

JUSTICE IN ITS FULLEST ORB: THE EVOLVING RELATIONSHIP BETWEEN PROCEDURE AND SUBSTANTIVE LAW (II/II)

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I. INTRODUCTION

This two-part article considers how various High Court and Court of Appeal cases from 2001 to 2020 show that procedure has been made coequal with substantive law, and how this shift to coequality has occurred in two stages:

- (a) From resolving the tension between procedure and substantive law as separate conceptions of justice (“to resolve this tension”, in the words of Andrew Phang JC, as his Honour then was¹) – discussed in Part I;
- (b) To balancing procedure and substantive law as integrated aspects of the orb of justice (“to integrate ... justice”, in Andrew Phang JC’s words²) – discussed in Part II (this Part).

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¹ *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425, [2005] SGHC 50 at [9] [emphasis removed].

² *Ibid.*

II. “TO INTEGRATE JUSTICE”

More recent cases have adopted a conceptually different approach. Procedure and substantive law are not conflicting concepts in a tension to be resolved, but harmonious aspects of the orb of justice to be integrated. The following propositions may be distilled from the cases:

A. The Balance of Justice

First, the court will weigh the procedural and substantive aspects of the case to locate the balance of justice. This judicial discretion is guided, not by rules, but by the following principles:

1. Procedural Merits

One, procedural merits are not about the technical procedural rights of parties, but the procedural conduct of parties and the spirit of procedural rules. In *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd [UOB]*,³ Andrew Phang JC dismissed an application to stay winding-up proceedings, pending an appeal against Lai Kew Chai J’s dismissal of an application for a scheme of arrangement. The substantive merits clearly favoured the respondent.⁴ The procedural merits also favoured the respondent; the applicant’s long string of procedural applications was merely “another device ... to stave off what appeared ... inevitabl[e]”,⁵ the respondent had endured “continued and unjustified delay”, and the applicant could still sue after winding-up (albeit by its liquidator).⁶ The court was unimpressed by the applicant’s plea for “procedural justice”,⁷ which

³ [2005] 2 SLR(R) 425, [2005] SGHC 50 [UOB].

⁴ *Ibid* at [16]. I use “applicant” and “respondent” to refer to the applicant and respondent in this stay application (rather than the respondent and applicant, respectively, in the principal winding-up petition).

⁵ *Ibid* at [17].

⁶ *Ibid* at [41] [emphasis removed].

⁷ *Ibid* at [14] [emphasis removed].

were really technical procedural rights. Subsequently, in *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd*,⁸ a claim for fraudulent misrepresentation, Andrew Phang JA rejected the representee's argument that the trial court had erroneously refused rescission as the representor had not pled any bars to rescission (as was the representor's onus to). Not only was the representee's argument "rather arid and technical"; it was "antithetical to the very spirit of the rules of pleading", because in this (somewhat unusual) case, it was the representee (rather than the representor) who had exclusive knowledge of the facts underlying potential bars to rescission.⁹ Furthermore, the representee had knowledge of the representor's arguments on potential bars to rescission, and had even written a letter to the trial court rebutting those arguments.¹⁰

Two, procedural merits may need to be balanced between the parties. Such balancing was evident in *Lea Tool and Moulding Industries Pte Ltd v CGU International Insurance plc [Lea Tools]*,¹¹ where neither party's procedural conduct was satisfactory (leading the court to dismiss the application initially),¹² though the balance tipped in the plaintiff's favour (since the court allowed the application only on further arguments).¹³

Three, procedural merits may need to be balanced between the parties and the public. In the administration of justice, the public interest weighs more heavily than the parties' interests. In *Alliance Management SA v Pendleton Lane P [Alliance]*,¹⁴ the High Court struck out the defence of a party which deliberately disregarded court orders regarding evidence. This was not to punish but to prevent injustice (whether to the other party in the proceedings, or to other litigants generally,

⁸ [2020] 1 SLR 606, [2020] SGCA 7.

⁹ *Ibid* at [16] [emphasis removed].

¹⁰ *Ibid* at [15].

¹¹ [2000] 3 SLR(R) 745, [2000] SGHC 241 [*Lea Tools*]. "Lea Tool" and "Lea Tools" were used interchangeably by the court.

