In The Supreme Court of Bermuda

CIVIL JURISDICTION
2021: No. 142

BETWEEN:

AB

Plaintiff

and

MOUNT SAINT AGNES ACADEMY

Defendant

RULING

Date of Hearing: **22 November 2023**
Date of Ruling: **1 December 2023**

Appearances: **Victoria Greening, Resolution Chambers Ltd., for Plaintiff**
Kyle Masters, Carey Olsen Bermuda Limited, for Defendant

RULING of Mussenden J

Introduction

1. The Plaintiff caused a Specially Endorsed Writ of Summons to be issued dated 17 May 2021 (the "**Writ**") along with an Amended Statement of Claim dated 28 October 2021 (the "**ASOC**"). She claims that when she was a student at the school run by the Defendant (the "**School**"), a teacher (the "**Teacher**"), groomed and sexually exploited her during the period 1998 to 1999.

2. By a Summons dated 1 December 2021, the Defendant applied to strike out the Plaintiff's Writ and ASOC (the "**Strike-Out Application**") on the grounds that it was statute barred by virtue of the Limitation Act 1984 (the "**1984 Act**") and thus discloses no reasonable cause of action and further, or in the alternative, is frivolous or vexatious or an abuse of process of the Court. The parties agreed on the utilisation of expert reports in the Strike-Out Application but did not agree on the remit of discovery for the purposes of the Strike-Out Application. The documents sought by the Defendant from the Plaintiff were agreed but the documents sought by the Plaintiff from the Defendant were not.

3. In a written Ruling dated 30 March 2023 in this matter (the "**March 2023 Ruling**"), I refused the Plaintiff's application of specific discovery. In that Ruling, I set out the issues for the strike-out application, the factual background and the relevant provisions of the Limitation Act 1984, in particular section 34 'Discretion of court to exclude time limit in case of personal injury or death'.

The Application

4. The matter now appears before me on the Plaintiff's Summons dated 11 October 2023 for leave to admit the First Affidavit of "**KL**" sworn 25 September 2023 ("**KL 1**") along with her Exhibit. The application is supported by the Second Affidavit of Ms. Greening sworn 28 September 2023 ("**Greening 2**").

5. KL set out that she was a former student of the Defendant's School during the period January to June 1985 when she was 15 years old. I note here that the time when KL attended the School was about 15 years before the material time of the Plaintiff's claim. She stated that the Teacher was her history teacher, that it was widely known in the School that he was a sexual predator and she was warned by teachers and students alike to be wary of him. She stated that the Teacher ran his fingers through her hair regularly and wished her happy birthday on a date that was transposed in error, by month and day. On another occasion, the Teacher slapper her on her bottom. He then told her, that if she told anyone then he

would fail her history test. He then did fail her history test after which she told her mother. KL stated that she and her mother met with Sister Judith who reviewed the history test and then changed her mark. Sister Judith then explained that the Teacher was being supportive but that she had overreacted, such explanation causing her to feel dismissed.

6. KL stated that on 25 October 2019 she was in a doctor's waiting room when she read two exhibited articles in the Royal Gazette on her phone entitled "*The scars are still deep*" and "*Bishop will act if more victims emerge*" about the Plaintiff. The purpose of the article was to provide contact details for the School if any other students wanted to file a report about the Teacher. She immediately called the Bishop and left a detailed message on his voicemail and requested a return call. She made 4 further calls leaving voicemails. The next day she the Plaintiff a Facebook to tell her brave she was to come forward.

7. For a period on and after 31 October 2019, KL sent emails and made phone calls eventually receiving a reply from the Bishop when they then discussed the possibility of a meeting which never took place. KL also reported the matter to the police and is scheduled to give evidence in the criminal prosecution of the Teacher. A few months later, KL states that she bumped into Sister Judith in a supermarket when she informed her that she had been trying to reach someone at the School in relation to the Teacher. To date, she has heard nothing further from the School or the Bishop.

8. Greening 2 set out that KL 1 was being filed at this point because she only came forward and offered to write a statement on 16 September 2023. She stated that the contents of KL 1 are relevant to the proceedings.

The Law

The Limitation Act 1984

9. Section 12 of the 1984 Act provides as follows:

   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 a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed 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. None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies. 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).
(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 6 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.

10. Section 34 of the 1984 Act provides as follows:

Discretion of court to exclude time limit in case of personal injury or death
"34 (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
(a) section 12 or 13 prejudice the plaintiff or any person whom he represents; and
(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,
the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(2) The court shall not under this section disapply section 13(1) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 12.
(3) In 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 of 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."

Case Law

11. In *O'Brien v Chief Constable of South Wales* [2005] UKHL 26 in respect of determining the admissibility of evidence Lord Bingham noted as follows:

    3. Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether judge or jury) is called upon to decide. As Lord Simon of Glaisdale observed in Director of Public Prosecutions v Kilbourne [1973] AC 729, 756, "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof ..... relevant (ie. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable".

12. The Court then set out the two-stage test:

    Lord Carswell – 69. The test in the first stage is that of relevance, whether the evidence is logically probative or disprobative of some matter which requires proof.

    Lord Bingham - 5.The second stage of the enquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.

13. Lord Bingham went on at paragraph 6 to state as follows:

    "6. While the argument against admitting evidence found to be legally admissible will necessarily depend on the particular case, some objections are likely to recur. First, it is likely to be said that admission of the evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues collateral to the issue to be decided. This is an argument which has long exercised the courts (see Metropolitan Asylum District Managers v Hill (1882) 47 LT 29, 31 per Lord O'Hagan) and it is often a potent argument, particularly where trial is by jury. Secondly, and again particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded. Thirdly, stress will be laid on the burden which

admission would lay on the resisting party: the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections. It is, I think, recognition of these problems which has prompted courts in the past to resist the admission of such evidence, sometimes (as, perhaps, in R v Boardman [1975] AC 421) propounding somewhat unprincipled tests for its admission. But the present case vividly illustrates how real these burdens may be. In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties."

Plaintiff's submissions

14. Ms. Greening submitted that at the strike-out hearing, the Court will need to consider whether it would be equitable to proceed having regard to the extent to which the limitation period would prejudice the Plaintiff and any decision to dis-apply the limitation period would prejudice the Defendant pursuant to section 34(1)(a) and (b) of the Act. She submitted that in acting under section 34(3), the Court shall have regard to all the circumstances of the case. Therefore, in order for the Court to carry out the exercise properly, it must be furnished with all the evidence in the case. Ms. Greening submitted that the Defendant misconstrued the KL 1 as similar fact evidence. However, she argued that KL 1 is direct evidence that the School knew of the conduct of the Teacher and therefore does not prejudice the School. She referred to the Third Affidavit of Carlos Ferreira at paragraph 17 wherein in essence he stated that the School was prejudiced because it was called upon to defend itself of the conduct which allegedly occurred nearly 40 years ago. Ms. Greening argued that the School could no longer rely on that position as KL 1 could help them to locate records and they could cross-examine KL on her evidence.

Defendant's Submissions

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 relevancy of KL 1 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 and the defence of the Strike-Out Application.

Analysis of the Plaintiff's Applications

16. In my view, the Plaintiff's application to admit further evidence should not be granted for several reasons.

17. First, in the March 2023 Ruling in respect of the relevance of allegations from other students, I stated "*In respect of section 34(3)(b) having regard to the delay on whether the evidence adduced or 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 and cogency. In other words, I am not satisfied that any material about allegations from other students, has anything to do with the delay and cogency of evidence if the action had been brought in time.*" In my view, KL 1 falls into the same category as the allegations from other students.

18. Second, the matter to be determined in the Strike-Out Application is whether the Plaintiff's application should be struck out as it is time barred by the 1984 Act or whether the Court should exercise its discretion pursuant to section 34 of the 1984 Act to waive the limitation period. However, KL 1 contains the evidence of a third party who is unrelated to the proceedings and who speaks about events that occurred nearly 15 years before the period when the teacher is accused of misconduct and then some interactions more recently. In my view, KL1 is not probative of whether the Plaintiff's claim is frivolous, vexatious or an abuse of the court process, or time barred. Thus, it is irrelevant to the Strike-Out Application. Further, it is not relevant to the issues arising under section 34 of the 1984 Act which have to do with the Plaintiff's knowledge and ability to bring the claim. Thus, the application fails at stage one of the two-stage test in respect of relevance.

19. Third, in my view the application does not meet the second limb of the two stage test. I have given consideration to the contents of KL 1 in the context of the Strike-Out Application. Apart from not being relevant to the issue for determination, KL 1 has the potential to cause the Defendant and the Court to be distracted down a tangential path and away from the issues to be determined in the Strike-Out Application. Ms. Greening argued that pursuant to section 34(3) the Court shall have regard to all the circumstances of the case and thus the Court should have before it all the evidence in the case. I do not agree with that contention as KL 1 is not relevant to the Strike-Out Application. To that point, sub-sections 34(3)(a) to (f) are more focused on the actions of the Plaintiff in being able to bring her claim. Thus, I find that the evidence in KL 1 is not significant to 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.

<u>Conclusion</u>

21. For the reasons set out above, I refuse the Plaintiff's application.

22. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendant against the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed.

Dated 1 December 2023

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT