Roe v Auckland District Health Board

2021 - ...

Introduction

I remember learning about 'sane in insane places' in psychology, as an undergraduate. The basic idea was that a Professor, in the US, managed to get a few volunteers. They were to present to the emergency department saying they heard voices saying 'bang, thump and thud' but otherwise to report no problems. All of them were detained for psychiatric observation. Apparently the average amount of time they were kept detained was 30 days. Only in one of the cases did they need to habeus corpus the institution to present the body before a Judge and get the person released in that manner, mode, or way.

Apparently more people present for treatment from NZ ED's than we can possibly treat. More people are asking for help than we can possibly help. So, I was interested, then, in how many of them are being detained involuntarily or non-voluntarily. Asking to leave. Requesting to leave. Being detained. Why? For more and more and more and more billings for the ADHB. I suppose that is why. They get paid on the basis of how many of their beds they report to be full. So, they are incentivised or motivated to report that all the beds are full, then. Whether they are in fact, or whether they aren't. I wonder how many of their patients died! Maybe years ago in fact. More and more and more and more and more billings for the 'hospital'.

I do not question whether they were correct or incorrect to keep me under an observation order for 5 days. Why? Because it is difficult to know if someone is psychiatrically disturbed (for example) without observing them. So I do not take any issue or problems with their decision to keep me for an observation order for 5 days.

My issue was with for how long they kept me unlawfully before they signed the forms they were supposed to sign to make the 5 day observation order

lawful. They refused to supply me with a telephone in order to prevent and prohibit my calling a lawyer. They refused to supply me with a telephone in order to prevent and prohibit my calling the police. To report my unlawful detention. To request a duty lawyer. They kept me unlawfully for a couple days. Then, after the 5 day observation order expired they kept me for a couple days more. Saying I was to remain in the hospital with 'voluntary' status even after I made it clear that I did not wish to remain in the hospital.

The ACC says that they pay the ADHB for my being in the hospital. But the hospital reported various things to the ACC that were false. The ACC says I have the right to request wrong records be put right (but they won't actually put the records right).

While I was kept in the most secure (not the least secure) psychiatric ward they unlawfully drugged me. They have no medication charts for me. Did I ever actually see a doctor? Lisence and registration number please. I want to phone up the institution you claim to be a Medical Graduate of and check whether they acknowledge you. Whether you were shipped to NZ to be the next Dr Leeks – because nobody else need apply to Medical School, in Australasia. They won't process the applications. They won't do it. They didn't keep medication charts. They had various people who claimed to be medical students who wanted to practice their physical examination skills and phlebotomy skills etc on the patients who were being kept under mental health acts. Ones who aren't in the position to consent. Allegedly. What hospital? There is nothing there. Hey. There aren't any District Health Boards anymore, that's for sure. And no doctors to be seen. No doctors in the 'hospital'. No doctors. Who is supervising the 'Medical students'? Oh. They just pay and pay and pay and pay the 'university' in order to... Um... Do a little anything anything anything they want in the 'hospitals'? Take the medical supplies and... Uh... What health system? There doesn't seem to be anything there. What judiciary?

Contents

1 Judgment of Justice Wylie (strike-out) (15 July, 2021) 4

2 Judgment of Justice Wylie as to Costs (18 August, 2021) 20

3 Judgment of Justice Clifford (7 September, 2021) 23

Chapter 1

Judgment of Justice Wylie (strike-out) (15 July, 2021)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-000248
[2021] NZHC 1780

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for Judicial Review
BETWEEN	KELLY ALEXANDRA ROE Applicant
AND	AUCKLAND DISTRICT HEALTH BOARD Respondent

Hearing: 12 July 2021

Appearances: Ms Roe in person
A J F Perkins QC for Respondent

Judgment: 15 July 2021

JUDGMENT OF WYLIE J
[Strike out application]

This judgment was delivered by Justice Wylie
On 15 July 2021 at 2.00 pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
C L Campbell, Legal Counsel, Auckland District Health Board/A J F Perkins QC, Auckland

Copy to:
Ms K A Roe

Introduction

[1] On 12 February 2021, Ms Kelly Roe filed proceedings under the Judicial Review Procedure Act 2016 against the Auckland District Health Board ("the ADHB"). The statement of claim is succinct. I set it out in full:

