Federal Court of Australia

Ridge v Hays Specialist Recruitment (Australia) Pty Limited [2022] FCA 1613

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| File number: |  |
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| Judgment of: | **MURPHY J** |
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| Date of judgment: | 4 August 2022 |
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| Catchwords: | **REPRESENTATIVE PROCEEDINGS** – application to narrow the group definition in a representative proceeding – whether Court approval required under s 33V of the *Federal Court of Australia Act 1976* (Cth) and/or leave required under s 33K – application under s 33K to broaden group definition to include causes of action accrued since commencement of the proceeding – application to withdraw two of the pleaded causes of action – whether the application to abandon the causes of action requires approval under s 33V(1) – application for discontinuance approved – application for amendment approved |
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| Legislation: | *Fair Work Act 2009* (Cth) s 15A  *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* (Cth)  *Federal Court of Australia Act 1976* (Cth) ss 33K, 33K(1), 33V, 33V(1), 33X(5), 33Y, 33ZE, 33ZE(1), 33ZF  *Federal Court Rules 2011* (Cth) rr 8.21, 16.51, 16.53  Black Coal Mining Industry Award 2010 (Cth) cl 4.1, 24 |
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| Cases cited: | *ACCC v Chats House Investments Pty Ltd & Ors* [1996] FCA 1119; 22 ACSR 539; 71 FCR 250  *Advanced Switching Services Pty Ltd v State Bank of NSW T/as Colonial State Bank* [2001] FCA 1508; ATPR 41-848  *Babscay Pty Ltd v Pitcher Partners* [2020] FCA 1610; 148 ACSR 551  *Bray v Hoffman-La Roche Ltd* [2003] FCA 1505  *Dyczynski v Gibson* [2020] FCAFC 120; 280 FCR 583  *Francis (Trustee) v Oculus Accounting Pty Ltd (No 2)* [2021] FCA 1275; 400 ALR 701  *Laine v Thiess Pty Ltd* [2016] VSC 689  *Matthews v SPI Electricity Pty Ltd (Ruling No 16)* [2013] VSC 74  *Mercedes Holdings Pty Ltd v Waters (No 1)* [2010] FCA 124; 77 ACSR 265  *Re Banksia Securities Ltd (recs and mgrs apptd)* [2017] VSC 148  *Research in Motion Ltd v Samsung Electronics Australia Pty Ltd* [2009] FCA 320; 176 FCR 66  *Turner v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435; 314 IR 214  *Watson v Maximus Holdings (NSW) Pty Ltd* [2021] FCA 87  *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925  *WorkPac Pty Ltd v**Rossato* [2021] HCA 23; 271 CLR 456 |
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| Division: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 23 |
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| Date of hearing: | Determined on the papers |
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| Solicitor for the Applicant: | Adero Law |
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| Solicitor for the Respondent: | Corrs Chambers Westgarth |

ORDERS

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|  | | VID 1661 of 2018 |
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| BETWEEN: | LAWRENCE RIDGE  Applicant | |
| AND: | HAYS SPECIALIST RECRUITMENT (AUSTRALIA) PTY LIMITED  Respondent | |

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| order made by: | MURPHY J |
| DATE OF ORDER: | 4 August 2022 |

THE COURT ORDERS BY CONSENT THAT:

1. Pursuant to ss 33K, 33V, and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**Act**), the Applicant have leave to amend his Originating Application and Statement of Claim (**Claim Documents**) conformably with the Amended Originating Application and Amended Statement of Claim set out in annexures RMM-2 and RMM-3 to the Affidavit of Rory Michael Markham made on 23 June 2022 (**Amended Claim Documents**).
2. The amendment in Order 1 shall take effect on 29 September 2022.
3. Pursuant to ss 33V and 33ZF of the Act any limitation period that applies to any claim of the Applicant and any group member which has been discontinued by reason of the Amended Claim Documents shall begin to run again from 29 September 2022.
4. By 4:00pm on 5 August 2022 the Applicant file and serve the Amended Claim Documents.
5. By 4:00pm on 11 August 2022 the Respondent provide, on a strictly confidential basis, to the third party provider engaged by the Applicant, the last recorded email address and physical address of any person who according to its records was employed as a casual employee and assigned to work at a black coal mine in Queensland or Western Australia in a role covered by the *Black Coal Mining Industry Award 2020* in the period from 21 December 2012 to 4 August 2022 (**Notice Recipients**).
6. The Third Party provider engaged by the Applicant will keep the contact details of the Notice Recipients confidential, and will not disclose those contact details to the Applicant or his advisors.
7. Pursuant to ss 33X(5) and 33Y of the Act, by 4:00pm on 18 August 2022 the third party provider engaged by the Applicant send a notice in the form set out in Annexure A, to the last recorded email address of the Notice Recipients.
8. If the third party provider receives electronic notice that an email sent pursuant to order 4 herein had not been delivered to the addressee, the third party provider shall within 72 hours send a copy of the notice by ordinary post to the person concerned to the last recorded physical address of that addressee.
9. The third party provider shall within seven (7) days after completion of the steps in orders 7 and 8 herein, provide to the Respondent a list of the persons to whom the notice was sent, together with the email or postal address to which the notice was sent (**List**).
10. The Respondent shall, within 3 days after receipt of the List from the third party provider in accordance with order 9 herein, file with the Court, but not serve, the List as a confidential exhibit.
11. The Applicant bears the costs of the process set out in orders 7, 8 and 9 herein.
12. Any other orders the Court considers appropriate.
13. Costs reserved.
14. Liberty to apply.

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

**Annexure A**

*Ridge v Hays Specialist Recruitment (Australia) Pty Ltd*

*Federal Court of Australia proceeding VID1661 of 2018*

**“HAYS CLASS ACTION”**

**IMPORTANT NOTICE TO EXISTING AND NEW GROUP MEMBERS**

**EXISTING AND NEW GROUP MEMBERS**

1. If you were employed by Hays Specialist Recruitment (Australia) Pty Ltd (**Hays**) and worked as a casual Production & Engineering employee or as a casual Staff Employee at a black coal mine in either Queensland or Western Australia at any time in the period between 21 December 2012 and 21 December 2018, then you may be an existing group member (**Existing Group Members**) in the Federal Court class action named *Ridge v Hays Specialist Recruitment (Australia) Pty Limited*(**Hays Class Action**).
2. If you worked for Hays as a casual Production & Engineering Employee, and ended your employment in the period from 21 December 2018 to 29September 2022, then you may be a new group membe**r** in the Hays Class Action (**New Group Members**).

**INFORMATION FOR EXISTING GROUP MEMBERS**

1. If you are an Existing Group Member, you should know that the Applicant, Mr Ridge, has stopped making the following claims on behalf of group members:
2. Production & Engineering employees: Mr Ridge has dropped the claim that various loadings were underpaid, and that the National Employment Standards were breached. He will still press his claim that casual Production & Engineering employees are owed paid annual leave entitlements under the *Black Coal Mining Industry Award 2020* (**Award**), as in operation at the relevant times.
3. Staff Employees: Mr Ridge has dropped all claims on behalf of Staff employees.
4. The detailed changes to the Hays Class Action are set out in the “amended originating application” and “amended statement of claim” filed in the Court. A copy of these documents can be viewed at the website: [www.aderolaw.com.au/mining/](http://www.aderolaw.com.au/mining/). The changes will take effect on 29September 2022.
5. The claims which have been dropped are no longer part of the Hays Class Action.
6. The limitation period for these claims will begin to run again on 29 September 2022.
7. If you want to pursue these claims yourself, you should seek legal advice. You should act quickly because, depending on your situation, the deadline for starting a new case might be 29 September 2022.
8. If you do not want to pursue these claims yourself, then there is nothing you need to do.

**INFORMATION FOR NEW GROUP MEMBERS**

1. The New Group Members will become “group members” in the Hays Class Action on 29 September 2022*.*
2. You should know that, in the Hays Class Action, the Applicant (Mr Ridge) alleges that even though you were classified as a casual, you were entitled to accrue paid annual leave entitlements under the Award, and he alleges that Hays failed to pay you those entitlements when your employment ended.
3. The details of the Hays Class Action claim are set out in the “amended originating application” and “amended statement of claim” filed in the Court. A copy of these documents can be viewed at the following website: [www.aderolaw.com.au/mining/](http://www.aderolaw.com.au/mining/).
4. You do not need to do anything now. You will be sent more information about the Hays Class Action and your rights to opt out of it at a later stage.

**FURTHER INFORMATION**

1. If you have any questions, you can contact Adero Law, who are Mr Ridge’s solicitors, at hayscoalaction@aderolaw.com.au, or you can seek independent legal advice.
2. Please DO NOT CONTACT THE COURT for legal advice, as the Court’s staff cannot provide such advice.

REASONS FOR JUDGMENT

MURPHY J:

1. By an interlocutory application in this wages underpayment class action the applicant sought leave to amend the Originating Application and Statement of Claim. The proposed amendments operate: (a) to narrow the group definition and thereby remove certain group members from the scope of the proceeding; (b) to broaden the group definition by adding persons whose causes of action have accrued since the commencement of the proceeding; and (c) to abandon some of the central causes of action in the proceeding.
2. On the return of the application I made the orders to allow the amendments. I now provide my reasons for doing so.

# The proceeding

1. On 21 December 2018 the applicant, Mr Lawrence Ridge, commenced this class action on his own behalf and on behalf of all persons who were employed by the respondent, **Hays** Specialist Recruitment (Australia) Pty Ltd, a labour hire company, to work at a black coal mine in either Queensland or Western Australia (the **Mines**) at any time between 21 December 2012 and 21 December 2018 (the **Original Claim Period**), who were at any time during the Relevant Period a coalmining employee within the meaning of cl 4.1(b)(ii) of the *Black Coal Mining Industry Award 2010* (Cth) (the **Award**), who worked according to a regular roster, and who were treated as “casual” employees by Hays.
2. In substance the proceeding alleged three kinds of claims:
3. the Loaded Rates Claims – a claim that insofar as the Award required shift work, weekend and public holiday work, and overtime to be paid at “double time” or similar, the respondent had underpaid the applicant and group members because it treated the sum to be doubled as the Award rate rather than the agreed or actual rate of pay;
4. the Award-based Annual Leave Claims – a claim that the applicant and group members were entitled to be paid annual leave under clause 24 of the Award; and
5. the National Employment Standard Claims – a claim that since in practice, the applicant and group members worked fixed hours, they were not “casuals” within the meaning of the *Fair Work Act 2009* (Cth) (**FW Act**) and they were entitled to but not paid the employment benefits provided for non-casual employees under the National Employment Standards, including paid annual leave and paid personal leave.

# The application

1. In an interlocutory application filed 24 June 2022, the applicant sought orders to amend the Originating Application and the Statement of Claim in the form of the Amended Originating Application and Amended Statement of Claim (**Amended Claim Documents**) annexed to the Affidavit of the applicant’s solicitor Mr Rory Markham made 23 June 2022. The proposed amendments operate to:
2. narrow the group definition to exclude Staff Employees (being persons who undertake white-collar roles), and to exclude Production Employees (being persons who undertake blue collar roles) who worked continuously throughout the Original Claim Period (the **first proposed amendments**);
3. withdraw the Loaded Rates Claims and the National Employment Standard Claims (the **second proposed amendments**);
4. extend the date range in the group definition such that the group will include Production Employees who ended their employment after December 2018 (when the proceeding was commenced) up to the date the proposed amendment takes effect (**New Group Members**) (the **third proposed amendment**); and
5. to reformulate the Award-based Annual Leave Claims so that the pleading conforms more closely with the structure of the Award (the **fourth proposed amendment**).

