In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 142

BETWEEN:

AB

Plaintiff

and

MOUNT SAINT AGNES ACADEMY

Defendant

RULING

Before:	**Hon. Alexandra Wheatley, Acting Puisne Judge**
Appearances:	**Ms Susan Rodway KC of 39 Essex Chambers, Mr Kyle Masters and Ms Charlotte Donnelly of Carey Olsen for the Defendant** **Ms Victoria Greening of Resolution Chambers for the Plaintiff**
Dates of Hearing:	**6 and 7 February 2024**
Date of Submissions:	**11 March 2024**
Date Draft Circulated:	**7 June 2024**
Date of Ruling:	**12 June 2024**

Claims in Tort; Historical Sexual Abuse; Breach of Duty; Vicarious Liability; The Limitation Act 1984; Section 34 - Discretion to Extend Limitation Period; Strike Out Application; Matters to be Determined at Interlocutory Hearing; Evidentiary Burden

JUDGMENT of Hon. Alexandra Wheatley, Acting Justice

INTRODUCTION

1. These proceedings were commenced in April 2021 by the Plaintiff (hereinafter referred to as **AB**) by way of filing a Specially Endorsed Writ of Summons. AB attended the Defendant school between September 1986 and June 1999. In affidavit evidence of the current Chairman for the Board of Governors of Mount St Agnes Academy (the Defendant) he confirmed that the Defendant is a private school in Bermuda being founded in 1890 by the Sisters of Charity. The Defendant provides Catholic education for students from kindergarten to Grade 12. Since 1975, the Defendant has been owned and operated by the Roman Catholic Dioceses of Hamilton, Bermuda and assisted by the Board of Governors (**the Board**). The affairs of the Defendant are managed and conducted by the Board.

2. This claim relates to allegations of grooming and sexual abuse of AB by a teacher (hereinafter referred to as **YZ**) employed by the Defendant, between the years 1997 and 1999. AB was between 16 and 17 years old when these incidents occurred. YZ was employed by the Defendant as a teacher commencing in or around 1980 until 21 January 1999. AB knew YZ both as a teacher as well as a family friend and had known him since she was just five years old. AB was also friends with YZ's daughter (hereinafter referred to as **YD**) who was in the same year as her at Mount Saint Agnes Academy (**MSA**).

3. AB says that as a direct result of the prolonged and sustained sexual and emotional abuse which was inflicted upon her along with the Defendant's failure to carry out its duties (as detailed in paragraph 30, a. to v. in the Amended Statement of Claim dated 28 October 2021) she has developed psychiatric injury. SPACE BETWEEN THIS PARAGRAPH AND NEXT
4. The allegations made against the Defendant are twofold: (1) the Defendant breached its duty of care owed to AB in her capacity as a student attending the school; and (2) the Defendant was vicariously liable for the acts/omissions of its teachers, including YZ.

5. The Defendant's summons issued on 1 December 2021, seeks that the Writ and Amended Statement of Claim be struck out on the basis that (1) there is no cause of action, or (2) alternatively, the claim is frivolous or vexatious or an abuse of process (**Strike Out Application**).

6. The Defendant relies on the affidavits of Carlos Ferreira sworn on 19 November 2021 (**Defendant's First Affidavit**), on 11 March 2022 (**Defendant's Second Affidavit**) and on 6 March 2023 (**Defendant's Third Affidavit**) respectively. Mr Ferreira is the Chairperson of the Board and has been in this position since November 2019. In addition, the Defendant instructed an expert psychiatrist, Professor Anthony Maden, who produced a report for the purposes of the Strike Out Application which is dated 30 January 2024 (**Defendant's Expert Report**). A joint psychiatric report was also prepared by Prof. Maden and AB's expert psychiatrist, Dr Martin Baggaley, on 6 February 2024 (**Joint Expert Report**). Additionally, various school records were produced by the Defendant in discovery.

7. AB relies on her affidavits sworn on 3 February 2022 (**AB's Affidavit**) and on 3 February 2022 (**AB's Second Affidavit**). She also relied on Dr Alicia Hancock's affidavit sworn on 3 February 2022 **(Dr Hancock's Affidavit**) and Dr Baggaley's expert psychiatric report (as reference in paragraph 7 above) dated 2 February 2024 (**AB's Expert Report**).

8. For the purposes of the Strike Out Application, AB, Prof. Maden and Dr Baggaley were cross-examined on their respective evidence. There were also various medical records and therapy notes which AB provided in discovery that were included in the hearing bundle.

9. From the outset, I must acknowledge and thank Counsel for the professionalism and tactfulness they both displayed in their advocacy given the extreme sensitivity of the case. Counsel are also recognised for providing most helpful and detailed written submissions which I have comprehensively reviewed and incorporated into this Ruling. The following written submissions were filed and relied on:

   (a) Counsel for the Defendant, Ms Susan Rodway KC, filed written, opening submissions on 5 February 2024 (**Defendant's Opening Submissions**). Thereafter, Ms Rodway filed written, closing submissions 7 March 2024 (**Defendant's Closing Submissions**).

   (b) Ms Victoria Greening's submissions filed on 8 February 2024 (**AB's Opening Submissions**) and the closing submissions filed on 5 March 2024 (**AB's Closing Submissions**).

STATUTORY PROVISIONS

10. The Limitation Act 1984 (**the Act**) provides the central statutory provisions relevant to the Claim and the Strike Out Application. Section 12 of the Act sets out the time limit applicable to AB's Claim:

> "***Time limit; personal injuries or death***

12 (1) this section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of the contract or a provision made by or under statute or independently of any contract or any such provision) where the damages claim by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) None of the time limits given in the preceding provisions of this act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5).

(4) except where subsection (5) applies, the period applicable is six years from –

(a) the date on which the cause of action accrued; or
(b) the date of knowledge (if later) of the person injured,

whichever is the later..." [Emphasis added]

11. The definition of a plaintiff's "*date of knowledge*" is provided for in section 15 of the Act:

"*15 (1) in sections 12 and 13 references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts –*

(a) that the injury in question was significant; and
(b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
(c) the identity of the defendant; and
(d) if it is alleged that the act or omission was that a person other than the defendant, the identity of the person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) for the purposes of this section and injury is sufficient if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against the defendant who did not dispute liability and was able to satisfy a judgment.
(3) for the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire –

(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek,

the person shall not be fixed under this subsection with knowledge of the fact ascertainable only with the help of expert advice so long as he is taking all reasonable steps to obtain (and, where appropriate, to act on) that advice…" [Emphasis added]

12. Section 34 of the Act provides the Court with the discretion to extend the limitation period in relation to matters where section 12 of the Act is applicable. In exercising discretion, section 34(3) of the Act provides, *inter alia*, that the Court must:

> "*(3) and acting under this section the court shall have regard to all the circumstances of the case and in particular to –*
>
> *(a) the length of, and the reasons for, the delay on the part of the plaintiff;*
>
> *(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 12 or (as the case may be) by section 13;*
>
> *(c) the conduct of the defendant after the cause in action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;*
>
> *(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;*
>
> *(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;*
>
> *(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received...*" [Emphasis added]

CASE LAW

13. Both Counsel provided authorities from the UK where there have been several historical sexual abuse cases determined by the Courts. The factors to be considered by the Court in exercising its discretion to extendthe limitation period is the central theme in these cases. Notably, the Limitation Act 1980 in the UK (**the UK Act**) is analogous with the Act in Bermuda, save for the numbering of the respective sections. The below is a list of the equivalents:

The UK Act	**The Act**
Section 11	Section 12

Section 14	Section 15
Section 33	Section 34

14. In the UK Supreme Court Case of *KR and others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and another* [2003] QB 1441, CA, the court set out what factors must be taken into consideration when exercising its discretion in disapplying the limitation period under section 34 of the Act (section 33 in the UK Act). Lord Justice Auld provided at paragraph 74 that the "*well-established and/or uncontroversial starting points for the exercising of the discretion*", *inter alia*, are as follows:

> "*...v) A judge should not reach a decision effectively concluding the matter on the strength of any one of the circumstances specified in section 33(3), or on one of any other circumstances relevant to his decision, or without regard to all the issues in the case. He should conduct the balancing exercise at the end of his analysis of all the relevant circumstances and with regard to all the issues, taking them all into account; Long v. Tolchard & Sons Ltd., per Roch LJ at P26.*
>
> *vi) Wherever the judge considers it feasible to do so, he should decide the limitation point by a preliminary hearing by reference to the pleadings and written witness statements and, importantly, the extent and content of discovery. In Stubbings v. Webb, for example, the matter was dealt with by the master and the judge as a preliminary issue on affidavit evidence, without cross-examination but with the benefit of discovery. As Bingham LJ commented when the matter was before the Court of Appeal, at 202H-203A:*
>
> > *"This produces an unusual situation, since the facts pleaded by the plaintiff cannot for purposes of this proceeding be assumed to be true, and they are not common ground. In particular, and this must be emphasised, the Webbs deny the allegations against them. We must, it would seem, like the judge, draw such provisional inferences from the evidence before us as appear to be fair."*
>
> *It may not always be feasible or produce savings in time and cost for the parties to deal with the matter by way of preliminary hearing, but a judge should strain to do so wherever possible.*
>
> *vii) Where a judge determines the section 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay in the cogency of the evidence. Much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him. To rely on his findings on those issues to assess the cogent evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would*

effectively require the defendant to prove a negative, namely, the judge could not have found against him on one or more of the substantive issues if he had tried the manner earlier and without the evidential disadvantages resulting from delay.
viii) where a judge has to assess the likely cogency of the available evidence, that is, before finding either way on the substantive issues in the case, you should keep in mind in balancing the respective prejudice to the parties that the more cogent the claimant's case the greater the prejudice to the defendant in depriving him of the benefit of the limitation period." [Emphasis added]

15. In the more recent Court of Appeal case of *Archbishop Bowen and The Scout Association v JL* [2017] EWCA Civ 82, these "*starting points*" set out by Auld LJ in *Bryn Alyn* were reaffirmed. *Bowen* is a case where the Court of Appeal allowed an appeal against a decision to allow a plaintiff to proceed outside the primary limitation period in a case of alleged historical sexual abuse. The Court of Appeal held, *inter alia*, that the trial judge had erred in failing to factor into his decision under section 33 his findings as to the reliability of the Plaintiff on the substantive matters which were being tried at the same time.

16. The law regarding the appropriate time limit applicable to claims for sexual abuse was clarified in 2008 by the House of Lords in *A v Hoare* [2008] 1 AC 844. This decision represented appeals in relation to six conjoined cases. The first of these appeals (including *A v Hoare*) all raised the same issue, namely whether the earlier decision of the House of Lords in *Stubbings v Webb* [1993] AC 498 (in which it was held that claims for deliberate sexual abuse lay in trespass to the person and were thus subject to non-extendable 6 year limitation period) was wrongly decided and, if so, whether the House should depart from it in accordance with its 1966 Practice Statement on Judicial Precedent. The facts of *A v Hoare* are that in 1988 the defendant attempted to rape the claimant for which he was convicted and sentenced to life imprisonment. The claimant did not make her claim for damages for personal injuries against the defendant until December 2004 which is when she found out that the defendant had won £7 million in a national lottery.

17. Lord Hoffman at paragraph 1[1] provided a helpful summary of issues which were considered:

"*…these six appeals all raise the question of whether claims for sexual assaults and abuse which took place many years before the commencement of the proceedings are barred by the Limitation Act 1980. The general rule is that the period of limitation for an action in tort is six years from the date on which the cause of action accrues. This period derives from the Limitation Act 1623 (21 Jac 1,c 16) and is now contained in section 2 of the 1980 Act. All the claimants started proceedings well after the six years had expired. It follows that, if section 2 applies, the claims are barred. But sections 11 to 14 contain provisions,*

[1] *A v Hoare* at pages 850 and 851

first introduced by the Limitation Act 1975, which create a different regime for actions for "damages for negligence, nuisance or breach of duty", where the damages are in respect of personal injuries. In such cases the limitation period is three years from either the date when the cause of action accrued or the "date of knowledge" as defined in section 14, whichever is the later. In addition, section 33 gives the court a discretion to extend the period when it appears equitable to do so. The chief question in these appeals is whether the claimants come within section 2 or section 11. In the latter case, the claimants say either that the date of knowledge was less than three years before the commencement of the proceedings or that the discretion under section 33 should be exercised in their favour." [Emphasis added]

18. At paragraphs 85 to 88 of *A v Hoare*, Lord Brown provided commentary (which Lord Hoffman stated as being "*particularly valuable*" at paragraph 52) in relation to issues that the court should consider in exercising its discretion under section 34 of the Act.

19. A further UK Court of Appeal case is that of *RE v GE* [2015] EWCA Civ 287. The facts of this case are that the claimant is the defendant's daughter. At the time of issuing the proceedings, the claimant was 46 years old. Her claim was for damages for personal injury alleged to have been inflicted upon her as a result of persistent sexual abuse on her by the defendant from 1974 to 1982 when the claimant was 6 and 14 years old respectively. The judge at first instance refused to extend the limitation period and granted judgment for the defendant. Counsel for the claimant in this matter argued that the judge applied the wrong test in exercising his discretion under section 33 of the UK Act. The decision was upheld by the Court of Appeal.

20. In the judgment of the Court of Appeal in *The Catholic Child Welfare Society et al v CD* [2018] EWCA Civ 2342 at paragraph 2, Lord Justice Lewison confirmed "*It is now settled that an action for deliberately inflicted personal injury is subject to the limitation period laid down by section 11 of the Limitation Act 1980.*"

21. *DSN v Blackpool Football Club Ltd* [2020] EWHC 595 (QB) is the most recent case relied on. The facts of this case were that there were allegations of sexual abuse by Frank Roper which were said to occur during a youth football trip. It was argued that the football club was vicariously liable for Mr Ropers actions. Counsel in this case agreed that the limitation period would be considered at the end of the trial "*at which all the evidence and arguments on all the issues had been heard*[2]", but it would be the first issue to be determined. There were five issues before the Court for determination:

" *i) Should the limitation period be extended under the discretion provided by section 33 of the Limitation Act 1980?*

[2] *Archbishop Bowen and The Scout Association v JL* at paragraph 23.

ii) Was DSN sexually abused by Roper and what was the extent of the assault?
iii) Is the defendant vicariously liable?
iv) What is the causation and the effect of DSN's psychiatric diagnosis?
v) What damages is DSN entitled to?"

22. Mr Justice Griffiths heard from 18 witnesses during the trial; 16 of which were cross-examined, one was not required to be cross-examined, and one was not able to attend the trial due to illness. There were two expert reports along with a joint statement as well as documentary evidence filed in two lever arch binders.

SUMMARY OF DEFENDANT'S POSITION

23. Ms Rodway KC submitted that if the Claim were to proceed to trial, the following factual issues would need to be determined:

i) The precise circumstances alleged to constitute abuse and where and when they occurred;
ii) The Plaintiff's consent to the same;
iii) The allegations of "*grooming*";
iv) The alleged knowledge of the Defendant concerning the alleged abuse;
v) The allegations of other students dating back to 1981;
vi) Vicarious liability for the Defendant in relation to YZ's alleged actions;
vii) The alleged abuse amounted to an actual tort;
viii) The alleged abuse caused AB a recognizable psychiatric injury, i.e. causation; and
ix) Quantum of damages.[3]

24. As it relates to the Strike Out Application, Ms Rodway KC says that there are several reasons which support the Defendant's position that there is no civil cause of action which necessitates the Claim being struck out. These reasons are as follows:

"*i) The Defendant is not vicariously liable for the actions of [YZ] which took place outside the scope of his employment, outside working hours or outside school premises;*

ii) The alleged actions of [YZ] do not amount to an assault because the Plaintiff gave legal consent to the actions of [YZ] at the material times;

iii) Her ability to consent was not impaired at the material times;

[3] Summarized from Defendant's Opening Submissions at paragraphs 5 and 26.

*iv) The Plaintiff's claim is very stale and has been brought over 16 years after the expiry of the primary limitation period and is statute barred by reason of Section 12 of the Limitation Act 1984 (**the Act**);*

v) There is no sufficient reason to extend the time for bringing the claim under the provisions of Section 34 of the Act.[4]"

25. Consequently, Ms Rodway KC submitted that the Court must make specific findings as it relates to: what is the applicable limitation period?; was there a later "*date of knowledge*"?; and if the proceedings were issued outside the primary limitation period, can that period be extended by the Court's discretion?[5]

26. It was argued by Ms Rodway KC that the only evidence AB is relying on is her own which should be considered with caution as it is self-serving, and the accuracy would have undoubtedly diminished over such a long period of time.

27. The Defendant relies heavily on the Defendant's Expert Report. It was submitted that the Defendant's Expert Report supports the following opinions which are to be considered on the issues of consent, causation and knowledge. Some examples of these conclusions made are namely, AB suffered a troubled home life, but is a woman of her own mind; AB graduated at the top of her year; there is no evidence of disability that support the reason for the delay in filing the proceedings; AB has a drinking problem, but the cause of this is multifactorial; AB has some sexual dysfunction, but this is vitiated by AB giving consent to the actions of YZ; there is no evidence of 'grooming'; AB had no impediment at the time the alleged instances occurred which would have impacted her ability to provide consent; medical records are sparse; and there is extensive criticism of AB's treatment by Dr Hancock.

28. In particular, the Defendant's Expert Report concluded the following regarding the cogency of evidence at paragraph 245:

> "*The delay by the Plaintiff in commencing a claim for damages has severely impaired the cogency of the evidence since medical records are sparse and she has received extensive but poorly documented therapy that has radically changed our understanding of events and the impact they had on her. There are no records of the counselling she received immediately after the material event or the counselling she received at university.*" [Emphasis added]

[4] Paragraph 6 (page 2) of the Defendant's Opening Submissions
[5] See Defendant's Closing Submissions

29. Ms Rodway KC also submitted that AB has had a successful career, and she has gone on to other relationships as AB is now married and has three children. Additionally, Ms Rodway KC asserted that AB had the requisite knowledge to commence an action prior to the expiry of the limitation period.

30. The issue of the delay in AB commencing proceedings was expanded on further in that Ms Rodway KC asserted that the Court "*must concentrate on whether the defendant can show that, in defending the action, there will be the real possibility of significant prejudice*" in accordance with *The Catholic Child Welfare Society et al v CD*.

31. The authorities cited in the Defendant's Opening Submissions were relied on to show how the legal principles from those authorities should be applied to the facts of this case. Ms Rodway KC argues that there is no possibility for there to be a fair trial in this matter due to the passage of time. She says the nature of humans is that memory is unreliable over long periods of time. Moreover, it was urged upon the Court that either important witnesses have died or cannot be traced and as such the Defendant does not have the ability to properly investigate the allegations made by AB. It was submitted that at the very least the Defendant is exposed to the real possibility of significant prejudice in its ability to defend the claim. This alone should result in the Court declining to disapply the limitation period.

32. Alternatively, the Defendant argues that, putting these issues aside, AB had the capacity to and did consent to the sexual activity with YZ. Consequently, AB does not have a cause of action against the Defendant.

33. Taking into account all of the above, Ms Rodway KC says that AB's Claim must be struck out as disclosing no cause of action and being statute barred.

SUMMARY OF PLAINTIFF'S POSITION

34. Ms Greening emphasized from the outset that this is not a case where the sexual relationship between her and YZ is being denied. She submitted that YZ abused his position of trust and power over AB which commenced by YZ's grooming of AB. AB's evidence is that the Defendant was aware of the relationship but took no action to prevent it from continuing.

35. Unsurprisingly, AB's Expert Report painted an entirely different picture from the Defendant's Expert Report. AB's Expert Report is relied on to support AB's reasons for the delay in commencing proceedings as well as provides supports for causation in that, as a direct result of YZ's actions, AB suffered psychiatric disorders. Along with the psychosexual disorder that was agreed in the Joint Expert Report, AB's Expert Report suggests there are further diagnoses of Post Traumatic Stress Disorder, an eating disorder and an alcohol disorder.

36. As to the issues of "date ofknowledge" and consent, Ms Greening stressed that these are matters which must be determined at the substantive hearing of the Claim. The Strike Out Application is not the forum for these issues to be determined.

37. Ms Greening rejected any suggestion that there would be significant prejudice to the Defendant in proceeding with the trial given its lack of ability to carry out an investigation due to the passage of time. However, Ms Greening noted that in the Defendant's letter to AB in 2018 (**Terms of Reference**) it confirmed that it had carried out a "*thorough investigation*" as it related to the AB complaints about YZ.

38. Moreover, the Terms of Reference confirm that YZ resigned as a direct result of AB reporting the sexual relationship to the school in January 1999, and in the event he had not done so, the Defendant would have terminated YZ.

39. As it relates to the issue of consent, Ms Greening argued that YZ has been charged before the criminal courts for his actions against AB and others and reiterated AB's position that any "consent" she may be deemed to have provided is negated by the duress placed upon her by YZ given his position of trust and power over her. In any event, Ms Greening submitted that AB's consent is a legal argument which must be determined at the substantive hearing.

40. Furthermore, Ms Greening submitted that the case authorities all support (as does Ms Rodway KC) the notion that all the evidence of the Claim must be before the Court for it to be able to exercise its discretion under section 34 of the Act. In any event, she argued that there is already an abundance of evidence before the Court to support AB's Claim which in turn supports the position that the Court should exercise its discretion by disapplying the limitation period.

41. Lastly, Ms Greening stressed that there is a triable issue in AB's Claim that has prospects of success and which the evidence supports.

ANALYSIS OF EVIDENCE

42. One of the greater challenges of this case is not only that this is the first case of its kind in Bermuda, but the leading authorities from cases in the UK have had the benefit of a full trial being conducted before the issue of the extension of the limitation period was considered. The most glaring difficulties with this case in comparison to the UK authorities is that in the exercise of the Court's discretion under section 34 of the Act, it must "…*have regard to <u>all</u> the circumstances of the case*…". Section 34(3) sets out that in addition to considering "all the circumstances of the case", there are specific factors which the Court must consider that are provided for in (3)(a) to (f).

43. It should be noted that for the purposes of this ruling, I have not rehashed the specifics of AB's Claim as I do not believe it would be helpful or useful at this time to provide the details of the allegations AB has made against YZ and the Defendant. It will become apparent in my decision as to why this has been done.

Previous rulings

44. In considering the Strike Out Application based on Counsels' oral and written submissions and reviewing all documents provided in the trial bundle, in addition to the requirement for the Court to have regard to "*all circumstances*" of the case in exercising its discretion under section 34 of the Act, it was apparent that it was essential to delve more deeply into the previous rulings of previous interlocutory applications made by Ms Greening.

45. Counsel for the Defendant contested two applications by Ms Greening for (1) discovery of certain documents for which the ruling was issued on 30 March 2023 (**the Discovery Ruling**); (2) leave to adduce the affidavit evidence of a third party for which the ruling was issued on 1 December 2023 (**the Affidavit Evidence Ruling**). In both these applications, Counsel for the Defendant's main submissions to the Court were that, *inter alia*, the documents and the affidavit were irrelevant for the purposes of determining the Strike Out Application. Ms Greening's position at both hearings was that the discovery and affidavit evidence being sought by AB was being sought on the basis that under section 34 (3), "*the court shall have regard to all the circumstances of the case*". Therefore, for the Court to carry out the exercise properly, it must be furnished with all evidence in the case.

46. In the Discovery Ruling, Mussenden J (as he was then) summarized the parties' respective positions at paragraphs 5 and 6 as follows:

> "*5. The Plaintiff submitted that the reasons for requesting the documents at this stage was so that the Court could carry out its task under section 34 (3) of the 1984 Act to have regard to all the circumstances of the case and, in particular to subsection 3(b) and 3(c). Ms Greening argued that in carrying out this task, there is nothing more useful or relevant in this regard than the material that has been requested from the Defendant. She argued that the Plaintiff was not on a fishing expedition.*
>
> *6. The Defendant's position was that the Specific Discovery Application was premature, some documents were protected by privilege and the documents are not relevant to the issues in the Strike-Out Application.*" [Emphasis added]

47. At various points within the Discovery Ruling, the position which was presented to and accepted by Mussenden J (as he was then) are as follows:

"*21. Fourth, in my view, the request for the Dismissal Material lacks the particularity required under Order 24. Also, I agree with Mr. Masters that it is the Plaintiff's knowledge that as a matter in issue in the Strike-Out Application, not the Defendant's. Further, I also agree that the Teacher's resignation is not an issue in dispute at the Strike-Out Application. In particular:*

a. *In respect of section 34(3)(b) having regard to the delay and whether the evidence adduced are likely to be adduced is or is likely to be less cogent than if the action had been brought in time, in my view the dismissal material is not relevant and has no bearing whatsoever on this question of delay in cogency. In other words, I am not satisfied that any material which the Defendant may have relied on determining the teacher if he had not resigned, has anything to do with the delay in cogency of evidence if the action had been brought in time.*
b. *In respect of section 34(3)(c) and the conduct of the Defendant after the cause of action arose in respect of request for information, in my view there is no relevance of the dismissal material to such conduct on the part of the Defendant. Again, in other words I'm not satisfied that any material which the defendant may have relied on to terminate the Teacher if he had not resigned, has anything to do with the conduct of the Defendant in respect of requests for information.*

22. In light of these reasons I find that the Plaintiff has failed to show that the discovery of these materials is necessary for the fair disposal of the interlocutory Strike-Out Application.

The Other Allegations Materials

23. Fifth, in my view, the requests for the Other Allegations Materials fails to state the relevance to the Strike-Out Application and lacks the particularity required under Order 24. I reject Ms Greening's umbrella submission that all the information that the Plaintiff has about other allegations is relevant to the Strike-Out Application. In particular:

a. *In respect of section 34(3)(b) having regard to the delay on whether the evidence adduced are likely to be adduced is or is likely to be less cogent than if the action had been brought in time in my view the other allegations material has no bearing whatsoever on this question of delay in cogency. In other words, I am not satisfied that any material about allegations from other students, has anything to do with the delay in cogency of evidence if the action had been brought in time.*

b. In respect of section 34(3)(c) and the conduct of the Defendant after the cause of action arose in respect of a request for information, in my view there is no relevance of the Other Allegations Materials to such conduct on the part of the Defendant. Again, in other words, I am not satisfied that any material about allegations from other students is anything to do with the conduct of the Defendant in respect of requests for information.

24. In light of these reasons, I find that the plaintiff has failed to show that the discovery of these materials is necessary for the fair disposal of the interlocutory Strike-Out Application." [Emphasis added]

48. As it relates to the Affidavit Evidence Ruling, Mussenden J (as he was then) summarized the Defendant's position at paragraph 15 and in his concluding statement at paragraph 20 stated:

"*15. Mr Masters submitted that: (a) the contents of KL 1 are irrelevant to the Strike-Out Application; and (b) the probative value does not outweigh the prejudice caused to the Defendant in the context of the Strike-Out Application. Mr Masters submitted that Greening 2 does nothing to introduce or explain the relevance to the Strike-Out Application which was surprising in light of the March 2023 Ruling on the Other Allegations Materials. Thus, the lack of explanation is because there is no evidential link between KL 1 in the defence of the Strike-Out Application.*"

…

20. In light of these reasons, I find that the Plaintiff has failed to show that the admission of additional information is necessary for the fair disposal of the interlocutory Strike-Out Application." [Emphasis added]

What is the applicable limitation period?

49. It is established by the authorities that a claim regarding allegations of sexual abuse, i.e. deliberately inflicted personal injury, is subject to the limitation period provided for in section 12 of the Act. This is an issue not disputed between the parties.

50. It is also accepted by the parties that the burden of proof is on AB to convince the Court to exercise its discretion under section 34 of the Act to extend the limitation period.

Was there a later "*date of knowledge*"?

51. The issue defining the "*date of knowledge*" was explored thoroughly by Lord Hoffman in paragraphs 40 through 48 of *A v Hoare*:

"*40. In the present case, Dyson LJ [2007] QB 932, para 55 (with whom Peter Gibson and Buxton LG agreed) said that when the claimant left the detention institution in 1977, he was "obviously aware that he had been seriously sexually assaulted". He went on to say:*

> *"Viewed objectively and without regard to the fact that the claimant suppressed his memories of the assaults, they were sufficiently serious for proceedings against an acquiescent and creditworthy defendant to be reasonably considered to be justified"*

41. I agree. The description of the assaults and indignities which the claimant says he suffered seem to me to put the matter beyond doubt I think that if the Court of Appeal had not been bound by Bryn Allen, it would have decided that it was the end of the matter. The date of knowledge would have been 1977. Instead, the Court of Appeal fixed on a later date by reference to when the claimant himself could reasonably have been expected to commence proceedings on the true construction of section 14 (2), I do not think that the later date can be justified.

42. Mr Brown, who appeared for the appellant, put forward an alternative argument that, even if the test which section 14 (2) applied to the injury as known to the claimant was entirely impersonal, claiming in this case could not be said to have had knowledge of his injury. This was because, according to the evidence of the claimant, supported by an expert witness, he had "blocked out his memory", or, in another metaphor which he used in evidence, but his memories "in a box with a tightly sealed lid in the attic". He was, he said, "in denial" about the psychological injuries which he had suffered.

43. I do not doubt the value of these explanations of the claimant's mental process when it comes to an assessment of whether he could reasonably have been expected to commence proceedings. But they are difficult enough concepts to apply in that context and I do not think that section 14 (2) was intended to convert them into even more difficult questions of epistemology. If one asks an expert psychologist whether the claimant "really" knew about his injuries, I expect he would say that it depends on what you mean by "know". And he might go on to say that if the question was whether he "knew" for the purposes of the Limitation Act, it would be better to ask a lawyer. In my opinion the subsection assumes a practical and relatively unsophisticated approach to the question of knowledge and seems to me to have been much sense in Lord Griffiths's observation in Stubbings v Webb [1993] AC 498, 506 that he had "the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered significant injury."

44. This does not mean that the law regards as irrelevant the question of whether the actual claimant, take into account his psychological state in consequence of the injury, could reasonably have been expected to institute proceedings. But it deals with that question under section 33, which specifically says in subsection (3) (a) that 1 of the matters to be taken into account in the exercise of the discretion is "the reasons for… the delay on the part of the plaintiff".

45. In my opinion that is a right place in which to consider it. Section 33 enables the judge to look at the matter broadly and not have to decide the highly artificial question of whether knowledge which the claimant has in some senses counts as knowledge for the purposes of the act. Furthermore, dealing with the matter under section 14 (2) means to sue as of right, without regard at any injustice which this might cause to the defendant. In my view it is far too brittle an instrument for this purpose. There are passages in the judgment of Buxton LJ which suggest that, had he not been bound by Bryn Allen, he would have shared this opinion.

46. This approach would, I think, be in accordance with the recommendations of the Law commission in the report (Law Com No 270) to which I have referred. In its consultation paper 151, Limitation of Actions (1998) para. 12.44, the Commission had proposed that the test of significance should take into account "the plaintiff's abilities". But they abandoned this position in their final report and recommended (at paragraph 3.24) that the test of significance should be entirely objective: "only claims in respect of which a reasonable person would have thought it worthwhile issuing proceedings will qualify as 'significant'."

47. In paras. 4.78-4.28 of their final report the Law Commission considered whether victims of sexual abuse should be subject to a special regime. It had been submitted that no limitation period should apply to sexual abuse claims because victims commonly suffered from "dissociative amnesia", a recognised mental disorder which produced an inability to recall traumatic events or at any rate and unwillingness to be reminded of them. The Law Commission said that so far as dissociative amnesia was a "mental disability" within a fairly broad definition proposed by the commission (see paras 3.123 – 3.124), it would (if their proposals were implemented) stop time running while disability persisted. But they rejected (in para 3.125) any specific provision for the psychological incapacity suffered by victims of sexual abuse because they said that would be very difficult to define.

48. If the commission thought that the "psychological incapacity suffered by victims of sexual abuse" (para 4.28) was too uncertain and indefinite a concept to be used for suspension of the limitation period on grounds of incapacity, I can see no advantage in relying upon the same uncertain concept to give an artificial meaning to the concept of

knowledge in section 14. Until Parliament decides whether to give effect to the Commission's recommendation of a more precise definition of incapacity, it is better to leave these considerations to the discretion under section 33." [Emphasis added]

52. Considering Lord Hoffman's guidance, I accept that the date of knowledge need not be precisely defined, but rather is a factor to be considered when the Court is exercising its discretion under section 34 of the Act.

If the proceedings were issued outside the primary limitation period, can that period be extended by the Court's discretion?

53. As previously stated at paragraph 51 above, it was accepted by both parties that the Plaintiff has the burden of proof to prove why the Court should exercise its discretion to extend the limitation period under section 34 of the Act.

54. Ms Rodway KC's submissions were also in line with Ms Greening's in accepting that the Court must have regard to "*all the circumstances*" of the case in addition to those specific factors found in section 34(3)(a) to (f). At paragraph 30 of the Defendant's Opening Submissions this position was clearly voiced:

> *"The court must have regard to all the factors set out in section 34 and the law relating to the same. This is covered in greater detail below but a particular feature concerns various important factual issues which the Defendant contends cannot fairly be tried so many years after the events in question. The Defendant will suffer considerable prejudice if the action is allowed to proceed in that it can no longer investigate matters that occurred so long ago. There is no objective documentary evidence to support the Plaintiff's allegations. The cogency of the evidence has been irreparably damaged by the passage of time.*" [Emphasis added]

55. During the hearing and in the Defendant's Opening Submissions and the Defendant's Closing Submissions, references were also made regarding the purported lack of evidence and/or the cogency thereof. For example, paragraphs 35 and 36 of the Defendant's Opening Submissions state:

> "*35. As referred to above, the only evidence with regard to the events is that of the Plaintiff herself. Such self-serving evidence has to be regarded with caution in any event but this is exasperated by the long passage of time. It is difficult if not impossible for the Court to dissect the genuine contemporaneous facts from those of which the Plaintiff has convinced herself over time.*

36. The court has already ruled that the Plaintiff cannot admit the further evidence of KL. In the judgment on the issue by Mussenden J illustrates the evidential problems caused by the delay." [Emphasis added]

56. On the first narrow point, I do not accept that Ms Rodway KC's submission that Mussenden J (as he was then) made any determination as to the cogency of evidence due to delay. Whilst Mussenden J in the Discovery Ruling and the Affidavit Evidence Ruling may have touched on section 34 criteria, his conclusions in both are clear that he accepted Counsel for the Defendant's argument that the documents had no relevance to the determination of the Strike Out Application. I do not accept that the Affidavit Evidence Ruling demonstrates "*the adverse evidential problems caused by the delay*".

57. I remind myself of the Defendant's Closing Submissions, at to what matters the Court shall take into consideration at paragraphs 35 and 38:

"*35. It is a misconception to suggest that the Plaintiff can rely upon new evidence at a full trial if such evidence is already available. All of the relevant evidence has to be before the Court in some form at the strikeout stage even if not all the witnesses are heard. The Court cannot assess the cogency of the evidence if it does not know what such evidence consists of. It follows that on the Strike-Out Application the Court must have the entirety of what would be before a trial court. This encompasses all of the documentary evidence and all of the written witness evidence. This has developed into the practice in the English courts for the issue of limitation to be decided at the same time as a full trial but with the decision on limitation strictly preceding any subsequent findings.*"

"*38. There is no evidence from anyone else who could have assisted had the claim been brought within time. Important witnesses whose evidence is not before the court include;*

i) The former pupils in respect of the allegations going back to 1981 as set out in the pleaded case;
ii) Christine Eldridge, the literature teacher;
iii) Mrs [YZ];
iv) Ms Abrahams mathematics teacher;
v) Bruce Fox music teacher;
vi) Andrea Chambray Pastoral lead/counsellor;
vii) Tony Da Costa janitor;
viii) Sister Judith Rollo principal who died on 27 July 2021;
ix) various members of the board of school governors named by the Plaintiff." [Emphasis added]

58. How can one now reconcile that for the purposes of the Strike Out Application, knowing the Defendant rigorously defended AB's applications to have further evidence before the Court for the purpose of the Strike Out Application as being "*premature*" and/or "*irrelevant*" as this stage, when it is now coming to Court submitting that all evidence must be before the Court now to be considered in the Strike Out Application? In my view, this can only be answered in one way. That answer being that at this time, the Court does not have all the evidence before it and therefore, cannot make any determination regarding the argument that the limitation period should not be disapplied in this matter.

59. I am being asked to fully consider AB's evidence in saying that it is unreliable and that I must consider the "*the entirety of what would be before a trial court*". The Defendant argues that as the burden of proof is on AB to show why the limitation period should be extended which means that she must present convincing evidence supporting her Claim. Ms Rodway KC argues that it was not a matter for the Defendant to produce witnesses for consideration of her Claim. Whilst I do accept that the burden of proof is on AB to convince the Court there are sufficient circumstances to extend the limitation period, I do not accept that in the circumstances of this case it takes the Defendant's application anywhere. I have already cited the number of difficulties without having all the evidence before the Court for consideration, and this is just another example.

60. Furthermore, it is of great significance that no evidence has been provided by the Defendant regarding what attempts have been made to contact witnesses to carry out an investigation. Indeed, at paragraph 18 of the Defendant's First Affidavit Mr Ferreira states:

> "*18. Important evidence is no longer available for several reasons. For example, I understand that Christine Eldridge, former literature teacher, resides in Pennsylvania USA and the Defendant has been unable to make contact with her. Former principal of the Defendant, Sister Judith Rollo, is now deceased. Both of these people feature significantly in the claim put forward by the Plaintiff. They were first identified as being part of the claim in the Amended Specially Endorsed Writ and Statement of Claim filed on 5 November 2021.*
>
> *19. The Plaintiff makes significant allegations that Sister Judith had direct knowledge of sexual advances made by [YZ] to at least 3 former pupils. The Defendant is unable to obtain or rely on Sister Judith evidence thereby impacting the ability to defend its case.*
>
> *20. There may now be evidence missing and or unavailable which could affect the outcome of the case and impact the defendant's ability to defend its case. The Defendant does not have the opportunity to review the best evidence of any witness and a witnesses'*

ability to recollect detailed material events as described by the Plaintiff is now unavailable.

21. Investigative attempts have likely been undermined by the passage of time and the Defendant has been deprived of the fair opportunity to investigate and defend the claim the potential prejudice suffered by the Defendant if the action proceeds is significant and serious. Owing to the named individuals contained in the Plaintiff's Amended Statement of Claim, the Defendant is now tasked with the further investigation of this matter and respectfully reserves its right to file further evidence as to the prejudice was suffer should the limitation period be disapplied in due course." [Emphasis added]

61. Additionally at paragraphs 18 and 19 of the Defendant's Second Affidavit states as follows:

"*18. The Defendant also notes that Mr Paul Fortuna, Chairman of the board of the Defendant, passed away in 2019. Mr Fortuna is referenced several times throughout the Plaintiff's affidavit. The Defendant understands that Mr Fortuna had numerous discussions with the Plaintiff regarding her allegations and Mr Fortuna was involved with the decision to commission the investigation conducted by Ms Helen Snowball. The Defendant is further deprived of the ability to obtain or rely upon the evidence of Mr Fortuna.*"

19. Following the receipt of the Plaintiff's affidavit the Defendant is faced with more questions than answers. I repeat paragraph 20 of my first affidavit that the cogency of any witness evidence is significantly and negatively affected given the delay. There may now be evidence missing and/or unavailable which could affect the outcome of the case. Prior to receipt of the Plaintiff's affidavit and Amended Statement of Claim and indeed prior to 2018, the Defendant was completely unaware of the depth and detail of the various and significant allegations made by the Plaintiff against the Defendant. The Defendant is now completely deprived of an opportunity to investigate, review the best evidence of any witness and properly defend the claim." [Emphasis added]

62. Further to the issue of alleged significant prejudice to the Defendant should the matter proceed to trial, paragraph 28 of the Defendant's Second Affidavit provides alarming contradictory evidence as to its ability to defend the Claim:

"*28. The Defendant launched 2 independent investigations between 2018 – 2021 at the request of the plaintiff and incurred considerable time and expense in doing so. Both investigations were extensive in nature and utilise the expertise of both Ms Snowball and T&M Protection Resources. Ms Snowball, a solicitor who leads the Local Authority and Abuse Team at Kennedys, was chosen for her breadth of experience in this area. The Plaintiff was provided with the terms of reference and so to suggest the investigation was*

merely an attempt for the Defendant to obtain the advice of a lawyer on how to get out of being held accountable is completely unsupported by the evidence."

63. It is important to bear in mind the content of the Terms of Reference provided by the former Chairman of the Board, Mr Paul Fortuna, to AB. The Terms of Reference are exhibited to AB's First Affidavit at pages 181 to 183.

64. There are glaringly compelling statements in the Terms of Reference which, in my view, are in complete opposition to the evidence provided in the Defendant's First Affidavit and the Defendant's Second Affidavit. The content of the Terms of Reference is as follows:

- "*To understand the circumstances in which [YZ] was able to develop an alleged inappropriate relationship with you in his role as a teacher at MSA;*
- *To explore how the relationship was discovered and what sanctions/safeguarding reports followed;*
- *Whether [YZ]'s alleged inappropriate behaviour was known to any member of staff at MSA and whether there were any missed opportunities to address his misconduct;*
- *Review historic and current safeguarding policies procedures and protocols at MSA.*

I can advise that 12 (former and current) members of MSA teaching staff contributed to the investigation in addition to 2 former members of the MSA Board of Governors. In addition the investigation was able to speak to one of the individuals whose name you provided as a potential witness. The investigation also considered the documentation provided, in addition to MSA's historic and current safeguarding policies, procedures and protocols.

I am now able to respond to your complaint as follows:

- *It is accepted that [YZ] handed in his letter of resignation in 1999 when it became known that he had engaged in inappropriate behaviour with yourself. His resignation was demanded and if it had not been forthcoming [YZ] would have been dismissed. Irrespective of resignation or dismissal the outcome was the same; [YZ] was escorted off the school premises in his role as a member of teaching staff at MSA was terminated. He was forbidden from returning to the MSA campus and in addition to the school principal at the time to all necessary safeguarding steps by reporting the matter to family services and writing to the stakeholders to advise that wisely should not be allowed to take a teaching or coaching role in the*

future. MSA did not report the matter to police and your family had already made a report.

- *The findings of the investigation did not support the allegation that members of staff were aware of YZ's behaviour, and the specific and very serious allegations made against [XX] and [XY] are vehemently denied. With regard to other victims the investigation has spoken to X who provided evidence that she was forcibly kissed by YZ but that she did not report this to anyone. Similarly a review of documentation that you forwarded from Y also highlights that she did not report her experiences rather she kept the matter secret. The conclusion of the investigation of MSA did not have knowledge of [YZ]'s propensity to engage in inappropriate behaviour before his misconduct with you became known.*

- *It was not, and are still not appropriate for MSA to launch an investigation to ascertain whether or not [YZ] was engaged in inappropriate relations with other MSA students prior to his relationship with you. MSA has not received any other disclosures/complaints from former students. The removal, and the reasons behind it, of [YZ] from MSA's teaching staff was/is well known in the community and received press coverage at the time albeit he was not named. Notwithstanding this nobody else come forward and an investigation by MSA, essentially to encourage other victims to come forward, would be straying into a criminal investigation in respect of [YZ]'s conduct which would be inappropriate.*

Finally I can advise that the investigation is satisfied that the lessons have been learnt following your disclosure and current safeguarding procedures, practices and protocols have been developed over time are in line with the expected standards of practice in Bermuda." [Emphasis added]

65. What I find most compelling regarding the Terms of Reference is that there is no indication whatsoever that its investigation(s) was hampered due to the passage of time. There was no suggestion at all that it was unable to make determinations regarding the allegations because there was lack of historical evidence.

66. As can be seen through the Defendant's Affidavit evidence, there are numerous references to the inability to investigate the allegations. The Defendant's First and Second Affidavit provide evidence surrounding the issue of the purported lack of ability to "*investigate*" are vague and unhelpful. No evidence was presented to state exactly what difficulties the Defendant had in being able to investigate other than noting that who they refer to as a central witness is now

deceased along with Mr Paul Fortuna who carried out the investigation into AB's allegations in 2018/2019.

67. Moreover, at no point has the Defendant suggested in the Terms of Reference that the allegations are untrue. In fact, the Terms of Reference clearly accept that YZ handed in resignation as a direct result of AB's reporting him to the school about their inappropriate relationship. The Terms of Reference even go so far as to confirm that had YZ not resigned as a direct result of him AB's report, the school would have terminated him. There is no denial in the Terms of Reference that the complaint made to the school in 1999 (or now) by AB was untrue.

68. Additionally, at no point in the Terms of Reference was it suggested that there was insufficient documentary and/or witness evidence to be able to investigate. The Terms of Reference went further to conclude based on its investigation, it "*vehemently*" denied the allegation that anyone at the school had knowledge of YZ's "*behaviour*" towards AB prior to her reporting it. Again, there were no suggestions that the investigation on this specific issue was inconclusive due to an inability to obtain the relevant information for consideration.

69. Of also great significance, the Terms of Reference confirm that the Defendant was able to interview fourteen witnesses during the course of the investigation. The question then becomes, who were the witnesses that were interviewed as part of the investigation and what was their evidence? As such, I see little value in any proposition that the Defendant does not have the ability to investigate AB's allegations due to the cogency of evidence resulting from the passage of time.

CONCLUSION

70. Therefore, I dismiss the Strike Out Application on the basis that at this stage of the proceedings I cannot properly or fairly exercise my unfettered discretion under section 34 of the Act to decide whether to extend the limitation period. The appropriate forum would be for the issue of the extension of the limitation period under section 34 of the Act to be carried out when all the evidence is before the Court.

71. For the avoidance of doubt, I note that the Defendant did not argue that this was an application being made in accordance with Order 18, Rule 19(1)(a) of the Rules of the Supreme Court 1985, that there is no cause of action. I do not believe it would be disputed that in a strike out application only a plaintiff's originating process is considered and no findings on evidential matters are made. As such, I have interpreted that the Defendant's position being that there is no cause of action due to the Claim being time barred. However, for the avoidance of doubt and if I have misinterpreted, I confirm that I am satisfied that there is *prima facie* cause of action with reasonable prospects of success and therefore should proceed to a substantive hearing. The

issues to be determined at such a hearing are, *inter alia*, the extension of the limitation period in accordance with section 34 (as a preliminary issue); consent; vicarious liability; causation and the quantum of damages (if successful).

72. In the circumstances, I can see no reason to steer away from the usual order that the successful party should have the costs of the application. Should the parties wish to be heard on costs, Counsel should advise the Court within fourteen days of the date hereof by way of filing a Form 31D, otherwise I shall award costs to the Plaintiff on a standard basis to be taxed, if not agreed.

DATED: 12 June 2024

ALEXANDRA WHEATLEY

ACTING PUISNE JUDGE OF THE SUPREME COURT