have expressed on occasion that, arguably, this constitutional right might not apply to speech that has been judicially determined to be *false* (see [58] above).

79 We therefore do not think that TOC has demonstrated that *on the facts of its appeal*, the issuance of the TOC CD constitutes compelled speech. It is thus unnecessary for us to come to a conclusive view as to whether the doctrine of compelled speech forms part of Singapore's constitutional law landscape,



Version No 3: 16 Jun 2022 (11:20 hrs)

and we leave that to be decided in a more appropriate case in the future when the issue is squarely before us.

80 Given our dismissal of TOC's arguments on the doctrine of compelled speech and our earlier holding that the issuance of a CD under Part 3 of the POFMA does not, in and of itself, restrict the right to free speech of the communicator of the subject statement identified in the CD, it is also unnecessary for us to embark on the second and third steps of the *Jolovan Wham* framework. Nonetheless, as detailed arguments were made by the parties on the issues to be decided by the court under these two steps, we set out our views on these issues below, on the assumption (for analytical purposes) that the issuance of a CD under Part 3 of the POFMA does restrict the right to free speech.

### *Whether Part 3 of the POFMA is justifiable under Art 14(2)(*a*) of the Constitution*

81 To recapitulate, when considering whether a legislation impermissibly restricts any of the rights conferred by Art 14(1) of the Constitution, if the court finds (under the first step of the *Jolovan Wham* framework) that the legislation does indeed restrict one or more of these rights, it then has to determine whether the restriction may be justified on any of the grounds set out in Art 14(2) for restricting these rights. In this regard, there are two points that the court is concerned with: first, whether Parliament considered it "necessary or expedient" to impose the restriction; and, second, whether there is a nexus between the purpose of the legislation containing the restriction and one or more of the Art 14(2) grounds. These correspond to the second and third steps under the *Jolovan Wham* framework (see, respectively, [55(b)] and [55(c)] above). Although the constitutional challenge to the POFMA in the present appeals is directed specifically at Part 3 of the Act, for completeness, we analyse these two points with reference to the Act as a whole.



Version No 3: 16 Jun 2022 (11:20 hrs)

82 As we summarised earlier (see [50]–[51] above), the core plank of SDP's constitutional challenge to Part 3 of the POFMA is that the "public interest" identified in s 4 of the POFMA, which underlies the Minister's exercise of his discretion to issue a Part 3 Direction, is distinct from and wider than "public order", which is listed in Art 14(2)(*a*) of the Constitution as one of the permitted grounds for restricting the right to freedom of speech. Specifically, SDP disputes that the public interest in preventing any influence of the outcome of an election to public office or a referendum in Singapore (see s 4(*d*) of the POFMA), or in preventing a diminution of public confidence in the Government, an Organ of State or a statutory board (see s 4(*f*) of the POFMA), can be an adequate basis for restricting the right to free speech on the ground of public order. SDP also contends that in enacting the POFMA, Parliament gave "no thought … to the question of the 'necessity or expediency' of Part 3 Directions issued under the [ss 4(*d*) and 4(*f*) limbs] of 'public interest' to achieve or protect 'public order'". On its part, TOC argues that to the extent that Part 3 of the POFMA allows the Minister to impose restrictions on free speech even without a prior judicial determination of the falsity of the speech in question and without requiring proof of the harmfulness of such speech, this goes beyond the ambit of the public order exception to free speech under Art 14(2)(*a*) of the Constitution.

83 In rebuttal, the AG submits that Part 3 of the POFMA, as well as ss 4(*d*) and 4(*f*) thereof, are justified on the grounds of national security, friendly relations with other countries and public order under Art 14(2)(*a*) of the Constitution.



Version No 3: 16 Jun 2022 (11:20 hrs)

*Whether Parliament considered the POFMA to be "necessary or expedient"*

84 We first consider the broad purposes of the POFMA and the motivations behind its enactment, which will shed light on whether Parliament considered this Act (including Part 3 thereof) to be "necessary or expedient" in the interests of national security, friendly relations with other countries and/or public order.

85 The long title of the POFMA states that it is:

> An Act *to prevent the electronic communication in Singapore of false statements of fact, to suppress support for and counteract the effects of such communication*, to safeguard against the use of online accounts for such communication and for information manipulation, to enable measures to be taken to enhance transparency of online political advertisements, and for related matters. [emphasis added]

86 The same points are spelt out in greater detail in s 5 of the POFMA. This section, which is titled "Purpose of Act", provides that the purpose of the POFMA is, among other things, "to prevent the communication of false statements of fact in Singapore and to enable measures to be taken to counteract the effects of such communication", and "to suppress … support of online locations that repeatedly communicate false statements of fact in Singapore" (see, respectively, ss 5(*a*) and 5(*b*) of the POFMA).

87 The reason for Parliament's focus on preventing and counteracting the spread of online falsehoods is readily apparent from the legislative material pertaining to the enactment of the POFMA. In the opening address by the Minister for Law, Mr K Shanmugam ("the Minister for Law"), at the second reading of the Protection from Online Falsehoods and Manipulation Bill (Bill No 10/2019) ("the POFMA Bill"), the societal backdrop against which the POFMA was enacted was explained as follows (see *Singapore Parliamentary*



Version No 3: 16 Jun 2022 (11:20 hrs)

*Debates, Official Report* (7 May 2019) vol 94 ("*Singapore Parliamentary Debates* (7 May 2019) vol 94")):

> … [W]hat is the fundamental problem in many countries today? It is really *a serious loss of trust in governments, in institutions both public and private, including the political system, the media, professions, businesses, financial institutions and so on*.
>
> What is the reason for the loss of trust?
>
> Several factors; I will mention four.
>
> First, inequality and inequity. Second, political systems not delivering. These developments have been aided by at least two other factors: the way traditional media has been behaving; and second, the effect of new media.
>
> …
>
> *In an active democracy, the foundations include: trust, free speech and the infrastructure of fact. The four elements I referred to, have combined, like a battering ram, to damage, destroy these foundations*.
>
> When people lose trust, when they lose faith, when there is no proper public discourse, when infrastructure of fact is damaged, then democracy, societies are at serious risk.
>
> …
>
> *This Bill is an attempt to deal with one part of the problem:* ***The serious problems arising from falsehoods spread through new media. And to try and help support the infrastructure of fact and promote honest speech in public discourse.*** …
>
> …
>
> [emphasis added in italics and bold italics]

88 The above extract is enlightening in that it explains the overriding purpose of the POFMA and, more importantly, the far-reaching ills that Parliament had envisaged would arise if online falsehoods were allowed to proliferate unchecked. As the Minister for Law explained, the POFMA is the Legislature's response to the threat of "a serious loss of trust in governments, in institutions[,] both public and private," and a weakening of the infrastructure of fact caused by "*falsehoods spread through new media*" [emphasis added]. In



Version No 3: 16 Jun 2022 (11:20 hrs)

the long run, this could result in "honest speech in public discourse", which is one of the key foundations for democracy to work, being undermined or even rendered impossible.

89 In our judgment, it is clear beyond doubt that Parliament did consider the POFMA to be "necessary or expedient" in the interests of national security and public order. The discussion in Parliament on "[t]he serious problems arising from falsehoods spread through new media" is especially relevant. In highlighting the prevalence of online falsehoods spread by foreign countries, the Minister for Law spoke of the shift in the "rules of war" (see *Singapore Parliamentary Debates* (7 May 2019) vol 94):

> … [T]he 'rules of war' have changed. Non-military measures, including information operations, … can be harnessed to … in turn harness what [is known as] the 'protest potential of the population'. What does it mean? *Information operations can target and create internal opposition as a 'permanently operating front' throughout the target country. … Even though military or overt violent measures are not being used, the target states' national sovereignty and security are threatened and violated.* …
>
> …
>
> *Singapore is a specific and vulnerable target for some very precise reasons*. It has military superiority in this region … [a]nd, therefore, militarily weaker countries will then focus on other means to weaken Singapore, sap our will from inside, create deep internal divisions and keep us in a permanent state of internal dissension.
>
> [emphasis added]

90 The Minister of State for National Development, Mr Zaqy Mohamad, spoke even more pointedly of the pernicious effect of online falsehoods on national security, likening it to "terrorism" in its design "to cause divisions and distrust in society" (see *Singapore Parliamentary Debates, Official Report* (8 May 2019) vol 94 ("*Singapore Parliamentary Debates* (8 May 2019) vol 94")).



Version No 3: 16 Jun 2022 (11:20 hrs)

91 It was recognised that the proliferation of online falsehoods could seriously damage public order, apart from posing a threat to national security. The Minister for Law gave examples of street protests and demonstrations in France and Germany that sprouted from falsehoods that had been deliberately circulated on social media. Several Members of Parliament also spoke of law and order concerns arising from online falsehoods, as well as "a pattern of falsehoods proliferating in the wake of serious public order incidents … [seeking] to exacerbate social divisions" (see *Singapore Parliamentary Debates* (8 May 2019) vol 94 (Melvin Yong Yik Chye, Member of Parliament)).

92 SDP contends that in enacting the POFMA, Parliament did not specifically consider whether restricting the right to free speech by reference to the public interest identified in ss 4(*d*) and 4(*f*) of the Act was "necessary or expedient" to achieve or protect public order for the purposes of Art 14(2)(*a*) of the Constitution (see [82] above). In our judgment, this submission has no merit. The opening address of the Minister for Law at the second reading of the POFMA Bill (quoted at [87] above) takes, as its starting premise, the "serious loss of trust in governments, in institutions[,] both public and private," as a "fundamental problem" corroding the foundations of democracy today. This clearly reflects s 4(*f*) of the POFMA, which is the public interest in "prevent[ing] a diminution of public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government" and other key public institutions. As for the public interest in preventing any improper influence over the electoral process (see s 4(*d*) of the POFMA), we find this concern amply expressed in the numerous examples given by the Minister for Law of how the spread of online falsehoods had turned public perception in elections around the world (such as in Australia and Germany, and, more notably, in the June 2016 Brexit referendum in the UK and the November 2016



Version No 3: 16 Jun 2022 (11:20 hrs)

United States presidential election: see *Singapore Parliamentary Debates* (7 May 2019) vol 94). Affecting the outcome of elections by means of online falsehoods is, without question, a key aspect – indeed, *the* key aspect – of how the democratic process may be illegitimately undermined by such falsehoods (see, for example, *Singapore Parliamentary Debates* (8 May 2019) vol 94 (Mohamed Irshad, Member of Parliament)).

93 We are therefore satisfied, from our examination of the legislative material, that Parliament did consider the POFMA to be necessitated by concerns, at least, of national security and public order. We next consider whether there is a nexus between the purpose of the POFMA and the grounds set out in Art 14(2)(*a*) of the Constitution for derogating from the right to freedom of speech, focusing in particular on the scope of the "public order" ground.

*Whether there is a nexus between the purpose of the POFMA and the exceptions to free speech under Art 14(2)(*a*) of the Constitution*

94 Although the purpose of the POFMA, as stated in s 5 of the Act, is (among other things) to prevent the communication of false statements of fact in Singapore and to counteract the effects of such communication (see [86] above), the catalyst for the Minister to take action, whether under Part 3 and/or Part 4 of the POFMA, against any statement which he considers to be a false statement of fact is his opinion that it is "in the public interest" to do so: see s 10(1)(*b*) in relation to Part 3 Directions, and s 20(1)(*b*) in relation to Part 4 Directions (that is to say, Targeted Correction Directions, Disabling Directions and General Correction Directions: see the definition of the term "Part 4 Direction" in s 2(1) of the POFMA). We set out again below the definition of the expression "in the public interest" in s 4 of the POFMA, which we referred to earlier (at [50] above):



Version No 3: 16 Jun 2022 (11:20 hrs)

> **Meaning of 'in the public interest'**
>
> **4.** For the purposes of this Act and without limiting the generality of the expression, it is in the public interest to do anything if the doing of that thing is necessary or expedient —
>
> (*a*) in the interest of the security of Singapore or any part of Singapore;
>
> (*b*) to protect public health or public finances, or to secure public safety or public tranquillity;
>
> (*c*) in the interest of friendly relations of Singapore with other countries;
>
> (*d*) to prevent any influence of the outcome of an election to the office of President, a general election of Members of Parliament, a by-election of a Member of Parliament, or a referendum;
>
> (*e*) to prevent incitement of feelings of enmity, hatred or ill-will between different groups of persons; or
>
> (*f*) to prevent a diminution of public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board.

95 Given the contours of the parties' arguments, the main inquiry in this section of our judgment pertains to whether the public interest underlying the issuance of Part 3 Directions under the POFMA – specifically, the public interest identified in ss 4(*d*) and 4(*f*) – falls within the ambit of the public order ground in Art 14(2)(*a*) of the Constitution for derogating from the right to free speech. In SDP's submission (which, in substance, is also TOC's submission), this is the real point of contention because even if the remaining limbs of what constitutes "public interest" for the purposes of the POFMA might fall under one or more of the other Art 14(2)(*a*) grounds for derogating from the right to free speech, the SDP CDs can only have been issued on the basis of the public interest identified in either s 4(*d*) or s 4(*f*) of the POFMA. The AG too has primarily aligned the public interest identified in ss 4(*d*) and 4(*f*) of the POFMA with the public order ground for derogating from the right to free speech, and



Version No 3: 16 Jun 2022 (11:20 hrs)

not with any of the other grounds set out in Art 14(2)(*a*) of the Constitution, such as national security or friendly relations with other countries. Accordingly, for SDP to succeed in its constitutional arguments, what it needs to do is to persuade us that the public interest identified in ss 4(*d*) and 4(*f*) of the POFMA does not fall within the ambit of the public order exception to free speech under Art 14(2)(*a*) of the Constitution. With this in mind, we turn to consider what "public order" means in the context of Art 14(2)(*a*).

96 SDP contends that the term "public order" should not be read as widely as has been done in case precedents, such as in *Chee Siok Chin* and in the minority judgment in *Ting Choon Meng* at [119]. In *Chee Siok Chin*, V K Rajah J (as he then was) noted that the legislative power to circumscribe the rights conferred by Art 14 of the Constitution was delineated by what was "in the interest of public order", which was wider than and not confined to "the maintenance of public order" (at [50]):

> … [T]he legislative power to circumscribe the rights conferred by Art 14 of the Constitution is, *inter alia*, delineated by what is 'in the interest of public order' and not confined to 'the maintenance of public order'. ***This is a much wider legislative remit that allows Parliament to take a prophylactic approach in the maintenance of public order. This necessarily will include laws that are not purely designed or crafted for the immediate or direct maintenance of public order***, according to Mahendra P Singh, *V N Shukla's Constitution of India* (Eastern Book Company, 9th Ed, 1996) at p 113:
>
> > The expression "public order" is synonymous with public peace, safety, and tranquillity. It signifies absence of disorder involving breaches of local significance in contradistinction to national upheavals such as revolution, civil strife or war, affecting the security of the State. To illustrate, the State may, in the interests of public order, prohibit and punish the causing of loud and raucous noise in streets and public places by means of sound amplifying instruments; *regulate the hours and place of public discussions and the use of public streets for the purpose of exercising*



Version No 3: 16 Jun 2022 (11:20 hrs)

> *freedom; provide for expulsion of hecklers from meetings and assemblies; punish utterances tending to incite breach of the peace or riot and use of threatening, abusive or insulting words or behaviour in any public place or at any public meeting* with intent to cause a breach of the peace or whereby breach of the peace is likely to be caused, and all such acts as would endanger public safety. …
>
> [emphasis in original in italics; emphasis added in bold italics]

97 SDP relies instead on the decision of the High Court in *Public Prosecutor v Phua Keng Tong and another* [1985–1986] SLR(R) 545 ("*Phua Keng Tong*"), where L P Thean J (as he then was), relying on Indian jurisprudence, seemed to articulate a narrower definition of "public order" as being "synonymous with 'public safety and tranquillity'". The question there was whether s 5(1) of the Official Secrets Act (Cap 233, 1970 Rev Ed) ("the OSA"), which prohibited the unauthorised communication of government documents or information, amounted to an unconstitutional restriction on the right to freedom of speech and expression. The trial judge had held that the provision in question did not contravene Art 14 of the Constitution because it "ha[d] nothing to do with 'the right to freedom of speech and expression'" and was, in any case, "designed to ensure 'public order' and 'good government'" (at [12]). On appeal, Thean J disagreed with the trial judge on this point and held as follows (at [13]):

> Mr Cashin [counsel for one of the accused persons] submitted that on this point the learned judge erred in law. *Section 5(1) of the [OSA], he said, has nothing to do with 'public order'. Falling within the ambit of 'public order' are legislations dealing with unlawful assembly, rioting and promoting enmity between different sections of the community.* In support he relied on *Basu's Commentary on the Constitution of India* vol C (6th Ed) at pp 121–122, where the learned author expressed the view that *read in the light of various Indian decisions the term 'public order' would be synonymous with 'public safety and tranquillity'.* The concept of 'good government' relied upon by the learned judge, Mr Cashin said, is also untenable, as 'good government' is not one of the matters listed in Art 14(2) of the Constitution;



Version No 3: 16 Jun 2022 (11:20 hrs)

> the list stated in Art 14(2) is exhaustive and the provisions thereof are to be strictly construed. *Thus far I agree with Mr Cashin.* … [emphasis added]

Thean J went on to hold that, contrary to the trial judge's view, s 5(1) of the OSA did impinge on the right to freedom of speech conferred by Art 14(1)(*a*) of the Constitution because this right included the right to communicate or disseminate information. Although s 5(1) of the OSA did not fall within the ambit of the public order exception to this right under Art 14(2)(*a*) of the Constitution, it fell within the ambit of the national security exception and was therefore not *ultra vires* Art 14(1) (at [13]–[14]).

98 In our judgment, to the extent that SDP seeks to rely just on the above passage from *Phua Keng Tong* to restrict the applicability of the public order exception to free speech under Art 14(2)(*a*) of the Constitution to laws targeting issues of public safety and tranquillity (such as laws dealing with unlawful assembly, rioting, or the incitement of enmity between different sections of the community), this is untenable. Undoubtedly, unlawful assembly, rioting and inciting intra-community enmity are clear examples of a disturbance to public order. But they are not exhaustive of the proper ambit of the public order exception to free speech under Art 14(2)(*a*). Indeed, even though the Indian jurisprudence cited in *Phua Keng Tong* and *Chee Siok Chin* appears to have been concerned with laws that seek to restrict free speech so as to prevent or contain physical disturbances in a public space, the approach even in Indian case law is not so limited. In *Shreya Singhal v Union of India* (2015) 3 MLJ 162 at [35], the Supreme Court of India considered the line of cases addressing the ambit of the public order exception to free speech, and stated that the overarching test for whether this exception could properly be invoked was whether a particular act "[led] to disturbance of the current life of the community", as opposed to "merely [affecting] an individual leaving the



Version No 3: 16 Jun 2022 (11:20 hrs)

tranquility of society undisturbed". This test was recognised in *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83 ("*Re Tan Boon Liat*"), which surveyed the case law emanating from the Supreme Court of India. The types of acts that may affect public order are therefore not closed, and whether or not a particular act poses a threat to public order depends in each case on the degree of disturbance that may be caused to the life of the community (see *Re Tan Boon Liat*, citing *Sudhir Kumar Saha v Commissioner of Police, Calcutta* AIR 1970 SC 814):

> Maintenance of 'law and order' is a conception much wider than that of maintenance of 'public order'. The latter is the prevention of a disorder of a grave nature. Every act that affects 'law and order' need not affect 'public order'. 'Public order' is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of 'law and order' …

99 As was observed in the minority judgment in *Ting Choon Meng* at [119], the digital landscape in which the free flow of ideas and information takes place today is such that information, including falsehoods, can be "rapidly disseminated in an unregulated Internet sphere". Depending on the content of the falsehoods in question, it is entirely conceivable that their swift spread online could *threaten* the preservation of public order by (among other things) undermining trust in the Government and other key public institutions, even though disorder has yet to break out physically in a public space. SDP argues that "it is not at all clear that trust in government is consistent with public order", since "[g]overnments and government departments do not have a monopoly on knowledge and good sense". With respect, this submission misses the point. Regardless of the merits of any government, the use of falsehoods and lies to



Version No 3: 16 Jun 2022 (11:20 hrs)

undermine a democratically elected government cannot be tolerated and cannot be seen as being compatible with a state of public order. To quote Rajah J's closing observations in *Chee Siok Chin* (at [135]):

> … While it is axiomatic that in every democratic society those who hold office must remain open to criticism, *such criticism must be founded on some factual or other legitimate basis*. The object of contesting and changing government policy has to be effected by lawful and not unlawful means. Wild and scurrilous allegations should be neither permitted nor tolerated under the pretext and in the guise of freedom of speech. *Disseminating false or inaccurate information or claims can harm and threaten public order*. [emphasis added]

100 For the same reasons, it is simply incompatible with the core principles of democracy to procure the outcome of an election to public office or a referendum by trading in disinformation and falsehoods. The outcome of an election to public office or a referendum is unquestionably a matter of national importance. Where a free and fair electoral process is undermined by the proliferation of online falsehoods, this is not merely a temporary "disturbance" to "the even tempo of the life of the community taking the country as a whole or … a specified locality", but instead shakes the foundations of a democratic society to its very core and carries the potential for far greater harm.

