CACV 123/2012

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 123 OF 2012

(ON APPEAL FROM HCAL 64/2012)

BETWEEN

LEUNG KWOK HUNG	Applicant (Appellant)
and	
THE PRESIDENT OF THE LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION	Putative Respondent

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Before: Hon Cheung CJHC, Kwan JA and Jeremy Poon J in Court

Date of Hearing: 10 January 2013

Date of Judgment: 1 February 2013

J U D G M E N T

Hon Cheung CJHC:

The facts

1. This is an appeal from the refusal of Lam J (as Lam JA then was) to grant leave to apply for judicial review and the judge's consequential order of costs against the applicant.

2. The facts of this case and the reasons for the judge's decisions have been fully set out in his two judgments dated 25 May 2012 ([2012] 3 HKLRD 470) and 18 July 2012. It is only necessary to give a very brief summary here.

3. The Legislative Council (Amendment) Bill 2012 ("the Bill") was introduced by the Administration into the Legislative Council for first reading on 8 February 2012. In gist, the Bill sought to disqualify a person who has resigned as a member of the Legislative Council from standing for a by-election to be held within 6 months of his resignation. After the second reading of the Bill was moved, it was adjourned under rule 54(4) of the Rules of Procedure of the Legislative Council ("the Rules of Procedure"). The Bill was then referred to the House Committee, which set up a Bills Committee to study the Bill. The debate on the Bill before the Council was scheduled to resume on 2 May 2012. In the meantime, two Legislative Council members had been given permission by the President of the Legislative Council to move respectively 1,232 and 74 committee stage amendments to the Bill at the resumed debate. The 1,232 amendments proposed by the first member dealt with six themes – five were concerned with situations where the disqualification would not apply and the sixth proposed a reduction of the disqualification period. As for the

74 amendments proposed by the second member, they sought to improve on the language of the Chinese text of the Bill.

4. The avowed intention of the two legislators and their ally, the applicant (also a legislator), for the introduction of these numerous amendments was to filibuster the Bill, which they opposed and which they apprehended would otherwise be passed by the majority in the Council.

5. The motion for the second reading of the Bill was passed on 2 May 2012 after a debate that lasted 8 hours 39 minutes. The Committee stage of the Bill before the whole Council commenced the next day at 9:00 am but was adjourned as the meeting was inquorate. The Committee of the whole Council resumed to deal with the Bill in the late afternoon of 9 May 2012. There was a motion to adjourn the proceedings of the Committee which was eventually negatived after a debate that took 4 hours and 29 minutes and straddled two days. The Committee then proceeded to debate on the clauses of the Bill and all the committee stage amendments.

6. The debate took place at meetings of the Committee of the whole Council which were, in accordance with the Rules of Procedure, presided over by the President as chairman.

7. By 4:30 am on 17 May 2012, the debate had gone on for over 33 hours and still no end to the debate was in sight. The President had on numerous occasions considered the speeches made by the filibusters (the applicant was one of them) irrelevant to the clauses and amendments, and had made decisions and rulings accordingly. Under those circumstances, a Legislative Councillor made reference to the procedure called “closure

motion" in other legislative bodies and suggested the President should conclude the debate immediately.

8. The President reviewed the situation and indicated his inclination to allow the members and the Government official who had also proposed a committee stage amendment to give concluding speeches and then end the debate. After hearing views from members further, the President announced his decision to that effect at 9:00 am on the same day (17 May 2012), and gave all those involved until 12:00 noon to conclude the debate. He based his decision on rule 92 of the Rules of Procedure which relevantly provides that "in any matter not provided for" in those rules, the President (as chairman) may decide the practice and procedure to be followed (etc). The debate duly ended at noon time. Thereafter, the amendments to the Bill proposed by the legislators were put to vote. They were all defeated. The voting itself took several days to complete. The Bill eventually became law on 1 June 2012.

The decisions below

9. Aggrieved by the President's decision to end the debate and thus the filibustering exercise, the applicant sought leave to apply for judicial review of the President's decision on the same day. After an urgent oral hearing attended by all parties concerned (including the Secretary for Justice as interested party) on 17 and 18 May 2012. Lam J announced his decision to refuse leave on 19 May 2012. He gave his written reasons on 25 May 2012. As noted, the Bill was passed on 1 June 2012.

10. The judge considered that the President's power to preside over meetings came primarily from article 72 of the Basic Law, rather than the Rules of Procedure, and said that by necessary implication, the orderly, fair and proper conduct of the proceedings is within the province of the President. The judge then looked at the question of separation of powers and parliamentary privilege and set out the relevant principles regarding the privilege and non-intervention by the court in paragraph 36 of his careful judgment. He then applied those principles to the facts and rejected the applicant's arguments based on article 73(1) of the Basic Law. He firmly rejected any suggestion that there is a constitutional right to filibuster. He further rejected the applicant's arguments based on article 75(2) of the Basic Law. He therefore concluded that parliamentary privilege applied in the present case and the court would not intervene. He observed that the proper interpretation of the relevant provisions in the Rules of Procedure is a matter for the Legislative Council and the President in the exercise of his authority under article 72, and therefore did not give any interpretation of his own. He further said that there was no good reason for entertaining a pre-enactment challenge in any event.

11. After considering the parties' written submissions on costs which he directed them to lodge, the judge gave the costs of the unsuccessful application for leave to the putative respondent, the President, whilst making no order in relation to the costs of the Secretary for Justice (as interested party).

The appeal

12. From the judge's decisions, the applicant appealed.

13. In this appeal, Mr Martin Lee SC (Mr Hectar Pun and Mr Carter Chim with him) for the applicant, essentially argued that the President's decision contravened articles 73(1) and 75(2) of the Basic Law. First, it infringed the constitutional right of the applicant, as an individual legislator, under article 73(1) to speak in the Council in accordance with its Rules of Procedure when the Council was exercising its power and function to enact, amend or repeal laws. Secondly, article 75(2) was also contravened because by his decision, the President was, in effect, making a new rule of procedure of the Council, which could only be made by the Council in accordance with that article. In those circumstances, counsel argued, the judge had a constitutional right and duty to intervene in the legislative process; and at this post-enactment stage, the court has such right and duty to grant declaratory relief against the amendments to the Legislative Council Ordinance (Cap 542) brought about by the Bill as being void for unconstitutional irregularity in the legislative process. Mr Lee contended that the usual parliamentary privilege that attaches to the business of the legislature had been displaced by the constitutional infringements.

14. Counsel argued that these were reasonably arguable matters, and leave to apply for judicial review ought to be granted.

15. Mr Lee also pointed out that at this post-enactment stage, the judge's original ground (amongst others) for refusing leave that the applicant's challenge was a premature one is no longer relevant, and as mentioned, he invited the court to grant leave for the applicant to seek declaratory relief against the amendments made to the Legislative Council Ordinance by the Bill.

16. In any event, Mr Lee argued that costs should not have been awarded against the applicant even if one were to assume that his application for leave had been correctly refused.

17. Both the President and the Secretary for Justice disagreed and put forward respective submissions in support of the judge's decisions.

The general principles of law

18. It is useful to set out first the relevant principles of law. They can be found in leading overseas authorities including: *The Bahamas District of the Methodist Church v Symonette* [2000] 5 LRC 196; *British Railways Board v Pickin* [1974] AC 765; *Ah Chong v Legislative Assembly of Western Samoa* [2001] NZAR 418; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321; *R v Chaytor* [2011] 1 AC 684; *Cormack v Cope* (1974) 131 CLR 432; and in local cases such as *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 and *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555.

19. First and foremost, under common law, the courts do *not* interfere with the internal workings of the legislature. The legislature has exclusive control over the conduct of its affairs. Alleged irregularities in the conduct of legislative business are a matter for the legislature alone.

20. This "parliamentary privilege" is an established principle of law of seminal importance and high constitutional significance. It is derived from or justified by historical development, functional necessity, the constitutional doctrine of separation of powers and (in the United Kingdom) the sovereignty of Parliament. As Mr Jin Pao, for the Secretary

for Justice, submitted, it is an element of our law which deals with an important aspect of the interrelationship between the legislative and judicial branches of government.

21. In particular, the privilege extends to the procedures which are to be followed before a Bill can become law. It is for the legislature to lay down and to construe its relevant procedures and further to decide whether they have been obeyed. It is also for the legislature to decide whether in any particular case to dispense with compliance with such procedures. The position has been firmly stated by Lord Morris in *British Railways Board v Pickin* at p 790C-E as follows:

> "It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. *It must be for Parliament to lay down and to construe its Standing Orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders.* It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed." (emphasis supplied)

22. In short, the legislature is the master of its own house. The necessary check and balance is achieved not in the courts, but politically.

23. Secondly, where, as here, there is a written constitution, the common law position is modified to the extent intended and required by the provisions in the constitution. Article 8 of the Basic Law specifically says

that the common law continues to apply in this jurisdiction "except for any that contravene[s] [the Basic Law]". In this regard, it should be noted that the Basic Law enshrines the principle of separation of powers: *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, para 101. Moreover, whilst the Legislative Council as the legislature of the Hong Kong Special Administrative Region is not supreme (but the Basic Law is), still the Basic Law recognizes the Legislative Council to be a sovereign body *under that law*: *Leung Kwok Hung* at para 10.

24. All this means that in the local context, the courts are empowered and indeed required to inquire into the internal workings of the Legislative Council *if and when, but only to the extent that,* the Basic Law so requires. It is, in other words, all a matter of interpretation of the Basic Law and of the true intention behind its relevant provisions. One possible area of intervention is where the Basic Law places upon the courts some duty of scrutinizing legislative proceedings for alleged breaches of constitutional requirements. Another possible example is where the Legislative Council has conducted its business in such a way as to infringe the constitutionally protected right of an individual which is intended by the Basic Law to be enforceable in a court of law, overriding parliamentary privilege. A third example that can be given is where (which is not the case here) the Rules of Procedure, made by the Legislative Council pursuant to article 75(2), are said to be in contravention of the Basic Law: *Leung Kwok Hung* at paras 24 to 32.

25. However, as a matter of interpretation of the Basic Law, a court would lean *against* an interpretation displacing parliamentary

privilege, and any real ambiguity would be resolved in favour of non-intervention: *Ah Chong* at p 427.

26. Thirdly, even assuming that on the proper interpretation of the relevant provisions of the Basic Law, parliamentary privilege is displaced in a particular case so that the courts have jurisdiction to intervene, exercising that jurisdiction at the *pre-enactment* stage is a totally different matter. A court should, "so far as possible", avoid interfering in the legislative process. Conceivably, however, there may be a case where the protection intended to be afforded by the Basic Law cannot be provided by the courts unless they intervene at an early stage to grant immediate declaratory or other relief, in which event pre-enactment intervention may exceptionally be justified. *The Bahamas* at p 209a/b – e/f.

27. This rule of self-restraint in the case of pre-enactment challenge makes good commonsense. If it were otherwise, the legislative business would be liable to delays, disruption, uncertainties and costs. Moreover, without knowing the outcome (that is, whether the Bill in question would eventually be passed into law), the challenge would, save in the most exceptional circumstances, usually be premature and unnecessary.

28. These considerations of great constitutional as well as practical significance do not apply when the challenge is a *post-enactment* one. Nonetheless, a court must still be satisfied that parliamentary privilege is displaced by the relevant provisions in the Basic Law before it may intervene. The intervention, it should be noted, at this post-enactment stage, would no longer be directed at the legislative process as such which, by

definition, has already completed, but at the product of that process, namely, the relevant piece of legislation.

The present case

29. Bearing these general principles in mind, I approach the facts and arguments in the present case. It should be remembered, however, that when the challenge first came before Lam J, it was a pre-enactment challenge. By the time of this appeal, the Bill has become law. We are therefore concerned not only with whether Lam J's rejection of the pre-enactment challenge was correct, but also (and perhaps more importantly) whether a post-enactment challenge can be mounted.

30. There can be no doubt that leaving aside any relevant provisions in the Basic Law, the President's decision to close the debate on 17 May 2012 at the Committee meeting of the whole Council is a matter squarely covered by parliamentary privilege. It relates solely to the procedure to be followed by the Legislative Council in going about its own business of law-making. It is a typical matter that the courts under common law would not interfere with.

31. In particular, under the common law described above, the courts will not entertain any debate on the proper interpretation of the relevant rules of procedure or their application to any given circumstances. Those are matters for the Legislative Council to decide. Likewise, it is for the Council to decide whether the relevant rules of procedure have been followed or whether in any particular case to dispense with compliance with them. In all these matters, a court, under common law, will not intervene.

32. Is parliamentary privilege displaced by the Basic Law in the present case? As mentioned, Mr Lee, for the applicant, argued for an affirmative answer. He relied on articles 73(1) and 75 of the Basic Law.

The applicant's arguments under article 73

33. Article 73 sets out the powers and functions of the Legislative Council, and there are ten of them. Article 73(1) reads:

> "To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures".

34. Mr Lee made two arguments out of it. First, Mr Lee accepted that article 73 gives the Legislative Council as a body the power to make law etc. However, since the Legislative Council is composed of its members and exercises its powers and functions through them, article 73(1) therefore gives the applicant, *as a member of the Council*, a constitutional right to participate in the legislative process of the Legislative Council to enact, amend or repeal laws "in accordance with … legal procedures", that is, the Rules of Procedure made by the Legislative Council under article 75(2): *Leung Kwok Hung* at para 7. That right includes the right to speak at the meetings of the Council which cannot be unconstitutionally curtailed or compromised.

35. In the present case, the President closed the debate purportedly pursuant to rule 92 of the Rules of Procedure (which only applies when no other rules are applicable) when, according to Mr Lee, there were applicable rules of procedure to deal with the filibustering situation. Counsel therefore argued that the legislative process was derailed as a result, and the applicant's constitutional right to participate in the

legislative process to make or amend laws "in accordance with … legal procedures", including his right to speak at the relevant meetings accordingly, was infringed.

36. Secondly, Mr Lee submitted that in any event, at this *post-enactment* stage, since the amendments made to the Legislative Council Ordinance have not been made by the legislature in accordance with article 73(1) in that the relevant legislative process was not "in accordance with … legal procedures", the amendments are null and void and of no effect.

37. I will deal with each of these arguments in turn, which obviously overlap with each other to a significant extent. However, it should be appreciated that the alleged constitutional right of the applicant as legislator to participate in the legislative process in accordance with the Rules of Procedure under Mr Lee's first argument was an important plank for the applicant to mount his *pre-enactment* challenge. If he had only relied on the second argument described above, there would have been nothing to justify his pre-enactment challenge, for the second argument could always be relied on to mount a post-enactment challenge. However, in relation to the first argument, that is, the applicant's alleged constitutional right as an individual legislator to participate in the legislative process, if the court were to refuse to intervene at the pre-enactment stage, any post-enactment intervention would be quite meaningless from the perspective of protection of the applicant's constitutional right – thus the significance of the first argument to the pre-enactment challenge before the judge.

38. Although the matter has now become academic since at this appellate stage, one is concerned with a post-enactment challenge, it is right that this court should make clear its views on the first argument.

Does article 73(1) give a legislator a constitutional right to participate etc?

39. I will put aside that part of the first argument which relates to "in accordance with … legal procedures" for the time being and focus first on the alleged constitutional right of the applicant as legislator under article 73(1).

40. Read in its context, article 73 is about the powers and functions of the Legislative Council (including its committees, panels, sub-committees etc) as a body. It is not about the rights of an individual legislator.

41. Indeed, a purposive interpretation of the Basic Law goes directly against any such interpretation. If there really were the suggested right of an individual legislator to participate in the legislative process of law-making in accordance with the Rules of Procedure, this would open the floodgate of litigation by disgruntled legislators who are dissatisfied, in one way or another, with the way the Rules of Procedure are interpreted or applied in meetings of the Legislative Council. And, as explained, given the nature of the suggested right, the court would be urged, on each of these occasions, to intervene at the pre-enactment stage. This would have a serious impact on the smooth workings of the Legislative Council. Indeed the proceedings in the Legislative Council would grind to a halt if any decision of the President that curtails a legislator's speech or participation in the proceedings is liable to be reviewed by the courts. This can hardly

have been the intention of the drafters of the Basic Law. The drafters of the Basic Law must be taken to have been fully conversant with the common law doctrine of parliamentary privilege and its fundamental constitutional significance.

42. In *Canada (House of Commons) v Vaid* [2005] 1 SCR 667, a case concerning parliamentary privilege, Binnie J, giving the judgment of the Supreme Court of Canada, gave this example, which is analogous to what we are faced with in the present case, to illustrate how the privilege works and its importance:

> "20 … It would be intolerable, for example, if a member of the House of Commons who was overlooked by the Speaker at question period could invoke the investigatory powers of the Canadian Human Rights Commission with a complaint that the Speaker's choice of another member of the House discriminated on some ground prohibited by the *Canadian Human Rights Act*, or to seek a ruling from the ordinary courts that the Speaker's choice violated the member's guarantee of free speech under the *Charter*. These are truly matters 'internal to the House' to be resolved by its own procedures. Quite apart from the potential interference by outsiders in the direction of the House, such external intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable even if, in the end, the Speaker's rulings were vindicated as entirely proper.
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> 21. Parliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected …"

43. As mentioned, the court would lean against any interpretation to displace parliamentary privilege, and in case of real ambiguity, it would resolve in favour of non-intervention. All this, as explained, is for very good reasons. In my view, the present case is nothing near a real ambiguity. Rather, the position is very clear – the suggested constitutional right under article 73(1) of the Basic Law simply does not exist.

44. Moreover, as the judge observed, any such constitutional right to participate in the legislative process in accordance with the Rules of Procedure cannot possibly include the right to filibuster. Indeed there is much to be said for the view that the very continuance of a filibustering exercise would be contrary to the proper exercise and discharge of the powers and functions of the Legislative Council provided under article 73 of the Basic Law, and would constitute an infringement of other legislators' constitutional rights (according to the applicant's own argument) to participate in the legislative process in a meaningful manner.

45. In any event, any such right to speak or participate must be read with, and subject to, the power of the President to preside over meetings under article 72(1), to which I will presently turn.

46. With respect, the applicant's contention is unarguable.

"in accordance with … legal procedures"

47. I now turn to the remainder of Mr Lee's first argument and his second argument, that is, "in accordance with … legal procedures". It is necessary to consider articles 72 to 75 together to see the whole picture.

48. Article 72 sets out the powers and functions of the President of the Legislative Council. Article 72(1) states that the President shall exercise the power and function "to preside over meetings". Article 72(6) reads:

> "To exercise other powers and functions as prescribed in the rules of procedure of the Legislative Council".

49. As mentioned, article 73(1) refers to "in accordance with … legal procedures" and "legal procedures" has been interpreted to mean or include the Rules of Procedure.

50. Article 74 says that members of the Legislative Council may introduce bills "in accordance with the provisions of this Law and legal procedures".

51. Article 75(2) provides that the rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene the Basic Law. As mentioned, the Council has made the Rules of Procedure.

52. A number of points can be made here. First, the President has, amongst other things, the constitutional power and function to preside over meetings under article 72(1) ("主持會議"). That must, as a matter of interpretation or necessary implication, include the power and function to exercise proper authority or control over the process, as the judge pointed out in paragraph 25 of his judgment. The orderly, fair and proper conduct of proceedings must be within the province of the President.

53. Secondly, his power under article 72(1) is supplemented, article 72(6) provides, by other powers and functions as prescribed in the Rules of Procedure. In other words, the powers given to the President in the Rules of Procedure are to be supplementary to his power, given under article 72(1) of the Basic Law, to preside over meetings. Put another way, the Rules of Procedure are there to give the President additional powers,

rather than to take away from him his power, given under the Basic Law, "to preside over meetings".

54. Thirdly, in this regard, it must be noted that article 75(2) specifically provides that the Rules of Procedure cannot contravene the Basic Law, and that must include article 72 relating to the President's powers and functions.

55. Fourthly, looking at the matter from the perspective of the Legislative Council, the phrase "on its own" in article 75(2) echoes or reflects the well-known common law background that the legislature is the master of its own house. It is for the legislature itself to determine what rules of procedure it wishes to follow (*Leung Kwok Hung* at para 10), so long as those rules do not conflict with the Basic Law.

56. Fifthly, the stipulation under article 73(1) that the Legislative Council has the power and function to enact, amend or repeal laws in accordance with its own rules of procedure must therefore be read in the light of the legislature's power, given under article 75(2) to regulate, and therefore to change at any time it pleases, its own rules of procedure, so long as they do not conflict with the Basic Law.

57. All these points, when considered together, can only lead to one relevant answer, that is, the reference to "in accordance with … legal procedures" in article 73(1) in the context of the Legislative Council's law-making process cannot possibly be a constitutional requirement that displaces parliamentary privilege. Far from evincing an intention to displace parliamentary privilege by imposing a constitutional requirement

on the legislative process, the Basic Law actually intends to leave it to the Council to decide for itself how it should go about its legislative business.

58. In other words, the Basic Law does not require or empower any court intervention in the case of the legislature's non-compliance with its own rules of procedure for the time being when making laws etc, in the absence of any suggestion that the non-complying procedure actually adopted is otherwise in contravention of the Basic Law. For after all, the bottom line is that the legislature can always achieve what it wants by changing the relevant rules of procedure pursuant to article 75(2) (absent any question of contravention of the Basic Law), and pass the same law by the same procedure again. The price for requiring or permitting any court intervention in the meantime would be wholly out of all proportions to the problem created by any non-compliance with the existing rules of procedure. The legislature, under the constitutional framework laid down in the Basic law, is fully capable of putting its own house in order in the type of situation under discussion. Any court intervention is neither necessary nor warranted.

59. Moreover, where, as here, the relevant rules of procedure involve the President's power and function to preside over meetings, a further reason for rejecting the argument that compliance with the relevant rules of procedure constitutes a constitutional requirement is that so far as controlling meetings is concerned, the President's right to preside over and, as explained, to exercise proper authority or control over meetings, is constitutionally stipulated, whereas rules of procedure are, by definition, subject to the Basic Law including article 72(1).