> **The Applicant claims:**
>
> [1] The [ADHB] involuntarily detained the applicant in the Grafton Hospital in September of 2020 in violation of her right to refuse to undergo medical treatment (Part 2, Section 11).
>
> [2] The [ADHB] involuntarily medicated the applicant in the Grafton Hospital in September of 2020 in violation of her right to refuse to undergo medical treatment (Part 2, Section 11).
>
> [3] The [ADHB] involuntarily detained the applicant in cruel, degrading and disproportionately severe conditions amounting to torture in the Grafton Hospital in September of 2020 in violation of her right not to be subjected to torture or cruel treatment (Part 2, Section 9).
>
> [4] The [ADHB] was informed by the applicant that she requested a copy of the entirety of the clinical notes pertaining to her admission and the [ADHB] failed to provide the clinical notes in a reasonable timeframe in violation of the Official Information Act.
>
> **The Remedy:**
>
> [5] Request removal from office of the CE of the [ADHB] on the grounds that he knew or ought to have known what things were going on in the hospital.
>
> [6] Request removal from office of the most senior clinician involved in the incident. A prescription was involved and admissions documents so that person was most likely on pay-roll as Doctor.

[2] On 18 March 2021 the ADHB applied to strike out Ms Roe's statement of claim on the grounds that:

(a) it does not disclose a reasonably arguable cause of action against the ADHB;

(b) it does not disclose a case appropriate to the nature of the pleading;

(c) the Court cannot grant the relief sought; and

(d) the proceeding is an abuse of process, misconceived and has no utility.

[3] There was a case management conference before van Bohemen J on 29 April 2021.[1] The Judge explained to Ms Roe that her statement of claim was vulnerable to being struck out because it contained general allegations that did not specify the actions she alleged had been taken by ADHB staff, and that, as a result, it could not readily be responded to by the ADHB. The Judge also noted that the proceeding sought relief that could not be granted on an application for judicial review. He invited Ms Roe to file a revised application that might avoid the need for a hearing of the strike-out application. Ms Roe responded that she would not submit a revised statement of claim and that she needed the clinical notes she had sought from the ADHB before she could set out her claim in full. As a result, the Judge set down the strike-out application for hearing.

[4] There was a further case management conference on 3 June 2021.[2] Walker J directed that the strike-out application was to proceed to hearing but noted that Ms Roe could file an amended statement of claim if she wished to do so.

Other papers filed

[5] On 31 May 2021, Ms Roe filed an interlocutory application on notice seeking an order that she be supplied with any and all file notes pertaining to her admission to Grafton Hospital in September 2020. The application did not name the ADHB as the respondent. Rather, it named as respondents "Ailsa Claire in her capacity as CE of Auckland District Health Board and District Inspector Prudence Free". There had been no application to the Court to change the name of the respondent or to add additional respondents. Further the application did not seek any specific orders against Ms Free, although it did refer to information requested from her by Ms Roe.

[6] There is nothing on the Court file to record whether or not the application was served on either Ms Claire or Ms Free. Before me, Ms Roe did assert that the document was sent to Ms Claire but acknowledged that it had not been sent to Ms Free.

---

1 *Roe v Auckland District Health Board* HC Auckland CIV-2021-404-000248, 29 April 2021 (Minute).

2 *Roe v Auckland District Health Board* HC Auckland CIV-2021-404-000248, 4 June 2021 (Minute).

[7] The ADHB did not file a notice of opposition to the application. Rather, it filed an affidavit from the director of its Information Management Operations – Mary Thompson. Ms Thompson confirmed that she was authorised to swear the affidavit on behalf of the ADHB. She deposed that:

(a) Ms Roe had requested her clinical records and they had been provided to her electronically in various tranches on 11 February 2021, 26 February 2021, 8 March 2021, 24 March 2021 and 25 May 2021;

(b) by 25 May 2021, Ms Roe had received electronically a complete copy of the clinical records she had requested;

(c) on 28 May 2021, a hard copy of the requested records was couriered to Ms Roe. The hard copy was received by Ms Roe;

(d) the records which had been sent to Ms Roe were a complete copy of the records held by ADHB relating to Ms Roe's admission to Auckland City Hospital's Emergency Department and Te Whetu Tawera Acute In-Patient Mental Health Unit in September 2020; and

(e) the ADHB had not withheld any pages from the records nor made any redactions or alterations to them.

