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Streamlining Procedures for Judicial Review: Legislative Amendments to the Singapore Rules of Court to Enhance Access to Justice

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Abstract

Judicial review cannot serve as an effective check on administrative action unless aggrieved applicants have a real way to access the courts to obtain relief. In an admirable, albeit belated move, significant amendments were made to the Singapore Rules of Court to remove the procedural strictures inherited from the pre-1977 UK system. The amendments allow an applicant to seek a declaration in addition to the traditional prerogative orders and recover damages within the same proceedings if the applicant can prove that he/she would have had a valid claim in a private law action. This article examines the mischief that the amendments sought to cure, which stemmed from overly technical rules that hitherto plagued such applications. It is argued that the changes are underpinned by a desire to allow greater access to justice by facilitating the review process. In a bid to create a litigation-friendly environment, and having learnt from the UK experience, the Singapore rule makers eschewed aspects of the UK reforms. In so doing, the amendments have largely achieved their goals, but there remain areas of uncertainty to be resolved. This article examines possible further refinements to the procedures, bearing in mind the central philosophy of access to justice.

1. Introduction

On 1 May 2011, significant amendments were introduced to Order 53 of the Singapore Rules of Court,[1] which sets out the procedure for judicial review applications against administrative action.[2] The amendments were made via the Rules of Court (Amendment No 2) Rules of 2011 (the May 2011 amendments). Two main changes were effected. First, Order 53 was amended to allow an applicant to seek declaratory relief under Order 53 in addition to one of the prerogative orders.[3] Second, amendments were made to allow a court to grant an applicant who, having obtained one of the prerogative orders and/or a declaration, is also able to prove within those same proceedings that he/she has a valid cause of action in private law such that he/she would have been able to obtain the necessary reliefs had he/she chosen to take out a separate private law action.

In fact, the reform story began some 30 years earlier. Order 53 of the Rules of Court was imported from and is materially similar to the UK Rules of Supreme Court Order LIII, before the latter was substantially

amended in 1977.[4] The first part of this article will examine the procedural problems that plagued Order LIII and the nature of the reforms of 1977 that were designed to eradicate those difficulties. These problems continued to subsist in Singapore for some 30 years thereafter, until the May 2011 amendments.

The second part of this article will critically examine the changes that were effected by the May 2011 amendments to the Singapore Rules of Court. In particular, this article will highlight the considered approach by the Rules Committee to enhance access to justice by taking a litigant-friendly approach,[5] particularly by increasing choices for litigants and reducing procedural hurdles in the judicial review application process. In particular, the article will focus on how the Rules Committee deliberately took a different approach from that taken in the UK reforms of 1977, in an attempt to sidestep the difficulties that have arisen in the United Kingdom because of the nature of those amendments.

As the reform efforts undertaken in Singapore are still in their relative infancy, there is some latent uncertainty as to how it will be interpreted and applied by the courts. The last part of this article explores some of the uncertainties that a litigant may face in navigating the uncharted waters and looks forward to offer suggestions on how further refinements may be added to enhance access to justice for the would-be litigant.

2. The Need for Reform

Singapore inherited its legal procedures for judicial review from the UK system,[6] which, prior to 1977, had maintained the position that prerogative orders, being exclusively public law remedies, could not be sought within the same application for the private law remedies of the injunction and declaration.[7] This dichotomy was problematic at several levels. First, as a matter of principle, the necessity of maintaining separate processes for private and public law remedies had to be called into question. The remedies that were available against administrative action were discrete and served different purposes, and the various remedies should have been treated on equal footing, with different remedies being appropriate on different occasions depending on the circumstances. The differing historical backgrounds and sources of origin of the remedies were hardly sufficient reasons to maintain separate procedural tracks.[8]

Further, the practical impact of the bifurcated procedure on litigants was significant. Those who sought redress against administrative action were often faced with a dilemma as to which procedure to select, as the particularities of one public law remedy may have suited his/her needs in one respect, while another private law remedy may have been more appropriate to address the same factual situation in other respects. This was particularly so since the private law and public law procedural tracks were subject to different rules. For instance, under the prevailing UK rules at that time, an application for certiorari had to be made within 6 months and discovery was not available to the litigant, whereas a litigant seeking a declaration was not subject to any limitation period and could avail himself/herself of the discovery process. On the other hand, a declaration as a remedy may not have been adequate in every circumstance as it would have at most been a definitive statement of the correct position at law, without any concomitant compulsion or prohibition against the public body.[9] A litigant would therefore have had to make an election as to which remedy would best suit his/her purpose at the outset and could not afford to utilize the wrong procedure or seek an inappropriate remedy.[10]

These difficulties and other concerns prompted sweeping changes to the UK rules in 1977, which created a single application for judicial review, wherein litigants could seek any of the five remedies within the same application.[11] Various provisions were also made to allow for pretrial interlocutory discovery, interrogatories, and cross-examination.[12] In a triumph of substance over form, the amendments eliminated the procedural traps that a litigant seeking judicial review faced and allowed the litigant to focus on the substantive merits of his/her case. Lord Denning MR dramatically described the amendments as such:

