FEDERAL COURT OF AUSTRALIA

King v Virgin Australia Airlines Pty Ltd [2014] FCA 36

|  |  |
| --- | --- |
| Citation: | King v Virgin Australia Airlines Pty Ltd [2014] FCA 36 |
|  |  |
| Parties: | **SHEILA KING v VIRGIN AUSTRALIA AIRLINES PTY LTD (ACN 090 670 965)** |
|  |  |
| File number: | NSD 1480 of 2011 NSD 2215 of 2011 |
|  |  |
| Judge: | **FOSTER J** |
|  |  |
| Date of judgment: | 5 February 2014 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** – whether an applicant who alleges direct and indirect unlawful discrimination on account of her physical disability or the need for her to use disability aids on the part of a low-fare airline in Australia should have the benefit of an order pursuant to r 40.51 of the *Federal Court Rules 2011* specifying the maximum amount of costs as between party and party that may be recovered for the proceeding in circumstances where she had obtained costs-capping orders both at trial and on appeal in litigation against the other major low-fare airline in Australia – discussion of relevant principles and factors |
|  |  |
| Legislation: | *Australian Human Rights Commission Act 1986* (Cth), Div 2 of Pt IIB  *Civil Aviation Act 1988* (Cth)  *Civil Aviation Regulations 1988* (Cth), reg 2A, Sch 1  *Civil Aviation Order 20.16.3*  *Disability Discrimination Act 1992* (Cth), ss 3, 4, 5, 6, 8, 9, 11, 24, 29A and 47  *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth)  *Disability Discrimination Regulations 1996* (Cth)*,* reg 2A, Sch 1  *Federal Court Rules 1979,* O 62A  *Federal Court Rules 2011*, r 40.51  *Disability Standards for Accessible Public Transport 2002* |
|  |  |
| Cases cited: | *King v Jetstar Airways Pty Ltd (No 2)* (2012) 286 ALR 149; [2012] FCA 8 cited  *King v Jetstar Airways Pty Ltd* (2012) 293 ALR 613; [2012] FCAFC 115 cited  *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* (2011) 280 ALR 91; [2011] FCAFC 84 cited  *Haraksin v Murrays Australia Ltd* (2010) 275 ALR 520; [2010] FCA 1133 cited  *Purvis v NSW* (2003) 217 CLR 902; [2003] HCA 62 cited |
|  |  | |
| Date of hearing: | 16 April 2013 | |
|  |  | |
| Date of last submissions: | 2 May 2013 | |
|  |  | |
| Place: |  | |
|  |  | |
| Division: |  | |
|  |  | |
| Category: | Catchwords | |
|  |  | |
| Number of paragraphs: | 98 | |
|  |  | |
| Counsel for the Applicant: | Ms K Nomchong SC, Mr B Fogarty | |
|  |  | |
| Solicitor for the Applicant: | Australian Centre for Disability Law | |
|  |  | |
| Counsel for the Respondent: | Mr T Saunders | |
|  |  | |
| Solicitor for the Respondent: | Allens | |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1480 of 2011 |

|  |  |
| --- | --- |
| BETWEEN: | SHEILA KING  Applicant |
| AND: | VIRGIN AUSTRALIA AIRLINES PTY LTD (ACN 090 670 965)  Respondent |

|  |  |
| --- | --- |
| JUDGE: | FOSTER J |
| DATE OF ORDER: | 5 FEBRUARY 2014 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The Interlocutory Application filed by the applicant on 21 December 2012 be dismissed.
2. The applicant pay the respondent’s costs of and incidental to that Application.
3. The proceeding be listed for directions at 9.30 am on 19 February 2014 before Foster J.

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

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 2215 of 2011 |

|  |  |
| --- | --- |
| BETWEEN: | SHEILA KING  Applicant |
| AND: | VIRGIN AUSTRALIA AIRLINES PTY LTD (ACN 090 670 965)  Respondent |

|  |  |
| --- | --- |
| JUDGE: | FOSTER J |
| DATE OF ORDER: | 5 FEBRUARY 2014 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The Interlocutory Application filed by the applicant on 21 December 2012 be dismissed.
2. The applicant pay the respondent’s costs of and incidental to that Application.
3. The proceeding be listed for directions at 9.30 am on 19 February 2014 before Foster J.

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

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1480 of 2011 NSD 2215 of 2011 |

|  |  |
| --- | --- |
| BETWEEN: | SHEILA KING  Applicant |
| AND: | VIRGIN AUSTRALIA AIRLINES PTY LTD (ACN 090 670 965)  Respondent |

|  |  |
| --- | --- |
| JUDGE: | FOSTER J |
| DATE: | 5 FEBRUARY 2014 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. The applicant (**Mrs King**) has brought two sets of proceedings in this Court in which she seeks redress against the respondent (**Virgin Airlines**) pursuant to Div 2 of Pt IIB of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) for unlawful discrimination allegedly suffered by her at the hands of Virgin Airlines on three separate occasions in the period from July 2010 to August 2011. For present purposes, the jurisdiction of this Court to entertain Mrs King’s claims is not in issue.
2. In very broad terms, Mrs King contends that Virgin Airlines refused to book three flights for her at her request in circumstances where those refusals constituted direct disability discrimination within the meaning of s 5 of the *Disability Discrimination Act 1992* (Cth) (**DDA**) or, in the alternative, indirect disability discrimination within the meaning of s 6 of that Act. Mrs King claims an appropriate declaration and damages for these acts of alleged unlawful discrimination. She also claims interest and costs.
3. On 4 April 2012, I ordered that the two sets of proceedings commenced by Mrs King against Virgin Airlines be consolidated. On 5 September 2012, I ordered Mrs King to file and serve Consolidated Points of Claim (**Points of Claim**), such Points of Claim to contain all allegations which she intends to press in the consolidated proceeding. Pursuant to that order, Mrs King filed Points of Claim on 3 October 2012. In her Points of Claim, Mrs King has refined the allegations which she had previously made in the Originating Application filed in each of the separate proceedings commenced by her (NSD 1480 of 2011 and NSD 2215 of 2011). Thus, it is to Mrs King’s Points of Claim that one must have regard in order to ascertain her case against Virgin Airlines.
4. By Interlocutory Application filed on 21 December 2012 in the consolidated proceeding, Mrs King claimed the following relief, namely, orders that:

1. The parties’ recoverable costs in these proceedings be capped [sic] $15,000 pursuant to r 40.51 of the *Federal Court Rules 2011*.

2. Any other order that the Court deems fit.

1. Mrs King’s costs-capping application is opposed by Virgin Airlines.
2. These Reasons for Judgment determine that application.
3. Mrs King’s costs-capping application in the present proceeding is made in circumstances where she has already had the benefit of two judgments in this Court dealing with unlawful discrimination complaints of a similar nature made by her against Jetstar Airways Pty Ltd (**Jetstar**) (as to which see *King v Jetstar Airways Pty Ltd (No 2)* (2012) 286 ALR 149; [2012] FCA 8 (Robertson J) (*Jetstar No 1*) and, on appeal, *King v Jetstar Airways Pty Ltd* (2012) 293 ALR 613; [2012] FCAFC 115 (Full Court) (*Jetstar No 2*)). Jetstar and Virgin Airlines are two of the three airlines operating low fare services in Australia. Together they have a substantial share of the market for such services.
4. Mrs King lost her case against Jetstar both at trial and on appeal. She conducted the whole case against Jetstar under the protection of orders which capped her liability for party/party costs in favour of Jetstar. At trial, the cap was $20,000. On appeal, the cap was $10,000. The appeal cap amount was indemnified by Legal Aid NSW. There is no doubt that Jetstar’s actual costs and its costs assessed on the party/party basis would have been significantly greater than the $30,000 ultimately paid to Jetstar by or on behalf of Mrs King. Had Mrs King not had the benefit of the costs-capping orders in her case against Jetstar, she would have been liable to pay to Jetstar a significant sum on account of its costs (probably in the range of $250,000 to $300,000).
5. The fact that Mrs King has had a protected opportunity to litigate claims of a similar nature against Jetstar is a matter which must inevitably be taken into account in the exercise of the Court’s discretion in deciding Mrs King’s current costs-capping application. The manner in which and the extent to which that circumstance should be taken into account will, in turn, largely depend upon the extent to which Mrs King is endeavouring to re-litigate or substantially re-litigate matters which were decided against her in *Jetstar No 1* and *Jetstar No 2*.
6. For this reason, the parties paid close attention in their submissions before me to the changes effected to the relevant sections of the DDA since 2008 (being the time when the alleged contraventions in the Jetstar litigation took place) and the differences between the case put by Mrs King in the Jetstar litigation and the case now pleaded by her in her Points of Claim in these proceedings. It will be necessary to address both of these aspects in more detail later in these Reasons.