## The first and second proposed amendments

1. The first proposed amendments operate to remove Staff Employees from the scope of the proceeding, and also Production Employees whose employment did not come to an end during the Original Claim Period. The second proposed amendments operate to withdraw the Loaded Rates Claims and the National Employment Standard Claims made by the applicant and group members.
2. Rule 8.21 of the *Federal Court Rules 2011* (Cth) (the **Rules**) provides that an applicant may apply to the Court for leave to amend an originating application for any reason. Rule 16.53 provides that a party must apply to the Court for leave to amend a pleading unless r 16.51 applies. Ordinarily, an application for amendment which complies with the Rules will be granted, subject to appropriate terms, unless the proposed amendment is futile or the amendment would cause substantial prejudice or injustice to the opposing party in a way that cannot be compensated by costs: see *Research in Motion Ltd v Samsung Electronics Australia Pty Ltd* [2009] FCA 320; 176 FCR 66; *Advanced Switching Services Pty Ltd v State Bank of NSW T/as Colonial State Bank* [2001] FCA 1508; ATPR 41-848 at 43 [8].
3. But amendments to the pleadings in a representative proceeding sometimes give rise to further considerations, essentially because of the representative nature of the role assumed by the applicant. As the Full Court explained in *Dyczynski v Gibson* [2020] FCAFC 120; 280 FCR 583 at [209]-[210] (Murphy and Colvin JJ):

[209] …The scheme of Part IVA is that the applicant has the conduct of proceedings on behalf of the class members and has fiduciary obligations to them: *Tomlinson v Ramsey Food Processing Pty Ltd*[2015] HCA 28; (2015) 256 CLR 507 at [40] (French CJ, Bell, Gageler and Keane JJ). The applicant’s lawyers also owe obligations to class members but how far those obligations extend is not settled. As stated in *Kelly v Willmott Forests Ltd (in liquidation)* *(No 4)*[2016] FCA 323; (2016) 335 ALR 439 at [220] and [308] per Murphy J:

…The applicant’s lawyers owe fiduciary duties to class members who are their clients and they also owe duties to class members who are not their clients. These duties may or may not be fiduciary in nature, but the applicant’s lawyers at least have a duty to act in the class members’ interests: *McMullin v ICI Australia Operations Pty Ltd*[1997] FCA 1426 (Wilcox J); *Courtney v Medtel Pty Ltd*(2002) 122 FCR 168; [2002] FCA 957 at [57] (Sackville J); *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*(2002) 121 FCR 480; [2002] FCA 872 at [24], [27] (Moore J); *Bray v F. Hoffman-La Roche Ltd*[2003] FCA 1505 at [15] (“*Bray*”)(Merkel J).

…

Some authorities provide that the applicant’s lawyers owe fiduciary duties to class members who are not clients, although the decisions tend to assume this rather than analyse the issue: see *McMullin*; *Courtney*at [57]. Associate Professor Legg argues that, by reference to the established criteria, a fiduciary relationship exists between an applicant’s lawyers and class members: Legg M, “Class Action Settlements in Australia - the Need for Greater Scrutiny” (2014) 38(2) *Melbourne University Law Review* 590, 596. Other authorities describe the applicant lawyer’s duty as being to conduct the representative proceeding on behalf of the applicant in a way that is consistent with the interests of class members including those who are not clients: *King*at [24] and [27]; *Bray*at [15]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 at [8] (Stone J).

[210] In acting for the representative applicant [the applicant’s solicitor] was obliged to act consistently with the representative applicant’s fiduciary obligations to class members. …

1. The first proposed amendments are amendments to the group definition. They therefore require leave under s 33K(1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), which provides that, on the application of the representative party, the Court may at any stage of a representative proceeding give leave to amend the originating application so as to alter the description of the represented group.
2. The first proposed amendments also require Court approval under s 33V(1) of the FCA Act, which provides that “a group proceeding may not be settled or discontinued without the approval of the Court”. That is so because, by narrowing the group definition, the proposed amendments effectively discontinue the claims of those group members who will be excluded from the group through the amendment. Section 33V requires Court approval for the partial settlement or discontinuance of the substantive claims of any category of group members in a class action to be effective: *ACCC v Chats House Investments Pty Ltd & Ors* [1996] FCA 1119; 22 ACSR 539; 71 FCR 250 at 258; ***Bray*** *v Hoffman-La Roche Ltd* [2003] FCA 1505 at [22]-[24](Merkel J); *Matthews v SPI Electricity Pty Ltd (Ruling No 16)* [2013] VSC 74 at [23]-[24] (John Dixon J); *Re Banksia Securities Ltd (recs and mgrs apptd)* [2017] VSC 148 at [45] (Robson J).
3. When the applicant commenced the class action, s 33ZE(1) of the FCA Act operated to automatically suspend the running of any limitation period that applies to the claims of a group member to which the class action relates. Therefore, the proposed narrowing of the group definition will mean that the excluded group members will be returned to the position they were in before the commencement of the proceeding, and the applicable limitation period will begin to run again.
4. In circumstances like the present case, the appropriate test for Court approval of the proposed discontinuance is whether discontinuance will be *un*fair or *un*reasonable in the sense of being adverse to group members' interests, rather than whether discontinuance is positively fair and reasonable in their interests: see *Laine v Thiess Pty Ltd* [2016] VSC 689 at [34] (John Dixon J); *Babscay Pty Ltd v Pitcher Partners* [2020] FCA 1610; 148 ACSR 551 at [28] (Anastassiou J); *Watson v Maximus Holdings (NSW) Pty Ltd* [2021] FCA 87 at [49] (Wigney J); *Francis (Trustee) v Oculus Accounting Pty Ltd (No 2)* [2021] FCA 1275; 400 ALR 701 at [33] (Derrington J); ***Turner*** *v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435; 314 IR 214 at [9]-[10] (Murphy J); c.f. *Mercedes Holdings Pty Ltd v Waters (No 1)* [2010] FCA 124; 77 ACSR 265 at [9]-[10] (Perram J). As I said in *Turner* at [10]:

At least in the context of a proposed discontinuance where the practical effect will be to return group members to the position they were in before the commencement of the class action, I consider the test in *Laine* to be appropriate. It could be said that group members will always have an interest in the applicant being forced to press on with the litigation, even if the prospects of success are remote, because they will share the benefits of any success in the case without having any of the costs and risks. If that approach is taken, a proposed discontinuance may never be positively fair and reasonable in their interests. That would be an unworkable test and in the circumstances of the present case it is appropriate to decide whether to approve the proposed discontinuance through the prism of what would be positively *un*fair or *un*reasonable having regard to group members’ interests.

