Hilary Term
[2025] UKPC 19
Privy Council Appeals Nos 0072 and 0073 of 2023

JUDGMENT

Attorney General of Trinidad and Tobago (Respondent) *v* Antonio Sobers (Appellant) (Trinidad and Tobago); Attorney General of Trinidad and Tobago (Respondent) *v* Gabriel Joseph (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge
Lord Lloyd-Jones
Lord Sales
Lord Leggatt
Lady Simler

JUDGMENT GIVEN ON
17 April 2025

Heard on 4 February 2025

Appellant
Tom Richards KC
Gerald Ramdeen
(Instructed by St Michael's Law (Trinidad))

Respondent
Rowan Pennington-Benton
Katharine Bailey
(Instructed by Charles Russell Speechlys)

LADY SIMLER:

1. Introduction

1. On 11 November 2006, there was an incident involving inmates and officers in the Remand Yard of the State Golden Grove Prison in Arouca, in Trinidad and Tobago. A joint operation (which began in the late evening and lasted into the night) was conducted by officers of the Trinidad and Tobago Prison Service, Police Service and the Special Anti-Crime Unit/Defence Force to suppress disorder and return control to the prison officers. The officers used force, and some prisoners were injured, some of them seriously. Proceedings were issued on 11 October 2010 by one of the appellants, Antonio Sobers, who was a remand inmate on the north wing of the prison at the time, alleging assault and battery during the incident. Fifty-three further claims by prisoners alleging assault and battery in the same incident followed (as listed in the appendix to the trial judge's judgment, which included the claims of the other appellant, Gabriel Joseph, and that of Clint Wilson). The claims were resisted by the Attorney General of Trinidad and Tobago, the respondent to these appeals, who filed defences on 25 July 2011.

2. Also on 25 July 2011, the trial judge, the Hon Madam Justice Judith Jones, made a consent order reflecting an agreement reached by the parties (referred to below as the "test case agreement"). Its essential terms, (as later recorded in paras 1 and 2 of her judgment dated 9 July 2012), were:

> (i) For the purposes of determining liability all 54 claims should be tried together, with representative test claimants in each category.
>
> (ii) The test claimants would be Mr Sobers representing claimants who had received treatment for injuries at the general hospital, Mr Joseph representing claimants who had received treatment for injuries at the prison infirmary, and Mr Wilson, representing claimants for whom no record of injuries existed.
>
> (iii) The parties would be bound by the judge's findings as to liability in relation to each category.

3. The liability trial took place on 22 and 23 November 2011. Messrs Sobers, Joseph and Wilson were called as witnesses for the claimants. The defendant's witnesses were the Commissioner of Prisoners (Mr Rougier), a military officer responsible for the contingent of soldiers during the incident (Mr Williams), and the senior police officer who was present (Mr Mohammed). By her judgment dated 9 July 2012, the judge held that the appellants (Mr Sobers and Mr Joseph) were assaulted and

injured by officers using unjustified, unreasonable force, entitling them to general and exemplary damages by reference to their recorded injuries. Mr Wilson's claim was dismissed by the judge on the basis that he had not proved that he had suffered any injury in the incident.

4. On 17 August 2012 the respondent appealed the judge's order that the appellants were entitled to damages. The grounds of appeal contended that she had erred in her factual assessment and her ruling that unjustified and unreasonable force was used during the incident by officers for whom the respondent was liable. Mr Wilson cross appealed against the dismissal of his claim. There was no challenge whatever to the test case agreement or to the use of representative test cases to determine liability in respect of all 54 claims.

5. The three appeals were dismissed by the Court of Appeal (Bereaux JA, Rajkumar JA and Kokaram JA) on 22 October 2021. The court upheld the findings of fact by the trial judge and her ruling that the force used on the appellants was unreasonable. However, in its judgment dismissing the appeal, the Court of Appeal raised concerns about the justification and rationale for the use of a test case procedure. The Court of Appeal observed that there was logic in such an agreement in respect of Mr Wilson, who could bind others in his position, namely those for whom there was no medical record to corroborate their claims to have sustained injuries from alleged assaults in the incident. However, it questioned the logic in relation to Messrs Sobers and Joseph. Findings of liability in each of their cases were viewed by the Court of Appeal as dependent on evidence as to whether disproportionate force was used on each of them in the specific circumstances which "was a matter of fact and evidence specific to each claimant" (para 49). The court observed that the rationale for a case being selected as a binding test case should be based on "an established common logical, factual and material connection with respect to the circumstances of the persons in the class" (para 50); the outcome of each case here was highly fact dependent (para 51); and tedious as it might have been, this was an exercise that had to be carried out in respect of each of the 54 claimants (para 52).

6. Having received further submissions on this question, by an order dated 14 February 2023, for reasons given in a majority judgment of that date (by Rajkumar JA with whom Bereaux JA agreed, with a dissenting judgment of Kokaram JA) the Court of Appeal set aside the test case agreement as it related to the two appellants and held that there should be individual trials of each claim by the claimants represented by these two appellants. The Court of Appeal upheld the test case agreement in the case of Mr Wilson and the claimants he represented and ordered the appellants to pay the respondent's costs of the test case agreement issue.

7. With leave granted by the Court of Appeal (Mendonca, Moosai and Lucky, JA), the appellants now appeal to the Board against the Court of Appeal's order setting aside the test case agreement in their cases.

2. The issues to be determined by the Board

8. There are three questions raised by the appeal as follows:

(i) Whether the Court of Appeal had jurisdiction partially to set aside the test case agreement.

(ii) Whether the Court of Appeal had jurisdiction partially to set aside the consent order which gave effect to the test case agreement, in the absence of any application to the first instance court to challenge the order or any procedural or other appeal against the order or any application for leave to appeal the order.

(iii) Whether, if it did have such jurisdiction, the Court of Appeal was wrong to exercise it in the circumstances of the case.

3. The circumstances leading to the test case agreement and the outcome of the trial

9. There was no dispute at trial that there was a violent incident in the remand section of the Golden Grove Prison on 11 November 2006. The nature and gravity of the injuries suffered by the appellants were disputed, as were the circumstances in which they received them. In the case of Mr Wilson there was a dispute about whether he sustained any injury at all. In their statements of case, all three claimants alleged they were victims of unprovoked assaults at the hands of armed and masked officers. The appellants asserted that they were in their cells at the time and that officers had fired weapons with rubber bullets into their cells and then taken them out of their cells and had beaten them up. Mr Wilson said he was outside his cell in the corridor and was ordered to lie on the ground and was attacked and beaten with batons and a bolt cutter but not taken for medical treatment.

10. The respondent's defence to the claims was generic (save that specific admissions were made to injuries recorded as having been sustained by each of the appellants) and did not advance any positive case about the specific treatment of individual claimants. For example, the defence made generalised allegations that inmates in the north wing seized control of it, committing acts of violence, vandalism and subversion which threatened and violated the safety and well-being of prison

officers and other inmates. The inmates also armed themselves with weapons and refused to obey instructions to return to their cells. Prison officers were unable to regain control of the north wing and accordingly, as a result of the extent and gravity of the situation a contingent of officers from the Trinidad and Tobago Defence Force, the Trinidad and Tobago Police Service and the Trinidad and Tobago Prison Service assembled together in Golden Grove and devised a strategy for restoring order to the north wing of the prison. This contingent was armed with both lethal and non-lethal weapons. Anti-riot measures were taken to quell the disturbance. These included the discharge of gas canisters containing non-lethal powder and the discharge of non-lethal rubber bullets in the direction of a mob of inmates hurling missiles. Once inmates were back in their cells, each inmate was removed from the cell and thoroughly searched by prison officers. Once this search had been conducted, the inmates were returned to the cells. Some inmates resisted being searched and force was used to subdue them. The whole exercise lasted several hours. The defence asserted that all force used was "necessary for the purpose of suppressing the mutinous activities of the inmates which occurred on 11 November 2006 and had been occurring prior to that date and such force was reasonable, appropriate and proportionate in the circumstances."

11. As discussed in para 2 above, rather than seeking to litigate each of the 54 claims separately, the parties agreed that all 54 claims should be tried together, and that three test cases should be chosen. These were Mr Sobers (one of 8 claimants who had required hospital treatment for his injuries), Mr Joseph (one of 10 claimants who had required treatment at the prison infirmary) and Mr Wilson (one of the remaining 36 claimants for whom no record of any injury existed). The parties expressly agreed to be bound by the judge's findings on liability in relation to each of these categories.

12. The only written record of the test case agreement that the parties have been able to identify is in the judge's judgment. At paragraphs 1 and 2 of her judgment, the judge recorded the following:

> "1. ... For the purpose of determining liability it was ordered by consent that all 57 [this should have been 54] cases would be heard together. To that end the cases were divided into three categories with each category represented by one of three cases: those in which the claimants have no record of injuries by CV 2010- 04649 Clint Wilson v The AG; those in which the claimants received treatment at the prison by CV 2010-04508 Gabriel Joseph v The AG and those in which the claimants received treatment at the hospital by CV 2010-04093 Antonio Sobers v The AG.
>
> 2. It was further agreed that the cases in each category would be bound by my findings in the action representing their

> category. There is attached to this judgement as an appendix a list of the various actions and the categories into which they fall. As can be seen from the schedule by far the largest category is that of claimants with no record of injuries."

13. Having endorsed the test case agreement in a consent order in this way, the trial of liability in the 54 claims proceeded before the trial judge. Consistently with the generic defences filed, the respondent did not adduce direct or specific evidence of what happened to each claimant in the incident. Rather, the respondent led evidence of an alleged mutiny in the remand section and maintained that officers took lawful steps throughout to deal with an unusual and critical situation, using force that was proportionate to and commensurate with the gravity of the situation. The respondent invited the judge to infer that the appellants were injured during legitimate attempts to quell the mutiny.

14. It is unnecessary to describe the judge's findings and conclusions in any detail. The Board notes that the judge recorded that the respondent failed to adduce any evidence specific to each claim (para 85). She accepted (in large measure) the evidence of each of Sobers and Joseph as to the circumstances of his assault in the cell and immediately outside it, and the injuries recorded as having been sustained by each man in consequence (paras 88 and 94). She held, in the absence of any evidence from the respondent justifying the use of force against Sobers and Joseph, "the only inference to be drawn from the evidence is that force was used on them for the purpose of punishment and not by way of a good faith effort to maintain or restore discipline. This, to my mind, is impermissible and improper." (para 109). She held at para 110, "In the circumstances, whatever the reason for the attacks, both Sobers and Joseph have satisfied me that they were the victims of unjustified and unreasonable attacks …".

15. As we have observed, there were appeals and cross appeals in 2012 but, as is common ground, neither side sought to challenge the test case agreement or to appeal the consent order made by the trial judge. Regrettably the appeals were not heard until July 2021, almost ten years after the trial and 15 years after the incident at the prison in which remand inmates were injured. The Court of Appeal unanimously dismissed both the appeals and cross appeal at para 46 of the judgment (and by an order dated 22 October 2021).

16. Under the heading "Additional Matter" at para 47 of the Court of Appeal judgment, and in the paras that followed, the Court of Appeal explained its concerns about the test case agreement reached by the parties as recorded at paras 1 and 2 of the first instance judgment. As we have recorded above, the court saw logic in the agreement that the finding of liability in Mr Wilson's case could bind others in his position but could not understand the basis of "the agreement that was presented to the trial judge, that the outcome of the cases of Mr Sobers and Mr Joseph would be binding

upon others" (para 50). As this was a concern that arose after the appeal hearing, the court invited submissions from the parties to address these concerns.

4. Resolution of the "additional matter" concerning the test case agreement

17. Notwithstanding the fact that the Court of Appeal had raised this additional matter, neither side sought to appeal the test case consent order itself. However, the respondent took up the point raised by the Court of Appeal, submitting for the first time that the test case procedure was inappropriate in the case of the appellants (though not in the case of Mr Wilson). The respondent identified the following issues for consideration: "Whether the Court of Appeal's appellate jurisdiction permits the variation of the agreement made between the parties in the High Court; whether the test case approach agreed upon was appropriate" (para 8 of the written submissions). The respondent concluded its submissions on the first issue stating that because the "agreement and subsequent order sanctioning the use of the test case approach" may not allow for a fair determination of liability, the unusual circumstances justified the Court of Appeal's intervention to ensure justice; and on the second issue, the respondent argued that the test case approach was inappropriate in the absence of common logical, factual and material connections between those in the class represented and the test case claimants, Mr Sobers and Mr Joseph.

18. The three representative claimants resisted these arguments, contesting the Court of Appeal's jurisdiction to interfere with the test case agreement in the absence of any appeal against the consent order, or any controversy between the parties as to the legitimacy of entering into the agreement or whether the right considerations were applied by the trial judge in approving that decision.

19. The Court of Appeal by a majority set aside the test case agreement by an order dated 14 February 2023 accompanied by written reasons. Rajkumar JA (with whom Bereaux JA agreed) explained in relation to the appellants, Mr Sobers and Mr Joseph, that "there was no rational, far less a common logical, factual, or material connection, demonstrated between the matter selected as common to members of the class and to the issue of liability. Yet it was being sought to affix liability to the State for the injuries to the members of each class on the basis of this arbitrary, illogical and irrelevant consideration embodied in the purported test case agreement" (para 11).

20. Rajkumar JA recognised that the trial judge had accepted the test case agreement but continued:

> "Once the matter engaged the attention of the Court of Appeal, the issue of liability was before this court for review. Given that the court's continued sanction of the test case

> agreement was being assumed, (which was the basis of the State's potential assumption of liability in respect of dozens of claimants who had themselves established no such liability on the part of the State), it was open to this court to itself examine that matter. It had the jurisdiction to do so whether or not the parties themselves raised it" (para 14).

21. Rajkumar JA reasoned that the real question in controversy was the issue of liability and said, "The test case agreement, attempting as it did to bypass the determination of liability in respect of each claimant, could only do so with the continued sanction of this court if it were justifiable" (para 16). Since the rationale of the test case agreement had only been demonstrated in the case of Mr Wilson, but not in the case of the appellants, it was irrational, unjustifiable and unsustainable and the court had power under section 39 of the Supreme Court of Judicature Act Chapter 4:01 ("the SCJA") to set it aside in relation to the appellants (para 25).

22. Kokaram JA dissented from the view of the majority on the validity of the test case agreement. As he explained at para 13 of his short ex tempore judgment:

> "Justice is a two way street. The court must give effect to the overriding objective and I am unfamiliar with the circumstances of the making of your agreement or how your consent order was entered. Litigation is a gamble and both of you may have hedged your bets by giving thought to the principle of the overriding objective of proportionality and economy and may have thought it prudent to go down this path. You argued an entire trial on that basis. To now change tack needs powerful evidence to do so, had you not done this and entered the test case agreement, all the cases would have then been heard together at the same time 9 years ago and our courts have robustly done nothing less in managing such multiple cases together. Both of you may have rolled your dice. Win one. Win all. One of you have lost. It is not for me to now reinvestigate the wisdom of that decision without proper procedural safeguards, evidence, and with that main controversy squarely before the Court of Appeal."

The Board will return to consider Kokaram JA's other reasons for reaching this decision below.

23. The result of the order setting aside the test case agreement was that the 18 other claims (represented by Mr Sobers and Mr Joseph) would now have to be tried more than

a decade after the liability trial, and almost 18 years after the incident itself in November 2006.

5. The powers of the Court of Appeal under section 39 of the SCJA

24. Civil appeals from the High Court to the Court of Appeal are governed by section 38 of the SCJA. The Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of the High Court in all civil proceedings and has the same power, authority and jurisdiction as the High Court for the purposes of and incidental to the hearing and determination of any appeal (section 38(1)). Section 38(2) provides:

> "(2) No appeal shall lie, except by leave of the Judge making the order or of the Court of Appeal from-
>
> (a) an order made with the consent of the parties;
>
> (b) an order as to costs;
>
> (c) a final order of a Judge of the High Court made in a summary proceeding."

25. As the Board has emphasised, although both sides unsuccessfully appealed the judge's decision on liability in the three test cases, neither side appealed or otherwise sought to challenge the consent order which gave effect to the test case agreement. Indeed, it is an agreed fact that no application was made by the respondent seeking permission to appeal the consent order from the Court of Appeal pursuant to the provisions of section 38(2)(a) of the SCJA (para 12 of the agreed statement of facts and issues, "the SFI"). Further, the Court of Appeal did not itself give leave to appeal the consent order pursuant to section 38(2).

26. Having questioned the "rationale" or justification for the test case agreement of its own motion, the sole provision relied on by the Court of Appeal as giving it jurisdiction to set aside the consent order made by the trial judge was section 39 of the SCJA. Contrary to the respondent's written case, and for good reason as it seems to the Board, no reliance was placed on section 38 of the SCJA.

27. So far as material, section 39 provides as follows:

> "(1) On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have the power to—
>
> (a) confirm, vary, amend, or set aside the order or make any such order as the Court from whose order the appeal is brought might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;
>
> (b) …
>
> (c) …
>
> (2) The powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in Court, or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court of Appeal thinks just, to ensure the determination on the merits of the real question in controversy between the parties.
>
> (3) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.
>
> …"

28. The scope of the power conferred on the Court of Appeal by section 39 of the SCJA was considered by the Board in *Hannays v Baldeosingh* [1992] 1 WLR 395 and that decision was applied more recently in *Caribbean Welding Supplies Ltd v Attorney General of Trinidad and Tobago* [2024] UKPC 7 at paras 45 to 47 and 58 to 60. In *Hannays v Baldeosingh* the claimant brought proceedings in debt for a sum due from the defendant on a settled account. The claimant applied for final judgment under Order 14 of the Rules of the Supreme Court (Trinidad and Tobago) but the application was dismissed by Collymore J, who gave the defendant unconditional leave to defend. That grant of leave could not be appealed by virtue of section 38(3)(c) of the SCJA. The claimant then served a reply to the defence and the defendant applied to strike out the

reply as tending to raise a new cause of action that was inconsistent with the statement of claim. That application was dismissed by Brooks J. The defendant appealed to the Court of Appeal, which dismissed the appeal and, in purported exercise of jurisdiction conferred on it by section 39 of the SCJA, gave judgment for the claimant in the sum claimed. The defendant then appealed to the Board contending that the Court of Appeal did not have jurisdiction under section 39 to give judgment for the claimant on an appeal from the order of Brooks J dealing with an application to strike out the claimant's reply. The Board agreed.

29. Lord Jauncey of Tullichettle addressed the proper construction of sections 39(1)(a), (2) and (3) at page 401 as follows:

> "The first part of section 39(1)(a) empowers the Court of Appeal inter alia to 'make any such order as the court from whose order the appeal is brought might have made.' The last three words cannot be construed as referring to the overall jurisdiction of the court below but must be restricted by the circumstances in which that court acted. Thus one must look at the application before that court and consider what order that court could competently have made thereupon. The reference to 'such further or other order' once again must refer to orders consequential upon any order which could or ought to have been made upon the application."

In relation to section 39(2), Lord Jauncey said:

> "Section 39(2) does not help the plaintiff because the last sentence presupposes that the order which the Court of Appeal may make arises out of the decision in the lower court."

In relation to section 39(3), Lord Jauncey said:

> "Furthermore [the plaintiff] cannot obtain any assistance from section 39(3). That subsection is in the same terms as Ord LVIII, r 14 of the Rules of the Supreme Court, as they were in 1876, and it was said by Mellish LJ in *Sugden v Lord St Leonards* (1876) 1 PD 154, 209:
>
> > 'The object of this was to prevent parties being prejudiced by their having omitted to appeal from an interlocutory order. The whole thing was to be open on the merits before the Court of Appeal.'

> It is clear from that dictum that subsection (3) is referring to an appealable order whereas, for the reasons already stated, Collymore J's order granting the defendant unconditional leave to defend was unappealable."

The only order then before the Court of Appeal in *Hannays v Baldeosingh* was the order of Brooks J dismissing the defendant's application to strike out the claimant's reply. Brooks J had no jurisdiction on that application to enter judgment for the claimant. The consequence accordingly was that neither did the Court of Appeal. The Board therefore allowed the defendant's appeal from that order and remitted the case back to the Court of Appeal so that the action could be listed for trial.

30. It follows that section 39(1) and (2) of the SCJA cannot be interpreted as referring to the overall jurisdiction of the lower court but must be more restricted. Section 39(1) only gives the Court of Appeal jurisdiction to make orders which the High Court could competently and as a matter of justice (rather than overall jurisdiction) have made when deciding the matter before it. The jurisdiction under section 39(2) is likewise limited and must arise out of the decision of the lower court and so relate to the real question in controversy between the parties on appeal. The purpose of section 39(3) is to avoid the situation where parties who have appealed a decision are prejudiced because they have failed to appeal an earlier interlocutory order, and this means that the interlocutory order must be relevant to the appeal itself in the sense that it directly or incidentally involves a decision on the point of the appeal.

6. The first issue: whether the Court of Appeal had jurisdiction to set aside the consent order

31. To determine whether the Court of Appeal had jurisdiction to set aside the consent order under section 39(1) of the SCJA in this case it is necessary to consider what order the High Court could competently have made. Although in a literal sense the trial judge had the jurisdictional power or competence to set aside the consent order, either on the application of the parties or of her own motion, the question that must be answered is whether she had jurisdiction to do so in the narrower sense that is conveyed by these provisions.

32. Significantly, the consent order was made by the trial judge a year before the trial. It is a basic principle of adversarial litigation that the parties decide the issues that will be contested at trial. This case was no different. The consent order reflecting the test case agreement was the basis on which the parties prepared for and proceeded to trial. It defined the issues that would have to be resolved. It reflected the parties' agreement that one case would stand for all other cases in that category and that liability would not be disputed in those other cases. Accordingly, there were only three cases

that had to be prepared for trial, rather than a trial involving 54 claimants, and only three determinations of liability would have to be made.

33. Against that background we must consider what order the trial judge could properly have made at the end of the trial when she made orders reflecting her determination of liability in the three test cases subsequently appealed. It is true that she had all 54 cases before her, but the Board is in no doubt that the judge could not competently or justly have varied or set aside the consent order at the end of the trial. This was adversarial litigation; both sides were legally represented and took their own strategic decisions as to how the trial should best be managed and which issues to contest; the trial had proceeded on the basis of the consent order that the parties would be bound by the findings of liability made by the judge in the three test cases. Neither side had challenged the consent order at any stage and there was no suggestion that it had been agreed by mistake nor any suggestion of a material change in circumstances such as to justify varying it or setting it aside. In these circumstances it would have been grossly unfair to disturb the underlying basis on which the whole litigation had been conducted. Accordingly, it would not have been just for the judge to interfere with the consent order at the conclusion of the trial.

34. The same is true in relation to section 39(2) of the SCJA. As the Court of Appeal said, the real question in controversy on the appeal was the issue of liability as determined in the three test cases. There was no appeal against the consent order itself. Its validity or suitability were neither questioned nor challenged. Accordingly, on any view, the validity of the consent order was not the subject of any controversy (still less the real controversy) between the parties in the appeal. It is wrong to characterise the test case agreement and consent order as an attempt to bypass the determination of liability in respect of each claimant (as the majority suggested at para 16 of the judgment): it was an agreement that findings in each test case would be binding on other claimants in the same class; it meant that the question of liability in those other cases was not in issue between the parties but would be determined by the findings in the test cases. The Board agrees with the observations of Kokaram JA in his dissenting judgment that the parties agreed that an efficient means of resolving liability in accordance with the overriding objective was to invite the court to decide liability in the test cases and agree that they would be bound by those findings. Having reached that agreement and argued the trial on that basis, to change tack would have required powerful justification which was absent. There was no jurisdiction for the Court of Appeal to intervene under section 39(2).

35. The same is also true of section 39(3). The consent order is an interlocutory order that was capable of being appealed but it did not directly or incidentally involve any decision on the point of the liability appeals. The point of the liability appeals was to challenge the judge's assessment of the evidence and her factual findings about the incident on 11 November 2006 that led to her upholding the appellants' claims and dismissing the claim made by Mr Wilson. The appeals proceeded on the common

premise and shared understanding that the consent order remained effective and in force, and that the parties would be bound by Justice Judith Jones's findings on liability in each of the test cases. Section 39(3) does not assist the respondent either in these circumstances.

36. It follows from these conclusions that the jurisdiction of the Court of Appeal pursuant to section 39 of the SCJA did not extend to varying, amending, or setting aside the consent order made before the trial. In the Board's view, the Court of Appeal had no jurisdiction to interfere with that order.

37. Even if the Court of Appeal had jurisdiction, the Board considers that the Court of Appeal was wrong to exercise it in this case, both as a matter of law, and as a matter of fact in the exercise of discretion. We set out our reasons for reaching this conclusion below.

7. The second issue: whether there was any legal basis for the Court of Appeal to set aside the test case agreement

38. It is common ground that the starting point where a court is considering whether to depart from a consent order giving effect to an agreement between parties to litigation is that while there is undoubtedly discretion to do so, that discretion should be exercised in accordance with the overriding objective, with appropriate weight given to the nature and substance of the parties' agreement, and the court should generally be slow to depart from the terms of such an order: see *Pannone LLP v Aardvark Digital Ltd* [2011] EWCA Civ 803; [2011] 1 WLR 2275 where Tomlinson LJ approved what was said by Neuberger J in a landlord and tenant dispute, *Ropac Ltd v Inntrepreneur Pub Co (CPC) Ltd* [2001] L & TR 93. In the *Ropac* case an extension of time was sought by the tenant overriding the terms of a consent order that had been agreed by the parties. Neuberger J said that the court has powers that are sufficiently flexible to do justice not only between the parties, but in the wider public interest. He continued that the overriding objective to deal with a case "justly" may, albeit rarely:

> "require the court to override an agreement made between the parties in the course of, and in connection with, the litigation. … Having said that, I should add this. Where the parties have agreed in clear terms on a certain course, then, while that does not take away its power to extend time, the court should, when considering an application to extend time, place very great weight on what the parties have agreed and should be slow, save in unusual circumstances, to depart from what the parties have agreed" (para 31).