60. Mr Lee submitted, in his written submissions, that the combined effect of rules 34(3) and (6), 38(1)(a) and 58 of the Rules of Procedure is that legislators may speak "again and again" in a debate in the Committee of the whole Council until no or no other legislator indicates his intention to speak. Whatever may be the effect of those rules interpreted on their own, it must be read subject to the constitutional power and function of the President under article 72(1) to preside over meetings.

61. Furthermore, as mentioned, the courts lean against an interpretation of the constitution to displace parliamentary privilege, and in case of real ambiguity, it will be resolved in favour of non-intervention. Even assuming (for the sake of argument) that Mr Lee managed to raise a real ambiguity in the present case in relation to the requirement of "in accordance with … legal procedure", I would still resolve it in favour of non-intervention by construing the requirement as a non-constitutional one.

62. The present situation is not unlike that faced by the Privy Council in *The Bahamas*, where article 59(1) in the Bahamas Constitution provides that a private Bill "shall be debated and disposed of according to the rules of procedure" of the Senate or (as the case may be) the House of Assembly. Each of the two Houses has been given the power under article 55(1) of the Constitution to "regulate its own procedure and for this purpose [to] make rules of procedure". In giving the advice of the Privy Council, Lord Nicholls stated that the relevant provisions were not intended to be restrictive, so as to found a claim for violation of the Constitution if a member were permitted to introduce a Bill etc in breach of the rules of the House. In particular, the judge did not think that the reference to the rules of procedure of the two Houses was intended to deprive either House of the

power given under the Constitution to regulate its own affairs. "Clearer language" would be required before it would be right, according to the judge, to construe the provision as having the "far reaching effect of opening up to court scrutiny the procedures followed in Parliament": *The Bahamas* at p 214e/f to g/h.

63. Mr Jat SC (Mr Anthony Chan with him), appearing for the President, was right in saying that the applicant's reliance on *Cormack v Cope*, *supra*, was misplaced. There, the High Court of Australia was concerned with article 57 of the Commonwealth Constitution which sets out the constitutional requirements to be followed for the enactment of laws following a deadlock between the Senate and the House of Representatives. Similarly, in *Doctors for Life International v Speakers of the National Assembly* [2006] ZACC 11, a case also relied on by Mr Lee, the South African Constitutional Court intervened in the legislative process because the National Council of Provinces had failed to discharge its national obligation under section 72(1)(a) of the Constitution to facilitate public involvement in the legislative process and section 167(4)(2) of the Constitution confers exclusive jurisdiction on that court to decide disputes concerning a failure by Parliament to fulfil a constitutional obligation. On the facts, as Mr Jat submitted, these two cases are very different from the present one where precisely the issue is whether "in accordance with … legal procedures" constitutes a constitutional requirement in the first place. In both overseas cases, however, there were clear constitutional provisions which made compliance with procedure a constitutional requirement, thereby engaging the courts' jurisdiction.

64. For these reasons, I also reject Mr Lee's argument that compliance with the Rules of Procedure constitutes a constitutional requirement under article 73(1).

Article 75(2)

65. Mr Lee also relied on article 75(2) of the Basic Law. His argument was essentially that the President was effectively making a new rule of procedure when he closed the debate in the way he did, purportedly pursuant to rule 92 (which, according to counsel, was not triggered because other rules were applicable to deal with the filibustering situation). Counsel pointed out that article 75(2) provides for rules of procedure to be made by the Legislative Council on its own, rather than by the President. What the President did in the present case therefore amounted to a usurpation of the power and function of the Legislative Council and constituted a contravention of article 75(2).

66. Even assuming, for the sake of argument, that the President's decision could not be supported by rule 92, it does not follow that he was therefore making a new rule of procedure. Plainly, he did not. On the evidence, the President certainly did not purport to make any new rule regarding filibustering and, in my view, he did not do so. What he did was to close the debate at the meeting he was then presiding. His decision affected the meeting in question and nothing else. The fact that the President's ruling might have some future reference value does not make his ruling in a specific case equivalent to a rule of procedure of general application, in the absence of a system of precedent. Furthermore, what the President did was clearly covered by article 72(1) anyway and he did not have to, and simply did not, make any new rule. The power of the

President to preside over meetings under article 72(1) must include the power to end debates in appropriate circumstances and put matters to vote. That precisely was what the President did.