1. Mr Markham deposed that the applicant instructed him only to press the claims in the proposed Amended Claim Documents, and no longer wished to make: (a) the Staff Employees’ claims for annual leave; (b) the claims by Production Employees who continuously worked throughout the Original Claim Period; (c) the Loaded Rates Claims; and (d) the National Employment Standards Claims. This evidence is, of course, relevant in deciding the application, but it does not take the issue very far. The applicant brought the proceeding on behalf of the group members and has fiduciary obligations to act consistently with their interests. Having brought the case on their behalf, the applicant cannot just amend the proceeding to exclude certain group members from the case or withdraw the claims made on their behalf. The applicant must put on evidence to persuade the Court that such amendments are fair and reasonable having regard to group members’ interests.
2. Mr Markham also deposed that the funder of the proceeding had ceased to provide funding on or around 25 February 2022, and that since that time Adero Law had conducted the proceeding on a no win-no fee basis. He said that the firm was no longer prepared to continue funding the proceeding if the proposed amendments were not allowed. Again, this evidence is relevant in deciding the application, but far from determinative. In accepting a retainer to act on behalf of the applicant and group members in a class action, Mr Markham took on fiduciary obligations to act consistently with their interests in progressing their case.
3. Generally speaking, it will not be in a group member’s interests that he or she be excluded from the class action which has the potential to vindicate their rights if the claim against the respondent can be established. Sometimes that will mean that affected group members should be given notice of a proposed narrowing of the group definition and an opportunity to put their views before the Court before a decision is made which will, in substance, discontinue their claims: *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 at [21]-[23] (Goldberg J). Other times, it will suffice that affected group members are given notice of the narrowing of the group definition in sufficient time that they can bring their own individual proceedings (or another class action) before the limitation period begins to run against them, should they wish to do so.
4. The second proposed amendments - the withdrawal of the Loaded Rates Claim and the National Employment Standards Claim - do not require leave under s 33K because they do not relate to the group definition. But I would not grant leave to discontinue these claims unless the group members are given notice. Unless group members are given notice of those proposed amendments they may think that those claims are still being advanced on their behalf, when they no longer would be.
5. It is significant to my decision that it is appropriate to grant leave to amend under s 33K, and to approve the proposed amendments pursuant to s 33V that the proposed orders provide for notice to be given to group members informing them that the Staff Employees’ claims for annual leave; the claims by continuously working Production Employees; the Loaded Rates Claims; and the National Employment Standards Claims would no longer form part of the class action. Any group member who sees merit in the claims to be discontinued will be free to litigate those claims individually, or through another representative proceeding, and the notice informs group members that the limitation period will not commence to run against them until approximately one month after the orders were made. The notice states that if any group member wishes to pursue those claims, they should speedily seek legal advice.
6. Another matter which is material to whether to grant leave to amend and/or to approve the first and second proposed amendments is the merit of the claims which are proposed to be discontinued through the amendments. The central claim in the proceeding is the National Employment Standards Claims, and in my view it is abundantly clear that the cumulative effect of the introduction of s 15A into the FW Act by the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* (Cth) (the **FW Amendment Act**) with retrospective effect, and the decision in *WorkPac Pty Ltd v**Rossato* [2021] HCA 23; 271 CLR 456, mean that these claims do not enjoy reasonable prospects of success: see *Turner* at [50]-[53].
7. Insofar as the other three claims are concerned, the Court had the benefit of the confidential opinion of Mr Joel Fetter of counsel (the **Confidential Opinion**). Because the opinion is confidential and privileged I cannot go to its detail and it must suffice to note that Mr Fetter considered the discontinuance of those claims was not adverse to group members’ interests. It is appropriate to give significant weight to counsel’s opinion in this regard.

## The third proposed amendment

1. The third proposed amendment will operate to broaden the group definition so as to pick up any Production Employees who ended their employment after the Original Claim Period had ended, and up to the date the amendment takes effect. As an amendment to the group definition it requires leave under s 33K(1) of the FCA Act. The Court has a broad discretion under s 33K to amend a group definition where it is in the interests of justice and efficiency to do so. Here, the claims of Production Employees who ended their employment after December 2018 are the same as, or at least similar to, the claims of group members that are already in issue, and it is appropriate that the claims of the New Group Members be dealt with in the same representative proceeding, rather than be litigated individually or in a different representative proceeding.
2. I am satisfied that it is appropriate to grant leave for this amendment.

## The fourth proposed amendment

1. The fourth proposed amendment is just to reformulate the Award-based Annual Leave Claims so that it more closely follows the terms of the Award. This proposed amendment does not involve any issue related to the representative nature of the proceeding and therefore the applicant need only satisfy the test for leave under rr 8.21 and 16.53 to amend the Originating Application and Statement of Claim. The application is compliant with the Rules, there was no opposition by the respondent, and there is nothing to show that the proposed amendment would be futile or would cause prejudice or injustice to the respondent which could not be met by a costs order. It is appropriate to grant leave for this amendment.
2. For these reasons I made the attached orders.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Murphy. |

Associate:

Dated: 10 March 2023