Talbot v The Board of Members of St Patricks College Prospect Catholic College [2020] FCA 1325

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| File number: | TAD 53 of 2019 |
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| Judgment of: | **KERR J** |
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| Date of judgment: | 16 September 2020 |
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| Catchwords: | **COSTS** – alleged discrimination against child in the provision of education services contrary to the *Disability Discrimination Act 1992* (Cth) - application by litigation representative for leave to discontinue proceeding with no order as to costs – consideration of r 26.12(7) of the *Federal Court Rules 2011* (Cth) – application granted |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 37N  *Federal Court Rules 2011* (Cth) rr 9.70, 26.12(7) |
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| Cases cited: | *Fordyce v Fordham* [2006] NSWCA 274; 67 NSWLR 497  *Grant v BHP Coal Pty Ltd (No 2)* [2015] FCA 1374  Dal Pont GE, *Law of Costs* (4th ed, LexisNexis Butterworths, 2018) |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 38 |
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| Date of hearing: | 8 September 2020 |
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| Counsel for the Applicants: | Ms K Cuthbertson |
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| Solicitor for the Applicants: | Public Interest Advocacy Centre |
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| Counsel for the Respondents: | Ms C Scott |
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| Solicitor for the Respondents: | Page Seager |

ORDERS

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|  | | TAD 53 of 2019 |
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| BETWEEN: | ABIGAIL TALBOT (BY HER NEXT FRIEND MELINDA TALBOT)  First Applicant  MELINDA TALBOT  Second Applicant | |
| AND: | THE BOARD OF MEMBERS OF ST PATRICKS COLLEGE PROSPECT CATHOLIC COLLEGE  First Respondent  ROMAN CATHOLIC CHURCH TRUST CORPORATION OF THE ARCHDIOCESES OF HOBART  Second Respondent  ANTHONY DALEY (and another named in the Schedule)  Third Respondent | |

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| order made by: | KERR J |
| DATE OF ORDER: | 16 september 2020 |

THE COURT ORDERS THAT:

1. The Applicants have leave to discontinue these proceedings.
2. The Applicants may exercise that leave without incurring liability to pay the Respondents’ costs in relation thereto.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KERR J:

1. These reasons address whether the Applicants should be granted leave to discontinue a proceeding they commenced on 13 December 2019 by filing an originating application under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRCA**) and, if so, whether the Court should relieve them of their obligation to pay the Respondents’ costs as they will be required to do by force of r 26.12(7) of the *Federal Court Rules 2011* (Cth) (**Rules**) unless the Court otherwise orders.
2. The Respondents consent to the Applicants being granted leave to discontinue their proceeding. However, they resist that the Court should relieve the Applicants of the burden of having to pay the Respondents’ costs properly incurred prior to that point.
3. As Dal Pont observes in the fourth edition of his frequently referenced text *Law of Costs* at 14.61, the policy reflected in r 26.12(7) is that “unless there are reasons in justice for another outcome, a defendant should not … be out of pocket in defending a proceeding the plaintiff chooses not to proceed with”.
4. However, that policy paradigm is not greatly relevant in this case. That is because the Applicants have been left with no practical choices realistically available to them but to seek leave to discontinue. Their only realistic option is to abandon the proceeding that they earlier initiated, in very different circumstances, late last year.
5. Of itself however, that does not require the Court to grant their application. The discretion with respect to costs is to be exercised as the justice of the circumstances appear to the Court, having regard to “the whole landscape comprising the course of the proceedings”: *Fordyce v Fordham* [2006] NSWCA 274; 67 NSWLR 497 per McColl JA at [79]. I thus turn to that landscape.

# The circumstances in which the proceedings were commenced

1. In 2018, Ms Abigail Talbot (who was born in mid-2005) was enrolled as a student at St Patrick’s College Prospect Catholic College. That school is located in northern Tasmania. On 14 January 2019 Abigail’s mother, Ms Melinda Talbot, made a complaint on her daughter’s behalf to the Australian Human Rights Commission (**AHRC**). That application made allegations against the school and its management that, inter-alia, Abigail had been discriminated against because of her disabilities: Down Syndrome and Reynaud’s Disease.
2. The basic proposition underlying Abigail’s complaint to the AHRC was that St Patrick’s College Prospect Catholic College had treated her differently from other students who were attending that school due to her disabilities, when there had been no proper basis for it to have done so.
3. On 26 May 2019, a Ms Julie Phillips wrote to the AHRC on Ms Melinda Talbot’s behalf. Ms Phillips stated that Abigail wanted to amend her complaint to extend the relevant timeframe over which the alleged discrimination was said to have occurred. She also advised that Ms Melinda Talbot wished to join as a complainant by reason of the school’s alleged conduct towards her in consequence of her having asserted Abigail’s rights. The AHRC subsequently agreed to those requests.
4. However, on 16 October 2019 a delegate of the President of the AHRC wrote to Ms Phillips as Ms Talbot’s disability advocate to advise that she had decided to terminate those complaints under s 46PH(1B)(b) of the AHRCA because she was satisfied that there was no reasonable prospect of the matter being settled by conciliation.
5. Having regard to the terms of the Applicants’ genuine steps statement as was later filed, I take it to be established that by 19 November 2019 at the latest they had instructed Clayton Utz to act for them in the present proceeding.
6. In any event, it is uncontentious that Clayton Utz was on the record as the Applicants’ lawyer when these proceedings were commenced on 13 December 2019. Because Clayton Utz has no physical presence in Tasmania, the Applicants’ address for service was given as Level 27, 250 St Georges Terrace, Perth WA.
7. On 3 February 2020 the Court made orders by consent providing, inter-alia, for the parties each to file and serve concise statements of their respective cases in accordance with [6.8]-[6.10] of the Court’s Central Practice Note. Those orders also provided for the matter to be referred to mediation on a date between 10 and 23 March 2020. Failing resolution of the matter at that mediation, it was to be listed for further case management on 30 March 2020.
8. Unfortunately, the initial mediation failed to settle the proceeding. Thus on the morning of 30 March 2020 the Respondents’ legal representative Ms Scott advised my associate of the orders the Respondents would seek when the matter came before the Court for case management later in that day.
9. Mr Rapley responded on behalf of the Applicants shortly afterwards, in the following terms:

As indicated below by Ms Scott, the orders that the Respondents propose are not consented to.

This morning I advised Ms Scott via email as follows:

*“After the Case Management Conference scheduled for this afternoon, Clayton Utz will withdraw from acting for the Talbots in relation to this matter.*

*As you may be aware Clayton Utz has been acting on a pro bono basis.  Given the impact of Covid 19 virus it is impracticable and inappropriate for Clayton Utz to continue to act.  I understand that this may have been reflected in the judge’s comments at the last CMH and this was before the impact of the virus.*

*The Applicants now intend to take some time to explore the possibility of engaging local representation or representing themselves.*

*In these circumstances the Applicants seeks a 16 week adjournment for that purpose.*

*The length of the adjournment is based upon:*

1. *The impact of Covid 19 generally.  For example, even being able to in an appropriate way brief local legal representation to find out whether they are willing to take the matter on;*
2. *Darren and Melinda need time to assess their financial position – which is currently poor;*
3. *The issues are complex and if local representation is found, that representation is likely to need to have quite some time to get across the brief;*
4. *If they are left with having to represent themselves, educating themselves as to the process involved with doing so;*
5. *The ability to brief expert witnesses properly.  For example, Dr Bob Jackson may well wish to meet with Abigail, Darren and Melinda.”*
6. Having heard submissions from Mr Rapley and Ms Scott, later that day I ordered that the case management hearing be adjourned to 2.15pm on Monday 15 June 2020. I directed the parties to confer with the object of providing the Court with a proposed joint timetable for the further management of the proceeding towards trial.
7. On 15 June 2020, the Applicants remained self-represented. Ms Melinda Talbot appeared and indicated that the Applicants were yet to secure alternative pro-bono legal representation, and that COVID-19 restrictions had limited her capacity to pursue such options. She sought a further adjournment. Ms Scott consented to that course. Accordingly, I adjourned the case management hearing to 2 July 2020.
8. When the matter came back before me on 2 July 2020, the Applicants were again self-represented. Ms Talbot advised the Court as follows:

… in relation to having legal representation, we do, at this stage, been unable to find anyone to assist, you know, due to the exceptional circumstances with regards to COVID-19 and the states being in lockdown for a long period of time. We’ve exhausted all options, so we’ve put in a pro bono application to the Law Society in April and we’ve yet to hear any information on whether that has been accepted. The other options, like Just Connect, they took on the case as a public interest case and have sent the case out to some lawyers to see if, you know, someone was interested in taking on the case, but, at this stage, we’re yet to hear back, and we have looked at many other options.

The other circumstances that have happened is our daughter has been extremely unwell over the last three months and is now under the care of a number of specialists. As a general rule, she’s probably only well enough to go to school maybe one day a fortnight. Given these exceptional circumstances, we approached the other party in terms of, you know, coming to an agreement that would enable us to withdraw from the matter, but still have Abby’s best interests at heart and give consideration to her medical needs. We received a response yesterday and, at this stage, we’ve been unable to come to an agreement that I believe would be in Abby’s best interests. Given the exceptional circumstances, we wish to seek the leave of the court to discontinue the matter but without a costs penalty.

1. Ms Scott informed the Court that her clients would not oppose leave being granted to discontinue but, if that course were to be pursued, would seek the usual orders with respect to costs after discontinuance.
2. I made orders by consent providing that any application by the Applicants to discontinue their proceeding without liability as to costs be filed and served on or before 24 July 2020. As events transpired, such an application was filed on 14 August 2020. I made orders by consent permitting that application to be filed and served: notwithstanding it being out of time as provided for by my earlier orders. It was listed for hearing on 8 September 2020.
3. The Applicants rely on the affidavit of Ms Melinda Talbot, filed on 14 August 2020. The Respondents rely on the affidavit Ms Catherine Scott, filed on 4 September 2020. Each side has filed written submissions.
4. As the Applicants’ written submissions establish, at the time of the hearing the Applicants remained unable to obtain legal representation with respect to their substantive claims. However, since the previous case management hearing they had secured limited pro-bono assistance from the Public Interest Advocacy Centre (**PIAC**) with respect to their discontinuance application. Ms Cuthbertson of counsel appeared for the Applicants at the hearing, instructed by the PIAC. Ms Scott appeared for the Respondents.
5. The respective affidavits of Ms Talbot and Ms Scott were read. Neither was required for cross-examination. Noting Ms Scott’s submissions as to their confined relevance, the Court also admitted into evidence as Ex A1 a bundle of documents that had been exchanged as correspondence between the parties.
6. At the hearing, Ms Cuthbertson and Ms Scott each made submissions relevant to the conduct of their respective clients’ opponents prior to 30 March 2020. I discount that any sound basis for criticism of any party’s conduct exists. I am satisfied that neither the Applicants nor the Respondents took a step outside of the proper range of conduct available to them to best advance their respective positions as they might have been advised to take, or omitted to take.
7. I am therefore affirmatively satisfied that I am entitled to find that neither side acted contrary to their duty pursuant to s 37N of the *Federal Court of Australia Act 1976* (Cth).
8. I proceed on the basis that there is nothing defective in the parties’ respective pleadings or materials on file as would allow me to conclude in the absence of a trial on the merits that the Applicants were doomed to fail, or conversely that the Respondents could not have established sound defences to the claims advanced.
9. In response to the Ms Abigail Talbot’s fundamental claim that St Patrick’s College Prospect Catholic College had treated her differently from other students who were attending that school due to her disabilities when there had been no proper basis for it to have done so, the Respondents plead (inter-alia) that to any extent they did so that was by way of reasonable adjustments to ensure that she was not treated less favourably than a student without a disability (at [3.2]). Neither proposition has been tested in this Court. Neither Ms Cuthbertson nor Ms Scott suggested that the Court was in a position to evaluate the merits of the parties’ rival contentions in that regard, even on a preliminary view.
10. I accept Ms Scott’s submission that it was the impact of Clayton Utz withdrawing as their legal representative, rather than Ms Abigail Talbot’s declining health, that triggered the application for an adjournment on 30 March 2020. However, it is clear that Abigail’s health then became a significant factor in the Applicants coming to accept that in practice they had no option but to discontinue. That was the import of Ms Melinda Talbot’s submissions to the Court on 2 July 2020 as I have set out above.
11. Abigail’s increasingly challenged general health is deposed to at paragraphs [12]-[18] of Ms Melinda Talbot’s affidavit. Her sworn evidence in that affidavit is consistent with what she earlier stated in her submissions to the Court on 2 July 2020. She deposes that as a result Abigail has come to be under the care of a number of specialists: being a paediatrician, a paediatric pain specialist, a psychologist, a dietician, a physiotherapist and an occupational therapist. She further deposes that an EEG scan conducted on 7 August 2020 showed an abnormal report, and that as a result Abigail has been triaged as Category 1 on the waiting list for urgent admission to see a neurologist at the Launceston General Hospital.
12. Ms Talbot then deposes as follows:

20. Upon reflecting on the changed circumstances and medical needs of Abigail, the Respondent’s approach to mediation in these proceedings, the financial impacts of continuing litigation in the absence of pro bono assistance, and having received advice as to the ongoing financial commitment associated with retaining a private lawyer in respect of these proceedings, I have formed the view that it would be the best possible scenario to discontinue these proceedings.

21. I understand that litigation bears risk. Whilst I believe that I would ultimately succeed to these proceedings based upon the merits of our case, I do not have the financial assets or means which could be relied upon if I were to be unsuccessful and a costs order were to be made against me. This is particularly in light of the circumstances of COVID-19, which I believe has been a factor which has influenced the ability for pro bono service providers to consider taking carriage of my matter.

1. I reject that the Respondents’ approach to mediation justifies any criticism. Otherwise however, I accept that evidence. I also accept that to extent that the Applicants’ incapacity to secure alternative legal representation is relevant, the Applicants have (without success) done everything open to them to secure pro-bono assistance. I also accept that Ms Melinda Talbot lacks the financial means to retain private counsel.
2. This may not strictly be a case in which a “supervening event” has so altered the subject matter of the underlying dispute that these proceedings cannot be proceeded with because, viewed purely as a matter of legal theory, perhaps they could be. However, it appears uncontentious that Ms Abigail Talbot has suffered a significant deterioration in her health. The result has been that her enrolment at St Patrick’s College Prospect Catholic College had already declined to the very irregular and indeed has since been terminated altogether (Ex A1, correspondence of 13 July 2020) for reasons as to which it is inappropriate for me to express any view. In those actual circumstances there is at least some analogy to the cases discussed by Dal Pont at 14.66, in which a supervening event has caused the subject matter of the dispute to no longer exist.
3. Two intersecting events occurring after the commencement of these proceedings (loss of legal representation and Abigail’s deterioration in health) have combined to make it neither sensible nor worthwhile for these proceedings to be litigated. Indeed, even had the Applicants remained legally represented, I am not confident that Abigail could have practically pursued her litigation within any reasonable timeframe. That is because I assume that she would have had great difficulty in making good her case without subjecting herself to the testing of the kind to which the Respondents have requested she be submitted, and which the Applicants have resisted having regard to her present health status. I need not speculate further on that possibility, but as to the theoretical issues that might have arisen see *Grant v BHP Coal Pty Ltd (No 2)* [2015] FCA 1374 per Collier J at [127].
4. Because Ms Abigail Talbot brings this proceeding by her litigation representative, she requires leave of the Court to discontinue (r 9.70). In the circumstances, that is the only rational option open to her. The Respondents do not oppose the Court granting such leave. I will so order.

# The discretion as to costs

1. As I have earlier observed, it is well established that the starting point prescribed by the Rules does not confine the Court’s discretion where an application comes before it as in the present instance by creating a presumptive entitlement to costs in the opposing party.
2. In my view, in circumstances in which it is impossible to conclude that the Applicants would have failed on the merits the appropriate disposition of this application is that each of the Applicant and Respondent parties are to bear their own costs.
3. When the issue is viewed in the context of the “whole landscape comprising the course of the proceedings” I have concluded that relieving the Applicants of liability for the Respondents’ costs is appropriate: notwithstanding that this will leave the Respondents having to meet the relatively limited costs they have incurred to date in consequence of the Applicants having initiated these proceedings. I am satisfied that that is the manner in which the Court ought to exercise its discretion having regard to, inter-alia, the facts that:

* these proceedings will be terminated at what is still a very early stage and where the costs remain modest;
* the Applicants, by reason of changed circumstances beyond their control, have been left with no realistic choices other than to discontinue;
* St Patrick’s College Prospect Catholic College has terminated Ms Abigail Talbot’s enrolment such that much of the subject matter of the dispute has ceased to be relevant; and
* neither side has been responsible for imposing unnecessary costs on the other.

1. I am satisfied that having regard to those observations, there should also be no order for costs in respect of this application. I thank Ms Cuthbertson for appearing pro-bono in this proceeding, consistently with the finest tradition of the bar.
2. I will make orders accordingly.

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| I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kerr. |

Associate:

Dated: 16 September 2020

SCHEDULE OF PARTIES

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|  | TAD 53 of 2019 |
| Respondents |  |
| Fourth Respondent: | RICHARD HEYWARD |