Vellama d/o Marie Muthu *v* Attorney-General
[2013] SGCA 39

Case Number	: Civil Appeal No 97 of 2012
Decision Date	: 05 July 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Ravi s/o Madasamy (L.F. Violet Netto) for the appellant; Chong Gek Sian David SC, Low Siew Ling and Lim Sai Nei (Attorney-General's Chambers) for the respondent.
Parties	: Vellama d/o Marie Muthu — Attorney-General

CONSTITUTIONAL LAW

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 2 SLR 1033.]

5 July 2013 Judgment reserved

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 Originating Summons No 196 of 2012 ("OS 196/2012") was instituted by the Appellant following the vacancy of the Hougang Single Member Constituency ("SMC") under Art 46(2)(b) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"), as a result of the incumbent Member of Parliament (hereinafter referred to as "MP" or "Member" as appropriate), Mr Yaw Shin Leong, being expelled from the political party for which he stood in the General Election 2011. In OS 196/2012, the Appellant sought a declaration as to the proper construction of Art 49 of the Constitution and also a mandatory order requiring the Prime Minister to advise the President of the Republic of Singapore ("the President") to issue a writ of election for Hougang SMC within three months from the date of the vacancy or such other reasonable period as the court deems fit. Following leave granted pursuant to O 53 r 1 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) (the "Rules of Court"), the High Court judge ("the Judge") ruled that the Prime Minister has the full discretion to determine if he wishes to call a by-election to fill the vacancy and, if so, when such a by-election should be held. The Appellant, being dissatisfied with that ruling, appeals to this court.

The background

2 On 14 February 2012 the seat for Hougang SMC, under which the Appellant was a resident voter, became vacant on account of the expulsion of Mr Yaw Shin Leong from the Workers' Party of Singapore ("the Workers' Party"). Thereafter some exchange of views between Members took place in the media. The Member for Holland-Bukit Timah Group Representational Constituency ("GRC"), Mr Christopher de Souza, tabled a question in Parliament asking whether the Prime Minister was considering calling a by-election in Hougang SMC and, if so, when. On 9 March 2012, the Prime Minister answered with the following statement (see *Singapore Parliamentary Debates, Official Report* (9 March 2012) vol 88):

> ... 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.

[emphasis added]

3 However, on 2 March 2012, one week before the Prime Minister's statement, the Appellant had already filed OS 196/2012.

4 On 3 April 2012, leave was granted by the Judge to apply for the mandatory order. [note: 1] The next day, 4 April 2012, the Attorney-General filed a Notice of Appeal against the leave given by the Judge. [note: 2]

5 On 9 May 2012, the President, upon the advice of the Prime Minister, issued a writ of election for Hougang SMC ("the Writ of Election"). Following this development, the Appellant wrote to the Attorney-General stating that "as the factual objective of her litigation has now been achieved timeously, she is prepared to withdraw her application in OS 196". [note: 3]

6 On 16 May 2012, the Attorney-General withdrew his appeal against the decision granting leave to the Appellant in OS 196/2012. The by-election was duly held on 26 May 2012 and the candidate for the Workers' Party was returned to the seat for Hougang SMC. However, on 29 May 2012 the Appellant nevertheless proceeded to file Summons No 2639 of 2012 seeking the same mandatory order and declaration. [note: 4] Following the dismissal on 5 July 2012 of certain interlocutory applications brought by both parties, oral arguments from both parties on the substantive merits were heard on 16 July 2012. We should add that at the latter hearing counsel for the Appellant informed the court that the Appellant was abandoning her application for the mandatory order (see *Vellama d/o Marie Muthu v Attorney-General* [2012] 4 SLR 698 ("the Judgment") at [14]). On 1 August 2012, the Judge delivered his judgment, dismissing the substantive prayer which the Appellant sought, namely, a declaration that the Prime Minister must within the period of three months of a seat becoming vacant, or such other reasonable period, advise the President to issue the writ of election.

Decision of the Judge

7 In his judgment the Judge addressed two issues:

(a) Whether the court has the power to grant standalone declarations in an application made under O 53 of the Rules of Court for a prerogative order which also included a prayer for declaratory reliefs ("the procedural issue") (at [35] of the Judgment); and

(b) Whether the Prime Minister has the discretion to call or not to call a by-election to fill an elected Member vacancy, and if he must call for such a by-election, the period within which he should do so ("the substantive issue") (at [115] of the Judgment).

8 In addition to these two issues addressed by the Judge, the parties have each raised an additional point. The Appellant has raised a novel argument that, by virtue of Art 39(1)(a) of the Constitution, Parliament is not properly constituted where the number of elected MPs is less than that required to be returned at a general election ("the Quorum issue"). This is relied upon to buttress the Appellant's contention that the Prime Minister must call a by-election to fill a vacancy which occurs during Parliament's term, commonly referred to as a 'casual vacancy'. On the other hand, the Attorney-General has contended that the Appellant lacks *locus standi* to pursue the application for a

declaration ("the *locus standi* issue").

The Judge's decision on the procedural issue

9 The procedural issue centres upon the interpretation of O 53 r 1 and O 53 r 7 as amended by the Rules of Court (Amendment No 2) Rules 2011, which came into effect on 1 May 2011. These provisions now read:

> **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.
>
> ...
>
> **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.

10 Before the amendments were made to this Order in 2011, no declaratory relief could be sought by an applicant in addition to the prerogative order(s) prayed for. The Judge, in this case, having examined the amended rules, particularly the rationale for the 2011 amendments, concluded that under O 53 the court is not permitted to grant standalone declaratory relief because:

(a) Order 53 r 1(1)(a) expressly labels an application for a declaration as being included in the "principal application" for a prerogative order;

(b) no specific leave is required in relation to the declaratory relief sought, thus preserving the distinction between prerogative orders and declaratory relief;

(c) the word "or" which appears before the word "declaration" in O 53 r 7(1) should not be construed as disjunctive; and

(d) in the premises, any declaratory order must be "appended to and contingent upon a prerogative order" (at [33] of the Judgment).

Locus standi

11 Before we proceed to deal with the procedural and substantive issues decided by the Judge, there is a preliminary but important concern, raised by the Attorney-General, which must be addressed – the Appellant's *locus standi* to seek the declaratory relief. The Judge granted the Appellant leave to apply for judicial review on 3 April 2012; at that point in time the by-election in Hougang SMC had yet to be called, and there was then no definite indication as to when it would

occur although the Prime Minister did in the statement issued on 9 March 2012 declare that he intended to call an election to fill the vacancy. The Attorney-General did not dispute the Appellant's *locus standi* at the leave hearing (see *Vellama d/o Marie Muthu v Attorney-General* [2012] 2 SLR 1033 at [11]). However, in submissions before the High Court, the Attorney-General contended that the Appellant no longer had the requisite *locus standi* to seek declaratory relief as, the by-election having been held, she had ceased to have a real interest in continuing with the proceedings. [note: 5] The Attorney-General again invited this court to revisit the issue of *locus standi* in the determination of the present appeal.

12 This raises the potentially vexing problem of whether the Appellant had standing to *continue* seeking a declaration under O 53 of the Rules of Court given that the factual substratum for her claim had collapsed by 9 May 2012 when the Prime Minister announced the Hougang SMC by-election. At its root, this is a question about whether standing should be regarded as having crystallised at the point of time when proceedings are initiated, or whether it should instead be treated as a live issue open to review at every stage of the proceedings.

The point of crystallisation

13 The Judge relied on the decision of Buckley J in *Gibson v Union of Shop, Distributive and Allied Workers* [1968] 1 WLR 1187 ("*Gibson*") for the proposition that subsequent events will not affect an applicant's right for his case to be tried (at [118] of the Judgment). The Attorney-General has countered with multiple authorities where the English courts have dismissed applications which were either overtaken by events or no longer of practical benefit to the individual litigant. The case most directly on point appears to be the decision of the House of Lords in *Commissioners of Inland Revenue v National Federation of Self-employed and Small Businesses Limited* [1982] AC 617 ("*National Federation*"), in which their Lordships were unanimous in holding that the Divisional Court's decision on standing was open to review on appeal. The reason given was that the court at the leave stage might not have the full facts before it to make a conclusive determination of the applicant's standing. This was succinctly explained by Lord Fraser of Tullybelton at 645D–F:

> ... I recognise that in some cases, perhaps in many, it may be impracticable to decide whether an applicant has a sufficient interest or not, without having evidence from both parties as to the matter to which the application relates, and that, in such cases, the court before whom the matter comes in the first instance cannot refuse leave to the applicant at the ex parte stage, under rule 3 (5). The court which grants leave at that stage will do so on the footing that it makes a provisional finding of sufficient interest, subject to revisal later on, and it is therefore not necessarily to be criticised merely because the final decision is that the applicant did not have sufficient interest. But where, after seeing the evidence of both parties, the proper conclusion is that the applicant did not have a sufficient interest to make the application, the decision ought to be made on that ground. ...

14 Following the *National Federation* case, it is the undoubted position of English law that the issue of standing, although determined as a preliminary issue, may be re-opened at the substantive hearing of the application for judicial review. This proposition of the law espoused in *National Federation* has been applied in subsequent cases such as *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co* [1990] 1 QB 504 at 519–520 and *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else (1982) Ltd* [1993] QB 534 at 551. A similar approach can also be discerned in a succession of cases analysed at [20]–[23] below. In the light of such overwhelming authority the short answer to the root question is that the applicant's standing does *not* crystallise at the point when proceedings are initiated, but remains subject to review until the courts arrive at a final determination.

Whether the Appellant ought to have standing to seek standalone declarations

15 It is trite that an applicant cannot apply for declaratory relief if there is no factual basis for such an application. However, the English case law suggests that the courts do exercise significant discretion in relation to the question whether the applicant *continues* to have standing following a change of circumstances which renders the matter factually moot.

16 The leading local authority on the requirement of standing to seek declaratory relief is *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 ("*Karaha Bodas*") which was affirmed in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong*") at [115]. The principles expounded in *Karaha Bodas* were distilled by this court in *Tan Eng Hong* to these three basic propositions (at [72]):

> ...
>
> (a) the applicant must have a "real interest" in bringing the action (at [19]);
>
> (b) there must be a "real controversy" between the parties to the action for the court to resolve (at [19]); and
>
> (c) the declaration must relate to a right which is personal to the applicant and which is enforceable against an adverse party to the litigation (at [15], [16] and [25]).

17 It is also important to highlight that the English rule on standing, based on O 53 r 3(5) of the English Rules of the Supreme Court (Amendment No 3) 1977 (SI 1977 No 1955) (UK) (and now s 31(3) of the Senior Courts Act 1981 (c 54) (UK)), only requires the applicant to have a "**sufficient interest** in the matter to which the application relates" [emphasis added in bold]. Because of this change, there appears to be greater scope in the English courts to grant leave where there is public interest in the litigation of the matter even though the applicant is not personally affected. The following statement of Lord Diplock in *National Federation* at 644E–G is pertinent:

> It would, in my view, be *a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped*. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They 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.
>
> [emphasis added]

18 Despite the more expansive landscape for judicial review in the UK, it is nevertheless instructive to examine the English cases where the issue of standing of the applicant has been reviewed in the light of new or changed circumstances as a starting point for determining our own approach on the matter.

19 In *Gibson*, which pre-dated O 53 r 3(5) of the English Rules of the Supreme Court (Amendment No 3) 1977, the factual substratum fell away two weeks from the start of the substantive hearing, when the applicant's suspension from the trade union – which was the subject of the requested declaratory relief – came to an end. Buckley J, sitting in the Chancery Division of the High Court, nevertheless granted leave for the action to proceed to trial on the basis that there remained "a good ground of complaint, not of an academic character but involving substantial legal issues" (at 1189). At the same time, Buckley J noted that the matter was not a purely academic one as the propriety of the suspension (at 1190):

> … may well have repercussions which are not in the nature of legal results flowing from the actual disciplinary action, but repercussions which might affect the plaintiff in his union in the future; if, for instance, he desired to seek office in the future in the union.

Viewed in context, therefore, *Gibson* does not lend unequivocal support for the proposition that applicants can have standing to seek declarations which are of no practical importance, as the court's decision was ultimately still predicated on an identifiable private interest.

2 0 *Gibson* can be compared with a series of cases in which the English courts have dismissed applications on a preliminary footing after leave to apply had been granted. First, in *R v Legal Aid Board, ex parte Hardiman* (CO/3193/95) ("*ex parte Hardiman*") the applicant brought proceedings to review the Legal Aid Board's decision to discharge her legal aid certificate. The remedies sought appeared to include a quashing order and damages, but not declaratory relief. Between the time that leave to apply was granted and the date of the substantive hearing, the Legal Aid Board rescinded its decision and restored legal aid to the applicant. Ognall J dismissed the application on the basis that the principal relief sought would have been "entirely a purposeless exercise" (*ex parte Hardiman* at 2). Second, in *R v Head Teacher of Fairfield Primary School and others ex parte W* (CO/541/97, transcript: Smith Bernal) ("*ex parte W*"), leave was granted to apply for, *inter alia*, a declaration that the head teacher and governors of the Fairfield Primary School had breached their statutory obligations by failing to take disciplinary action against a student who had injured the applicant. By the time of the substantive hearing, both students were almost due to leave the school. Scott Baker J held that there would be no "practical benefit" to the applicant, and that:

> … where the interest has lapsed between the granting of leave and the hearing of the substantive application, that…may well be a matter that falls to be taken into account when considering whether the dispute has ceased to be of practical significance to the parties.

21 The third case also placed emphasis on the issue of practical significance. In *R (on the application of Barnes) v Secretary of State for the Home Department* (unreported, 18 December 2000) ("*Barnes*"), leave was granted to the applicant to seek a declaration that the Secretary of State's policy on the return of General Pinochet to Chile was unlawful. The applicant failed at first instance. The Court of Appeal dismissed the applicant's appeal, Sir Murray Stuart-Smith (as he then was), being of the view that the applicant simply had no standing, said (at [9] and [11]):

> The judge who dealt with this matter at first instance, Scott Baker J, gave a clear and reasoned judgment why the application should not be granted. I agree with it. I would add that in fact I do not think that the applicant has any locus standi or sufficient interest to bring these proceedings against the Secretary of State in any event.
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> ...
>
> As I say, I take the view that Mr Barnes has no sufficient interest to make this application in any

event and, as Scott Baker J pointed out, the relief really which the applicant is seeking is quite out of the question, even if he did have an arguable case, because it is all past history now. It is all water under the bridge. General Pinochet has gone back to Chile. It is a matter for the Chileans to decide whether they are going to try him or not. The courts will not make declarations of legality or lawfulness which can have no bearing on tangible events.

[emphasis added]

22 Finally, in *R (McKenzie) v Waltham Forest London Borough Council* [2009] EWHC 1097 ("*McKenzie*"), the applicant sought declarations relating to the local authority's refusal to provide her with suitable accommodation when she was due to give birth. In the interim between the grant of leave and the substantive hearing, the applicant was given the accommodation which she had requested for, thereby rendering the declarations entirely academic. Belinda Bucknall QC, sitting as a deputy judge of the High Court, declined to decide on the academic points raised as the declarations sought were "entirely fact-sensitive, rendering general guidance an unsafe course for any court to attempt" (see *McKenzie* at [27]). It might also be observed that this analysis is generally applicable to the foregoing cases (*ex parte Hardiman*, *ex parte W*, and *Barnes*) as well. Those cases were all 'fact-sensitive' in the sense that the applicants were seeking redress for violations which were highly specific to their own personal circumstances.

23 On the other hand, there are cases where the English courts have found that the applicant had standing to proceed notwithstanding that the factual substratum which gave rise to the institution of the proceeding had collapsed. A prime example of such a case arose in *R (Giles v Parole Board* [2004] 1 AC 1 ("*Giles*"). The applicant pleaded guilty to certain offences and was specifically sentenced to a seven-year jail term in total. He sought a declaration that the appropriate test for the release of determinate sentence prisoners should be the same as for discretionary life prisoners. Shortly before leave was granted the applicant was released from prison, thereby rendering the proceedings entirely without any practical significance *for him*. Despite this, the judges at both the leave stage and at first instance thought that as the applicant had raised a matter of public importance which affected the liberty of *other persons*, the courts should make a definitive pronouncement sooner rather than later. The applicant was successful at first instance but overruled on appeal. The House of Lords upheld the Court of Appeal's decision. Neither appellate court suggested, however, that the application should have been dismissed for want of standing – although we should also point out that the question of standing was not specifically raised in either appeal.

24 Apart from reiterating the point that the applicant's standing to seek judicial review is not a matter confined to the leave stage of proceedings, the foregoing English authorities also reveal that the English courts have generally been reluctant to find that an applicant continues to have *locus standi* to seek a declaration when the remedies sought would not augur any practical significance – save where there are compelling issues of public interest which affect other persons still in the applicant's former predicament. It seems to us that the correct English position on this issue is succinctly encapsulated in the following dictum of Lord Slynn of Hadley in *R v Secretary of State for the Home Department, ex parte Salem* [1999] AC 450 ("*Salem*") at 457A–B:

> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.

25 The above passage from *Salem* was also cited by this court in *Tan Eng Hong* (at [145]), albeit without specifically endorsing the considerations outlined in Lord Slynn's speech, *viz*, a discrete point of statutory construction which could affect a large number of similar cases presently or in the near future. However, there was a general acknowledgement in *Tan Eng Hong* (at [143]) that in some circumstances the court may proceed to hear the case and grant declaratory relief even if the facts on which the action is based can be described as theoretical:

> … Where the circumstances of a case are such that a declaration will be of value to the parties or to the public, the court may proceed to hear the case and grant declaratory relief even though the facts on which the action is based are theoretical. We do not necessarily see this as an exception to the "real controversy" requirement as we are of the view that it can logically be said that where there is a real *legal* interest in a case being heard, there is a real controversy to be determined. …

26 It seems to follow by implication from this passage in *Tan Eng Hong* that the court may recognise an applicant's standing to seek judicial review even where there is no violation of a personal right – the third limb of the *Karaha Bodas* test – so long as there is a real legal interest and a real controversy. This statement though apparently broad must be viewed in its proper context. It must be kept in mind that *Tan Eng Hong* raised the question as to whether s 377A of the Penal Code (Cap 224, 2008 Rev Ed) (the "Penal Code") offended Art 12 of the Constitution and should be struck down. There, while the Public Prosecutor had decided not to prosecute the applicant under s 377A but under s 294(*a*) of the Penal Code instead, and to that extent the constitutional question had arguably become theoretical in respect of the particular act for which the charge was brought, the applicant still had a real interest in the question having regard to his sexual orientation. Another similar act of his in the future could very well attract a prosecution under s 377A. Thus, so long as s 377A remains on the statute book, it could not be said that the personal rights of the applicant in *Tan Eng Hong* would not be affected. To draw a parallel from the English cases cited at [20]–[23] above, it is evident that the constitutionality of s 377A is of great practical significance *to the applicant*.

27 The issue in the present appeal relates to the discretion of the Prime Minister under Art 49 of the Constitution. Arguably, before the by-election was held, the appellant could assert that she, as a resident of the constituency, was entitled to vote in an MP to represent her and other Hougang residents in Parliament. To that extent, her private rights as a resident were arguably affected. However, now that an election has been held and an MP duly elected, her interest in Art 49 can no longer be framed as a private right. Having said that, the public at large undoubtedly have an interest in the issue raised as casual vacancies can arise from time to time whereupon the issue will become real.

