Neutral Citation Number: [2025] CA (Bda) 13 Civ

Civil Appeal No. 11 of 2024

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ACTING JUSTICE ALEXANDRA WHEATLEY
CASE NUMBER 2021: No. 142

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 20/06/2025

Before:

JUSTICE OF APPEAL THE HON IAN KAWALEY
JUSTICE OF APPEAL THE HON NARINDER HARGUN
and
ACTING JUSTICE OF APPEAL THE HON SHADE SUBAIR WILLIAMS

- -

Between:

MOUNT SAINT AGNES ACADEMY

Appellant

- and -

AB

Respondent

Appearances:
Ms. Susan Rodway KC of 39 Essex Chambers and Ms. Charlotte Donnelly of Carey Olsen for the Appellant
Ms. Victoria Greening of Resolution Chambers Ltd. for the Respondent

Hearing date(s): 3 June 2025
Draft Judgment Circulated: 11 June 2025
Date of Judgment: 20 June 2025

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Claim in tort for historical sexual abuse; discretion to extend time under section 34 of the Limitation Act 1984; whether an application to strike out based upon limitation should be heard as a preliminary issue

JUDGMENT

HARGUN JA:

Introduction

1. This is an appeal against the decision of Acting Justice Wheatley ("**the Judge**") dated 12 June 2024 ("**the Judgment**") dismissing the application of the Mount Saint Agnes Academy ("**the School**") to strike out these proceedings on the ground that the claims sought to be pursued by the Plaintiff were statute barred under the Limitation Act 1984 ("**the Act**"). The Judge dismissed the application on the basis that at this stage of the proceedings she was unable to fairly exercise her unfettered discretion under section 34 of the Act to decide whether the limitation period should be extended in the circumstances of this case. The Judge ruled that the appropriate time for the determination of the issue whether the limitation period should be extended under section 34 of the Act would be at the trial of the action when the Court would have had the benefit of reviewing all the relevant evidence and taking into account all material circumstances of the case.

2. The School was established in 1892 and is dedicated to the principles of Christian education. It provides education to students in Bermuda from kindergarten to Grade 12. The present proceedings relate to a claim of grooming and sexual abuse by AB, a former student at the School ("**the Plaintiff**"). The Plaintiff claims that in around 1997, when she was 15 or 16, her teacher ("**YZ** ") persuaded her on several occasions to have sexual contact with him and on two occasions to have sexual intercourse with him. The Plaintiff claims that the sexual relationship between her and YZ was known to the members of the staff and/or other teachers and students of the School. It is the Plaintiff's case that the School, in breach of its duty of care owed to her, failed to take any adequate action to ensure that the Plaintiff did not suffer sexual abuse from a teacher employed by the School and thereby prevent psychiatric injury to the Plaintiff.

Background

3. These proceedings were commenced by the Plaintiff on 20 April 2021. In the Amended Statement of Claim the Plaintiff alleges that she was a student at the School between 1986 and June 1999. At all material times until 1999, YZ was a history teacher employed by the School. It is alleged that prior to 1998, YZ solicited relationships with or made sexual advances towards a number of students at the School.

4. It is said that in about 1997, when the Plaintiff was aged 15 or 16, YZ would regularly request that she come into school early and stay behind after school, either to assist with "classroom duties" or to be given "extra help". The Plaintiff relies on this as evidence that YZ was grooming and/or taking opportunities to be privately in her company over a period of several years.

5. The Plaintiff alleges that in around 1998 to 1999, YZ made sexual advances towards her and had a sexual relationship with her while she was a student of the Defendant. In particular:

   (a) In or around April 1998, YZ told the Plaintiff that he was in love with her. The encounter happened after Mass during Holy Week in 1998. The following Monday he requested that she attend the School early, repeated that he loved her and sexually touched her.

   (b) YZ bought the Plaintiff gifts including jewellery, flowers and lingerie.

   (c) YZ wrote letters to the Plaintiff which included statements like: "*Your love for me so great… I want you to be my wife, my lover, my joy and reason to live. I want to give your child that we would raise*."

   (d) On several occasions, YZ persuaded the Plaintiff to have sexual contact with him.

   (e) On two occasions, YZ persuaded the Plaintiff to have sexual intercourse with him.

6. The Plaintiff contends that YZ was not sanctioned by the School in respect of his behaviour towards female students prior to 1998, nor in and after 1998 when such conduct involved the Plaintiff. The Plaintiff's case is that the School continued to allow YZ unsupervised access to all students and did not take any steps to monitor him or his interactions with students. The Plaintiff claims that the School did not act on the knowledge it had, or recently ought to have had, of the relationship between the Plaintiff and YZ and/or his sexually predatory behaviour towards students at the School until early 1999.

7. The Plaintiff claims that she has suffered injury, loss and damage and that injury, loss and damage were caused by the breach of duty and negligence of YZ, for whose actions and omissions the School is vicariously liable.

Application by the School to strike out the proceedings

8. As noted above, these proceedings were commenced by the Plaintiff on 20 April 2021. The School filed its Defence on 9 July 2021 and in paragraph 12 the School claimed that the Plaintiff's alleged cause of action is out of time in that it did not accrue within 6 years before the commencement of this action, or such other time period is calculated in accordance with the Act.

9. On 1 December 2021 the School filed a Summons (the **"Summons**") seeking an order that the Writ of Summons dated 17 May 2021 and the Amended Statement of Claim dated 28 October 2021 be struck out as disclosing no reasonable cause of action. It is to be noted that the Summons was filed by the School without any prior consideration by the Court as to whether the limitation issue should be considered at trial or as a preliminary issue.

10. The application to strike out the proceedings was supported by the First Affidavit of Mr Carlos Ferreira, the Chairperson of the Board of Governors of the School ("**Mr Ferreira**"). In his affidavit Mr Ferreira stated that it was his understanding that the type of claim that appears to be made by the Plaintiff must be commenced from the date on which the cause of action accrued or the date of knowledge of the person injured, whichever is the later. From reviewing the Plaintiff's Statement of Claim, it appeared to Mr Ferreira that the Plaintiff's alleged cause of action would have accrued on or about 1998 and was reported to the Defendant in or around 1999. On that footing, it is argued that the 6-year limitation period has long expired.

11. Mr Ferreira also refers to the difficulties which the School would face if it was required to defend the claims made by the Plaintiff. He points out that the conduct alleged by the Plaintiff in the Statement of Claim dates back as early as 1981. The Plaintiff names a number of former students and teachers as either being subject to the sexual advances of YZ, witnesses to the alleged incidents or having knowledge of the alleged incidents. He says that the School is likely to face significant injustice if it is required to defend itself some 40 years after the first alleged incident occurred.

12. Mr Ferreira further states that important evidence is no longer available for several reasons. He understands that CE a former literature teacher, resides in Pennsylvania USA and the School has been unable to make contact with her. Former Principal of the School, SJR, is now deceased. Both of these people feature significantly in the claim put forward by the Plaintiff. Mr Ferreira concludes that investigative attempts have likely been

undermined by the passage of time and the Defendant has been deprived of a fair opportunity to investigate and defend the claim.

Statutory Framework

13. 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 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.*
>
> *(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..."*

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

> *"**Definition of date of knowledge under sections 12 and 13***
> *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 of a person other than the defendant, the identity of that 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 an injury is significant 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 a 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,

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice…"

15. 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 that discretion, section 34(3) of the Act provides, *inter alia*, that the Court must:

"(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 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..."

16. The scope of the discretion given to a judge under section 34(3) of the Act (the identical provision as section 33(3) of the English Limitation Act 1980 (the "**English Act**")) was considered by the House of Lords in *Donovan v Gwentoys* [1990] 1 WLR 472. Lord Griffiths held at page 477E:

> *"This subsection bestows upon the judge a discretion in unfettered terms to allow an action in respect of personal injuries or death to proceed despite the expiry of the limitation period if he considers it fair to do so having regard to the degree to which the plaintiff would be prejudiced on the one hand and the defendant on the other hand."*
>
> [After setting out the terms of section 33(3) of the English Act Lord Griffiths continued]
>
> *"This subsection is not intended to place a fetter on the discretion given by subsection (1), this much is made plain by the opening words "the court shall have regard to all the circumstances of the case", but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and which must be taken into consideration by the judge."*

The applications for discovery and admission of affidavit evidence made by the Plaintiff

17. In order to ensure that the Court, exercising its discretion whether to disapply the limitation period under section 34(3) of the Act, was placed in a position to "*have regard to all the circumstances of the case*", the Plaintiff sought discovery of relevant material from the School. The Plaintiff also sought to adduce affidavit evidence from a former student stating that it was widely known in the School that YZ was a sexual predator and she was warned by teachers and students alike to be wary of him.

18. As noted by Mussenden J (as he then was) in paragraph 4 of his Ruling dated 30 March 2023, the Plaintiff made a request for specific discovery of the following:

    (a) The knowledge of the Defendant as a result of which it would have dismissed YZ had he not resigned (the "**Dismissal Material**");

    (b) All facts and matters set before or provided to Helen Snowball and her report (the "**Snowball Report**");

    (c) All facts and materials provided to T&M Protection Resources ("**T&M**") and any

report(s) by them (the "**T&M Material**"); and

(d) All documents referring to or concerning other allegations of inappropriate conduct of YZ towards pupils of the Defendant (the "**Other Allegations Material**").

19. At the hearing before Mussenden J, the Plaintiff submitted that the reason for requesting the documents at this stage was to enable the Court to carry out its task under section 34(3) of the Act to have regard to all the circumstances of the case and, in particular to subsections 3(b) (the effect of delay on cogency of the evidence) and 3(c) (the conduct of the Defendant after the cause of action arose, including the extent (if any) to which it responded to requests reasonably made by the Plaintiff for information). The Plaintiff's Counsel argued that in carrying out this task, there is nothing more useful or relevant that has been requested from the Defendant.

20. The Defendant's position was that the specific discovery application was premature, some documents were protected by privilege and other documents sought were not relevant to the issues in the strike out application.

21. In opposition to the discovery application, the School filed the Second Affidavit of Mr Ferreira. At paragraph 28 of the affidavit Mr Ferreira referred to the Snowball investigation and the T&M investigation and stated:

> *"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 utilised the expertise of both Ms Helen 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 that 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.**"* [emphasis added]

22. In relation to the discovery application Mussenden J dismissed the application in its entirety and held:

(a) The Snowball Report is the subject of legal professional privilege and he had not been taken to any evidence that the School had waived the privilege.

(b) The T&M Report is also the subject of legal professional privilege.

(c) The discovery of the Dismissal Material and Other Allegations Material is limited to after pleadings have closed, noting that discovery in interlocutory proceedings is

not the norm. In this regard Mussenden J relied upon *Matthews & Malek, Disclosure, 5th Edition* [at 2.39] stating that in relation to interlocutory proceedings, discovery "… *would be ordered sparingly and only such documents as could be shown to be necessary for the fair disposal of the application*."

23. By further Summons dated 11 October 2023, the Plaintiffs sought leave to admit the affidavit of KL, sworn on 25 September 2023. KL's evidence was that she was a former student of the School during the period of January to June 1985 when she was 15 years old. She deposed that it was widely known in the School that YZ was a sexual predator and she was warned by teachers and students alike to be wary of him.

24. Ms. Greening for the Plaintiff submitted that the Court's role was to consider whether it would be equitable to proceed, notwithstanding the expiry of the limitation period. Ms. Greening argued that the question as to whether it would be equitable to proceed requires the Court to have regard to the extent of prejudice that would be caused by any decision to disapply the limitation period. Pursuant to section 34 of the Act, that exercise entails an assessment and balancing act in respect of both the Plaintiff's and the Defendant's respective positions. Counsel also submitted that section 34(3), requiring the Court to have regard to all the circumstances of the case, would require having regard to the evidence of KL, a former student, to the effect that it was widely known in the school that YZ was a sexual predator, and she was warned by teachers to be wary of him. Counsel for the School submitted that the evidence of KL was irrelevant to the strike out application and its probative value did not outweigh the prejudice caused to the Defendant in the context of the strike out application. Mussenden J dismissed the Plaintiff's application to adduce the affidavit evidence of KL on the ground that he was not satisfied that the evidence was sufficiently relevant to the strike out application.

Decision of Wheatley AJ

25. In considering the School's application to strike out these proceedings based upon the limitation defence, the Judge heard evidence from the Plaintiff as well as the two expert witnesses of the parties, Dr Martin Baggaley and Professor Anthony Maden. The Judge referred to the decision of the English Court of Appeal in ***KR and Others v Bryn Alyn Community (Holdings) Ltd (in liquidation)*** [2003] QB 1441, in relation to the factors which must be taken into consideration when exercising its discretion in disapplying the limitation period under section 34 of the Act, including the following passage in the judgment of Auld LJ at paragraph 74 (vi):

> *"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.***" [emphasis in the Judgment]

26. The Judge referred to the following submissions of counsel for the Defendant contending 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:

    (a) 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;

    (b) 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;

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

    (d) 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);

    (e) There is no sufficient reason to extend the time for bringing the claim under the provisions of Section 34 of the Act.

27. The Judge summarised the submissions made by counsel for the Plaintiff:

    (a) This is not a case where the sexual relationship between the Plaintiff and YZ is being denied;

    (b) The Plaintiff relies on the expert report in support of her reasons for delay in commencing these proceedings. Dr Baggaley in his report explains that: (i) it is very common for there to be delay in victims of childhood sexual abuse seeking legal redress. In many cases the delay is over 20 years; (ii) in this case the claimant did not lack capacity verbally for 20 years that she was at fault and that no criminal offence

had occurred; (iii) she did not appreciate she has suffered psychiatric injury until she started to have psychotherapy from 2016/7; (iv) in his opinion the School contributed to this belief through their response to the discovery of the abuse (sending her to confessional, failing to emphasise that she was the victim in the abuse and allowing YZ to resign); and (v) the School also failed to respond to related requests for assistance in 2018);

(c) There was unlikely to be any significant prejudice to the School given that, according to the School itself, it had carried out a "*thorough investigation*" in 2018 as it related to the Plaintiff's complaints about YZ and to which 12 (former and current) members of the School's teaching staff had contributed;

(d) YZ resigned as a direct result of the Plaintiff reporting the sexual relationship to the School in January 1999, and the School was in possession of sufficient information that it took the view that in the event YZ had not done so, the School would have summarily terminated his employment; and

(e) All the case authorities support the notion that all the relevant circumstances should be before the court for it to be able to exercise its discretion under section 34 of the Act.

28. The Judge noted that in the leading English case authorities the Court was seeking to exercise its discretion whether to disapply the limitation period under section 34 following the trial of the action when the court has had the benefit of reviewing all the documentary material following general discovery and the oral evidence of all material witnesses. In this case the Court was asked to determine the application to strike out at the stage of the proceedings when general discovery had not taken place. Indeed, in this case, as the Judge notes at paragraph 45 of the Judgment, the application for specific discovery in relation to the present strike out application was resisted by the School. In relation to both the discovery application and the application to admit affidavit evidence, the School successfully contended that these applications were premature and irrelevant to the determination of the strike out application. It seems reasonably clear that the Judge took the view that the discovery material sought by the Plaintiff was relevant to the exercise of her discretion under section 34 of the Act and in the absence of that material the appropriate course for her to take was to defer the decision the trial. At paragraph 58 of the Judgment the Judge held:

> *"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."*

29. At paragraph 65 the Judge referred to the Terms of Reference relating to the Snowball Report (not before the Court) and expressed the view that there is no indication whatsoever that the investigation was hampered due to the passage of time. Furthermore, there was no suggestion at all that its author was unable to make determinations regarding the allegations because there was a lack of historical evidence.

30. The Judge dismissed the strike out application on the basis that at this stage of the proceedings she could not properly or fairly exercise her unfettered discretion under section 34 of the Act to decide whether to extend the limitation period. The Judge held that the appropriate forum for the issue of the extension of limitation period under section 34 of the Act to be carried out would be when all the evidence is before the Court.

31. Leaving aside the issue of limitation, the Judge held that she was satisfied that there is *prima facie* cause of action with reasonable prospects of success and therefore should proceed to a substantive hearing.

Grounds of Appeal

Deferring any decision on the strike out application to a full trial (Ground (a))

32. The principal ground of appeal is that the Judge was wrong in law to defer the decision as to the exercise of the Court's discretion to extend time under section 34 of the Act until a full trial of the action. It is said on behalf of the School that the time for such a fundamental procedural direction had long passed. The School's strike out application was filed in December 2021 and the matter was case managed by the Court after the final hearing on 6 and 7 February 2024. No direction was made that the strike out application had to be heard at the same time as a full trial. The School argues that it was not, therefore, open to the Judge to defer making any decision on the strike out until a further full trial. It is submitted by the School that the Court was obliged to come to its conclusions on the evidence before it at the strike out application.

33. The starting point in relation to this ground of appeal is that the Judge clearly had the *jurisdiction* to determine that she did not have all the relevant material before her to exercise her discretion to determine whether limitation period should be disapplied. It was essentially a case management decision by the Judge.

34. The strike out application before the Judge required her to "*have regard to all the circumstances of the case*" in determining whether the limitation period in this case

should be disapplied under section 34 of the Act. As noted at paragraph 16 above, the decision of the House of Lords in ***Donovan v Gwentoys*** [1990] 1 WLR 472 confirms that section 34 provides a court with unfettered discretion to determine whether the limitation period should be disapplied having regard to what the judge considers to be fair having regard to the degree to which the plaintiff would be prejudiced on the one hand and the defendant on the other.

35. The older English case authorities emphasise that whilst the judge should strive to deal with the issue of limitation as a preliminary issue, it may not be possible in the circumstances of a particular case (see: ***KR and Others v Bryn Alyn Community (Holdings) Ltd (in liquidation)*** [2003] QB 1441, at paragraph 74 (vi)).

36. In the present case it is to be noted that prior to the hearing before the Judge on 6 February 2024, the Court had made no determination as to whether the strike out application based upon the expiry of the limitation period could appropriately be determined as a preliminary issue. The application was made by the School by filing the Summons dated 1 December 2021. Prior to the hearing of the application by the Judge in February 2024, the Plaintiff applied for discovery and leave to file additional affidavit evidence in relation to this application. Whilst these applications were considered and determined by Mussenden J, the Court made no determination that the strike out application based upon the expiry of the limitation period was appropriate at this stage of the proceedings. It is correct, as Ms. Rodway KC for the School points out, that the Plaintiff did not make a prior application that the limitation issue should be determined at the trial and not as a preliminary issue. However, the absence of such an application cannot affect the Court's jurisdiction under section 34 of the Act or its inherent jurisdiction to manage cases to ensure a fair hearing, to defer the consideration of the limitation defence in historical sexual abuse cases to trial where the Court considers that it is not feasible to determine the limitation defence as a preliminary issue.

37. Furthermore, the decision of the Judge to defer the consideration of the limitation defence trial is in accordance with the current English practice. As Ms. Rodway KC noted the Courts of England and Wales have developed a different approach whereby the full hearing takes place at the same time as the issue of limitation is decided. It is not difficult to discern the reasons for the modern English approach in relation to the timing of the hearing of the limitation issue in historical sexual abuse cases. As Baroness Hale held in ***A v Hoare*** [2008] 1 AC 844 at [54], historical sexual abuse cases present a challenge to the legal system which has historically discouraged stale claims as a matter of policy:

> *"…until the 1970s many people were reluctant to believe that child sexual abuse took place at all. Now we know only too well that it does. But it remains hard to protect children from it. This is because the perpetrators are so often people in authority over the victims, sometimes people whom the victims love and trust. These perpetrators have many ways, some subtle and some not so subtle, of*

> *making their victims keep quiet about what they have suffered. The abuse itself is the reason why so many victims do not come forward until years after the event. This presents a challenge to a legal system which resists stale claims. Six years, let alone three, from reaching the age of majority is not long enough, especially since the age of majority was reduced from 21 to 18."*

38. The modern English practice recognises that the consideration of deciding whether to disapply the limitation period requires a detailed enquiry into the reasons for the delay, the impact on the evidence, and whether a fair trial is possible. These issues would typically require detailed analysis of the facts which is not suitable at the preliminary hearing and is better addressed at trial where all the evidence would be available to the court.

39. The courts have consistently emphasised the need for caution in striking out claims where factual disputes exist. This is particularly so in cases where the parties and the Court have not had the benefit of general discovery. Cases of historical sexual abuse, as this case demonstrates, are a prime example of cases where both the factual and expert evidence is hotly contested by the parties.

40. Determining the limitation issue at trial avoids the need for a separate hearing which can, as this case again demonstrates, be costly and time consuming. Such a course also avoids the victim of sexual abuse having to give evidence of abuse more than once.

41. As Baroness Hale noted in ***R v Hoare,*** cases of historical sexual abuse carry significant public interest due to their impact on victims and society. Courts have to be mindful of the need to balance the defendant's rights with the plaintiff's access to justice. The courts have to be conscious to the possibility that striking out the claim prematurely and without a full hearing may have the effect of deterring survivors of sexual abuse from coming forward and undermining the public confidence in the justice system.

42. The English courts' approach to the determination of the limitation issue in historical sexual abuse cases makes eminently good sense. There is no peculiar Bermudian public policy reason why the Bermuda courts should not adopt the same approach.

43. Finally, the Judge's reasoning for deferring the decision in relation to the limitation issue to trial is reasonably clear when the Judgment is considered as a whole. At paragraph 55 of the Judgment the Judge concluded that the Court does not have all the evidence before it and therefore, cannot make any determination regarding the issue that the limitation period should be disapplied in this matter. The Judge took into account that the School rigorously opposed the Plaintiff's applications for documentary discovery and admission of affidavit evidence for the purposes of the strike out application on the grounds that, *inter alia*, the applications were premature and/or irrelevant.

44. It seems reasonably clear that the specific discovery sought by the Plaintiff was relevant to the exercise of the discretion by the Judge whether to extend the limitation period under section 34 of the Act. The Dismissal Material could potentially show the information in possession of the School in January 1999, bearing in mind that the School was prepared to summarily dismiss YZ if he did not immediately resign as an employee of the School. The Snowball Material and the T&M Material could potentially assist in determining whether the School can fairly defend these proceedings given that the School was able to carry out these two independent investigations during 2018-2021 with the assistance of 12 (former and current) members of the School's teaching staff.

45. It seems to me that the Judge was entitled to take the view that the Court was not in possession of all the evidence relevant to the exercise of the unfettered discretion under section 34 of the Act. Conceivably the Judge could have come to that conclusion at the outset of the hearing on 6 February 2024 and without hearing the oral evidence from the Plaintiff and the two expert witnesses. However, it is plain to me that the Judge was perfectly entitled to exercise her discretion to defer the consideration of the limitation issue to trial if at the end of the hearing she was of the view that the Court was not in possession of all relevant evidence. In my judgment the Judge's decision to do so does not amount to an error of law. Accordingly, I would dismiss this ground of appeal.

46. In light of the dismissal of the principal ground of appeal the remaining grounds of appeal can be dealt with briefly.

The discretion to extend time under section 34 (Grounds (d) to (e))

47. Under these grounds of appeal the School contends, *inter alia*, that the failure by the Judge to address the reasons why the Plaintiff failed to commence these proceedings entitles this Court to conclude that there are no good reasons to explain it. It is also argued that the failure to make any findings in relation to the cogency of the evidence entitles this Court to conclude that the passage of time has undermined cogency of the evidence across all the issues that must be decided at the full trial such that a fair trial of the issues can no longer take place. The School also argues that the failure by the Judge to make any adverse findings in relation to the conduct of the Defendant weighs in the balance against the extension of time.

48. It seems to me that even if the Court had taken the view that the Judge was wrong to defer the decision as to whether the limitation period should be disapplied, the Court would not have been in a position to form its own view on the exercise of discretion under section 34 of the Act. The parties clearly took the view that it was essential to the exercise of the discretion that the Judge should hear oral evidence from the Plaintiff and the expert witnesses. The oral evidence was clearly relevant to, *inter alia*, (a) the reasons for the

delay in commencing these proceedings; (b) the impact of the delay on cogency of the evidence; and (c) the issue of consent relied upon by the School. This Court has not had the benefit of this oral evidence and is not in a position to resolve conflicting expert evidence. Accordingly, even if the Court had taken the view that the Judge was wrong in law in deferring/adjourning the decision on the limitation issue to trial the Court would have remitted the matter to the Judge for reconsideration.

The Rulings of Mussenden J (Grounds (h) and (j))

49. It is said that the Judge misdirected herself by reframing the refusal by Mussenden J to order specific discovery sought by the Plaintiff and the refusal to adduce affidavit evidence of KL as a contradiction to the Defendant's submission that the Court at the strike out application needs to know what evidence each party relies upon to support or deny an extension of time.

50. It seems to me that the Judge's concern was that the evidence sought to be adduced by the Plaintiff at the hearing of the strike out application (both documentary and affidavit evidence) was relevant to the exercise of her discretion to extend time under section 34 of the Act and it was unhelpful for the School to take the position before Mussenden J that this evidence was either premature or irrelevant to the strike out application. In any event this issue is not determinative of the outcome of this appeal.

Finding as to an investigation by the School (Ground j)

51. It is said that the Judge misdirected herself and was wrong in law in relying upon the terms of reference for an investigation carried out by the School when such investigation was plainly not dealing with issues of consent, vicarious liability, grooming, or the cogency of the relevant evidence.

52. It seems to me that the relevant investigation (the Snowball Report) was relevant to the core issue of whether the School was in a position to fairly defend this action. As noted earlier, it was the School's own case that this was an independent investigation carried out by the school during the period 2018-2021 in order to (a) understand the circumstances in which YZ was able to develop an alleged inappropriate relationship with the Plaintiff in his role as a teacher at the School; (b) explore how the relationship was discovered and what sanctions/safeguarding reports followed; (c) consider whether YZ's alleged inappropriate behaviour was known to any member of staff at the School and whether there were any missed opportunities to address his misconduct; and (d) review historic and current safeguarding policies, procedures and protocols at the School. This investigation was apparently completed without undue difficulty with the assistance of 12 (former and current) members of the teaching staff in addition to two former

members of the School's Board of Governors.

53. At paragraph 65 of the Judgment, the Judge remarks that what is most compelling regarding the terms of reference is that there is no indication whatsoever that the investigation(s) was hampered due to the passage of time. The Judge notes that there was no suggestion at all that the investigators were unable to make determinations regarding the allegations because there was lack of historical evidence. It seems to me that the Judge was fully entitled to make these observations and/or findings. Accordingly, I would dismiss this particular ground of appeal. The overall result is that I would dismiss the appeal pursued by the School pursuant to the Notice of Appeal filed on 30 July 2024

Application to admit fresh evidence

54. In light of the dismissal of the appeal on the grounds stated above it is unnecessary to formally deal with the School's application to admit additional evidence save to state that even if the additional evidence is formally admitted it would not have affected the Court's analysis and decision on the grounds of appeal discussed above. No doubt this evidence can be tendered at the trial of this matter in relation to the limitation issue.

Applications before Mussenden J

55. Counsel for the Plaintiff advised the Court that she viewed these applications and the Rulings as limited to the application to strike out and she expected that much of the material would be disclosed in general discovery. The Plaintiff would of course be entitled to adduce any relevant oral evidence from the witnesses tendered at the trial.

56. I agree that the Ruling of Mussenden J dated 30 March 2023 dealing with specific discovery is best viewed in the context in which it was made, namely, whether ordering discovery was appropriate in aid of the strike out application. The School should consider afresh as to whether this material should be disclosed under a general discovery.

57. In relation to the Snowball Report and the T&M Material, Mussenden J held that they were the subjects of legal professional privilege. In relation to these two investigations, it is the sworn evidence of Mr Ferreira that (a) the School launched two "*independent investigations between 2018-2021* ***at the request of the Plaintiff*** *and incurred considerable time and expense in doing so*"; (b) "*The Plaintiff was provided with the terms of reference [in relation to the Snowball Report] and* ***so to suggest that 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***." In light of the sworn evidence that the investigations were launched at the request of the Plaintiff and not for the purpose of the School obtaining legal advice to

"*get out of being held accountable*", there is considerable doubt whether the documentary material relating to these investigations can properly be subject to legal professional privilege.

58. Further, the Plaintiff has been provided by the School with a document headed "TERMS OF REFERENCE" relating to the Snowball Report and now exhibited to the affidavit of the Plaintiff in these proceedings. In that document the School sets out some of the findings of the Snowball Report. It is said that (a) "*The findings of the investigation did not support your allegation that members of staff were aware of YZ's behaviour, and the very specific and very serious allegations made against BF and SA are vehemently denied*"; (b) "*The conclusion of the investigation is that MSA did not have knowledge of YZ's propensity to engage in inappropriate behaviour before his misconduct with you became known*."; and (c) "*Finally I can advise that the investigation is satisfied that lessons have been learnt following your disclosure and current safeguarding procedures, practices and protocols have been developed over time and are in line with expected standards of practice in Bermuda*." In light of the disclosure by the School of these findings and determinations apparently set out in the Snowball Report it is strongly arguable that any privilege attaching to the Snowball Report has been waived by the School. In the circumstances it is appropriate that the issue of privilege in relation to the Snowball Report and the T&M Material should be considered afresh by the trial judge.

Conclusion

59. In my judgment the decision of the Judge to defer the consideration of the limitation issue and the strike out application to trial was not wrong in law. The Judge was entitled to make this decision if she took the view that she was not in possession of all relevant material for the exercise of the discretion to disapply the limitation period under section 34 of the Act. Accordingly, this appeal is dismissed.

60. Unless either party applies by letter to the Registrar within 14 days of the date of delivery of this Judgment to be heard on papers in relation to costs, the Respondent shall be awarded the costs of this appeal on the standard basis to be taxed if not agreed.

SUBAIRWILLIAM AJA

61. I agree.

62. I would only add a brief remark in respect of the Dismissal Material which was excluded by Mussenden J. As observed by Hargun JA, the Dismissal Material may potentially reveal the information in possession of the School in January 1999 when it was prepared to summarily dismiss YZ as an employee of the School, failing his resignation. That is

indeed a relevant factor to be considered in deciding whether or not to exercise the Court's discretionary power to disapply the limitation period pursuant to section 34 of the Act.

63. During the hearing before us, the School's initial position was that the Dismissal Material did not exist. That position, however, was not consistent with the decision of Mussenden J to refuse the specific discovery application by excluding it. The School, having been given a recess opportunity to make further enquiries, confirmed the existence of the material before the Court.

64. That being the case, emphasis is to be given to the School's obligation, at the general discovery stage, to give full and frank disclosure of the Dismissal Material.

KAWALEY JA

65. I also agree, subject to adding one gloss of my own.

66. The findings made by Mussenden J on privilege were made in circumstances where the point does not appear to have received the benefit of full argument, and the specific discovery application was in any event refused on other grounds as well. On what legal basis can those findings be varied? Our Rules, unlike the English CPR (rule 3.1 (7), provide no express power to "vary and revoke" interim orders. However, the inherent jurisdiction to exercise a corresponding power undoubtedly exists. Sitting as a trial judge in the Cayman Islands in ***Re Global Cord Blood Corporation***, FSD 108/2021 (IKJ), Judgment dated 8 September 2023 (unreported), I considered the jurisdiction to set aside or vary an inter partes interlocutory order after hearing full argument (at paragraphs 13-19). I cited '*Gee on Injunctions*', 7th edition (at paragraph 21-059):

> "*Where there is an interim order made after a hearing on the merits inter partes, the court will not entertain an application to set aside that order or part of it or which is inconsistent with that order, unless there has been a material change of circumstances, or the judge on the original application had been misled in a material respect, or if there has been a manifest mistake, or the applicant becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This prevents* ***relitigation*** *of the same application.*" [Emphasis added]

67. Based on these principles, I concur with Hargun JA's suggestion that it seems that the privilege findings made in the context of the specific discovery application may potentially be revisited in the Supreme Court.