# Rule 40.51 FCR

1. Rule 40.51 of the *Federal Court Rules 2011* (**FCR**) provides:

**40.51 Maximum costs in a proceeding**

(1) A party may apply to the Court for an order specifying the maximum costs as between party and party that may be recovered for the proceeding.

Note: ***Costs as between party and party*** is defined in the Dictionary.

(2) An order made under subrule (1) will not include an amount that a party is ordered to pay because the party:

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

(b) has sought leave to amend 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 not conducted the proceeding in a manner to facilitate a just resolution as quickly, inexpensively and efficiently as possible, and another party has been caused to incur costs as a result.

1. Although the language of r 40.51 FCR differs from the language deployed in O 62A of the *Federal Court Rules 1979*, the differences are not material.
2. In the present case, both parties relied upon a number of authorities in which judges of this and other Courts have considered and applied O 62A (or its equivalent) as providing appropriate guidance for the application of r 40.51 FCR.
3. I agree with this approach.
4. A useful recent exposition of the factors which are commonly relevant to the exercise of the discretion called for when r 40.51 is invoked is to be found in the judgment of Nicholas J in *Haraksin v Murrays Australia Ltd* (2010) 275 ALR 520 at 521–522 [6]–[9]; [2010] FCA 1133 at [6]–[9]. In that case, after setting out the terms of O 62A, his Honour said:

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 Ltd* (1993) 45 FCR 509 ; 118 ALR 265 (*Sacks*) per Beazley J, *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139 (*Woodlands*) per Wilcox J, *Hanisch v Strive Pty Ltd* (1997) 74 FCR 384 ; 143 ALR 641 (*Hanisch*) per Drummond J, *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1; [2009] NSWLEC 150 per Pain J, *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (*Corcoran*) per Bennett J and *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (2009) 170 LGERA 22; [2009] NSWLEC 165 (*Caroona Coal*) per 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) 176 LGERA 424; [2010] NSWCA 263 (*Delta Electricity*) dismissing (by majority) an appeal from the decision of Pain J.

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 FCR 511; ALR 267–8 concerning the origin of the rule. His Honour stated:

In *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509; 118 ALR 265, Beazley J referred to the origin of O 62 A. 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”.

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.

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.

1. As Nicholas J observed in *Haraksin*, the factors which he gathered together in that case provide useful guidance in relation to the exercise of the relevant discretion but should not be treated as an exhaustive statement of fixed criteria relevant to the exercise of that discretion. The discretion is a broad one and must be exercised judicially having regard to all relevant circumstances.
2. As I have already mentioned, in the present case, an important factor peculiar to the present case is the circumstance that Mrs King has already had the benefit of two costs-capping orders in her litigation against Jetstar, litigation in which she was wholly unsuccessful.

# Mrs King’s case against Virgin Airlines

1. Mrs King’s case is pleaded in her Points of Claim.
2. After pleading facts and matters relied upon as conferring jurisdiction on this Court, Mrs King makes the following allegations in that document:
3. At all times relevant to the proceeding, she had a physical disability. The disability claimed is the partial loss of bodily function, being lower limb function, that resulted from polio contracted in infancy (par 6);
4. She utilises one or more specified disability aids to alleviate the effect of her disability when travelling on Virgin Airlines aircraft, namely:
   1. A motorised scooter;
   2. An aisle chair;
   3. An hydraulic lift; and
   4. A bus fitted with a wheelchair access ramp (par 7);
5. At all relevant times, Virgin Airlines offered air passenger transport services including ancillary facilities and services for passenger embarkation and disembarkation (defined in the pleading as *“the Services”*). The Services are services within the meaning of that expression in subpar (c) of the definition of *services* in s 4(1) of the DDA and thus *services* within s 24 of the DDA (par 9);
6. The Services included:
   1. Booking and ticketing services;
   2. Provision for passengers to carry baggage in the hold or cabin of aircraft operated by Virgin Airlines whilst travelling;
   3. Collection and delivery of items checked in as baggage;
   4. Air passenger transport services; and
   5. A bus, where it is required to transport passengers between the terminal and the aircraft on the tarmac (subpars 9.1.1 to 9.1.5);
7. At all relevant times, the provision of the Services was subject to s 24 of the DDA (subpar 9.3);
8. On 23 July 2010, Virgin Airlines refused to provide its Services to Mrs King for an air passenger flight between Sydney Airport and Hervey Bay Airport scheduled for 20 August 2010 (par 11);
9. On or about 2 August 2010, Virgin Airlines refused to provide its Services to Mrs King for an air passenger flight between Hervey Bay Airport and Sydney Airport scheduled for 14 September 2010 (par 12);
10. On 9 August 2011, Virgin Airlines refused to provide to Mrs King its Services for an air passenger flight between Sydney Airport and Hervey Bay Airport scheduled for 11 September 2011 (par 13);
11. By its refusal to supply its Services to Mrs King as pleaded in pars 11, 12 and 13, Virgin Airlines unlawfully discriminated against Mrs King on the basis of her disability in contravention of ss 5(1), 8 and 24(a) and (b) of the DDA (pars 14 to 25); and
12. In the alternative, by dint of such refusals, Virgin Airlines indirectly discriminated against Mrs King in that it imposed a requirement or condition that she be able to move without the disability aids in order to embark and disembark the aircraft (pars 26 to 33).
13. As a result, Mrs King alleges that she suffered damage in the following respects:
14. The refusals in question constituted a serious assault upon the inherent dignity and equality of Mrs King’s person;
15. Mrs King was denied the opportunity to participate in certain important meetings and thus denied the opportunity for civic participation; and
16. Mrs King suffered stress, hurt and humiliation as a result of the discrimination alleged.
17. In pars 11, 12 and 13 of her Points of Claim, Mrs King alleges that she advised Virgin Airlines that she:
18. Was a person requiring wheelchair assistance;
19. Would be travelling with her motorised scooter;
20. Required personal assistance in order to embark and disembark Virgin Airlines’ aircraft; and
21. Wanted to travel on the refused flights in order to attend important meetings of the Australian Government Aviation Access Working Group.
22. In those paragraphs, she also alleges that Virgin Airlines had seats available on the refused flights, that her booking request was refused and that the alternative arrangements offered were not acceptable or reasonable.
23. In pars 14 to 25 of her Points of Claim, Mrs King pleads the matters which she contends constituted the relevant direct discrimination. Those paragraphs are in the following terms:

**DIRECT DISCRIMINATION**

*Refusal to provide Services: ss. 5(1 ), 8 and 24(a) of the DDA*

14. In respect of the First and/or Second and/or Third Refused Flights, the Respondent unlawfully discriminated against the Applicant on the basis of the Applicant's disability in contravention of sections 5(1), 8 and 24(a) of the DDA in that the Respondent’s customer service officer refused to accept the Applicant's reservation request because the Applicant:

14.1 had a disability, and/or

14.2 would require the following disability aids:

14.2.1 a motorised scooter; and

14.2.2 an aisle chair,

and/or

14.3 might require the following disability aids:

14.3.1 an hydraulic lift; and/or

14.3.2 a bus fitted with a wheelchair access ramp.

and/or

14.4 required personal assistance provided or arranged by the Respondent to embark and disembark the Respondent’s aircraft.

(sub-paragraphs 14.1 to 14.3 are collectively referred to hereinafter as the Applicant’s ‘**disability aids**’)

15. The Respondent treated the Applicant less favourably on the basis of her disability and/or disability aids than it would have treated a person without the Applicant's disability and/or disability aids in circumstances that were not, as a matter of law, materially different, in that the Respondent would have accepted the reservation requests if made by a person without the Applicant's disability and, or in the alternative, disability aids for each of the Refused Flights.

**Particulars**

15.1 At all relevant times on 23 July 2010 the Respondent had seats available on Flight DJ1555 from Sydney Airport to Hervey Bay Airport on 20 August 2010 for reservation;

15.2 At all relevant times on or about 2 August 2010 the Respondent had seats available on Flight DJ1556 from Hervey Bay Airport to Sydney Airport on 14 September 2010 for reservation;

15.3 At all relevant times on 9 August 2010 the Respondent had seats available on Flight DJ1555 from Sydney Airport to Hervey Bay Airport on 11 September 2010 for reservation.

*Terms on which the Services are made available: ss. 5(1), 8 and 24(b) of the DDA*

16. In respect of the First and/or Second and/or Third Refused Flights, the Respondent treated the Applicant less favourably on the basis of her disability and/or disability aids than it would have treated a person without the Applicant's disability and/or disability aids in circumstances that were not, as a matter of law, materially different in that the Respondent imposed a term or condition that, in order to have her request accepted for each of the Refused Flights, the Applicant had to have been one of the first two persons with her disability and/or disability aids to do so.

**Particulars**

16.1 At all material times the Respondent adopted a policy of permitting only two persons who use wheelchairs or mobility aids on any one flight, subject to a discretion to increase that number;

16.2 The factors (if any) which influenced the Respondent's discretion were not published by the Respondent;

16.3 that term was not imposed on persons who did not have the Applicant’s disability or disability aids;

16.4 At all relevant times on 23 July 2010 the Respondent had seats available on Flight DJ1555 from Sydney Airport to Hervey Bay Airport on 20 August 2010 for reservation;

16.5 At all relevant times on or about 2 August 2010 the Respondent had seats available on Flight DJ1556 from Hervey Bay Airport to Sydney Airport on 14 September 2010 for reservation;

16.6 At all relevant times on 9 August 2010 the Respondent had seats available on Flight DJ1555 from Sydney Airport to Hervey Bay Airport on 11 September 2010 for reservation.

17. By reason of the conduct referred to in paragraph 16 above, the Respondent unlawfully discriminated against the Applicant on the basis of the Applicant’s disability and/or disability aids in contravention of sections 5(1), 8 and 24(b) of the DDA.

*Failure to Make Reasonable Adjustments- Refusal: ss. 5(2), 8 and 24(a) of the DDA*

18. In respect of the First and/or Second and/or Third Refused Flights, the Respondent did not make, nor did it propose to make, reasonable adjustments for the Applicant by:

18.1 collecting and delivering her motorised scooter from transfer areas (after check-in and prior to baggage claim);

18.2 permitting the Applicant to check-in her motorised scooter to be conveyed on the flight in the aircraft hold;

18.3 providing an aisle chair and an accompanying person to mobilise the Applicant in the aisle chair to and from the aircraft;

18.4 if any of the three Refused Flights required passengers to embark or disembark without the use of an aerobridge, the provision of an hydraulic lift (and a person to operate it) to convey the Applicant between the tarmac and the cabin door;

18.5 if any of the three Refused Flights required passengers to utilise a bus to travel between the terminal and the aircraft, the provision of a bus with a wheelchair access ramp for the aisle chair.

18.6 exercising the discretion under its own policy to permit the Applicant to travel as a third person who used a wheelchair and mobility aids;

18.7 making alternative travel arrangements for the Applicant whereby any additional cost would be met by the Respondent (including for overnight accommodation and additional meals).

**The Adjustments**

19. The Adjustments, where relevant in respect of the First and/or Second and/or Third Refused Flights were reasonable adjustments in that they would not have imposed an unjustifiable hardship on the Respondent.

20. The failure by the Respondent to make the relevant reasonable Adjustments in respect of the First and/or Second and/or Third Refused Flights had the effect that the Applicant was, because of her disability and/or disability aids, treated less favourably than a person without her disability and/or disability aids in circumstances that were not, as a matter of law, materially different.

**Particulars**

20.1 The Applicant refers to and repeats the particulars at sub-paragraphs 16.1 to 16.6 above.

21. By reason of the conduct pleaded in paragraphs 18, 19 and 20 above, in respect of the First and/or Second and/or Third Refused Flights, the Respondent unlawfully discriminated against the Applicant on the basis of the Applicant’s disability and/or disability aids in contravention of sections 5(2), 8 and 24(a) of the DDA.

*Failure to Make Reasonable Adjustments: Terms on which the Services are made available: ss. 5(2), 8 and 24(b) of the DDA*

22. Further, or in the alternative, the Respondent did not make, nor did it propose to make, a reasonable adjustment for the Applicant on the First and/or Second and/or third Refused Flights by accepting hers as a third reservation request from persons with her disability and/or disability aids (**Third Reservation Adjustment**).

23. The Third Reservation Adjustment on the First and/or Second and/or Third Refused Flights was a reasonable adjustment in that it would not have imposed an unjustifiable hardship on the Respondent.

24. The failure by the Respondent to make the Third Reservation Adjustment on the First, and/or Second and/or Third Refused Flights had the effect that the Applicant was, because of her disability and/or disability aids, treated less favourably than a person without her disability and/or disability aids in circumstances that were not, as a matter of law, materially different.

**Particulars**

24.1 The Applicant refers to and repeats the particulars at sub-paragraphs 16.1 to 16.6 above

25. By reason of the conduct pleaded in paragraphs 22 to 24 above, in respect of each of the First and/or, Second and/or Third Refused Flights, the Respondent unlawfully discriminated against the Applicant on the basis of the Applicant’s disability and/or disability aids in contravention of sections 5(2), 8 and 24(b) of the DDA.

1. In pars 26–33 of her Points of Claim, Mrs King sets out her contentions in respect of the alleged indirect discrimination which she suffered at the hands of Virgin Airlines. Paragraphs 26 and 27 are expressed as follows:

**INDIRECT DISCRIMINATION**

*The Condition*

26. In respect of the First and/or Second and/or Third Refused Flights, the Respondent imposed a requirement or condition that the Applicant be able to move without the disability aids in order to embark and disembark the aircraft (**the Condition**).

**Particulars**

26.1 The Respondent refused or failed to provide for the collection and delivery of the Applicant's motorised scooter at the transfer areas after check in and before baggage claim; and/or

26.2 The Respondent refused and/or failed to allow transport of the Applicant's motorised scooter as luggage in the hold of the aircraft; and/or

26.3 The Respondent refused or failed to provide an aisle chair and a person engaged by or on behalf of the Respondent to push/manoeuvre the aisle chair to and from the transfer areas and the cabin of the aircraft; and/or

26.4 where required on any of the Refused Flights, the Respondent refused or failed to provide an hydraulic lift, including a person engaged by or on behalf of the Respondent to operate that lift to assist the Applicant to enter and alight from the cabin of the aircraft; and/or

26.5 where a bus transport between the terminal and the aircraft was required on any of the Refused Flights, the Respondent refused or failed to provide the use of a wheelchair access ramp on the bus, including a person engaged by or on behalf of the Respondent to operate that ramp.

*Unable to Comply*

27. Because of her disability the Applicant was unable to comply with the Condition because:

27.1 she cannot walk; and/or

27.2 she relies on her disability aids to mobilise.

1. For reasons specified in par 28 of her Points of Claim, Mrs King contends that the imposition of the conditions set out in par 26 of her pleading was not reasonable, having regard to the circumstances of each of the refused flights. In par 29, she pleads that the imposition of the conditions about which she complains had, or was likely to have, the effect of disadvantaging persons with her disabilities. At par 30, she says that she would have been able to comply with the conditions only if Virgin Airlines made the reasonable adjustments in respect of the refused flights which she sets out at subpars 18.1–18.7 of her pleading.
2. At pars 31–33, Mrs King alleges:

*Disadvantage*

31. The failure to make the relevant reasonable adjustments in respect of the First and/or Second and/or Third Refused Flights had, and/or was likely to have, the effect of disadvantaging persons with the Applicant's disability.

*Imposition of a Condition: ss. 6(1). 8 and 24(a) of the DDA*

32. Further, or in the alternative to the alleged unlawful direct discrimination pleaded above, by reason of the conduct pleaded at paragraphs 26 to 29 above, the Respondent unlawfully indirectly discriminated against the Applicant on the basis of the Applicant's disability in contravention of sections 6(1), 8 and 24(a) of the DDA.

*Failure to make Reasonable Adjustments: ss. 6(2), 8 and 24(a) of the DDA*

33. Further, or in the alternative to the alleged unlawful direct discrimination pleaded above, by reason of the conduct pleaded at paragraphs 26, 28, 30 and 31 above, the Respondent unlawfully indirectly discriminated against the Applicant on the basis of the Applicant’s disability in contravention of sections 6(2), 8 and 24(a) of the DDA.

1. By way of relief, Mrs King seeks a declaration that Virgin Airlines has committed unlawful discrimination in relation to her in breach of ss 5, 6, 8 and 24 of the DDA by refusing to allow her to fly on the refused flights. She also seeks damages … *“by way of compensation for loss and damage suffered by* [her] *for distress, hurt and humiliation”.* She also seeks an order that Virgin Airlines pay her costs of the proceeding, interest on any monetary award and such other orders as the Court considers appropriate.
2. In each of her Originating Applications, Mrs King also claimed an order requiring Virgin Airlines to apologise to her for its unlawful discrimination against her in contravention of the *Disability Standards for Accessible Public Transport 2002.*  That claim for relief does not appear in Mrs King’s Points of Claim. I take it, therefore, that that claim has been abandoned. In addition, in each of those Originating Applications, Mrs King claimed $50,000 as damages. In her Points of Claim, her claim for damages is at large—no specific sum is claimed.
3. In its Consolidated Defence, Virgin Airlines puts in issue many of the allegations made by Mrs King in her Points of Claim. It denies unlawfully discriminating against her. It does, however, make a number of significant admissions in its Consolidated Defence.
4. It is not necessary to set out comprehensively all of the issues raised by Virgin Airlines in its Consolidated Defence. However, for present purposes, the following matters are noteworthy:
5. Virgin Airlines admits that Mrs King uses a motorised scooter when travelling on its aircraft but denies that the aisle chair, hydraulic lift or bus alleged by Mrs King to be *disability aids* are *disability aids* used by her within the meaning of s 9(3) of the DDA. Virgin Airlines contends that those aids are provided by it or by the airport operator as part of the services which they provide to passengers. They are not brought into play by Mrs King and are, for that reason, not *disability aids* within s 9(3) of the DDA.
6. Virgin Airlines admits that it provides the services described in subpars 9.1.1 to 9.1.4 of Mrs King’s Points of Claim. It denies that it provides the bus referred to in subpar 9.1.5. It contends that the bus is provided by the relevant airport operator.
7. Virgin Airlines admits that the services provided by it as described in subpars 9.1.1 to 9.1.4 were, and are, *services* within the meaning of subpar (c) of the definition of *services* in s 4(1) of the DDA and that the provision of its services was subject to s 24 of the DDA.
8. Virgin Airlines does not admit Mrs King’s allegations concerning the first flight refusal (as to which, see par 11 of her Points of Claim). However, apart from raising minor points about the date of the conversation which Mrs King alleged took place on or about 2 August 2010 and the terms of the conversation which took place on 9 August 2011, Virgin Airlines admits that, on the occasion of each of the second and third flight refusals, Mrs King told its employee that:
   1. She required wheelchair assistance at the airport;
   2. She would be travelling with a motorised scooter; and
   3. She required personal assistance to embark and disembark Virgin Airlines’ aircraft.
9. Virgin Airlines denies that it discriminated unlawfully against Mrs King. In pars 14 and 15 of its Consolidated Defence, it pleads the following:

14 As to paragraph 14 of the points of claim, the Respondent:

(a) denies that it discriminated unlawfully against the Applicant as alleged or at all;

(b) repeats and relies on the matters pleaded in paragraph 7(b) above;

(c) says that:

(i) the Respondent recognises that a number of different categories of guest require or benefit from special assistance when using the Respondent's services;

(ii) one category of guest for whom the Respondent provides special assistance is those who use wheelchairs or mobility aids;

(iii) the Respondent applies a policy in relation to guests requiring special assistance by way of capping the number of bookings it will take per flight, depending on the specific category of guest;

(iv) in relation to guests with wheelchairs or mobility aids, the Respondent applies a cap of 2 guests per flight, subject to a discretion to raise the cap as set out in (vi) below;

(v) when bookings are made by a guest intending to travel with an electric wheelchair or mobility aid, the Respondent records the booking under a specific code (EWCH) so as to monitor how many bookings have been made under that code and are contributing towards the cap;

(vi) the Respondent may exercise a discretion to raise the cap, depending on all of the circumstances that apply to the particular flight; and

(vii) if the Respondent does not exercise its discretion to raise the cap, the guest will not be able to travel on their preferred flight;

(d) says that the Respondent has a policy that provides for special assistance to be provided to guests with wheelchair or mobility devices to facilitate their access to the Respondent's services, including:

(i) having a priority assistance desk dedicated to take bookings from guests who require special assistance;

(ii) the option of checking-in wheelchairs at the time of check-in (or requiring it for electric wheelchairs and mobility aids) or at the boarding gate just before boarding;

(iii) providing wheelchair facilities for use by guests at the airport, including aisle wheelchairs for use by guests in boarding and leaving the aircraft;

(iv) assistance with baggage;

(v) providing assistance:

(A) within the airport between check-in and the boarding gate;

(B) with boarding and leaving the aircraft; and

(C) from the boarding gate to the baggage carousel upon arrival;

(vi) providing disabled person lifts to enable access to aircraft not serviced by an aerobridge;

(vii) excluding wheelchairs and mobility aids from checked-in baggage limits;

(viii) providing conveniently located seat allocations on flights;

(ix) maintaining vacant seats adjacent to allocated seating when possible;

(x) providing individual briefings on emergency safety procedures, in accordance with civil aviation laws;

(e) says that the removal of its capping policy would impose an unjustifiable hardship under section 5(2) and section 29A of the Act; and

(f) says that its capping policy is necessary to ensure compliance with the Respondent's obligations under the *Civil Aviation Act 1988* (Cth) and *Civil Aviation Regulations 1988* (Cth) and that this enlivens section 47(2) of the Act.

15. As to paragraph 15 of the points of claim, the Respondent:

(a) denies that it treated the Applicant less favourably than it would have treated someone without the Applicant's disability and/or disability aids in circumstances that are not materially different; and

(b) repeats and relies on the matters pleaded in paragraphs 7(b), 14(c) and 14(d) above.

1. As to the allegations made in par 16 of Mrs King’s Points of Claim, Virgin Airlines denies that it imposed a term or condition that, in order to have her request accepted for each of the refused flights, Mrs King had to have been one of the first two persons with her disability and/or disability aids to request a seat on those flights and contends, in the alternative, that:
   1. The removal of its capping policy would impose an unjustifiable hardship on Virgin Airlines under s 5(2) and s 29A of the DDA; and
   2. Its capping policy is necessary in order to ensure compliance with its obligations under the *Civil Aviation Act 1988* (Cth) and the *Civil Aviation Regulations 1988* (Cth) and that this enlivens s 47(2) of the DDA.
2. Virgin Airlines denies that the *reasonable adjustments* propounded by Mrs King at subpars 18.1 to 18.7 and 22 of her Points of Claim are reasonable and contends that making those adjustments would impose unjustifiable hardship on it under s 5(2) and s 29A of the DDA.
3. Virgin Airlines contends that Mrs King’s indirect discrimination case is misconceived and without merit. In any event, it says that it did not impose the condition pleaded in par 26 of Mrs King’s Points of Claim. In the alternative, if the Court holds that Virgin Airlines did impose the alleged condition:
   1. Not being able to apply the condition would impose unjustifiable hardship on it under s 6(2) and s 29A of the DDA; and
   2. The alleged condition is necessary in order to enliven compliance with Virgin Airlines’ obligations under the *Civil Aviation Act 1988* (Cth) and the *Civil Aviation Regulations 1988* (Cth) and that this enlivens s 47(2) of the DDA.

# The Relevant Provisions of the DDA

1. Section 3 of the DDA specifies the objects of the DDA in the following terms:

**3 Objects**

The objects of this Act are:

(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:

(i) work, accommodation, education, access to premises, clubs and sport; and

(ii) the provision of goods, facilities, services and land; and

(iii) existing laws; and

(iv) the administration of Commonwealth laws and programs; and

(b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and

(c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

1. The definition of *disability* in s 4(1) of the DDA covers Mrs King’s pleaded disability.
2. *Disability aid* is defined in s 4(1) as having the meaning given by s 9(3). Section 9(3) of the DDA provides:

(3) For the purposes of this Act, a ***disability aid***, in relation to a person with a disability, is equipment (including a palliative or therapeutic device) that:

(a) is used by the person; and

(b) provides assistance to alleviate the effect of the disability.

1. *Discriminate* is defined in s 4(1) as having the meaning given by s 5 and s 6. That definition is accompanied by a note in the following terms:

Note: Section 7 (associates) and section 8 (carers, assistants, assistance animals and disability aids) extend the concept of discrimination.

1. Section 5 and s 6 of the DDA are in the following terms:

**5 Direct disability discrimination**

(1) For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.

(2) For the purposes of this Act, a person (the ***discriminator***) also ***discriminates*** against another person (the ***aggrieved*** ***person***) on the ground of a disability of the aggrieved person if:

(a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and

(b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

(3) For the purposes of this section, circumstances are not ***materially*** ***different*** because of the fact that, because of the disability, the aggrieved person requires adjustments.

**6 Indirect disability discrimination**

(1) For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved*** ***person***) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and

(c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

(2) For the purposes of this Act, a person (the ***discriminator***) also disc***r***iminates against another person (the ***aggrieved*** ***person***) on the ground of a disability of the aggrieved person if:

(a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and

(b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and

(c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

(3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

(4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

1. *Reasonable adjustment* is defined in s 4(1) as:

… an adjustment to be made by a person is a ***reasonable adjustment*** unless making the adjustment would impose an unjustifiable hardship on the person.

1. Subparagraph (c) of the definition of *services* provides that the concept of *services* includes services relating to transport or travel.
2. *Unjustifiable hardship* is defined in s 4(1) as having a meaning affected by s 11.
3. Section 8 of the DDA provides:

**8 Discrimination in relation to carers, assistants, assistance animals and disability aids**

(1) This Act applies in relation to having a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to having a disability.

Example: For the purposes of section 5 (direct discrimination), circumstances are not materially different because of the fact that a person with a disability requires adjustments for the person’s carer, assistant, assistance animal or disability aid (see subsection 5(3)).

(2) For the purposes of subsection (1), but without limiting that subsection, this Act has effect in relation to a person with a disability who has a carer, assistant, assistance animal or disability aid as if:

(a) each reference to something being done or needed because of a disability were a reference to the thing being done or needed because of the fact that the person has the carer, assistant, animal or aid; and

(b) each other reference to a disability were a reference to the carer, assistant, animal or aid.

(3) This section does not apply to section 48 (infectious diseases) or section 54A (exemptions in relation to assistance animals).

Note: The combined effect of sections 7 and 8 is that this Act applies in relation to a person who has an associate who has a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to a person with a disability.

1. Sections 11, 24 and 29A of the DDA are in the following terms:

**11 Unjustifiable hardship**

(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the ***first person***) would be an ***unjustifiable hardship***, all relevant circumstances of the particular case must be taken into account, including the following:

(a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;

(b) the effect of the disability of any person concerned;

(c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;

(d) the availability of financial and other assistance to the first person;

(e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

(2) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.

**24 Goods, services and facilities**

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person’s disability:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

**29A Unjustifiable hardship**

This Division (other than section 30) does not render it unlawful for a person (the ***discriminator***) to discriminate against another person on the ground of a disability of the other person if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.

1. Both s 24 and s 29A are found in Div 2 of Pt 2 of the DDA.
2. Section 47(2) exempts from the operation of Pt 2 of the DDA acts done in direct compliance with a prescribed law. Civil Aviation Order 20.16.3 is a prescribed law for the purposes of s 47(2) of the DDA (see *Disability Discrimination Regulations 1996* (Cth)*,* reg 2A and Sch 1). Clause 14 of that Order addresses the balance required in order to deal with the reasonable needs of aircraft passengers with a disability compared with the reasonable needs of other passengers.
3. The provisions referred to above applied in 2010 and 2011 when the unlawful discrimination alleged by Mrs King is said to have taken place.
4. The current form of many of the provisions which have been referred to above or set out above were inserted into the DDA by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) (Act No 70 of 2009). That Amending Act inserted replacements for ss 5–9 and s 11 (amongst other provisions). I shall refer to the amendments effected by that Act as *“the 2009 amendments”*.

# The Evidence

1. Mrs King swore two affidavits in support of her costs-capping application, the first on 20 December 2012 and the second on 22 February 2013. In addition, towards the end of the hearing before me, I granted leave to Mrs King to supplement her evidence in support of her application in such manner as she saw fit and to make further submissions directed to such further evidence. As a result, Phillip French, who is Mrs King’s solicitor in the present proceeding, swore an affidavit on 24 April 2013 upon which Mrs King now relies. A Supplementary Written Submission was also filed on behalf of Mrs King.
2. No objection was taken to either of Mrs King’s affidavits. She was not cross-examined. The evidence contained in those affidavits was, therefore, left uncontested for the purposes of the present application.
3. Objection was taken to portions of Mr French’s affidavit upon the ground that the material to which objection was taken was outside the leave granted by me on 16 April 2013. The objections taken by Virgin Airlines to parts of Mr French’s affidavit are not justified. I admit the whole of Mr French’s affidavit into evidence.
4. Relevantly, the evidence tendered before me establishes the following facts and matters:
5. Three requests for a seat on Virgin Airlines flights were refused by Virgin Airlines as alleged by Mrs King.
6. On the first of these occasions, alternative flights were offered to Mrs King by Virgin Airlines.
7. Although QantasLink had flights which were more or less comparable to the flights which Mrs King wished to book with Virgin Airlines, the QantasLink flights were too expensive and too inconvenient to be regarded as acceptable replacements for the Virgin Airlines flights upon which Mrs King wished to travel.
8. On each occasion when Mrs King attempted to book her flights, she was, in effect, told that no seats were available on the flights which were refused to her because of the application of Virgin Airlines’ two seat cap per flight for disabled travellers policy. In each case, the Virgin Airlines’ employee with whom Mrs King dealt indicated to her that the two seat cap had been met on the flights in question prior to her making her request for a seat.
9. On the second occasion when a flight was refused to her, Mrs King was told that no wheelchair assistance could be made available to her in connection with the flight which she had requested because Virgin Airlines had a limited number of staff who could be allocated to assisting persons such as her and that all of those staff had already been allocated to the two disabled travellers who had secured seats under the airlines’ two seat cap per flight for disabled travellers policy.
10. Mrs King asserted that access to public transport and associated facilities by persons with a disability is a matter of public interest. In support of that proposition, she cited various reports and tendered in evidence a number of public statements which had found their way into the media concerning the alleged discrimination perpetrated on disabled travellers by airlines in Australia. Her second affidavit, in particular, contained material of that character.
11. At pars 55 to 59 of her first affidavit, Mrs King said:

55 I believe that the lack of access to affordable transport for people with disability, such as low-cost air travel, plays a part in contributing to their social isolation. It makes interstate travel for me much more difficult, limited and costly.

56 I also believe the significant costs associated with pursuing a case in the Court against an airline, both the costs a person may have to pay their own legal representatives and the risk of paying the costs of the respondent because of an adverse costs order, deter people with disability from bringing proceedings against airlines.

57 I believe these proceedings are of value to the public as well because they provide one of the first opportunities for the Court to deliver judgment on allegations of contraventions of the new direct and indirect disability discrimination provisions of the DDA. I understand that those provisions in sections 5 and 6 of the DDA were amended by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) (**DDA Amendment Act**). There are now stand-alone forms of direct and indirect disability discrimination based on a failure to make reasonable adjustments by an alleged discriminator. I have made such allegations in these proceedings.

58 Additionally, on 17 July 2008 the Australian Government ratified the Convention on the Rights of Persons with Disabilities (**CRPD**). That convention entered into force with respect to Australia on 16 August 2008. The CRPD deals extensively with the human rights of persons with disability to accessibility (Article 9) and to personal mobility (Article 20).

59 I understand that the DDA Amendment Act also amended the DDA by inserting subsection 12(8)(ba). The purpose of this new subsection is to give effect to the CRPD in relation to claims alleging disability discrimination brought under the DDA. believe there is an important public interest in the Court considering and delivering judgment in relation to the effect and import of subsection 12(8)(ba) in terms of the nexus it establishes between the CRPD and unlawful discrimination under the DDA.

1. At pars 67 to 77 of the same affidavit, Mrs King also said:

**My financial position**

67 I currently receive an aged pension and a United Kingdom seniority payment and am unable to work due to my disability and age. My husband has retired and his income sources are a carer’s pension, UK seniority payment and superannuation payments. Annexed and marked '**SK17**' is my Taxation Notice of Assessment for the year ending 30 June 2012 dated 3 August 2012. Annexed and marked '**SK18**' is my latest Centrelink benefit statement for 2011-2012 dated 13 November 2012 outlining my pension details.

68 On 8 February 2008 I was involved in a motor vehicle accident and sustained three crushed vertebrae. As a result of these injuries I require the use of a wheelchair as a mobility aid and have complex ongoing care needs.

69 In April 2009, I settled a claim against the motor vehicle driver's insurer for medical and care expenses for $201,000 (plus legal costs).

70 This compensation was solely to cover my medical expenses and future care. I have incurred significant medical and disability aid expenses since my accident.

71 My ability to walk has significantly deteriorated since my accident. I have had to use the compensation amount to purchase an electric wheelchair, an electric lounge chair and a manual wheelchair. Annexed and marked '**SK19**' are the invoices for the purchase of my electric lounge chair, electric wheel chair and manual wheelchair respectively.

**Inability to continue proceedings without costs capping order**

72 Since the commencement of these proceedings and on account of the adverse cost order totalling $30,000 for the Jetstar cases, I have given further thought to my financial position, and I have decided that I will be forced to abandon these proceedings if a maximum costs order is not made or the maximum costs ordered is greater than $15,000.

73 $15,000 is the level of the costs indemnity I have in place on account of a grant from NSW Legal Aid, which I refer to below in paragraph 77.

74 I have brought these proceedings out of a desire to assist people who rely on wheelchairs for mobility and not for personal financial compensation. I have decided that I do not want to risk the provision I have set aside for my future care needs and those of my husband and family.

75 I am conscious of my declining health and do not want to jeopardise my financial capacity to provide for my future care. I do not wish to be forced to sell or mortgage my home and thereby deprive myself of financial security and provision for my future.

**Legal assistance**

76 My solicitors, at the ACDL, are acting for me for free. The ACDL is a community legal centre that specialises in disability discrimination litigation.

77 On my instructions, the ACDL applied to NSW Legal Aid for a legal aid grant to brief counsel for these proceedings. I understand that that application was successful. I understand there are two barristers working on my case under this grant. Annexed and marked '**SK20**' is a copy of the NSW Legal Aid grant for these proceedings.

1. Mrs King is now 80 years of age. It appears that she has no income other than the pensions to which she referred at par 67 of her first affidavit, although this is not entirely clear. She has not provided a statement of her assets and liabilities. I was told from the Bar table that she owns her house at Hervey Bay jointly with her husband. No details about that property were provided in evidence nor was its value the subject of any evidence.
2. At par 72 of her first affidavit, Mrs King says that ***she has decided that***, if a costs-capping order as sought by her is not granted by the Court, she will be forced to abandon these proceedings. That evidence does not rise as high as an assertion that her financial position is such that she could not afford to press on with the current proceedings in the absence of a costs-capping order. The language is more apt to fit a state of affairs where Mrs King is not prepared to risk her assets in pursuing the litigation rather than one where she is simply not in a position to do so.
3. In his affidavit, Mr French explains in detail the arrangements concerning legal fees and disbursements likely to be incurred by those representing Mrs King. Mr French is a solicitor employed at the Australian Centre for Disability Law (**ACDL**). ACDL has procured a grant of legal aid in favour of Mrs King. ACDL will provide the services of its lawyers to Mrs King free of charge. The grant of legal aid obtained on behalf of Mrs King will provide sufficient funds for Counsel to be retained and remunerated on behalf of Mrs King and for appropriate disbursements to be reimbursed to ACDL. Mrs King has not been required to make any contribution to legal fees at this stage although Legal Aid NSW has reserved the right to seek a contribution from her at the end of the litigation. If she is not successful in the litigation, it is unlikely that Legal Aid NSW will seek such a contribution.
4. Mr French estimates that the amount of fees payable to Counsel likely to be recovered on a party/party assessment, should Mrs King be successful, would be approximately $93,750 (GST inclusive).
5. Mr Wells, who is the solicitor for Virgin Airlines, swore an affidavit on 8 March 2013 which was read at the hearing of Mrs King’s costs-capping application. In that affidavit, Mr Wells said that, in his opinion, on the assumptions set out in his affidavit, Virgin Airlines was likely to spend between $285,000 and $335,000 on legal fees and disbursements in conducting the present litigation (excluding GST but including Counsels’ fees and other disbursements). On a party/party basis, those fees and disbursements (excluding GST) would be likely to tax in the range of $190,000–$225,000.
6. According to Mr Wells, on a party/party basis, assuming it were successful, Virgin Airlines would be likely to have an entitlement to recover costs of the order of $200,000.
7. Mr Wells also placed before the Court correspondence sent by him to Mr French in which he set out in reasonable detail reasons why the current formulation of Mrs King’s case was wider than it needs to be, was wider than was reasonable and was proceeding upon bases which could no longer be sustained. In particular, Mr Wells:
8. Contended that Mrs King’s indirect discrimination case was bound to fail in light of the Court’s judgments in *Jetstar No 1* and *Jetstar No 2*;
9. Mrs King’s case based upon s 24(b) of the DDA (pars 16 and 17 of her Points of Claim) to the effect that Virgin Airlines imposed a condition upon her booking was bound to fail for similar reasons;
10. The assistance and facilities provided by Virgin Airlines to Mrs King and other disabled travellers were not *disability aids* within the meaning of s 9(3) of the DDA; and
11. Mrs King should not have the benefit of a costs-cap in the present proceedings given the benefits which she obtained from having such a cap in *Jetstar No 1* and *Jetstar No 2.*
12. Virgin Airlines’ solicitors’ correspondence was answered by Mr French in detail by his letter dated 10 December 2012. It is not necessary to traverse Mr French’s answer. It is sufficient to note for present purposes that he did not accept any of the points raised in his opponent’s correspondence but rather insisted that Mrs King was entitled to maintain the proceedings as presently pleaded.

# Consideration

1. I propose to deal with Mrs King’s costs-capping application by addressing each of the relevant considerations raised by her in support of her application in turn. Mrs King has identified ten such considerations.
2. First, she contended that the proceedings involve a considerable public interest in the sense that they provide an opportunity to improve accessibility to transport services for people with a disability and aged persons who utilise wheelchairs and the opportunity to clarify relatively new legislative provisions in the DDA, being remedial, beneficial legislation.
3. Senior Counsel who appeared for Mrs King submitted that Mrs King was refused service as a result of the inflexible application of Virgin Airlines’ two seat cap for disabled travellers policy on any given flight. She submitted that this conduct constituted unlawful discrimination against Mrs King contrary to ss 5, 6 and 24 of the DDA. She submitted that Virgin Airlines directly discriminated against Mrs King by failing to make reasonable adjustments in the services which they provided or, in the alternative, indirectly discriminated against her, including by way of failing to make such reasonable adjustments. Senior Counsel submitted that the primary remedy sought is a declaration, the purpose of which will serve the public interest. She went on to submit that, in due course, if Mrs King is unsuccessful in the present litigation, the public interest involved would be an appropriate basis for departing from the usual costs rule. It was submitted that the public interest concerned the extent to which a low-cost airline can refuse its air flight services to people with a disability who require wheelchair access in circumstances where:
4. Many people who use wheelchairs have limited income and are therefore attracted to low-cost airlines;
5. Australia is a vast country where major cities are many hours away by land travel; and
6. There is a growing ageing population, many of whom will require the use of a wheelchair when travelling by air.
7. Senior Counsel for Mrs King also submitted that the public interest nature of the litigation is confirmed by the fact that Legal Aid NSW has granted legal aid to Mrs King and that ACDL is acting for her. Counsel also relied upon the various reports tendered in evidence through Mrs King.
8. The nature of the public interest at stake in the present litigation is essentially the same public interest as was in play in the Jetstar litigation brought by Mrs King. Counsel for Virgin Airlines made this point emphatically by quoting from submissions made on behalf of Mrs King in the Jetstar litigation which essentially repeat the submissions which I have summarised at [61] above. Further, I do not think that the matters to which I have referred at [62] above enhance the merit of Mrs King’s current application.
9. Although there is no evidence at the moment which would enable me to make a precise comparison between the business model utilised by Jetstar and the business model deployed by Virgin Airlines, I think that it is a reasonable working assumption for me to make for present purposes that those business models are broadly the same. In addition, Virgin Airlines has made clear in its Consolidated Defence to Mrs King’s Points of Claim that it intends to advance as a reason why it should not be held to have unlawfully discriminated against Mrs King the fact that to have met her requests as made would have involved unjustifiable hardship within the meaning of the relevant provisions of the DDA.
10. Although some of those provisions were amended in 2009 with the consequence that different legislative provisions apply to the conduct of Virgin Airlines about which complaint is made in the present litigation from those which applied to the conduct of Jetstar in the Jetstar litigation, the considerations thrown up by the Jetstar litigation are essentially the same as those raised in the present litigation.
11. There is no doubt that there is a public interest in the Court authoritatively determining the correct interpretation and application of ss 5, 6, 8 and 24 of the DDA insofar as the two seat cap for disabled travellers policy of domestic low-cost airlines is concerned. However, if that interest has been fairly satisfied by *Jetstar No 1* and *Jetstar No 2*, its significance to the exercise of the discretion with which I am charged will be diminished.
12. It must also be borne in mind that there is a countervailing public interest in ensuring that those who are unable to foot the bill for the costs which they cause a successful party to incur in meeting litigation brought by them should not be permitted to bring such litigation even if, in a *prima facie* sense, the case sought to be maintained is arguable. These ideas underpin the Court’s approach to ordering security for costs.
13. At the moment, I do not think that, if Virgin Airlines is successful in the present litigation, the Court is likely nonetheless to decline to make an order for costs in its favour because Mrs King’s case was brought in the public interest (see the discussion on this point in *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* (2011) 280 ALR 91 at 93–95 [10]–[13]; [2011] FCAFC 84 at [10]–[13]). Opinions among members of the public may well differ as to which of the two is the weightier consideration: The provision of greater access to flights for disabled travellers or the provision of low-fare services to all. It is not at all obvious that the former should outweigh the latter. As is the case with many things, a reasonable balance needs to be struck. In any event, Mrs King has not confined her claims for relief to declarations. She seeks damages. Her claim for damages is entirely personal to her and enures for her benefit alone.
14. The second relevant factor raised on behalf of Mrs King is the proposition that her case is at least seriously arguable and is not frivolous or vexatious. Her case based upon s 5 of the DDA (direct discrimination against her on account of her disability) is in that category. However, her case based upon discrimination in relation to disability aids and her case based upon indirect discrimination are in quite a different category. As submitted on behalf of Virgin Airlines, *Jetstar No 1* and *Jetstar No 2* are strong authorities against these latter cases which Mrs King seeks to run. This was drawn to the attention of her lawyers by the solicitors for Virgin Airlines in correspondence, but they were rebuffed. Mrs King has insisted on pressing the case which she has pleaded, notwithstanding the obvious difficulties to which her lawyers’ attention has been drawn. For these reasons, I am of the opinion that Mrs King’s case has been formulated too widely and incorporates contentions which are barely arguable in the respects to which I have referred. Her stubborn reluctance to narrow her case to its core elements is a factor operating against a costs-capping order. I think that it does so notwithstanding the terms of r 40.51(2)(d) FCR.
15. The third factor relied upon by Mrs King is that the DDA has been relevantly amended since *Jetstar No 1* and *Jetstar No 2* were decided. This is literally true. But the proposition requires further examination.
16. Senior Counsel for Mrs King submitted that the 2009 amendments to the DDA introduced a new test in relation to direct discrimination, in that the amendments to s 5 and s 6 effected by the 2009 amendments now incorporate a failure to make reasonable adjustments as a component of the unlawful discrimination prohibited by those amended sections. In addition, in the present litigation, Mrs King relies upon new s 8 of the DDA which underpins her allegation that she has been unlawfully discriminated against by Virgin Airlines because she had a need for the disability aids referred to in par 7 of her Points of Claim.
17. It was also submitted on behalf of Mrs King that, in the present litigation, she does not specifically challenge the two seat cap per flight for disabled travellers policy which Virgin Airlines applies to its flights but rather contends that Virgin Airlines did not make reasonable adjustments on the refused flights. She argues that this is a fundamental difference between the present case and the case she ran in the Jetstar litigation.
18. Counsel for Virgin Airlines submitted that, in the Jetstar litigation, Mrs King pursued a claim against Jetstar to the effect that she was discriminated against on the basis of her need to use a disability aid (a wheelchair). In *Jetstar No 1* (at [229]–[232]), Robertson J dealt with the proposition advanced in *Jetstar No 1* by Mrs King that Jetstar had treated her less favourably because of the fact that she was accompanied by or possessed a wheelchair that she used or because of a matter related to that fact. His Honour found that this proposition was not made out. His Honour held that the reason for the discrimination was that Mrs King needed assistance rather than the fact that she had a wheelchair (or, as is the case here, a scooter). His Honour noted that there was no limitation on the number of wheelchairs that could be accommodated on the flight. This is also the case with scooters of the type used by Mrs King as far as Virgin Airlines is concerned. Mrs King did not appeal against his Honour’s findings at [229]–[232] of *Jetstar No 1*.
19. There is no material difference between Mrs King’s disability aid discrimination claim in the present proceedings and the similar claim made by her in the Jetstar litigation. The fact that other particular alleged disability aids are referred to in her Points of Claim does not matter.
20. The final proposition advanced on behalf of Mrs King is that the 2009 amendments introduced an entirely new test for unlawful discrimination and that her Points of Claim reflect that circumstance by focussing on the circumstance that Virgin Airlines failed to make reasonable adjustments in respect of her request to travel on the refused flights.
21. It is true that the concept of *reasonable adjustments* was introduced into the legislation by the 2009 amendments. That concept was not the subject of consideration by the Court either in *Jetstar No 1* or *Jetstar No 2*. The case pleaded and maintained by Mrs King in the Jetstar litigation was that Jetstar discriminated unlawfully against her by applying the two seat cap per flight for disabled travellers policy.
22. Senior Counsel for Mrs King focussed a good deal of attention on the points of difference between the Jetstar litigation and the present litigation insofar as the two seat cap per flight for disabled travellers policy was concerned. She accepted that, if I concluded that there was no difference of substance in the way in which this core allegation was advanced in each case, she would have difficulty in justifying a costs-capping order in the present case.
23. Counsel for Virgin Airlines submitted that, in the Jetstar litigation, the Court found that Jetstar had engaged in direct discrimination against Mrs King on the basis of her disability by not offering her the flights which she had requested, but that Jetstar was entitled to succeed on its unjustifiable hardship argument. It was submitted that the 2009 amendments provide that a failure to make reasonable adjustments is an explicit feature of the definitions of *direct* and *indirect discrimination*. That is, a person may establish discrimination if they can prove that the discriminator failed to make reasonable adjustments because the person had a disability. *Reasonable adjustment* is defined in s 4(1) of the DDA. That definition picks up the concept of unjustifiable hardship.
24. The 2009 amendments replaced the then existing s 11 of the DDA. Section 11 of the DDA sets out relevant considerations as to the way in which unjustifiable hardship is to be determined. Counsel for Virgin Airlines submitted that the new s 11 merely made explicit that which was previously understood as the way in which unjustifiable hardship should be determined. He submitted that, in substance, the concepts set out in s 11 were applied in the Jetstar litigation. He made particular reference to *Jetstar No 2* at [255] and at [258]–[260].
25. Paragraphs 54 to 58 of the Explanatory Memorandum published in respect of the 2009 amendments make very clear that the purpose of amending s 11 was to clarify the present law and to ensure that the legislature had always intended that the burden of proving unjustifiable hardship lies on the person claiming unjustifiable hardship.
26. It was submitted on behalf of Virgin Airlines that the unjustifiable hardship defence has not been altered in any material way following the introduction of the 2009 amendments.
27. I agree with that submission and with the propositions advanced by Virgin Airlines in support of it.
28. It was also submitted on behalf of Virgin Airlines that the legislature had intended that, right from the commencement of the DDA, there was a general duty to make reasonable adjustments, with the exception of those adjustments that would cause unjustifiable hardship. Counsel submitted that the decision of the High Court in *Purvis v NSW* (2003) 217 CLR 902; [2003] HCA 62 (*Purvis*) had cast some doubt upon whether that truly was the legislative intention.
29. It was the High Court decision in *Purvis* that led to the 2009 amendments. This is made very clear in pars 33 to 39 of the Explanatory Memorandum referable to those amendments. At par 39 of that Memorandum, this is said:

The proposed amendment removes this doubt [a doubt explained by reference to *Purvis*] by making explicit the duty to make reasonable adjustments, which are defined to exclude adjustments that would impose unjustifiable hardship. This will return the status of the law to the original intention when the *Disability Discrimination Act* was introduced.

1. Virgin Airlines also submitted that the amendment to s 12(8) of the DDA effected by the 2009 amendments does not assist Mrs King’s arguments that the 2009 amendments effected a fundamental change to the relevant provision in the DDA. I agree with that submission.
2. The next factor relied upon by Mrs King is that she made her costs-capping application in a timely fashion. Although, at first blush, it may appear that this is not so, I am satisfied that she did so. The apparent delay in the making of her application is explained by the fact that the parties and the Court were awaiting the final outcome in the Jetstar litigation before expending time and money on the present litigation.
3. The next factor relied upon by Mrs King is that a costs-capping order would apply to both parties. This is true. However, in the present case, it is of little weight. Virgin Airlines can take little comfort from the fact that its costs exposure to Mrs King would be limited to $15,000 in the event that it loses the present litigation.
4. Mrs King next submitted that there was no limit specified in r 40.51 on the number of costs-cap applications a litigant might be able to make in respect of issues of concern to that litigant. While, as a matter of interpretation of the rule, this is obviously true, the fact that a litigant is seeking to relitigate or substantially relitigate issues which have already been determined unfavourably to that litigant is a relevant factor against making a further costs-capping order.
5. Senior Counsel for Mrs King submitted that the present litigation is not so complex as to take it outside the type of case that is suitable for a costs-capping order.
6. I do not agree. The fact that the litigation is going to cost a substantial amount of money is a reliable indication of its complexity. In addition, the Court now has the benefit of the Jetstar litigation as an appropriate benchmark. It can hardly be said that that litigation was not complex.
7. I think that the present litigation is complex. That circumstance counts against the making of a costs-capping order.
8. The next matter relied upon by Senior Counsel for Mrs King is that the proceedings will be conducted efficiently. This factor is neutral because r 40.51(2)(d) makes explicit the requirement that has previously been applied by the Court in any event: namely, that a costs-capping order will not protect a litigant against liability for costs which are unreasonably incurred.
9. The final factor relied upon by Mrs King is that the making of an unfettered costs order against her would have such dire consequences for her financially that, if no costs-capping order is made, she will abandon the present litigation.
10. I have already noted that Mrs King has not placed before the Court a comprehensive statement of her assets and liabilities. Nor has she given a comprehensive account of her income and expenses. Nonetheless, it is reasonable to conclude that she probably has a modest income matched by modest expenses and limited assets probably confined to the balance of funds remaining from her motor vehicle accident payout and the family home in which she lives with her husband. It is a reasonable inference for me to draw that, if Mrs King is unsuccessful in the present litigation and is subjected to a full-blown party/party costs order in favour of Virgin Airlines, she will probably go bankrupt.
11. Had she not had the benefit of the Jetstar litigation conducted, as it was, under the protection of costs-capping orders, this factor would be a very powerful factor in favour of the making of a costs-capping order.
12. However, given that I have come to the conclusion that the substance of the case which Mrs King seeks to maintain in the present litigation is the same as the case which she advanced in the Jetstar litigation, the significance of this factor is very substantially diminished.

# Conclusion

1. For all of the above reasons, I have decided to refuse Mrs King’s application for a costs-capping order in the present case. There is no reason why costs of that application should not follow the event.
2. There will be orders accordingly.

|  |
| --- |
| I certify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster. |

Associate:

Dated: 5 February 2014