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IN PURSUIT OF JUSTICE: THE PLACE OF PROCEDURE IN JUDICIAL CASE MANAGEMENT

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Judicial case management is a delicate work of art. On one hand, it is said that justice hurried is justice buried. The courts must carefully adjudicate each case based on its merits to ensure that an accurate outcome would be realised. To this end, judges are often concerned with obtaining all available evidence before assessing each claim. Yet, on the other hand, it has been remarked that justice delayed is justice denied. As such, the courts are also mindful that cases must move along in a fairly expeditious manner. The prevailing attitude of both English and Singapore courts is therefore to balance the enforcement of procedural discipline with the imperative to judge a case on its substantive merits. This article argues that such a "balancing" approach is not the most appropriate philosophy to adopt. Instead, it proposes a "lexical priority" approach where procedural discipline occupies a prior position to substantive justice, preceding the latter by way of a precondition. It offers justifications for the "lexical priority" approach and exposes the shortcomings of the "balancing" approach by examining the English and Singapore jurisprudence on case management.

I. Introduction

"Justice", much like the "Rule of Law", is an elusive concept and carries a different meaning for different people.[1] This article is however not a jurisprudential investigation on what 'justice' entails.[2] Instead, the scope is a relatively modest and focused one. It examines the position that procedures occupy within the justice system as courts navigate through their day-to-day tasks of dispute resolution. As Andrew Phang JC (as he then was) rightly observed in *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd*: "[I]n the sphere of practical reality, there is often a *tension* between the need for procedural justice on the one hand and substantive justice on the other. The task of the court is to attempt… to *resolve* this tension".[3] "Procedural justice" here refers to the adherence to rules, court directions and due process, while "substantive justice" refers to litigants' rights and their merits in pursuing or defending a claim. From a judicial case management perspective, there exists a perennial tension between these two spheres of justice. When a litigant has

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1 John Gardner, "Amartya Sen's *The Idea of Justice*" (2012) 6 J of L, Phil & Culture 241.

2 For a discussion of what 'justice' could entail, see: Nicholas J McBride and Sandy Steel, *Great Debates in Jurisprudence*, (London: Palgrave, 2d Ed, 2018) at ch 9.

3 *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [9] [emphasis in original] [*United Overseas Bank*].

unreasonably caused inordinate delays in the course of litigation, should the court impose sanctions that would adversely affect the litigant's rights to enforce his substantive claim? This is a question that invites no easy answer, with at least three different approaches having been identified. In this regard, it shall be contended that the prevailing responses from both the English and Singapore courts have only garnered limited success, and that a "lexical priority" approach, where procedural discipline is a precondition to a litigant's substantive merits, would be a better solution in resolving this tension.

The article will proceed as follows. Part II examines the various approaches that courts have adopted to resolve the tension between procedural and substantive justice. It will discuss the "justice on the merits" approach, the "balancing" approach and the "lexical priority" approach. Part III then offers justifications for the "lexical priority" approach. It argues that this approach is more appropriate because respecting the primacy of procedural justice confers legitimacy on the courts, helps to ameliorate the risk of a psychological mechanism known as "self-deception" and assists in overcoming the hurdle of inconsistency. The latter two problems are evident in the "balancing" approach. Part IV demonstrates the inconsistent developments in English law as the courts have struggled to apply the balancing test as articulated by their Court of Appeal. Part V adopts a comparative analysis and discusses the case management strategy in the Singapore courts, with particular reference to their governance of 'unless orders'. While the Singapore courts have adopted and refined their balancing approaches over the decades, and have valuable perspectives to offer, it is suggested that these approaches ultimately do not escape the problems that have troubled the English courts. Part VI concludes.

II. The Different Responses to Resolve the Procedural-Substantive Tension

In attempting to resolve the tension between procedural and substantive justice, courts have formulated different approaches towards case management. Two of such approaches remain prevalent till today. The first is dubbed the "justice on the merits" approach,[4] while the second is commonly referred to as the "balancing" approach or the "proportionality" approach. However, neither approach represents the ideal method to resolve this tension. Instead, it is submitted that a better way forward requires procedural justice to occupy a lexically prior position to substantive justice. Each approach will be discussed in turn.

A. *Procedural justice as a "handmaid" to substantive justice*

Following the reforms by the Supreme Court of Judicature Acts 1873 and 1875, judges in the UK have demonstrated a strong tendency to approach case management with the "justice on the merits" mentality. Notably, Collins MR declared in

[4] Adrian Zuckerman, "The Revised CPR 3.9: A Coded Message Demanding Articulation" (2013) 33 CJQ at 123, 127 [*Zuckerman*].

Re Coles and Ravenshear Arbitration that "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules… as to be compelled to do what will cause injustice in the particular case".[5] Under this approach, any tension is resolved in favour of substantive justice such that procedure readily yields to, and is made subservient to, substantive law. Procedures are merely "general rules", and do not form part of the justice equation. Cases are therefore managed and decided solely based on a litigant's substantive rights and merits.

The "justice on the merits" approach in case management trivialised the importance of procedure and has led to the development of a complacent attitude amongst litigants and judges towards compliance with procedural rules. The consequences were excessive delay and exorbitant costs in the adjudication of disputes.[6] To address this problem, the Civil Procedure Rules 1998 ("CPR") were introduced pursuant to the Woolf reforms,[7] with CPR 3.9 governing the jurisdiction to grant relief from sanctions for non-compliance with any rules, directions, or court orders. However, the reforms were widely regarded to be a failure as judges continued to manage cases via an assessment of the litigants' merits alone.[8] Some judges insisted that while "the interests of good administration of justice were important, the rights of claimants were more important".[9] It was also not uncommon for courts to tolerate late compliance for the sake of doing justice on the merits, provided that the non-defaulting party had not suffered prejudice and the defaulting party could make amends through costs.[10]

The release of the Jackson Report saw further reforms enacted in 2013.[11] Nevertheless, due to a strong "lingering judicial attachment" for the "justice on the merits" approach, the reforms were once again not as effective as envisaged.[12] There is still a tendency for judges to approach case management issues, including applications for relief from sanctions, with excessive sympathy towards the substantive merits of an individual case at the expense of procedural discipline. For instance, Lord Mance opined in *Real Time Systems Ltd v Renraw Investments Ltd* that it "would be very strange" and "radical" for relief of sanctions not to be granted where evidence relating to a case would consequently be prohibited.[13] Others have argued that a tougher stance, one which hardens its heart and refuses to allow a party

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5 *Re Coles and Ravenshear Arbitration* [1907] 1 KB at 1, 4.

6 *Zuckerman, supra* note 4 at 128.

7 The Woolf reforms were led by Lord Woolf in the late 1990s via his reports, and consequently led to the introduction of the Civil Procedure Rules of 1998. These reforms sought to help reduce the cost and time spent by the courts on civil proceedings by reducing the costs of litigation, simplifying procedural rules, and removing unnecessary complexities in the litigation process.

8 UK Courts and Tribunals Judiciary, "Review of Litigation Costs: Final Report" [2010] < https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> at 397.

9 *Fay v Chief Constable of Bedfordshire Police* [2003] EWCA Civ 1770 (QB).

10 *Roberts v Williams* [2005] EWCA Civ 1086 at [27].

11 The Jackson reforms in 2013 were the result of Lord Justice Jackson's wide-ranging review of the civil litigation system. These reforms dealt with, *inter alia*, litigation funding, the conduct of litigation and issues with costs, and sought to streamline the dispute resolution process while discouraging unmeritorious claims, particularly for personal injury claims.

12 *Zuckerman, supra* note 4 at 134.

13 *Real Time Systems Ltd v Renraw Investments Ltd* [2014] UKPC 6 at [18].

to adduce probative evidence that has not been exchanged at the required time, or which strikes out a claim or defence for non-compliance with an unless order, would transform rules into tripwires for the unwary and incompetent, or allow them to be utilised as procedural weapons for the unscrupulous.[14]

Although the Singapore courts have traditionally adopted a more robust approach towards case management and relief from sanctions, the intuitive appeal of the "justice on the merits" approach has proven difficult to look past in some instances. Thus, in *Lea Tool and Moulding Industries Pte Ltd v GCU International Insurance plc*,[15] the High Court set aside a judgment in default of an unless order. Lai Kew Chai J held that there were "triable issues" and that the claim at stake was "substantial".[16] Notwithstanding that the application to set aside the default judgment was made nearly three years late, the applicant's non-compliance with the unless order was "minor".[17] His Honour further emphasised that the applicant "should not be deprived of the benefit of an insurance cover merely because of a minor [procedural] irregularity"[18] given that "procedural laws are ultimately handmaidens to help us achieve the ultimate and only objective of achieving justice".[19] The last statement underscores that on the "justice on the merits" approach, procedural discipline does not constitute an inherent component of 'justice' itself.

B. *Procedural justice to be "balanced" with substantive justice*

The 2013 Jackson reforms were meant to expunge the "justice on the merits" mentality once and for all, and the revised CPR 3.9 now requires the judge, on an application for relief from sanctions, to "consider all the circumstances of the case" in order to "deal justly" with the application, bearing in mind the need (1)(a) for litigation to be conducted efficiently and at proportionate cost, and (1)(b) to enforce compliance with rules, practice directions and orders. The imperative words of "proportionate" justice and to "consider all the circumstances of the case" indicate that judges should adopt a "balancing" approach going forward.

That CPR 3.9 requires judges to embrace a "balancing" approach was affirmed in the seminal decision of *Denton v TH White Ltd*.[20] Lord Dyson MR and Vos LJ in a joint majority judgment articulated a "three-stage" test. The first stage examines whether the breach was serious.[21] The second stage assesses whether there are any good reasons to excuse the breach.[22] The third stage requires a judge to "weigh in the balance" along with all the circumstances of the case to deal with the application justly.[23] In conducting this balancing exercise, the two factors as stipulated in

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14 *Ryder Plc v Beever* [2012] EWCA Civ 1737 at [62].
15 *Lea Tool and Moulding Industries Pte Ltd v GCU International Insurance plc* [2000] 3 SLR(R) 745.
16 *Ibid* at [3], [21].
17 *Ibid* at [21].
18 *Ibid* at [21].
19 *Ibid* at [16].
20 *Denton v TH White Ltd* [2014] 1 WLR 3926 [*Denton*].
21 *Ibid* at [25].
22 *Ibid* at [30].
23 *Ibid* at [56].

CPR 3.9(1)(a) and (b) are to be given "particular importance".[24] With this particular emphasis, the majority intended to signal to the legal fraternity that sloppy compliance with procedural rules would no longer be condoned, and that more weight would be attached to procedural discipline. Crucially, procedure is no longer a mere handmaid to substantive justice, and a more nuanced balancing approach between procedural and substantive justice has been adopted.[25]

Such a "balancing" approach towards case management also represents the modern-day philosophy of the Singapore judiciary. For instance, Phang JC observed the following in *United Overseas Bank Ltd*:

> [I]f the procedure is unjust, that will itself taint the outcome.
>
> On the other hand, a just and fair procedure does not, in and of itself, ensure a just outcome. In other words, procedural fairness is a necessary but not sufficient condition for a fair and just result.
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> The quest for justice, therefore, entails a continuous need to *balance* the procedural with the substantive.[26]

The mission to secure a proportionate and balanced model of justice has since been reiterated and affirmed on multiple occasions by the Singapore Court of Appeal.[27] A more comprehensive examination of the relevant jurisprudence emanating from the Singapore courts will be undertaken in Part V below.

The call for a "balancing" approach has been echoed and supported by the academic community. Wong, while lauding the heavier emphasis on procedural compliance as a welcome development, ultimately urged for a balance to be struck between procedure and substantive merits.[28] Similarly, Sime has advocated a more refined and balanced approach towards case management, one that reflects a "middle course" and "adopts a less tolerant and robust approach to non-compliance".[29] The desire to resolve the tension via a balancing exercise is understandable and ostensibly appealing. Procedure is an integral component of justice and should not be neglected at the expense of substantive merits alone. As Lord Neuberger explained extra-judicially:

> Procedural justice goes beyond the immediate concerns of individual litigants; it goes beyond what is necessary to achieve a decision on the merits in any

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24 *Ibid* at [32].

25 It is interesting to note that Jackson LJ, at [85], disagreed with the majority in *Denton*. His Lordship opined that the factors in CPR 3.9(1)(a) and (b) should not be given "paramount" or "particular" importance. Instead, they should be given equal weight, no more and less, to all the other circumstances of the case.

26 *United Overseas Bank*, *supra* note 3 at [6] – [8].

27 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 [*Mitora*]; *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196.

28 Denise Huiwen Wong, "Sanctions: Where Law and Justice Collide" (2014) 33 CJQ at 24, 30.

29 Stuart Sime, "Sanctions after Mitchell" (2014) 33 CJQ at 133, 156 [*Sime*].

> individual case. In this way, it is *outward looking*… in order to strike the balance between substantive justice in the individual case and procedural justice for all.[30]

In addition, Lord Dyson MR in commenting on amendments to the CPR was emphatic that:

> Dealing with a case justly does not simply mean ensuring that a decision is reached on the merits. It is a mistake to assume that it does. Equally, it is a mistaken assumption, which some have made, that the overriding objective of dealing with cases justly does not require the court to manage cases so that no more than proportionate costs are expended. It requires the courts… to achieve the *effective and consistent enforcement of compliance with rules, [practice directions] and court orders*.[31]

His Lordship went on to highlight that "the proper administration of justice goes beyond the immediate parties to litigation. It requires the court to consider the needs of all litigants, all court-users. This idea finds expression in the overriding objective".[32] Therefore, both Lords Neuberger and Dyson MR were at pains to emphasise the distinction between individual justice and systemic justice. While the former looks *inwards* towards the parties of a particular case, the latter looks *outwards* beyond the confines of any individual case in ensuring that judicial services remain accessible to all litigants. The enforcement of procedural discipline ensures that cases would proceed and be disposed of in a timely fashion, thereby freeing up limited time and resources to adjudicate other cases.

C. *Procedural justice as a "lexical priority" to substantive justice*

Although the "balancing" approach may appear to be an attractive solution in the classroom, this article contends that this approach plays out rather differently before the courtroom. It shall be argued that the superior way to resolve the tension is to conceive procedural justice as being lexically prior to substantive justice. The concept of "lexical priority" featured heavily in Rawls's seminal work on "Justice as Fairness",[33] although the analysis advanced here does not engage with his arguments (which explored a very different question from case management) save for the borrowing of this idea of "lexical priority". This unusual phrase requires some explanation. If it is said that A is lexically prior to B, it means that B can only be given effect to against a background matrix that has given effect to A.[34] In other words, A must always come before B, preceding it by way of a precondition. In the

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[30] David Neuberger, "A New Approach to Justice – From Woolf to Jackson", in Gary Meggitt (ed), *Civil Justice Reform: What has it Achieved?* (Sweet & Maxwell, 2010) at 11 [emphasis added].

[31] John Dyson, "The application of the amendments to the Civil Procedure Rules" (2014) 33 CJQ 124 at 127 [emphasis added] [*Dyson*].

[32] *Ibid* at 128.

[33] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) [*Rawls*].

[34] *Ibid* at 42.

context of the argument at hand, the "lexical priority" approach differs materially from the "balancing" approach. The difference can be illustrated by the following:

"Balancing" Approach:
Justice = procedural discipline + substantive merits

"Lexical Priority" Approach:
Justice = procedural discipline
+
substantive merits

The "lexical priority" approach to case management accords primacy to procedural justice. However, it does not turn the tables around and make procedure the mistress rather than the handmaid of justice. The claim here is that considerations of procedure and substantive merits do not enter the justice equation simultaneously. Consequently, procedural justice need not be "weighed" against substantive justice to reach some sort of a "balance". Procedural justice ought to be realised first before the court takes a closer look at the litigants' merits in a case.

As this approach is novel, there is no direct doctrinal endorsement for it unlike the other two approaches. Nevertheless, there are cases which impliedly lend support to such an approach. In *Edmund Tie & Co (SEA) Pte Ltd v Savills Residential Pte Ltd*, Choo Han Teck J said that:

> It is substantive law and not procedure that occupies the throne, but one must climb the steps of procedure if he is to pluck the crown. Part of the reason law is regarded as a discipline is that solicitors are required to observe procedure, which is an essential part of respecting the law.[35]

The view expressed by Choo J here differs from the usual balancing approach.[36] In fact, Choo J's analogy of procedure as "climbing steps" to substantive justice accords with the "lexical priority" approach. Before a party can claim victory on the basis of his substantive merits, he must *first* comply with the procedural rules and court orders. In this sense, procedural discipline is a precondition before a party can have his day in court to argue on the substantive law.

There are also English authorities that lend indirect support to the "lexical priority" approach. *Mitchell v News Group Newspapers Ltd*[37] is one of them. Although Lord Dyson MR delivered both *Mitchell* and *Denton*, it should be noted that *Mitchell* pre-dated *Denton*, and that *Denton* did modify and revise the guidance set out in *Mitchell*. In *Mitchell*, Lord Dyson MR, who delivered the unanimous decision of the Court of Appeal, held that the two factors in CPR 3.9(1)(a) and (b) were of "paramount importance".[38] Furthermore, if an incident of non-compliance cannot

[35] *Edmund Tie & Co (SEA) Pte Ltd v Savills Residential Pte Ltd* [2018] 5 SLR 349 at [13].

[36] Jeffrey Pinsler SC, "The Ideals in the Proposed Rules of Court" (2019) 31 SAcLJ at 987, 992.

[37] *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 [*Mitchell*].

[38] *Ibid* at [36].

be characterised as trivial, a court should only grant relief from sanctions if there was a good reason for it.[39]

Mitchell is considered a watershed decision that caused a great deal of consternation and criticism from the Bar. It has been described as "having changed the face of litigation overnight".[40] The high degree of hostility prompted Lord Dyson MR to revise the guidance in *Denton* subsequently. Two differences are worth emphasising. First, the majority in *Denton* downgraded the importance of the two factors in CPR 3.9(1)(a) and (b) from "paramount importance" to "particular importance". Second, if the non-compliance was not trivial and there was no good reason for the default, the court could still grant relief if it was just to do so having considered all the circumstances of the case. In other words, the trivial breach/good reasons inquiry were merely factors to be weighed in the balance along with all other circumstances of the case.[41] The effect of *Denton* was therefore to soften the tough stance taken in *Mitchell*.

Notwithstanding the revisions in *Denton*, it is submitted that *Mitchell* was a step in the right direction towards the "lexical priority" approach. "Paramount" means something that is "chief in importance" or "more important than anything else".[42] As such, the need for litigation to be conducted efficiently and the robust enforcement of procedural discipline are to be regarded as pre-eminent. In that sense, it is implicit in *Mitchell* that the court is not weighing the procedural against the substantive to reach the appropriate balance. Further support for the proposition that the conduct of case management and the grant of relief from sanctions need not involve a balancing between procedure and substance can be found in *Prince Abdulaziz v Apex Global Management Ltd*, where Lord Neuberger, with the concurrence of three other Law Lords, held that the weight of a litigant's substantive merits is generally irrelevant in relation to case management.[43] Furthermore, his Lordship added that since a trial involves procedural directions, it is difficult to perceive how the merits of a litigant should ordinarily interfere with the nature or enforcement of these directions.[44]

While positing procedural justice as being lexically prior to substantive justice means that there is no balancing exercise between the two, it does not follow that the courts will never grant relief from sanctions for every instance of non-compliance. Such an approach towards case management may have accorded primacy to procedural discipline but it is not a rigid dogma that leaves no room for flexibility. Three matters in particular should influence the court's exercise of discretion in granting relief.

The first concerns the *de minimis* exception. The maxim of *de minimis non curat lex* applicable to most areas of the law applies equally here. Therefore, where a

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39 *Ibid* at [41].

40 Stephen Richards, "The Mitchell/Denton Line of Cases: Securing Compliance with Rules and Court Orders" (2015) 34 CJQ 249 at 251.

41 Andrew Higgins, "CPR 3.9: The Mitchell Guidance, The Denton Revision, and Why Coded Messages Don't Make for Good Case Management" (2014) 33 CJQ 379 at 388.

42 Cambridge Dictionary, *Meaning of Paramount in English,* Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/paramount>.

43 *Prince Abdulaziz v Apex Global Management Ltd* [2014] 1 WLR 4495 at [29].

44 *Ibid* at [30].

litigant has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms, he should be entitled to relief. This was recognised as a legitimate reason for relief in *Mitchell*,[45] which was subsequently followed in *Viridor Waste Management Ltd v Veolia ES Ltd*, where Popplewell J rejected the defendant's submission that any delay, be it minutes or hours, is a serious breach of procedural compliance.[46] Indeed, the majority in *Denton* accepted that a 45 minute delay in filing a cost budget was not serious.[47] Where then is the line drawn in the sand? It is suggested that any late compliance beyond one calendar day would not qualify under this *de minimis* exception. This is so even if the late compliance would not have a significant, or indeed any, adverse impact on the conduct of the litigation. While this is somewhat strict and arbitrary, it is necessary to mitigate the possibility of satellite litigation – a major reason why the Woolf reforms failed in the first place.[48] Leaving this exception open-ended is likely to encourage litigants to argue that their default was insignificant in light of the potentially trivial consequences on the litigation timetable. Furthermore, with such a bright line drawn, this also encourages parties who anticipate that compliance will not be forthcoming to seek early relief or extension of time from the court, rather than to seek relief only after a breach or delay has occurred.

The second exception for the court to consider is whether the time allocated to the performance of the particular process was reasonable at the time the case management direction was issued.[49] Timetables for pre-trial processes are a *bona fide* estimate and are normally formulated on the basis of information provided by the parties and in consultation with them. Therefore, if a party is of the opinion that the time allowed by a court order is insufficient, he should make representations to the court to have the order varied. If later developments in the course of litigation reveal that the original estimate of time was indeed too short or unreasonable, although it seemed reasonable at the time the timetable was drawn up, it would be justifiable for the court to grant a time extension.[50] Be that as it may, a party should, where possible, not wait until a default has occurred before applying for relief from sanctions on the ground that the original timetable was unreasonable. In short, a party is expected to be diligent in complying with the order and should act as soon as he realises that the original timeline for compliance is too short.

The third exception for the court to consider is whether there exists any reasonable excuse for non-compliance after directions had been issued that was beyond the control of the party.[51] Examples would include a party or his solicitor suffering from a debilitating illness, or being involved in an accident that has prevented the due compliance with an order.[52] By contrast, a mere overlooking of a deadline, whether on account of being overworked or otherwise, is unlikely to qualify as a

[45] *Mitchell*, *supra* note 37 at [40].
[46] *Viridor Waste Management Ltd v Veolia ES Ltd* [2015] EWHC 2321 (Comm) at [23].
[47] *Denton*, *supra* note 20 at [80].
[48] *Zuckerman*, *supra* note 4 at 131.
[49] *Ibid* at 136.
[50] *Mitchell*, *supra* note 37 at [41].
[51] *Ibid* at [43].
[52] *Ibid* at [41].

reasonable excuse justifying the grant of relief from sanctions.[53] Nevertheless, the court should be astute to guard against an opportunistic defaulter with a convenient excuse. An excuse would be "reasonable" only if it bears some causal or proximate nexus to the default to support a meaningful and complete explanation. For instance, being hospitalised for food poisoning is likely to constitute as a reasonable excuse for a two-week delay but not for a four-month delay. In *Heathfield International LLC v Axiom Stone (London) Ltd*,[54] Judge Simon Barker QC rejected the defendant's reason for non-compliance, noting "its brevity and vagueness"[55] and that the bare assertion was "less than complete and open to doubt".[56]

The "lexical priority" approach materially differs from the "balancing" approach in *Denton* in that once a reasonable excuse or an extenuating circumstance has been provided, relief from sanctions would be granted. There is no further stage to weigh in the balance all other circumstances of the case. Conversely, relief would be refused in the event of non-compliance if none of the three exceptions applied. Once again, the substantive merits of the defaulting party should not be invoked to mitigate the non-compliance. This should not be viewed as a punitive or draconian measure. The effects wrought by these sanctions are "regulatory consequences" rather than a form of punishment for recalcitrant litigants.[57] The proposition that the robust enforcement of procedural discipline is not intended as a punishment is fortified by *Mitora Pte Ltd v Agritrade International (Pte) Ltd*,[58] where the Singapore Court of Appeal confirmed that enforcing the consequences of an unless order is "not to punish misconduct but to secure a fair trial in accordance with due process of law".[59]

In other words, a refusal to grant relief in the absence of a justified reason is merely a "penalty" as opposed to a "punishment". As Penner has argued, a "penalty" is imposed to disentitle a party from taking an advantage by playing outside a set of prescribed rules.[60] Examples of penalties include (i) the equitable rule that a fiduciary who has made an unauthorised profit must be deprived of that gain,[61] and (ii) the barring of a claimant from enforcing his rights where his claim is commenced beyond the relevant limitation period.[62] Similarly, a party who defaults on a case management direction or order without a justified explanation is simply disentitled from gaining an unfair advantage of buying more time to prepare his case without any consequence. The sanctions could take the form of depriving the admission of witness statements where they are filed late, or the striking out of claims that have

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53 *Ibid.*

54 *Heathfield International LLC v Axiom Stone (London) Ltd* [2020] EWHC 1075 (Ch).

55 *Ibid* at [31].

56 *Ibid* at [15].

57 Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* 4d ed (London: Sweet & Maxwell, 2013) at ch 11.136 [*Zuckerman Civil Procedure*].

58 *Mitora*, *supra* note 27.

59 *Ibid* at [45].

60 James Penner, "Punishments and Penalties in Private Law, with Particular Reference to the Law Governing Fiduciaries" in Elise Bant, Wayne Courtney, James Goudkamp and Jeannie Marie Paterson, eds. *Punishment and Private Law* (London: Hart Publishing, 2021) at 115 [*Penner*].

61 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

62 In this regard, s 6(1)(a) of the Limitation Act 1959 (2020 Rev Ed) provides that, subject to the Act, actions founded on a contract or on tort shall not be brought after the expiration of 5 years from the date on which the cause of action accrued.

not been filed on time. In addition, recognising a particular sanction as a "penalty" instead of "punishment" would mean that whether the sanction applies does not turn on any form of *mens rea*.[63] Unlike a punishment for a crime, an inquiry into the defaulting party's mental state is not relevant. The intended effect of the penalty is simply to strip him of the advantage gained as a result of breaching the rules.[64] For instance, there is no need for a contracting party to act in bad faith or have ulterior intentions when deciding to strike down a clause as a penalty.[65] In a similar vein, the decision to enforce a sanction in the case management context should not rest on whether the defaulting party had committed a breach intentionally or maliciously.

III. The Justifications for the "Lexical Priority" Approach

It is trite that the "justice on the merits" approach is no longer the preferred route for judicial case management. In an attempt to expunge this lingering mentality, English law has undergone a series of reforms and the courts have settled on a "balancing" approach. This approach is also the prevailing attitude amongst the Singapore courts. As will be demonstrated in Parts IV and V below, this "balancing" approach has been met with limited success in both the English and Singapore courts. It has been argued that a "lexical priority" approach would be preferable instead. The above discussion has illustrated *how* this approach is supposed to be applied, and the ways it differs from the "balancing" approach. The ensuing analysis will justify *why* the approach should be adopted.

A. *Procedural justice confers legitimacy on the courts*

It has been commented that "it is easier to make things legal than to make them legitimate".[66] Indeed, the legality of a system does not *ipso facto* guarantee its legitimacy; the fact that a law is validly enacted does not automatically mean that it is just.[67] Recognising the primacy of procedural discipline will ensure that the courts, in their daily task to dispense justice, remain a legitimate institution. Consider the following illustration: Worker was an employee of Factory Ltd. Worker contracted mesothelioma due to negligent malpractices of the factory and sued Factory Ltd. The factory engaged in numerous tactical delays and satellite litigation. In addition, it repeatedly flouted court directions, claiming that it needed more time for disclosure and the filing of expert witnesses' statements even though reasonable time had elapsed. The court indulged in the defendant's conduct and granted relief from

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63 *Penner*, *supra* note 60 at 116.

64 Indeed, it has been noted in dicta that the fact that a fiduciary acts "lawfully, in good faith and indeed avowedly in the interests of the [beneficiary]…[would] not absolve them from accountability for any profit which they made, if it was by reason and in virtue of their fiduciary office" (Viscount Dilhorne in *Boardman v Phipps* [1967] 2 AC 46 at 86).

65 *Cavendish Square Holding BV v Talal El Makdessi* [2016] AC 1172 at 1184.

66 Sébastien-Roch Nicolas de Chamfort, *Maximes et pensées* (Paris: Garnier-Flammarion, 1968) at 134.

67 The classic example of Parliament passing a statute providing that "All blue-eyed babies shall be killed" comes to mind.

sanctions on numerous occasions in the hope of securing an accurate outcome based on the merits. The protracted litigation dragged on for the next four years and Worker finally won a huge sum as compensation. However, his mesothelioma was already terminal, and no amount of money would provide him with treatment. Had the trial proceeded according to schedule, it would have only taken two years to conclude, and Worker's condition would still be non-terminal and treatable.

The function of the civil courts is to enforce and vindicate rights.[68] The well-known maxim articulated by Holt CJ in *Ashby v White*[69], "*Ubi jus ibi remedium*".[70] bears repeating. However, as the above example has shown, justice cannot be achieved independently of process and to a certain degree procedural rules themselves do influence the substantive justice of a case.[71] As observed by Chan Sek Keong SJ in *V Nithia v Buthmanaban s/o Vaithilingam*, "[w]hen procedure is defective, the very substance of the result may rightly be called into question".[72] Worker in the illustration above might have eventually been able to enforce his right to damages but it would have been a Pyrrhic victory as he would be unable to vindicate his right through an effective remedy. It is unlikely that Worker would accept that the court was legitimately dispensing justice given that the "very substance" of his litigation would have been robbed of any meaningful content. Therefore, *before* a court can adjudicate a case on its merits, it must *first* ensure that its procedure and orders are strictly complied with for the final outcome to be just.

Furthermore, it would not only be Worker's claim that would be adversely affected. The consequence of the court having to spend an unnecessary amount of time and resources on his case would mean that it is deprived of the opportunity to handle other cases. This knock-on effect would excessively burden the entire justice system, culminating in a huge backlog of cases, and compromising access to justice. Over time, public frustration at the inordinate delays would result in an erosion of the confidence and respect for the courts. Consequently, the legitimacy of the justice system in the eyes of the litigants seeking to have their claims heard would be lost. Therefore, in iterating how procedure should not be neglected at the expense of substantive law, Phang JC in *United Overseas Bank* rightly observed that: "This is especially significant because, in many ways, this is how, I believe, laypersons perceive the administration of justice to be. The legitimacy of the law in their eyes must never be compromised".[73] Respect and legitimacy of the courts do not derive solely from the justice of individual cases. More importantly, the legitimacy of the courts can only be maintained if systemic justice is secured (i.e. to secure a proper and functioning judicial system that can competently handle a stream of caseload). There is a popular Chinese idiom that goes, "there must first be a country before one can build a home". This applies to the justice system in equal force – there must first be a sustainable judicial system dealing with litigants' cases at a steady rate before any party can have a meaningful day in court and obtain an adequate remedy. To

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[68] *Zuckerman Civil Procedure*, *supra* note 57 at para 1.5.

[69] *Ashby v White* (1703) 92 ER 126 at 137.

[70] "When there is a right, there is a remedy".

[71] See also Jay Tidmarsh, "Resolving Cases On The Merits" (2010) 87 Denv U LR 407 at 411.

[72] *V Nithia v Buthmanaban s/o Vaithilingam* [2015] 5 SLR 1422 at [37].

[73] *United Overseas Bank*, *supra* note 3 at [8].

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achieve this, the enforcement of procedural discipline ahead of the considerations of substantive merits at the case management stage is paramount. In this regard, parallel lessons can be drawn from *Re Ang Jian Xiang*.[74] This case concerned the admission of Advocates and Solicitors. In four of these applications to be called to the Bar, the supervising solicitors were late although their practice trainees were on time.[75] However, the Singapore High Court dismissed the applications notwithstanding that the trainees would have been admitted had their solicitors been punctual. Choo Han Teck J not only reiterated that rules of procedure are "expected to be followed",[76] but also emphasised that:

> When counsel is late for court it is a mark of disrespect, not for the individual judge as a person, but to the *court as representing a legal institution*. Unpunctuality in such applications also impart the wrong lesson that the court can be kept waiting.[77]

The above comment demonstrates that in robustly enforcing procedure and court orders, the court is preserving its legitimacy as a public institution by preventing its systems from falling into disrepute. Choo J's decision to dismiss the applications on the ground of the solicitors' procedural default despite the fact that the trainees' applications were meritorious was a prime example of how procedural discipline must first be observed before entertaining the substantive merits.

B. *Ameliorating the risk of "self-deception"*

The "lexical priority" approach is preferable to the "balancing" approach in case management because judges who practise the latter leave themselves susceptible to "self-deception" whereas the former is likely to ameliorate this risk. "Self-deception" is a phenomenon rooted in moral psychology. It is a psychological mechanism that persuades people to reach a conclusion that is more comfortable and intuitive for them to adopt even when it is otherwise unwarranted.[78]

Two points about "self-deception" must first be mentioned. First, it must be emphasised that the following analysis does not accuse judges of being dishonest. On the contrary, it pre-supposes that judges discharge their duties in good faith.[79] The phenomenon of "self-deception" may afflict anyone, including *bona fide* fiduciaries exercising their professional judgments.[80] Second, it is not contended that *all* judges will *always* be influenced by "self-deception". What is submitted instead is

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[74] *Re Ang Jian Xiang* [2016] SGHC 92 [*Re Ang*].

[75] *Ibid* at [1].

[76] *Ibid* at [8].

[77] *Ibid* at [3] [emphasis added].

[78] Donald Davidson, "Deception and Division" in J Elster, ed., *The Multiple Self* (Cambridge: Cambridge University Press, 1986) at 79.

[79] Joseph Butler & WR Matthews, *Fifteen Sermons Preached at the Rolls Chapel and A Dissertation upon the Nature of Virtue* (London: Bell, 1914) at 153.

[80] Irit Samet, "Guarding the Fiduciary's Conscience–A justification of a Stringent Profit-stripping Rule" (2008) 28 OJLS 763 at 775–777 [*Samet*].

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that there is a *real risk* that judges could unknowingly labour under "self-deception" when trying to balance the procedural against the substantive.

In the context of case management, it is submitted that the intuitive appeal for "substantive justice" is greater than "procedural justice". That is the seed of the "self-deception" mechanism in influencing the judges' minds. The "lingering judicial attachment" for the "justice on the merits" approach alluded to earlier is not exaggerated.[81] Speaking in an extra-judicial capacity, Lord Dyson MR summarised the sentiments from some quarters of the profession as follows:

> The court's refusal to grant relief from a sanction, for instance, may appear to be a denial of the need to ensure that justice is done as between the parties. Faced with an apparent conflict between the need to do justice to the parties, to secure a decision on the merits, and the need to secure proportionality it is easy to see why the former might – and often has – prevailed. The courts exist to do justice: where justice and proportionality come into conflict, the former should be given greater weight. Intuitively this seems obviously correct. After all, is a judge not required by his or her oath "to do right by all manner of people, after the law and usages of this realm, without fear or favour, affection or ill will?[82]

His Lordship then continued:

> Perhaps this is not surprising, as the court does not address case management questions, questions of relief from sanctions and so on in the abstract. It does so in the context of a particular case. In such circumstances it is easy to see why, not least given the long heritage we have of striving to secure justice on the merits in each case and the intuitive understanding that doing justice is to reach a decision on the merits, mistaken assumptions took hold.[83]

With respect, it is suggested that the judges were not under any "mistaken assumptions" but fell into the trap of "self-deception" instead. The Woolf and Jackson reforms have made it abundantly clear that judges are expected to adopt a stricter and more active stance towards case management; thus, there is little room for them to be mistaken. It has been identified earlier that notwithstanding the strict attitude adopted by the courts, Lord Mance in *Renraw Investments* and Lai J in *Lea Tool* were still reluctant to refuse relief from sanctions on the ground that procedure should not be seen to impede substantive justice. Such sentiments are merely examples of the overt, intuitive appeal towards the "justice on the merits" approach. This sets the stage for self-deception to kick in where a compelling force and intuition trigger psychological thought-processes that distort the ordinary process of gathering evidence.[84] This distortion would then project an inaccurate view that is more accommodating to the relevant "desire" than the warranted conclusion. The "desire"

[81] *Zuckerman*, *supra* note 4 at 134.
[82] *Dyson*, *supra* note 31 at 127.
[83] *Ibid* at 128.
[84] Ariela Lazar, "Division and Deception: Davidson on Being Self-Deceived" in Jean-Pierre Dupuy, ed. *Self-deception and Paradoxes of Rationality* (Stanford: CSLI Publications, 1998) at 32.

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in this context would be judges' intuition to approach case management with the "justice on the merits" mentality. There are numerous ways in which this psychological distortion can occur. However, one such way is directly relevant to judges dealing with case management. Such a distortion occurs when there is selective focus on data that supports the desired belief while data that undermines it is discounted or disregarded.[85]

The intuitive appeal of applying the "justice on the merits" approach, combined with the psychological interference of "self-deception" would be fatal to the *Denton* approach, or indeed any "balancing" approach. An English judge when entertaining an application for relief from sanction would be bound by the *Denton* guidance and apply the third stage of "considering all circumstances of the case". Given that *Denton* has removed the requirement to give procedural discipline "paramount importance", the judge faces a real danger of subconsciously pre-selecting and enlarging the importance of substantive merits while downplaying the effects of procedural non-compliance. This is especially so when there is such a strong intuitive appeal for substantive merits emanating from the judiciary over the centuries, as acknowledged by Lord Dyson MR. Kant carefully explained that "self-deception" rarely produces an unwarranted view about the basic rule itself.[86] Instead, it works by self-persuasion that the specific course of action does not infringe the rule, and that it is an exception to the general rule.[87] Consequently, a judge may very well reach the conclusion that even though procedural compliance should be accorded greater weight, the "circumstances" of the case are unique and compelling so as to grant relief. Indeed, it will be demonstrated below that some judges did succumb to "self-deception" while considering relief from sanctions.

This does not mean that judges are dishonest, for "self-deception" is "conscious-silencing", enabling virtuous people to justify their beliefs by overriding their conscience so as to be convinced that the right course of action has been taken.[88] Not all judges will be susceptible to "self-deception" each time they engage in the decision-making process. However, given this phenomenon, there exists a real risk that judges might be influenced by it. The "balancing" approach could then revive the "justice on the merits" approach through the back door. On the other hand, the "lexical priority" approach does not engage in any balancing exercise. When considering the grant of relief from sanctions, the court is only permitted to consider the three exceptions as discussed above. Absent any valid excuse, sanctions for non-compliance will follow through regardless of the defaulting party's substantive merits.

C. *Overcoming the hurdle of inconsistency*

Not only does the "lexical priority" approach guard against the risk of self-deception, but it also enables a stable and consistent application in case management.

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85 *Ibid* at 26, 27.

86 Immanuel Kant, *Groundwork of The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1998) at 75, 76.

87 *Ibid*.

88 *Samet*, *supra* note 80 at 763.

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Parties in the commercial world place a premium on the clarity and certainty of the (substantive) law.[89] This enables them to allocate their rights and risks in a predictable manner. Similarly, Solum has argued that the real value of procedure lies in its ability to provide action-guiding legal norms.[90] A set of procedural rules loses its value if it cannot be applied and followed reliably. In procedural case management, the courts must adopt a principled approach, and they can only do so if there is clear guidance to begin with. It is suggested that the "lexical priority" approach provides a clear framework. It circumscribes judges' discretion by focusing their minds to the primacy of procedural discipline at the first instance. There is thus a rule to follow, albeit subject to a set of clearly defined exceptions.

The previous CPR 3.9 contained a "laundry list" of nine non-exhaustive factors that the courts had to consider when engaging the provision. Levy has examined the issue from the perspective of behavioural psychology and explained why case law under the old provision was inconsistent.[91] Humans, when confronted with excessive options, suffer from information overload: they have difficulty managing complex choices, which include a large number of alternatives or factors.[92] The consequence is that they tend to simplify the decision-making by relying on simple heuristics.[93] The present CPR 3.9 however sits on the other extreme end. It is overly simplistic and merely reiterates the overriding objective enshrined in CPR 1.1. Crucially, it not only preserves the language of "consider all the circumstances", but also includes the phrase "deal justly with the application". This has been criticised as a "coded message" devoid of guidance,[94] and based on Levy's study of behavioural psychology would remain unsuccessful in achieving the requisite specificity to guide the decision-making process of the courts given that an unbridled discretion to consider all circumstances is still likely to result in cognitive overload.[95]

Although *Denton* has advocated for a "balancing" approach whilst paying "particular importance" to the need for the enforcement of procedure, it has done little to illuminate the opacity of CPR 3.9. While applying the third stage of the test, how is a judge to ensure that "particular importance" has been given to the factors in CPR 3.9? Even with the *Denton* approach of attaching particular weight to the factors in CPR 3.9(a) and (b), in exercising discretion, how far should the judicial pendulum swing in favour of these factors? These are questions that *Denton* cannot handle. It has been acknowledged that the *Denton* guidance is neither necessarily clearer nor easier to apply.[96] This is due to a lack of precise articulation of how the factors in CPR 3.9 are to be sufficiently accorded "particular importance" while "considering all the circumstances of the case". *Denton* is a regressive step from *Mitchell*. In *Mitchell*, the emphasis for "paramount importance" places the demand for procedural compliance as pre-eminent, sending a strong signal for a robust stance towards case management.

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89 *Bunge SA v Nidera BV* [2015] 3 All ER 1082 at [23].

90 Lawrence B Solum, "Procedural Justice" (2004) 78 S Cal LR 181 at 225.

91 Inbar Levy, "Lightening the Overload of CPR Rule 3.9" (2013) 32 CJQ at 139 [*Levy*].

92 *Ibid* at 142.

93 *Ibid.*

94 *Zuckerman*, *supra* note 4 at 137.

95 *Levy*, *supra* note 90 at 152.

96 *Higgins*, *supra* note 41 at 388.

Even without specific reference to *Denton*, any "balancing" approach without a closely defined category of factors is likely doomed to fail. Take for instance *Fred Perry Ltd v Brands Plaza Trading Ltd*,[97] a decision which Sime would have preferred over *Mitchell*.[98] In *Fred Perry*, Jackson LJ held that "litigants who *substantially* disregard court orders or the requirements of the Civil Procedure Rules will receive significantly less indulgence than hitherto".[99] However, this in turn begs the question as to when the "substantial" threshold has been crossed. When applying such a "balancing" approach, each judge will take a different approach in interpreting where the overall justice of the case lies, resulting in inconsistent and unpredictable outcomes. In fact, as the examination of both English and Singapore cases will show, courts do differ in their application of the balancing test, and it is not uncommon for an appellate court to overturn the decision of the lower court when applying the test. The "balancing" approach should therefore not be the solution to expunge the "justice on the merits" approach given that it could instead be a recipe for unequal justice.

IV. The Inconsistent Developments in English Law Post-*Denton*

The *Denton* restatement of *Mitchell* has contributed to the inconsistent development of CPR 3.9 jurisprudence, and the revival of the "justice on the merits" approach. Selected cases from two timeframes will be examined. The first period is from 2014 to 2015, at a time when the *Denton* guidance had just been delivered, while the second period is from 2020 to 2021, a time that is relatively more recent. The purpose is to demonstrate that the application of the "balancing" approach in *Denton* has failed to yield predictable outcomes and has failed to establish a stable line of jurisprudence despite the effluxion of time.

A. *The immediate aftermath of Denton*

It could be argued that not all was lost after *Denton* restated the *Mitchell* principles. Several judges were adamant in upholding the spirit of the revised CPR 3.9, especially in the Supreme Court. In *Thevarajah v Riordan*,[100] the appellants failed to comply fully with an unless order. Consequently, the judge at first instance refused to grant relief from sanction, and the appellants were debarred from defending their claim. A series of appeals ensued that ultimately reached the Supreme Court. Lord Neuberger, delivering the unanimous judgment, dismissed the appeal, and held that where a party has failed to comply with the terms of an unless order and relief from sanctions has been denied when the party was still in default, the subsequent late compliance with the order by itself does not constitute a material change of

[97] *Fred Perry Ltd v Brands Plaza Trading Ltd* [2012] EWCA Civ 224 [*Fred Perry*].
[98] *Sime*, *supra* note 29 at 156.
[99] *Fred Perry*, *supra* note 97 at [4].
[100] *Thevarajah v Riordan* [2016] 1 WLR 76.

circumstances entitling him to re-apply for relief.[101] When such relief had been refused, this signified that it was "now too late" for that party to comply with the order and obtain relief.[102] *Thevarajah* therefore demonstrated the strict enforcement of procedure, and that a non-complying party without a valid excuse would not be allowed a second bite of the cherry for relief.

Similarly, the Supreme Court's judgment in *Apex Global* is also instructive in demonstrating the court's resolve in recognising the primacy of procedure. The appellant had failed to comply with an order requiring him to file and serve a disclosure statement certified by a Statement of Truth. The sanction for non-compliance was to have his defence struck out. As discussed earlier, the majority held that the substantive merits of a case should not interfere with the inquiry on whether relief from sanctions should be granted. The court rejected the contention that depriving the appellant of the opportunity to maintain a defence to claim for US$6m was a "disproportionate sanction",[103] and reaffirmed that:

> The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are *to continue to enjoy the respect which they ought to have*.[104]

The majority's reasoning resonates well with the "lexical priority" approach advanced in this article. It disregards the substantive merits of a party's case in favour of a robust enforcement of procedural discipline. Furthermore, it rightly acknowledged that such a firm stance is vital in maintaining the legitimacy of the courts as a legal institution.

However, unlike *Thevarajah*, the court in *Apex Global* was not unanimous. Lord Clarke, dissenting, opined that considering all the circumstances, 'justice' required that the appellant be allowed to challenge the claim against him,[105] and that having the defence struck out would be "disproportionate".[106] Accordingly, his Lordship was prepared to grant the relief sought by the appellant. Although Lord Clarke was in the minority, it was striking that a Justice from an apex court was still inclined towards the "justice on the merits" approach towards case management. His Lordship explicitly stated that his reasoning was not intended to impinge on *Denton*.[107] This demonstrates that his Lordship accepted the *Denton* restatement and was fully aware that *Denton* requires particular weight to be given to procedural discipline. Nevertheless, after weighing up the different considerations at play, the interests of 'justice' still compelled his Lordship to grant relief. From this reasoning, it is suggested that Lord Clarke could have inadvertently fallen into the "self-deception" phenomenon that the *Denton* approach is susceptible to.

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[101] *Ibid* at [21].
[102] *Ibid*.
[103] *Apex Global*, *supra* note 43 at [22], [23].
[104] *Ibid* at [23] [emphasis added].
[105] *Ibid* at [46].
[106] *Ibid* at [48].
[107] *Ibid* at [79].

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While the two Supreme Court decisions offered some glimpse of hope in realising the ambition of the revised CPR 3.9, the *Denton* restatement of *Mitchell* has proven to be the Achilles' heel in the Jackson reforms. In *Altomart Ltd v Salford Estates (No. 2) Ltd*,[108] the respondent's non-compliance of a court direction constituted a substantial delay, given that only 14 days were allowed but the relevant notice was in fact served 36 days late.[109] Despite this significant lapse of time, Moore-Bick LJ, writing for a unanimous Court of Appeal, applied *Denton* and decided that since the appellant would not suffer any substantive prejudice if a time extension was granted, and it was not likely to compromise any proceedings, relief from sanctions was appropriate.[110] It was also felt that refusal of relief was a rather punitive measure even though his Lordship had concluded that the explanation for the delay did not seem to be persuasive at all.[111] The court also noted that "the rigour of the decision in *Mitchell* has been tempered by the decision in *Denton*" and that "[a]lthough the factors mentioned in rule 3.9 are of particular importance, they are not of overriding significance".[112] This demonstrates that the shift from *Mitchell* to *Denton* has been material in softening the attitude towards procedural discipline.

In *Michael Wilson & Partners Ltd v Sinclair*,[113] the Court of Appeal granted relief from sanctions, and overturned an earlier judgment in light of the *Denton* restatement of *Mitchell*. Lewison LJ, delivering the earlier judgment, had rejected the application for relief.[114] It is important to note that at the time of Lewison LJ's decision, the prevailing guidance was *Mitchell* and that the *Denton* case had not been heard. In light of *Denton*, the appellant applied to have Lewison LJ's order overturned. Richards LJ held that the relevant breach was serious and without good reason.[115] On the contrary, his Lordship was even prepared to infer that the non-compliance was deliberate.[116] However, despite these adverse findings against the appellant, the court expressly relied on the third stage of *Denton* to consider "all the circumstances of the case" and concluded that refusing relief from the sanction of striking out would be disproportionate.[117]

B. *The Denton approach down the road*

More than six years after *Denton*, the situation does not seem to have improved. The inherent difficulties in applying the "balancing" approach continues to present itself, and judges have on occasion fallen back on their "justice on the merits" intuition. *Razaq v Zafar* is one such example.[118] In this recent case, the claimant filed

[108] *Altomart Ltd v Salford Estates (No. 2) Ltd* [2015] 1 WLR 1825
[109] *Ibid* at [21].
[110] *Ibid* at [22], [23].
[111] *Ibid* at [23].
[112] *Ibid* at para 19.
[113] *Michael Wilson & Partners Ltd v Sinclair* [2015] EWCA Civ 774
[114] *Ibid* at [1].
[115] *Ibid* at [28]–[30].
[116] *Ibid* at [29].
[117] *Ibid* at [47].
[118] *Razaq v Zafar* [2020] EWHC 1236 (QB)

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his list of documents some six weeks late, and the witness statements some three weeks late. The judge at first instance refused to grant relief from sanctions.[119] An appeal was made to the High Court, and relief was then granted. The delay in serving the witness statements was significant in the context of the timetable given that the effect was that the order of sequential exchange directed by the court had been reversed; the claimant had the opportunity to read the defendant's evidence before serving his own and the defendant had lost the opportunity to respond to his evidence.[120] Yip J applied the three-staged test in *Denton*, and held that (i) the breach was not insignificant, but it was "not at the upper end of the scale of seriousness";[121] (ii) the excuses put forward by the claimant were "poor";[122] but (iii) "standing back and weighing all the circumstances", relief ought nevertheless to be granted.[123]

Yip J acknowledged that the need to enforce compliance with procedure "remain[s] an important point to weigh in the balance against granting relief. There was no good reason for the delay… [and it] was right to say that litigants and their solicitors cannot ignore directions and then expect the court to indulge them".[124] Nevertheless, her Ladyship also considered the effect of refusing relief and concluded that:

> The Claimant *may* still be able to have a trial, but he will be at a very significant disadvantage. In my view, this claim ought to be tried with the benefit of all the available evidence so that the Court can reach a fair decision, particularly as a finding of dishonesty on one side or the other is likely to be made.[125]

The tenor of the reasoning appears to suggest that Yip J was ultimately entrapped by her own "justice on the merits" intuition, possibly through the self-deception phenomenon, given that her Ladyship was in fact cognisant of the importance in upholding procedural discipline yet still decided to grant relief in the absence of a valid excuse.

Another recent case worthy of attention is *Depp II v News Group Newspapers Ltd*.[126] The claimant served two witness statements one day late. Application for relief from sanctions was made, and relief was granted. Counsel for the claimant conceded that any breach of a court order was serious but submitted that the delay in this case was minor.[127] It was argued that the statements were only served one day late, and that the previous trial dates had been adjourned earlier thereby allowing for a sufficiently long runway before trial despite the breach.[128] Nicol J agreed and held that:

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[119] *Ibid* at [1].
[120] *Ibid* at [39].
[121] *Ibid* at [41].
[122] *Ibid* at [42].
[123] *Ibid* at [47].
[124] *Ibid* at [44].
[125] *Ibid* at [46] [emphasis in original].
[126] *Depp II v News Group Newspapers Ltd* [2020] EWHC 1237 (QB) [*Depp*].
[127] *Ibid* at [7].
[128] *Ibid* at [7].

> [I]n view of the adjournment of the trial, future hearing dates are not imperilled by the breach and the conduct of the litigation has not otherwise been disrupted (or not to any serious extent)… I must consider the application for relief from sanctions against the background of the circumstances as they exist now, rather than as they existed at the date of the breach.[129]

Under the "lexical priority" approach, this case would not qualify for relief, with the one day delay falling outside the *de minimis* exception. In addition, Nicol J did express reservations about the quality of the excuse offered for the delay.[130] Although his Lordship opined that the application for relief has to be considered in light of the circumstances at the time the application was made, it is submitted that the preferable view, consistent with the second exception under the "lexical priority" approach, is that existing circumstances would only be relevant in so far as they shed light on the reasonableness of the original case management timeline and direction. To adopt Nicol J's approach would be to invite further satellite litigation, as parties contest and underplay the impact of their non-compliance. If the original timeline and directions given remained reasonable notwithstanding the supervening events, then there should be no issues for litigants to comply with them. Such an event that has arisen in the interim should not be used as a convenient excuse by a defaulting litigant.

Nevertheless, it must be acknowledged that not all is lost. There have been cases where the courts have remained steadfast in upholding the spirit of the Jackson reforms. In *Jalla v Shell International Trading Co Ltd*,[131] the Court of Appeal dismissed an appeal for an extension of time. This had the effect of an implied sanction given that the vast majority of the appellant's claim would effectively be struck out. Coulson LJ made it clear that while the court would take into account the consequences of refusing the application in deciding whether to exercise its discretion to extend time, the fact that those consequences might be draconian would not in itself guarantee a positive outcome to the application.[132] His Lordship held that the case was similar to where there was an unless order and proceeded to apply *Denton*,[133] and concluded that the procedural breaches were serious and that there was no proper explanation, or indeed any real explanation at all, for the delays.[134] It was also found that there had been little attempt made to comply with the court's orders until it was too late.[135] Bearing in mind the need for litigation to be conducted efficiently and the need to enforce compliance with court orders, the court unanimously decided that, applying the "balancing" approach in *Denton*, justice lay in favour of the respondents and it was appropriate to refuse a time extension.[136]

The examination of the various cases above demonstrate that the "balancing" approach enshrined in *Denton* does not produce a consistent result, with some cases

[129] *Ibid* at [8], [10].
[130] *Ibid* at [13].
[131] *Jalla v Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 1559.
[132] *Ibid* at [36]–[39], [46].
[133] *Ibid* at [33].
[134] *Ibid* at [53].
[135] *Ibid* at [58]–[64].
[136] *Ibid* at [68].

adhering to the clarion call for strict procedural compliance while others came close to reviving the "justice of the merits" approach. It is suggested that the "lexical priority" approach, when applied, would fare better.

V. The Attitude of Singapore Courts Towards Relief from Sanctions for Procedural Non-Compliance in Unless Orders

The Singapore judiciary holds an enviable track record in case management. In 2019, the World Economic Forum conducted an assessment of 141 countries and ranked Singapore first for the efficiency of its legal framework in settling disputes.[137] Since 2009, Singapore has held the top spot in the Forum's rankings.[138]

While one marvels at Singapore's success, history paints a different picture. In the early 1990s, Singapore had a considerably smaller population, and the annual caseload of the courts was much lighter. Nevertheless, the courts were plagued with massive backlog of cases. The Supreme Court had more than 2,000 pending cases that had been set down for trial but for which trial dates were only available three or more years later.[139] Not only were there more than 10,000 inactive cases, but approximately 44% of cases took around five to ten years to be fully disposed of.[140] The then Chief Justice, Yong Pung How CJ, implemented radical reforms to judicial case management. The reforms included a more extensive use of pre-trial conferences, the introduction of the "Electronic Filing System", and a more aggressive set of rules in the Rules of Court. These aspects have been covered in detail elsewhere and will not be repeated here.[141] Instead, the ensuing analysis examines the judicial attitude that the Singapore courts have adopted over the years in relation to the use and regulation of unless orders in their case management endeavours.

In the 1990s, the courts were neither slow nor appeared to loathe issuing unless orders. Such orders were even made in anticipation of a breach instead of being issued against a party after he had committed a default. In fact, the "not infrequent" use of unless orders continued for more than a decade.[142] This was largely due to the necessity of clearing the accumulated backlog of cases. After clearing the backlog, and having secured a culture of compliance amongst litigants, the modern attitude of the courts has since leaned towards being more circumspect in the use of unless orders, while adopting a "balancing" approach towards relief from sanctions. While there are valuable lessons to be gleaned from the Singapore experience, it shall be argued that the "balancing" approach can occasionally persuade judges to adopt the "justice on the merits" approach instead. Therefore, a "lexical priority" approach could be a more reliable method to adopt.

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[137] Klaus Schwab, *The Global Competitiveness Report 2019* (10 October 2019), World Economic Forum <https://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf> at 507.

[138] State Courts of Singapore, *Annual Report 2013 – Renewing our Commitment to Justice* (2014) at 62.

[139] Judith Prakash, *Making the Civil Litigation More Effective* (2009), Asia Pacific Judicial Reform Forum Round Table Meeting <http://www.apjrf.com/papers/Prakash_paper.pdf> at para 2 [*Prakash*].

[140] *Ibid*.

[141] Lionel Leo, "Case Management: Drawing from the Singapore Experience" (2011) 30 CJQ 143.

[142] Boon Heng Tan, "Mitora: The Mantra on "Unless Orders"?" (2014) 26 SAcLJ 295 at 301.

The seminal decision of *Mitora* represents the most authoritative guidance on unless orders today. Although relief was granted from the striking-out action, the outcome of the case was uncontroversial given that the Court of Appeal had found that the appellant was "hamstrung by extraneous circumstances".[143] The same outcome would be reached if the "lexical priority" approach were to be applied. However, the court in *Mitora* expressly endorsed a "balancing" philosophy and articulated a set of guidelines for a more "scrupulous"[144] use of unless orders. Specifically, the court suggested that:

(a) Unless orders stipulating the consequence of dismissal are to be used as a last resort when the defaulting party's conduct is inexcusable;
(b) The conditions appended to "unless orders" should as far as possible be tailored to the prejudice which would be suffered should there be non-compliance;
(c) Other means of penalising contumelious or persistent breaches are available, including but not limited to
   (i) awarding costs on an indemnity basis;
   (ii) ordering the payment of the plaintiff's claim or part thereof into court where the defaulting party is a defendant;
   (iii) striking out relevant portions of the defaulting party's statement of claim or defence rather than the whole;
   (iv) barring the defaulting party from adducing certain classes of evidence or calling related witnesses; and
   (v) raising adverse inferences against the defaulting party at trial.[145]

Although *Mitora* was receptive towards a "balancing" or "proportionality" approach, it was not simply weighing the force of procedural discipline against substantive rights. Instead, it was proposing a more nuanced approach, in striking a balance between the gravity of the task to which the unless order attached and the consequence of the sanction to be imposed. Therefore, it did away with the traditional notion that the sanction of an unless order invariably leads to a striking out of the party's action or a default judgment entered against the defaulting party. This approach has much to commend it since the court would be performing an *ex ante* calibration when issuing the unless order, and the likelihood of "draconian" or "disproportionate" sanctions for non-compliance would thus be lower. For instance, where witness statements are served late in the day, it would be open for the court to impose options (iii) or (iv). This would avoid the "nuclear payload" of striking out the litigant's claim in entirety.[146] Such an approach would, in theory, assuage a judge's dilemma between throwing out a claim (sanction enforced) or allowing it to proceed notwithstanding the procedural non-compliance (relief from sanction).

On the other hand, the court was also quick to warn that "[t]he court's power to strike out an action may be properly invoked in cases involving an inexcusable

[143] *Ibid* at [41].
[144] *Ibid* at [45].
[145] *Ibid* at [45].
[146] *Ibid* at [46].

breach of a significant procedural obligation",[147] yet the only authorities it cited for this category mainly concerned parties who had committed an intentional or contumelious breach. This qualification in turn undermines certainty in application given that guideline (c) applied to contumelious breaches as well. It might well be the court's strategy that litigants who commit process breaches will be subject to this penumbra of doubt – not knowing whether their breach would constitute an "inexcusable breach of significant procedural obligation" – and hence be deterred from committing such breaches in the first place. However, this would also mean that judges might interpret this category of breach attracting the ultimate sanction differently. The *Mitora* approach would then be susceptible to one of the main problems of the "balancing" approach, that of inconsistency in application.

While the *Mitora* guidelines appear to be a refined version of the "balancing" approach, it remains doubtful whether it could expunge the "justice on the merits" mentality. Even if the sanction is to bar the defaulting party from calling the affected witnesses instead of a striking out, it is plausible that the substantive merits of a case might intuitively appeal to the judge, who would thereafter conclude that relief should nevertheless be granted because the claim at stake was very high, or that it would be better to have all available evidence presented before the court for an accurate outcome to be reached. The suggestions in *Mitora* could perhaps be better deployed as an adjunct to the "lexical priority" approach where unless orders are concerned (so that the attached sanction need not be a striking out), rather than being used as a standalone "balancing" approach.

Although the court in *Mitora*[148] cited the balancing philosophy in *Teeni Enterprise Pte Ltd v Singco Pte Ltd*[149] with approval, the application of the balancing exercise in the latter was in fact different. Although the appellant in *Teeni* was four months late in complying with the unless order, relief was nevertheless granted. Chan Seng Onn J held that:

> [T]he court must balance the need to ensure compliance with court orders which are made to be adhered to and not ignored, and the need to ensure that a party would not be summarily deprived of its cause of action or have default judgment entered against it without any hearing of the merits.[150]

The default judgment was set aside as his Honour opined that there was no prejudice or uncompensatable damage caused by the four-month delay.[151] Chan J also opined that given the "voluminous documents", it was understandable that the required document to be served was initially overlooked.[152] Furthermore, it was concluded that there was no "contumelious conduct or deliberate suppression" of the document.[153]

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[147] *Ibid* at [47].
[148] *Ibid* at [39].
[149] *Teeni Enterprise Pte Ltd v Singco Pte Ltd* [2008] SGHC 115 [*Teeni*].
[150] *Ibid* at [64].
[151] *Ibid* at [60].
[152] *Ibid* at [16].
[153] *Ibid* at [18].

Two observations are worthy of mention at this juncture. First, by balancing the procedural against the substantive, similar to the way that the English courts have applied *Denton*, there is an inherent risk that a court will inadvertently revert to the "justice of the merits" approach. *Teeni* is arguably an example of this, given that a major aspect of the judgment was that parties' substantive rights and remedies were not prejudiced. Second, if the relevant document was indeed very difficult to locate, the appellant could have applied for a time extension or relief from sanction on the ground that the original deadline was unreasonable, or that later events had materially affected the timetable, rendering the initial allotted time insufficient (the second exception under the "lexical priority" approach). *Ex ante* considerations of proportionality in process arrangements should not be conflated with *ex post* excuses for non-compliance. If the original timeline was reasonable or proportionate to the difficulty of process compliance, then the consequences of a sanction following a default, without any reasonable excuse, would not be disproportionate. After all, rules are meant to be obeyed, and "it is self-evident that the breach of an unless order will automatically trigger its specified adverse consequences".[154]

Tracing back in time, an even earlier variant of a "balancing" approach can be identified in *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani*.[155] It is noteworthy that Yong CJ was part of the coram, and the case was decided towards the tail end of the 1990s – the decade in which the courts aggressively tightened up procedural discipline to clear the backlogs. It was noteworthy that the unless order in *Chotrani* was issued in anticipation of a breach rather than in response to an earlier breach. The Court of Appeal appeared to take a tough stance, and held that:

> The power of the court to extend the time for complying with an unless order should be exercised cautiously… The onus was on the defaulting party to show why his failure to obey the order did not warrant the striking out of the claim. The default must not have been intentional and contumelious or contumacious… *The crux of the matter was that the party seeking to escape the consequences of his default must show that he had made positive efforts to comply but was prevented from doing so by extraneous circumstances*.[156]

This part of the court's analysis resonates with the "lexical priority" approach. It demonstrates the primacy of procedural discipline while allowing a defaulting party to obtain relief if he faced extraneous and extenuating circumstances. However, and perhaps motivated by a desire to grant relief, the court went on to state that "all the circumstances of the case must be taken into account", including any prejudice done to the other party, the nature of the relief sought, and the proportionality of the sanction.[157] Thus, although the court reiterated a tough stance towards procedural discipline with narrow exceptions, it also left the door for a "balancing" approach ajar. Ultimately, the striking-out order was set aside as the court accepted that the breach

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[154] *Mitora*, *supra* note 27 at [35].

[155] *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 [*Chotrani*].

[156] *Ibid* at [14] [emphasis added].

[157] *Ibid* at [15].

was not intentional and contumelious.[158] Although the appellant had no good reason for his default, it was also material in the court's decision that the default to furnish further and better particulars was merely late by the "thinnest of margins".[159] The outcome in *Chotrani* could thus be justified based on the *de minimis* exception alone instead of adopting a proportionality-centric reasoning.

The courts in *Chotrani* and *Teeni* appear to have been influenced by the argument that to enforce a sanction may sometimes be "disproportionate".[160] In both cases, the courts mentioned that "the question in each case is whether the punishment fits the crime".[161] It is submitted that this is a misconceived premise. As argued earlier, and clarified in *Mitora*, the purpose of these sanctions is not punitive. While proportionality of the *punishment* for *crimes* is a legitimate consideration, a *penalty* for a *civil* breach does not engage such a concern.

Furthermore, a constant theme running through the Singapore judgments is that an intentional or contumelious breach could possibly attract the sanction of striking-out but to do so otherwise could be perceived as draconian. This was also borne out in recent decisions. In *Saxo Bank A/S v Innopac Holdings Ltd*, Andre Maniam JC, in striking-out the defendant's defence and counterclaim, held that *inter alia* the defendant's overall conduct and breaches were "intentional and contumelious; it [was] not the case that the defendant had made positive efforts to comply but was prevented from doing so by extraneous circumstances".[162] Similarly, in *Energy & Commodity Pte Ltd and others v BTS Tankers Pte Ltd*, Phang JCA, in upholding the striking-out sanction, distinguished *Mitora* and concluded that the appellants' breaches were intentional, that they had constantly lied, and that they had failed to show any genuine attempt to comply with the orders.[163] While *mens rea* is an element of a crime, this is not so for a civil penalty. Nevertheless, it is accepted that, while not directly relevant to the inquiry of whether sanctions should be imposed, a defaulting party whose conduct was intentional and contumelious would have greater difficulty proving that he had a reasonable excuse for the non-compliance.

VI. Conclusion

The "justice on the merits" approach has no place in the modern era of judicial case management. 'Justice' does not entail an exclusive obsession for substantive justice at the expense of procedural justice. While both types of justice are necessary, the most appropriate way to resolve the tension between them is not to balance them on the scales of justice. It has been demonstrated that the adoption of a "balancing" approach by the courts may lead to inconsistent outcomes, and risk reviving the

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[158] *Ibid* at [21].

[159] *Ibid* at [19]. The particulars were ready to be filed at 3.45 pm, but counsel arrived a few minutes late after 4 pm by which the time the stamp office was shut.

[160] *Ibid* at [24]; *Teeni*, *supra* note 150 at [63].

[161] *Chotrani*, *supra* note 156 at [24]; *Teeni*, *supra* note 150 at [62].

[162] *Saxo Bank A/S v Innopac Holdings Ltd* [2022] 3 SLR 964 at [95(f)].

[163] *Energy & Commodity Pte Ltd and others v BTS Tankers Pte Ltd* [2021] 2 SLR 877 at [22].

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"justice on the merits" approach through the back door. This article has argued that, in the context of case management, a better way forward would be to adopt a "lexical priority" approach, where the enforcement of procedural discipline should come prior to substantive justice by way of a precondition. This would assist in ameliorating the problems associated with the "balancing" approach, while providing more focused guidance when the courts deal with applications for relief from sanctions.

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