¹² *Ibid* at [17].

¹³ *Ibid* at [18], [22].

¹⁴ [2008] 4 SLR(R) 1, [2008] SGHC 76 [*Alliance*].

with their demands on the court's limited resources),¹⁵ because irrespective of the possibility of a fair trial, total disregard of court rules or orders amounts to abuse of process.¹⁶

Four, the adequacy of compensation by costs is a significant, but not determinative, factor. In *Eller, Urs v Cheong Kiat Wah*,¹⁷ the High Court made a bifurcation order even though the plaintiff only effectively requested bifurcation in closing submissions¹⁸ (rather than before the trial commenced). Any prejudice to the defendant was "readily compensated by costs" as it was "very slight" (at best), because first, a bifurcation order would almost certainly have been granted if the plaintiff had applied for bifurcation timeously,¹⁹ and second, the defendant had not called expert witnesses to rebut the plaintiff's submissions on quantum²⁰ (and spent any money or effort doing so). By contrast, in *Alliance*,²¹ the High Court struck out the disobedient party's defence to liability (though it was allowed to take part on the question of quantum).²² This reflects the principle that, while adjudication will ordinarily not be denied if costs adequately compensate the aggrieved party, it will be denied if demanded by the public interest on balance (as this case demanded).²³

2. Substantive Merits

Five, in weighing substantive merits, the court may need to form a view of the substantive case:

- (a) If liability and remedies have been tried, the court already has a final view of the substantive merits. For example, in *Lee Chee Wei v Tan Hor Peow Victor* [*Lee Chee*

¹⁵ *Ibid* at [9].

¹⁶ *Ibid* at [13].

¹⁷ [2020] SGHC 106.

¹⁸ *Ibid* at [137].

¹⁹ *Ibid* at [142].

²⁰ *Ibid* at [143].

²¹ *Alliance*, *supra* note 14.

²² *Ibid* at [45].

²³ *Ibid* at [6]–[7].

Wei],²⁴ where a non-bifurcated trial²⁵ had taken place, the Court of Appeal could form the view that an order for assessment of damages in lieu of specific performance (which the trial judge had refused to make²⁶) was appropriate.²⁷

(b) If not, the court may need to form a provisional view of the substantive merits:

(i) It may be clear where the substantive justice lies. For example, in *UOB*,²⁸ even though the principal petition was still being heard,²⁹ the “long string of procedural applications”³⁰ made it clear where the substantive justice lay.³¹

(ii) If not, the court will likely not require proof on a balance of probabilities. For example, in *Lea Tools*,³² the court considered it sufficient that there were triable issues (as summary judgment had been refused³³).

(c) Nonetheless, a provisional view may be impossible or unnecessary where evidence is deliberately made unavailable (eg in *K Solutions Pte Ltd v National University of Singapore*³⁴ and *Alliance*³⁵).

Six, the claim amount is also a factor. In *Lee Chee Wei*,³⁶ the Court of Appeal ordered damages to be assessed, despite the plaintiff’s failure to plead for damages “to be assessed” and to adduce evidence on damages.³⁷ While the latter “le[ft] much to be desired”,³⁸ the court seemed moved by

²⁴ [2007] 3 SLR(R) 537, [2007] SGCA 22 [*Lee Chee Wei*].

²⁵ *Ibid* at [64].

²⁶ *Ibid* at [57].

²⁷ *Ibid* at [80].

²⁸ *UOB*, *supra* note 3.

²⁹ *Ibid* at [10].

³⁰ *Ibid* at [15] [emphasis removed].

³¹ *Ibid* at [16].

³² *Lea Tools*, *supra* note 11.

³³ *Ibid* at [3], [21].

³⁴ [2009] 4 SLR(R) 254, [2009] SGHC 143.

³⁵ *Alliance*, *supra* note 14.

³⁶ *Lee Chee Wei*, *supra* note 24.

³⁷ *Ibid* at [62], [72], [80].

³⁸ *Ibid*.

“the princely consideration of \$4.5m”, which was “anything but small change”.³⁹ (The former was not prejudicial, as the words “to be assessed” were “superfluous”.⁴⁰) By contrast, in *Edmund Tie & Co (SEA) Pte Ltd v Savills Residential Pte Ltd [Edmund Tie]*,⁴¹ the High Court did not allow the plaintiff, who had pleaded for a particular amount of damages without the words “or such sums as the court deems fit”, to claim a different amount of damages. The court emphasised that “the amount involved is only \$13,385.70, at best, or just \$6,255”.⁴² (The court also emphasised that the plaintiff made no attempt to rectify its inadequately pleaded case.⁴³)

3. *Fact Sensitivity*

Seven, the exercise is fact-sensitive. The opposite outcomes in *Lee Chee Wei*⁴⁴ and *Edmund Tie*,⁴⁵ despite apparently similar facts, show that “previous decisions [are] no more than guides”.⁴⁶

4. *No Procedure-Substance Dichotomy*

Eight, the procedural and substantive aspects need not be distinguished as such in every case. While often convenient, the procedure-substance dichotomy sometimes obscures the true principle: the court balances, not procedure on the one hand and substance on the other hand, but all procedural and substantive aspects of the case in a manner inadequately described by a two-handed metaphor. For example, in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo*,⁴⁷ the Court of Appeal allowed a late application for stay of proceedings based on various factors: the applicant’s lateness was

³⁹ *Ibid* at [65].

⁴⁰ *Ibid* at [62].

⁴¹ [2018] 5 SLR 349, [2018] SGHC 84 [*Edmund Tie*].

⁴² *Ibid* at [8].

⁴³ *Ibid* at [11].

⁴⁴ *Lee Chee Wei*, *supra* note 24.

⁴⁵ *Edmund Tie*, *supra* note 41.

⁴⁶ *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196, [2011] SGCA 4 at [30].

⁴⁷ [2011] 2 SLR 196, [2011] SGCA 4.

unintentional, the application was not without merit, and the application did not pertain to a notice of appeal.⁴⁸ Under the classical approach, these factors must be classified as procedural or substantive before a tension arises. One might argue all the factors are procedural; another might argue that the application's merits are a substantive aspect of procedural justice. But under the integrated approach, such a fruitless inquiry is unnecessary.

B. The Importance of Procedure

Second, procedure remains an important aspect of the orb of justice.

Courts constantly enjoin litigants to observe procedural discipline. But the Court of Appeal dramatically enjoined judges to do the same in *AXM v AXO*,⁴⁹ where it considered whether an interim maintenance order could be retrospectively lowered. While substantive justice was not in issue, Andrew Phang JA's concern was the procedural pathway to the substantive outcome.⁵⁰ As a matter of statutory interpretation, an interim maintenance order could not be retrospectively overridden⁵¹ or varied by a final maintenance order.⁵² Inherent power was inapt.⁵³ Instead, a final maintenance order should be (prospectively) made based on retrospective considerations.⁵⁴ His Honour concluded that "on the facts at hand ... a substantively just and fair result can be achieved in accordance with [procedure]".⁵⁵

The message is clear: procedure is not just an aspect of the orb of justice that occasionally recedes out of sight as the orb rotates. Even without tensions to resolve, the task of integrating justice remains at hand, for procedural discipline is also justice.

⁴⁸ *Ibid* at [45].

⁴⁹ [2014] 2 SLR 705, [2014] SGCA 13.

⁵⁰ *Ibid* at [36].

⁵¹ *Ibid* at [19]–[20].

⁵² *Ibid* at [29].

⁵³ *Ibid* at [23].

⁵⁴ See *ibid* at [29]–[30], [35]–[37].

⁵⁵ *Ibid* at [30].

C. The Place of Ethics

Third, ethics must be an important aspect of the orb of justice. Apart from its fundamental importance to a noble and honourable profession,⁵⁶ ethics also affects the administration of justice.

*Lock Han Chng Jonathan v Goh Jessiline*⁵⁷ was a dispute over merely \$60.35 that reached the Court of Appeal. The Court of Appeal ordered the plaintiff's solicitor not to tax his solicitor-and-client costs before disciplinary investigations concluded.⁵⁸ *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang*⁵⁹ was not only a dispute over merely \$1,208 that reached the Court of Appeal, but also an appeal with "absolutely no merit" (the defendant's solicitor quoted a 17th-century Lord Coke commentary and a 19th-century case on a 21st-century Rules of Court issue, which was both irrelevant⁶⁰ and erroneous⁶¹). The Court of Appeal ordered the defendant's solicitor's law firm to bear the plaintiff's costs on an indemnity basis.⁶²

These decisions evince the court's readiness to use procedural mechanisms to address ethical considerations. Indeed, in these cases, costs struck an optimum balance between binding a principal to their agent's acts and imposing liability on the actual wrongdoer. However, where costs do not adequately compensate (eg where land is involved), a more difficult balance may need to be found between the procedural, substantive and ethical merits of the case.

⁵⁶ See *Legal Profession (Professional Conduct) Rules 2015* (S 706/2015), r 7(1), Principle (a).

⁵⁷ [2008] 2 SLR(R) 455, [2007] SGCA 56.

⁵⁸ *Ibid* at [47].

⁵⁹ [2014] 2 SLR 191, [2014] SGCA 3.

⁶⁰ *Ibid* at [24].

⁶¹ *Ibid* at [25].

⁶² *Ibid* at [42]–[43].

D. Limitations

Finally, the orb of justice need not be slavishly applied in well-developed areas of civil procedure. For example, setting aside irregular default judgments is already governed by established *Mercurine*⁶³ principles, which embody the orb principle at a less abstract level. An analogy⁶⁴ is the *Spandeck*⁶⁵ test in negligence, which is in theory universal, but in practice applied only in novel situations.⁶⁶

III. CONCLUSION

Where will the orb of justice next turn? The history of physics provides an instructive parallel. For millennia, space (with its three dimensions) and time were considered separate concepts. Only by Albert Einstein were they unified as four dimensions of the same thing – spacetime.⁶⁷ Hermann Minkowski, his ex-teacher, famously hailed thus: “Henceforth, space by itself, and time by itself, are doomed to fade away into mere shadows, and only a kind of union of the two shall [be

⁶³ *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907, [2008] SGCA 38.

⁶⁴ In *AXM v AXO* [2014] 2 SLR 705, [2014] SGCA 13 at [23], Andrew Phang JA noted parallels between procedural law and negligence law, such as the applicability of the floodgates argument.

⁶⁵ *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100, [2007] SGCA 37.

⁶⁶ See *ibid* at [73].

⁶⁷ Albert Einstein, “On the Electrodynamics of Moving Bodies” (1905) 322:10 *Annalen der Physik* 891, set out two postulates of special relativity (the principle of relativity and the principle of invariant light speed). A consequence of the postulates was that space and time were inseparable. Subsequently, Hermann Minkowski, “The Union of Space and Time” (Address delivered at the 80th Assembly of German Natural Scientists and Physicians, 21 September 1908) in Milič Čapek, ed, *The Concepts of Space and Time: Their Structure and Their Development* (Dordrecht: D Reidel Publishing Co, 1976) 339, developed a mathematical model of special relativity that unified space and time (although, to be precise, it treated the dimension of time differently from the three dimensions of space). Eventually, Minkowski’s model was used by Albert Einstein, “The Foundation of the General Theory of Relativity” (1916) 49:7 *Annalen der Physik* 769, to develop general relativity.

feasible].”⁶⁸ This was hyperbolic, for today, physics remains divided into two branches: classical physics, which separates space and time and is sufficient for most situations, and modern physics, which unifies spacetime and is necessary only for extreme conditions.

Similarly, well-developed areas of civil procedure are governed by established principles. Even in the less-developed areas of civil procedure, most cases can be resolved using the classical approach. Only in the most difficult cases does the integrated approach come vividly to the fore, and “justice in its fullest orb ... shine forth”.⁶⁹

⁶⁸ Hermann Minkowski, “The Union of Space and Time” (Address delivered at the 80th Assembly of German Natural Scientists and Physicians, 21 September 1908) in Milič Čapek, ed, *The Concepts of Space and Time: Their Structure and Their Development* (Dordrecht: D Reidel Publishing Co, 1976) 339 at 339.

⁶⁹ *UOB*, *supra* note 3 at [9].