Distinction between public and private rights

28 At this juncture there is a need for us to address the distinction between public rights and private rights and in this regard we would first set out what this court stated in *Tan Eng Hong* (at [69]):

> In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 27, the majority of the Malaysian Supreme Court ruled that to possess locus standi, an applicant must show that he had a private right which had been infringed. *If a public right was involved, the applicant must show that he had suffered special damage as a result of the public act being challenged and that he had a genuine private interest to protect or further*. It is not disputed that in the present appeal, the rights concerned are not public rights. To clarify the terminology used here, *a public right is one*

which is held and vindicated by public authorities, whereas a private right is one which is held and vindicated by a private individual. Therefore, despite being a matter of public law, a constitutional right is a private right as it is held and can be vindicated by individuals on their own behalf.

[emphasis added]

29 The appropriate test for determining standing turns on the *nature of the rights* at stake although, whether it is a public or private right, it can be prosecuted by private citizens. Under English law there are important substantive differences depending on the nature of the right asserted – an applicant who is suing in respect of his right as a member of the public would have to join the Attorney-General in a relator action, unless he could establish that he had personally suffered special damage (see *Stockport District Waterworks Co v Manchester Corporation* (1862) 9 Jur.N.S. 266 at 267). In *Boyce v Paddington Borough Council* [1901] 1 Ch 109 ("*Boyce*") at 113–114, Buckley J provided some guidance as to how to differentiate between a public and private right:

> The public are not owners of lights overlooking the space, and there is no public right to access of light to any such windows. The public right is to have the open space so kept as to allow the enjoyment by the public of the space in an open condition, free from buildings. That right the plaintiff is entitled to as a member of the public; but any right of access of light to the windows of his property is not a public right. It is not a right which he enjoys as one of the public, or which any member of the public enjoys in common with himself. If, therefore, he claims upon the footing that he has a right to the access of light to his windows, he is suing in respect of a private, and not a public, right, and the Attorney-General is not a necessary party.

30 It would seem from the cited passage that the distinction between public and private rights has its etymological roots in the law of nuisance. Public nuisance can be traced as far back to the creation of the Assize of Novel Disseisin in the early thirteenth century (see J R Spencer, "Public Nuisance – A Critical Examination" (1989) 48 CLJ 55 ("*Spencer*") at 56–59). Sir James Fitzjames Stephen describes public nuisance in *A General View of The Criminal Law of England* (Macmillan and Co, 2nd Ed, 1890) at 105 as any "act not warranted by law, or an omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty's subjects." The action in public nuisance was heard in the criminal courts and prosecuted by the sheriff and later the Attorney-General (*Spencer* at 59). In contrast, private nuisance has been a tortious cause of action from its inception. A hybrid action was permitted in the sixteenth century where the courts created an exception for individuals who suffered 'special damage' from a public nuisance to seek injunctions in the same manner as an action under private nuisance. This exception was then gradually applied in cases involving individuals who sought to restrain public nuisances caused by public bodies (*eg*, *Winterbottom v Lord Derby* (1867) LR 2 Ex 316, *Ricket v Directors, &c. of Metropolitan Railway Co* (1867) LR 2 HL 175). These cases illustrate how private law modalities were imported into the sphere of public law remedies, culminating in Buckley J's celebrated statement in *Boyce* at 114:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of the premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. …

31 The House of Lords, first in *London Passenger Transport Board v Moscrop* [1942] 1AC 332

("*Moscrop*") at 345, and then in *Gouriet v Union of Post Office Workers* [1978] AC 435 ("*Gouriet*") (at 483–484 per Lord Wilberforce, 518 per Lord Edmund-Davies and 522 per Lord Fraser), accepted the above statement as the applicable test for standing to seek declaratory relief against a public body. In *Karaha Bodas*, this court adopted the propositions expounded in *Gouriet* as the applicable law on standing for declaratory relief under O 15 r 16 of the Rules of Court as the English rules of court were then identical to ours. The test set out in *Karaha Bodas* was then applied in *Tan Eng Hong* (at [76], citing *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542 at [18]) for applications under O 53 r 1 of the Rules of Court in the context of private rights. It now falls on this court to determine the applicable principle on standing where an application for declaratory relief is predicated on public rights. By parity of reasoning, further supported by this court's approval of *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 in *Tan Eng Hong* at [69] (see [28] above), the applicable principle must be that which was set out in *Gouriet* and traceable to the second limb of Buckley J's statement in *Boyce* (see [30] above), namely, that the applicant who asserts no more than a public right must demonstrate that the interference with, or violation of, such a public right has caused him 'special damage'.

32 In the context of the law of nuisance, the distinction between public nuisance and private nuisance has been a subject on which numerous commentators have expressed frustration – most notably by Professor F H Newark, in "The Boundaries of Nuisance" (1949) 65 LQR 480 at 480, who described nuisance as "a mass of material which proves so intractable to definition and analysis that it immediately betrays its mongrel origins." However, within the field of public law the distinction between public and private rights is more readily explicable. Where the alleged interference with the public interest also affects an applicant's private right, the court will recognise the applicant's standing to seek relief. This is so regardless of the existence of identical private rights held by other potential litigants in the same class as the applicant – in this regard we are reminded of what Lord Wilberforce stated in *Gouriet* at 483H:

> … A right is none the less a right, or a wrong any less a wrong, because millions of people have a similar right or may suffer a similar wrong. …

33 Where the applicant asserts no more than a public right which is *shared in common* with other citizens, however, standing accrues only if a nexus between the applicant and the desired remedy is established by demonstrating 'special damage'. Public rights are shared in common because they arise from public duties which are owed to the general class of affected persons as a whole. It is in this sense that public rights are "held and vindicated by public authorities" (see [28] above). As public rights are shared with the public in common, an applicant cannot have standing unless he has suffered some 'special damage' which distinguishes his claim from those of other potential litigants in the same class. Furthermore, if 'special damage' were not to be required, it is likely that the courts will be inundated by a multiplicity of actions, some raised by mere busybodies and social gadflies, to the detriment of good public administration. Action by a public authority could very well be impeded every step of the way. The burden of having to bear costs may not be a sufficient deterrence. There is a need for balance and that balance is to be found in the requirement to show 'special damage' or 'special interest', to adopt the term used by the Australian courts (see [41] below). This requirement is a safeguard against essentially political issues, which should be more appropriately ventilated elsewhere, being camouflaged as legal questions. At the same time, we do not think that the balance would be fairly calibrated if proof of 'special damage' requires the applicant to take on the impossible task of demonstrating that it is only he, and no one else, who has suffered damage. In other words, the mere fact that other potential litigants have also suffered damage does not preclude the applicant from establishing that he has incurred 'special damage' (also see [42]–[43] below).

34 Taken collectively, these rules on standing espouse an ethos of judicial review focused on

vindicating personal rights and interests through adjudication rather than determining public policy through exposition. Matters of public policy are the proper remit of the Executive, and decoupling judicial review from the fundamental precepts of adversarial litigation would leave the courts vulnerable to being misused as a platform for political point-scoring. One can do no better than to repeat the words of Lord Wilberforce in *Gouriet* at 482D–F:

> … Surely, it is said, since the whole matter is discretionary it can be left to the court. The court can prevent vexatious or frivolous, or multiple actions…leave it in the court's hands. I cannot accept this either. The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas.

35 Lord Diplock added further weight to this account of the core function of the courts when he said at 501D–F:

> The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.

36 At the same time, it is important to note that these principles on standing have grown out of, and apply only to, cases which are principally related to the adjudication of private rights and interests. We do not have occasion here to address whether the same principles are equally germane to applications founded purely on the breach of public duties which do not generate correlative public or private rights.

Application to the present appeal

37 The present appeal relates to the scope and exercise of the Prime Minister's discretion to call an election to fill a casual vacancy of an elected Member. When the Appellant filed OS 196/2012 on 2 March 2012, she was acting in her personal capacity as a directly affected voter of an unrepresented constituency. In her supporting affidavit filed on 2 March 2012, the Appellant explained that she had been experiencing personal and familial difficulties on which she had sought the assistance of Mr Yaw Shin Leong. It would therefore seem that her standing to seek a mandatory order and declaratory relief was based on the *Karaha Bodas* test. It is presently unnecessary, partly as the Attorney-General did not raise the issue of standing at the time and partly because the factual circumstances have since changed, to answer the question whether the Appellant had fulfilled the *Karaha Bodas* test on 3 April 2012 when leave was granted to her to make her application under O 53 for a prerogative order. We would confine ourselves to the observation that we entertain considerable doubt as to whether there was indeed a violation of a personal right when the Prime Minister had earlier clearly expressed an intention to call a by-election along with an assurance that all relevant circumstances would be taken into consideration. The position would have been quite different if the Prime Minister had categorically stated that he would not be calling for election to fill the vacancy for Hougang SMC.

38 After the by-election in Hougang SMC was held on 26 May 2012, the facts underpinning the Appellant's application were rendered moot. As such, when Summons No 2639 of 2012 was filed, the Appellant could only assert a *public* right arising under Art 49, rendering her no different from any other citizen interested in the proper construction of Art 49. Yet as explained above at [33], in order to seek declaratory relief for a public right, something more than just being a member of the general body of citizens, to whom the Prime Minister's duties under Art 49 are collectively owed, would be required: the Appellant must show proof of 'special damage'.

Special damage

39 There is no categorical answer as to what constitutes 'special damage'. Itzhak Zamir, in *The Declaratory Judgment* (Sweet & Maxwell, 1986 Reprint, originally published: Stevens, 1962) at 270–271, offers a contemporaneous snapshot of the English position prior to the landmark decision of *Gouriet*:

> … The courts have not endeavoured to answer this question exhaustively. They have usually decided the question, when it arose, not on any general principle but on the particular circumstances of each case. The only safe generalization which the cases allow is, it is submitted, that any slight variation of the damage sustained by the plaintiff from the damage suffered by the other members of the public may be, but does not necessarily have to be, regarded as special damage. …

40 Peter Cane, in "The Function of Standing Rules in Administrative Law" (1980) PL 303 at 313–314 offers the following retrospective elucidation in light of the legislative amendments outlined above at [17]:

> Identification of the public requires identification of a public interest which has been adversely affected by the impugned administrative act; those who share that interest are the public. This interest may be just that an *ultra vires* act has been performed which could potentially injure the pecuniary interests, for example, of any member of the public, as in the case of much delegated legislation; or it may be some pecuniary or other interest which has been actually damaged, as, for example, in the case of an *ultra vires* decision by a local authority to finance some scheme of benevolence by a rate increase. *Special damage is either damage to the interest common to all members of the public but quantitatively greater than that suffered by other members of the public, or damage qualitatively different from that suffered by the public, that is, damage to some interest not shared by the public generally*. Thus to say that an applicant has been especially damaged is to say that some interest of his, though not such as the law will recognize as founding a claim for damages, has been adversely affected in such a way as deserves recognition by the granting of a supervisory remedy. … [emphasis added]

41 In Australia, the 'special damage' criterion has been modified in *Australia Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 ("*ACF*") to a requirement of 'special interest'. *ACF* involved a challenge by an environmental interest group to the proposed establishment of a tourist resort in Queensland. The High Court of Australia held that the applicant did not have standing under either limb of the *Boyce* test. Gibbs J took the opportunity to expound upon the content and meaning of 'special damage' at 527:

> Although the general rule is clear, the formulation of the exceptions to it which Buckley J made in [*Boyce*] is not altogether satisfactory. Indeed the words which he used are apt to be misleading. His references to "special damage" cannot be limited to actual pecuniary loss, and the words "peculiar to himself" do not mean that the plaintiff, and no one else, must have suffered damage.

> However, the expression "special damage peculiar to himself" in my opinion should be regarded as equivalent in meaning to "having a special interest in the subject matter of the action". The words appear to have been understood in this sense by Viscount Maugham in [*Moscrop*] at 345, and by Lord Wilberforce and Lord Edmund-Davies in [*Gouriet*] at 482, 514. …

42 Further down, at 530–531, Gibbs J provided the following analysis of 'special interest':

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

43 At this juncture, we pause to observe that we see merit in, and do agree with, the clarifications given by Gibbs J (quoted above) in relation to the expressions "peculiar to himself" and "special damage" used by Buckley J in the second exception in *Boyce.* In the present case, it is abundantly clear that the 'special damage' or 'special interest' exception has not been made out as the Appellant is not able to point to *any* damage which she has suffered or any special interest of hers which has been affected. Putting it plainly, her interest is no more than a general desire to have Art 49 interpreted by the court. We therefore do not see any need, and indeed we doubt the court could really offer more specific guidelines on the operation of an exception which must of necessity be fact-sensitive and which the court will have to assess on the facts of each case. It suffices to say that differences in nomenclature aside, the pre-1977 English and present Australian positions on 'special damage' or 'special interest' are aligned in that the applicant who asserts a public right must demonstrate that his personal interests are directly and practically affected over and above the general class of persons who hold that right, but need not go so far as to show that he is the only person affected (see [33] above).

Our conclusion on standing

44 It follows from the above analysis that the appeal is dismissed on the ground of the Appellant's lack of standing in pursuing the matter after the election to fill the vacancy at Hougang SMC was carried out on 26 May 2012.

Our analysis of the procedural issue

45 The foregoing decision should suffice to dispose of this appeal. However, as we are of the opinion that the Judge's views on the procedural and substantive issues need clarification, we feel constrained to examine them. In coming to his decision on the procedural issue, we note that the Judge speculated (at [34] of the Judgment) that the 2011 amendments to the Rules of Court were precipitated by Chan Sek Keong CJ's decision in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong*"):

> 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.

He seemed to think that the bright line between prerogative orders and any additional declaratory relief sought is not confined only to the procedural requirement of seeking leave but extends into the substantive remedies which can be granted by the court – so much so that if the application for a prerogative order fails on the *merits*, for whatever reasons, the additional application for declaratory relief cannot be granted.

46 However, we have also noted this interesting passage where the Judge dealt with the relationship between O 53 and O 15 r 16 (at [36] of the Judgment):

> However, an applicant is at liberty to seek standalone declarations under O 15 r 16. It is settled law that declarations under O 15 r 16 do not require leave of court although they are, however, still subject to the requirements set out in *Karaha Bodas* ([27] *supra*). Under the current Rules of Court, if an applicant wishes to apply for (a) prerogative orders under O 53 r 1; and separately, (b) standalone declarations under O 15 r 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 O 4 r 1 Rules of Court.

As in this case the Appellant had reserved her rights to apply under O 15 r 16, the Judge held (at [37]–[39] of the Judgment) that he could still grant a declaration under O 15 r 16 even though in his view O 53 did not countenance this.

47 Therefore the issue which we must address is whether the Judge is correct in holding that under O 53 declaratory relief may not be granted except as an *addition* to a prerogative order. As the Judge rightly observed, O 53 r 1 only requires leave to be obtained in relation to the 'principal application', which is defined to mean the application for prerogative orders. In contrast, O 53 r 7 pertains to the substantive power of the Court to grant relief, and refers to the Court making "a Mandatory Order, Prohibiting Order, Quashing Order, *or* declaration" [emphasis added]. The other rules in O 53 relate to procedures as to how an applicant should progress with his application after leave is obtained. It is abundantly clear that O 53 r 1 and O 53 r 7 regulate different *stages* of the judicial review process. The Judge appears to have telescoped the two provisions and inferred that, since an application for declaratory relief can only be tacked on to an application for prerogative orders (though only the application for prerogative orders requires leave), the court cannot grant declaratory relief alone unless it also grants a prerogative order. This is evident from [33] of his Judgment:

> The point of contention between both counsel arises from O 53 r 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 O 53. However, in the light of *Yong Vui Kong* ([29] *supra*), the word "or" that comes before the word "declaration" in O 53 r 7(1) is not disjunctive. *The phrase "or declaration" here relates back to O 53 r 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 O 53. I therefore reject the submission of the counsel for the applicant that O 53 r 1 read with O 53 r 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 O 53, the phrase "or declaration" means a declaration that is appended to and contingent upon a prerogative order.
>
> [emphasis added]

48 With respect to the Judge, we are impelled to hold that his approach to the two rules is erroneous. It is a *non-sequitur* to hold that the High Court is barred from *granting* a standalone declaration simply because the applicant is barred from *seeking* a standalone declaration under O 53 r 1. We do not see how that follows, particularly as such an interpretation effectively implies a condition subsequent out of a condition precedent. In this regard, we would also point out that O 53 r 1(1) expressly states that the term 'principal application' is used in relation to "this paragraph", *ie*, O 53 r 1(1). No equivalent signifier of differentiation between prerogative orders and declaratory relief is found in O 53 r 7(1).

49 Further, the Judge's construction of the word "or" in O 53 r 7(1) as being "not disjunctive", would appear to suggest that it must be read as conjunctive. However, the ordinary sense of the word "or" is not conjunctive. This is not only grammatical convention but also well-recognised in the law. For example, in *Re Diplock* [1941] 1 Ch 253 at 260–261, Sir Wilfrid Greene MR held that the word "or" was *prima facie*, and in the absence of some restraining context, to be read as disjunctive. There are also authorities which clearly hold that "or" could in particular contexts be construed as "and/or". Here we would refer to *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] 1 WLR 505 where Lord Wilberforce analysed the issue as follows (at 522B–E):

> If all these meanings are rejected, there remains the course of treating "or" as expressing a non-exclusionary alternative - in modern logic symbolised by "v." In lawyer's terms this may be described as the course of substituting "and" for "or," or, rather the course of redrafting the phrase so as to read: "the owner and the master shall each be guilty," or, if the phrase of convenience were permitted "the owner and/or the master." To substitute "and" for "or" is a strong and exceptional interference with a legislative text, and in a penal statute one must be even more convinced of its necessity. It is surgery rather than therapeutics. But there are sound precedents for so doing: my noble and learned friend, Lord Morris of Borth-y-Gest, has mentioned some of the best known; they are sufficient illustrations and I need not re-state them. I would add, however, one United States case, a civil case, on an Act concerning seamen of 1915. This contained the words: "Any failure of the master shall render the master or vessel or the owner of the vessel liable in damages." A District Court in Washington D.C. read "or" as "and" saying that there could not have been any purpose or intention on the part of Congress to compel the seamen to elect as to which to pursue and thereby exempt the others from liability - *The Blakeley*, 234 Fed. 959. Although this was a civil, not a criminal case, I find the conclusion and the reasoning reassuring.

50 In *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, the point of interpretation before the House of Lords concerned a provision under the Immigration Act 1971 (c 77) (UK) which provided for the deportation of a person where "his deportation is conducive to the public good as being in the interests of national security **or** of the relations between the United Kingdom and any other country **or** for other reasons of a political nature" [emphasis added in bold]. Lord Hoffmann analysed (at [59]) the provision as such:

> ... it is necessary only to decide that the Home Secretary's reasons fall into one or more of the specified categories. If his reasons could be said to relate to national security or foreign relations or possibly both, it is unnecessary to allocate them to one class or the other. The categories... do not create separate classes of reasons but a single composite class. ... [emphasis added]

It is evident from Lord Hoffmann's exposition that his Lordship regarded the word "or" as operating as a "non-exclusionary alternative" most accurately expressed as 'and/or'.

51 Returning to the present appeal, we see no justification for construing "or" in O 53 r 7(1) in a

manner which ignores its core disjunctive function when its ordinary meaning points to the other way. Such a reading would also emasculate much of the provision's usefulness and blunt the impact of the 2011 amendments since prudent applicants would still have to maintain a separate action under O 15 r 16 to insure against the all-or-nothing operation of O 53. This is acknowledged in the Judgment (at [46]) with the suggested solution being the consolidation of the two proceedings. In effect, this is an understanding which by implication treats the 2011 amendments as no more than a knee-jerk response to *Yong Vui Kong* (see [45] above). It would also leave very much intact many of the valid concerns highlighted by Woo Bih Li J in *Yip Kok Seng v Traditional Chinese Medicine Practitioners Board* [2010] 4 SLR 990, at [17]:

> Our O 53 derives from the pre-1977 O 53 in the English equivalent ("English O 53") of the Rules of the Supreme Court 1965, with the distinction that it is (since 1994) begun by *ex parte* originating summons and not originating motion. The procedure is both uncertain and cumbersome. It is not clear whether certain processes applicable to ordinary originating summons, such as discovery, are applicable in addition to those prescribed under O 53. An applicant seeking both prerogative and ordinary remedies is obliged to proceed via two separate originating processes, and again it is not clear whether subsequent consolidation is possible. From the perspective of a public body, it enjoys the procedural protection in O 53, such as the requirement for leave and the limitation of time, in respect of actions for the prerogative remedies, but not in actions for other remedies. ...

52 The foregoing only addressed the interpretation of the word "or" in O 53 r 7(1). An equally important aspect to consider is the object of this rule, an aspect which was not addressed by the Judge (presumably because it was not a point raised by the parties). To our mind it is clearly a facilitative provision to enable the court which hears an application under O 53 to grant further relief to the applicant, relief which the applicant would be entitled to obtain if he were to commence a separate action. The purpose of the rule is not to circumscribe the power of the court to grant declaratory relief in particular. It must be borne in mind that the condition precedent to the grant of such further relief is where the court "has made a Mandatory Order, Prohibiting Order, Quashing Order or declaration". The aim of this rule is obviously to make the court process friendlier to litigants so that an applicant who succeeds in obtaining a prerogative order or declaratory relief need not have to institute further proceedings in order to obtain the further relief which he would be entitled to.

Our conclusion on the procedural issue

53 In the premises, it is our judgment that the proper construction of O 53 should be such that an applicant who wishes to obtain a prerogative order and a declaration under this Order must, first, obtain leave to make an application for a prerogative order (O 53 r 1(1)(b)). In the same application he may also apply for declaratory relief. Once leave is granted, and upon hearing the parties on the substantive merits, the Court may grant (i) any prerogative order and a declaration; or (ii) only a prerogative order without any declaration; or (iii) only the declaration without any prerogative order. We should further clarify that if in an application more than one prerogative order is prayed for then the court may, of course, grant more than one such prerogative order. It is understandable why O 53 does not permit the application for only declaratory relief because it is essentially an Order relating to the grant of prerogative orders. Indeed, if a party only wishes to apply for freestanding declaratory relief he could have done so under O 15 with less hassle as no leave of court is required for him to proceed with his application. Of course, even though no leave is required for an application for declaratory relief, he must still show that he has a genuine basis to ask for the relief as the court is not obliged to answer essentially academic questions. The 2011 amendments to O 53 r 1 are clearly facilitative, to enable the court to also grant declaratory relief where an application is made for a prerogative order. The leave process serves to sieve out hopeless or frivolous public law claims. Once leave is obtained and the matter goes on to the merits stage, the court must obviously consider the

substantive merits of the claim and upon that being established, consider whether it is an appropriate case to issue a prerogative order (it could be more than one, depending on the prayers). If, for whatever reasons, the court thinks that a prerogative order is not appropriate, it could then consider whether a declaratory order could be made. We would hasten to add that there is nothing to preclude the court, if it should think fit, from granting a prerogative order as well as declaratory relief, always bearing in mind that the court should not be asked to do anything in vain.

The Judge's holding on the substantive issue

54 The Judge underpinned his reading of Art 49 of the Constitution with three modes of analysis – textual, contextual, and historical – and was persuaded that the expression "shall be filled by election" in the Article referred to a process and not an event. In the premises, he concluded at [115] of his Judgment that "[t]here 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".

55 The Judge's textual analysis centred on a comparison between Art 49 and Art 66, and the latter provision reads:

> **General elections**
>
> 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.

He noted that Art 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", a process (at [58] of the Judgment). In contrast, Art 66 refers to "*a* general election" which is an event. In his view, the omission of the word "an" before "election" in Art 49 was significant.

56 Moving next to consider the context, the Judge having noted that Art 49 appears in Part VI of the Constitution, stated (at [62] of the Judgment) that "there is an orderly and logical structure inherent within the constitution" and (at [79] of the Judgment) that Part VI methodically "prescribes different rules for different types of Members, and the similarly by [*sic*] different processes for filling each type of Member vacancies." Extrapolating from this overarching structure, the Judge concluded (at [80] of the Judgment) that the purpose of Art 49 must be to clarify that vacant seats for elected Members are to be filled by election and not by some other mode such as appointment or being declared elected.

57 Finally the Judge devoted a substantial part of his Judgment in examining the historical development of Art 49, tracing it back to the Singapore Colony Order in Council, 1946 (Statutory Rules and Orders 1946 No 464). The crucial insight gleaned from this review, however, centres on s 51 of the Singapore Colony Order in Council, 1955 (SI 1955 No 187) ("the 1955 Order"), which was the "original source of Art 49(1) of the current Constitution" (at [96] of the Judgment). Section 51(1) of the 1955 Order provided that where the seat of a Nominated Member of the Legislative Assembly had become vacant, it "shall be filled by appointment by the Governor", whilst s 51(2) provides that where the seat of an elected Member had become vacant it "shall be filled by election". As the historical material is extensive, we thought that this merited close attention.

Historical development of Art 49

58 Before Singapore joined Malaysia as a constituent state, an agreement was concluded between

the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore in London on 9 July 1963 (see Agreement concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore (UK Cmnd 2094, 1963), hereinafter referred to as the "Blue Book", which contained the Agreement Relating To Malaysia (the "Malaysia Agreement")). In Annex D to the Malaysia Agreement the proposed Constitution of the State of Singapore (as a part of Malaysia) was set out. In Art 33 therein it was provided that:

> 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 is 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.

It would be noted that in this Article, contrary to what was set out in the 1955 Order, a time-limit of three months was prescribed for the holding of an election to fill a casual vacancy (hereinafter in this judgment referred to as "the time-limit clause").

59 On 29 July 1963, in introducing a Motion in the Singapore Legislative Assembly, the then Prime Minister Mr Lee Kuan Yew ("Prime Minister Lee") informed the House that he would be seeking some drafting as well as substantive amendments to the proposed Singapore State Constitution as set out in the 1963 White Paper *Malaysia. Agreement Concluded Between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore* (Cmd 22 of 1963) ("the White Paper"). One of the substantive amendments sought was in relation to the removal of the time-limit clause in Art 33. This proposal for a change, adopted by the Singapore Legislative Assembly, was forwarded to the United Kingdom government with the expectation that it would be reflected in the Order-in-Council promulgating the Singapore State Constitution. However, that was not to be and when Singapore became a constituent State of Malaysia in September 1963, Art 33 of the Singapore State Constitution as promulgated in the Third Schedule to the Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (SI 1963 No 1493), remained in the terms as set out in the Blue Book (see [58] above). In other words, the time-limit clause was not removed as requested by the Singapore Legislative Assembly.

60 Following the separation of Singapore from Malaysia, our Parliament passed the Constitution (Amendment) Act 1965 (Act 8 of 1965) which deleted the time-limit clause from Art 33. The significance of the events in 1963 touching on Art 33 (the version set out in the Blue Book, the version adopted by the Singapore Legislative Assembly as reflected in the White Paper and the eventual version in the Singapore State Constitution) as well as the subsequent removal of the time-frame clause in 1965 will be examined in some detail in a moment. We specifically, at the conclusion of the oral hearing before us, requested parties to make further submission on this very point. After 1965, what was Art 33 remained substantively unchanged following its renumbering in 1980 to Art 49 and subsequent amendments to the same Article as a result of the introduction of non-constituency MPs.

Debates in 1963

61 The Appellant referred to the debates in the Legislative Assembly in July 1963 to show that a casual vacancy must be filled as no Legislative Assemblyman had even raised a suggestion to the contrary. She highlighted that the focus of the debate was on the Prime Minister's discretion as to the time-frame within which a by-election to fill a casual vacancy must be called, which the opposition bench asserted had been abused in relation to the vacancy in the Sembawang constituency following the death of Mr Ahmad Ibrahim on 21 August 1962 ("the Sembawang

vacancy").

62 The Attorney-General explains that in July 1963 Singapore sought to amend Art 33 (as set out in the Blue Book), by deleting the time-limit clause (as proposed in the White Paper), with a view to bringing it in line with Singapore's then-existing law relating to by-elections. He argues that the state of the existing law could be gleaned from the statements of the opposition bench during the debates. In particular, Mr A P Rajah voiced concerns over "how much time [the Government] waste thinking over *whether they should have a by-election in Sembawang*, whether it should be five days from today, or whether it should be six days from tomorrow" [emphasis added] (see *Singapore Parliamentary Debates, Official Report* (31 July 1963) vol 21 at col 474). Inche Ahmad Jabri Bin Mohammar Akib also opposed the version of Art 33 proposed in the White Paper on the basis that "the absence of a particular clause which binds the Government" will leave any future vacancies to "the whims and fancies of the Party in power" (see *Singapore Parliamentary Debates, Official Report* (1 August 1963) vol 21 at col 689).

63 The Attorney-General also avers that the 1963 debates must be viewed in the context of the Sembawang vacancy. Prime Minister Lee had informed the Assembly on 5 April 1963, some seven months after the vacancy, that a by-election would be held once the electoral registers had been updated. A further statement was also made on 11 June 1963 to clarify that the Statistics Department was working at full capacity to complete the registers by the end of June or the beginning of July. The Prime Minister went on to say that the by-election would be held soon after (see *Singapore Parliamentary Debates, Official Report* (11 June 1963) vol 20 at col 767). However, the Sembawang by-election was never held – instead, the Legislative Assembly was dissolved on 3 September 1963 and a general election was called. The Attorney-General argues that this indicates the absence of a constitutional duty for casual vacancies to be filled.

64 The Attorney-General also singles out comments made by two opposition Members some months before the debates on the White Paper to support his conclusion. On 9 April 1963, Tun Lim Yew Hock commented that the date of the Sembawang by-election "could be June, it could be July, it could not even be held at all. It is left to the PAP Government" (see *Singapore Parliamentary Debates, Official Report* (9 April 1963) vol 20 at col 350). Dr Lee Siew Choh echoed this and suggested that "if the Sembawang by-election should be further delayed…we would have to consider seriously bringing in amendments to the Constitution to make good the lacuna in the law which has allowed the PAP to make a mockery of parliamentary democracy" (see *Singapore Parliamentary Debates, Official Report* (9 April 1963) vol 20 at col 451).

65 However, the Appellant counter-argues that the election for the Sembawang vacancy had not been held for purely logistical reasons, as evidenced by the passage of the Singapore Legislative Assembly Elections (Temporary Provisions) Bill (Bill 198 of 1963) which provided for an extension of time for the revision of the electoral registers for 1962. As such, no principle of unfettered discretion can be extrapolated from the fact that a by-election had not been called for the Sembawang constituency.

Analysis of the historical development

66 It is clear that counsel for both the Appellant and the Attorney-General have based much of their arguments on the *subtext* of statements made during the 1963 debates. However, subtext, in its inherent nature, is just as capable of amplifying rather than clarifying any latent ambiguity. The statements have to be carefully scrutinised. For example, Mr A P Rajah's aside that the Government had agonised over "whether they should have a by-election in Sembawang" could indicate an assumption that the Prime Minister had discretion over whether to call a by-election, or it could be a

reference to whether a by-election should be called in advance of an upcoming general election. Equally, Inche Ahmad Jabri Bin Mohammar Akib's statement that there was no "particular clause which binds the Government" could relate to the timing of elections or to the calling of elections. One should not read too much into such statements, particularly if it is accepted that the phrase "shall be filled by election" is inherently pregnant with ambiguity. That being the case, it is understandable why the Legislative Assemblymen would have had different interpretations of what the phrase encompassed. With this in mind, the only common thread which can be gathered from the comments of the opposition bench is that the then existing law attributed too much discretion to the Prime Minister who could, in their mind, unreasonably delay the calling of a by-election.

67 As for the ruling party, it is pertinent to note that neither Prime Minister Lee nor any member of his Party denied that there was a constitutional obligation to call a by-election to fill a casual vacancy. The Minister for Health and Law, Mr Byrne, only observed that "the present Singapore (Constitution) Order in Council does not prescribe any period within which the vacancy must be filled" (see *Singapore Parliamentary Debates, Official Report* (31 July 1963) vol 21 at col 556). Prime Minister Lee gave the example of Hugh Gaitskell, a leader of the Labour Party in the UK, whose vacated seat was not filled until nine months after his demise (in fact only five months, as Mr Gaitskell died on 18 January 1963 and the by-election was held on 20 June 1963) (see *Singapore Parliamentary Debates, Official Report* (31 July 1963) vol 21 at col 700). Evidently, the entire focus of the debate in the Assembly was on the time-frame within which by-elections to fill casual vacancies should be called rather than the need to fill such vacancies. An opinion on whether such vacancies had to be filled was not volunteered by Prime Minister Lee. Again, one should not read this as implying that he had taken it for granted that there was a duty to fill vacancies, as he could just as easily have taken the opposite position for granted. However, given that the debate had centered on the timing of by-elections, it would seem odd that Prime Minister Lee did not offer the short answer that he had a discretion as to whether to call a by-election at all, if that had really been his intention or belief at the time.

68 For example, Prime Minister Lee could have responded as he did in 1983, when the death of Mr Hon Sui Sen left the seat for Havelock constituency vacant. In response to Mr J B Jeyaretnam's questions as to when the seat would be filled, the Prime Minister answered (see *Singapore Parliamentary Debates, Official Report* (20 December 1983) vol 43 at col 190-192):

> **Mr J.B. Jeyaretnam** (Anson): Supplementary question, Sir. Would the Prime Minister say what was the reason for the amendment to the Constitution way back in 1965, taking away the requirement for the vacancy to be filled within three months?
>
> **The Prime Minister**: Mr Deputy Speaker, Sir, 1965 did not see such an amendment. He goes by what he reads. The Member for Anson, as a member of the learned profession, should not go by what he reads in the press. The legislation on elections was governed by laws which were promulgated in 1959, and I remember distinctly that when the then Member for Sembawang died in August of 1962, we did not have to hold an election because there was an evenly divided House of 25 Members on each side until we held the General Elections in September 1963. When we became part of Malaysia, Malaysian laws then applied to Singapore. When we were separated from Malaysia, we re-adopted the 1959 practice which does not require us to hold an election or bye-election within three months. There are variations in as many countries as there are running the first-past-the-post system.
>
> ...
>
> **Mr Jeyaretnam**: Would the Prime Minister explain why it was necessary to go back - if that was

the practice before the Malaysian Constitution came into effect -because the Malaysian Constitution contained a requirement that the vacancy be filled within three months? ...

The Prime Minister: Mr Deputy Speaker, Sir, I find it tedious and tiresome to have to explain the simple elementary rules of parliamentary practice. *There is no requirement. There never was a requirement to hold a bye-election, and we decided to go back to the practice of 1959 because of my experience*. As I have explained, the House was evenly divided, 25 on each side, and we governed with firmness and fairness from August 1962 to September 1963, for 15 months, and we won the General Elections. I can assure the Member for Anson that we will govern with firmness and fairness between now and a date before the end of 1985. 1 have already given him the answer when the General Elections will be held, how long it will be, and if there is any further information which will be helpful to him, I will contrive to ensure that he is duly informed and given as much notice as all other Opposition parties.

[emphasis added]

69 Given Prime Minister Lee's avowal that there "never was a requirement to hold a bye-election", it ought to be considered why this was not asserted in 1963 in response to the comments from the opposition bench. At the same time, we must be careful not to treat Prime Minister Lee's extemporaneous statements during a spirited Parliamentary debate as definitive pronouncements. When viewed in context, one must also take into account that Prime Minister Lee's views were couched in more forceful terms than those which might be employed in a dispassionate judicial setting.

70 In the period of about 12 months between the death of Mr Ahmad Ibrahim and the dissolution of Parliament on 3 September 1963, Prime Minister Lee never suggested that he did not have to call a by-election. Instead, there were repeated assurances that the by-election would be called accompanied by an explanation that the electoral registers had to be updated. In 1965, following the separation of Singapore from Malaysia, during the Second Reading of the Constitution (Amendment) Bill (Bill No 44 of 1965) which proposed the removal of the three month time-limit clause from Art 33, Prime Minister Lee only stated that "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" (see *Singapore Parliamentary Debates, Official Report* (22 December 1965) vol 24 at col 432).

71 In retrospect, the "experience" being referred to was likely to have been that of the Sembawang vacancy, suggesting that the intention of Parliament in removing the time-limit clause was to leave the filling of casual vacancies to the discretion of the Prime Minister. However, we find it difficult to see how the Sembawang vacancy can be relied upon as a historical precedent in support of the proposition that casual vacancies need not be filled at all, when there were no contemporaneous express statements to that effect and the explanation offered for the delay was that the register of voters was being updated. There is a distinction between having a discretion in deciding when to call for an election to fill a casual vacancy and an entitlement not to fill such a vacancy at all. Vacancies can be cured prescriptively by election or ontologically by the dissolution of Parliament. The non-existence of Parliament would also, *ipso facto*, negate any vacancy. Thus the failure to call a Sembawang by-election in 1962/1963 cannot be equated to an exercise of the Prime Minister's discretion not to fill a casual vacancy – instead, it was simply an example of the discretion vested in the Prime Minister to call for either a by-election or a general election, and in making that determination he was entitled to take into account all relevant circumstances. The 1963 debates reveal, at the highest, that the Sembawang vacancy was an instance where the executive had tested the limits of its discretion as to *when* it had to call a by-election. There is no basis to hold

that historical moment as evidence that there had never been a requirement to call for by-elections in response to casual vacancies.

72 What the preceding survey of legislative interventions demonstrates in relation to the phrase "shall be filled by election" is that there was no consensus as to its meaning. In 1963, it was a matter of political contention without any overt assertion of a total unfettered discretion. In 1965, it was understood through the prism of previous experience without acknowledgement that the law was unsettled at the time. From 1983, it was categorically taken to mean that there was no requirement to call by-elections to fill vacancies without any explanation as to why by-elections were called as a matter of course up till then (except for the Sembawang vacancy). It is true that the time-limit clause in Art 33 was regarded by those who took part in the debate in the Legislative Assembly as essentially political and this was neatly encapsulated in the following comment of Prime Minister Lee during the 1963 debates on the White Paper (see *Singapore Parliamentary Debates, Official Report* (31 July 1963) vol 21 at col 700-701):

> **The Prime Minister**: Make it another election issue. If they win, change the Constitution. This is a State Constitution. It can be changed at the behest of the State Assembly. Even if we drafted it the way the Member for Farrer Park wanted, there would be nothing to prevent us from amending it the way we want, if and when we win the next election. They can do it if and when they win. But perhaps they consider the possibility of winning is such a remote eventuality that they have no confidence in themselves and that they are thinking of conscribing a P.A.P. Government.

The removal of the time-limit clause in 1965 only rendered the question as to when a by-election should be called to fill a vacancy more uncertain, and in that sense making the issue more political. However, the legal question still remains.

Our analysis of the substantive issue

73 As would be seen from [55] above, the Judge's conclusion on the substantive issue rests essentially on the omission of just the word "an" from Art 49. In his view, the reference in Art 49 to "election", without the word "an" before it meant that what is there referred to is a process and that the word "shall" in the phrase "shall be filled by election" relates to the process and had nothing to do with the question as to the period within which the vacancy of a seat ought to be filled.

74 With respect, we fail to see how the presence or absence of the word "an" could really help to resolve the question, which can be fully framed as: whether the Prime Minister is accorded a full and unfettered discretion whether or not to advise the President to issue a writ of election to fill a casual vacancy of an elected Member and whether he could delay the tendering of such advice to the President indefinitely or declare that he is not going to fill the vacancy although Parliament is not being dissolved in the near future (for convenience this question is hereinafter referred to as "the Discretionary Question").

75 Even reading the word "election" in the context as prescribing only a process, we fail to see how that necessarily leads to the conclusion that the Prime Minister has thereby an unfettered discretion as to whether he will tender advice to the President to issue a writ of election. Indeed, whether we construe the word "election" as a process or an event, the Discretionary Question still remains. It seems to us that the omission of the word "an" in the phrase "shall be filled by election" ("the phrase") is neither here nor there.

76 The phrase is plainly capable of being read in a double-barrelled sense, such that the imperative

attaches to both the filling of the vacant seat as well as the mode of doing so. The Judge did not appear to have considered this possibility because he started his textual analysis (at [58] of the Judgment) by a simple comparison between Art 49 and Art 66 – which shifts the focus of the controversy to the absence of the definite article "an" in the phrase "shall be filled by election". This resulted in an undue emphasis on the article which, had it been included, would not have completely resolved the Discretionary Question. We do not see the phrase "shall be filled by an election" as being any clearer than "shall be filled by election", because the operative ambiguity is whether the mandating effect of the word "shall" also affects the filling of the vacancy. In our opinion, the key to the Discretionary Question lies with the word "shall" rather than "election".

77 We would point out that the Judge's textual emphasis on the latter in fact substantially modifies the meaning of Art 49. His construction would amount to reading the phrase to mean that the vacancy *may* be filled and if so *shall* be by election (or an election). The implication of a less definitive and directory rather than mandatory verb where the word "shall" is used, and where its ordinary sense is not open to question, is simply unwarranted.

78 As outlined at [66]–[72] above, the historical development of what is now Art 49 which the Judge had carefully narrated, while informative and interesting, does not in fact shed much light as to how the phrase should be construed. It would be recalled from [58] above that the only previous version of Art 49 which set out a time-limit within which a vacancy was required to be filled was Art 33 of the Singapore State Constitution when we were a part of Malaysia. There it was provided that "the vacancy shall within three months from the date on which it was established that there is a vacancy be filled by election". It is interesting to note that in Art 33 the time-limit clause followed immediately after the word "shall". It is difficult to appreciate how the removal of the time-limit clause should alter the sense of the phrase. The removal of the time-limit clause would only mean that no time-frame is prescribed for the holding of an election to fill a casual vacancy. The specification as to *how* or *when* a casual vacancy is to be filled cannot answer the question as to the imperative to fill the vacancy itself. The absence of the time-limit clause cannot lead to the conclusion that the Prime Minister is thereby completely free to do as he pleases, even to the extent of delaying indefinitely the calling of a by-election or even declaring that he will not fill the casual vacancy. We agree however that the absence of the time-limit clause means that there is no pre-determined time frame and the issue of timing has to be resolved by applying the general law relating to statutory construction.

79 At this juncture, it is vital to remind ourselves that the form of government of the Republic of Singapore as reflected in the Constitution is the Westminster model of government, with the party commanding the majority support in Parliament having the mandate to form the government. The authority of the government emanates from the people. Each Member represents the people of the constituency who voted him into Parliament. The voters of a constituency are entitled to have a Member representing and speaking for them in Parliament. The Member is not just the mouthpiece but the voice of the people of the constituency. *Griffith & Ryle on Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, 2nd ed, 2003) at para 2-073 offers a succinct summary:

> The functions of Members are of two kinds and flow from the working of representative government. When a voter at a general election, in that hiatus between Parliaments, puts his cross against the name of a candidate, he is (most often) consciously performing two functions: seeking to return a particular person to the House of Commons as a Member for that constituency, and seeking to return to power as the government of the country, a group of individuals of the same party as that particular person...
>
> When a candidate is elected as a Member of the House of Commons, he reflects those two functions of the voter. Whatever other part he may play, he will be a constituency M.P. As such,

his job will be to help his constituents as individuals in their dealings with the departments of State. He must listen to their grievances and often seek to persuade those in authority to provide remedies. He should have no regard to the political leanings of his constituents for he represents those who voted against him or who did not vote at all as much as those who voted for him. ...

80 It is also true that Singapore has to an extent modified the Westminster model. We have introduced the non-constituency MP. We also have the GRC, where a larger constituency returns more than one MP for that constituency, a scheme to take into account the multiracial composition of the electorate. For the GRC where a Member ceases to be a Member for whatever reasons, s 24(2A) of the Parliamentary Elections Act (Cap 218, 2011 Rev Ed) ("Parliamentary Elections Act") provides that no writ of election shall be issued to fill the vacancy unless all the Members for that constituency have vacated their seats. Furthermore, our Constitution emphasises the political party rather than the individual MPs by providing that should an MP cease to be a member of the party under which banner he was elected, he shall on that account also cease to be an MP (see Art 46(2)(b) of the Constitution). But none of these modifications changes the basic character of an elected MP who represents the citizens who voted him into Parliament, particularly in the case of a SMC.

81 In his speech in Parliament on 22 December 1965 introducing the amendment to remove the time-limit clause from Art 33 after Singapore separated from Malaysia, Prime Minister Lee said (*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...

82 It would be noted that what Prime Minister Lee said in proposing the removal of the time-limit clause was that the three month time-limit was not appropriate for Singapore in the light of our experience. He did not say that by virtue of this removal of the time-limit clause the Prime Minister would have an unfettered discretion (irrespective as to the basis thereof) to postpone indefinitely the holding of an election to fill a casual vacancy. Neither was that stated by any other MP. What he sought was not to be bound by the three month time-limit. Having regard to the role of an MP in the Westminster form of government and on a plain reading of Art 49, it seems clear to us that the Constitution places a duty upon the Prime Minister to call a by-election (unless he intends to dissolve Parliament in the near future) to fill casual vacancies of elected MPs which may arise from time to time. Of course, in the present context, this will only apply to a SMC as there is a special provision where a vacancy arises in a GRC (see [80] above).

83 We acknowledge that neither Art 49, nor s 24 of the Parliamentary Elections Act, stipulates any time frame within which a casual vacancy must be filled. In the absence of a specific time limit, what then should be the time frame within which the Prime Minister must act? That is really the crux of the issue before us. On this we think s 52 of the Interpretation Act (Cap 1, 2002 Rev Ed) is germane as it provides:

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.

Section 2(1) of the same Act also provides that "written law" means the Constitution, all Acts and Ordinances and subsidiary legislation having the force of law in Singapore, whether enacted before or after 28 December 1965. It would necessarily follow that what is provided in s 52 would apply to what is required to be done under the Constitution just as under any Act or subsidiary legislation.

84 While s 52 refers to the test of "all convenient speed", it seems to us that what this provision basically enshrines is the common law concept of a reasonable time, which must of necessity take into account all the circumstances relevant to the act to be carried out. The Appellant contends that only logistical factors should be taken into account, but this would be tantamount to adopting an exceedingly narrow interpretation of "convenient speed" or "reasonable time" so as to judicially circumscribe the Prime Minister's decision. [note: 6] The Attorney-General quite rightly questioned whether, if SARS (which shook Singapore in 2003) should return to trouble Singapore, the Appellant would seriously contend that the Prime Minister would not be entitled to take public health concerns into consideration in determining when to call an election to fill a vacancy. Similarly, in the current situation, where the country is affected by haze, that should also be a factor which the Prime Minister would be entitled to take into account. In the Malaysian case of *Tai Choi Yu v Government of Malaysia and Others* [1994] 1 MLJ 677 the Malaysian Supreme Court defined (at 683F) the expression "convenient speed" in an equivalent Malaysian statutory provision as "reasonable time within which an act has to be done, but always having regard to the facts and peculiar circumstances of each case". In the earlier Malaysian case of *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, the Malaysian Federal Court agreed with an even earlier authority, *Public Prosecutor v Mah Chain Lim and Others* [1975] 1 MLJ 95 at 96, where it was held that "convenient speed" would depend "on the circumstances of each particular case" and that it was not desirable "to lay down the speed convenient to all cases".

85 As the timing for the holding of an election to fill a vacancy is a polycentric matter which would involve considerations which go well beyond mere practicality and the Prime Minister could justifiably take into account matters relating to policy, including the physical well-being of the country, it is impossible to lay down the specific considerations or factors which would have a bearing on the question as to whether the Prime Minister has acted unreasonably for not, to date, calling a by-election to fill a vacancy. We are here dealing with a dynamic situation, and no pre-determination of the Prime Minister's considerations would be warranted. However, while we accept that the Prime Minister should be accorded a measure of latitude in deciding when to call for election to fill a vacancy, it does not follow from this flexibility that he would, therefore, be entitled to defer the calling of an election to fill a vacancy indefinitely, or to simply declare that he would not be advising the President to issue a writ of election (unless he intends to advise the President to dissolve Parliament in the near future). In this regard, we would reiterate the point made earlier that a Member represents and is the voice of his constituents. If a vacancy is left unfilled for an unnecessarily prolonged period that would raise a serious risk of disenfranchising the residents of that constituency. There is thus a need to balance the rights of the voters in a Parliamentary system of government and the discretion vested in the Prime Minister to decide when to call for by-elections to fill a vacancy. It is also a basic proposition of the rule of law that all discretionary power is subject to legal limits: see *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 at [86]. Whilst the Prime Minister's discretion as to the timing of an election to fill a casual vacancy is subject to judicial review, it is in the nature of such a fact-sensitive discretion that judicial intervention would only be warranted in exceptional cases.

86 A case much relied upon by the Attorney-General and which illustrates how a discretionary power vested in a Minister of the government, in a slightly different context, should be exercised is

the House of Lords' decision (by a majority of 3-2) in *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union* [1995] 2 AC 513 ("*Fire Brigades Union*"). The case revolved around the implementation of the Criminal Injuries Compensation Scheme. The provisions of the scheme were, under s 171(1) of the Criminal Justice Act 1988 (c 33) (UK), to come into force "on such day as the Secretary of State may...appoint." The Secretary of State did not bring the scheme into force and, instead, implemented a non-statutory tariff scheme. All of the judges in the Court of Appeal and the House of Lords, except Sir Thomas Bingham MR, found that the Secretary of State had no duty to bring the provisions into force. However, the House of Lords (with Lords Keith of Kinkel and Mustill dissenting on the substantive appeal) also found that the Secretary of State had a continuing duty to keep the implementation under active consideration. It followed that the Secretary of State could not repudiate his powers or otherwise act inconsistently with the continued duty to consider bringing the statutory scheme into force. The following passage from Lord Nicholls of Birkenhead's judgment (at 575E–H) is instructive:

> Nevertheless, although he is not under a legal *duty to appoint* a commencement day, the Secretary of State is under a legal *duty to consider* whether or not to exercise the power and appoint a day. That is inherent in the power Parliament has entrusted to him. He is under a duty to consider, in good faith, whether he should exercise the power. Further, and this is the next step, ***if the Secretary of State considers the matter and decides not to exercise the power, that does not end his duty. The statutory commencement day power continues to exist. The minister cannot abrogate it.*** The power, and the concomitant duty to consider whether to exercise it, will continue to exist despite any change in the holders of the office of Secretary of State. The power is exercisable, and the duty is to be performed, by the holder for the time being of the office of one of Her Majesty's Principal Secretaries of State: see the Interpretation Act 1978, sections 5 and 12(2) and Schedule 1. So although he has decided not to appoint a commencement day for sections 108 to 117, the Secretary of State remains under an obligation to keep the matter under review. This obligation will cease only when the power is exercised or Parliament repeals the legislation. Until then the duty to keep under review will continue.
>
> [emphasis in original in italics; emphasis added in bold italics]

87 We would wish to highlight the significant differences between the discretion vested in the Prime Minister under Art 49 and the discretion vested in the Secretary of State in *Fire Brigades Union*. First, whereas under Art 49, the Prime Minister "shall" fill the vacancy, under the English Criminal Justice Act 1988, the word used was "may" and as Lord Nicholls said, the Secretary of State was not under a duty to appoint a commencement date. Second, while in the case of *Fire Brigades Union*, the discretion was largely dictated by policy considerations, that is not the case here because there is an equally important consideration which the Prime Minister must bear in mind which is the interests of the people of the constituency in respect of which a vacancy has arisen. These differences explain why the House of Lords held that the duty of the Secretary of State was only to keep the question of appointing a commencement date under review until and unless Parliament decided to repeal the Act. The sum total of all this in the context of the present appeal is that while the Prime Minister retains a substantial measure of discretion as to the timing of an election to fill a casual vacancy, his discretion is not unconditional. Thus, it will not be in order for him to declare that he will not be calling an election to fill such a vacancy unless at that point in time he intends, in the near future, to advise the President to dissolve Parliament. In any event, even if at a particular point in time he feels that it would not be appropriate to call for an election to fill a vacancy, he must still review the circumstances from time to time and call for election to fill the vacancy if and when the circumstances have changed.

88 In the light of our decision on the Discretionary Question as set out in [74]–[78] above, we are

constrained to make a further observation that the filing of OS 196/2012 by the Appellant barely two weeks after the seat of Hougang SMC had become vacant was so close in time to the event as to be premature. The Prime Minister had yet to make his stand on the matter. At the time, there was simply no basis to make any complaint against the Prime Minister as the application pre-empted any executive decision on the matter. Further, leave should not have been granted in OS 196/2012 as by the date of the hearing of the leave application the Prime Minister had already announced that he would be calling a by-election to fill the vacancy at Hougang SMC although he had not yet set his mind on a precise date (see [2] above). At that point there would have been no basis for the court to grant leave and the court would be well within its power to dismiss the application although we acknowledge that it also had the discretion to adjourn the hearing of the leave application until a reasonable time had elapsed. In any event, as the Writ of Election to fill the vacancy was in fact issued on 9 May 2012, there would thereafter have been no basis to allege that the Prime Minister had acted unreasonably in so advising the President. There must be a *prima facie* factual basis upon which the court may be asked to rule on the reasonableness or otherwise of the Prime Minister in not calling for an election to fill the vacancy. Here there was simply none.

Arguments based on Art 39

89 Finally, we turn now to examine briefly a new point raised by the Appellant based on Art 39(1)(a) of the Constitution which reads:

> 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;

90 The Appellant relies on this Article to aver that where the seat of an elected Member is vacant, and until it is filled up, Parliament would as a result of the vacancy cease to be properly constituted and does not have the competence to make law. She highlights the difference in the wording between Art 39(1)(a) and Arts 39(1)(b) and 39(1)(c) which touch on the number of non-constituency MPs and nominated MPs, both of which are limited to not "exceeding 9 in number". The Attorney-General's answer to this new point is Art 55 which reads:

> **55**. Parliament shall not be disqualified for the transaction of business by reason of any vacancy among the Members thereof, including any vacancy not filled when Parliament is first constituted or is reconstituted at any time; and any proceedings therein shall be valid notwithstanding that some person who was not entitled to do so sat or voted in Parliament or otherwise took part in the proceedings.

91 The Appellant's counter response to Art 55 is that the reference to "transaction of business" in Art 55 does not include the exercise of legislative power and she based this argument by tracing Art 55 back to ss 53 and 57 of the 1955 Order, where a distinction was drawn between "the transaction of business" and "the making of laws". In our view, this contention of the Appellant is tenuous. First, the sense of Art 55 must be construed in accordance with its express terms and in the context of the Constitution. We fail to see how the provisions under the 1955 Order could be germane in any way to the construction of Art 55. Article 38 expressly provides that the legislative power of Singapore vests in the President and Parliament. It stands to reason that "transaction of business" of Parliament must, of necessity, encompass the making of laws which is its most important function. We would also point out that the Appellant's argument ignores the fact that specific Articles (*ie*, Arts 56 and 57) in the Constitution expressly set out the conditions under which Parliament would have the competence to carry out its business, which would include the business of making laws. Under Art 56, at least one-

quarter of the total number of Members must be present before Parliament can proceed with its business. Under Art 57, a majority of votes of the Members present and voting must be received in order to approve any business of Parliament. On the Appellant's argument it would mean that if only a quarter of the total MPs are present Parliament (provided there is no vacancy) could pass a law and yet the same law cannot be passed if just one seat is vacant, even where all existing MPs are present and voting. Such a view would only paralyse Parliament and it is precisely to prevent such an occurrence that Art 55 expressly provides that any vacancy among the Members will not disqualify Parliament from transacting its business. This whole argument of the Appellant is, with respect, absurd.

Judgment

92 It will be useful at this juncture to summarise our holdings. First, for the reasons set out in [88] above, we hold that the institution of OS 196/2012 by the Appellant was clearly premature. Secondly, as at the hearing of the leave application on 3 April 2012 the Prime Minister had already declared that a by-election would be held to fill the vacancy in Hougang SMC, leave should not have been granted by the Judge to the Appellant to proceed with the action. If the Judge was not minded to dismiss the leave application then he should have adjourned the hearing of the leave application to an appropriate later date. Third, in any event, leave having been granted, and the by-election to fill the vacancy in Hougang SMC having been held on 26 May 2012, the Appellant did not have standing to seek declaratory relief as she had incurred no 'special damage'. Fourth, Art 49 does not give the Prime Minister an unfettered discretion in the calling of an election to fill a casual vacancy of an elected MP. He must do so within a reasonable time and in that regard, the Prime Minister is entitled to take into account all relevant circumstances and only in clear cases can there be judicial intervention.

93 In the result, this appeal is dismissed. On the question of costs, in the circumstances of this case, and bearing particularly in mind that this court is in the main with the Appellant on the substantive issue relating to the construction of Art 49, we think it appropriate to hold that each party is to bear his or her own costs.

[note: 1] Core Bundle Vol 1, Tab 3

[note: 2] Core Bundle Vol 2, Tab 7

[note: 3] Supplementary Core Bundle, Tab 1

[note: 4] Core Bundle Vol 2A, Tab 12

[note: 5] Core Bundle Vol 2B Tab 31 p 4

[note: 6] On the meaning of "convenient speed", see the Respondent's Case at [150]