[8] On 29 June 2021, Ms Roe filed a document headed "Revised Statement of Claim (pending hearing on motion to have proceedings struck out)". Again, this document did not name the ADHB as the respondent; rather, it named Ms Claire and Ms Free as respondents. Although the document purported to be a revised statement of claim, it did not read as such. It read instead as Ms Roe's submissions. This was broadly in compliance with the timetable order made by van Bohemen J, which required Ms Roe to file her submissions by 28 June 2021. When I queried the nature of the document with Ms Roe, she explained that she had hoped that it might avoid the need to proceed with the ADHB's application to strike out her statement of claim. Mr Perkins QC, appearing on behalf of the ADHB, acknowledged that Ms Roe is self-represented and he did not take issue with the nature of the document. Rather, he

argued that very little if anything had changed between the initial statement of claim and the "revised statement of claim".

Factual background

[9] Ms Roe's statement of claim arises out of various events which occurred in September 2020. Mr Perkins took me through the factual background by reference to the clinical notes attached to Ms Thompson's affidavit. Ms Roe agreed with Mr Perkins' summary and accordingly, and because the original statement of claim makes assertions but contains no factual allegations, I set out the background, albeit relatively briefly.

(a) On the evening of 1 September 2020, Ms Roe presented at the Emergency Department at Auckland Hospital. She believed she was "being ingested by parasites" and she had removed two of her toenails and some of the surrounding skin tissue. After receiving initial treatment, she was seen by Dr Mathew Kay. Dr Kay considered that Ms Roe had presented in a delusional state. He further considered that she was at risk of further self-harm and he expressed the view that she was at the time mentally disordered. He therefore made application to the Director of Area Mental Health Services to have Ms Roe assessed pursuant to s 8A of the Mental Health (Compulsory Assessment and Treatment) Act 1992 ("the Act"). As a result, Ms Roe was examined by Dr Imran Ahmed shortly thereafter. Dr Ahmed considered that there were reasonable grounds for believing that Ms Roe might be suffering from a mental disorder, noting that she was experiencing delusions, that she was psychotic and that she had no insight into her condition. Dr Ahmed recorded his views and the reasons for them in a certificate issued under s 8B of the Act. It accompanied Dr Kay's application for assessment.

(b) Ms Roe was then served with a notice requiring her to attend an assessment examination pursuant to s 9 of the Act. This notice was issued by Bella Hilbers, who was described in the notice as an officer

authorised by the Director of Area Mental Health Services. Ms Roe was required to attend an assessment examination by Dr Sebastian Grandi between 5.15 – 6 am on 2 September.

(c) Dr Grandi assessed Ms Roe and he then issued a certificate of preliminary assessment pursuant to s 10 of the Act. He certified that there were reasonable grounds for believing that Ms Roe was mentally disordered and that it was desirable that she be required to undergo further assessment and treatment. Notice was then given to Ms Roe under s 11 of the Act, requiring her to undergo a five-day period of assessment and treatment, beginning on 2 September 2020 and ending on 7 September 2020.

(d) Ms Roe was initially placed in the ADHB's Te Whatu Tawera In-Patient Mental Health Unit. She was later moved to a general ward. Pursuant to s 58 of the Act, any patient undergoing assessment pursuant to s 11 is required to accept such treatment for mental disorder as the responsible clinician directs. Ms Roe was given medication – primarily Lorazepan but other drugs as well.

(e) On 7 September 2020, Ms Roe was reassessed by Dr Kirsten Young. Dr Young noted that Ms Roe wanted to be discharged and that she did not like being held against her will and forced to take medication. Dr Young recorded that Ms Roe wanted to go back to her home address. Relevantly, Dr Young recorded as follows:

> Agreeable to further period in hospital involuntarily, and without medication. Does think the idea of going home immediately remains overwhelming.
>
> Agrees further period in hospital may allow for further reduction of anxiety.
>
> Would like to get laptop from home so can continue to work on some projects which she enjoys rather than cause stress.
>
> Agrees medication could have been helping to reduce anxiety since admission, so if over next few days anxiety arises again would indicate she needs to restart medication.

Dr Young suggested a plan for Ms Roe. The plan included Ms Roe staying in hospital as an in-patient for a few days, informally and without medication, until a link with the Community Mental Health team could be ben sorted out for her. It was noted that this would afford an opportunity to see if Ms Roe's "meds" worked or not. It was also recorded that Ms Roe was to have escorted leave to go home to retrieve items if staffing allowed, and that it had been explained to her that she could not have non-escorted leave due to "lock down" policies. Dr Young concluded that Ms Roe should be released from her status as a compulsory patient under the Act. Ms Roe was given formal notice advising her that she had been released from her status as a compulsory assessment and treatment in-patient subject to s 11 of the Act.

(f) Ms Roe remained in hospital for another two days from 7 September to 9 September. She was not given medication over this period.

Principles applicable to a strike out

[10] Relevantly, r 15.1 of the High Court Rules provides as follows:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> …
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> …

[11] The established criteria for striking out were summarised by the Court of Appeal in *Attorney-General v Prince*.[3] They are as follows:

(a) pleaded facts, whether or not admitted, are assumed to be true. This does not however extend to pleaded allegations which are entirely speculative and without foundation;

(b) the causes of action must be clearly untenable. The Court must be certain that it (they) cannot succeed;

(c) the jurisdiction is to be exercised sparingly and only in clear cases;

(d) the jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive arguments; and

(e) the Court should be slow to strike out a claim in any developing area of the law particularly where a duty of care is alleged in a new situation.

[12] The threshold for a strike-out is high and the Courts will consider not only the basis on which the claim is pleaded but also any other basis on which the claim might be pleaded.[4]

[13] These criteria, applicable in the civil jurisdiction generally, apply to a strike-out application in respect of an application for judicial review.[5]

Submissions

[14] Mr Perkins argued that the allegations made by Ms Roe, both in her initial statement of claim and in the revised statement of claim, can only be described as vague and entirely speculative. He put it to me that no attempt had been made at

---

3 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]; *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [25] and [146].

4 *Couch v Attorney-General*, above n 1, at [123].

5 *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA); *Te Whakakitenga O Waikato Inc v Martin* [2016] NZCA 548, [2017] NZAR 173 at [15]–[16].

providing a foundation for any of them. It was argued that the pleadings do not specify the actions Ms Roe alleges were taken by the ADHB's staff, and that as a result, the ADHB cannot properly respond. It was noted that, while pleaded facts are generally regarded as true in the context of an application to strike out, this principle is not without qualification; it does not extend to pleaded allegations that are entirely speculative and without foundation.

[15] Mr Perkins further submitted that Ms Roe's statement of claim is an abuse of process because no reasonable basis is identified for what are serious allegations made against health professionals employed by the ADHB. It was argued that it would be unfair and oppressive for the employees to face bald allegations of the sort pleaded without further details, and that, if left unchecked, such allegations would strike at the public's confidence in the judicial process and diminish the ability of the Court to fulfil its function as a court of law. It was said that the ADHB should not have to incur costs, perhaps irrecoverable, to defend a claim which is untenable particularly where there is a statutory regime designed to address complaints of the sort that Ms Roe wishes to make.[6] It was also observed that the Court cannot grant the relief sought and that as a result, the proceeding is misconceived.

[16] After hearing from Mr Perkins, Ms Roe accepted that the allegations made in the original statement of claim will have to be amended. She told me that she accepted that she can no longer maintain that she was involuntarily detained over the period 1 – 7 September 2020.

[17] In relation to the period 1 – 7 September 2020, Ms Roe advised that she still wishes to challenge:

(a) the medication she received. She asserted that there is nothing in the clinical notes recording who the responsible clinician was or what directions he or she gave for Ms Roe's treatment and medication which she was required to accept pursuant to s 58 of the Act; and

[6] The Health and Disability Commissioner Act 1994 and the Mental Health (Compulsory Assessment and Treatment) Act 1992 (a complaint to a District Inspector under s 75).

(b) the conditions in which she was held. She asserted that she was denied access to a phone and a lawyer and that guards were placed outside her room to prevent her leaving the hospital. She said that the room had no natural light, that there were flickering light bulbs and constant beeping noises. She said that these conditions amounted to torture. She asserted that these conditions were put in place and/or enforced by "Bella", and that:

> Bella the social worker read a fragment that Ms Roe had assaulted a health care worker and decided to teach her a lesson by involuntarily detaining her in conditions of torture so Ms Roe understands it's not just that she's trespassed from the Taylor Centre she had better not step foot on the Grafton Hospital unless she wants to be detained forever in the psychiatric ICU.

[18] In relation to the period 7 – 9 September 2020, Ms Roe still wishes to argue that she was held involuntarily. She referred to Dr Young's notes, and in particular to the paragraph in those notes where Dr Young recorded that Ms Roe was only allowed to return to her apartment if she was escorted. Ms Roe also asserted that she was denied access to her belongings which had been taken from her when she first came into hospital and that she was not prepared to leave hospital until they were returned to her.

[19] