FEDERAL COURT OF AUSTRALIA

Haraksin v Murrays Australia Ltd [2010] FCA 1133

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| Citation: | Haraksin v Murrays Australia Ltd [2010] FCA 1133 |
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| Parties: | **JULIA HARAKSIN v MURRAYS AUSTRALIA LTD (ACN 008 468 666)** |
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| File number: | NSD 907 of 2010 |
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| Judge: | **NICHOLAS J** |
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| Date of judgment: | 20 October 2010 |
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| Catchwords: | **PRACTICE AND PROCEDURE –** Application for an order under O 62A r 1 – applicant suffers from physical disability – alleges direct and indirect discrimination and contraventions of the *Disability Standards for Accessible Public Transport* 2002 (Cth) by respondent based upon its alleged failure to provide wheelchair accessible coaches – factors relevant to exercise of Court’s discretion – public interest element – estimate of likely costs – applicant not seeking compensation – applicant has substantial assets – proceeding unlikely to be legally or factually complex – applicant will not proceed with case if no order made –appropriate in this case to make order under O 62A r 1 in the amount of $25,000  |
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| Legislation: | *Federal Court Rules* O 62A r 1*Australian Human Rights Commission Act* 1986 (Cth) s 46PO*Disability Discrimination Act* 1992 (Cth) ss 4(1), 11, 23, 24, 29A, 32*Disability Standards for Accessible Public Transport* 2002 (Cth) ss 33.1, 33.2, 33.7  |
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| Cases cited: | *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1 cited *Caroona Coal Action Group Inc v Coal Miners Australia Pty Ltd* (2009) 170 LGERA 22 cited*Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 cited *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263 cited *Hanisch v Strive Pty Ltd* (1997) 74 FCR 384 cited*Sacks v Permanent Trustee Australia Limited* (1993) 45 FCR 509 cited*Woodlands v Permanent Trustee Company Limited* (1995) 58 FCR 139 cited |
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| Date of hearing: | 15 October 2010 |
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| Date of last submissions: | 15 October 2010 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 30 |
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| Counsel for the Applicant: | C Ronalds SC |
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| Solicitor for the Applicant: | Public Interest Advocacy Centre |
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| Counsel for the Respondent: | A Moses SC |
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| Solicitor for the Respondent: | Blake Dawson |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 907 of 2010 |

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| BETWEEN: | JULIA HARAKSINApplicant |
| AND: | MURRAYS AUSTRALIA LTD (ACN 008 468 666)Respondent |

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| JUDGE: | NICHOLAS J |
| DATE OF ORDER: | 20 october 2010 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. Pursuant to Order 62A, Rule 1, the maximum costs that may be recovered in this proceeding by one party from the other party on a party/party basis is $25,000.
2. The costs of the applicant’s notice of motion filed 22 July 2010 be costs in the proceeding.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court’s website.

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| JUDGE: | NICHOLAS J |
| DATE: | 20 october 2010 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. Before me is a notice of motion filed by the applicant in this proceeding seeking an order under O 62A r 1 of the *Federal Court Rules* limiting the costs that may be recovered by one party from another on a party/party basis to $15,000. The application under O 62A r 1 has been made promptly. It was foreshadowed at the first directions hearing. The pleadings in the proceeding have closed but no affidavits have been filed.

# Nature of the proceeding

1. The proceeding was commenced in July this year pursuant to s 46PO of the *Australian Human Rights Commission Act* 1986 (Cth). The applicant alleges that she suffers from a disability as defined in s 4(1) of the *Disability Discrimination Act* 1992 (Cth) (**Disability** **Discrimination Act**). She alleges that the respondent is an operator of a public transport service which is required to comply with the *Disability Standards for Accessible Public Transport* 2002 (Cth) (**Transport Standards**). She alleges that the respondent has contravened s 32 of the Disability Discrimination Act and s 33.1 and s 33.2 and Schedule 1 of the Transport Standards. Section 32 of the Disability Discrimination Act states that it is unlawful for a person to contravene a disability standard.
2. The applicant further alleges that the respondent has engaged in direct discrimination against her in the provision of services on the ground of her disability and thereby contravened s 23(a), (b) and (c), and s 24(a) and (b) of the Disability Discrimination Act. She also alleges that the respondent engaged in indirect discrimination in contravention of s 23(a), (b) and (c) and 24(a) and (b) of the Disability Discrimination Act. All allegations of contravention of the Disability Discrimination Act and the Transport Standards are denied or not admitted by the respondent.
3. The respondent does not admit that the Transport Standards apply in the circumstances of this case or that it was obliged to comply with the provisions alleged to have been contravened. It also relies upon a defence of “unjustifiable hardship”: see s 29A and s 11 of the Disability Discrimination Act and s 33.7 of the Transport Standards. Section 11(2) of the Disability Discrimination Act provides that the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.

# Order 62A

1. Order 62A provides:

1. **Power to order maximum costs**

 The Court may, by order made at a directions hearing, specify the maximum costs that may be recovered on a party and party basis.

2. **Excluded costs**

 A maximum amount specified in an order under rule 1 shall not include an amount that a party is ordered to pay because the party:

 (a) has failed to comply with an order or with any of these Rules; or

 (b) has sought leave to amend its pleadings or particulars; or

 (c) has sought an extension of time for complying with an order or with any of these Rules; or

 (d) has otherwise caused another party to incur costs that were not necessary for the economic and efficient:

 (i) progress of the proceedings to trial; or

 (ii) hearing of the action.

3. **Further directions**

 An order under rule 1 may include such directions as the Court considers necessary to effect the economic and efficient:

 (a) progress of the proceedings to trial; or

 (b) hearing of the action.

4. **Variation of order**

 If, in the Court’s opinion, there are special reasons, and it is in the interests of justice to do so, the Court may vary the specification of maximum recoverable costs ordered under rule 1.

1. During the course of argument I was referred to various authorities concerned with O 62A r 1 or similar provisions in other jurisdictions. These included *Sacks v Permanent Trustee Australia Limited* (1993) 45 FCR 509 (Beazley J), *Woodlands v Permanent Trustee Company Limited* (1995) 58 FCR 139 (Wilcox J), *Hanisch v Strive Pty Ltd* (1997) 74 FCR 384 (Drummond J), *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1 (Pain J), *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (Bennett J) and *Caroona Coal Action Group Inc v Coal Miners Australia Pty Ltd* (2009) 170 LGERA 22 (Preston CJ). The applicant has since drawn my attention to the recent decision of the Court of Appeal in *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263 dismissing (by majority) an appeal from the decision of Pain J.
2. By way of background to O 62A r 1, Wilcox J in *Woodlands* at 144 referred to some observations of Beazley J in *Sacks* at 511 concerning the origin of the rule. His Honour stated:

In *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, Beazley J referred to the origin of O 62A. At 511 she quoted a letter from the then Chief Justice of the Court to the then President of the Law Council of Australia speaking of concern within the Court, and the wider community and legal profession, “that the cost of litigation, particularly for persons of ordinary means, places access to the civil courts beyond their reach and thus effectively denies them justice”. He explained the then proposed Order as being intended to mitigate the “deterrent to the assertion or defence of rights in civil litigation” represented by fear of exposure to “the legal costs to which an unsuccessful party may be subjected”. The Chief Justice predicted that the rule “would be applied principally to commercial litigation at the lower end of the scale in terms of complexity and the amount in dispute”. But he added “it could be applied in other cases as appropriate”.

1. Drawing on previous authorities including *Sacks*, *Woodlands* and *Hanisch*, Bennett J in *Corcoran* at [6] identified a number of factors relevant to the exercise of the discretion under O 62A r 1 including:
* the timing of the application;
* the complexity of the factual or legal issues raised in the proceeding;
* the amount of damages the applicant seeks to recover;
* whether the applicant’s claims are arguable and not frivolous or vexatious;
* the undesirability of forcing the applicant to abandon the proceedings;
* whether there is a public interest element to the case;
* the costs likely to be incurred by the parties in the preparation for, and hearing of, the matter;
* whether the party opposing the making of the order has been uncooperative and/or has delayed the proceedings.
1. These factors provide useful guidance in relation to the exercise of the relevant discretion. However, as pointed out by Preston CJ in *Caroona Coal* at [36], they must not be treated as fixed criteria governing the exercise of a broad discretion.

# The evidence

1. In support of her application for an order under O 62A r 1 the applicant states that she has osteogenesis impertecta (brittle bone disease) and that she is totally reliant on electric and manual wheelchair for mobility. She states that in August 2009 she attempted to book a seat on a coach with the respondent for a return trip from Sydney to Canberra. She states that she was informed by the respondent’s representative that none of its coaches are wheelchair accessible. She also states that the respondent operates a fleet of over 200 vehicles located in depots in Brisbane, Gold Coast, Sydney, Canberra and Melbourne and that the main routes the respondent operates are Sydney/Canberra, Sydney Airport/Canberra, Canberra/South Coast, Sydney/South Coast, Canberra/Wollongong and Canberra/Snowy Mountains. For the purposes of the present application, the respondent does not challenge the correctness of any of these statements.
2. The applicant works full-time as Manager Diversity Services, New South Wales Department of Justice and Attorney General. She earns a substantial salary in this position. She and her husband own their home which is the subject of a small mortgage. They also own two investment properties both of which are mortgaged. The applicant appears to have net assets worth approximately $900,000. Most of this value is in real estate. She also owns shares in Qantas and Telstra which are worth about $16,000.
3. The applicant states that her solicitors are acting for her in this proceeding on a conditional costs basis, that is to say, they will not charge her if she is not able to recover her legal costs. Senior counsel for the applicant informed me that she is also appearing on the same basis.
4. The applicant states that her legal advisers have informed her, and she believes, that the respondent’s legal fees for this case could be between $23,000 and $35,000 depending on how the respondent defends the proceeding.
5. The applicant also states that she has a grant of legal aid from the Legal Aid Commission of New South Wales (**LAC**). While this grant covers disbursements in a very modest amount ($250), it also entitles the applicant, according to her evidence, to an indemnity against an adverse costs order for an amount of up to $15,000. The applicant states that she will be personally responsible for the payment of the legal costs of the respondent above this amount in the event a costs order is made against her.
6. The applicant states that if she was unsuccessful in this case and was ordered to pay the legal costs of the respondent, she could personally contribute a maximum of $5,000. Her evidence does not explain how she has arrived at that figure. She also states that if no order is made under O 62A r 1 then she will be unable to proceed with her case. This is because of the risk of an adverse costs order which she says could be for as much as $25,000 to $35,000.
7. The applicant states that her primary motivation in bringing this case is that she believes that it is in the public interest. She states that she is concerned that in the years since the Transport Standards commenced operation the respondent has made little or no progress in complying with its requirements.
8. The applicant is represented by the Public Interest Advocacy Centre (**PIAC**) and a solicitor for PIAC is acting for the applicant. While an affidavit of Ms Namey, a solicitor with PIAC, was read, it refers to a number of formal matters only. In particular, it does not include any breakdown or other analysis of the estimate of the respondent’s legal costs referred to in the applicant’s affidavit.
9. A number of other affidavits were relied upon by the applicant on the present application. It is not necessary for me to say more than that they indicate that there are other people who have disabilities or who care for other people who have disabilities who are inconvenienced by the lack of wheelchair accessible coaches on Sydney/Canberra coach services.
10. The solicitor for the respondent has made an affidavit in which he estimates that his client’s costs in this proceeding will most likely be in a range of $150,000 to $200,000 exclusive of GST. There is some analysis included in the affidavit in support of that estimate. The solicitor’s estimate is calculated on the basis that the hearing of the proceeding will occupy four days and that the respondent will need to call two expert witnesses. It is accepted by the respondent that its solicitor’s estimate of $150,000 to $200,000 exclusive of GST relates to solicitor/client costs.

# What are the costs likely to be incurred by the respondent?

1. The applicant submitted that the respondent’s estimate of its costs in defending the proceeding was excessive. In support of this submission senior counsel for the applicant stated that the hearing of the proceeding would be likely to occupy only two days. While it is difficult to estimate the likely length of the hearing at this early stage of the proceeding, I think that a two day estimate is somewhat optimistic. I propose to consider the present application on the basis that the hearing of the proceeding is likely to take between three and four days.
2. Senior counsel for the respondent accepted that in arriving at an assessment of the respondent’s likely costs it was appropriate that I begin at the bottom end of the respondent’s estimate of costs ($150,000). This is what I propose to do. It is difficult to say what proportion of this amount is likely to be recoverable on a party/party basis in the event that the respondent is successful in the proceeding and an order for costs is made in its favour. In the absence of any evidence on this point, I would not be prepared to assume that the respondent would recover more than one half of that amount. I therefore approach the present application on the footing that it is likely that the respondent’s party/party costs of defending this proceeding will be in the range of $50,000 to $75,000 (exclusive of GST).

# Should an order be made under Order 62A rule 1, and if so, in what amount?

1. Senior counsel for the applicant accepted that the applicant would be able to contribute $20,000 to the respondent’s legal costs in the event that an order for costs is made in the respondent’s favour at the conclusion of the proceeding. This is on the basis the applicant will have the benefit of the $15,000 indemnity from the LAC and that she is willing to put $5,000 of her own assets at risk so that she may continue with the case.
2. It is important to observe that the applicant has more than sufficient assets to fully satisfy any costs order made in favour of the respondent. The evidence discloses that she has substantial assets. Nevertheless, I accept the applicant’s evidence that, in the event that no order is made under O 62A r 1, she will not proceed with the case. She said so in the context of her solicitor’s estimate that the costs of the respondent would be in the range of $23,000 to $35,000. I am working on the basis that a more realistic estimate of those costs would be in the range of $50,000 to $75,000 (exclusive of GST).
3. I also accept that the applicant’s primary motivation in commencing and maintaining this proceeding is that she believes that it is in the public interest that the Transport Standards be observed by the respondent. She has not made any claim for compensation. To the extent (if any) that the applicant may be motivated by some other private interest, it is very much a minor factor in the overall scheme of things.
4. The applicant submitted, and this was not challenged by the respondent, that there is no case law concerning the operation of the Transport Standards. I have considered the provisions of the Transport Standards to which I was referred by the parties. While there was some argument concerning the effect of those provisions it was not very extensive. However, my present view is that any question of interpretation that may arise in this proceeding is not likely to be complex. Similarly, my present view is that the proceeding is unlikely to be factually complex though I would accept that this is not something I can be very confident about at this early stage of the proceeding.
5. I am satisfied that there is a public interest element to this case. And I am also satisfied that the case is brought by the applicant in good faith for the purpose of obtaining orders enforcing a legislative instrument which is expressly intended “as far as possible” to eliminate discrimination against people with disabilities in the field of public transport. The evidence shows that there are other people suffering from similar disabilities who are inconvenienced by the lack of wheelchair accessible coaches on Sydney/Canberra coach services.
6. In my view the interests of justice favour the making of the order sought by the applicant except that it should be for the amount of $25,000 rather than $15,000. This amount represents the $15,000 available under the LCA’s indemnity together with a further amount of $10,000 representing something less than the full value of the applicant’s shares which, in the event she is unsuccessful in this litigation, may be used by her to contribute to the payment of the respondent’s party/party costs if that be required and without the need for her to sell or borrow against less liquid assets.
7. I think it follows from what I have said that I am not satisfied on the evidence before me that an order under O 62A r 1 in the amount of $25,000 will prevent the applicant in any practical sense from continuing with the proceeding if she wishes to do so. That amount represents 50% of the lower end of my estimate of the party/party costs (exclusive of GST) which the applicant would be required to pay to the respondent in the event that she is unsuccessful and an order for costs was made in the respondent’s favour. There is no magic in the 50% figure. But it is significant in that it still allows the respondent to recover a substantial proportion of its party/party costs from the applicant in the event that the applicant is ordered to pay to them.
8. Whether or not it would be appropriate to order the applicant to pay the respondent’s costs in the event that she is unsuccessful in this proceeding is something about which I do not find it necessary to express any opinion. While I have approached the matter on the assumption that such an order would be made, it remains to be seen whether that is what actually occurs. I should add that it may not always be appropriate to approach an application under O 62A r 1 in this way: cf. *Delta Electricity* at [198]-[203] per Basten JA.
9. The applicant also sought an order that the costs of the notice of motion be costs in the proceeding. I think that is appropriate.

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| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholas. |

Associate:

Dated: 20 October 2010