In the *Ropac* case the consent order represented the compromise of a substantive dispute and Neuberger J did not in fact extend time.

39. In *Pannone*, Tomlinson LJ (with whom the other members of the court agreed) held that the weight to be given to the fact that an order has been agreed by the parties will vary according to the nature of the order and the underlying agreement. On the one hand, where the agreement is the compromise of a substantive dispute, that factor will carry great and often decisive weight against overriding it. On the other hand, where the agreement is no more than procedural, concerning time or case management issues, the weight to be accorded to the fact of the parties' agreement about the consequences of non-compliance will be correspondingly less and will rarely be decisive. Nonetheless, in both cases, respect should be given to the fact of agreement which remains a relevant and substantial factor to consider. The Board endorses that approach and notes that a similar approach was adopted by Kokaram J in the case of *Soogrim v Singh,* 23 February 2017, at para 18.

40. In his submissions to the Board on behalf of the respondent, Mr Pennington-Benton contended that the consent order did not evidence a "real contract" between the parties; rather, it was at most, a procedural accommodation offered to the court as a proposed way forward in the litigation. The Board does not consider that it is open to the respondent now to deny the substantive effect of the test case agreement given the way the matter was dealt with in the lower courts and the way it has been presented in writing to the Board. The precise circumstances in which and reasons why the parties entered into the test case agreement were not in evidence before the Court of Appeal (as Kokaram JA made clear at para 7) not least because it did not form part of the subject matter of either the appeal or cross appeal. There is no evidence about any of this before the Board either. Instead, the clear implication of paras 4, 5, and 6 of the SFI is that the parties agree that there was a binding test case agreement reached by them, and that a consent order reflecting that agreement was subsequently made. There is nothing to suggest that the test case agreement was conditional on the making of the consent order. Moreover, the parties agreed before both the Court of Appeal and the Board that the effect of the test case agreement was that the parties would be bound by the trial judge's findings on liability in each category represented by a test claimant; that the trial proceeded on that basis; and that "pursuant to the test case agreement, the trial judge's judgment resolved those cases waiting in the wings and within the 3 agreed categories" (para 8).

41. In *Baker v The Queen* [1975] AC 774, 788, the Board stated that:

> "… its normal practice is not to allow the parties to raise for the first time in an appeal to the Board a point of law which has not been argued in the court from which the appeal is brought. Exceptionally it allows this practice to be departed

> from if the new point of law sought to be raised is one which in the Board's view is incapable of depending upon an appreciation of matters of evidence or of facts of which judicial notice might be taken and is also one upon which in the Board's view they would not derive assistance from learning the opinions of judges of the local courts upon it."

(Recent examples of the application of this approach include *Sahatoo v Attorney General of Trinidad and Tobago* [2019] UKPC 19, at para 28; *Port Authority of Trinidad and Tobago v Daban* [2019] UKPC 22; [2020] 1 All ER 373, at para 26 and *Flashbird Ltd v Compagnie de Sécurité Privée et Industrielle SARL* [2021] UKPC 32; [2022] Bus LR 55, at para 20.)

42. The Board has been given no reason, still less any good reason to depart from this practice here.

43. In any event, the Court of Appeal majority appear to have overlooked altogether the distinction between the consent order and the test case agreement that led to it. There was no consideration of what weight should be attached to the fact of the parties' agreement or the nature and effect of that agreement. Indeed, its binding effect was simply not addressed. On any view, the court should have placed weight on what the parties had agreed and should have been slow to depart from the binding test case agreement. The principle of party autonomy, the overriding objective in section 1.1(2) of the Civil Proceedings Rules and the public interest in promoting alternative dispute resolution were all factors that should have weighed heavily in favour of upholding the test case agreement which the parties had reached well before the trial. Instead, the judgment of Rajkumar JA simply conducted a de novo assessment of the justifiability of the test case agreement and consent order. That was an error of principle.

44. Moreover, it ignored the wider public interest and the fundamental importance of the principle of finality, especially as it applied at the end of the trial. As the UK Supreme Court (Lord Briggs and Lord Sales) explained in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16; [2022] 1 WLR 3223:

> "31. … Litigation cannot be conducted at proportionate cost, with expedition, with an appropriate share of the court's resources and with due regard to the rules of procedure unless it is undertaken on the basis that a party brings his whole and best case to bear at the trial or other hearing when a matter in dispute is finally to be decided (subject only to appeal). As Lewison LJ said in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, at para 114:

> ‘The trial is not a dress rehearsal. It is the first and last night of the show.’

In that respect we are in full agreement with Coulson LJ, in the Court of Appeal at para 50, when he said:

> ‘The principle of finality is of fundamental public importance … The successful party should not have to worry that something will subsequently come along to deprive him or her of the fruits of victory. The unsuccessful party cannot treat the judgment that has been handed down as some kind of rehearsal, and hurry away to come up with some new evidence or a better legal argument. … [T]here is a particular jurisdiction which permits a judge to change his or her order between the handing down of the judgment and the subsequent sealing of the order. But in most civil cases, the latter is an administrative function, and it would be wrong in principle to allow parties carte blanche to take advantage of an administrative delay to go back over the judgment or order and reargue the case before it is sealed. Hence it is a jurisdiction which needs to be carefully patrolled.’”

As the Supreme Court went on to explain at para 35 in that case, the principle of finality is likely to be at its highest importance in relation to orders made at the end of a full trial.

45. In this case it would have been wrong in principle for the trial judge to reopen the consent order having finally concluded the trial of liability in the action. It was wrong for the Court of Appeal to do so for the same reason. That conclusion would have been strengthened by a consideration of the likely consequences of any such order by the Court of Appeal: the decision would require fresh trials to assess liability on an individualised basis, when the relevant events took place more than 16 years earlier and all parties had for ten years proceeded on the agreed basis that they were to be bound by the results of the test cases. Despite that, the Court of Appeal set aside the test case agreement without any apparent consideration for the practical consequences that followed from the significant lapse of time and without considering whether fair trials remained possible.

8. The third issue: whether the Court of Appeal was wrong to interfere in any event

46. Furthermore, the Board agrees with the appellants' submissions that the Court of Appeal was wrong to interfere with a case management order that was the foundation of the trial, and was in a practical sense, irreversible more than a decade later. In this respect, far from the test case agreement being manifestly irrational, the majority of the Court of Appeal disregarded important practical considerations that supported its rationality. First, they ignored the fact that the respondent's defence to the claims was generic. The respondent had no specific evidence to lead about each individual claimant's case. A trial of 54 separate cases on the same generic evidence with the potential for different outcomes was reasonably and sensibly avoided by the use of test cases. Secondly, avoiding a trial of so many cases saved time and cost to the parties, and was an effective and efficient use of limited court resources. Thirdly, the judgment of Rajkumar JA recognised that Clint Wilson represented claimants who had no record of injuries and that this could "conceivably have been a common logical factual and material connection with other persons who equally had no record of injuries to corroborate their claims of injuries from assault and battery" (para 7). The majority held that it was therefore logical and appropriate for Mr Wilson's case to be utilised as a test case. The same arguments regarding medical evidence could, as a matter of logic and rationality, have applied to the appellants' cases. This was a "win one win all" agreement that was either valid as a whole or not. It was not open to the Court of Appeal to rewrite it in favour of one side.

9. Conclusion

47. That the test case agreement was a rough and ready agreement is not in doubt. With the benefit of hindsight, it is possible that different common factors could have been identified as a better means of determining representative classes of claimants injured in the incident on 11 November 2006. However, as Kokaram JA said, litigation is a gamble. The parties to this litigation adopted a proportionate approach to the resolution of the dispute having regard to the nature of each party's case with the test case agreement and argued an entire trial on that basis. The claimants having succeeded in establishing liability in the minority of cases represented by the appellants but failed in the greater number of cases represented by Mr Wilson, it was not for the Court of Appeal to investigate afresh the wisdom of making that agreement many years later, still less set aside the consent order that embodied it. To do so required a strong jurisdictional and legal basis. Neither was established and there were compelling public interest and other reasons not to do so.

48. For all these reasons the appeal is allowed.