Vellama d/o Marie Muthu *v* Attorney-General
[2012] SGHC 155

Case Number : Originating Summons No 196 of 2012 (Summons No 2639 of 2012)

Decision Date : 01 August 2012

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : M Ravi (L.F. Violet Netto) for the applicant; David Chong SC and Tammy Low (Attorney-General's Chambers) for the respondent.

Parties : Vellama d/o Marie Muthu — Attorney-General

Administrative law – judicial review

Constitutional law – Constitution – interpretation

Courts and jurisdiction – jurisdiction – judicial review

Constitutional interpretation – constitutional provisions

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 97 of 2012 was dismissed by the Court of Appeal on 5 July 2013. See [2013] SGCA 39.]

1 August 2012 Judgment reserved.

Philip Pillai J:

Introduction

1 Originating Summons No 196 of 2012 and Summons No 2639 of 2012 are applications under Order 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) concerning the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"), which is the supreme law of Singapore.

2 This application invokes the court's judicial review jurisdiction. Judicial review is founded upon the rule of law. In judicial review, the court looks not to the decision itself, which is properly the function of the relevant public officers, but only to the lawfulness of arriving at a decision. Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] 1 AC 617 at 644 explained that:

> [The] officers or departments of central government … are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.

3 The purposes of judicial review include: (a) protecting the individual against illegal acts of the administration; (b) providing remedies for wrongs done to the individual; (c) ensuring that administrative bodies act lawfully; and (d) ensuring that administrative bodies perform their public duties: see M P Jain, *Administrative Law in Malaysia and Singapore* (LexisNexis, 4th Ed, 2011) at

p 587.

4 The English common law courts devised special remedies known as prerogative orders for judicial review. These prerogative orders are special in the sense that these are public law remedies available only against public authorities. The four principal prerogative orders are: *certiorari*, prohibition, *mandamus* and the writ of *habeas corpus*. In Singapore, these orders are now known as the Quashing Order, Prohibiting Order, Mandatory Order, and the Order for Review of Detention respectively. Professor H W R Wade explains how each of the first three prerogative orders operate in *Procedure and Prerogative in Public Law* [1985] 101 LQR 180 at p 182:

> The complainant, if he makes good his case, may have an adverse decision quashed by the ancient remedy of *certiorari*. If the blow has not yet fallen, he can ward it off with the remedy of prohibition. If some government authority is failing to perform a legal duty owed to him, he can compel them to perform it by another ancient remedy, *mandamus*. […] Those remedies belong to public law in the sense that they lie only against public authorities.

5 In Singapore, applications for first three prerogative orders must be made under Order 53 of the Rules of Court and are heard in two stages. At the first stage, the applicant must apply and obtain the leave of court to proceed. The court will not grant leave to proceed unless certain threshold conditions are met. The reason for requiring leave to proceed is to sieve out frivolous and hopeless applications at an early stage. It is ordinarily only if the threshold conditions for leave are met that the court will grant leave to proceed to the second stage and hear the application in open court. At the second stage, the applicant will have to establish his case in law and the court may, in its discretion, grant him a remedy.

6 Quite apart from judicial review, declarations may be sought under Order 15 rule 16 of the Rules of Court to determine the constitutionality of ordinary legislation and constitutional questions. In contrast to judicial review applications, applications for declarations under Order 15 rule 16 do not require leave of the court but must meet certain other conditions.

Events leading to the application

7 The grounds of this application were set out in the applicant's affidavit dated 2 March 2012, and are summarized as follows:

> (a) On 7 May 2011, Mr Yaw Shin Leong of the Workers' Party was elected in the general election as the Member of Parliament for Hougang Single Member Constituency ("SMC").
>
> (b) On 15 February 2012, the Workers' Party declared that Mr Yaw Shin Leong had been expelled from the party with immediate effect.
>
> (c) On 28 February 2012, the Speaker of Parliament announced in Parliament that Mr Yaw Shin Leong's seat in Parliament had become vacant pursuant to Article 46(2)(b) of the Constitution, by reason of his expulsion from the Worker's Party.

8 On 2 March 2012, the applicant, Madam Vellama d/o Marie Muthu, filed Originating Summons No 196 of 2012 under Order 53 of the Rules of Court asking for leave to seek the following reliefs:

> (a) Declarations:
>
> > (i) That the Prime Minister does not have unfettered discretion in deciding whether to

announce by-elections in Hougang SMC; and

(ii) That the Prime Minister does not have unfettered discretion to decide when to announce by-elections in Hougang SMC and must do so within three months or within such reasonable time as this Honourable Court deems fit; and

(b) Mandatory Order

A Mandatory Order enjoining the Prime Minister to advise the President to issue a Writ of Election mandating by-elections in Hougang SMC pursuant to Article 49(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) and section 24(1) of the Parliamentary Elections Act (Cap 218, 2011 Rev Ed) and to tender such advice within three months or within such reasonable time as the Honourable Court deems fit.

9 After hearing both counsel in chambers on the issue of whether leave to proceed should be granted, I reserved my decision. On 3 April 2012, I granted leave for the applicant to proceed to the second stage. The grounds of the decision to grant leave are set out in *Vellama d/o Marie Muthu v Attorney-General* [2012] 2 SLR 1033 ("the Leave Judgment"). The Attorney-General's counsel ("AG's counsel") appealed against the grant of leave but subsequently withdrew the appeal on 16 May 2012. The applicant then filed Summons No 2639 of 2012 on 29 May 2012 to seek the same reliefs.

10 After leave was granted on 3 April 2012 for the applicant to proceed, the following events occurred (" subsequent events"):

(a) On 9 March 2012, the Prime Minister made the following announcement in Parliament (see *Singapore Parliamentary Debates, Official Report* (9 March 2012), vol 88 at *col 5*)*:*

> I intend to call a by election in Hougang to fill this vacancy. However I have not yet decided on the timing of the by-election. In deciding on the timing I will take into account all relevant factors including the well-being of Hougang residents, issues on the national agenda, as well as the international backdrop which affects our prosperity and security.

(b) On 9 May 2012, the President, upon the advice of the Prime Minister, issued the writ of election for Hougang SMC on 26 May 2012.

(c) The 26 May 2012 election returned Mr Png Eng Huat of the Workers' Party as the elected Member of Parliament for Hougang SMC.

11 Before the second stage open court hearing, both counsel filed and exchanged extensive written submissions. At the open court hearing on 16 July 2012, both counsel orally summarised their submissions and expressly adopted and relied on their earlier written submissions.

The legal issues

12 This application raises two legal issues:

(a) **"The Procedural Issue"** (see [14] to [41] below)

(i) Does the court have the power to grant standalone declarations in an application commenced under Order 53 of the Rules of Court for a Mandatory Order which included the declarations?

(b) **"The Substantive Issue"** (see [42] to [117] below)

(i) Does the expression "shall be filled by election" in Article 49(1) of the Constitution mean that the Prime Minister must advise the President to issue a writ of election to fill the vacancy of an elected Member of Parliament?

(ii) If so, when must the writ of election be issued?

13 In order to succeed in this application, the applicant must succeed on both issues. I shall now turn to the Procedural Issue.

The Procedural Issue

14 As a preliminary point, I should explain why the Procedural Issue turns on the declarations sought under Order 53. As set out earlier, the reliefs that the applicant sought in the application filed on 2 March 2012 were for a Mandatory Order under Order 53 rule 1 and included two declarations pursuant to Order 53 rule 1(1)(a). However, as it is trite law that the court will not make orders that do not serve any purpose, the subsequent events rendered the Mandatory Order academic even if the application might otherwise have succeeded on 2 March 2012. Indeed, counsel for the applicant informed the court at the open court hearing on 16 July 2012 that the applicant was abandoning her application for the Mandatory Order.

15 The case thus turned on the declarations sought in this application. At the leave application, there appeared to be some uncertainty as to whether or not the court has the power to grant declarations independent of the principal application ("standalone declarations") under Order 53. Both counsel were invited to make further submissions on this issue at the open court hearing.

Submissions of counsel

16 Counsel for the applicant submitted that the court may grant standalone declarations, because Order 53 rule 1(1) states that the principal application "may include an application for a declaration", and Order 53 rule 7(1) contemplates that the court may make "a Mandatory Order, Prohibiting Order, Quashing Order or declaration", *ie* the word "or" in rule 7(1) should be read disjunctively from the other three orders.

17 The AG's counsel, on the other hand, submitted that the court could not grant standalone declarations because Order 53 was amended on 1 May 2011 so as to empower the court to grant declarations under Order 53 proceedings only in conjunction with prerogative orders. In other words, the amendment was not intended to allow the court to grant declarations under Order 53 where no prerogative order was granted by the court.

18 This issue is not a question of construction of Order 53 alone. The procedural issue goes to the nature and origin of the court's powers to grant declarations, its historical relationship with the prerogative orders, and the scope of the amendment made on 1 May 2011. Accordingly, it is necessary for me to trace the source and nature of declarations in general, to cast light on how declarations function specifically within the current Order 53.

Source of court's power to grant prerogative orders and declarations

19 The powers of the Supreme Court are derived from Article 93 of the Constitution which states:

Judicial power of Singapore

93. The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.

20 Under section 3 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), the Supreme Court consists of the High Court and the Court of Appeal. Section 18(2) read with the First Schedule to the Supreme Court of Judicature Act sets out a non-exhaustive list of some of the powers of the High Court:

Powers of High Court

18.—(1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.

(2) Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.

(3) The powers referred to in subsection (2) shall be exercised in accordance with any written law or Rules of Court relating to them.

21 In particular, paragraph 1 of the First Schedule states that the High Court has the power to issue prerogative orders, and paragraph 14 states that the High Court has the power to grant all reliefs and remedies at law and in equity:

FIRST SCHEDULE

Section 18(2)

ADDITIONAL POWERS OF THE HIGH COURT

Prerogative orders

1. Power to issue to any person or authority any direction, order or writ for the enforcement of any right conferred by any written law or for any other purpose, including the following prerogative orders:

(a) a Mandatory Order (formerly known as *mandamus*);

(b) a Prohibiting Order (formerly known as a prohibition);

(c) a Quashing Order (formerly known as *certiorari*); and

(d) an Order for Review of Detention (formerly known as a writ of habeas corpus).

…

Reliefs and remedies

14. Power to grant ***all reliefs and remedies*** at law and ***in equity*** , including damages in addition to, or in substitution for, an injunction or specific performance.

[emphasis added in bold italics]

22 For reasons that will become apparent later, it is important to keep in mind that the power to grant prerogative orders has its roots in the common law courts, whereas the power to grant declarations has its roots in equity. The jurisdiction of the High Court to grant declarations is further repeated in Order 15 rule 16 of the Rules of Court:

Declaratory judgment (O. 15, r. 16)

16. ***No action*** or other proceeding ***shall be open to objection on the ground that a merely declaratory judgment or order is sought*** thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

[emphasis added in bold italics]

23 It must be stressed that neither Order 15 rule 16 nor paragraph 14 of the First Schedule to the Supreme Court of Judicature Act constitute the source of the court's power to grant declarations. Those provisions merely restate the power of the High Court to grant declarations. The source of the court's power is Article 93 of the Constitution.

Nature of declaratory relief

24 In contrast to prerogative orders (see [4] above), a declaration is a unique form of relief. It is a judicial pronouncement on a state of affairs and does not require execution. The authors of *The Declaratory Judgment* (4th Ed, Sweet & Maxwell, 2011) (Woolf and Woolf eds) explain at p 1:

A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. *It is to be contrasted with an executory, in other words coercive, judgment which can be enforced by the courts.* In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way … *A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant.*

[emphasis added]

25 The jurisdiction of the court to grant declarations has its roots in the English Court of Chancery, which makes it a form of equitable relief. The English courts' declaratory jurisdiction was described in *The Supreme Court Practice 1979*, *Volume 1* (Sweet & Maxwell Ltd, 1978) at p 221:

Before 1883, the position with regard to declaratory judgments was broadly as follows. In an action in the old common law Courts, no such thing was known as a judgment declaratory of existing or future rights. Speaking generally, a common law action could only be brought to recover money, damages, goods or land, though before the Judicature Act, the common law Courts had certain powers of granting injunctions and mandatory orders. In the Court of Chancery, binding declarations of right were made, but only if some right to relief which the Court could grant, whether claimed or not, was shown and established ...

In 1883, the former O. 25, r. 5, introduced " ***an innovation of a very important kind*** " (*per*

> Lindley, M.R., in *Ellis v Bedford (Duke of)*, [1899] 1 Ch. 494 at p. 515), and " ***made a great change in the law with reference to declaratory judgments*** " (*per* Stirling, L.J., in *West v Sackville* [1903] 2 Ch. 378 at p. 393). It empowered the Court to make binding declarations of right "whether or not any consequential relief is or could be claimed"; these words enlarged the powers of the Court under the old Chancery practice, ***so that it is not now possible " to have recourse to the old equitable practice to explain, still less to limit, a novel practice created by the Judicature Acts and a power given to the High Court under the rule*** " (*per* Farwell, L.J., in *Chapman v Michaelson* [1909] 1 Ch. at p. 238).
>
> [emphasis added in bold italics]

26 Further, like all other forms of equitable relief, the grant of a declaration is a matter of the court's discretion: see *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 447 and 448. Over the years, the English courts developed rules to control the floodgates of litigants attempting to seek declaratory relief. As stated in *The Supreme Court Practice 1979*, *Volume 1* (Sweet & Maxwell Ltd, 1978) at p 222,

> The Court will not generally decide academical or hypothetical questions (*Tindall v. Wright*, [1922] W.N. 124; *Re Barnato*, [1949] Ch. 258 C.A.). Nor can a person against whom no claim has been made obtain a declaration that no such claim exists (*Re Clay*, [1919] 1 Ch. 66, C.A.). But a declaration will be granted even though such relief has been rendered virtually unnecessary by the lapse of time for the action to come on for trial, if at the time when the action was brought, it raised substantial issues, for in such case the question is not purely academic (*Gibson v. Union of Shop, Distributive and Allied Workers* [1968] 1 W.L.R. 1187; [1968] 2 All E.R. 252).

27 In Singapore, the requirements that must be satisfied before the court will grant a declaration were set out by the Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and anor appeal* [2006] 1 SLR(R) 112 ("*Karaha Bodas*") at [14]:

> [T]he following are the requirements that must be satisfied before the court grants such relief:
>
> (a) the court must have the jurisdiction and power to award the remedy;
>
> (b) the matter must be justiciable in the court;
>
> (c) as *a declaration is a discretionary remedy*, it must be justified by the circumstances of the case;
>
> (d) the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve;
>
> (e) any person whose interests might be affected by the declaration should be before the court; and
>
> (f) *there must be some ambiguity or uncertainty about the issue in respect of which the declaration is asked for so that the court's determination would have the effect of laying such doubts to rest.*
>
> [emphasis added]

Background to Order 53 of the Rules of Court in Singapore

28 In England, it was only after the English Rules of Supreme Court were amended in 1977 that the English courts acquired the power to grant declarations in addition to or in lieu of prerogative orders in judicial review proceedings. "In addition to" is different from "in lieu of", and this distinction is easily understood by looking at the English Rules of Supreme Court as it stood in 1977 after their major procedural reform:

> **Cases appropriate for application for judicial review (O. 53, r. 1).**
>
> **1.—** ...
>
> (2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to –
>
> > (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,
> >
> > (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
> >
> > (c) all the circumstances of the case,
>
> It would be just and convenient for the declaration or injunction to be granted on an application for judicial review.
>
> **Joinder of claims for relief (O. 53, r. 2).**
>
> **2.** On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed ***as an alternative*** or ***in addition to*** any other relief so mentioned if it arises out of or relates to or is connected with the same matter.
>
> [emphasis added in bold italics]

29 The position in Singapore remains similar to the pre-1977 English Rules of Supreme Court. The Singapore Rules of Court prior to 1 May 2011 did not allow an applicant to seek declaratory relief in proceedings commenced under Order 53. In *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong*"), the applicant applied for Prohibiting Orders as well as for declarations under Order 53. In the Court of Appeal judgment delivered on 4 April 2011, Chan Sek Keong CJ held at [25]:

> **The Declaratory Relief Issue**
>
> 25 I shall begin my analysis with the Discretionary Relief Issue since it can be given short shrift in view of existing case law on the type of relief available in proceedings brought under O 53 of the Rules of Court (see, eg, *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [5]-[6] and *Re Application by Dow Jones (Asia) Inc* [1987] SLR(R) 627 at [14]). ***The case authorities show clearly that declaratory relief is not a remedy provided for under O 53 of the Rules of Court, and, thus, the court has no power to grant such relief in proceedings commenced under this Order.*** Mr Ravi has not convinced us that his argument to the contrary is correct.

[emphasis added in bold italics]

30 The Rules of Court were amended by the Rules of Court (Amendment No 2) Rules 2011 which came into effect on 1 May 2011. The amendments introduced additional relief by way of liquidated sums, damages, equitable relief or restitution and provided for declarations to be included in the principal application for prerogative orders. The relevant provisions of the amended Order 53 of the Rules of Court which apply to this application, are as follows:

ORDER 53

APPLICATION FOR MANDATORY ORDER, PROHIBITING ORDER, QUASHING ORDER, ETC.

No application for Mandatory Order, etc., without leave (O. 53, r. 1)

1. —(1) An application for a Mandatory Order, Prohibiting Order or Quashing Order (referred to in this paragraph as the principal application) —

(a) ***may include*** an application for a ***declaration*** ; but

(b) ***shall not be made, unless leave to make the principal application has been granted*** in accordance with this Rule.

…

Mode of applying for Mandatory Order, etc. (O. 53, r. 2)

2. —(1) When leave has been granted to apply for a Mandatory Order, Prohibiting Order or Quashing Order —

(a) the application for the order ***and any included application for a declaration*** must be made by summons to a Court in the originating summons in which leave was obtained;

…

Power of Court to grant relief in addition to Mandatory Order, etc. (O. 53, r. 7)

7. —(1) Subject to the Government Proceedings Act (Cap. 121), where, upon hearing any summons filed under Rule 2, the Court has made a Mandatory Order, Prohibiting Order, Quashing Order ***or declaration*** , and the Court is satisfied that ***the applicant has a cause of action that would have entitled the applicant to any relevant relief*** if the relevant relief had been claimed in a separate action, the Court may, ***in addition*** , grant the applicant the relevant relief.

…

(4) In this Rule, "relevant relief" means any liquidated sum, damages, ***equitable relief*** or restitution.

[emphasis added in bold italics]

Analysis of Order 53

31 I now proceed to analyse Order 53 in its current form. Order 53 still governs applications for prerogative orders only, even though it has been enlarged to allow the applicant to obtain additional "relevant relief". Order 53 rule 1(1)(a) now also allows an application for a prerogative order (referred to as the principal application in Order 53 rule 1(1)(b)), to include an application for a declaration. This preserves the distinction between the prerogative orders and declarations, which is necessary because Order 53 rule 1(1)(b) stipulates that the principal application shall not be made unless leave was granted.

32 It is clear from a plain reading of Order 53 rule 1 that leave is not required to include an application for a declaration in the principal application. Order 53 rule 2(1) reinforces this plain reading because it refers to the application for the prerogative order and "any included application for a declaration". The language of Order 53 rules 1 and 2 is clear that the amendment did not have the effect of elevating declarations to the same level as the principal application. Otherwise, leave, which is required for the prerogative order, would also have also been required for such included declaration.

33 The point of contention between both counsel arises from Order 53 rule 7(1), which when read in isolation, may suggest that a declaration has now been elevated to the same level as a prerogative order under Order 53. However, in the light of *Yong Vui Kong*, the word "or" that comes before the word "declaration" in Order 53 rule 7(1) is not disjunctive. The phrase "or declaration" here relates back to Order 53 rule 1, which states that it may be included in the principal application. This implies that a declaration is contingent upon the prerogative order and cannot be granted independent of the principal application under Order 53. I therefore reject the submission of the counsel for the applicant that Order 53 rule 1 read with Order 53 rule 7 has the combined effect of empowering the court to grant standalone declarations independent of the grant of the prerogative order. In the full context of Order 53, the phrase "or declaration" means a declaration that is appended to and contingent upon a prerogative order.

34 The close proximity in time between *Yong Vui Kong* and the amendment to Order 53 in 2011 may suggest that the amendments filled the *lacunae* observed in *Yong Vui Kong.* Had the application in *Yong Vui Kong* been made today, the court now has the power, having granted the Prohibiting Orders to also append the included declarations.

Conclusion on the Procedural Issue

35 I would, for the above reasons, find that the court has no power to grant a standalone declaration under Order 53 if the application for a Mandatory Order which included such declaration, fails.

36 However, an applicant is at liberty to seek standalone declarations under Order 15 rule 16. It is settled law that declarations under Order 15 rule 16 do not require leave of court although they are, however, still subject to the requirements set out in *Karaha Bodas*. Under the current Rules of Court, if an applicant wishes to apply for (a) prerogative orders under Order 53 rule 1; and separately, (b) standalone declarations under Order 15 rule 16 concurrently, he may do so. In the event that he fails to obtain leave for the prerogative orders, he may continue with his separate standalone declaration application. On the other hand, in the event that he obtains leave for the prerogative orders, he may proceed with his separate standalone declaration application. He may, in such event, apply to consolidate both proceedings under Order 4 rule 1 Rules of Court.

Postscript on the Procedural Issue

37 Although the applicant has failed on the Procedural Issue, counsel for the applicant had anticipated this in the leave application as noted in the Leave Judgment at [26]:

> Counsel for the applicant notified the AG's counsel and the court that he would if necessary immediately apply under O 15 r 16 for the [Declarations] to be considered as standalone declarations for which the leave of court is not required. In light of this, the question of whether the quite separate requirements for standalone declarations have been met would have to be determined at a substantive hearing, which this O 53 leave hearing is not.

38 Because counsel for the applicant had reserved the applicant's right to apply for a standalone declaration under Order 15 rule 16 which does not require leave of the court, the Substantive Issue remains to be heard and determined in the light of section 3(h) of the Civil Law Act (Cap 43, 1999 Rev Ed) which would apply in these circumstances:

> **Court to grant all such remedies as any of the parties are entitled to in respect of every legal and equitable claim to avoid multiplicity**
>
> (h) the court ... shall grant, either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to, in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

39 The procedural rules to give effect to section 3(h) of the Civil Law Act exist under Order 28 rule 8 of the Rules of Court. This would preserve the applicant's originally reserved right to apply for declarations under Order 15 rule 16 without the procedural constraints of Order 53.

40 In the light of the above uncertainties brought to light in this application, there is a case for further law reform of Order 53 to streamline and consolidate the judicial review remedies (including declarations in addition to and in lieu of prerogative orders) and the separate mechanism for public law declarations: see generally observations of Woo Bih Li J in *Yip Kok Seng v Traditional Chinese Medicine Practitioners Board* [2010] 4 SLR 990 at [16]; the Law Commission Report on Remedies in Administrative Law (Law Com No 73 of 1976); and the amendments to the equivalent of Order 53 of the English Rules of Supreme Court since 1977 (see [28] above).

41 Having disposed of the Procedural Issue, I shall now turn to examine the Substantive Issue.

The Substantive Issue

42 The Substantive Issue in this application is whether the phrase "shall be filled by election" found in Article 49(1) means that elections must be called to fill vacancies of elected Members of Parliament.

Submissions of counsel

43 Counsel for the applicant submitted that that the word "election" in Article 49(1) of the Constitution should be construed to mean an election for the following reasons. First, "election" in Article 49(1) cannot mean "general election", as this would render Article 66 otiose, since Article 66 already provides for general elections. Second, sections 22(1) and 24(1) of the Parliamentary Elections Act expressly contemplate the calling of elections to supply vacancies other than in a

general election. The relevant sections state:

> **Number of Members to be returned for each electoral division and group representation constituency**
>
> 22.—(1) Subject to subsection (2), each electoral division shall return one Member to serve in Parliament.
>
> …
>
> **Writ of election**
>
> 24.—(1) For the purposes of every general election of Members of Parliament, and for the purposes of the election of Members to supply vacancies caused by death, resignation or otherwise, the President shall issue writs under the public seal, addressed to the Returning Officer.

44 Third, counsel for the applicant submitted that because the word "shall" was used in Article 49(1) instead of the word "may", this means that the calling of such elections is mandatory, and not discretionary. He argued that the Parliamentary history and intent ought not to be considered in construing the meaning of "election" in Article 49(1). Finally, since Article 49(1) of the Constitution does not prescribe a time for calling the election, section 52 of the Interpretation Act (Cap 1, 2002 Rev Ed) would apply, with the result that the "election" of an elected Member under Article 49(1) must be called within a reasonable time, taking into account only logistical factors. Section 52 of the Interpretation Act states:

> **Provision when no time prescribed**
>
> **52.** Where no time is prescribed or allowed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

45 The AG's counsel submitted that a review of the immediate background to Article 49(1) showed Parliament's intention that there is no duty to hold an election to fill a vacancy in Parliament arising by any reason other than dissolution. He submitted that the word "election" in Article 49(1) referred only to the modality of filling the vacancy.

46 On the issue of the timing of the election, the AG's counsel submitted that this was a matter entirely within the Prime Minister's discretion, if he so decides to call it. The AG's counsel pointed out that the three month requirement that was introduced in the State Constitution of Singapore in 1963 was deliberately removed from the Constitution upon Singapore's separation from Malaysia in 1965. Furthermore, a comparison of Article 49(1) and Article 66 would show that if Parliament had intended a prescribed time limit for vacancy elections, it would have expressly so provided.

47 The AG's counsel further submitted that section 52 of the Interpretation Act (at [44] above) should not take precedence over section 9A of the same act, which requires written law to be construed purposively. Therefore, when the phrase "convenient speed" is interpreted purposefully, what amounted to "convenient speed" would vary from case to case, having regard to the specific circumstances or context in which the expression is sought to be invoked.

Interpretation of the Constitution

48 The Constitution sets out the foundational structure and arrangements of Singapore's public governance. As an independent nation of almost 50 years, the Constitution reflects the conditions, realities, experience and history of Singapore. It contains fundamental elements from our British colonial history, our self-government, our brief Malaysian experience, and refinements introduced since independence in 1965. Whilst refinements have been introduced to address new imperatives, the basic framework of our inherited colonial constitution has not changed.

49 I will first set out the approach towards the interpretation of the Constitution and then examine Article 49(1) in the context of Part VI of the Constitution to determine its meaning. I will thereafter test this contextual interpretation against the source and historical progression leading to Article 49(1).

50 As a starting point, the British decolonisation process involved each colony selecting and adapting mechanisms from the Westminster model, best suited to their particular conditions, into their constitutions. The following passage from S A de Smith, *The New Commonwealth and Its Constitutions* (Stevens & Sons, 1964) ("de Smith") at p 69 gives a flavour of the different options of electoral systems available under the Westminster model:

> ***The Legislature***
>
> If ingenuity has been in short supply where the composition and status of the executive branch of government have been concerned, there has been no want of imagination in the invention of electoral systems and methods of legislative representation. We have had unicameral and bicameral legislatures, Senates and Houses of Chiefs; *ex officio* members, nominated officials, and nominated non-officials who might be in the upper House or on the government side of the Legislative Council or on a cross-bench or on the non-government side; electoral primaries, direct and indirect elections; communal members elected on communal rolls, communal members elected on common rolls, communal and non-communal members elected on separate, non-communal mathematically weighted rolls, communal and non-communal members elected by the legislature itself; specially elected members and nationally elected members, multi-member constituencies and single-member constituencies, proportional representation and the first-past-the-post system; franchise qualifications based on race, religion, sex, education, literacy, property, income, chiefly status, military service and the award of decorations; multiple votes with a fancy franchise, and one man one vote one value.

51 In relation to the legislature, a review of the British decolonisation process also reveals the importance placed on continuity and gradual devolution of power. It explains why in Singapore the details of elections are not set out in the Constitution, but are set out in ordinary legislation, currently the Parliamentary Elections Act. According to de Smith at pp 70 to 73:

> In the first place, the official majority may well disappear from the Legislative Council long before it disappears from the Executive Council. But since 1947 the almost universal practice has been to defer the introduction of an *elected* majority into the legislature until a substantial number (though not necessarily a majority) of elected members has been appointed to the Executive Council …
>
> We have also considered how a legislature is likely to be composed at the stage of internal self-government. It will no longer be styled the Legislative Council; Legislative Assembly and National Assembly are among the most favoured designations. The Speaker will be elected by the Assembly, not nominated by the Governor. The Governor will cease to be entitled to reject the Assembly's standing orders in his discretion … *Whether the constitution will prescribe in detail the*

qualifications and disqualifications of electors, or state them in general terms, leaving matters of detail to ordinary legislation, or leave the whole question to ordinary legislation, may again depend on the degree of political importance attached to the definition of the franchise.

[emphasis added]

52 Turning now to the principles governing the interpretation of a constitution, that the Constitution is to be construed in the light of its context and circumstances is well settled: see *Hinds v The Queen* [1977] 1 AC 195 at 211 to 212:

> A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made … Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.
>
> ...
>
> In the result there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftsmanship which may conveniently be described as "the Westminster model."

53 With the above background, I now move to the foreground of the meaning of "shall be filled by election" in Article 49(1) of the Constitution. The court does not take Constitutional expressions out of context or determine their meaning in isolation. The Constitution which is the supreme law of the nation is not to be approached or read loosely or superficially. As a matter of law, any interpretation of the Constitution must begin with its text. If the text of the provision is unclear or ambiguous, extrinsic sources such as the Constitution's history and framer's intentions behind the relevant provisions, or any relevant conventions, can be referred to in order to aid the interpretation process.

Interpretation of Article 49(1)

54 The meaning of the phrase "shall be filled by election" in Article 49(1) cannot be determined in isolation. It takes its meaning first within the context of Article 49 itself, and then within the wider context of Part VI of the Constitution which provides for the Legislature, and finally, within the context of the entire Constitution.

In the context of Article 49(1) itself

55 Returning to the meaning of the phrase "shall be filled by election", the starting point is the meaning of the word "election". There is no definition of "election" in the Constitution, except under Article 39A(3) where "election" is defined for the limited purposes of group representation constituencies. This omission is explained by the fact that in Singapore, the details of elections are not placed in the Constitution but in ordinary legislation enacted by Parliament (see [51] above). Thus, section 2 of the Parliamentary Elections Act defines "election" to mean an election for the purpose of electing a Member of Parliament and defines "general election" to mean a general election of Members after a dissolution of Parliament. Section 24 of the Parliamentary Elections Act provides that the President shall issue a writ of election for the purposes of every general election of Members of Parliament and for the purposes of the election of Members to supply vacancies.

56 In fact, the commonly used expression "by-election" does not appear anywhere in the Constitution or in the Parliamentary Elections Act.

57 Since the word "election" in Article 49(1) is not defined in the Constitution, but is used in Article 66 in the phrase "general election", it is instructive to place Articles 49(1) and 66 of the Constitution side by side to compare their texts:

Filling of vacancies	**General elections**
49.—(1) Whenever the seat of a ***Member*** , not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy ***shall be filled by election*** in the manner provided by or under any law relating to Parliamentary elections for the time being in force. [emphasis added in bold italics]	66. There ***shall be a general election*** at such time, ***within 3 months*** after every dissolution of Parliament, as the President ***shall*** , by Proclamation in the Gazette, appoint. [emphasis added in bold italics]

58 It is clear that Article 66 mandates that there shall be a general election within three months of the dissolution of Parliament. In sharp contrast, Article 49(1) does not state that the vacancy "shall be filled by *an* election". Instead, it merely states that the vacancy "shall be filled by election".

59 The word "shall" ordinarily means that whatever it is referring to is mandatory. However, what is being mandated by the word "shall" in Article 49(1) is not immediately clear, because "election" can mean either:

(a) an event, in the sense, "to hold an election"; or

(b) a process, in the sense, "by the process of election".

60 If "shall" is referring to an "election" in the first sense, then it means that the holding of an election is mandatory; whereas if "shall" is referring to an "election" in the second sense, then it means that the vacancy can only be filled by election and not by any other process, such as by appointment. It is clear from a literal reading of Article 66 that the word "election" in the expression "shall be a general election" is used in the first sense meaning an event.

61 The significance of this distinction cannot be overstated, since this case turns entirely upon

the meaning of the word “election” in Article 49(1). It is clear from the arguments of counsel for the applicant that he proceeded on the basis that “election” means an event, and that the word “shall” mandates the event of election. However, looking at Article 49(1) alone, a literal reading of “election” is capable of more than one meaning. It therefore becomes necessary to proceed further to determine the meaning of the expression “shall be filled by election” in Article 49(1) in the wider context of Part VI of the Constitution, which provides for matters relating to the Legislature.

In the wider context of Part VI of the Constitution

Different types of Members

62 There is an orderly and logical structure inherent within the Constitution. Article 49(1) refers to a “Member”, and a “non-constituency Member”. The reference to Parliament in Article 49(1) implies that the term “Members” refers to Members of Parliament. Article 39(1) distinguishes between three different types of Members of Parliament, namely: (a) elected Members; (b) non-constituency Members; and (c) nominated Members:

> **Parliament**
>
> **39.**—(1) Parliament shall consist of —
>
> (a) such number of ***elected Members*** as is required to be returned at a general election by the constituencies prescribed by or under any law made by the Legislature;
>
> (b) ***such other Members*** , not exceeding 9 in number, who shall be ***known as non-constituency Members*** , as the Legislature may provide in any law relating to Parliamentary elections to ensure the representation in Parliament of a minimum number of Members from a political party or parties not forming the Government; and
>
> (c) ***such other Members*** not exceeding 9 in number, who shall be ***known as nominated Members*** , as may be appointed by the President in accordance with the provisions of the Fourth Schedule.
>
> [emphasis added in bold italics]

Method of filling seats upon dissolution

Elected Members

63 Articles 39(1)(a), (b) and (c) set out different mechanisms by which the seats of the Members of Parliament are to be filled upon dissolution. Under Article 39(1)(a), elected Members are required to be returned at a general election by the constituencies prescribed by or under any law made by the Legislature. The law referred to is the Parliamentary Elections Act. Article 66 of the Constitution mandates the calling of a general election within three months after every dissolution of Parliament.

64 The word “shall” appears twice in Article 66. The first “shall” mandates the calling of a general election within 3 months after every dissolution of Parliament as the President shall appoint and the second “shall” means that the obligation of the President to make a Proclamation in the Gazette is mandatory. The “general election” referred to in Article 66 is an event by which all the seats of elected Members of a dissolved Parliament are filled.

65 Article 66 refers to "dissolution of Parliament", which is an event provided for in Article 65:

Prorogation and dissolution of Parliament

65.— ... (3) The President ***may*** , at any time, by Proclamation in the Gazette, dissolve Parliament if he is advised by the Prime Minister to do so, but he ***shall not*** be obliged to act in this respect in accordance with the advice of the Prime Minister unless he is satisfied that, in tendering that advice, the Prime Minister commands the confidence of a majority of the Members of Parliament.

…

(4) Parliament, unless sooner dissolved, ***shall*** continue for 5 years from the date of its first sitting and ***shall*** then stand dissolved.

[emphasis added in bold italics]

66 Under Article 65(4), the first "shall" mandates the continuance of Parliament for 5 years from the date of the first sitting unless sooner dissolved; whereas the second "shall" mandates the dissolution if Parliament were not dissolved any sooner. The distinction between "may" and "shall" can be seen in Article 65(3), with the effect that the President has the power to dissolve Parliament if he is advised by the Prime Minister to do so, but the President is obliged not to exercise his power to do so unless he is satisfied that the Prime Minister commands the confidence of a majority of the Members of Parliament.

Non-Constituency Members

67 The seats of non-constituency Members are filled not directly through a general election described under Article 66, but indirectly through a mechanism provided for under section 52 of the Parliamentary Elections Act, which states:

Election of non-constituency Members in certain circumstances

52.—(1) At any general election, the number of non-constituency Members to be declared elected shall be the whole number (ignoring any less than 0) ascertained in accordance with the formula

$$9 - B,$$

where B is the total number of Opposition Members elected to Parliament in accordance with section 49(7) or (7E) or 49A(5), as the case may be.

(2) Subject to subsection (3A), the non-constituency Member or Members to be declared elected under subsection (1) shall be determined from among the candidates of those political parties (other than the party or parties that will form the Government) contesting the general election on the basis of the percentage of the votes polled at the same general election by such candidates in the following order of priority — the candidate receiving the highest percentage of votes being placed first and the other candidates being placed in descending order in accordance with the percentages of votes polled by them.

> …
>
> (4) In this section, "Opposition Member" means a Member of Parliament who is not a member of the political party or parties forming the Government.

68 The results of the general election will determine the eligibility and priority of candidates from political parties which do not form the Government to be declared elected as non-constituency Members.

Nominated Members

69 In contrast, all nominated members are appointed and not elected. Upon the dissolution of a Parliament, the seat of a nominated Member in the next Parliament is filled by appointment through the process stated in section 1(2) of the Fourth Schedule to the Constitution, which states:

> (2) Subject to the provisions of this Constitution, the President ***shall*** , within 6 months after Parliament first sits after any General Election, ***appoint*** as nominated Members of Parliament the persons nominated by a Special Select Committee of Parliament.
>
> [emphasis added in bold italics]

The word "shall" in section 1(2) mandates the event of appointment, as well as the time frame within which the appointment must be made.

Tenure of office

70 After the seats of the elected and non-constituency Members are filled, the new Parliament is constituted. Article 65 provides for the dissolution of Parliament, which results in all the seats in Parliament becoming vacant. The tenure of office of every Member therefore ceases upon dissolution. This is provided by Article 46(1), which states:

> **Tenure of office of Members**
>
> **46.**—(1) Every Member of Parliament ***shall*** cease to be a Member at the ***next dissolution of Parliament after he has been elected or appointed*** , ***or*** previously thereto ***if his seat becomes vacant*** , under the provisions of this Constitution.
>
> [emphasis added in bold italics]

71 Article 46(1) applies to all Members, including elected, non-constituency and nominated Members. The shorter tenure of nominated Members is provided for in section 1(4) of the Fourth Schedule to the Constitution, which states that:

> (4) ***Subject to Article 46*** , every person appointed as a nominated Member of Parliament ***shall*** serve for a term of 2½ years commencing on the date of his appointment.
>
> [emphasis added in bold italics]

72 The word "shall" in section 1(4) mandates that each term of a nominated Member is two and a half years.

Events triggering vacation of seats other than by dissolution

73 Quite apart from dissolution, which will result in all the seats in Parliament becoming vacant to be filled by a general election, individual seats may also become vacant during a Parliamentary term when any of the following events stated in Articles 46(2), (2A) and (2B) occur:

> (2) The seat of a Member of Parliament ***shall*** become vacant —
>
> (a) if he ceases to be a citizen of Singapore;
>
> (b) if he ceases to be a member of, or is expelled or resigns from, the political party for which he stood in the election;
>
> (c) if, by writing under his hand addressed to the Speaker, he resigns his seat in Parliament;
>
> (d) if during 2 consecutive months in each of which sittings of Parliament (or any committee of Parliament to which he has been appointed) are held, he is absent from all such sittings without having obtained from the Speaker before the termination of any such sitting permission to be or to remain absent therefrom;
>
> (e) if he becomes subject to any of the disqualifications specified in Article 45;
>
> (f) if he is expelled from Parliament in the exercise of its power of expulsion; or
>
> (g) if being a nominated Member, his term of service as such a Member expires.
>
> (2A) A non-constituency Member of Parliament ***shall*** vacate his seat as such a Member if he is subsequently elected as a Member of Parliament for any constituency.
>
> (2B) A nominated Member of Parliament ***shall*** vacate his seat as such a Member —
>
> (a) if he stands as a candidate for any political party in an election; or
>
> (b) if, not being a candidate referred to in paragraph (a), he is elected as a Member of Parliament for any constituency.
>
> [emphasis added in bold italics]

74 All the instances of the word "shall" in the above provisions mean that the vacation of the seat is mandatory should any of the events specified in Articles 46(2), (2A) or (2B) occur. There is a logical structure to the arrangement of these provisions: Articles 46(2)(a) to (2)(f) applies to all Members; Article 46(2A) applies only to non-constituency Members, whereas Articles 46(2)(g) and (2B) apply only to nominated Members. It is evident that there are common core and differing special events which trigger the vacation of seats for elected, non-constituency and nominated Members respectively.

Filling of vacancies occurring other than by dissolution

75 As the mode of filling the seat is different for elected, non-constituency and nominated Members, different mechanisms are also prescribed for the filling of seats that have become vacant for any reason other than a dissolution of Parliament. The mode of filling of a seat of an elected Member and a non-constituency Member are found in Articles 49(1) and (2) respectively, which

state:

Filling of vacancies

49.—(1) Whenever the seat of a Member, ***not being a non-constituency Member*** , has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.

(2) The Legislature may by law provide for —

(a) the vacating of a seat of a non-constituency Member in circumstances other than those specified in Article 46;

(b) the filling of vacancies of the seats of non-constituency Members where such vacancies are caused otherwise than by a dissolution of Parliament.

[emphasis added in bold italics]

76 As for a nominated Member, the mode of filling a vacated seat is set out in section 4 of the Fourth Schedule to the Constitution, which states:

4.—(1) Whenever the seat of a nominated Member has become vacant by reason of the expiry of his term of service, the vacancy ***shall*** , as soon as practicable, be filled by the President by making an appointment on the nomination of the Special Select Committee referred to in section 1.

(2) Whenever the seat of a nominated Member has become vacant for any reason other than a dissolution of Parliament or the expiry of his term of service, the Special Select Committee ***may*** , if it thinks fit, nominate a person for the President to appoint as a nominated Member to fill the vacancy.

[emphasis added in bold italics]

77 In the case of a vacancy arising upon the expiry of a term, the word “shall” means that the President must fill the vacancy as soon as practicable. In the case of a vacancy arising under section 4(2), the word “may” means that the Special Select Committee has a discretion as to whether to nominate a person for the President to appoint as a nominated Member to fill such vacancy.

The Interpretation of Article 49(1) in the context of Part VI of the Constitution

78 From the internal structure of Part VI of the Constitution, it is clear that the rules relating to the:

(a) method of filling a seat upon dissolution;

(b) tenure of office;

(c) events triggering vacation of seats other than by dissolution; and

(d) filling of vacancies occurring other than by general election

are different depending on whether the Member is an elected Member, a non-constituency Member or nominated Member.

79 For each type of event listed above, Part VI of the Constitution prescribes different rules for different types of Members, and the similarly by different processes for filling each type of Member vacancies.

80 It is abundantly clear that a nominated Member can only be appointed and not elected. It is also clear that non-constituency Members can only be declared elected under the Parliamentary Elections Act. Accordingly, elected Member vacancies are to be filled only by election. It must therefore follow that the phrase "shall be filled by election" in Article 49(1) refers to the process whereby the vacated seats of elected Members are to be filled. The phrase "shall be filled by election" must mean that a vacant elected Member seat cannot be filled by any way other than by election, such as appointment or being declared elected. Therefore, in Article 49(1), the expression "shall be filled by election" means the process of how this vacancy is to be filled and not the event of an election.

Historical origins of Article 49(1)

81 I will next proceed to trace the constitutional source of Article 49(1) and how each and every successive constitutional instrument leading to its current form.

82 Since the Second World War, Singapore's principal constitutional instruments leading to our current Constitution have been the following:

(a) the Singapore Colony Order in Council, 1946;

(b) the Singapore Colony (Amendment) Order in Council, 1948;

(c) the Singapore Colony Order in Council, 1955;

(d) the Singapore (Constitution) Order in Council, 1958;

(e) the Agreement relating to Malaysia, 1963;

(f) the Sabah, Sarawak and Singapore (State Constitutions) Order in Council, 1963; and

(g) the Republic of Singapore Constitution, 1965.

83 This historical narrative traces the origin of the expression "shall be filled by election" in Article 49(1) and puts it beyond doubt that it means a process and not an event.

The Order in Council, 1946

84 After the Second World War, the British returned to the colony of Singapore and the British Military Administration temporarily administered Singapore. Soon after, the Colonial Office of the United Kingdom decided to disband the Straits Settlements and re-constitute Singapore as a separate colony. On 27 March 1946, both the Straits Settlements (Repeal) Order in Council, 1946 (Statutory Rules and Orders 1946 No 462), and the Singapore Colony Order in Council, 1946 (Statutory Rules and Orders 1946 No 464) ("the 1946 Order") were enacted. The 1946 Order came into operation in Singapore on 1 April 1946.

85 Section 16 of the 1946 Order provided for four different types of Members in the Legislative Council, namely *ex-officio* Members; Nominated Official Members; Nominated Unofficial Members; and for the first time, Elected Members:

> **Establishment of Legislative Council**
>
> **16.**—(1) There shall be a Legislative Council in and for the Colony, constituted in accordance with the provisions of this Order.
>
> (2) The Council shall consist of ***the Governor*** as President, four ***ex officio Members*** and such ***Nominated Official Members*** , not exceeding seven, such ***Nominated Unofficial Members*** not exceeding two, and such ***Elected Members*** not exceeding nine as His Majesty shall direct by Instructions under His Sign Manual and Signet or through a Secretary of State.
>
> [emphasis added in bold italics]

86 Since section 16 of the 1946 Order required seats in the Legislative Council to be filled by nomination or election, a Reconstitution Committee was set up in 1946 to make recommendations on the nomination and election processes: see Kevin Y L Tan, "A Short Legal and Constitutional History of Singapore", in *The Singapore Legal System* (Singapore University Press, 2nd Ed, 1999) (Kevin Y L Tan ed) ch 2 at p 41:

> In order to work out the number of nominated and elected unofficials and the manner in which the seats would be filled, a Reconstitution Committee comprising official and local representatives was convened by Governor Sir Franklin Gimson in 1946. The Committee presented its report that same year and all but two of their recommendations were accepted … The reforms were significant in that, first, there was an unofficial majority of 13 to 9 members in the legislature and secondly, democratic elections were being introduced for the first time. *The new constitution came into effect on the 1st March 1948 and elections were held for the first time on 20th March 1948.*
>
> [emphasis added]

87 In accordance with section 40 of the 1946 Order, the Singapore Legislative Council Elections Ordinance, 1947 (Ordinance No 24 of 1947) ("the 1947 Ordinance") was passed on 14 July 1947 to provide the legislative mechanism to fill the seats of Elected Members in the Legislative Council. Section 23(1) of the 1947 Ordinance, which was the original source of section 24(1) of the current Parliamentary Elections Act, read:

> **Writ of election**
>
> **23.—**(1) For the purposes of every general election of members of the Legislative Council, and ***for the purposes of the election of members to supply vacancies caused by death, resignation or otherwise*** , the Governor shall issue writs under the Public Seal of the Colony, addressed to the returning officers of the respective electoral districts for which members are to be returned. Such writs shall be forwarded to the Supervisor of Elections for transmission to the several returning officers.
>
> [emphasis added in bold italics]

88 Section 23(1) of the 1947 Ordinance referred to "vacancies caused by death, resignation or otherwise", which was defined in section 22 of the 1946 Order:

> **Tenure of office Members**
>
> **22.**—(1) Subject to the provisions of this Order, every Nominated Official Member or Nominated Unofficial Member of the Legislative Council shall hold his seat in the Legislative Council during His Majesty's pleasure.
>
> (2) Every Member shall in any case cease to be a Member ***at the next dissolution of the Legislative Council after his appointment or election*** , or previously if his seat shall become vacant under the provisions of this Order.
>
> (3) The seat of a Member of the Legislative Council (other than an *ex officio* Member) shall become vacant—
>
> (a) upon his death; or
>
> (b) if he shall, without leave of the Governor, be absent from two consecutive meetings of the Council;
>
> …
>
> [emphasis added in bold italics]

89 In a broadly similar fashion to the current Constitution, the 1946 Order provided a mechanism to fill vacated seats of *ex officio* Members; Nominated Official Members; and Nominated Unofficial Members. Under section 23(1) of the 1946 Order, the Governor was empowered to appoint Temporary Members for the period of the vacancy:

> **Temporary Members**
>
> **23.**—(1) Whenever there ***shall*** be a vacancy in the number of persons sitting in the Legislative Council, as ***ex officio Members*** , or ***Nominated Official Members*** or ***Nominated Unofficial Members*** , by reason of the fact that — ...
>
> (e) the seat of a Nominated Official Member or of a Nominated Unofficial Member is vacant for any cause other than a dissolution of the Council;
>
> ...
>
> ***the Governor may*** , by Instrument under the Public Seal, ***appoint a person to be a Temporary Member for the period of such vacancy.***
>
> [emphasis added in bold italics]

90 The Singapore Colony (Amendment) Order in Council (Statutory Instrument 1948 No 341) ("the 1948 Order") was made on 24 February and came into operation on 1 March 1948 before the first elections were held on 20 March 1948. The 1948 Order provided, amongst other things, for the prescribed term of the Legislative Council. Section 5 of the 1948 Order read:

Duration of Legislative Council

5. In section 39 of the Principal Order sub-section (2) shall be renumbered as sub-section (3) and the following sub-section shall be inserted as sub-section (2):—

"(2) Unless it is sooner dissolved every Legislative Council shall continue for three years from the date appointed for the commencement of its first meeting, and the expiry of the said period of three years shall operate as a dissolution of the Council."

91 Shortly before the term of the first Legislative Council was to expire, the Singapore Colony (Amendment) Order in Council, 1950 (Statutory Instrument 1950 No 2099) was made on 21 December 1950 and came into operation on 17 February 1951 to increase the number of Elected Members in the Legislative Council from nine to twelve before the second Legislative Council elections:

Amendment of section 16(2)(c) of the Principal Order

2. In paragraph (c) of subsection (2) of section 16 of the Principal Order the word "twelve" shall be substituted for the word "nine".

Report of the Constitutional Commission, 1954

92 The next constitutional milestone was the appointment of the Constitutional Commission of 1954. Sir George Rendel was appointed by the Governor as the Chairman of a Constitutional Commission "to undertake a comprehensive review of the constitution of the Colony of Singapore, including the relationship between the Government and the City Council, and to make such recommendations for changes as are deemed desirable at present time": see Report of the Constitutional Commission, Singapore ("the Rendel Report") published on 22 February 1954 at p 43. The Rendel Report stated at paras 26 to 28:

26. We have carefully considered the question of the *composition of the new Legislative Assembly* which we recommend should *replace the present Legislative Council.* …

27. Firstly, we believe that, if real progress is to be made towards self-government, the new Assembly should be primarily an elected body, and that, if there is to be a majority of Elected Members, that majority should be an effective one. …

28. Bearing all these considerations in mind, we recommend that the new Legislative Assembly should consist of *thirty-two members*, of whom *twenty-five should be Elected Members*, *three* should, at the outset, be *Official Members* holding the three *ex-officio* Ministerial posts... *and four* should be *Unofficial Members nominated by the Governor.*

[emphasis added]

93 The proposal in the Rendel Report to have a majority of Elected Members in the Legislative Council was accepted and the Singapore Colony (Electoral Provisions) Order in Council, 1954 (Statutory Instruments 1954 No 1377) was made on 19 October 1954 and came into operation on 25 October 1954 to increase the number of Elected Members in the Legislative Council from twelve to twenty-five:

Provision for election of members to proposed Legislative Assembly

3.—(1) Provision may be made, by or in pursuance of any law enacted under the existing Orders, for the election of ***twenty-five members*** to the proposed Legislative Assembly […]

[emphasis added in bold italics]

The Order in Council, 1955

94 Following the Rendel Report, the Singapore Colony Order in Council, 1955 (Statutory Instruments 1955 No 187) ("the 1955 Order") was made on 1 February 1955 and came into operation on 8 February 1955. Under the 1955 Order, the Legislative Council constituted under section 16 of the 1946 Order was replaced with a Legislative Assembly constituted under section 38 of the 1955 Order:

Legislative Assembly

38. There shall be a ***Legislative Assembly*** in and for the Colony, which shall consist of a ***Speaker*** , three ***ex-officio Members*** , twenty-five ***Elected Members*** and four ***Nominated Members.***

[emphasis added in bold italics]

Section 38 of the 1955 Order distinguished between three types of Members in the Legislative Assembly: *ex-officio* Members, Elected Members and Nominated Members. It also removed the distinction between Nominated Official Members and Nominated Unofficial Members.

95 Another significant feature of the 1955 Order was that it changed the mode of filling vacant seats in the Legislative Assembly. It no longer empowered the Governor to appoint Temporary Members to fill vacancies. Instead, depending on whether the vacant seat was one of a Nominated or Elected Member, sections 51(1) and 51(2) of the 1955 Order set out how each respective vacancy was to be filled.

96 Section 51 of the 1955 Order is the original source of Article 49(1) of the current Constitution. The exact wording of section 51 of the 1955 Order is crucial as it brings into clear light the meaning of Article 49(1) of the Constitution. The provisions are set out in the table below to display the obvious connections.

The 1955 Order	**The current Constitution**
Filling of vacancies 51.—(1) Whenever the seat of a Nominated Member of the Assembly becomes vacant, the vacancy ***shall be filled by appointment by the Governor*** in accordance with the provisions of this Order.	**Filling of vacancies** [No equivalent provision]

(2) Whenever the seat of an Elected Member of the Assembly becomes vacant, the vacancy ***shall be filled by election*** in accordance with the provisions of this Order. [emphasis added in bold italics]	49.—(1) Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy ***shall be filled by election*** in the manner provided by or under any law relating to Parliamentary elections for the time being in force. [emphasis added in bold italics]

97 It is immediately apparent that the expression "shall be filled by election" is common to both section 51(2) of the 1955 Order and the current Article 49(1) of the Constitution. Yet, there was no ambiguity in the meaning of the expression "shall be filled by election" in section 51(2) of the 1955 Order, because section 51(1) used the contrasting expression "shall be filled by appointment by the Governor". Such an expression clearly meant that "election" in section 51(2) referred to a process and not an event, and the word "shall" in sections 51(1) and 51(2) of the 1955 Order mandated the process of filling the seat. In other words, under section 51(2) of the 1955 Order, whenever the seat of an Elected Member of the Assembly became vacant, the only process that could be used to fill that seat was by election and not by appointment. Subsequent constitutional provisions that originated from section 51(2) of the 1955 Order and containing the same expression have the same meaning unless the text was intentionally changed.

The Order in Council, 1958

98 The expression "shall be filled by election" in Article 49(1) of the Constitution subsequently became obscure because the distinction between the processes of appointment and election in the 1955 Order was lost in subsequent Orders in Council and later, the Constitution. It is therefore important to follow the precise chain of events in our history to understand how and why this distinction became obscure.

99 After the 1955 Order, Singapore moved towards full internal self-government, through two rounds of talks in London, led by the successive Chief Ministers of Singapore, Mr David Marshall in April 1956 and subsequently by Mr Lim Yew Hock in March 1957. These talks culminated in an agreement for a fully elected Legislative Assembly in Singapore. The Singapore (Constitution) Order in Council, 1958 (Statutory Instruments 1958 No 1956) ("the 1958 Order") was made on 21 November 1958 and came into operation on 28 November 1958. Sections 34(1) and 39 of the 1958 Order provided for a fully elected Legislative Assembly:

> **Legislative Assembly**
>
> **34.—(1**) There shall be a Legislative Assembly in and for Singapore which shall consist of fifty-one Members.
>
> …
>
> **Members of the Assembly**
>
> **39**. Members of the Assembly shall be persons qualified for election in accordance with the provisions of this Order and elected in the manner provided by or under any law for the time being in force in Singapore.

100 With a fully elected Legislative Assembly, there were no longer any Nominated Members. Accordingly, section 51(1) of the 1955 Order that provided for filling of vacancies of Nominated Members was dropped, and the critical text of section 51(2) of the 1955 Order "shall be filled by election" remained unchanged in section 44 of the 1958 Order:

> **Filling of vacancies**
>
> 44. Whenever it appears to the Speaker that the seat of a Member has become vacant, he ***shall*** , by writing under his hand, ***report such vacancy*** to the Yang di-Pertuan Negara, and the vacancy ***shall be filled by election*** in the manner provided by or under any law for the time being in force in Singapore.
>
> [emphasis added in bold italics]

101 It is clear that the expression "shall be filled by election" in section 44 of the 1958 Order referred to a process and not an event. Section 44 uses the word "shall" twice, which neatly captures the distinction between mandating an event and mandating a process. This first "shall" mandated an event, which was for the Speaker to "report such vacancy". However, the second "shall" which was again used in the expression "shall be filled by election" clearly mandated a process. There is no reason why this provision should be interpreted any differently from section 51(2) of the 1955 Order. Without the contrasting provisions of sections 51(1) and 51(2) in the 1955 Order, the meaning of the second "shall" in section 44 of the 1958 Order only became less obvious, but it had not changed.

The Agreement relating to Malaysia, 9 July 1963

102 The Agreement Relating To Malaysia (Government Printing Office, 1963) ("the 1963 Malaysia Agreement"), being an agreement concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore, was signed in London on 9 July 1963. Article III of the 1963 Malaysia Agreement stated:

ARTICLE III

> The Government of the United Kingdom will submit to Her Britannic Majesty before Malaysia Day Orders in Council for the purpose of giving the force of law to the Constitutions of Sabah, Sarawak and Singapore as States of Malaysia which are set out in Annexes B, C and D to this Agreement.

103 The Constitution of the State of Singapore referred to in Article III of the 1963 Malaysia Agreement was found at Annex D. Article 33 of Annex D of the 1963 Malaysia Agreement read:

> **Filling of vacancies**
>
> **33.** Whenever the seat of a Member has become vacant for any reason other than a dissolution, the vacancy ***shall be filled by election*** in the manner provided by or under any law for the time being in force in the State.
>
> [emphasis added in bold italics]

104 Interestingly, the wording of this provision mirrored the language of the original section 51(2) of

the 1955 Order rather than its immediate predecessor, section 44 of the 1958 Order.

The Constitution of the State of Singapore, 16 September 1963

105 The Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (Statutory Instruments 1963 No 1493) ("the 1963 Order") was made on 29 August 1963. The Third Schedule to the 1963 Order set out the Constitution of the State of Singapore ("the 1963 Constitution"). Pursuant to Article 94 of the 1963 Constitution, the 1963 Constitution only came into operation immediately before Malaysia Day which fell on 16 September 1963.

106 However, after the signing of the 1963 Malaysia Agreement and before the making of the 1963 Order on 29 August 1963, Article 33 was substantially changed. How and why this change from the 1963 Malaysia Agreement came to be made is explained below (see [108]). Article 33 of the 1963 Constitution was significantly amended to include the insertion highlighted below:

> **Filling of vacancies**
>
> **33.** Whenever the seat of a Member has become vacant for any reason other than a dissolution, the vacancy shall ***within three months from the date on which it was established that there is a vacancy*** be filled by election in the manner provided by or under any law for the time being in force in the State.
>
> [insertion emphasized in bold italics]

The Constitution of the Republic of Singapore of 1965

107 The separation of Singapore from Malaysia on 9 August 1965 necessitated a new constitution for the Republic of Singapore. This new Constitution was a consolidation of provisions from pre-Malaysia colonial constitutional legacy and the deliberate and conscious selection of some but not all relevant provisions from the preceding Federal Constitution of Malaysia.

108 The then Prime Minister Mr Lee Kuan Yew explained what had transpired between the 1963 Malaysia Agreement dated 9 July 1963 and the 1963 Order dated 29 August 1963 in his speech in Parliament proposing to delete the highlighted insertions (see above at [106]) in Article 33 of the 1963 Constitution (see *Singapore Parliamentary Debates, Official Report* (22 December 1965) vol 24 at col 432):

> **Article 7** revokes a clause which was introduced into the State Constitution of Singapore when it entered Malaysia. ***Members in this House will know that there was no such injunction of holding a by-election within three months in our previous Constitution.*** We resisted this particular condition being imposed upon the State Constitution at the time we entered Malaysia, but our representations were not accepted because Malaysia insisted on uniformity of our laws with the other States in the Federation and with the Federal Constitution itself. ***Since we are no longer a part of the Federal whole, for reasons which we find valid and valuable as a result of our own experience of elections and of government in Singapore, we have decided that this limitation should no longer apply.***
>
> [emphasis added in bold italics]

109 On the same day after this speech, Parliament passed the Constitution (Amendment) Act, 1965 (Act 8 of 1965) ("the 1965 Act") on 22 December 1965 to delete the words "within three months from

the date on which it was established that there is a vacancy" with retrospective effect from 9 August 1965. Sections 1 and 7 of the 1965 Act state:

> **Short title and commencement**
>
> **1**. This Act may be cited as the Constitution (Amendment) Act, 1965, and ***shall be deemed to have come into operation on the 9th day of August, 1965.***
>
> ...
>
> **Amendment of Article 33**
>
> **7**. Article 33 of the Constitution is hereby amended ***by deleting the words "within three months from the date on which it is established that there is a vacancy"*** appearing in the second and third lines thereof.
>
> [emphasis added in bold italics]

110 The 1965 Act excised the insertions introduced in Article 33 of the 1963 Constitution and Article 33 accordingly reverted to the original language of section 51(2) of the 1955 Order. This has remained unchanged to this day as Article 49(1) of the Constitution with respect to elected Members' vacancies.

Subsequent renumbering of Article 33 to Article 49

111 The most significant reprint of the Constitution was made on 31 March 1980 ("the 1980 Reprint") pursuant to the Constitution (Amendment) Act, 1979 (Act 10 of 1979). Prior to the 1980 Reprint, the Constitutional provisions that applied to Singapore were found in three separate documents: (a) the Republic of Singapore Independence Act (Act 9 of 1965) ("RSIA"); (b) the State Constitution of Singapore; and (c) provisions of the Federal Constitution of Malaysia as made applicable by the RSIA. The 1980 Reprint consolidated all the Constitutional provisions into one single document and all the Articles were renumbered sequentially. In the 1980 Reprint, Article 33 of the 1965 Constitution was renumbered as Article 49, with no change made to its text.

112 In 1984, non-constituency Members of Parliament were introduced by Act No 16 of 1984, which was passed on 25 July 1984 and came into operation on 10 August 1984 ("the 1984 Act"). This resulted in a new Article 49(2) providing for the filling of vacancies of non-constituency Members. The original Article 49 in the 1980 Reprint became Article 49(1) and remained unchanged save for the addition of the phrase, "not being a non-constituency Member".

Constitution (1980 Reprint)	**After the 1984 Act**
Filling of vacancies **49.** Whenever the ***seat of a Member*** has become vacant for any reason other than a dissolution, the vacancy ***shall be filled by election*** in the manner provided by or under any law for the time being in force in Singapore. [emphasis added in bold italics]	**Filling of vacancies** **49.**—(1) Whenever the ***seat of a Member*** , not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy ***shall be filled by election*** in the manner provided by or under any law relating to Parliamentary elections for the time being in force.

[No equivalent provision]	(2) The legislature may be law provide for — (*a*) the vacating of a seat of a non-Constituency Member in circumstances other than those specified in Article 46; (*b*) the filling of vacancies of the seats of non-Constituency Members where such vacancies are caused otherwise than by a dissolution of Parliament. [emphasis added in bold italics]

113 For good order I should complete the systematic survey of the constitutional instruments by noting the Report of the Constitutional Commission of 1966. This resulted in some amendments to the Constitution but did not touch on the provisions relating to the filling vacancies of elected Members of Parliament.

114 The grand sweep of successive colonial constitutions from 1946 to the current Constitution shows that since 1955, the expression "shall be filled by election" continuously and consistently meant a process and not an event. The only aberration to this grand sweep was the brief Malaysian period when Singapore was obliged, notwithstanding the 1963 Malaysia Agreement to the contrary, to provide for elections to fill vacancies of elected Members.

Conclusion on the Substantive Issue

115 There is no requirement in the Constitution to call elections to fill elected Member vacancies. There being no such requirement, there arises no prescribed time within which such elections must be called. Under the Constitution, to call or not to call an election to fill an elected Member vacancy is a decision to be made by the Prime Minister. Should the Prime Minister decide to call an election to fill an elected Member vacancy, he has a discretion as to when to call it.

116 The Parliamentary Elections Act merely provides the mechanism to hold such an election should the Prime Minister decide to call one. In the event that the Prime Minister decides to call an election to fill an elected Member vacancy, section 24 of the Parliamentary Elections Act requires that the President issue writs under the public seal to the Returning Officer to convene such election to supply vacancies caused by death, resignation or otherwise. In so doing, the President is obliged to act in accordance with Article 21 of the Constitution.

117 I conclude by reiterating the interplay of the separation of powers in the Constitution between the executive, legislature and the judiciary which is well set out by Professor Thio Li-ann in her magisterial work, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at p 164:

> In *Yong Vui Kong v Attorney-General*, Chan Sek Keong CJ noted that "under Art[icle] 93 of the Singapore Constitution, the Supreme Court has jurisdiction to adjudicate on every legal dispute on a subject matter in respect of which Parliament has conferred jurisdiction on it, including any constitutional dispute between the State and an individual". At issue was the justiciability of the clemency power under Article 22P which is an executive power. Chan CJ noted that as this power was a constitutional power vested exclusively in the Executive, it was on the merits non-justiciable. The courts could not substitute their decision for that of the Executive but this did not mean that it was entirely beyond review. As a legal power, specifically, a constitutional

power, its exercise was not "beyond the reach of the supervisory jurisdiction of the courts if it is exercised beyond its legal limits (*ie*, *ultra vires* the enabling law) or if it is exercised mala fide (*ie* for an extraneous purpose). Judicial review over clemency power lies with respect to the principle of the rule of law that all legal power has limits and is subject to judicial review to enforce those limits, and with respect to ensuring compliance with the procedure stipulated in Article 22P. ... This case demonstrates the interplay of the separation of powers and the rule of law and is a reminder that none of the constitutional principles act in isolation.

[footnotes omitted]

Implications of subsequent events

118 As this application was commenced on 2 March 2012, the cause of action crystallised on that date, and will succeed or fail based on the state of events as at that date. The implications of subsequent events on the application for a declaration were addressed by Buckley J in *Gibson v Union of Shop, Distributive and Allied Workers* [1968] 1 WLR 1187 at 1189:

I can easily understand why, if a plaintiff starts an action seeking declaratory relief in respect of some question of such a kind that no legal results will flow from the declaration which he seeks, the court will be disinclined to entertain his action and to grant any relief in it and that the action would be dismissed as being one the trial of which would serve no useful purpose; but if when the action is instituted the plaintiff has, or may have, a good ground of complaint, not of an academic character but involving substantial legal issues, it seems hard that he should be faced when the case comes on trial with the suggestion that his case ought not to be tried because, owing to the lapse of time between the date when he issued the writ and the time when, having regard to the business of the court and the necessary preparatory steps, the action comes on for trial, the relief which he seeks has become much less important or perhaps has even ceased to have any practical implications at all.

119 In any event, the implications of subsequent events do not need to be considered here because the applicant did not succeed on the Substantive Issue.

Judgment

120 For the reasons above, the applicant's application in Summons No 2639 of 2012 is dismissed.

121 I will hear the parties on costs at a later date.

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