67. In any event, I fail to see how an alleged contravention of article 75(2) can, on its own, justify the court's intervention. In the context of the present discussion, that is, the displacement of parliamentary privilege by a constitutional requirement, Mr Lee's contention on article 75(2) cannot be run separately from his earlier arguments based on article 73(1), that is, his arguments on "in accordance with … legal procedures", which I have already rejected.

68. For these reasons, Mr Lee's submission based on article 75(2) also fails.

The President vs the legislature?

69. Mr Lee vaguely suggested that there is a distinction between the President and the legislature. Whatever privilege there may be under common law attaches only to the legislature, not the President. The court's non-intervention is directed at the internal workings of the Legislative Council, but not the acts or inaction of the President.

70. I reject the argument. In so far as the President was performing his role as President or Chairman to preside over meetings of the Legislative Council, what he did or did not do constituted part of the internal workings of the Legislative Council and is therefore covered by parliamentary privilege.

71. That being the case, in my view, the judge was right to reject the pre-enactment challenge before him, and so far as this court is concerned, the post-enactment challenge must also be rejected.

The proper interpretation of the relevant rules of procedure

72. It is therefore unnecessary to express any views on the arguments regarding the scope of application of rule 92, or for that matter, the ambit of rules 41(1), 45 and 57(4) relied on by Mr Lee to say that rule 92 was not applicable (because these other rules were applicable). In my view, the judge rightly declined to entertain the debate.

73. Under common law, an important part of parliamentary privilege, as explained, is that it is for the legislature, not the courts, to construe its own rules and procedures, and further to decide whether they have been obeyed. This is so even if, in the eyes of the court, the legislature's interpretation of its own rules should be erroneous – the court would still not interfere with the matter directly or indirectly: *Bradlaugh v Gossett* (1884) 12 QBD 271, 280-281. Where at issue is whether a rule of procedure made by the legislature purportedly pursuant to article 75(2) is in contravention of some provisions in the Basic Law, the proper interpretation of that rule of procedure is ultimately a matter for the courts, not the legislature (assuming that the matter cannot be resolved satisfactorily by the legislature itself): *Leung Kwok Hung* at paras 24 to 28. The common law position is to that extent modified. However, this is *not* such a case. There is no suggestion of any relevant contravention of the Basic Law. The present case is covered entirely by the common law principles described at the beginning of this paragraph.

74. Indeed this is reinforced by the Basic Law's bestowing on the Legislative Council the power to make, and therefore change, "on its own", its rules of procedure. This must be the bottom line of the matter, in terms of whether the Basic Law intends to leave it to the legislature to interpret and apply its own rules and procedures insofar as its internal workings are concerned (absent any suggestion that the rules are not Basic Law-compliant).

75. With respect, this constitutional arrangement accords with good commonsense. If it were otherwise, it would only encourage attempts to challenge the validity of legislation already passed by the legislature by arguing that in one way or another the legislation had not been enacted by the Legislative Council in accordance with the Rules of Procedure. This would be contrary to the public interest, undermine certainty and be detrimental to good administration. Again, I do not believe that it was the intention of the drafters of the Basic Law to open the floodgate of litigation by tampering with the well-tested common law doctrine of parliamentary privilege absent a compelling reason.

76. This is not to say that the President can disregard the Rules of Procedure as he pleases. Article 72 sets out specific matters that are within his powers and functions. For those matters not covered by article 72(1) to (5), he has to resort to the Rules of Procedure. And if he breaches the Rules of Procedure, there are certainly remedies available within the legislature. After all, the President is elected by and from among the members of the Legislative Council: article 71 of the Basic Law. Moreover, as an elected legislator himself, the President must eventually be answerable to the electorate. But none of this requires one to construe a

constitutional requirement displacing parliamentary privilege in the context of the present case out of the Basic Law when none exists.

A ground of appeal not pursued

77. In the notice of appeal, it is also said that the judge was wrong in finding that "ample opportunity had been afforded to the applicant and the other legislators to have a proper debate" with regard to the proposed amendments to the Bill. At the hearing of the appeal, this was no longer pursued by the applicant, and I need say no more about it.

Disposition of the substantive appeal

78. I would therefore dismiss the substantive appeal.

The appeal on costs

79. As regards Mr Lee's appeal against the order of costs made below on the alternative basis that the judge was right to reject his pre-enactment challenge, it must be remembered that this court takes a very restrained approach to appeals on costs: *Hong Kong Civil Procedure 2013*, vol 1, para 62/2/11.

80. The judge's reasons for his decision on costs were fully set out in his judgment dated 18 July 2012. He correctly followed the decision of this court (differently constituted) in *Sky Wide Development Ltd v Building Authority* [2011] 5 HKLRD 202 which was binding on him to the effect that in an unsuccessful leave application for judicial review, costs should only be awarded in favour of the putative respondent or interested party in exceptional cases. He found that there were exceptional circumstances for

awarding costs in favour of the putative respondent (the President) but he did not find it appropriate to award costs in favour of the Secretary for Justice (by way of a separate set of costs).

81. Having reviewed those reasons, I fail to see on what basis this court can legitimately interfere with the judge's exercise of discretion. Certainly, Mr Lee has not, in his detailed oral submissions, pinpointed any. Rather, in my view, given that the pre-enactment challenge – which, as analysed above, essentially turned on the first of the two arguments run by Mr Lee based on article 73(1) which was, with respect, wholly unarguable, it was an important factor for the judge to take into account which he did.

82. I also agree with the judge's assessment that the applicant had his own political agenda in mind in pursuing the pre-enactment challenge (whether one agrees with his political views on the amendments or with the filibustering exercise is neither here nor there). His insistence on applying for interim injunctive relief until the tail end of Mr Lee's opening speech at the hearing on 18 May 2012 was also something that the judge could and did take into account.

83. The judge also rightly took into account the fact that in the papers he filed in support of his leave application, the applicant did not refer the court to two leading local authorities, in which he was personally involved, on parliamentary privilege (*Leung Kwok Hung*; *Cheng Kar Shun*). He also rightly rejected his argument based on lack of resources.

84. All in all, I find no justification for interfering with the judge's exercise of discretion on costs.

85. The possibility that the Court of Final Appeal may in a later case give authoritative guidance on the question of costs when a leave application fails is not a good reason to adjourn the present appeal on costs. I see no reason why this court should not decide the costs appeal on the law as it stands.

86. I would dismiss the appeal on costs.

The costs of this appeal

87. Finally, as regards the costs of this appeal, the applicant had already had the benefit of the two judgments of the learned judge which I would uphold, when he lodged the present appeal. His arguments at this post-enactment stage are no better than those at the pre-enactment stage before the judge. They are not reasonably arguable. I see no reason why costs should not follow the event. As presently advised, I would order him to pay the costs of the putative respondent in this appeal.

88. I can understand why the judge declined to order the costs of the Secretary for Justice against this applicant. However, this appeal involves a post-enactment challenge directed at the amendments which are already law. The Secretary for Justice is a necessary party to this appeal to defend the legal validity of the amendments. At present, I see no reason why his costs should not be borne by the applicant.

89. I would therefore make a costs order nisi that the applicant pay to the putative respondent and to the Secretary for Justice respectively their costs of the appeal, to be taxed if not agreed, together with a certificate for

two counsel. Any application to vary the costs order nisi will be dealt with on paper.

Hon Kwan JA:

90. For the reasons given by the Chief Judge, I agree with him the substantive appeal and the appeal on costs should be dismissed. I agree also with him on the costs order nisi of this appeal.

Hon Poon J:

91. I agree with the judgment of the Chief Judge. I too would dismiss the substantive appeal and the appeal on costs. I also agree with the costs orders that the Chief Judge has made. I would like to emphasize one particular point only.

92. Stripped of all the niceties of legal submissions, the stark facts before Lam J were these. When the filibustering tactics that the applicant and his political allies in the Legislative Council deployed against the Bill failed because the President ended the debate, he rushed to court to seek the court's immediate intervention in the legislative process. But, as explained by Lam J and the Chief Judge, on the facts of this case, there was simply no basis whatsoever for the court to disregard the parliamentary privilege and intervene in the internal workings of the Legislative Council. In my view, the application for judicial review was no more than a further but futile attempt by the applicant to delay the legislative process of the Bill. Put bluntly, he wanted to pursue something in the court which he had already failed to achieve in the political arena. It is only right that leave was

refused lest the court's process would be used (or abused to be more precise) by the applicant for his own political agenda.

Hon Cheung CJHC:

93. We accordingly dismiss the appeal. We also make a costs order nisi as set out in paragraph 89 above.

(Andrew Cheung) Chief Judge of the High Court	(Susan Kwan) Justice of Appeal	(Jeremy Poon) Judge of the Court of First Instance

Mr Martin Lee SC, Mr Hectar Pun and Mr Carter Chim, instructed by Lam and Lai, for the applicant

Mr Jat Sew Tong SC and Mr Anthony Chan, instructed by Lo & Lo, for the putative respondent

Mr Jin Pao, instructed by the Department of Justice, for the Secretary for Justice