In 1977 the black-out was lifted . . . . The curtains were drawn back. The light was let in. Our administrative law became well-organised and comprehensive . . . it enabled the High Court to award damages and grant declarations. No longer is it necessary to bring an ordinary action to obtain damages and grant declarations. It can all be done by judicial review. This new remedy (by judicial review) has made the old remedy (by action at law) superfluous.[13]

Somewhat curiously however, the same light did not shine through on the Singapore judicial review landscape until almost 30 years after. The Singapore courts stoically held on to the distinction between the procedures for public law remedies and private law relief, despite there being no express statement to like effect in Order 53, or its parent Act, the Supreme Court of Judicature Act.[14]

Thus, in Singapore, it remained the case until the recent amendments that an applicant had to proceed under Order 53 to seek a prerogative order and, in addition, had to take out an originating summons to seek a declaration under Order 15 rule 16, even if the particular act or incident in respect of which he/she sought the court's intervention was the same as that which formed the subject matter of the judicial review proceedings under Order 53. A failure to comply with this cumbersome two-track procedure could lead drastically to a denial of substantive relief.[15]

Moreover, the procedural hurdles an applicant faced were markedly different depending on whether he/she chose to take out an application under Order 53 or an ordinary action. An obvious example was the requirement of obtaining leave of the court, a filtering threshold that an applicant had to cross before being able to mount a challenge under Order 53, but which was absent from the ordinary private law procedure. The Order 53 process also had inbuilt limitation periods, which would not apply in an action by way of originating summons.[16] There seemed little reason in principle to maintain such vastly different paths to obtaining judicial redress against the same administrative action.

Acknowledging that the laws of Singapore were falling behind the times, the High Court, in *Yip Kok Seng* v. *Traditional Chinese Medicine Practitioners Board*,[17] observed that other common law jurisdictions had already taken steps to update their judicial review procedural laws and hinted that it might be time for Singapore to do the same.

3. Enhancing Access to Justice through Rule Amendments

In answer to these calls for reform, amendments were made to the Singapore Rules of Court to streamline the judicial review procedure and address some of the concerns set out above. The main amendments made were as follows:

(1) To allow applicants to seek declarations in addition to the prerogative orders at the first stage of judicial review proceedings; and
(2) Once the declaration or prerogative orders have been obtained, to provide for a procedure to allow an applicant to seek damages or other private law remedies at the second stage of proceedings if the

applicant could prove that he/she had a valid cause of action such that the private law remedies sought would have been obtainable if they had been claimed in a separate action.

In effecting these changes, no amendments were made to primary legislation, presumably on the basis that the courts were already vested with full power to grant both the prerogative orders[18] and declarations.[19] The amendments were meant to effect changes in the procedural law only; they did not amend the substantive law of judicial review.

(A) Amendments to Allow an Applicant to Seek Declarations within Order 53

Rules 1(1) and 2(1) of the amended Order 53 now read as follows:

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

> (1) An application for a Mandatory Order, Prohibiting Order or Quashing Order (referred to in this paragraph as the principal application) —
> (a) **may include** an application for a declaration; but
> (b) shall not be made, unless leave to make the principal application has been granted in accordance with this Rule.
> . . . .

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

> (1) When leave has been granted to apply for a Mandatory Order, Prohibiting Order or Quashing Order—
> (a) the application for the order and any included application for a declaration must be made by summons to a Court in the originating summons in which leave was obtained . . .'
> (Emphasis added)

Order 53 rule 1(1) of the Rules of Court was amended to provide that an applicant 'may include an application for a declaration' in an application for one or more of the prerogative orders. This key amendment allowed an applicant to seek both prerogative orders as well as a declaration within the same proceedings. An applicant therefore no longer has to institute separate proceedings, one under Order 53, to obtain a prerogative order, and another under Order 15 rule 16 to obtain a declaration.

The manner in which the provision has been drafted entails that a litigant must first seek and obtain leave to commence an application for at least one of the prerogative orders. If leave is granted, the litigant can then also seek a declaration at the substantive hearing.[20] Consequential amendments have been made to Order 53 rule 2(1) to provide that the application for a declaration must be made by summons in the originating summons in which leave was obtained.

As is evident from the use of the phrase 'may **include**', the amended Order 53 rule 1(1) precludes an applicant from seeking solely a declaration by using the Order 53 procedure. It is suggested that this is evidence that, despite the amendments, the Rules Committee continued to view Order 53 as primarily a procedure to obtain public law relief. The amendments were simply to allow a declaration to be sought **in addition** to the public law remedies and were not intended to introduce a separate and alternative route by which to obtain a declaration, without other public law remedies, against a public body.

(B) Amendments to Allow the Court to Grant Other Reliefs

To the extent that the amendments were instituted to address the mischief identified by the courts in relation to the overly rigid technical rules on how an applicant had to begin his/her action, the amendments described above would have been sufficient. The Rules Committee, however, took the opportunity to streamline even further the procedural route by which an applicant could obtain relief, by also allowing him/her (once he/she had successfully obtained the prerogative order(s) and/or declaration sought) to seek private law remedies such as damages and restitutionary reliefs within the same proceedings if he/she could satisfy the court that he/she had a valid cause of action in private law such that he/she would have been entitled to those reliefs had he/she begun separate proceedings under private law.