101 We therefore reject SDP's submission that the public interest identified in ss 4(*d*) and 4(*f*) of the POFMA does not fall within the ambit of "public order" for the purposes of Art 14(2)(*a*) of the Constitution. In our judgment, there is ample support in the legislative material for finding a nexus between the public interest identified in ss 4(*d*) and 4(*f*) of the POFMA on the one hand, and public order on the other. Our view in this regard is consistent with the following observations of Prof Thio Li-Ann in her written representations to the Select Committee on Deliberate Online Falsehoods:



Version No 3: 16 Jun 2022 (11:20 hrs)

> 2.5 Public order is a 'less decentralised' idea than a 'law and order' issue. It is usually defined as relating to a disturbance to communal tranquility … [and] entails a disruption of the 'even tempo of the life of the community taking the country as a whole.'
>
> …
>
> 2.7 'Public order' thus appears able to accommodate not only physical threats, but *threats to fundamental values and processes, such as the harm [that] deliberate online falsehoods poses* [*sic*] *to democratic institutions and processes* …
>
> [emphasis added]

102 We thus hold that there is a nexus between the purpose of the POFMA, as reflected in the public interest identified in ss 4(*d*) and 4(*f*) thereof, and the public order exception to free speech under Art 14(2)(*a*) of the Constitution.

*Whether the public order exception to free speech applies to speech that is "merely false"*

103 We turn now to TOC's argument that the public order exception to free speech under Art 14(2)(*a*) of the Constitution should not be extended to speech that is "merely false" [emphasis in original omitted] in the absence of proof that such speech is also harmful (see [82] above). TOC contends that, unlike the position under s 15 of the May 2015 version of the POHA, whereby speech that is "merely false" [emphasis in original omitted] may be justifiably restricted even without proof of its harmfulness because there would have been a prior judicial determination of its falsity, the lack of initial judicial oversight in the POFMA context (in that a Part 3 Direction is issued in respect of a statement that *the Minister* considers to be a false statement of fact, as opposed to a statement that has been *judicially determined* to be so) and "the lack of adequate safeguards against the wrongful issuance of [Part 3] [D]irections" [emphasis in original omitted] entail that should the constitutionality of a Part 3 Direction be challenged in court, a more stringent assessment of constitutionality should be



Version No 3: 16 Jun 2022 (11:20 hrs)

carried out than that which would apply in relation to an order under s 15 of the May 2015 version of the POHA.

104 With respect, TOC's argument rests on a misunderstanding of the POFMA framework. Although TOC appears to believe that the POFMA may be utilised against *any* form of false speech, s 10(1)(*b*) of the POFMA in fact requires the Minister, first, to form the opinion that it is "in the public interest" to issue a Part 3 Direction against a statement which he considers to be a false statement of fact before he may act. We have already found that the public interest identified in ss 4(*d*) and 4(*f*) of the POFMA (these being the specific limbs of s 4 that are in issue in these appeals) falls within the ambit of the "public order" ground in Art 14(2)(*a*) of the Constitution for derogating from the right to free speech. It follows that if the Minister determines that the public interest identified in s 4(*d*) and/or s 4(*f*) of the POFMA warrants taking action against a statement which he considers to be a false statement of fact, he must have concluded that that statement actually or potentially disturbs "the even tempo of the life of the community taking the country as a whole or … a specified locality". Hence, it is *not* the case that a statement may be targeted for mere falsity without regard to its potential for harm. As for TOC's argument that there are inadequate safeguards against the wrongful issuance of Part 3 Directions, this is unfounded because a Part 3 Direction is subject to review under ss 19 and 17 of the POFMA. These provisions allow the recipient of a Part 3 Direction to challenge the Direction by way of an application to the Minister to vary or cancel the Direction (under s 19), and, if that application fails either in whole or in part, by way of proceedings in the High Court to set aside the Direction (under s 17). These provisions also do not preclude the recipient of the Direction from challenging, by way of judicial review, other aspects of the Minister's decision to issue the Direction.



Version No 3: 16 Jun 2022 (11:20 hrs)

105 We are therefore satisfied that there is no merit in the appellants' various arguments that the POFMA in its entirety, or, more particularly, Part 3 thereof, is unconstitutional, whether in whole or in part.

### *Whether s 2(2)(**b**) of the POFMA is unconstitutional*

106 We deal briefly with the two alternative arguments raised by TOC in relation to the constitutionality of Part 3 of the POFMA. We consider, first, its argument that part of the definition of the term "false" in s 2(2)(*b*) of the POFMA should be struck down as being contrary to Art 14 of the Constitution (see [42] and [53(a)] above). Specifically, TOC contends that the portion of s 2(2)(*b*) shown in strikethrough text below should be struck down:

> (2) In this Act —
>
> …
>
> (*b*) a statement is false if it is false or misleading~~, whether wholly or in part, and whether on its own or~~ in the context in which it appears.
>
> [strikethrough marking added]

107 This argument is premised on there being a "fundamental constitutional right to make statements which are true, *read in context*" [emphasis added]. From TOC's perspective, "[t]he issuance of a Part 3 [Direction] against a subject statement that is purportedly 'false', when *read out of context*, cannot possibly bear any rational relation to any interest [in restricting the right to freedom of speech]" [emphasis added], whether under Art 14(2)(*a*) of the Constitution or in any other context. TOC also submits that speech that is rendered false because it has been taken out of context does not pose any threat to public order. In the context of the TOC appeal, the argument is that TOC's publication of the allegations made in the LFL press statement was not an endorsement of the allegations themselves, but was merely the *reporting of the fact* that LFL had



Version No 3: 16 Jun 2022 (11:20 hrs)

made the allegations (which fact was true, even if the allegations were themselves false). Thus, the allegations made in the LFL press statement, as reproduced in the TOC Article in the form of a neutral report, did not constitute a falsehood, and s 2(2)(*b*) of the POFMA is incompatible with the constitutional right to free speech in so far as it empowered the Minister to divorce those allegations from their surrounding context and issue the TOC CD on the basis that those allegations, as reported in the TOC Article, amounted to a false statement of fact. In other words, TOC's argument is that as long as a false statement of fact made by someone else is reproduced in the form of neutral reportage, then that statement should lie beyond the reach of the POFMA.

108 This is a point of importance. While TOC's argument may be superficially attractive, it overlooks the fact that the legislative imperatives underlying the POFMA are focused on the deleterious *effects* of online falsehoods and seek, specifically, to safeguard the infrastructure of fact as well as to protect the Government and other key public institutions from breakdowns of trust engendered by the proliferation of such falsehoods (see [87]–[88] above). In our judgment, this cuts against an approach which prevents the court from considering the falsity of a statement on the basis of its being read out of context because statements that are rendered false when they are reasonably understood in a particular way, whether read in or out of context, can conceivably cause the very harm that the POFMA was enacted to address. Indeed, it is not difficult to envisage circumstances where statements that are rendered false because they have been taken out of context may nonetheless weaken the infrastructure of fact, undermine public confidence in the Government and other key public institutions, and/or influence the outcome of an election to public office or a referendum, and, in turn, give rise to public order concerns. For instance, while a "clickbait" article may use deceptive



Version No 3: 16 Jun 2022 (11:20 hrs)

headlines to attract attention, such headlines may turn out not to be false when the article is carefully read together with the accompanying material (if any). Yet, many encountering such an article may nonetheless be misled by the headlines, and may, without reading or paying attention to the main body of the article and any accompanying material, construe the headlines out of context in a way that renders them false. This could potentially affect public order, depending on the subject matter of the article and the scale of its publication. This is, of course, a matter to be assessed on the facts of each individual case, but it nevertheless exposes the flaw in TOC's argument that speech that is rendered false because it has been taken out of context is *necessarily* harmless to public order.

109 As we see it, given that the POFMA is concerned with the deleterious *effects* of online falsehoods, the real inquiry is whether the subject statement identified by the Minister in a Part 3 Direction is a reasonable interpretation of the material in respect of which the Direction is issued (the "subject material"), in the sense that an ordinary reasonable reader of that material would construe it as making or containing the subject statement, or regard the subject statement as a reasonable interpretation of that material. If the court concludes that the subject statement identified by the Minister is a reasonable interpretation of the subject material, it then has to go on to ascertain whether the subject statement is indeed a "statement of fact" as defined in s 2(2)(*a*) of the POFMA, and if so, whether it is "false" in the sense explained in s 2(2)(*b*) of the POFMA and whether it "has been or is being communicated in Singapore" as required under s 10(1)(*a*) of the POFMA. We shall elaborate on these steps of the analysis in greater detail below in discussing the approach to determining whether a Part 3 Direction may be set aside under s 17(5)(*a*) and/or s 17(5)(*b*) of the POFMA. For now, we limit ourselves to observing that there is no constitutional basis for



Version No 3: 16 Jun 2022 (11:20 hrs)

striking down part of s 2(2)(*b*) of the POFMA in the way that TOC contends. In each case, the validity of the Part 3 Direction in question will have to be assessed by applying the analytical framework that we set out below.

***Whether there is an additional requirement of proportionality***

110 TOC's second alternative argument in relation to the constitutionality of the POFMA is that if this Act is held to be constitutional, a requirement of proportionality ought to be read into s 4 (see [42] and [53(b)] above), in that in assessing whether it is "in the public interest" to issue a Part 3 Direction, the Minister should be required to consider whether utilising the executive powers under Part 3 of the POFMA is, in the circumstances, "the least restrictive means" available to him of taking action against a statement that he considers to be a false statement of fact. This is necessary, TOC submits, so as to strike a proper balance "between the right to free speech and the public interest in protecting against online falsehoods". In support of its argument, TOC relies on the following comments by the Minister for Law during the second reading of the POFMA Bill (see *Singapore Parliamentary Debates* (7 May 2019) vol 94):

> … Proportionality is already incorporated into the requirements under the Bill and it is stronger than your proposal because when it is incorporated in the Bill, it is part of the legal requirement. … So the legal test already requires that the power can only be exercised when it is necessary or expedient in the public interest to do so. …

111 In our view, TOC has incorrectly taken the Minister for Law's comments out of context. The Minister for Law made those comments in the context of explaining the framework that was "*already incorporated*" [emphasis added] within the POFMA, and was not thereby suggesting that a *further* requirement of proportionality was to be read into the statutory framework. Indeed, the Minister for Law went on to state explicitly that the POFMA regime



Version No 3: 16 Jun 2022 (11:20 hrs)

did not require Ministers to attempt to avoid availing themselves of the powers under the Act. On the contrary, once Parliament accepted that the POFMA was a necessary piece of legislation, the powers thereunder could and would be exercised if the conditions for taking action under the Act were met (see *Singapore Parliamentary Debates* (7 May 2019) vol 94):

> … The principle [of critical thinking] is important [in a democracy]. … And it is one of the tools that supports the development of a well-informed public. But you need legislation at the same time and you have got to have legislation work with non-legislative measures. … [I]n the kind of situations we are talking about, there is no question whatsoever that legislation is essential and this Bill [meaning the POFMA Bill] is about legislation.
>
> Separately, the Government has committed to a whole series of non-legislative matters; and Parliament can question the different Ministries ranging from education to public education to media literacy, there is a … variety of things. But *when there is public interest involved and there is falsehood, and the Nominated Members accept the Bill is necessary, then there can be no argument and the Bill has to be used and the powers under the Act have got to be used.* It is necessary then to push out the facts to the public by way of correction to inoculate them against the falsehood.
>
> [emphasis added]

112 That is not to say that the Minister may invoke his powers under the POFMA without regard to all the relevant circumstances. This can be clearly seen from the structure of the POFMA's provisions. Section 10(1) of the POFMA sets out two clear prerequisites which must be satisfied before the Minister may issue a Part 3 Direction: (a) the communication of a false statement of fact in Singapore; *and* (b) the Minister's opinion that it is "in the public interest" to issue a Part 3 Direction in respect of that statement (see [114] below). Section 4, which guides the Minister's consideration of whether the public interest is at stake, already *incorporates* an element of proportionality, in that it mandates that it is in the public interest to do anything only if the doing of that thing is "*necessary or expedient*" [emphasis added] for one of the



Version No 3: 16 Jun 2022 (11:20 hrs)

purposes listed in that section. The Minister for Law's comments in the passage reproduced at [110] above do not provide any basis for TOC to suggest that a *further and different* conception of proportionality should be read into s 4 of the POFMA, specifically, one that requires the Minister to utilise only "the *least* restrictive means available to him in the circumstances" [emphasis added] to counteract statements which he considers to be false statements of fact.

113 For these reasons, we are satisfied that the appellants' arguments on the alleged unconstitutionality of the POFMA are without merit. We dismiss these arguments and move on to the applicable approach in determining whether a Part 3 Direction may be set aside under s 17(5)(*a*) and/or s 17(5)(*b*) of the POFMA.

## The applicable approach in determining whether a Part 3 Direction may be set aside under s 17(5)(*a*) and/or s 17(5)(*b*) of the POFMA

### *The relevant statutory provisions*

114 We begin our analysis by outlining the relevant statutory provisions. The powers and procedures under Part 3 of the POFMA begin with the Minister's invocation of s 10, which sets out the conditions for the Minister's exercise of his power to issue a Part 3 Direction, such as a CD. Section 10 states:

> **Conditions for issue of Part 3 Directions**
>
> **10.**—(1) Any Minister may instruct the Competent Authority to issue a Part 3 Direction if all of the following conditions are satisfied:
>
> (*a*) a false statement of fact (called in this Part the subject statement) has been or is being communicated in Singapore;
>
> (*b*) the Minister is of the opinion that it is in the public interest to issue the Direction.



Version No 3: 16 Jun 2022 (11:20 hrs)

> (2) Any Minister may instruct the Competent Authority to issue a Part 3 Direction in relation to the subject statement even if it has been amended or has ceased to be communicated in Singapore.

115 Sections 11(1) and 12(1) of the POFMA specify *who* a Part 3 Direction is to be issued to. Section 11(1) provides that a CD is to be issued to "a person who communicated the subject statement in Singapore", and s 12(1) provides likewise in relation to a Stop Communication Direction. Pausing there, it may be noted that ss 11(1) and 12(1) of the POFMA are both directed at the person who communicates, conveys or transmits a subject statement, regardless of whether or not the statement (or other material) that is said to be or to give rise to the subject statement was made by or originated from that person. This coheres with the fact that the POFMA is intended (among other things) "to prevent the *communication* of false statements of fact in Singapore and to enable measures to be taken to counteract the *effects of such communication*" [emphasis added] (see s 5(*a*) of the POFMA, which we referred to earlier at [86] above). Section 3(1) of the POFMA states that a statement or material is "communicated in Singapore" if it is "made available to one or more end-users in Singapore on or through the internet"; and ss 17(5)(*a*) and 17(5)(*b*) of the POFMA (see [46] above) provide that a Part 3 Direction may be set aside by the court if the person to whom the Direction is issued "did not communicate in Singapore the subject statement [identified therein]" (s 17(5)(*a*)), or if the subject statement either "is not a statement of fact" or "is a true statement of fact" (s 17(5)(*b*)).

### *The issues to be determined by the court in an application under s 17(5)(a) and/or s 17(5)(b)*

116 In our judgment, having regard to the statutory provisions set out above, in determining whether a Part 3 Direction may be set aside under s 17(5)(*a*)



Version No 3: 16 Jun 2022 (11:20 hrs)

and/or s 17(5)(*b*) of the POFMA, it will, broadly speaking, be necessary for the court to ascertain:

(a) The meaning of the subject statement identified by the Minister in the Part 3 Direction and the meaning of the subject material (that is to say, the material in respect of which the Direction is issued: see [109] above). This is necessary in order to ascertain whether the subject material makes or contains the subject statement identified by the Minister, as understood according to the meaning placed on it by the Minister, which in turn goes towards addressing whether the requirement in s 10(1)(*a*) of the POFMA that the subject statement "has been or is being communicated in Singapore" has been satisfied. If the subject material does not make or contain the subject statement in the first place, the subject statement would not have been "communicated in Singapore" by the person to whom the Direction is issued, in which case, the Direction may be set aside under s 17(5)(*a*) of the POFMA. If the subject material does make or contain the subject statement, but has not been or is not being communicated in Singapore, the Direction may similarly be set aside under s 17(5)(*a*) as the element of communication of the subject statement in Singapore would likewise not have been satisfied.

(b) Whether the subject statement identified by the Minister, as understood according to the meaning placed on it by the Minister, is a false statement of fact. If it is not, then the Direction may be set aside under s 17(5)(*b*) of the POFMA.

117 Following from this, it seems to us that the issues to be determined by the court in an application to set aside a Part 3 Direction under s 17(5)(*a*) and/or



Version No 3: 16 Jun 2022 (11:20 hrs)

s 17(5)(*b*) of the POFMA can be approached in the following sequential manner:

(a) First, the court should start with the subject statement identified by the Minister in the Part 3 Direction. This is because the identified subject statement is the reason for the Minister's decision to issue the Direction, and the Direction issued, the instrument by which he acts. The court must ascertain what is the statement that the Minister wishes to target by way of the Part 3 Direction. As we explain below, words are not always precise in conveying the meaning intended by the person from whom the words issue. It may therefore be necessary for the court, on occasion, to interpret the subject statement identified by the Minister in a Part 3 Direction so as to ascertain the meaning that he intended to place upon the subject statement. This interpretive exercise is essential because the meaning that the Minister intended to place upon the subject statement, which we refer to hereafter as "the Minister's intended meaning", is the meaning which he intended to act against in framing the subject statement as he did and which, in the final analysis, is what the Part 3 Direction issued is directed at.

(b) Second, the court should determine whether the subject material makes or contains the subject statement (or statements) identified by the Minister in the Part 3 Direction, as understood according to the Minister's intended meaning ascertained under the previous step of the analytical framework. The Part 3 Direction may be directed not at specific words used in the subject material, but at the interpretation that the Minister has placed upon the subject material in framing the subject statement. The court should consider whether that is a reasonable interpretation, applying the principles we set out below. As we noted at



Version No 3: 16 Jun 2022 (11:20 hrs)

> [116(a)] above, if the subject material does not, in the court's judgment, make or contain the subject statement identified by the Minister, then that subject statement would not have been "communicated in Singapore" by the publication of the subject material on or through the internet, and the Part 3 Direction may be set aside on that basis.
>
> (c) Third, the court should determine whether the identified subject statement is a "statement of fact" as defined in s 2(2)(*a*) of the POFMA.
>
> (d) Fourth, the court should determine whether the identified subject statement is "false" in the sense explained in s 2(2)(*b*) of the POFMA.
>
> (e) Fifth, the court should consider whether the identified subject statement "has been or is being communicated in Singapore" as required under s 10(1)(*a*) of the POFMA.

We shall elaborate on each of these requirements in turn. Obviously, the inquiry under some of these steps may be uncontroversial in many cases.

### *The subject statement and the meaning that the Minister intended to place on it*

118 Section 10(1)(*a*) of the POFMA contemplates that the "subject statement" identified in a Part 3 Direction is a "false statement of fact" that "has been or is being communicated in Singapore". Once these two elements are established *and* the Minister forms the opinion that it is in the public interest to issue a Part 3 Direction in respect of the subject statement (see s 10(1)(*b*)), he may instruct the Competent Authority to do so. It is important to reiterate that this process can give rise to two discrete interpretive exercises for the court, one of which involves the interpretation of the ***subject material*** that, in the Minister's assessment, has given rise to a subject statement that ought to be



Version No 3: 16 Jun 2022 (11:20 hrs)

acted against. This interpretive exercise is concerned with *objectively* ascertaining *what the subject material means*, with a view to determining whether it makes or contains the subject statement identified by the Minister. This is *not* the focus of attention in this section of the judgment, but is considered in the next.

119 In this section of the judgment, we are concerned with a discrete issue which arises due to the inherent imprecision of language. The Minister, having identified the meaning or possible meanings that the subject material may bear, may determine that it is in the public interest to issue a Part 3 Direction in respect of one or more of those meanings. To that end, he would have to specify the meaning or meanings that he intends to act against by framing the appropriate subject statement or statements. The focus of the interpretive exercise here is to ascertain the Minister's intended meaning as defined at [117(a)] above – in other words, *the meaning that the Minister intended to place on the* ***subject statement****, which is also the meaning that he intended to act against* in framing the subject statement as he did. The Minister's intended meaning in respect of a subject statement will sometimes be plain and evident; but, equally, it may not always be clear on the face of a Part 3 Direction. Where the subject statement framed by the Minister is a direct reproduction of the words used in the particular part of the subject material that is said to be or to give rise to the subject statement, the Minister's intended meaning may be relatively straightforward (although not necessarily so). In contrast, where the Minister expresses the meaning or meanings that he intends to act against in his own words in the subject statement or statements that he frames, it may well be necessary to interpret the subject statement or statements so that it is clear what the Minister's intended meaning is. As we pointed out at [117(a)] above, this is an essential exercise because the Minister's intended meaning in respect of a subject statement is the basis upon



Version No 3: 16 Jun 2022 (11:20 hrs)

which he decides to issue a Part 3 Direction. It must be emphasised that in undertaking this interpretive exercise, the court is *not* concerned with construing the *subject material* to determine whether it makes or contains the subject statement identified by the Minister – that is the focus of the interpretive exercise that we alluded to at [118] above. Although both interpretive exercises revolve around the same subject statement and are closely related in many ways, it will often be important to maintain the distinction between them because the considerations as well as the interpretive approach are not, as will be seen, the same.

120 In ascertaining the Minister's intended meaning in respect of a subject statement, there are two issues which are pertinent. Before we address these issues, we first set out the key provisions governing the *content* of a Part 3 Direction. In relation to CDs, s 11 of the POFMA provides as follows:

> **Correction Direction**
>
> **11.**—(1) A Correction Direction is one issued to a person who communicated the subject statement in Singapore, requiring the person to communicate in Singapore in the specified form and manner, to a specified person or description of persons (if any), and by the specified time, a notice (called in this Part a correction notice) that contains one or both of the following:
>
> (*a*) *a statement*, in such terms as may be specified, *that the subject statement is false*, or that the specified material contains a false statement of fact;
>
> (*b*) a specified statement of fact, or a reference to a specified location where the specified statement of fact may be found, or both.
>
> …
>
> [emphasis added]

121 In relation to Stop Communication Directions, s 12 of the POFMA provides as follows:



Version No 3: 16 Jun 2022 (11:20 hrs)

> **Stop Communication Direction**
>
> **12.**—(1) A Stop Communication Direction is one issued to a person who communicated the subject statement in Singapore, requiring the person to stop communicating in Singapore the subject statement by the specified time.
>
> (2) A Stop Communication Direction may also require the person to whom it is issued to stop communicating any statement that is substantially similar to the subject statement.
>
> (3) A Stop Communication Direction may also require the person to whom it is issued to do one or both of the following:
>
> > (*a*) to communicate in Singapore a correction notice in the specified form and manner, to a specified person or description of persons (if any), and by the specified time;
> >
> > (*b*) to publish a correction notice in the specified manner in a specified newspaper or other printed publication of Singapore.
>
> …

122 These substantive elements are supplemented by certain procedural requirements stipulated in s 13 of the POFMA, which is applicable to all Part 3 Directions, and reg 6 of the Protection from Online Falsehoods and Manipulation Regulations 2019 ("the POFMA Regulations"), which is applicable to all Part 3 Directions and Part 4 Directions. Section 13(3) of the POFMA states that "[a] Part 3 Direction must *identify the subject statement in sufficient detail*" [emphasis added]. As for reg 6 of the POFMA Regulations, it reads as follows:

> **Requirements for Part 3 Directions and Part 4 Directions**
>
> **6.** A Part 3 Direction or Part 4 Direction must contain —
>
> > (*a*) the online location where the subject statement or subject material (as the case may be) is communicated;
> >
> > (*b*) *the basis on which the subject statement or the statement contained in the subject material (as the case may be) is determined to be a false statement of fact*;



Version No 3: 16 Jun 2022 (11:20 hrs)

> (*c*) *a statement that the Minister is of the opinion that it is in the public interest to issue the Part 3 Direction or Part 4 Direction*;
>
> (*d*) the email address at [*sic*] which any application to the Minister to vary or cancel the Part 3 Direction or Part 4 Direction must be sent; and
>
> (*e*) a statement to the effect that any application to the Minister to vary or cancel the Part 3 Direction or Part 4 Direction must be in writing and —
>
> (i) either —
>
> (A) be made and completed in the form that may be obtained from the Uniform Resource Locator (URL) specified in the Direction; or
>
> (B) if not made and completed in that form, meet the requirements mentioned in regulation 13(3); and
>
> (ii) be sent by email to the email address specified in the Direction.
>
> [emphasis added]

123 In this light, we turn to the two issues alluded to at [120] above. First, we consider whether it is open to the court, in effect, to reframe the subject statement identified by the Minister in a Part 3 Direction and uphold the Direction on the basis of a subject statement that has not been identified therein, or whether the Minister is bound by the subject statement identified in the Direction, such that the validity of the Direction is to be assessed solely by reference to that subject statement. This issue arises because in *SDP v AG*, Ang Cheng Hock J in effect upheld the SDP CDs, in so far as they pertained to the SDP Article, on the basis of a subject statement that was not identified in these CDs. We elaborate on this further below in our analysis of the SDP appeal. Second, we consider how the court should construe the subject statement identified in a Part 3 Direction for the purposes of ascertaining the Minister's intended meaning.



Version No 3: 16 Jun 2022 (11:20 hrs)

*Whether the court may uphold a Part 3 Direction on the basis of an unidentified subject statement*

124 On the first issue, Mr Nair Suresh Sukumaran ("Mr Nair"), on behalf of SDP, submitted that, in the light of the foregoing provisions of the POFMA and the POFMA Regulations, the *only* "subject statement" that the court can possibly be concerned with when dealing with an application to set aside a CD (or, as the case may be, a Stop Communication Direction) under s 17 of the POFMA is that which has been *identified on the face of the CD (or Stop Communication Direction)*. If what the Minister has identified as the subject statement is not in fact made or contained in the subject material upon a reasonable interpretation of that material, then that must be the end of the matter. The court cannot go further and find that the CD (or Stop Communication Direction) may be upheld on the basis of *another* subject statement that has not been articulated on the face of the Direction, even if that subject statement might be thought to be a reasonable meaning of the words used in the subject material.

125 Having regard to the relevant provisions of the POFMA and the POFMA Regulations, and, more fundamentally, the underlying rationale and purpose of these provisions, we agree with Mr Nair on this point. To be sure, as we noted at [119] above (see also [131] below), the Minister may intend to act in respect of more than one of the possible meanings that he considers the subject material bears. Where this is the case, it is incumbent on the Minister to set out the meanings that he intends to act against by identifying them as subject statements in the Part 3 Direction that he issues. It is not for the court to undertake an analysis of the subject material to identify possible meanings that may be false and uphold the Direction on the basis of a possible meaning that has not been identified therein as a subject statement, and that therefore has not been shown to be a meaning that the Minister intended to act against. We take this view for



Version No 3: 16 Jun 2022 (11:20 hrs)

three reasons. First, it is clear from the provisions we have been considering that the subject statement, which is what the Minister believes to be the false statement of fact arising from the subject material, must be expressly stated "in sufficient detail" in a Part 3 Direction (see s 13(3) of the POFMA). It is also the Minister's duty, under ss 11 and 12 of the POFMA as well as reg 6 of the POFMA Regulations, to set out the basis on which the subject statement is said to be a false statement of fact, to state his opinion that it is in the public interest to issue a Part 3 Direction in respect of that subject statement, and to fashion a correction notice that clearly states that the subject statement is false (this last-mentioned element applies to a Stop Communication Direction only where the Minister considers it appropriate to require the recipient of the Direction to publish a correction notice as well, in addition to stopping communication of the subject statement: see s 12(3) of the POFMA). All of these requirements hinge, as a matter of logic, on *what the Minister has identified in the Part 3 Direction as the subject statement*. Procedurally speaking then, the validity of the Direction must stand or fall based on the identified subject statement. If the identified subject statement is not in fact made or contained in the subject material or is not in fact a false statement of fact, then it is open to the recipient of the Direction to have the Direction set aside under s 17(5)(*a*) (if the subject statement is not in fact made or contained in the subject material) or s 17(5)(*b*) (if the subject statement is not in fact a false statement of fact).

126 Second, the importance of identifying the subject statement "in sufficient detail" is not only procedural but also substantive. Mr Nair submitted that there was good reason for the Minister to be held strictly to the subject statement that was expressly articulated in a CD (or, as the case may be, in a Stop Communication Direction); were it otherwise, the recipient of the CD (or Stop Communication Direction) would be unable to know the Minister's case



Version No 3: 16 Jun 2022 (11:20 hrs)

against it and to file the relevant application(s) to cancel or set aside the Direction.

127 There is force in this submission. It is important to bear in mind that the procedures under ss 19 and 17 of the POFMA are intended to operate as a "fast" and "simplified" process for the recipient of a Part 3 Direction to challenge the Minister's decision to issue the Direction. As stated by the Minister for Law during the second reading of the POFMA Bill (see *Singapore Parliamentary Debates* (7 May 2019) vol 94):

> … [I]t is said [that] it is difficult to challenge a Minister's decision. I have previously said, *the process that will be in place, it will be fast, it will be simplified to allow individuals to appear and present arguments on whether it* [that is to say, the subject statement identified in the Part 3 Direction being challenged] *is true or false*. …
>
> First, an aggrieved person must apply to the Minister to cancel a Direction. This is consistent with the usual position of exhausting administrative remedies before resorting to the Courts. We will provide a standard form online for aggrieved persons to use. The form must be sent to an email address which will be set out in the Direction and the relevant Minister must make a decision no later than two days after the form is received, excluding non-working days.
>
> *The appeal to court will be similarly quick. The appeal will have to be filed no later than 14 days later.* This is up to the applicant. He can file the very next day if he wants, after the Minister decides on the application to cancel a Direction. Simple standard forms will be provided for the appeal documents that an appellant can fill out and file in the Courts. *The Courts will be asked to fix the hearing within six days of an application being filed.* …
>
> *The documents will need to be served on the Minister no later than the next day.* Again, an email address will be provided for the appellant to serve the documents on the Minister, to make it easy for him. *The Minister must then file his or her reply in Court no later than three days after the documents are served as prescribed.* As stated earlier, meanwhile, the Court would have already fixed the hearing no later than six days after the date on which the Court first received the application.



Version No 3: 16 Jun 2022 (11:20 hrs)

> To summarise, a person aggrieved by a Direction will have the opportunity to have his or her case heard in the High Court as early as nine days after he initiates a challenge by writing to the Minister.
>
> [emphasis added]

128 The only way in which the recipient of a Part 3 Direction would be able, by way of the procedures set out in ss 19 and 17 of the POFMA, to challenge meaningfully the Minister's decision to issue the Direction would be if the Minister is held strictly to what he has identified in the Direction as the subject statement. That is the statement that crystallises the rest of the process and, in the case of proceedings under s 17, the court's analysis of whether the Direction may be set aside. The recipient of a Part 3 Direction must be able to know the case against it and the meaning that has been attributed to the subject statement that it is alleged to have communicated, which is what it must defend. This is the information which the recipient of a Part 3 Direction must have, or must fairly be able to ascertain, in order to mount a meaningful challenge to the Direction by making the relevant applications to the Minister and to the High Court. The recipient of a Part 3 Direction, in seeking to have the Direction either varied or cancelled by the Minister or set aside by the High Court, may also have to defend the subject statement that has been identified as arising from the subject material, and, in the context of proceedings under s 17 of the POFMA, must file its application to the High Court *without* the benefit of pleadings. All that it has to go on is the Direction itself. Seen in this light, the Minister's identification of the subject statement "in sufficient detail" on the face of the Direction, and holding the Minister strictly to that subject statement, become critically important if the right of the recipient of the Direction to seek relief is to be given effect.



Version No 3: 16 Jun 2022 (11:20 hrs)

129 The speed at which the POFMA procedures for challenging a Part 3 Direction are meant to operate strengthens this conclusion. Although both the Minister and the recipient of a Part 3 Direction are subject to short timelines once the Direction is issued, the Minister holds the initiative in the sense that he decides when to issue the Direction. The POFMA, on the face of its provisions, does not stipulate a time frame within which the Minister must issue a Part 3 Direction in respect of material that he regards as communicating or as having communicated a false statement of fact. This will typically be done swiftly since it is triggered by a concern for the "public interest" (as defined in s 4 of the POFMA), but the Minister will, in any case, have had time to define the subject statement or statements that will form the basis of the Part 3 Direction to be issued. It is accordingly not unjust to hold the Minister to a standard of strict compliance with the requirements under the POFMA and the POFMA Regulations, in particular, the requirement under s 13(3) of the POFMA to identify the subject statement "in sufficient detail" from the outset.

130 Third, a fundamental difficulty arises if *the court* were to uphold a Part 3 Direction on the basis of a subject statement that has not been identified by the Minister. Under s 10(1) of the POFMA, it is a prerequisite to the Minister's exercise of his *executive* power to issue a Part 3 Direction that: (a) there be communication of a false statement of fact (namely, the subject statement identified in the Direction) in Singapore; and (b) *the Minister be of the opinion that it is in the public interest to issue a Part 3 Direction in respect of that statement*. The decision to issue a Part 3 Direction in respect of a subject statement is a discretion that clearly lies with *the Minister alone*. The assessment of whether it is "in the public interest" to issue a Part 3 Direction to correct or stop the communication of a statement that the Minister deems to be a false statement of fact is part of the discretion to be exercised by the Minister, and



Version No 3: 16 Jun 2022 (11:20 hrs)

not by the court. For this reason, as well as those set out at [125]–[129] above, we disagree with the approach taken by Ang Cheng Hock J in *SDP v AG* to the subject statement that was said to have arisen from the SDP Article (namely, the first subject statement defined at [10(a)] above), and consider that it is *not* open to the court to uphold a Part 3 Direction on the basis of a subject statement that the Minister did not identify in the Direction.

*Construing the subject statement to ascertain the Minister's intended meaning*

131 We turn to the second issue in this section of the judgment, which is how the court should construe the subject statement identified in a Part 3 Direction so as to ascertain the meaning (or meanings) that *the Minister intended* to place upon the subject statement, that being the meaning (or meanings) that he intended to act against in framing the subject statement as he did, which we have termed "the Minister's intended meaning" (see [117(a)] above). As we alluded to earlier (at [119] and [125] above) and elaborate on in the next section of this judgment, it may be the case that the Minister regards the subject material as bearing more than a single meaning. It may also be the case that the Minister intends to act against more than one of the possible meanings. Where this is indeed the Minister's intention, he must specify the relevant meanings that he intends to act against by identifying them as subject statements in the Part 3 Direction that he issues.

132 We earlier noted (at [128] above) that in order for the recipient of a Part 3 Direction to be able to challenge meaningfully the Minister's decision to issue the Direction, it must know, or must fairly be able to ascertain, the case against it and the meaning that has been attributed to the subject statement that it is alleged to have communicated – in other words, it must know, or must fairly be able to ascertain, the Minister's intended meaning in respect of that subject



Version No 3: 16 Jun 2022 (11:20 hrs)

statement. Consistent with this, the relevant provisions of the POFMA and the POFMA Regulations outlined at [120]–[122] above prescribe a number of elements that a Part 3 Direction must contain. These include:

(a) the subject statement (which must be identified "in sufficient detail") and the assertion that it is false;

(b) in the case of a CD, a correction notice (as mentioned at [125] above, this applies in the case of a Stop Communication Direction only where the Minister considers it appropriate to require the recipient of the Direction to publish a correction notice as well, in addition to stopping communication of the subject statement); and

(c) the basis on which the subject statement is determined to be a false statement of fact.

All of this information must be conveyed to the recipient of a Part 3 Direction at the time the Direction is issued, and this then triggers the applicable timelines for any relief which the recipient of the Direction may wish to seek under s 19 and/or s 17 of the POFMA. It follows that this information constitutes the basis upon which the court is to ascertain the Minister's intended meaning in respect of the subject statement identified in a Part 3 Direction.

133 In our judgment, what this interpretive exercise requires is an objective construction of the subject statement in the light of the Part 3 Direction in question as a whole. The starting point will inevitably be the words used by the Minister to frame the subject statement. Where these words clearly lead to only one interpretation, the inquiry ends there. However, where these words lend themselves to multiple interpretations, it would be appropriate for the court to have regard to the correction notice set out in the Direction, together with any



Version No 3: 16 Jun 2022 (11:20 hrs)

attachment(s) thereto. The correction notice would generally be relevant if it sheds light on the Minister's intended meaning by setting out the correction in terms that point to what the Minister considers to be the true position. It may also be helpful to have regard to the basis on which the Minister considers the subject statement to be a false statement of fact, if and to the extent this would fairly and objectively convey to the recipient of the Direction just what the Minister's intended meaning is. This is because that basis is, in some part, the justification for the issuance of the Direction. Where there remains a real (as opposed to merely theoretical or fanciful) doubt as to what the Minister's intended meaning is, the court should lean in favour of how the recipient of the Direction would reasonably have understood the Minister's intended meaning, given the tight timelines for mounting a challenge to a Part 3 Direction and the ease with which Parliament intended such a challenge to be capable of being brought.

134 We end this section of the judgment by reiterating that this interpretive exercise may often not be controversial.

***Whether the subject material makes or contains the subject statement***

135 The second step of the analytical framework involves determining whether the subject material makes or contains the subject statement (or statements) identified by the Minister in the Part 3 Direction in question, *as understood according to the Minister's intended meaning* ascertained under the first step: see [117(b)] above. This turns on the interpretation of the subject material. We observe in passing that in the judgment of Ang Cheng Hock J in *SDP v AG*, the first two steps of the analytical framework that we set out at [117] above appeared to have been conflated as a result of the way in which the



Version No 3: 16 Jun 2022 (11:20 hrs)

AG's case was argued in the court below. We return to this point in more detail below when we discuss the SDP appeal.

136 For the reasons that we develop below, as in the case of ascertaining the Minister's intended meaning in respect of the subject statement identified in a Part 3 Direction, an objective approach to interpretation ought similarly to be adopted in determining whether the subject material makes or contains the identified subject statement. This is essentially because, as the AG has highlighted, the POFMA is primarily concerned with the *effect* that the subject material has *on the public*, and not with the meaning that the statement-maker subjectively intended to place on the subject material (referred to hereafter as "the statement-maker's subjective intended meaning" where appropriate to the context). This is in line with the passages we have already cited from the legislative material. In undertaking this interpretive exercise, the court should eschew a fine-grained or unduly technical analysis and consider *whether, on an objective construction of the subject material regardless of the subjective intention of the statement-maker, there would be at least an appreciable segment of the potential readership or audience of the subject material in Singapore, or a particular class of potential readers sharing certain clearly identifiable characteristics such as socio-political beliefs or ideals (referred to hereafter as a "particular class"), who would construe the subject material as making or containing the subject statement, or regard the subject statement as a reasonable interpretation of the subject material*.

137 This inquiry will be straightforward where the subject material may only be reasonably interpreted in one way. However, where the subject material is capable of bearing multiple reasonable interpretations that include, but are not limited to, the subject statement, the inquiry becomes more complicated. The AG contends that in such a case, as long as the subject statement is *one*



Version No 3: 16 Jun 2022 (11:20 hrs)

reasonable interpretation of the subject material in the sense that "a reasonable group of people would have adopted that interpretation", and that interpretation is in fact false, the Part 3 Direction in question may be issued or upheld on the basis of that interpretation, even if there may also be other reasonable interpretations of the same subject material that would not be false (*SDP v AG* at [60]). In other words, the AG submits that in interpreting the subject material, the court should adopt the "multiple meanings rule", and *not* the "single meaning rule" in defamation law, which requires "the determination of a single 'correct' meaning conveyed to the hypothetical ordinary reasonable reader from the published material, and not a range of possible meanings" (*SDP v AG* at [61]). The AG continues to maintain these arguments on appeal.

138 SDP accepts that the subject material may be linguistically capable of bearing multiple reasonable meanings. However, it submits that the appropriate meaning or meanings that the court alights on for the purposes of the POFMA must fall within the ambit of the statement-maker's subjective intended meaning (as defined at [136] above). Further, SDP submits that the single meaning rule should apply in the context of the POFMA because the rationale for the imposition of this rule in defamation law, in particular, the need to balance an individual's right to free speech against other interests (such as the right to protection of reputation), continues to be relevant under the POFMA.

139 Unlike SDP, TOC submits that the statement-maker's subjective intended meaning is *not* relevant to the interpretation of the subject material because the inquiry is essentially objective in nature. Rather, the *context* of the subject material is crucial. This submission is only natural given the position that TOC takes on the TOC Article, in particular, with regard to whether the reproduction in that article of the allegations made in the LFL press statement constitutes a "statement of fact" for the purposes of the POFMA.



Version No 3: 16 Jun 2022 (11:20 hrs)

140 We therefore address, at the level of legal principle, two questions in this part of our judgment: (a) first, whether the single meaning rule applies in the context of the POFMA; and (b) second, whether the statement-maker's subjective intended meaning is relevant to the interpretation of the subject material. Before turning to these questions, we make an observation in passing on the single meaning rule. In our view, this rule has no relevance to the court's determination of the Minister's intended meaning in respect of the subject statement identified in a Part 3 Direction. This is because the single meaning rule was developed in the context of considering the liability of a tortfeasor for the effects of his wrongful statements, and it is as an extension of that concept that the rule has been raised in relation to statements that are the subject of Part 3 Directions under the POFMA. In ascertaining the Minister's intended meaning in respect of a subject statement, the court is not concerned with any question of liability. Rather, it is concerned with establishing the precise scope of the exercise of state power by the Minister. Following from this, the court is not concerned with the effect on the general public of the Minister's framing of the subject statement. Instead, it is concerned with determining, first, precisely what meaning (or meanings) the Minister intended to act against in framing the subject statement (or statements) as he did, and, second, whether the recipient of the Part 3 Direction would reasonably have understood this. The court is emphatically not concerned in this context with multiple meanings that, in its judgment, the Minister did not intend to act against. The Minister's exercise of his power to issue a Part 3 Direction is conditioned on the satisfaction of the prerequisites set out in s 10(1) of the POFMA, and the court must assess the validity of the Direction issued by reference to what it concludes, on an objective interpretation of the subject statement framed by the Minister in the light of the Direction as a whole, was the Minister's intended meaning. With



Version No 3: 16 Jun 2022 (11:20 hrs)

that, we turn to the first of the two questions that we shall deal with in this part of the judgment.

*Whether the single meaning rule applies in the context of the POFMA*

141 The single meaning rule is a basic principle in defamation law. It was expressed in these terms by the High Court in *Goh Chok Tong v Tang Liang Hong* [1997] 1 SLR(R) 811 (at [59]):

> … The other basic tenet in the law of libel [apart from that pertaining to the 'natural and ordinary' meaning of the alleged defamatory words or publication], which is also applicable in the law of slander, is that *although the alleged libellous publication or the alleged slanderous words may convey different meanings to different readers or listeners*, a judge in Singapore, as a finder of facts, is required by the common law to determine *the single and the right meaning which the publication or words conveyed to the notional reasonable reader or reasonable listener* and, having identified it, the judge is then to proceed to consider if it is defamatory of the plaintiff and, if so, he is to base the damages on that meaning and that meaning alone … [emphasis added]

142 In the context of defamation law, the single meaning rule requires, in essence, that out of a range of possible meanings that could arise from the words in question, the court must alight on "the single and the right meaning" of the words, and then determine whether they are defamatory having regard to that meaning *only*. Transposed to the context of the POFMA, the single meaning rule would entail that although there may be several reasonable interpretations of the subject material, some but not all of which constitute false statements of fact, a Part 3 Direction may only be issued or upheld where "the single and the right meaning" of the subject material amounts to a false statement of fact.

143 As we noted earlier (see [137] above), the AG contends that the single meaning rule has no place in the interpretation of the subject material for the purposes of the POFMA, and submits, instead, that if the subject material gives



Version No 3: 16 Jun 2022 (11:20 hrs)

rise to multiple reasonable meanings, the Minister would be justified in issuing a CD (or, as the case may be, a Stop Communication Direction) in respect of that material so long as *one* of these reasonable meanings constitutes a false statement of fact. The AG contends that this approach (which corresponds to the multiple meanings rule) is more consistent with the legislative purpose of the POFMA, and further notes that the single meaning rule has been heavily criticised even in the context of defamation law.

144 In *SDP v AG*, Ang Cheng Hock J was of the view that because he had found that only *one* of the three interpretations of the SDP Article proffered by the parties was a reasonable interpretation, there was strictly no need to consider the applicability of the single meaning rule in the POFMA context (at [89]). We maintain the same caveat here because the applicability of the single meaning rule only becomes an issue if we disagree with Ang J and find that there is *more than one* reasonable interpretation of the sentence in the SDP Article that is said to give rise to the first subject statement defined at [10(a)] above. Nevertheless, since the parties devoted some time to the applicability of the single meaning rule in both their oral and their written submissions, we take the opportunity to set out our brief views on this issue.

145 In a celebrated passage in *Slim and Others v Daily Telegraph Ltd and Others* [1968] 2 QB 157, Diplock LJ (as he then was) critiqued the single meaning rule in this way (at 171–173):

> … Libel is concerned with the meaning of words. Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey. But the notion that the same words should bear different meanings to different men and that more than one meaning should be 'right' conflicts with



Version No 3: 16 Jun 2022 (11:20 hrs)

> the whole training of a lawyer. Words are the tools of his trade. He uses them to define legal rights and duties. They do not achieve that purpose unless there can be attributed to them a single meaning as the 'right' meaning. And so the argument between lawyers as to the meaning of words starts with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the 'right' meaning by the adjudicator to whom the law confides the responsibility of determining it.
>
> *That is what makes the meaning ascribed to words for the purposes of the tort of libel so artificial.* … Where, as in the present case, words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings. *But none of this matters. What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel.*
>
> [emphasis added]

146 It is evident that it has long been recognised that the single meaning rule is somewhat "artificial", given the range of meanings that words may bear even to reasonable readers (see *Bonnick v Morris and others* [2003] 1 AC 300 at [21]). While it has been said that the single meaning rule is so deeply rooted in defamation law that it has "passed beyond redemption by the courts" (see *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 ("*Ajinomoto*") at [27]), the English courts have in recent times declined to apply it in other areas of law, such as in the context of the *Reynolds* privilege (a limited set of circumstances in which the media may publish defamatory statements: see *Reynolds*) and the tort of malicious falsehood (where one person maliciously publishes false words referring to another person or to his property or business, causing special damage as a "direct and natural result": see *Lee Tat*



Version No 3: 16 Jun 2022 (11:20 hrs)

*Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866 at [169]).

147 In particular, where the tort of malicious falsehood is concerned, Rimer LJ noted in *Ajinomoto*, in the context of words used on food labelling, that the potential for injustice arising from the application of the single meaning rule stemmed from the fact that it could lead to a situation where, despite there being a substantial body of consumers who might find that the words in question bore a damaging meaning, the court had to satisfy itself with the fiction that the entire consuming public would interpret the words as bearing a single innocuous meaning (at [41]). In his view, the single meaning rule was a blunt tool (at [43]):

> … The application of the rule can also be said to carry with it the potential for *swinging the balance unfairly against one party [or] the other*, resulting in no compensation in cases when fairness might suggest that some should be due, or in over-compensation in others. … [emphasis added]

148 In our judgment, these criticisms of the single meaning rule have much force in the context of the POFMA, especially in the light of the rationale underlying this Act. As we have pointed out, the legislative purpose of the POFMA is, among other things, to prevent the communication of false statements of fact in Singapore and to enable measures to be taken to counteract the deleterious effects of such communication (see s 5(*a*) of the POFMA, which we referred to earlier at [86] above). The seriousness with which Parliament viewed the dissemination of online falsehoods was underscored by the points made by the Minister for Law in his opening address at the second reading of the POFMA Bill (see *Singapore Parliamentary Debates* (7 May 2019) vol 94):

> … [T]hrough a combination of falsehoods and digital technology, the foundations of democratic society are severely attacked. Falsehoods are used to undermine public trust[,] which is the cornerstone of our infrastructure of fact. They are used to divide and polarise, tearing the social fabric. And



Version No 3: 16 Jun 2022 (11:20 hrs)

> democratic discourse, accommodation and compromise become very difficult. In these conditions, the political centre becomes hollowed out and people are driven to extremes.
>
> …
>
> So in the digital age, almost anyone can make a falsehood go viral, or run a disinformation campaign. …
>
> … In every country, this is happening. No one can disagree that this is a serious threat and that it has to be dealt with head on.

149 Crucially, the Minister for Law took pains to highlight the reality that certain segments of the public or classes of persons might be particularly prone to be taken in by online falsehoods, depending on their views and socio-political identities and inclinations, as well as the content of the falsehoods in question (see *Singapore Parliamentary Debates* (7 May 2019) vol 94):

> … [W]ho is misled by these falsehoods? In a 2018 survey by Ipsos, a global independent market research agency, on Singaporeans, 91% of Singaporean respondents could not correctly identify one or more of five false headlines presented to them. *Falsehoods work. They work in a complex manner. They take advantage of the attention spans, mental shortcuts, cognitive biases of reasonable, rational people.* So, every day, all of us decide which issues to give our time and attention. A lot of the information we come across, we make quick judgements, based on who it comes from, how aligned it is with what we know and believe. These are the human loopholes that falsehoods seek to exploit.
>
> ***People's socio-political identities can play a key role in why people believe and share falsehoods***. It is consistent with psychological studies on confirmation bias. So, Members can see from all this that in the Digital Age, the conditions supporting a Shared Reality have fundamentally changed. From a main artery sustained by mainstream newspapers, public discourse is fragmenting into millions of social media groups and conversations. Mainstream media was likened by law professor Dr Thio Li-Ann to a public street. On this street, she said, 'you might encounter not only friends, but a … variety of people engaged in a wide array of activities.'
>
> In this system, people are made to see and show civility towards viewpoints they may not otherwise like and choose to see. But *social media does the opposite. It is designed to connect people with whom they want to be connected …, usually people they*



Version No 3: 16 Jun 2022 (11:20 hrs)

> *know or like, or who are like-minded. They allow people to cut themselves off from the views and information they do not like.*
>
> [emphasis added in italics and bold italics]

150 It may be gleaned from the above extract that one of Parliament's concerns was that falsehoods could be targeted at and, in turn, spread through particular segments of the public or classes of persons who might be inherently more inclined to believe such falsehoods by dint of their backgrounds and socio-political beliefs or ideals. This was the context in which the POFMA was enacted to empower the relevant authorities to take swift action against the circulation of online falsehoods. Accordingly, the legislative purpose of the POFMA would *not* be served by allowing statements that are demonstrably false in some respects to remain in circulation merely because certain segments of the public or classes of persons might reasonably interpret the subject material containing the statements in a way that does not render the statements untrue. As the Minister for Law's comments highlighted, of concern is the fact that in such situations, there will nonetheless likely be other segments of the public or classes of persons who will construe the subject material in the false sense and believe it. It follows that where there are multiple reasonable ways in which the subject material may be interpreted, it would be more consistent with the purposes of the POFMA if measures could be taken under Part 3 thereof as long as at least *one* of the reasonable interpretations amounts to a false statement of fact. The single meaning rule would be at odds with Parliament's intention in enacting the POFMA, and this is a strong reason why it should not apply in this context.

151 Mr Nair argued that just as the single meaning rule is tolerated in defamation law because it strikes a fair balance between the protection of individual reputation and the protection of the statement-maker's right to freedom of speech, so the same impetus may be found in the POFMA, given the



Version No 3: 16 Jun 2022 (11:20 hrs)

need to balance the right to free speech against the exercise of executive power. We do not accept this characterisation. The balance that is at stake in the POFMA context is the protection of truth in public debate on the one hand, and the protection of free speech on the other. In this regard, it is significant that s 2(2)(*b*) of the POFMA expressly provides that a statement is "false" if it is "false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears". Implicit in this provision is the understanding that a statement, when read in different ways, may give rise to different meanings, but this *does not negate its falsity on at least one of the meanings*. Section 2(2)(*b*) is, in our judgment, a clear indication of the legislative intent that the court is not to ignore the potential ways in which a statement of fact may be false, notwithstanding other interpretations of the same statement that may render it true. Whatever balance is to be struck between preventing the circulation of online falsehoods and protecting the right to free speech, that balance is *not* to be found by adopting the single meaning rule.

152 For these reasons, we agree with the AG that the single meaning rule ought not to apply in the POFMA context.

*Whether the statement-maker's subjective intended meaning is relevant to the interpretation of the subject material*

153 Next, we address SDP's argument that even if the single meaning rule does not apply in the POFMA context, in interpreting the subject material so as to determine whether it makes or contains the subject statement identified by the Minister in the Part 3 Direction in question, the court may nonetheless consider only the range of reasonable meanings that were *subjectively intended* by the statement-maker. In Mr Nair's submission, this is necessary in order to carve out a principled outer limit to "liability" under the POFMA, given the serious consequences of being on the receiving end of a Part 3 Direction. If the



Version No 3: 16 Jun 2022 (11:20 hrs)

position were otherwise, Mr Nair contended, multiple reasonable meanings could be ascribed to the offending words (as in an action for malicious falsehood) and a Part 3 Direction issued based on any of those meanings, without the Minister even having to prove malice on the part of the statement-maker or the statement-maker's subjective intended meaning in respect of those words.

154 In our judgment, the comparison between the POFMA and the legal principles in the torts of defamation and malicious falsehood can only be taken up to a point. Although the interpretation of statements is central to each of these areas of law, the purpose of the interpretive exercise in each area is fundamentally different. The POFMA is concerned not with the protection of private reputation, but with the larger public interest in arresting the circulation of online falsehoods that may affect the public interest in one or more of the ways specified in s 4 of the POFMA. The POFMA is not only unique to that extent, but also entirely derived from statute, unlike the torts of defamation and malicious falsehood. Therefore, when assessing whether the statement-maker's subjective intended meaning is relevant to the interpretation of the subject material, the first port of call is the structure and wording of the POFMA itself. It is clear to us from s 10(1) of the POFMA that in identifying statements which are false statements of fact (in other words, in identifying subject statements) for the purposes of issuing a Part 3 Direction, the Minister's focus is on how the statement in question would be received or perceived by those who come across it, rather than on the subjective intention of the statement-maker (which includes the statement-maker's subjective intended meaning). This is the only way to make sense of the requirement in s 10(1)(*b*) of the POFMA that before the Minister may issue a Part 3 Direction in respect of a statement that he has identified as a subject statement, he must be satisfied that it is "in the public



Version No 3: 16 Jun 2022 (11:20 hrs)

interest" to take action against that statement. Fault, in the sense of knowledge of the falsity of the subject statement or an intention to communicate the subject statement, is not required before a Part 3 Direction may be issued.

155 However, one point that did leave an impression on us in oral submissions was Mr Nair's argument that it would be unreasonable for a statement-maker to be required to defend a subject statement in respect of which the Minister's intended meaning is a meaning that the statement-maker had not intended the statement to bear and did not believe in, even if that meaning is a reasonable interpretation arising objectively from the subject material. Such situations may conceivably occur given that words are capable of bearing an outer range of reasonable meanings. While this issue did not arise for decision in these appeals, we observed to Mr Nair that in such a scenario, perhaps a viable way in which the statement-maker might be able to object to the Minister's intended meaning in respect of the subject statement, and the issuance of a Part 3 Direction on the basis of that meaning, would be to disavow clearly and unequivocally to the target readership of the subject material in its original published form the Minister's intended meaning and any association with it. Such disavowal might, for instance, take the form of an addendum or a follow-up to the subject material, clarifying that the statement-maker *did not* intend to convey the particular meaning that the Minister had placed on the subject statement as the basis for issuing a Part 3 Direction. Such clear and public disavowal does not seem to us to be unduly onerous if, as Mr Nair submitted, the statement-maker insists that it was not making the subject statement that the Minister said was being made. In such circumstances, the statement-maker, in truth, would have no interest in allowing the misconception to persist, and would instead have every incentive to clarify to the public that the subject statement should not be read in the particular way that the Minister had done.



Version No 3: 16 Jun 2022 (11:20 hrs)

This seems to us to strike a possible balance between an objective interpretation of the subject statement from the perspective of the potential readership or audience of the subject material in Singapore, and an interpretation based on the statement-maker's subjective intended meaning. However, we leave this as a provisional view for future consideration since, as we mentioned earlier, the point did not arise for decision in the present appeals.

*The appropriate approach to the interpretation of the subject material*

156 Bearing in mind the principles set out above, we consider that in determining whether the subject material makes or contains the subject statement identified by the Minister in the Part 3 Direction in question, the court should interpret the subject material objectively in its proper context and ask whether, on that approach to the subject material regardless of the subjective intention of the statement-maker (including the statement-maker's subjective intended meaning), there would be at least an appreciable segment or a particular class of the potential readership or audience of the subject material in Singapore who would construe it as making or containing the subject statement, or regard the subject statement as a reasonable interpretation of the subject material (see [136] above). This, we think, strikes a reasonable balance between the need to give effect to the legislative intention underlying the POFMA (namely, the prevention of the communication of online falsehoods among the general public in Singapore and the counteracting of the deleterious effects of such communication) on the one hand, and the need to ensure that statements which will *only* be construed in the false sense by an insignificant segment of the public or class of persons are not culled from the public discourse on the other.



Version No 3: 16 Jun 2022 (11:20 hrs)

157 We stress that the interpretation of the subject material should be approached as a matter of impression; that is to say, in ascertaining the interpretation that would be put upon the subject material by at least an appreciable segment or a particular class of its potential readership or audience in Singapore (which may, as indicated at [149]–[150] above, consist of persons who might be inherently more inclined to believe certain falsehoods, depending on their content), the court should not engage in fine-grained legal interpretation or unduly technical analysis (see [136] above). The court should also be alive to the likelihood of an appreciable segment or a particular class of the potential readership or audience of the subject material in Singapore taking the particular part of the subject material that is said to be or to give rise to the subject statement out of context from the subject material as a whole owing to factors such as "clickbait", deceptive headlines, or forms of emphasis placed on that part of the subject material such as through the use of outsized graphics (see [108] above). At the same time, the court should not be content to accept what, in truth, are nothing more than theoretically possible interpretations of the subject material.

***Whether the subject statement is a "statement of fact"***

158 Once it has been found that the subject material makes or contains the subject statement identified by the Minister in the Part 3 Direction in question (as understood according to the Minister's intended meaning), the third step under the analytical framework is to determine whether the subject statement is a "statement of fact" (see [117(c)] above). This is a necessary element for the issuance of a Part 3 Direction, and its absence is one of the grounds on which a Part 3 Direction may be set aside under s 17(5)(*b*) of the POFMA. A "statement of fact" is defined in s 2(2)(*a*) of the POFMA as "a statement which *a reasonable person* seeing, hearing or otherwise perceiving it would consider to



Version No 3: 16 Jun 2022 (11:20 hrs)

be a representation of fact" [emphasis added]. This plainly points towards an *objective* approach in ascertaining whether the subject statement identified by the Minister is a "statement of fact".

***Whether the subject statement is "false"***

159 The fourth step under the analytical framework is to consider whether the subject statement identified by the Minister in the Part 3 Direction in question (as understood according to the Minister's intended meaning) is "false" in the sense of being "false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears" as stated in s 2(2)(*b*) of the POFMA (see [117(d)] above). An objective approach applies here as well, meaning that it is not relevant whether the person communicating the subject statement believes it to be true. This, we observe, is consistent with the purpose of the POFMA, which is (among other things) to prevent the communication of online falsehoods and to counteract the deleterious effects of such communication. As the AG has pointed out (see [136] above), the POFMA is primarily concerned with the effect that the subject material has on the public, and not with the statement-maker's subjective intention (which includes the statement-maker's subjective intended meaning). This is also in line with the passages we have already cited from the legislative material. Further, an objective approach coheres with ss 11(4) and 12(4) of the POFMA, which provide that a person who communicates a false statement of fact in Singapore may be issued a CD (in the case of s 11(4)) or a Stop Communication Direction (in the case of s 12(4)) "even if the person does not know or has no reason to believe that the statement is false". If it subsequently turns out that, construed objectively, the subject statement identified in the Direction is *not* a false statement of fact, the Direction may be set aside under s 17(5)(*b*) of the POFMA.



Version No 3: 16 Jun 2022 (11:20 hrs)

***Whether the subject statement "has been or is being communicated in Singapore"***

160 The final step under the analytical framework is to ascertain whether the subject statement identified by the Minister in the Part 3 Direction in question (as understood according to the Minister's intended meaning) "has been or is being communicated in Singapore" as required under s 10(1)(*a*) of the POFMA (see [117(e)] above). Section 3 of the POFMA defines the term "communicate" in the context of the "communication" of a statement or material in Singapore as follows:

> **Meaning of 'communicate'**
>
> **3.**—(1) In this Act other than in Part 2, a statement or material is communicated in Singapore if it is made available to one or more end-users in Singapore on or through the internet.
>
> (2) In Part 2, a statement is communicated in Singapore if it is made available to one or more end-users in Singapore on or through —
>
> (*a*) the internet; or
>
> (*b*) MMS or SMS.
>
> (3) A reference in this Act to communicating a statement or material in Singapore includes causing its communication (within the meaning of subsection (1) or (2), as the case may be) in Singapore.

161 On a literal reading of s 3(1) of the POFMA, the element of communication is made out where the subject material is published on or through the internet and is accessible by at least one end-user in Singapore. This means that in most cases, this element will generally be established in respect of material that has been published on or through the internet. For instance, the mere inclusion of a false statement of fact in material published on or through the internet, or the passive repetition of such a statement (whatever the context) on or through the internet, would amount to making the statement "available to



Version No 3: 16 Jun 2022 (11:20 hrs)

one or more end-users in Singapore on or through the internet", and thus potentially attract the issuance of a Part 3 Direction under the POFMA. We return here to a point that we made earlier (at [115] above), which is that ss 11(1) and 12(1) of the POFMA provide that a CD (in the case of s 11(1)) and a Stop Communication Direction (in the case of s 12(1)) are issued to "a person who communicated the subject statement in Singapore" (see, respectively, [120] and [121] above). This coheres with the fact that the POFMA is directed at (among other things) the communication of online falsehoods and the *deleterious effects* of such communication. It therefore targets not only those who *make* false statements of fact, but also those who *communicate* them. As this is a point of particular significance in the TOC appeal, we shall elaborate on it when we deal specifically with that appeal. For now, it suffices for us to highlight that for the recipient of a Part 3 Direction to have the Direction set aside under s 17(5)(*a*) on the basis that the subject statement was not "communicate[d] in Singapore" in the sense explained in s 3(1) of the POFMA, it will need to prove that it did not publish on or through the internet the subject material that is said to make or contain the subject statement, or that there were such restrictions imposed on the availability of that material that *no* end-user in Singapore could access it.

162 There is, as we alluded to earlier (at [116(a)] and [117(b)] above), also a *broader* sense to the element of communication. As a matter of logic, even if the subject material *has* been communicated in Singapore (in the statutory sense set out in s 3(1) of the POFMA) by the recipient of a Part 3 Direction, the subject statement that is said to be made by or contained in the subject material will *not* have been communicated in Singapore if, upon an objective interpretation of the subject material in the manner outlined at [156]–[157] above, the court concludes that it does not in fact make or contain the subject statement. In such



Version No 3: 16 Jun 2022 (11:20 hrs)

a case, the Part 3 Direction may similarly be set aside under s 17(5)(*a*) of the POFMA.

***Summary of the applicable analytical framework***

163 To summarise, the analytical framework that should be applied by the court in determining whether a Part 3 Direction may be set aside under s 17(5)(*a*) and/or s 17(5)(*b*) of the POFMA is as follows.

(a) First, the court should determine the Minister's intended meaning in respect of the subject statement that he has identified in the Part 3 Direction. This is to be done by construing the subject statement objectively in the light of the Direction as a whole. It is the subject statement *as understood according to the Minister's intended meaning* which is the subject statement that the court is concerned with under the second to fifth steps of the analytical framework set out at sub-paras (b) to (e) below.

(b) Second, the court should determine whether the subject material in fact makes or contains the subject statement (or statements) identified by the Minister in the Part 3 Direction. This should be done by: (a) interpreting the subject material objectively in its proper context, and as a matter of impression rather than of fine-grained or unduly technical analysis; and (b) asking whether, on that approach to the subject material, there would be at least an appreciable segment or a particular class of the potential readership or audience of the subject material in Singapore who would construe it as making or containing the subject statement, or regard the subject statement as a reasonable interpretation of the subject material. In undertaking this interpretive exercise, the court is not concerned with the single meaning rule, nor with the



Version No 3: 16 Jun 2022 (11:20 hrs)

subjective intention of the statement-maker (including the meaning that it subjectively intended to place on the subject material). Furthermore, while considering the subject material as a whole, the court should be alive to the likelihood that the particular part of the subject material that is said to be or to give rise to the subject statement may be taken out of context from the subject material as a whole owing to factors such as "clickbait", deceptive headlines, or forms of emphasis placed on that part of the subject material (such as through the use of outsized graphics). If the court determines that the subject material does not in fact make or contain the subject statement identified in the Part 3 Direction, the Direction may be set aside under s 17(5)(*a*) of the POFMA.

(c) Third, the court should determine whether the identified subject statement is a "statement of fact" as defined in s 2(2)(*a*) of the POFMA, in the sense that a reasonable person would consider it to be a representation of fact. An objective approach applies in this regard. If the court finds that the identified subject statement is not a statement of fact, the Part 3 Direction may be set aside under s 17(5)(*b*) of the POFMA.

(d) Fourth, the court should determine, likewise on an objective approach, whether the identified subject statement is "false" in the sense explained in s 2(2)(*b*) of the POFMA. If the court finds that the identified subject statement is not false, the Part 3 Direction may similarly be set aside under s 17(5)(*b*) of the POFMA.

(e) Fifth, the court should consider whether the identified subject statement "has been or is being communicated in Singapore", in the



Version No 3: 16 Jun 2022 (11:20 hrs)

sense that it has been or is being published on or through the internet, *and* has been or is being accessed by at least one end-user in Singapore, as stated in s 3(1) of the POFMA. If the element of communication is not present, the Part 3 Direction may be set aside under s 17(5)(*a*) of the POFMA.

164 Before we apply this analytical framework to the facts of these appeals, we consider the issue of the burden and standard of proof in applications to set aside Part 3 Directions under s 17 of the POFMA.

**The burden and standard of proof in applications to set aside Part 3 Directions under s 17 of the POFMA**

165 In the parties' written submissions, several arguments were raised in relation to the question of the burden of proof in applications to set aside Part 3 Directions under s 17 of the POFMA. These centred on the wording of the relevant provisions of the POFMA, the need to consider Parliament's intention in enacting this statute, the problem of information asymmetry between the Minister and the communicator of a subject statement (who is the person to whom a Part 3 Direction is issued), and the relationship between the POFMA framework and the principles of judicial review generally. At the hearing before us, Mr Nair focused in particular on the fact that an application under s 17 of the POFMA is referred to as an "appeal" in that section as well as in the POFMA Rules, and "shall be by way of rehearing" pursuant to r 5(1) of the POFMA Rules. Following from this, he contended that the burden of proof in proceedings under s 17 of the POFMA lay throughout the process on the Minister to prove the falsity of the subject statement identified in the Part 3 Direction being challenged, from "day 1", which we understand to mean the day on which the application to set aside the Direction was filed in the High Court, right through to the conclusion of any appeal which might be brought to the



Version No 3: 16 Jun 2022 (11:20 hrs)

Court of Appeal against the High Court's decision on the application. Mr Nair also submitted that this made sense because in the POFMA context, the recipient of a Part 3 Direction (who, as just indicated above, is the communicator of the subject statement identified in the Direction) in effect stood in the position of a defendant, and it should be the effective plaintiff – in this case, the Minister – who must bear the burden of proving that the legal requirements for issuing the Direction had been met. TOC aligned itself with these arguments.

166 To address the question of the burden of proof in applications under s 17 of the POFMA, we first consider the structure of the POFMA and the wording of the relevant provisions. For convenience, we reproduce some of these again.

167 As we mentioned earlier (see [114] above), the powers and procedures under Part 3 of the POFMA begin with the Minister's invocation of s 10, which sets out the conditions for the Minister's exercise of his power to issue a Part 3 Direction, such as a CD. Section 10 states:

> **Conditions for issue of Part 3 Directions**
>
> **10.**—(1) Any Minister may instruct the Competent Authority to issue a Part 3 Direction if all of the following conditions are satisfied:
>
> (*a*) a false statement of fact (called in this Part the subject statement) has been or is being communicated in Singapore;
>
> (*b*) the Minister is of the opinion that it is in the public interest to issue the Direction.
>
> (2) Any Minister may instruct the Competent Authority to issue a Part 3 Direction in relation to the subject statement even if it has been amended or has ceased to be communicated in Singapore.



Version No 3: 16 Jun 2022 (11:20 hrs)

168 It is evident from s 10(1) of the POFMA that, as we stated at [112] above, two conditions must be satisfied before a Part 3 Direction may be issued: first, there must be a *false statement of fact* that has been or is being *communicated in Singapore*; and, second, the Minister must be of the opinion that it is *in the public interest* to issue a Part 3 Direction in respect of that statement. Upon receipt of a Part 3 Direction, the communicator of the subject statement may apply to the Minister under s 19(2) of the POFMA to vary or cancel the Direction. If the Minister declines to vary or cancel the Direction, whether in whole or in part, the communicator of the subject statement may apply to the High Court under s 17 of the POFMA to set aside the Direction. Section 17 of the POFMA reads, in relevant part:

> **Appeals to High Court**
>
> **17.**—(1) A person to whom a Part 3 Direction is issued may appeal to the High Court against the Direction.
>
> (2) No appeal may be made to the High Court by any person unless the person has first applied to the Minister mentioned in section 19 to vary or cancel the Part 3 Direction under that section, and the Minister refused the application whether in whole or in part.
>
> (3) An appeal may only be made to the High Court within such period as may be prescribed by Rules of Court.
>
> (4) The High Court must hear and determine any such appeal and may either confirm the Part 3 Direction or set it aside.
>
> (5) The High Court may only set aside a Part 3 Direction on any of the following grounds on an appeal:
>
> (*a*) the person did not communicate in Singapore the subject statement;
>
> (*b*) the subject statement is not a statement of fact, or is a true statement of fact;
>
> (*c*) it is not technically possible to comply with the Direction.
>
> (6) A Part 3 Direction that is the subject of an appeal under subsection (1) remains in effect despite the appeal, and only ceases to have effect if it is set aside by the High Court or the



Version No 3: 16 Jun 2022 (11:20 hrs)

> Court of Appeal on appeal from the High Court, or if it expires or is cancelled under section 19.
>
> (7) Despite subsection (6), if the appellant establishes a prima facie case that it is technically impossible to comply with the Part 3 Direction, the High Court may direct that the Direction be stayed pending [the] determination of the appeal.
>
> …

169 The ambit of what the court may determine when dealing with an "appeal" under s 17 of the POFMA is set out in s 17(5). As to the three grounds listed there upon which a Part 3 Direction may be set aside, the parties agree that in respect of the ground under s 17(5)(*c*), the burden of proving any technical impossibility of complying with the Direction falls on the communicator of the subject statement as the recipient of the Direction. Accordingly, the discussion in this section on the burden of proof, strictly speaking, relates only to applications grounded on s 17(5)(*a*) and/or s 17(5)(*b*). Mr Nair conceded as much in relation to the s 17(5)(*c*) ground because, as he rightly noted, s 17(7) contemplates that the burden of proof is on "the appellant" (meaning the recipient of the Part 3 Direction being challenged) to establish a *prima facie* case that it is technically impossible to comply with the Direction. He submitted, however, that if Parliament had similarly intended for the burden of proof to be on the appellant in respect of the grounds under ss 17(5)(*a*) and 17(5)(*b*), the POFMA would have expressly said so. He further submitted that s 17(7) should be seen as an instance where the burden of proof had been squarely shifted to the party in the position of the effective defendant to prove matters within its exclusive knowledge, but this did not displace the general principle that for all the other legal requirements that had to be met before a Part 3 Direction could be issued, the effective plaintiff – meaning the Minister – bore the burden of proof.



Version No 3: 16 Jun 2022 (11:20 hrs)

170 In our judgment, the answer to the question of the burden of proof, and the applicable standard of proof, must stem from an understanding of the true nature of the procedure for setting aside a Part 3 Direction under s 17 of the POFMA. The appellants have, with respect, misunderstood the significance of the term "appeal" in s 17 of the POFMA and the term "rehearing" in r 5(1) of the POFMA Rules.

171 Section 17 of the POFMA is titled "Appeals to High Court", but some reflection is called for as to what an appeal under this section is an appeal *against*. In the appellants' submission, it is an appeal against the Minister's issuance of a Part 3 Direction, in respect of which, it is said, the Minister bears the burden of proving that the legal requirements under s 10(1) of the POFMA for issuing the Direction have been met. Flowing from that understanding, Mr Nair argues that the term "rehearing" in r 5(1) of the POFMA Rules entails that although an appellant typically bears the burden of showing that the decision being appealed against is wrong or was made without proper basis, in the context of s 17 of the POFMA, the burden remains on the Minister, when a Part 3 Direction is challenged before the court, to establish that all the legal requirements to justify the exercise of his power to issue the Direction have been met.

172 This conception of the "appeal" procedure under s 17 of the POFMA is, in our view, flawed and erroneous. The procedure provided for in s 17 is not an "appeal" in the sense of a superior court's appellate review of the decision of a lower court or tribunal. Rather, it is a statutory mechanism that is specially provided under the POFMA to afford the communicator of a subject statement who is dissatisfied with the Minister's issuance of a Part 3 Direction against it a direct avenue to *challenge* the Minister's decision. In the words of the Minister



Version No 3: 16 Jun 2022 (11:20 hrs)

for Law during the second reading of the POFMA Bill (see *Singapore Parliamentary Debates* (7 May 2019) vol 94):

> … [C]urrent laws also criminalise the transmission of false or fabricated messages including on the Internet. …
>
> …
>
> … [T]he BA [the Broadcasting Act (Cap 28, 2012 Rev Ed)] is broader on the types of material that can be taken down. The [POFMA] Bill is narrower. …
>
> … [P]owers under the BA are exercised by the Minister today, and there is no direct appeal to the Court; it is only by judicial review.
>
> …
>
> … [The POFMA Bill] is not just narrower in scope but *it also gives greater judicial oversight compared with the current law*. Existing powers on take down of objectionable material; the Government responses to be carried; other orders to be made; what oversight does the Court have today? It is by judicial review.
>
> *According to POFMA, the Bill, on the determination of falsehoods, the Court oversight is by way of direct appeal. That was a considered decision by the Government. The process will be made fast and inexpensive for individuals.*
>
> [emphasis added]

173 From the Minister for Law's speech cited above, it can be seen that the decision to provide for judicial oversight of certain aspects of the Minister's powers under the POFMA to be by way of "direct appeal", as opposed to "judicial review", was "a considered decision by the Government" to make it both "fast and inexpensive" for individuals to challenge the exercise of those aspects of the Minister's powers. The key point to note here is the juxtaposition of the terms "appeal" and "judicial review" in the Minister for Law's speech. In administrative law, it is well established that judicial review is a means of challenging the *legality* of government decision-making. It does not extend to a review of the *merits* of the decision being challenged, but is instead confined to



Version No 3: 16 Jun 2022 (11:20 hrs)

a review of whether the power pursuant to which the decision was made was exercised on lawful grounds and following a lawful process. As against this, an appellate body may examine the *merits* of the decision being challenged, and not merely its legality (see Peter Leyland & Gordon Anthony, *Textbook on Administrative Law* (Oxford University Press, 7th Ed, 2012) at pp 182–183).

174 In *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934, Rajah J provided (at [79]) a helpful distinction between the concepts of judicial review and appeal, albeit not in the specific context of statutory appeals (that is to say, appeals where the right of appeal arises from, and may therefore be limited by, statute):

> … [T]here is a clear distinction between the powers that a superior court exercises in judicial reviews and appeals. ***While judicial reviews and appeals are two avenues that an unsatisfied party in an inferior tribunal may have recourse to, they are separate and distinct in so far as they are designed to address two different*** *types* ***of wrongs that the tribunal may commit.*** Judicial review is almost invariably limited to examining, *inter alia*, whether the tribunal has exceeded its jurisdiction, whether there has been an abuse of discretion or a failure of natural justice, and whether the tribunal has acted irrationally, unreasonably or in bad faith. In other words, it hinges on the legality of the decision. ***An appeal, on the other hand has a wider scope: an appellate court may in limited circumstances evaluate the substantive merits of the decision arrived at by the tribunal***: see *AG v Ng Hock Guan* [2004] 3 SLR(R) 253 at [22]. See also, [Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 3rd Ed, 2004)] at para 11-052 and William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 9th Ed, 2004) at p 704. As explained in Mark Aronson & Bruce Dyer, *Judicial Review of Administrative Action* (LCB Information Services, 2nd Ed, 2000) at pp 134–142, ***the basic distinction between an appeal and a review operates at two levels: one is formal and the other is substantive***. … [emphasis in original in italics; emphasis added in bold italics]

175 The same distinction exists between judicial review and statutory appeals, with the latter involving a review of the *merits* of the decision being



Version No 3: 16 Jun 2022 (11:20 hrs)

challenged to the extent permitted by the provisions of the relevant statute. This is illustrated by the Privy Council's decision in *Kenneth Merrall Fox v General Medical Council* [1960] 1 WLR 1017 ("*Fox*"), which concerned a statutory appeal under s 36 of the Medical Act 1956 (c 76) (UK) ("the 1956 UK Medical Act") against a decision of the Disciplinary Committee of the General Medical Council. The Privy Council observed that the provisions of the 1956 UK Medical Act "[did] not limit or qualify the appeal in any way, so that an appellant [was] entitled to claim that [the appeal was] in a general sense nothing less than a rehearing of his case and a review of the decision" (at 1020). In the Privy Council's view, a useful analogy could be drawn between its position in a statutory appeal from a decision of the Disciplinary Committee of the General Medical Council and that of an appellate court hearing an appeal from a judge sitting alone without a jury (at 1021). The Privy Council was therefore entitled to examine the merits of the decision, and was not (unlike in judicial review proceedings, which were "not truly by way of appeal") confined to "satisfy[ing] itself that certain essential rules of procedure, which [were] treated by it as constituting the requirements of natural justice, [had] been duly observed" (at 1022).

176 As we highlighted earlier (at [172] above), the "appeal" procedure provided for in s 17 of the POFMA is a statutory mechanism for the recipient of a Part 3 Direction to challenge the Minister's decision to issue the Direction against it. Unlike the position in a statutory appeal under s 36 of the 1956 UK Medical Act, in respect of which the Privy Council's powers amount, in essence, to the powers of a court hearing an appeal against (as opposed to undertaking judicial review of) a decision of the Disciplinary Committee of the General Medical Council, the High Court's powers in an application to set aside a Part 3 Direction under s 17 of the POFMA are much narrower, in that the grounds



Version No 3: 16 Jun 2022 (11:20 hrs)

upon which the Direction may be set aside are expressly confined to the three grounds listed in s 17(5). Although the High Court is empowered, in an "appeal" under s 17 of the POFMA, to review certain aspects of the Minister's decision on the merits and come to a different conclusion, at least in relation to those aspects, it cannot be said that such an "appeal" is an "appeal" in the sense of a superior court hearing an appeal from an inferior court or tribunal. The Minister is a party to the litigation, and it is the exercise of his power under s 10 of the POFMA, namely, his decision to issue a Part 3 Direction, that is being challenged before the High Court. That decision is squarely an *executive* function, and is in no way a judicial or quasi-judicial function. In that sense, an "appeal" under s 17 of the POFMA is analogous to judicial review in the sphere of administrative law – both are avenues for a dissatisfied party to challenge an *executive* decision. The use of the term "appeal" is, as is evident from the extract from the Minister for Law's speech set out at [172] above, really intended to do no more than make explicit the broader remit for review by the High Court than would typically be the case when executive action is judicially reviewed. It follows that the underlying assumption in SDP's argument – namely, that there is an implicit burden of proof borne by the Minister at the time of issuance of a Part 3 Direction, albeit one that he notionally discharges to himself – is misconceived. In form and in substance, and contrary to Mr Nair's submissions, the applicant in proceedings under s 17 of the POFMA is the effective plaintiff and the Minister, the effective defendant.

177 Turning to the stipulation in r 5(1) of the POFMA Rules that an "appeal" under s 17 of the POFMA "shall be by way of rehearing", in our view, this simply connotes that the High Court must determine afresh the relevant facts pertaining to the ss 17(5)(*a*) and 17(5)(*b*) grounds for setting aside a Part 3 Direction, without deferring to the Minister's determination of those facts or



Version No 3: 16 Jun 2022 (11:20 hrs)

being constrained by the usual principles of appellate review. In the typical context of appellate review, an appellate court will only intervene if the trial judge's assessment is "plainly wrong or against the weight of the evidence" (see, among other cases, *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41]). This does not apply to the High Court when it is determining whether any of the grounds for setting aside a Part 3 Direction under s 17(5)(*a*) and/or s 17(5)(*b*) of the POFMA have been established.

178 It is clear then that the statutory mechanism set out in s 17 of the POFMA is unique. How does this affect the determination of on whom the burden of proof lies in an application under this section?

179 The starting point is that, like judicial review, the statutory mechanism under s 17 of the POFMA is, as we observed at [176] above, an avenue for challenging an *executive* decision. From this perspective, the appellants' submission that the burden of proof must lie on the Minister from the outset does not sit well with the nature of this statutory mechanism. In this regard, TOC submitted that the grounds upon which a Part 3 Direction may be set aside under s 17 of the POFMA bear more than a passing resemblance to the grounds upon which an executive decision may be judicially reviewed, in so far as what the grounds of challenge under ss 17(5)(*a*) and 17(5)(*b*) are directed at is whether the first condition precedent for the Minister's exercise of his power to issue a Part 3 Direction pursuant to s 10 of the POFMA (namely, the communication of a false statement of fact in Singapore: see s 10(1)(*a*)) has been satisfied. It is well established that in an action for judicial review, where an issue arises as to the existence of a precedent fact justifying the exercise of an executive power, the burden is on the Executive to prove the existence of that fact (see *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 at [124]). However, the analogy drawn by TOC



Version No 3: 16 Jun 2022 (11:20 hrs)

with the doctrine of precedent fact review is incomplete. Where the existence of a precedent fact justifying the exercise of an executive power is in issue in judicial review proceedings, the applicant would first have to obtain leave from the court to commence the proceedings, and in doing so, would be required to demonstrate at least a *prima facie* case of reasonable suspicion in favour of granting the relief sought (see *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 ("*Lai Swee Lin Linda*") at [20]–[22]). Accordingly, in such a case, the applicant must first demonstrate at least some objective basis for its complaint against the executive decision in question.

180 In our judgment, there are at least three reasons why the burden of proof in proceedings under s 17 of the POFMA should lie from the outset on the recipient of the Part 3 Direction being challenged. First, as in the case of judicial review proceedings, it is inconsistent with the administrative law presumption of the legality of executive action to allow an applicant under s 17 of the POFMA to mount a challenge to the Minister's issuance of a Part 3 Direction without putting forward any basis for its challenge. As we explained in *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 ("*Ridzuan*"), it is presumed that constitutional office holders and other officials exercise their public functions in conformity with the law, and it is for any party alleging otherwise to adduce at least *prima facie* evidence at the outset to rebut this presumption (at [36]):

> *In general, a person who challenges an executive decision based on an alleged breach of one or more of the fundamental liberties enshrined in the Constitution or based on other grounds of review established in administrative law bears the burden of having to establish a* prima facie *case of reasonable suspicion of breach of the relevant standard.* He will be granted leave to commence judicial review proceedings only if he satisfies this threshold requirement. *This is because decisions of constitutional office holders and other officials are presumed to be made in conformity with the law. The presumptions of constitutionality and regularity apply as a matter of the separation of powers*



Version No 3: 16 Jun 2022 (11:20 hrs)

> *doctrine (in the context of constitutional office holders) and legal policy (in the context of other officials)* (*Ramalingam Ravinthran v AG* [2012] 2 SLR 49 … at [44] and [47]). It falls upon the applicant to adduce *prima facie* evidence of breach of the relevant standard in order to rebut the presumption. *The decision-maker is not required to justify his decision until the applicant has crossed this threshold. Indeed it would not be sensible to hold that the presumption of legality applies and at the same time require the decision-maker to disclose the reasons for his decision every time a challenge is lodged against his decision.* [emphasis added]

181 The second reason, which is alluded to in the last sentence of the above passage from *Ridzuan*, is that placing the burden of proof on the Minister from the outset without first requiring the recipient of the Part 3 Direction being challenged to show some objective basis for its complaint opens the way for abuse. It would mean, in the POFMA context, that a person may make or communicate any sort of false allegation pertaining to a matter of public interest; and if he is subsequently issued with a Part 3 Direction and is unsuccessful (whether in whole or in part) in his application to the Minister to vary or cancel the Direction under s 19 of the POFMA, he may then bring an application in the High Court to set aside the Direction under s 17 of the POFMA, thus requiring the Minister to prove that the legal requirements for issuing the Direction have been satisfied, no matter how frivolous or plainly unmeritorious the challenge to the Direction might be. This would be inconsistent with Parliament's intention as regards the nature and design of the statutory mechanism provided in s 17 of the POFMA for challenging the Minister's issuance of a Part 3 Direction, as we have explained it at [172], [173] and [176] above.

182 The third reason why we consider that the burden of proof in proceedings under s 17 of the POFMA should lie from the outset on the recipient of the Part 3 Direction being challenged is that under reg 6(*b*) of the POFMA



Version No 3: 16 Jun 2022 (11:20 hrs)

Regulations, the Minister is required to set out in the Direction "the basis on which the subject statement … is determined to be a false statement of fact" (see [122] above). SDP submitted that this "basis" could simply be an assertion by the Minister that the subject statement is a false statement of fact, relying on similar observations made by Ang Cheng Hock J in *SDP v AG* at [41]–[42]. With respect, we do not think reg 6(*b*) must necessarily be read so narrowly. Of course, much will depend on the content of the subject statement. In some situations, it may well be the case that the *basis* for the determination that a subject statement is a false statement of fact is the knowledge of the Minister and/or his officials that that subject statement is a false statement of fact. To take an example, the basis for the determination that the subject statement identified in the TOC CD is a false statement of fact is the knowledge of the Minister for Home Affairs and/or his staff that the SPS does not in fact employ the "brutal & unlawful hanging methods" that were alleged by LFL in its press statement and reproduced by TOC in the TOC Article (those allegations, as reproduced in the TOC Article, being the identified subject statement: see [18] above). The *basis* on which a subject statement is said to be a false statement of fact would extend to the *grounds* for the assertion that it is a false statement of fact, which could encompass the types or sources of information and/or knowledge relied on, the investigations undertaken and, as in the case of the SDP CDs, the data relied on. In other words, the basis on which a subject statement is said to be a false statement of fact is more than a *mere assertion* that that subject statement is a false statement of fact. Rather, it refers to the *reason(s)* underlying the determination that that subject statement is a false statement of fact, including the grounds upon which the determination is made. Since the Minister is required, on this interpretation of reg 6(*b*), to provide his grounds for regarding the subject statement identified in a Part 3 Direction to be a false statement of fact, the recipient of the Direction who seeks to challenge



Version No 3: 16 Jun 2022 (11:20 hrs)

those grounds must explain *why* it challenges those grounds. This reinforces our conclusion that the recipient of a Part 3 Direction who wishes to challenge the Direction must, at the point of filing its application under s 17 of the POFMA, bear the burden of showing its entitlement to have the Direction set aside under one or more of the grounds set out in s 17(5).

183 Accordingly, we are of the view that in applications under s 17 of the POFMA, the burden of proof must lie on the recipient of the Part 3 Direction being challenged to prove one or more of the grounds listed in s 17(5) upon which the Direction may be set aside. There remains a question as to the applicable *standard* of proof. In our judgment, there is force in TOC's submission that an application based on the grounds set out in s 17(5)(*a*) and/or s 17(5)(*b*) is closely analogous to a precedent fact review, in that the first precondition for the Minister's exercise of his power to issue a Part 3 Direction pursuant to s 10 (namely, the communication of a false statement of fact in Singapore: see s 10(1)(*a*)) is being challenged. As we have already noted (at [179] above), in judicial review cases where the existence of a precedent fact justifying the exercise of an executive power is in issue, the applicant would first have to obtain leave to bring judicial review proceedings by showing at least a *prima facie* case of reasonable suspicion in favour of granting the relief sought. Given our conclusion that the legislative intention underlying s 17 of the POFMA is to confer on applicants under the section a wider right of relief than that afforded by judicial review as it is traditionally understood, the initial burden on the recipient of the Part 3 Direction being challenged should be no more onerous than to show a *prima facie* case of reasonable suspicion that one or more of the grounds for setting aside the Direction under s 17(5)(*a*) and/or s 17(5)(*b*) is satisfied. Where the recipient of the Part 3 Direction cannot even establish this, its application would fail at the threshold. Conversely, where the



Version No 3: 16 Jun 2022 (11:20 hrs)

recipient of the Part 3 Direction is able to cross this threshold, the evidential burden will then shift to the Minister to show that none of the grounds under s 17(5)(*a*) and/or s 17(5)(*b*) that are relied upon by the recipient of the Part 3 Direction are made out. In line with what we have set out at [182] above, how the Minister discharges that evidential burden will depend on all the circumstances, including the content of the subject statement, the types or sources of information and/or knowledge relied on, the investigations undertaken and, conceivably, the pertinent data. The final determination will be made by the court based on the totality of the evidence adduced by the parties, applying the standard of proof on the balance of probabilities. In our view, adopting such a graduated and calibrated approach to proof in the POFMA context would achieve broad consistency between the statutory mechanism provided in s 17 of the POFMA for challenging the Minister's decision to issue a Part 3 Direction and judicial review of other aspects of the Minister's decision-making in this regard.

184 The initial standard of a *prima facie* case of reasonable suspicion is not a high bar to meet. What is required is that there be some material "which might, on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed" (see *Lai Swee Lin Linda* at [22]). As we explained in *Re Nalpon, Zero Geraldo Mario* [2018] 2 SLR 1378 at [19], this standard is "a means of filtering out groundless or hopeless cases at an early stage". In the context of applications under s 17 of the POFMA, it serves to strike the appropriate balance between, on the one hand, the fact that the Minister has greater resources at his disposal to ascertain the truth or falsity of any statement of fact that has been or is being communicated online in Singapore, and, on the other hand, the need to sieve out frivolous or vexatious applications by requiring the recipient of the Part 3 Direction being challenged



Version No 3: 16 Jun 2022 (11:20 hrs)

to demonstrate an objective basis for its complaint against the Direction. In this regard, the court should ensure that the inquiry is targeted and focused on the specific grounds of challenge that the recipient of the Direction raised and relied upon by examining whether, in the light of those grounds, an adequate basis has been raised for suggesting that the Minister improperly exercised his powers in issuing the Direction, and if so, whether the Minister has adequately addressed those grounds.

185 In that light, we turn to the substantive issues arising in the present appeals, starting with the SDP appeal.

## Our decision on the substantive issues in the present appeals

### *The SDP appeal*

186 As we noted at [10] above, three CDs were issued to SDP in connection with the false statements of fact that allegedly arose from the SDP Article, the November Facebook post and the December Facebook post. We summarise in tabular form below the subject statements identified in these CDs:

| S/N | The identified subject statements | The CDs in which the subject statements were identified | The subject material |
|---|---|---|---|
| 1 | The first subject statement defined at [10(a)] above: "*Local PMET retrenchment has been increasing*" [emphasis added] | SDP CD-1 | The SDP Article |
| | | SDP CD-2 | The November Facebook post (hyperlink to the SDP Article) |



Version No 3: 16 Jun 2022 (11:20 hrs)

| S/N | The identified subject statements | The CDs in which the subject statements were identified | The subject material |
|---|---|---|---|
| | | SDP CD-3 (second half) | The December Facebook post (hyperlink to the SDP Article) |
| 2 | The second subject statement defined at [10(b)] above: "*Local PMET employment has gone down*" [emphasis added] | SDP CD-3 (first half) | The December Facebook post (graphical illustration) |

It should be noted that, in keeping with the analytical framework summarised at [163] (in particular, at [163(a)]) above, when we refer to each of the two aforesaid subject statements in the rest of this section, we mean the relevant subject statement as understood according to the Minister's intended meaning.

187 We should also point out that although the word "local" is used in both the SDP Article (in the context of the term "local PMETs") and the graphical illustration in the December Facebook post (in the context of the phrase "[l]ocal PMET employment"), the meaning of this word, in terms of how it would have been construed by at least an appreciable segment or a particular class of the potential readership or audience of these two publications in Singapore, is a matter in dispute only in relation to the December Facebook post and the second subject statement, but not in relation to the SDP Article and the first subject statement. Where the SDP Article is concerned, although SDP takes the position in its written case for CA 52 that the term "Singaporeans", as used in this article, is "unambiguously a reference to Singapore citizens, as against 'foreigners' … including Singapore Permanent Residents", it also *disavows* any intention to



Version No 3: 16 Jun 2022 (11:20 hrs)

make the claim that this article "refer[s] only to 'Singaporeans' and not to 'locals', which … would include both Singaporean[s] and SPRs" (see [25] above). Specifically, at para 26 of its written case, after setting out its position as to what the words "Singaporeans" and "foreigners" "unambiguously" (in its view) mean, SDP goes on to state: "[t]he point is relevant to *CD-3 (Part 2)* [meaning the first half of SDP CD-3, which is that part of SDP CD-3 that pertains to *the December Facebook post*], and we deal with it in detail at paragraphs [188]–[205] below" [emphasis added]. This is reiterated at para 162 of its written case, where, in addressing the first subject statement, SDP states:

> … [T]he learned Judge rejected what His Honour appeared to consider was the SDP's claim that the SDP Article was referring only to 'Singaporeans' and not to 'locals', which, in His Honour's view, would include both Singaporean [*sic*] and SPRs. With respect, *that claim was not made in respect of the SDP Article*, and the distinction between the two does not aid in in its interpretation. *A distinction was drawn between Singaporeans and non-Singaporeans in respect of CD-3 (Part 2), with which we deal at paragraphs 188 to 205 below*. [emphasis added]

Finally, at para 187 of its written case, when dealing with the second subject statement, SDP states: "[i]t is only in the context of CD-3 (Part 2) that the issue of the meaning of the word '*local*' arises" [emphasis in original].

188 In other words, SDP does not appear to put in issue the AG's contention that the term "local PMETs" in the SDP Article is synonymous with the term "Singapore PMETs" (which is also used in the article), with both terms denoting (to use the AG's words) "PMETs who are Singapore citizens *and* Singapore permanent residents" [emphasis in original] for the purposes of the first subject statement. Presumably because of this, the parties did not tender to us any substantive arguments on the meaning of the word "local" in relation to the SDP Article and the first subject statement. As this issue is not a matter in dispute, we need not decide on it for the purposes of determining whether the SDP CDs,



Version No 3: 16 Jun 2022 (11:20 hrs)

in so far as they pertain to the SDP Article, may be set aside. However, we think it has a bearing on the meaning of the word "[l]ocal" in the graphical illustration in the December Facebook post, which *is* a contested point. We discuss this further below when we analyse the December Facebook post and the second subject statement. First, we address the SDP Article and the first subject statement.

*The first subject statement*

189 To recapitulate, in the SDP Article published on 8 June 2019, SDP wrote:

> *The SDP's proposal comes amidst a rising proportion of Singapore PMETs getting retrenched.* Such a trend is partly the result of hundreds of local companies continuing to discriminate against local workers. [emphasis added]

The "proposal" mentioned in the italicised sentence in the above extract ("the Relevant Sentence") was, as we noted at [7] above, the introduction of a points-based system for foreign PMETs wishing to work in Singapore, so as to help ensure that firms were not hiring foreigners based solely on their willingness to accept lower wages. In the affidavit of Wong Weiqi dated 13 January 2020 that was filed on behalf of the Minister for Manpower in the proceedings below ("the MOM's 13 January 2020 affidavit"), it was confirmed that the Relevant Sentence was the specific sentence in the SDP Article from which the first subject statement was said to arise. The first subject statement was the basis upon which SDP CD-1, SDP CD-2 and the second half of SDP CD-3 (which was that part of SDP CD-3 that was directed at the hyperlink to the SDP Article in the December Facebook post) were issued. We hereafter refer to these CDs collectively as "the SDP CDs pertaining to the SDP Article" in this section of our judgment where appropriate to the context.



Version No 3: 16 Jun 2022 (11:20 hrs)

190 Before this court, the AG, just as in the proceedings below (see *SDP v AG* at [64]), advanced two interpretations of the Relevant Sentence that were said to give rise to the first subject statement. These two interpretations were also set out in the MOM's 13 January 2020 affidavit, and they are as follows:

(a) local PMET retrenchment has been increasing in *absolute numerical terms* ("the MOM's primary interpretation"); and

(b) in the alternative, the *proportion* of retrenched local PMETs compared to all local PMET employees has been rising ("the MOM's alternative interpretation").

191 We return here to the observation we made earlier at [135] above. Before Ang Cheng Hock J, and, indeed, also before us, the AG appeared to have conflated the first two steps of the analytical framework set out at [117] (and summarised at [163]) above. In our judgment, this impacted the analysis that was applied by Ang J in *SDP v AG* in respect of the first subject statement, in that he did not determine separately the meaning to be attributed to that subject statement and whether that subject statement, so understood, was made or contained in the SDP Article. Instead, he ascertained the meaning of that subject statement by considering what subject statement could be identified from, or could be said to have been made or contained in, the content of the SDP Article (*SDP v AG* at [57]). (We digress here to observe that since the analytical framework set out in this judgment had not been articulated yet at the time *SDP v AG* was decided, Ang J understandably did not analyse the meaning to be attributed to the first subject statement in terms of the meaning that the Minister intended to place on it.) As we mentioned earlier (see [26] above), Ang J agreed with SDP that the first subject statement, as understood according to the MOM's *primary* interpretation of the Relevant Sentence, did not arise from the SDP



Version No 3: 16 Jun 2022 (11:20 hrs)

Article (*SDP v AG* at [80]–[84]). However, he accepted the AG's submission that that subject statement, as understood according to the MOM's *alternative* interpretation of the Relevant Sentence, arose from the SDP Article, and found that it was demonstrably false on the evidence (*SDP v AG* at [59], [88], [89] and [100]). Crucially, in arriving at this conclusion, he acknowledged that (*SDP v AG* at [102]):

> … ***[SDP] CD-1 and its correction notice arguably does*** [*sic*] ***not appear to*** *directly* ***address the subject statement for the SDP Article, as determined in my judgment, which is the [AG]'s alternative case.*** This is perhaps unsurprising, given that [SDP] CD-1 presumably proceeded on the basis of the [AG]'s primary case. [emphasis in original in italics; emphasis added in bold italics]

192 Ang J held that it was immaterial that SDP CD-1 had failed to identify the first subject statement, as understood according to the MOM's alternative interpretation of the Relevant Sentence, as the subject statement that arose from the SDP Article. He noted that the correction notice which SDP CD-1 required SDP to put up contained a link to an article published on the Government's "Factually" website addressing the alleged falsehoods in the SDP Article (as well as those in the November Facebook post and the December Facebook post), and that there was sufficient data in that article ("the 'Factually' article") on the *proportion* of retrenched local PMETs relative to all local PMET employees to address directly the MOM's alternative interpretation of the Relevant Sentence (*SDP v AG* at [103]). He therefore concluded that SDP CD-1 and its correction notice were, on balance, worded widely enough to encompass the subject statement that he found had arisen from the SDP Article (which was the first subject statement as understood according to the MOM's alternative interpretation of the Relevant Sentence), and that this applied to SDP CD-2 and SDP CD-3 (as well as the corresponding correction notices therein) too in so far as those two CDs were premised on the hyperlinking of the SDP Article in,



Version No 3: 16 Jun 2022 (11:20 hrs)

respectively, the November Facebook post and the December Facebook post (*SDP v AG* at [103], [109] and [112]). In effect, as we pointed out at [123] above, Ang J upheld the SDP CDs pertaining to the SDP Article on the basis of a subject statement that was not identified in these CDs.

193 SDP's argument on appeal is simple. It contends that Ang J was correct to find that the first subject statement, as understood according to the MOM's primary interpretation of the Relevant Sentence, did not arise on a proper interpretation of the SDP Article. Since that was the case, SDP submits, Ang J should not have gone *further* and found that there was an alternative interpretation of the Relevant Sentence – namely, the MOM's alternative interpretation – that gave rise to the first subject statement and, in turn, justified the issuance of the SDP CDs pertaining to the SDP Article. These CDs did not identify the first subject statement, as understood according to the MOM's alternative interpretation of the Relevant Sentence, as the subject statement that arose from the SDP Article, and that alternative interpretation was in fact proffered for the first time only in the MOM's 13 January 2020 affidavit, which was filed just three days prior to the hearing before Ang J. In the circumstances, the only subject statement that was identified in the SDP CDs pertaining to the SDP Article was the first subject statement as understood according to the MOM's *primary* interpretation of the Relevant Sentence – in other words, according to SDP, the first subject statement was a statement that local PMET retrenchment has been increasing in *absolute numerical terms*.

194 SDP contends that the first subject statement, as understood in the sense just stated, was not a reasonable interpretation of the Relevant Sentence as that sentence "clearly referred to the '*proportion*' of Singapore PMETs being retrenched" [emphasis in original], and not the absolute number of "Singapore PMETs" being retrenched. Thus, the first subject statement (as understood



Version No 3: 16 Jun 2022 (11:20 hrs)

according to the MOM's primary interpretation of the Relevant Sentence) did not arise from the SDP Article. This, SDP submits, is dispositive of its appeal where the first subject statement is concerned, and the SDP CDs pertaining to the SDP Article ought to be set aside under s 17(5)(*a*) of the POFMA on the ground that the subject statement identified in these CDs was in fact never "communicate[d] in Singapore". We should point out that although SDP had previously sought to advance its own alternative interpretation of the Relevant Sentence, and had also attempted to defend the truth of that sentence as understood according to the MOM's alternative interpretation, at the hearing before us, Mr Nair confirmed that SDP's primary argument on the first subject statement was that this subject statement: (a) as understood according to the MOM's primary interpretation of the Relevant Sentence, did not arise from the SDP Article and was thus never "communicate[d] in Singapore"; and (b) as understood according to the MOM's alternative interpretation of the Relevant Sentence, was not identified as a subject statement in the SDP CDs pertaining to the SDP Article.

195 Having recounted the background to the SDP appeal in so far as the first subject statement is concerned, we now apply the analytical framework set out above to this subject statement.

(1) The Minister's intended meaning in respect of the first subject statement

196 We begin with the Minister's intended meaning in respect of the first subject statement, which, as we stated at [117(a)] and [119] above, is the meaning that she intended to act against in framing the first subject statement as she did. As we highlighted at [189] above, the specific sentence in the SDP Article based on which the Minister framed the first subject statement was the Relevant Sentence, namely: "The SDP's proposal comes amidst a rising



Version No 3: 16 Jun 2022 (11:20 hrs)

proportion of Singapore PMETs getting retrenched". The first subject statement was framed by the Minister as follows: "Local PMET retrenchment has been increasing".

197 It appears to us, on the face of the first subject statement, that the Minister intended this subject statement to be a statement that local PMET retrenchment has been increasing in *absolute numerical terms*. This is because, unlike the Relevant Sentence, the first subject statement does not contain the word "proportion". Indeed, as we noted above, this interpretation of the first subject statement was advanced by the AG as the MOM's primary interpretation of the Relevant Sentence. We return to the significance of this later.

198 The aforesaid interpretation of the first subject statement is supported by the terms of the correction notice pertaining to the SDP Article, which we set out earlier at [11] above. For ease of reference, we reproduce this correction notice again below:

> This post contains a false statement of fact. There is no rising trend of local PMET retrenchment. Local PMET employment has in fact increased consistently and continues to do so today. …

In our judgment, it is significant that this correction notice, like the first subject statement, simply refers to local PMET retrenchment without using the word "proportion" at all. This strongly reinforces our view that the Minister intended the first subject statement to be a reference to the trend of local PMET retrenchment increasing in *absolute numerical terms*.

199 Countervailing against this interpretation of the first subject statement is the fact that in Annex A to the SDP CDs pertaining to the SDP Article, the Minister explained the basis for her determination that the first subject statement was a false statement of fact as follows:



Version No 3: 16 Jun 2022 (11:20 hrs)

> There is no rising trend of retrenchments since 2015. The *number* of local PMETs retrenched *as a share* of all PMETs [*sic*] employees in the labour force has declined since 2015. [emphasis added]

Accompanying that explanation were two graphs and statistics compiled by the MOM showing a decline in both the "*[n]umber* of retrenched local PMETs" [emphasis added] as well as the "*[i]ncidence* of retrenched local PMETs among all local PMETs" [emphasis added] for the period from 2015 to 2018. This would suggest that the Minister intended the first subject statement to refer to an increase in local PMET retrenchment both in *absolute numerical terms* as well as in terms of *proportion* (relative to total local PMET employment), and considered it to be false in both respects. Indeed, the latter respect, which corresponds to the MOM's alternative interpretation of the Relevant Sentence, was the basis on which Ang Cheng Hock J upheld the SDP CDs pertaining to the SDP Article (see [191]–[192] above).

200 The AG contended that Ang J's decision in this regard should be affirmed, and that even if the first subject statement should have been worded more precisely to reflect the MOM's alternative interpretation of the Relevant Sentence as well, SDP did not suffer any prejudice because, as evidenced in its application to the Minister to cancel the SDP CDs under s 19 of the POFMA, it had in fact understood that one of the Minister's contentions was that there was no trend of rising local PMET retrenchment "*as a share of* ***all local PMET employees***" [emphasis in italics and bold italics in original]. As against this, there is the fact that both the MOM's 13 January 2020 affidavit and the AG's submissions before us advanced the primary meaning of the first subject statement as being the MOM's primary interpretation of the Relevant Sentence, namely, that local PMET retrenchment has been increasing in absolute numerical terms (which we elaborate on below). We reiterate that we are



Version No 3: 16 Jun 2022 (11:20 hrs)

concerned here with ascertaining the Minister's intended meaning in respect of the first subject statement, which is the meaning that she intended to act against in framing this subject statement as she did in the SDP CDs pertaining to the SDP Article. If the Minister thought that the Relevant Sentence was open to more than one interpretation that amounted to a false statement of fact, she could and should have framed more than one subject statement so that there would have been no doubt at all as to what meaning (or meanings) she intended to act against. Indeed, Ang J had suggested that the Minister could vary the SDP CDs pertaining to the SDP Article and the corresponding correction notices to make the identification of the subject statement clearer (*SDP v AG* at [104]), but this suggestion was not taken up.

201 The AG contended that the primary meaning of the first subject statement was that it was a statement that local PMET retrenchment has been increasing in *absolute numerical terms* because this was "the reasonable (and therefore correct) interpretation" of the Relevant Sentence in the SDP Article, and accorded with the plain language chosen by the Minister in framing the first subject statement as she did. This is also what we consider to be the Minister's intended meaning in respect of the first subject statement, taking this subject statement on its face and having regard as well to the correction notice pertaining to the SDP Article (see [197]–[198] above). The question which we have to consider is whether this interpretation of the first subject statement is displaced by the terms of Annex A to the SDP CDs pertaining to the SDP Article.

202 As we noted at [199] above, this annex set out the Minister's explanation of the basis for her determination that the first subject statement was a false statement of fact, as well as data from the MOM which showed a decline in local PMET retrenchment for the period from 2015 to 2018 both in *absolute*



Version No 3: 16 Jun 2022 (11:20 hrs)

*numerical terms* as well as in terms of *proportion* (relative to total local PMET employment). This same explanation and data also featured in the "Factually" article mentioned at [192] above, and a hyperlink to that article was provided in the correction notices that SDP was required to put up. At the hearing before us, Ms Tan Ruyan Kristy SC ("Ms Tan"), who appeared on behalf of the AG in respect of the SDP appeal, argued that, reading the first subject statement *together* with Annex A to the SDP CDs pertaining to the SDP Article, SDP would have known that the Minister was including an *alternative subject statement* in these CDs, and, therefore, Ang J's decision to uphold these CDs on the basis of the MOM's alternative interpretation of the Relevant Sentence in the SDP Article should be affirmed.

203 We first underscore that only one subject statement – namely, the first subject statement – was identified as arising from the Relevant Sentence in the SDP Article. In our view, but for the explanation and the MOM data set out in Annex A to the SDP CDs pertaining to the SDP Article that we have just referred to, there would have been no real doubt, or, at most, little doubt, as to what the Minister's intended meaning in respect of the first subject statement was. Indeed, as we noted at [197] and [200] above, the meaning of the first subject statement that the AG advanced as its *primary case* was that this subject statement was a statement that local PMET retrenchment has been increasing in *absolute numerical terms*. In line with this, Ang Cheng Hock J observed in *SDP v AG* at [102] that SDP CD-1 and the accompanying correction notice did not appear to address directly the MOM's alternative interpretation of the Relevant Sentence because SDP CD-1 (and, by extension, SDP CD-2 and the second half of SDP CD-3) "presumably proceeded on the basis of the [AG]'s primary case" (see [191] above).



Version No 3: 16 Jun 2022 (11:20 hrs)

204 The response to SDP's arguments which was set out in the MOM's 13 January 2020 affidavit ("the Response") reinforces our view that, if not for Annex A to the SDP CDs pertaining to the SDP Article, there would have been either no or, at most, little doubt as to what the Minister's intended meaning in respect of the first subject statement was. One part of the Response is especially illuminating. In para 4(f), after explaining how the first subject statement was derived from the Relevant Sentence in the SDP Article, it was stated:

> … [A] reasonable person would understand the Relevant Sentence in the SDP Article to be asserting (as intended) that *the* ***number*** *of local retrenched PMETs has been increasing … The reasonable meaning of the Relevant Sentence is the subject statement identified in the CD for [the] SDP Article.* … [emphasis added in italics and bold italics]

In our judgment, this passage points to the conclusion that the meaning which the Minister intended to place on the first subject statement was that it was a statement that the absolute *number* of retrenched local PMETs has been increasing.

205 For completeness, we note that there then follows a further discussion in the Response (at paras 13–14), where it is made clear that the MOM's alternative interpretation of the Relevant Sentence in the SDP Article is in the *alternative* to the MOM's primary interpretation. We have two observations on this. First, as Mr Nair pointed out, this alternative was articulated as such for the first time only in the Response set out in the MOM's 13 January 2020 affidavit, which was filed just three days prior to the hearing before Ang Cheng Hock J (see [193] above). We stress that while we considered the Response in the previous paragraph, that was to *confirm*, rather than *alter*, what seemed to us to be the Minister's intended meaning in respect of the first subject statement based on an objective interpretation of that subject statement in the light of the SDP CDs pertaining to the SDP Article (including the corresponding correction



Version No 3: 16 Jun 2022 (11:20 hrs)

notices and Annex A thereto) as a whole. Second, if the Minister's intended meaning in respect of the first subject statement was (as we have found) that it was a statement that local PMET retrenchment has been increasing in absolute numerical terms, the first subject statement, so understood, would then be quite separate and distinct from, and therefore could not be said to encompass as well, an alternative statement that local PMET retrenchment has been increasing as a proportion of some comparator. That alternative statement might well have been a false statement of fact, and, indeed, that was what Ang J found in *SDP* v *AG* at [100] (see [191] above), but it was *not identified in the SDP CDs pertaining to the SDP Article as an alternative subject statement* that arose from the article. With respect, for the reasons explained at [125]–[130] above, it was not open to Ang J to uphold the SDP CDs pertaining to the SDP Article on the basis of a subject statement that was not identified as such in these CDs, which, as we noted at [202] above, was precisely what Ms Tan invited us to do.

206 In the light of these considerations, what is one to make of Annex A to the SDP CDs pertaining to the SDP Article, which was meant to provide "the *basis* on which the [first] subject statement … [was] determined to be a false statement of fact" [emphasis added] for the purposes of reg 6(*b*) of the POFMA Regulations? As we pointed out earlier (see [199] and [202] above), the explanation in this annex of the basis for the Minister's determination that the first subject statement was a false statement of fact made reference to "[t]he *number* of local PMETs retrenched *as a share* of all local PMETs [*sic*] employees in the labour force" [emphasis added]; similarly, the MOM data provided in support of this explanation pertained to local PMET retrenchment for the period from 2015 to 2018 *both* in *absolute numerical terms* and also *in terms of proportion* (relative to total local PMET employment). In our judgment, this is best understood as an explanation, from two different



Version No 3: 16 Jun 2022 (11:20 hrs)

perspectives, of why the first subject statement was considered by the Minister to be a false statement of fact. But it is an insufficient basis for *altering* the Minister's intended meaning in respect of the first subject statement. We reiterate that it would have been open to the Minister to identify an alternative subject statement or to amend the SDP CDs pertaining to the SDP Article if she had intended to act as well against a different subject statement that, in her view, also arose from the SDP Article, but this was not done (see [200] above).

207 We therefore conclude that, contrary to what Ang Cheng Hock J found in *SDP v AG*, the first subject statement relates *only* to the MOM's *primary* interpretation of the Relevant Sentence in the SDP Article. In other words, the Minister's intended meaning in respect of this subject statement was that it was a statement that local PMET retrenchment has been increasing in *absolute numerical terms*. Proceeding on this basis, we turn now to the second step of the analytical framework.

(2) Whether the SDP Article made or contained the first subject statement

208 The second step of the analytical framework requires us to interpret the SDP Article, in particular, the Relevant Sentence therein, so as to determine whether the article made or contained the first subject statement as understood according to the Minister's intended meaning; that is to say, as understood as a statement that the retrenchment of local PMETs has been increasing in *absolute numerical terms*. At the hearing before us, Ms Tan clarified that although the AG is not cross-appealing against Ang Cheng Hock J's finding that the first subject statement, so understood, did not arise from the SDP Article, it is seeking to rely on O 57 r 9A(5) of the Rules of Court (2014 Rev Ed) to advance the submission that Ang J's decision not to set aside the SDP CDs pertaining to the SDP Article can also be supported on the ground that the MOM's primary



Version No 3: 16 Jun 2022 (11:20 hrs)

interpretation of the Relevant Sentence (which corresponds to the Minister's intended meaning in respect of the first subject statement: see [207] above) is ultimately borne out by the terms of the article, apart from the ground actually relied on by Ang J (which was that the first subject statement, as understood according to the MOM's alternative interpretation of the Relevant Sentence, did arise from the SDP Article and did amount to a false statement of fact: see [191] above).

209 In determining whether the SDP Article made or contained the first subject statement as understood according to the Minister's intended meaning, the specific question which we have to consider is whether there would have been at least an appreciable segment or a particular class of the potential readership or audience of the article in Singapore who would have regarded the Relevant Sentence therein as a reference to an increase in "Singapore PMETs getting retrenched" in *absolute numerical terms*, as opposed to in terms of *proportion*.

210 In this regard, the AG contends that the premise of the SDP Article was that foreign PMETs were being allowed to enter Singapore indiscriminately and in large numbers, and the effect of this was to "displace local PMETs". This was the basis on which SDP was "push[ing] for reform of the immigration policy". It was in this context that the SDP Article went on to state in the Relevant Sentence: "The SDP's proposal comes amidst a rising proportion of Singapore PMETs getting retrenched". The AG submits that since the Relevant Sentence did not state the comparator against which the retrenchment of "Singapore PMETs" was being measured, "the ordinary reader would gloss over and attach no weight to the word '*proportion*' in the Relevant Sentence" [emphasis in original]. Simply put, the AG's submission is that the ordinary reasonable reader would have understood the Relevant Sentence to mean that



Version No 3: 16 Jun 2022 (11:20 hrs)

there was a rising *absolute number*, as opposed to a rising *proportion*, of "Singapore PMETs" getting retrenched.

211 We agree with the AG's submission. In our judgment, looking at the SDP Article as a matter of impression rather than fine-grained or unduly technical analysis, the Relevant Sentence therein would, on the balance of probabilities, have been interpreted by at least an appreciable segment or a particular class of the potential readership or audience of the article in Singapore as referring *not* to a rising *proportion* of "Singapore PMETs getting retrenched", but, instead, to a rising *number* of "Singapore PMETs getting retrenched". We note that in the court below, Ang Cheng Hock J rejected the AG's submission that the Relevant Sentence would have been construed as a reference to an increase in the absolute number of "Singapore PMETs getting retrenched" on the basis that while the ordinary reasonable reader might be prone to some degree of loose thinking, the concept of "proportion" was "not a complex one" for most people and "[did] not involve a convoluted deductive process" (*SDP v AG* at [82]). However, this must be balanced against the fact that the Relevant Sentence referred to "a rising proportion of Singapore PMETs getting retrenched" *without* mentioning what this rise was a proportion of. In our judgment, the failure to specify or identify any such comparator would have led to at least an appreciable segment or a particular class of the SDP Article's potential readership or audience in Singapore having the impression that, notwithstanding the use of the word "proportion" in the Relevant Sentence, this sentence, when viewed in the light of the article as a whole, was in fact intended to refer instead to a rising *number* of "Singapore PMETs getting retrenched". Simply put, in the absence of a comparator, the reference to a "proportion" did not make sense. It follows that it *cannot* be said that there would not have been any appreciable segment or any particular class of the SDP Article's potential



Version No 3: 16 Jun 2022 (11:20 hrs)

readership or audience in Singapore who would have interpreted the Relevant Sentence as a reference to a rising *number* of "Singapore PMETs getting retrenched". We therefore find that the SDP Article (specifically, the Relevant Sentence therein) did make or contain the first subject statement as understood according to the Minister's intended meaning, and that, by extension, the November Facebook post and the December Facebook post likewise made or contained this subject statement, so understood, due to their both containing a hyperlink to the SDP Article.

(3) Whether the first subject statement was a false statement of fact

212 In view of our finding that the SDP Article (and, by extension, the November Facebook post and the December Facebook post) did make or contain the first subject statement as understood according to the Minister's intended meaning, it is necessary for us to determine under, respectively, the third and fourth steps of the analytical framework whether the first subject statement, so understood, was a "statement of fact" as defined in s 2(2)(*a*) of the POFMA, and if so, whether it was "false" in the sense explained in s 2(2)(*b*) of this Act.

213 As regards the former, we are satisfied that the first subject statement was a "statement of fact" as "a reasonable person seeing … it would [have] consider[ed] it to be a representation of fact" (see s 2(2)(*a*) of the POFMA). This is because the first subject statement was, on its face, a simple, straightforward assertion as to the fact of local PMET retrenchment increasing in absolute numerical terms.

214 In view of the MOM data set out in Annex A to the SDP CDs pertaining to the SDP Article, we are also satisfied, where the fourth step of the analytical



Version No 3: 16 Jun 2022 (11:20 hrs)

framework is concerned, that the first subject statement was false. As we pointed out at [199] and [202] above, the aforesaid MOM data showed a *decline*, rather than an increase, in local PMET retrenchment in absolute numerical terms (as well as in terms of proportion, relative to total local PMET employment) for the period from 2015 to 2018. Notably, both in the court below and before this court, SDP did not challenge the SDP CDs pertaining to the SDP Article by attacking the veracity of this data; in other words, SDP did not seek to argue that this data was inaccurate or untrue, and therefore did not show that the first subject statement was false. Instead, SDP's challenge to the SDP CDs pertaining to the SDP Article was based on the argument that the first subject statement (as understood according to the Minister's intended meaning) did not arise from the SDP Article because it overlooked the crucial word "proportion" in the Relevant Sentence, which was the specific sentence in the article from which the first subject statement was derived. We have rejected this argument for the reasons explained at [211] above.

(4) Whether the first subject statement was communicated in Singapore

215 It remains for us to consider the question under the fifth, and last, step of the analytical framework of whether the first subject statement was "communicated in Singapore" within the meaning of s 3(1) of the POFMA. This point was not seriously disputed by SDP, in that it did not deny that the SDP Article was published on its website, and that the November Facebook post and the December Facebook post (both of which contained a hyperlink to the SDP Article) were posted on its Facebook page. It is thus clear that these three publications were all "made available to one or more end-users in Singapore on or through the internet", and therefore "communicated in Singapore" within the meaning of s 3(1) of the POFMA.



Version No 3: 16 Jun 2022 (11:20 hrs)

(5) Our decision on the SDP CDs pertaining to the SDP Article

216 In view of our finding that the first subject statement, as understood according to the Minister's intended meaning (which corresponds to the MOM's primary interpretation of the Relevant Sentence in the SDP Article): (a) was made or contained in the SDP Article, and, by extension, in the November Facebook post and the December Facebook post as well; (b) was a false statement of fact; and (c) was communicated in Singapore, we do not see any grounds for setting aside the SDP CDs pertaining to the SDP Article under s 17(5) of the POFMA. We thus uphold these CDs, but on a different basis from that relied on by Ang Cheng Hock J in *SDP v AG*, which was premised on the first subject statement being understood according to the MOM's alternative interpretation of the Relevant Sentence. It follows that we also accept Ms Tan's submission (see [208] above) that these CDs can be supported on the ground that the MOM's primary interpretation of the Relevant Sentence is ultimately borne out by the terms of the SDP Article.

*The second subject statement*

217 We turn now to the second subject statement. This subject statement was framed by the Minister as "Local PMET employment has gone down", and it formed the basis for the first half of SDP CD-3. It was said to have arisen from the following graphical illustration in the December Facebook post:



Version No 3: 16 Jun 2022 (11:20 hrs)

The key points of contention between the parties were what the Minister meant by the word "[l]ocal" in framing this subject statement as she did, and how this word would have been understood by at least an appreciable segment or a particular class of the potential readership or audience of the December Facebook post in Singapore.

(1) The Minister's intended meaning in respect of the second subject statement

218 Applying the analytical framework set out above to the second subject statement, our task under the first step of this framework is to determine, on an objective approach, the Minister's intended meaning in respect of this subject statement, that being the meaning which she intended to act against in framing



Version No 3: 16 Jun 2022 (11:20 hrs)

this subject statement as she did. In particular, what we have to ascertain is the meaning that the Minister intended to place on the word "[l]ocal" in the context of the phrase "[l]ocal PMET employment".

219 In this regard, it is pertinent that in SDP CD-3, in explaining the basis for her determination that the second subject statement was a false statement of fact, the Minister stated that "[l]ocal PMET employment has risen steadily since 2015". In support of this explanation, statistics from the MOM showing an increase in "[l]ocal PMET employment" for the period from 2015 to 2019 were provided, both in Annex A to SDP CD-3 as well as in the "Factually" article mentioned at [192] above. For the purposes of these statistics, which were published on the MOM's website, a "local" employee was defined by the MOM as "a *Singapore citizen or Permanent Resident* who is employed by an employer under a contract of service or other agreement entered into in Singapore" [emphasis added].

220 In view of the aforesaid definition of a "local" employee, we find that the Minister intended the word "[l]ocal" in the second subject statement to be a reference to "Singapore citizen[s] or Permanent Resident[s]". It follows that the Minister's intended meaning in respect of this subject statement was that it was a statement that the employment of PMETs who are *either* Singapore citizens *or* SPRs has decreased. With this in mind, we proceed to the second step of the analytical framework, which entails determining whether the December Facebook post, interpreted objectively, made or contained the second subject statement as understood in the way we have just stated.



Version No 3: 16 Jun 2022 (11:20 hrs)

(2) Whether the December Facebook post made or contained the second subject statement

221 The key question at the second step of the analytical framework is how the word "[l]ocal" in the graphical illustration in the December Facebook post would have been understood by at least an appreciable segment or a particular class of the potential readership or audience of the post in Singapore.

222 On this, Mr Nair's argument during his oral submissions at the hearing before us was simple – namely, that when the graphical illustration in the December Facebook post was read *together with* the text of the post, it would be clear to the ordinary reasonable reader that, in using the word "[l]ocal" in the graphical illustration, SDP was referring to *Singapore citizens only*. This was because the focus of the text of the post was on "*Singaporeans*" [emphasis added] who had been "displaced from their PMET jobs by foreign employees". Seen in this light, Mr Nair contended, the word "[l]ocal" in the graphical illustration in the post could only be a reference to "'*Singaporeans*' only" [emphasis in original], that is to say, "Singapore citizens, … exclud[ing] all others, including SPRs". Mr Nair also submitted that the Minister had not provided any basis for her determination that the second subject statement that "[l]ocal PMET employment" – meaning, from SDP's perspective, PMET employment among *Singapore citizens only* – has gone down was a false statement of fact.

223 The AG, on the other hand, relied on s 2(2)(*b*) of the POFMA, which provides that a statement is "false" if it is "false or misleading, whether wholly or in part, and whether *on its own* or in the context in which it appears" [emphasis added], and submitted that the graphical illustration in the December Facebook post should be considered *on its own*, rather than in the context of what was said in the text of the post. Proceeding on this basis, the AG contended



Version No 3: 16 Jun 2022 (11:20 hrs)

that it was "straightforward and obvious" that the word "[l]ocal" in the graphical illustration "must mean *both* Singapore citizens *and* SPRs" [emphasis added]. In support of this contention, the AG referred us to the 15 March 2019 Straits Times article mentioned at [24] above, which expressly defined the word "locals" in the context of the phrase "locals … who were retrenched" as encompassing "Singaporeans and permanent residents", as well as the MOM statistics on "[l]ocal PMET employment" which underlay the Minister's determination that the second subject statement was a false statement of fact (see [219] above). As we noted earlier (likewise at [219] above), these statistics were premised on the MOM's definition of a "local" employee, which covered employees who were either "Singapore citizen[s] or Permanent Resident[s]". The AG also highlighted that official MOM data and publicly available statistics on PMET employment had "consistently presented SPRs as grouped under the '*local*' category as opposed to '*foreign*'" [emphasis in original].

224 In response to the AG's arguments, Mr Nair pointed out that the 15 March 2019 Straits Times article expressly defined the word "locals" therein to mean "Singaporeans and permanent residents", in all likelihood because the article was based on the same MOM data on local PMET retrenchment as that outlined at [199] above, which, in view of the MOM's definition of a "local" employee, pertained to the retrenchment of PMETs who are either Singapore citizens or SPRs. That, Mr Nair submitted, is not evidence that the word "[l]ocal" in the graphical illustration in the December Facebook post would have been understood by the ordinary reasonable reader in the sense contended by the AG. Instead, the ordinary reasonable reader would have construed this word as a reference to Singapore citizens only.

225 In our judgment, the word "[l]ocal" in the graphical illustration in the December Facebook post is not self-explanatory and does not have a customary



Version No 3: 16 Jun 2022 (11:20 hrs)

meaning in Singapore. It is therefore necessary to turn to the context in which this graphical illustration appears in order to determine how the word "[l]ocal" therein would have been understood by at least an appreciable segment or a particular class of the potential readership or audience of the December Facebook post in Singapore, and, in turn, whether the post made or contained the second subject statement (as understood according to the Minister's intended meaning) that the employment of PMETs who are *either* Singapore citizens *or* SPRs has fallen. The text of the post that accompanies the graphical illustration assumes considerable significance in colouring the impression that readers would have received. The text states, in full:

> As *Singaporeans*, many of us have either heard stories from friends or family who have been displaced from their PMET jobs by foreign employees.
>
> Some of us have even experienced it ourselves.
>
> PAP [The People's Action Party] tells us that this is all for the sake of 'greater economic prosperity' for 'everyone'. But who actually gains from this economic prosperity?
>
> Certainly not everyday *Singaporeans*, but do we not deserve the protection of the PAP government?
>
> The SDP believes that *Singaporeans* are more than capable for these PMET jobs. When graduates from our reputable universities are displaced, it's not an issue of workforce quality anymore.
>
> We should not invest into [*sic*] our education system, only to prefer foreign talent over home-grown *Singaporean* talent.
>
> The SDP believes that *Singaporeans* deserve more protection in the labour market.
>
> Our solution is a reform of Singapore's immigration policy. To create a *Singaporeans* First policy and a more measured approach towards allowing foreigners to work in Singapore.
>
> [emphasis added]

226 There are two things about the text of the December Facebook post which should be noted. First, as Mr Nair was at pains to point out, the term



Version No 3: 16 Jun 2022 (11:20 hrs)

"Singaporeans"/"Singaporean" is used in the text no less than six times. Second, the word "local" does not appear anywhere in the text, and features only in the caption "[l]ocal PMET employment" in the graphical illustration.

227 Below the text of the December Facebook post is a hyperlink to the SDP Article. The graphical illustration depicting a trend of decreasing "[l]ocal PMET employment" (see [217] above) is exhibited *right at the end* of the post *after* the hyperlink to the SDP Article, as shown below:

228 In our judgment, on an objective reading of the December Facebook post as a whole, there would not, on the balance of probabilities, have been any



Version No 3: 16 Jun 2022 (11:20 hrs)

appreciable segment or any particular class of the potential readership or audience of the post in Singapore who would have construed the word "[l]ocal" in the graphical illustration therein as meaning anything other than *Singapore citizens*, *excluding SPRs*. Our reasoning is as follows. The text of the post speaks of "home-grown Singaporean talent", which it claims is being "displaced" in favour of "foreign talent", and proposes "a Singaporeans First policy and a more measured approach towards allowing foreigners to work in Singapore". The overall thrust of the post is clearly directed at protecting "*Singaporeans* … who have been displaced from their PMET jobs by foreign employees" [emphasis added], with no mention made of *SPRs* who may have been similarly displaced. Indeed, the juxtaposition of the words "*foreign* talent" [emphasis added] and "*home-grown* Singaporean talent" [emphasis added] is a strong indication that the term "Singaporeans"/"Singaporean" *does not* include SPRs because SPRs, despite having some degree of connection with Singapore that may not be insubstantial (by virtue of their residence here), would typically *not be regarded as* "*home-grown* Singaporean[s]" [emphasis added]. Although the word "[l]ocal" in the graphical illustration does not, as we noted at [226] above, appear anywhere in the text of the post, it must be read in the light of these considerations. On this basis, we find it unlikely, on the balance of probabilities, that there would have been any appreciable segment or any particular class of the potential readership or audience of the post in Singapore who, taking the post *on its own*, would have understood the word "[l]ocal" in the graphical illustration to mean anything other than "Singaporeans", that is to say, *Singapore citizens*, *excluding SPRs*.

229 In our judgment, the above conclusion remains unchanged even if the December Facebook post is read *together with* the SDP Article. As we see it, the December Facebook post is intended to direct the reader's attention to the



Version No 3: 16 Jun 2022 (11:20 hrs)

SDP Article, given that the hyperlink to the article is situated in the middle of the post, in between the text and the graphical illustration. It is apposite for us to reiterate here the point that we highlighted earlier at [25], [187] and [188] above – namely, that in its written case for CA 52, SDP: (a) expressly stated that, contrary to what Ang Cheng Hock J believed to be its position in *SDP v AG* at [74] (see [24] above), it was *not* contending that *the SDP Article* "referr[ed] only to 'Singaporeans' and not to 'locals', which … would include both Singaporean[s] and SPRs"; and (b) did not appear to contest the AG's submission that the phrase "Singapore PMETs getting retrenched" in the Relevant Sentence *in the SDP Article* referred to "retrenched PMETs who are Singapore citizens *and* Singapore permanent residents … [i]n other words, retrenched *local* PMETs" [emphasis in original]. We also note the fact that the 15 March 2019 Straits Times article, which SDP claimed to have based the SDP Article upon (see likewise [24] above), expressly defined the word "locals" in the context of the phrase "locals … who were retrenched" to mean "Singaporeans *and permanent residents*" [emphasis added]. In short, we are aware that both the AG and SDP appear to have proceeded on the premise that *the SDP Article* pertained to PMETs who are Singapore citizens *as well as* PMETs who are SPRs, this point not being in any way material to their submissions on this article and on the first subject statement. Be that as it may, we are of the view that even if *the December Facebook post* is read together with the SDP Article, there would not, on the balance of probabilities, have been any appreciable segment or any particular class of the potential readership or audience of the post in Singapore who would have construed the word "[l]ocal" in the graphical illustration therein as referring to anything other than *only* Singapore citizens, *excluding* SPRs. Our reasons for so holding are as follows.



Version No 3: 16 Jun 2022 (11:20 hrs)

230 First, like the December Facebook post, the SDP Article uses the term "Singaporeans"/"Singaporean" multiple times, and its overall thrust is to provide solutions targeted at Singaporeans who have been displaced from their PMET jobs by foreigners, *without* any mention of SPRs who may have been similarly displaced. Second, the SDP Article does not, on its face, make any reference or contain any link to the 15 March 2019 Straits Times article, and therefore does not give any indication that the word "local" in the context of the term "local PMETs" is intended to cover both "Singaporeans and permanent residents". Third, we consider it significant that the Relevant Sentence in the SDP Article refers to "a rising proportion of *Singapore* PMETs getting retrenched" [emphasis added], and is immediately followed by a sentence which attributes this trend to the problem of "local companies continuing to discriminate against *local* workers" [emphasis added]. In our view, it is unlikely that a person reading these two sentences would have formed any impression other than that the terms "local PMETs" and "Singapore PMETs" are used synonymously, with both terms denoting *only* PMETs who are *Singapore citizens*, *excluding* PMETs who are *SPRs*.

231 Taking all of the above factors in the round, we are satisfied that even though, from the AG's perspective (and, apparently, SDP's as well), the SDP Article pertained to both PMETs who are Singapore citizens and PMETs who are SPRs, to the extent that the potential readership or audience of the December Facebook post in Singapore would *also* have read the SDP Article, there would not, on the balance of probabilities, have been any appreciable segment or any particular class among this category of readers who, having looked at both publications, would have construed the word "[l]ocal" in the graphical illustration in the December Facebook post (in the context of the phrase "[l]ocal



Version No 3: 16 Jun 2022 (11:20 hrs)

PMET employment") as meaning anything other than *Singapore citizens, excluding SPRs*.

232 We note that bright, eye-catching colours are used in the graphical illustration, which might cause some readers to take it out of context from the December Facebook post. However, we think it unlikely, on the balance of probabilities, that there would have been any appreciable segment or any particular class of the potential readership or audience of the post in Singapore who would have failed to appreciate that the post was by a political party, and was hence likely to be targeted at voters, meaning Singapore citizens; or that there would have been any appreciable segment or any particular class among this category of readers who would have ignored the text of the post either before or after viewing the graphical illustration, given that the graphical illustration is, in itself, sparse on detail, which, in turn, would likely have caused these readers to direct their attention to the text of the post. We also consider it significant that the graphical illustration is located at the end of the post (see [227] above) as this makes it even more unlikely that there would have been any appreciable segment or any particular class among the aforesaid category of readers who would have failed to peruse at least part of the text of the post, if not the SDP Article as well.

233 Taking all of these factors in the round, we conclude that, contrary to what Ang Cheng Hock J found in *SDP v AG*, it has not been shown that there would have been any appreciable segment or any particular class of the potential readership or audience of the December Facebook post in Singapore who would have understood the word "[l]ocal" in the graphical illustration in the post to mean (as the AG contended) "both Singapore citizens and SPRs", rather than (as SDP submitted) "Singapore citizens, … exclud[ing] all others, including SPRs". It follows that the December Facebook post did not make or contain the



Version No 3: 16 Jun 2022 (11:20 hrs)

second subject statement that the employment of PMETs who are *either* Singapore citizens *or* SPRs has gone down, which was the false statement of fact that the Minister believed had arisen from the graphical illustration.

234 This in turn entails that the second subject statement was not in fact communicated in Singapore. On this basis, we set aside the first half of SDP CD-3 under s 17(5)(*a*) of the POFMA, and allow the SDP appeal to this extent.

***The TOC appeal***

235 We turn now to the TOC appeal. To recapitulate, the TOC Article was published under the title "M'sian human rights group alleges 'brutal, unlawful' state execution process in Changi Prison". For context, the article begins in this manner:

> Allegations concerning the 'brutal' and 'unlawful' process of execution by hanging in Changi Prison have surfaced in a statement by Malaysian human rights organisation Lawyers for Liberty (LFL) on Thu (16 Jan).
>
> Citing an unnamed former Singapore Prison Services (SPS) officer's account, LFL advisor N Surendran said that the former officer and other *prison officers were 'instructed to carry out the following brutal procedure whenever the rope breaks during a hanging, which happens from time to time'*:
>
> > *a) The prison officer is instructed to pull the rope around the neck of the prisoner towards him.*
> >
> > *b) Meanwhile, another prison officer will apply pressure by pulling the body in the opposite direction.*
> >
> > *c) The first officer must then kick the back of the neck of the prisoner with great force in order to break it.*
> >
> > *d) The officers are told to kick the back of the neck because that would be consistent with death by hanging.*
> >
> > *e) The officers are told not to kick more than 2 times, so that there will be no tell-tale marks in case there is an autopsy.*



Version No 3: 16 Jun 2022 (11:20 hrs)

> *f) Strict orders are also given not to divulge the above to other prison staff not involved in executions.*
>
> …
>
> [emphasis in original omitted; emphasis added in italics]

236 In the TOC CD issued on 22 January 2020, the italicised portion of the above passage was identified by the Minister for Home Affairs as the subject statement that arose from the TOC Article (see [18] above). The correction notice in the TOC CD explicitly stated that the allegations that constituted the subject statement had been made by LFL (see [19] above). Annex A to the TOC CD clarified that the SPS "does not use any of the steps in the alleged procedure for judicial executions". The article from the "Factually" website that was hyperlinked in the correction notice further elaborated that to ensure that judicial executions in Singapore were carried out in strict compliance with the law, all executions were conducted in the presence of the Superintendent of the Prison and a medical doctor, with an inquiry conducted by a Coroner within 24 hours of the execution. That article also stated that "the rope used for judicial executions ha[d] never broken before".

237 Having set out the background to the TOC appeal, we now apply the analytical framework laid down above to the subject statement identified in the TOC CD.

*The undisputed points*

238 It is significant that the subject statement identified in the TOC CD consisted of the allegations *made by LFL* in its press statement, which allegations were *reproduced* in the TOC Article. For this reason, there is no doubt that the TOC Article contained the subject statement. There is also no issue as to the interpretation of the TOC Article, nor as to the Minister's



Version No 3: 16 Jun 2022 (11:20 hrs)

intended meaning in respect of the subject statement. Further, it is undisputed that the TOC Article was published on the internet and was available to at least one end-user in Singapore, and that the subject statement contained in the article was therefore "communicated in Singapore" within the meaning of s 3(1) of the POFMA. Accordingly, the TOC appeal turns on the third and fourth steps of the analytical framework, which examine, respectively, whether the subject statement was a "statement of fact" as defined in s 2(2)(*a*) of the POFMA, and if so, whether it was "false" in the sense explained in s 2(2)(*b*) of this Act.

*Whether the subject statement identified in the TOC CD was a false statement of fact*

239 As we noted earlier (see [41] above), TOC's main argument on appeal is that the subject statement identified in the TOC CD, properly interpreted in the context of the TOC Article, was not a "statement of fact" as defined in s 2(2)(*a*) of the POFMA. Specifically, Mr Thuraisingam submits that the ordinary reasonable reader would have considered the subject statement identified in the TOC CD to be "nothing more than [TOC's] objective *report*" [emphasis added] that a third party, LFL, had made certain allegations about the use of "brutal, unlawful" methods in the state execution process, and that TOC was seeking comments from the MHA on those allegations. The TOC CD should thus be set aside under s 17(5)(*b*) of the POFMA on the basis that the subject statement identified therein was not a "statement of fact".

240 In response, the AG argues that Part 3 of the POFMA is targeted at statements and not at the statement-maker. Thus, if a statement determined by the Minister to be a false statement of fact were repeated or reported on, regardless of whether or not the statement-maker was objectively endorsing or taking a position as to the truth of the statement, as long as the statement was "communicated in Singapore" within the meaning of s 3(1) of the POFMA, it



Version No 3: 16 Jun 2022 (11:20 hrs)

could be made the subject of a Part 3 Direction. This, the AG submits, is also borne out by s 11(4) of the POFMA, which states that a CD may be issued to a person who communicated a false statement of fact even if he does not know or has no reason to believe that the statement is false. The end point of the AG's submission is that, by having quoted extensively from the LFL press statement in the TOC Article, which quotation had been determined by the Minister to contain a falsehood, TOC had communicated a false statement of fact that could be made the subject of a CD.

241 We begin our analysis of the parties' arguments by reiterating some of the points that we made earlier (see, among other paragraphs, [85], [86], [115], [154], [160] and [161] above). In brief:

(a) The POFMA is designed to enable the Minister to act against those who communicate online falsehoods.

(b) An online falsehood may be made by or originate from either the person who communicated it or someone else. It is ultimately irrelevant who is the maker or originator of the falsehood. What is relevant is whether the person to whom the Part 3 Direction is issued communicated the falsehood in Singapore, in the sense of making it "available to one or more end-users in Singapore on or through the internet" as stated in s 3(1) of the POFMA.

(c) It is also irrelevant whether the person who communicated the online falsehood knew or had reason to believe that it was false. The POFMA is concerned with (among other things) the communication of online falsehoods and the deleterious effects of such communication, and not (at least, not directly) with the subjective intentions of those who deliberately spread such falsehoods.



Version No 3: 16 Jun 2022 (11:20 hrs)

These points are borne out by the plain language of ss 3(1), 10, 11(1) and 11(4), among other provisions of the POFMA.

242 Having regard to the above points, we do not agree with TOC's argument that the subject statement identified in the TOC CD was not a "statement of fact". In the first place, the real effect of that argument, as Belinda Ang J noted in *TOC v AG*, is to reframe or recharacterise the identified subject statement. In the TOC CD, the Minister did not take issue with any statement of fact *made by TOC*. Instead, the TOC CD was issued on the basis of TOC's *reproduction* in the TOC Article of the allegations *made by LFL* in its press statement. It is irrelevant, in our view, that LFL's allegations were reproduced in the TOC Article in the form of a neutral report. We reiterate that the legislative purpose underlying the POFMA is (among other things) to prevent the communication of online falsehoods by suppressing online means of communicating false statements of fact in Singapore (see [85]–[86] above). Indeed, it is unmistakeable from the legislative material that a key concern of Parliament in enacting the POFMA was the speed and scale at which falsehoods might be spread online under the guise of news reports. This can be seen from the examples given by the Minister for Law during the second reading of the POFMA Bill of fake news being quickly "cross-posted on dozens of news sites and their social media pages, catered to different countries and demographics" (see *Singapore Parliamentary Debates* (7 May 2019) vol 94). A similar observation was made in the *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018), which preceded the drafting of the POFMA, as follows (at para 85):

> *Online falsehoods cascade over different platforms.* Although social media platforms have been a key vector for the spread of online falsehoods, other online platforms have also been



Version No 3: 16 Jun 2022 (11:20 hrs)

> important. In the earlier example of the false article titled 'Pope Francis Shocks World, Endorses Donald Trump for President, Releases Statement,' the story spread through a network of 'fake news' websites as well as on Facebook. In another example, Mr Nimmo shared how a false claim that the latest Russian technology could wipe out the entire US Navy was first posted on a Russian television station's website, then picked up by two British tabloids. Within hours, the story started to trend on social media, and quickly spread across the websites of a significant number of news outlets, comprising both mainstream and alternative media. [emphasis in italics and underlining in original]

In our judgment, therefore, the fact that the subject statement identified in the TOC CD consisted of the allegations made by LFL that were reproduced in the TOC Article in the form of a neutral report did not take those allegations beyond the reach of the POFMA.

243 The question under the third step of the analytical framework is, as we mentioned earlier, whether the subject statement identified in the Part 3 Direction being challenged is a "statement of fact" as defined in s 2(2)(*a*) of the POFMA. In the context of the TOC Article, this turns on whether the allegations made by LFL that were reproduced therein would have been considered by the ordinary reasonable reader to be a "representation of fact". As to this, we are satisfied that the answer would clearly be in the affirmative. This is because LFL's allegations were not mere vague assertions in the nature of conjecture, but instead recounted *in detail* what was asserted to be a "brutal" and "unlawful" process of execution by hanging at Changi Prison. That these allegations originated from LFL and were then repeated by TOC in the TOC Article does not, as we have just stated in the preceding paragraph, change the analysis so as to render them any less a "statement of fact" within the meaning of s 2(2)(*a*) of the POFMA.



Version No 3: 16 Jun 2022 (11:20 hrs)

244 As for the question under the fourth step of the analytical framework, which is whether LFL's allegations, as reproduced in the TOC Article, were false, we can see no basis for finding otherwise. LFL's allegations were baseless. Consistent with that, by the time of the hearing before us, TOC's focus was no longer on proving the veracity of these allegations (see [36] and [41] above), and thus, no evidence was even proffered to attempt to convince us that they were true. We note too that, as mentioned at [35] above, these allegations were categorically refuted by an affidavit filed on behalf of the SPS, which Belinda Ang J took into account in dismissing TOC's application to set aside the TOC CD. We therefore find that there is no basis for us to set aside this CD under s 17(5)(*b*) of the POFMA, and accordingly dismiss the TOC appeal.

**Conclusion**

245 To summarise, we allow the SDP appeal in part and dismiss the TOC appeal. Where the SDP appeal is concerned, we set aside under s 17(5)(*a*) of the POFMA the first half of SDP CD-3, which is that part of SDP CD-3 that pertains to the December Facebook post, on the ground that the second subject statement, as understood according to the Minister's intended meaning, was not made or contained in the graphical illustration in this post, and was therefore not "communicated in Singapore" within the meaning of s 3(1) of the POFMA. We uphold, however, the SDP CDs pertaining to the SDP Article (that is to say, SDP CD-1, SDP CD-2 and the second half of SDP CD-3) on the ground that the first subject statement, as understood according to the Minister's meaning, was made or contained in the SDP Article (and, by extension, in the November Facebook post and the December Facebook post as well), did amount to a false statement of fact and was communicated in Singapore. Where the TOC appeal is concerned, we do not see any grounds for setting aside the TOC CD under either s 17(5)(*a*) or s 17(5)(*b*) of the POFMA as the subject statement identified



Version No 3: 16 Jun 2022 (11:20 hrs)

in that CD was a false statement of fact, and there was no dispute that it was contained in the TOC Article and had been "communicated in Singapore".

246 With regard to the costs of these appeals, unless the parties are able to come to an agreement on this, they are to file, within ten days from the release of this judgment, written submissions, limited to eight pages each, as to the appropriate orders to be made.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Eugene Singarah Thuraisingam and Joel Wong En Jie (Eugene Thuraisingam LLP) for the appellant in Civil Appeal No 47 of 2020 and the applicant in Summonses Nos 72 and 98 of 2020;
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Version No 3: 16 Jun 2022 (11:20 hrs)