[2023] SC (Bda) 27 Civ. 30 March 2023

In The Supreme Court of Bermuda

CIVIL JURISDICTION
2021: No. 142

BETWEEN:

AB

Plaintiff

and

MOUNT SAINT AGNES ACADEMY

Defendant

RULING

Date of Hearing: **13 March 2023**
Date of Ruling: **30 March 2023**

<u>Appearances</u>: **Victoria Greening, Resolution Chambers Ltd., for Plaintiff**
Kyle Masters and Emma Duffy, Carey Olsen Bermuda Limited, for Defendant

RULING of Mussenden J

<u>Introduction</u>

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, 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. I had earlier ordered that the Plaintiff's application for discovery be supported by evidence and listed the matter for hearing (the "**Specific Discovery Application**"). The Plaintiff filed her Third Affidavit ("**AB 3**") and the Defendant filed the Third Affidavit of Carlos Ferreira ("**Ferreira 3**").

4. The Plaintiff submitted that the issues to be determined by the Court in the Strike-Out Application are: (a) whether the action is time-barred pursuant to section 12 of the 1984 Act, that is, the time limit for personal injury; and (b) whether the Court is entitled to exercise its discretion to disapply the limitation period pursuant to section 34 of the 1984 Act. Thus, 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 the Teacher had he not resigned (the "**Dismissal Material**");
    b. All facts and matters set before or provided to Helen Snowball ("**Ms. Snowball**") and her report (the "**Snowball Report**") (jointly the "**Snowball Material**");
    c. All facts and matters 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 the Teacher towards pupils of the Defendant (the "**Other Allegations Material**").

5. The Plaintiff submitted that the reason 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 sought were not relevant to the issues in the Strike-Out Application.

Factual Background

7. In the First Affidavit of Carlos Ferreira ("**Ferreira 1**"), he stated that: (a) Sister Judith Rollo (the "**Principal**") was the Principal at all material times; (b) once the complaint of allegations of sexual impropriety by the Teacher was reported to her in January 1999, the Principal demanded that he resign, escorted him off the premises and suspended him, he resigned shortly thereafter; (c) the Principal reported the matter to the then equivalent of Child & Family Services, a government department responsible for the protection of children; and (d) the Principal died on 27 July 2021[1].

8. In the Second Affidavit of Carlos Ferreira ("**Ferreira 2**"), he stated that: (a) former chairman of the Board of the Defendant, Mr. Paul Fortuna, had numerous discussions with the Plaintiff regarding her allegations and he was involved in the decision to commission the investigation conducted by Ms. Snowball; (b) Mr. Fortuna died in 2019; (c) the Defendant had launched two independent investigations, "extensive in nature", during the period 2018 – 2021, at the request of the Plaintiff, namely: (i) the investigation by Helen Snowball; and (ii) the investigation conducted by T&M; (d) the Plaintiff was provided with the terms of reference that were given to Ms. Snowball to carry out her investigation; (e) to suggest that that the investigation was merely an attempt for the Defendant to obtain the

[1] The date of death was stated in Ferreira 2 para 17.

advice of a lawyer on how to get out of being held accountable is completely unsupported by the evidence; and (f) the Defendant took several steps to notify parents of current students by posting through an online platform having consulted with Ms. Snowball and T&M on how to notify as wide an audience as possible and it also posted information and sent correspondence by email and post to alumni.

The Limitation Act 1984

9. 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."

Analysis of the Plaintiff's Applications

10. In my view, the Plaintiff's Specific Discovery Application should not be granted for several reasons.

The Snowball Material

11. First, in my view, the Snowball Material is the subject of legal professional privilege. Legal professional privilege is an absolute and fundamental right protected in the Human Rights Act and the common law. In *Re Braswell and Gero Vita International Inc.* [2001] Bda LR 41 Meerabux J stated that "*... it is much more than an ordinary rule of evidence, that it is a fundamental condition on which the administration of justice as a whole rests and that it forms part of the constitutional right to a fair trial and as such cannot be abridged by statute.*" In respect of legal advice privilege, *Passmore on Privilege 4th Edition* summarised it as follows: "*a communication, whether written or oral, that is made: (a) between a client and his lawyer, where the lawyer is acting in the course of their professional relationship and within the scope of the lawyer's professional duties; (b) under conditions of confidentiality; and (c) for the purpose of enabling the client to seek, or the lawyer to give, legal advice or assistance in a relevant legal context.*"

12. The White Book at 24/5/9 states that "*The test is whether the communication or other document is made confidentially for the purpose of legal advice. Those purposes have to be construed broadly. ... Where information is passed by the solicitor or client to the other*

as part of a process aimed at keeping both informed, so that advice may be sought and given, privilege will attach. Moreover, legal advice is not confined to telling the client the law; it may include advice about what should prudently and sensibly be done in the relevant legal context. ... This privilege extends to information which the solicitor receives in a professional capacity from a third party and which he conveys to his client."

13. In *Keithly Daniel v Exxon Services (Bermuda) Ltd* [2011] Bda LR 54, Kawaley J (as he then was), after reviewing the principles set out in a number of cases, stated "*[16] ... the Court should be slow to find that legal advice is not privileged or that, where it is privileged, implied waiver has occurred.*" He went on to find that in that case the advice was *prima facie* privileged and that no question of waiver or implied waiver had arisen.

14. I accept the Defendant's submissions that the dominant purpose for retaining Ms. Snowball was for obtaining legal advice on a confidential basis. Ferreira 3 sets out that Helen Snowball is a partner at Kennedys Law LLP ("**Kennedys**") and that Kennedys was engaged by the Defendant, after the Plaintiff had contacted the Defendant with regards to her complaints, for the purpose of providing legal advice to the Defendant. As a result of that retainer, the Snowball Material passed between them. It is clear to me that the principles in *Passmore on Privilege* as set out above have been met. On that basis, I do not accept the arguments of Ms. Greening, who relied heavily on the statements in Ferreira 2, that the Snowball Report was not prepared to provide the Defendant with legal advice and accordingly is not protected by privilege. I also do not accept her argument that the Snowball Material is highly relevant because by seeing what was sent to Ms. Snowball and her report, it will show what material was available to the Defendant before Mr. Fortuna and the Principal died. Any relevance will not override the privilege. Further, I have not been taken to any evidence that the Defendant has waived privilege. On that basis, in following *Keithly Daniel v Exxon Services (Bermuda) Ltd*, I am inclined to find that the legal advice is privileged.

The T&M Material

15. Second, to my mind, the T&M Material is the subject of litigation privilege. *Passmore on Privilege* summarised the principles applicable to litigation privilege as follows [3-00]:

> *"... In order to make a successful claim in litigation privilege, the client must establish that what is sought to be protected is a communication, whether written or oral, that is made:*
>
> - *between either (i) himself or (ii) his lawyer (who is acting for him in a professional capacity) and a third party;*
> - *in either case under conditions of confidentiality;*
> - *for the dominant purpose of use in litigation that, at the time the communication is made (i) is either proceeding or pending, or reasonably anticipated or in contemplation; and (ii) is litigation in which the client is, or reasonably anticipates becoming, a party; and*
> - *for the purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in connection with the litigation concerned."*

16. The rationale for litigation privilege was given by Lord Roger in *Three Rivers District Council and Others v Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48 [at para 52] and was cited by Hellman J with approval in *Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) v Ford Motor Company* [2017] Bda LR 113 at 35 "... *each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations*". In respect of the "dominant purpose test", in *Starbev GP Ltd v. Interbrew* [2013] EWHC 4038 (Comm), recently cited with approval in *Wong v Grand View Private Trust Company Ltd and Ors* [2021] Bda LR 23 [at 24], Hamblen J stated:

"...

> *(3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation –*

see, for example, United States of America v Philip Morris Inc [2004] EWCA Civ 330 at [68]; Westminster International v Dornoch Ltd [2009] EWCA Civ 1323 at paras [19] – [20]. As Eder J stated in Tchenguiz at [48(iii)]: 'Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility'.

(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA [1992] BCLC 583, 589-590 (cited in Tchenguiz at [54]-[55]); West London Pipeline and Storage Ltd v Total UK Ltd at [52]." [Emphasis added]

25. I am guided by these principles in the present case. All the Trustees need do to establish that privilege attaches to the process of obtaining witness statements for use at trial in the present proceedings is to demonstrate that the relevant communications were made for the dominant purpose of that process."

17. Thus, the dominant purpose for engaging Kennedys and T&M was to investigate the Plaintiff's claims so the Defendant could receive legal advice and prepare for the Plaintiff's imminent legal proceedings. In or around November 2018, the Plaintiff contacted the Defendant to discuss her allegations against the Defendant which included allegations that the Defendant had failed to protect her because they knew about other victims. I accept that the Defendant at all times was cognizant that the Plaintiff was intent on pursuing legal action against it. Thus, the engagement of Kennedys and T&M was based on the

Defendant's reasonable anticipation and contemplation that the Plaintiff was intent on commencing legal action. I also accept that it is clear that the Plaintiff intended to advance legal proceedings against the Defendant as she stated in her email to Mr. Fortuna dated 4 June 2019 "*I stand by my information that I have presented during this investigation and would equally be prepared to do so under oath should this matter ever reach that point.*" It is significant that the engagement of T&M by Kennedys took place after that email.

The Dismissal Material and the Other Allegations Material

18. Third, the Rules of the Supreme Court 1985 ("**RSC**") Order 24, rule 1 anticipate that discovery of documents is limited to after pleadings have closed. Therefore, discovery in interlocutory proceedings is not the norm. *Matthews & Malek, Disclosure, 5th Edition* [at 2.39] sets out 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.*" In respect of specific discovery per RSC Order 24, rule 7, the White Book [at 24/7/2] confirms that the affidavit in support must show a "*prima facie*" case that (i) the documents exist; (ii) are in possession, custody or power of the defendant; and (iii) are relevant to the issues in dispute. Thus, the order sought by the Plaintiff for discovery must be precise and the documents readily identifiable by the Defendant. Further, RSC Order 24, rule 8 provides the Court with a discretion to refuse an application for specific discovery on the basis that, at the time, it is not necessary.

19. In my view, the issues in respect of the Strike-Out Application are as follows: (i) did the Plaintiff have the requisite knowledge when the cause of action arose in 2002; (ii) was the action brought within the time limit prescribed by statute; and (iii) if the claim is out of time, should the Court exercise its discretion to disapply the limitation period. The Plaintiff's reasons for this Specific Discovery Application as set out in AB 3 are that the documents are required (i) to instruct properly her expert to prepare the expert report; and (ii) in order to address all the issues that the Court will consider when determining the Strike-Out Application. However, I note that the Plaintiff has not filed any evidence from

her expert which supports her request nor has she explained how the documents are relevant to the Strike-Out Application.

20. In respect of whether the documents are necessary, the Court must first consider their relevance in light of the matters to be taken into consideration as set out above in section 34(3) of the 1984 Act when reaching the determination of the Strike-Out Application.

Dismissal Material

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 is 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 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 Dismissal Material is not relevant and has no bearing whatsoever on this question of delay and cogency. In other words, I am 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 delay and cogency of evidence if the action had been brought in time.
    b. In respect of section 34(3)(c) on 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 am 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.

<u>The Other Allegations Material</u>

23. Fifth, in my view, the request for the Other Allegations Material 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 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.
    b. In respect of section 34(3)(c) on 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 Other Allegations Material 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 has 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.

<u>Conclusion</u>

25. For the reasons set out above, I refuse the Plaintiff's Specific Discovery Application.

26. 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 30 March 2023

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