In this regard, the newly inserted rule reads as follows:

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

> (1) . . . [W]here, 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.

(2) For the purposes of determining whether the Court should grant the applicant any relevant relief under paragraph (1), or where the Court has determined that the applicant should be granted any such relief, the Court may give such directions, whether relating to the conduct of the proceedings or otherwise, as may be necessary for the purposes of making the determination or granting the relief, as the case may be.

(3) Before the Court grants any relevant relief under paragraph (1), any person who opposes the granting of the relief, and who appears to the Court to be a proper person to be heard, shall be heard.

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

Before the insertion of this rule, an applicant who had successfully obtained a prerogative order would have had to institute separate proceedings in order to obtain the reliefs available in private law, such as damages or restitutionary remedies. To have continued requiring the applicant to do so would have resulted in the unsatisfactory situation whereby amendments would have been effected to allow declarations to be sought within the framework of Order 53, but not other consequential private law remedies such as damages even after the court had recognized that there had been wrongful conduct on the part of the public authority. Such a distinction would have been indefensible. With the May 2011 amendments, such relief can be sought within the same proceedings under the Order 53 framework. This amendment echoes the post-1977 UK reforms.[21]

Post-amendment, Order 53 rule 7(2) of the Rules of Court further grants the court full power to give the necessary directions for the conduct of the proceedings or otherwise, as appropriate, in particular to obtain the relevant evidence that is necessary for the court to grant and assess the damages sought, or grant any other civil law remedies claimed. This amendment was necessary as, unlike the wide range of interlocutory procedures that are applicable for applications begun in a private law action, the procedural framework under Order 53 is not designed to cater to the taking and management of the (documentary and affidavit) evidence that is necessary for the court to adjudicate on a claim for a civil law remedy. Such processes were therefore deemed necessary, for example, for the court to determine issues of remoteness of damages or issues of admissibility and authenticity of evidence pertaining to damages.[22] This is yet another example of the May 2011 amendments' focus on creating a litigation-

friendly atmosphere, although some uncertainties linger about the extent to which the full suite of interlocutory reliefs is available.

While streamlining the process by which aggrieved applicants could seek redress through judicial review, the rule makers were also keenly aware of the concomitant need to provide an avenue for the assertions of any affected third parties to be ventilated. Order 53 rule 7(3) now provides that before the court grants any relevant relief, the court must hear any person who opposes the grant of such relief. Given that an applicant may now seek other reliefs if he/she successfully obtains one of the prerogative orders or a declaration under Order 53, without commencing a separate action (which would have given formal notice of his/her claim for such reliefs), it is therefore necessary and procedurally fair for a party opposing the grant of such reliefs, or for example, the Attorney-General, to be given the opportunity to be heard by the court before such relief is granted. At the same time, in so far as the procedure also allows the parties and the court to be in possession of all the necessary evidence before the claim is adjudicated upon, the amendments ensure that any enhancement of procedural access for the applicant is not at the expense of the fairness of the substantive outcome.

(C) Points of Departure from the UK Reforms

In addition to stripping the procedural laws of its vestigial antiquities, a process that largely mirrors the UK reform efforts, there are also a few specific areas where the Singapore rule makers had consciously departed from their UK counterparts. This illustrates how carefully considered and well-crafted rule amendments are critical to achieving the desired legislative ends. Residual ambiguities in the detailed rules or any ambivalence in the general purport of the rule changes would have heightened the risk of satellite litigation, running counter to the objective of bringing about greater access to justice in the first place.

In this connection, it is argued that a careful examination of the manner in which the Singapore rule amendments were effected reveals a deliberate attempt to avoid any uncertainty of characterization as to whether an action is of a public law or private law nature to justify utilization of the appropriate process. In particular, the way the amended Rules were drafted made it clear that the amendments were not intended to preclude the applicant from seeking a declaration via Order 15 rule 16 of the Rules of Court, **even if the issue was one of public law**. The amended Order 53 was instead meant to offer an **additional option** for the litigant, who wished to obtain both the prerogative orders **and** a declaration.

The manner of reform signals a clear departure from the position taken by case law in the United Kingdom on the interpretation of the post-1977 Order LIII of the UK Rules of Supreme Court.

The amended UK Order LIII had led to confusion and a raft of satellite litigation on the criteria to determine whether a claim should be brought by way of judicial review rather than as a private law action.[23] The genesis of the confusion was the ruling of the House of Lords in *O'Reilly* v. *Mackman*, which was followed in *Cocks* v. *Thanet DC,*[24]where it was held that, as a general rule, it was contrary to public policy and an abuse of process to permit an applicant to proceed by way of ordinary action where the applicant was 'seeking to establish that a decision of a public authority infringed rights to which he/she was entitled to protection under public law'.[25] In the Courts' view, this was because an applicant would in so doing evade the safeguards inherent in the UK Order 53 procedure. However, Lord Diplock accepted that there were limited exceptions to this general rule, particularly where the invalidity of the decision arose as a collateral issue in a claim for infringement of a private right or where none of the parties objected to the adoption of the procedure by ordinary originating process.[26]

The position taken by the House of Lords created great uncertainty as to the distinction between public and private law, and the applicability of the collaterality exception.[27] Since the decision in *O'Reilly* v. *Mackman*, the preponderance of case law seems to be in favour of allowing proceedings involving public law issues to be litigated under the ordinary originating processes, provided that some private law right is also being asserted.[28] Happily, it can also be argued that the distinction in procedure between judicial review proceedings and ordinary actions has been diminished with the advent of the UK Civil Procedure Rules.[29]

The approach taken in Singapore, in contrast, was to simply open up to the applicant the option of seeking a declaration under Order 53 provided that he/she was also seeking at least one of the prerogative orders. There was no corresponding amendment to Order 15 rule 16 in order to close this other already-existing route to seeking a declaration. Accordingly, post-amendment, an applicant who wishes to seek a declaration can choose which procedure he/she wants to adopt. His/her decision would likely depend on the nature of his/her claim and the remedies he/she would like to obtain. It is left to the applicant to assess which procedure is most practically advantageous to him/her, without having to first consider the intricacies of case law on how his/her action should be characterized so as to determine the correct originating procedure.

To further facilitate access to justice, the amended Order 53 rule 1(1) does not require an applicant to obtain leave to seek a declaration under the judicial review procedure. This parallels the position under Order 15 rule 16, wherein an applicant is not required to seek leave of court in order to commence an ordinary private law action to obtain a declaratory judgment. In so doing, the amendments are designed to be deliberately litigant friendly, as it would have been open for the Rules Committee to treat the declaration as being on par with the other prerogative orders and require that leave be granted before the applicant is allowed to make the substantive application to obtain a declaration. This additional hurdle is not present in the current architecture of the rule. Arguably, this approach is also right in principle, since the question of whether a threshold requirement of obtaining leave of court ought to apply should be dependent on the nature of the relief being sought, as opposed to the form of the originating process by which the action is instituted.

Having said that, even though leave of court is not required for seeking a declaration in the judicial review proceedings, the requirement nevertheless still applies to the application in relation to the prerogative orders being sought. The consequence of this is that, if an applicant were to commence a claim under Order 53, seeking both the prerogative order(s) and a declaration, but then fail to obtain leave to make his/her substantive application for the prerogative order(s), his/her claim would end there. However, he/she would still be able to commence a claim using the ordinary originating process to seek a declaration from the court. This is not as surprising as it first seems, as even prior to the amendments, the applicant would have had the opportunity to avail himself/herself of the ordinary originating process even if his/her claim under Order 53 failed. The difference now is that he/she would have the opportunity to seek a declaration twice, in two separate proceedings.

In yet another departure from the UK 1977 reforms, the procedural framework under the Rules of Court would appear to envisage a situation where the applicant can, at a subsequent stage after having filed his/her application for judicial review, seek additional private law remedies. In notable contrast, the UK rules of 1977 provided that the court could only award damages in an application for judicial review if the applicant had included in the statement in support of his/her application for leave a claim for damages arising from any matter to which the application for judicial review related.[30] The Singapore amendments therefore not only give an applicant the additional option of seeking private law reliefs in the same judicial review proceedings but also provide him/her with the flexibility of deciding at what stage he/she wants to seek such additional reliefs. While obviously facilitative of the aggrieved applicant's seeking of

the appropriate redress, the extent to which a proper balance has been struck between the interests of the applicant and the public body respondent will be queried below.

4. Uncharted Waters

While the amendments have done much to update, clarify, and streamline the procedural rules governing judicial review, there are a number of important issues that may still require consideration by the Rules Committee and the courts. As with any legislative reform, the rule changes may not always be all-encompassing ones, and there will often be gaps to be plugged or uncertainties to be resolved. The amendments may thus have to be subsequently fine-tuned and calibrated, or judicially interpreted and explained, as they are applied in practice to achieve their desired objectives. This section highlights a few areas that may require judicial clarification or further amendments in the future in order to further enhance access to justice for the would-be litigant by ensuring not only the adequacy of final reliefs but also the availability of suitable recourse to ancillary and interim orders at a pretrial or prehearing stage. At the same time, the rules should not be interpreted or applied in such a way as to be solely concerned with promoting access for the applicant, without any regard for the interest of respondent public bodies to be sufficiently prepared in meeting the judicial review challenges. Furthermore, while the rule changes are certainly favourable to the aggrieved applicant, an increase in the number of available options of recourse may also bring about new questions for litigants and their lawyers to consider.

(A) Uncertainty as to the Applicable Pretrial Interlocutory Procedures

To a large degree, the uncertainty as to pretrial interlocutory processes already existed before the amendments and is inherent to the Order 53 framework. Admittedly, it is not the case that there is an absolute dearth of prescription as to the applicable interlocutory procedures in judicial review proceedings. For example, Order 53 rule 3 specifies the manner in which further affidavit evidence may be produced before the court upon the hearing of the substantive judicial review application.[31]

However, the extent to which the panoply of usual pretrial interlocutory procedures that are applicable in ordinary private law proceedings also applies in judicial review proceedings has never been clear. As the court highlighted in *Yip Kok Seng* v.. *Traditional Chinese Medicine Practitioners Board*:

. . . It is not clear whether certain processes applicable to ordinary originating summons, such as disclosure, 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.[32]

(i) Disclosure

In the area of disclosure, there is at least some judicial guidance. The most recent pronouncement on the law in Singapore was set out in *Lim May Lee Susan* v. *Singapore Medical Council*,[33] where the High Court found that, despite there being a lack of clarity in the case law of both the United Kingdom (pre-1977) and Singapore as to whether disclosure was available in judicial review proceedings, such disclosure should, in principle, be available.[34] The Judge relied on the phrase 'any party to a cause or matter' in Order 24 rule 1 to find that judicial review proceedings should be included as well.[35] The Judge, however, made clear that the nature and extent of the disclosure in judicial review proceedings would be different from that of ordinary proceedings, because in judicial review proceedings, the court was not called upon to make findings of fact based on evidence but rather determine whether the action being challenged ought to be quashed or prohibited, and so on. The court's role being limited to review, the amount of disclosure necessary would also be correspondingly limited.

After the May 2011 amendments, it can be argued that Order 53 rule 7(2) entails that disclosure will have a wider application, at least at the second stage of the judicial review process where private law reliefs are being sought.[36] This is because the limited role that the court plays in respect of judicial review proceedings, as highlighted by the Judge in *Lim May Lee Susan* v. *Singapore Medical Council*, would no longer be applicable in the context of the court deciding whether to award a private law relief. Instead, the court's power to order disclosure would arguably be akin to its power to order disclosure in private law proceedings. Logically, Order 24 of the Rules of Court, which governs the disclosure obligations of parties in private law actions, would therefore be instructive as to the extent of the court's powers to order disclosure under Order 53 rule 7(2).

There may be some latent uncertainty, however, due to the fact that Order 53 rule 7(2) does not make any direct reference to Order 24. Instead, it is drafted very generally to give the court the power to 'give such directions, whether relating to the conduct of the proceedings or otherwise, as may be necessary for the purposes of making the determination or granting the relief'. This is in contrast to the 1977 UK

rules,[37] which specifically define an 'interlocutory application' in judicial review proceedings as including 'an application for an order under Order 24'.

The impact of the comparative silence in the Singapore Rules of Court on the disclosure obligations of the parties is unclear. In particular, are parties meant to comply with the narrower obligation under Order 24 rule 1,[38] in which parties are only required to disclose documents that directly affect their case or that of another party to the action, or the more onerous obligation under Order 24 rule 5, which encompasses a broader concept of discoverable documents, which is extended to include not just documents relevant in and of themselves but also documents that would lead the applicant on a 'train of inquiry' to documents that may be relevant?[39]As this is not made clear in Order 53 itself, it is presumably for the parties to seek the court's directions as to the extent of their disclosure obligations. It is suggested that the court should have the full power under Order 53 rule 7 to order disclosure in the same way that it does in any ordinary originating summons, which would include the broader scope of discovery in the sense envisioned by *Peruvian Guano*, as this would give full effect to the intent behind the amendments, which must be to allow the procedural mechanism of judicial review to be equally effective and efficacious as ordinary private law proceedings in resolving conflicting allegations of facts for the purpose of determining substantive private law reliefs.

If that is true, a further related question is whether the wider disclosure obligations at the second stage of the judicial proceedings (i.e. at the stage where private law relief is being sought) will have any impact on the more limited disclosure obligations at the first stage of the proceedings (i.e. at the stage where the prerogative order(s) or declaration is being sought). Conceptually and in theory, there should be a clear distinction between the two stages, with the court only having the power to impose more extensive disclosure obligations on the parties at the second stage of proceedings when private law reliefs are being considered. Yet, it is easy to envisage a situation where the court, already knowing that the applicant is likely to obtain the prerogative order or declaration sought, and knowing that the applicant would then require the court to adjudicate on his/her entitlement to private law relief, feels compelled to save time and resources by ordering the relevant and necessary disclosure at the earlier stage of the proceedings. Parties must thus be prepared to open their cupboards from a very early stage in proceedings.

(ii) Necessity to Plead

The analysis above assumes that the court knew at a very early stage in the proceedings that the applicant would be seeking additional private law relief under Order 53 rule 7. However, it is an open question whether the court and the respondent public authority have the ability to acquire such knowledge given that the applicant is not required to pray for such relief in the originating summons under Order 53 rule 1[40] or the summons under Order 53 rule 2.[41] The current drafting of the provision would suggest that the respondent bears the risk of being caught by surprise and having to immediately defend a private law claim, having just lost in the public law part of the proceedings.

From the applicant's perspective, however, the provision gives him/her more than just a tactical advantage. Lack of prescription on pleadings means that an applicant does not risk his/her claim for private law relief being struck out due to the relief not being pleaded. As mentioned above, this is another example of a concerted effort being made during the May 2011 amendments to reduce the procedural hurdles faced by the applicant.

Similar concerns apply in respect of the application for a declaration under Order 53 rule 2. As highlighted above, leave of the court under Order 53 rule 1 is not required in order to make an application for a declaration. Order 53 rule 1 also does not require the applicant to state that, should he/she obtain leave to make an application for the prerogative order(s) he/she seeks, he/she also intends to make an application for a declaration. This means that the respondent and the court will only be made aware of the applicant's intention to seek such relief at the time that the summons under Order 53 rule 2(1), which contains the principal application, is served.

The concern that the respondent public authority may be caught by surprise is mitigated to a certain extent by the insertion of Order 53 rule 7(3), which states:

(3) Before the Court grants any relevant relief under paragraph (1), any person who opposes the granting of the relief, and who appears to the Court to be a proper person to be heard, shall be heard.

Thus, the respondent and any other proper party retain the right to be heard before the private law relief may be granted. Yet, although a right of hearing is afforded, this may not be sufficient to eradicate the concern that the public authority would not have adequate notice of the nature of the private law claims, as well as the bases for and factual allegations in support of such claims, in advance of such a hearing. It

can be argued that it would have been preferable if the amended rules had specifically prescribed the filing of affidavits setting out all grounds of relief being prayed for, which should be served on all affected parties.

(B) Differing Standards under Order 53 and Order 15 Rule 16

Before the May 2011 amendments, the level of protection that the Rules of Court afforded the public authority depended on the type of relief being sought. To quickly revisit, if the applicant was seeking a prerogative order, leave of the court was necessary, which would serve as a filtering mechanism to ensure that the authority is called upon to justify its actions only if the applicant crosses a certain threshold. On the other hand, if a declaration was being sought under Order 15 rule 16, leave of the court was not necessary, and the fast and expedited ordinary originating summons procedure was a quick and effective means by which an applicant could obtain recourse.[42]

Although the May 2011 amendments preserve the position that applications for declarations do not require leave of court, in practice, an applicant seeking a declaration under Order 53 would have to surpass the leave threshold under Order 53 rule 1 before his/her application for a declaration under Order 53 rule 2 can get off the ground. This means that there is some degree of disparity between the procedures to obtain a declaration under Order 15 rule 16 and Order 53, when viewed from the perspective of the applicant.

The practical effect of this disparity is that the applicant (and his/her lawyers) must, from the outset, be clear and strategic about the manner in which he/she commences his/her action and the precise nature of the reliefs required to obtain redress. While the May 2011 amendments may have made it more attractive for applicants to proceed under Order 53, there may be circumstances in which seeking a declaration under Order 15 rule 16 is more appropriate. This could be where, for example, the applicant needs an immediate remedy and a declaration by the court is sufficient to address his/her needs. In this regard, it should be borne in mind that, even after a declaration is obtained under Order 15 rule 16, a private law action for damages can still be mounted subsequently.

(C) Continued Unavailability of the Injunction

The court's powers under Order 53 rule 7 are expressly made subject to the Government Proceedings Act (GPA).[43] The provision was made subject to the GPA in order to make clear that the court could not

purport to grant any relief contrary to the GPA, given that section 19(c) of the Interpretation Act prohibits the making of subsidiary legislation under an Act that is 'inconsistent with the provisions of any Act'.[44] Of particular importance is section 27 of the GPA, which prohibits the granting of an injunction against the Government. The impact of section 27 of the GPA is that, despite the rule amendments, it is still not possible for a court to grant an applicant an injunction against the Government under Order 53 rule 7. In contrast, in the United Kingdom, judicial review proceedings are excluded by section 38(2) of the Crown Proceedings Act 1947 from section 21 of the same Act, which prohibits the granting of injunctions against the Crown. Further, the 1977 reforms allowed injunctions to be claimed in applications for judicial review, and this was given statutory force in section 31 of the Supreme Court Act 1981.[45] This carve-out provision is absent from the GPA. In fact, the definition of 'civil proceedings' in section 2(2) of the GPA was amended in 1997 (via the Statutes (Miscellaneous Amendments) Act 1997) to specifically include proceedings for judicial review and this was not reversed by the May 2011 amendments. Hence, injunctions continue to be unavailable against the Government.

This issue, in a sense, can be seen as unfinished business on the part of the lawmakers. On the one hand, the argument could be made that Parliament should be slow to allow injunctive orders to be made against the Government as such remedies would be anathema to the efficient workings of Government. Of particular concern is the fact that interim injunctions may be ordered against the Government to preserve the status quo between parties pending the final determination the proceedings. There is an argument to be made against impeding the Government's ability to put in measures or make decisions promptly in the public interest, especially in circumstances where the claim may be entirely unmeritorious. Further, it may be argued that it would serve no purpose to bring in injunctions under Order 53 since an applicant can simply commence an application for a prohibiting order and/or a mandatory order under Order 53.

On the other hand, it is clear that a mandatory order and/or prohibiting order, which cannot be granted on an interim basis, does not address the situation where an applicant needs to immediately compel (or prohibit) the Government to carry out an act. An applicant with a meritorious claim would have no recourse until he/she has cleared the hurdle imposed by the leave stage and then has gone on to complete the substantive proceedings. While both arguments are compelling, one would have thought that preserving this exceptional treatment of the Government by shielding it from injunctive orders is at odds with the general philosophy of promoting access to justice, which underpins the amendments. Moreover, even if interim injunctive relief becomes an available option against the Government, the courts would

still act as the necessary check against unwarranted applications for interim injunctions that could hamper the Government in the legitimate discharge of its functions. A full debate on the desirability of interim injunctive relief against the Government is beyond the scope of this paper, but these are real concerns that may warrant a reconsideration of section 27 of the GPA at the appropriate time.

It is also not clear whether the phrase 'injunction' within the meaning of the GPA is wide enough to encompass stays of execution of executive orders as well. This is a vexed matter that has received extensive judicial treatment in the United Kingdom, without any clear resolution.[46] If it is the case that a stay of execution against an executive order does amount to an injunction, the implication is that such stays cannot be ordered against the Government because of section 27 GPA. The impact of this is significant. The applicability of Order 53 rule 1(5), which provides that the granting of leave to apply for judicial review shall, if the Judge so directs, operate as a stay of proceedings in question until the determination of the application or the Judge so orders, would be narrowed considerably. By way of illustration, it would mean that the court would be unable to direct a Government agency to hold its hands on carrying out a decision, for example, to revoke a hawker's licence, even as the hawker takes out a judicial review application to challenge the legality of that decision. Any judicial clarification of this area would be welcome.

5. Conclusion

Much has been done to update the procedural law that governs judicial review applications in Singapore. In removing legal technicalities and archaic distinctions, a litigant-friendly approach was clearly taken and a deliberate decision made to enhance access to justice for the applicant as far as possible. An applicant can now seek a declaration and one or more of the prerogative orders under a single consolidated procedure under Order 53. Having obtained these remedies, he/she can also seek private law reliefs if he/she can convince the court that he/she has a valid private law cause of action against the public authority. These reforms are welcome and have done much to clarify and streamline this hitherto-complicated area of procedural law. The Singapore reforms in this area of judicial review, underpinned by the central philosophy of access to justice, have illustrated how legislation, particularly in the area of procedure, needs to be well crafted in order to create a comprehensive and coherent infrastructure to ensure that substantive relief can be effectively sought. Inevitably, legislative reforms and rule changes

bring new questions of interpretation as well as uncertainties in application. This article has sought to identify a number of such areas that still require some judicial elucidation or perhaps even future refinement when the opportunity arises.

Notes:

1 Rules of Court (Cap 322, R 5, 2006 Rev Ed) (Singapore).

2 For ease of reference, the Singapore Rules of Court will be referred to as 'Rules of Court' and the Orders therein referred to using Arabic numerals. The UK Rules of the Supreme Court will be referred to as 'UK Rules of Supreme Court' and the Orders therein referred to using Roman numerals. The Civil Procedure Rules, which are currently in force and govern procedure in the United Kingdom, will be referred to as 'UK Civil Procedure Rules'. In this regard, I have gratefully adapted the naming conventions of Seow Zhixiang, 'Rationalising the Procedure for Judicial Review in Singapore' [2011] 2 *Singapore Journal of Legal Studies* 533.

3 The prerogative orders refer to certiorari, mandamus, and prohibition, known in modern times as the quashing order, the mandatory order, and prohibiting order in both the United Kingdom and Singapore.

4 Rules of the Supreme Court (Amendment No 3) 1977, S.I. 1977/1955.

5 Constituted under section 80(3) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)(Singapore); section 80(1) of the same Act states that the role of the Rules Committee in Singapore is to 'make Rules of Court regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court and the Court of Appeal respectively in all causes and matters whatsoever in or with respect to which those courts respectively have for the time being jurisdiction (including the procedure and practice to be followed in the Registry of the Supreme Court) and any matters incidental to or relating to any such procedure or practice'.

6 Judicial control over the legality of administrative acts and omissions was, at the time, governed by section 10 of the Administration of Justice (Miscellaneous Provisions) Act 1938 and Ord LIII of the UK Rules of Supreme Court. An individual could invoke the jurisdiction of the Court in order to seek five distinct remedies. The first was certiorari, which could be utilized to quash decisions that had already been made. The second was prohibition, which prevented inferior tribunals and administrative or other public bodies from carrying out an action. The third was mandamus, which was useful to compel the performance of public duty. These three remedies collectively formed the prerogative orders. The fourth remedy that was available to the litigant was the injunction, which had its roots in private law of equity, as developed by the Court of Chancery. Although available, it was rarely granted in public law proceedings. Lastly, there was the declaration, which was provided for under Ord XV r XVI of the UK Rules of Supreme Court. Like the injunction, the declaration as a remedy originated from the Court of Chancery.

7 UK Law Commission *Report on Remedies in Administrative Law* (Report No 73, Cmnd 6407, 1976), 10.

8 It has even been argued that there is no reason to maintain special procedures and remedies for judicial review proceedings: see Dawn Oliver 'Public law procedures and remedies—do we need them?' (2002), PL Spr, 91–110.

9 *Report on Remedies in Administrative Law* (n 7), 15. These difficulties were recognized by the House of Lords in *O'Reilly* v. *Mackman* 2 AC 237 at 283 per Lord Diplock.

10 As will be elaborated upon below, these problems continued to persist in Singapore until the May 2011 amendments.

11 Rules of the Supreme Court (Amendment No 3) 1977 (n 4). The current UK position as set out in Part 54 of the UK Civil Procedure Rules retains the same combined application for judicial review.

12 Rules of the Supreme Court (Amendment No 3) 1977 (n 4) rule 8.

13 *O'Reilly* v. *Mackman* (n 9), 254 per Lord Denning MR.

14 Supreme Court of Judicature Act (SCJA)(Cap 322, 2007 Rev Ed) (Singapore).

15 See *Chan Hiang Leng Colin* v. *Minister for Information and the Arts* [1996] 1 SLR(R) 294 (Singapore Court of Appeal (SGCA)) [5]–[6]; *Re Application by Dow Jones (Asia) Inc*[1987] SLR(R) 627 (Singapore High Court (SHC)) [14]; *Yong Vui Kong* v. *Attorney-General* [2011] 2 SLR 1189 (SGCA) [25].

16 Ord 53 r 1(6) of the Rules of Court states that 'Notwithstanding the foregoing, leave shall not be granted to apply for a Quashing Order to remove any judgment, order, conviction, or other proceeding for the purpose of its being quashed, **unless the application for leave is made within 3 months after the date of the proceeding or**such other period (if any) as may be prescribed by any written law or, except where a period is so prescribed, **the delay is accounted for to the satisfaction of the Judge**to whom the application for leave is made . . .' (Emphasis added).

17 [2010] SGHC 226 (SHC) [18]–[19].

18 Pursuant to the SCJA.

19 Pursuant to Ord 15 r 16 of the Rules of Court.

20 Ord 53 r 2 of the Rules of Court.

21 Prior to those UK reforms, damages could only be claimed in a separate action by writ. In contrast, the amended Ord LIII r VII permitted an applicant for judicial review to include in the statement in support of his/her application a claim for damages and empowered the court to award damages on the hearing of the application if satisfied that such damages could have been awarded to him/her in an action begun by him/her by writ at the time of making the application (see *O'Reilly* v. *Mackman* (n 9), 283).

22 As was the case in *Jet Holding Ltd and others* v. *Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 (SGCA).

23 See, for example, *Davy* v. *Spelthorne BC* [1984] AC 262 HL; *Wandsworth LBC* v. *Winder*[1985] AC 461 HL; *Roy* v. *Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 HL.

24 [1983] 2 AC 286, HL.

25 *O'Reilly* v. *Mackman* (n 9) 285.

26 Ibid.

27 For a detailed discussion on the issue, see Paul Craig, *Administrative Law* (Sweet & Maxwell London 2012) 836–77.

28 Ibid 846–47.

29 *Clark* v. *University of Lincolnshire and Humberside* [2000] 1 WLR 1988 CA (Civ Div).

30 Rule 7 of the Rules of the Supreme Court (Amendment No 3) 1977 (n 4).

31 Rule 3(2)—'The Court may on the hearing of the summons filed under Rule 2 allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of any

affidavit of any other party to the application, and where the applicant intends to ask to be allowed to amend his/her statement or use further affidavits, he/she must give notice of his/her intention and of any proposed amendment of his/her statement to every other party, and must serve a copy of such further affidavits on every other party'.

32 [2010] SGHC 226 (SHC) [17].

33 [2011] 4 SLR 147 (SHC).

34 The post-1977 Ord LIII of the UK Rules of Supreme Court specifically provided for interlocutory applications for discovery, interrogatories, and cross-examination (Rule 8). The position today under the UK Civil Procedure Rules is set out in Practice Direction 54A r 54.16, which makes clear that disclosure is not required unless the court orders otherwise.

35 This is the rule that governs the general disclosure obligations of parties in ordinary private law actions.

36 The rule states that '[f]or the purposes of determining whether the Court should grant the applicant any relevant relief under paragraph (1), or where the Court has determined that the applicant should be granted any such relief, the Court may give such directions, whether relating to the conduct of the proceedings or otherwise, as may be necessary for the purposes of making the determination or granting the relief, as the case may be'.

37 Rule 8 of the Rules of the Supreme Court (Amendment No 3) [1977] (n 4).

38 For general discovery, Ord 24 r 1(2) of the Rules of Court (n 1) describes the documents to be provided as follows:
(a) The documents on which the party relies or will rely; and
(b) The documents that could–
    (i) adversely affect his/her own case;
    (ii) adversely affect another party's case; or
    (iii) support another party's case.

39 The broader test of relevancy can be traced back to the famous UK case of *Compagnie Financiere et Commerciale du Pacifique* v. *Peruvian Guano Co.* [1882] 11 QBD 55 (*Peruvian Guano*).

40 The ex parte originating summons is the process by which leave to take out the principal application for judicial review is sought (see Ord 53 r 1(2) of the Rules of Court).

41 Once leave has been obtained, the principal application for judicial review is to be taken out by way of summons (see Ord 53 r 2(1) of the Rules of Court).

42 Under Ord 7 of the Rules of Court.

43 Government Proceedings Act (Cap 121, 1985 Rev Ed) (Singapore).

44 Section 19(c) of the Interpretation Act (Cap 1, 2002 Rev Ed) (Singapore).

45 See *Administrative Law* (n 27), 899, for a full discussion of the topic.

46 *Minister of Foreign Affairs Trade and Industry* v. *Vehicles and Supplies Ltd & Anor* [1991] WLR 550 in contrast to *R* v. *Secretary of State for Education and Science, ex p Avon County Council* [1991] 1 QB 558, as discussed in *R* v. *Secretary for State for the Home Department, ex p Muboyayi* [1991] 3 WLR 442 and *R (H)* v. *Ashworth Hospital Authority* [2003] 1 WLR 127.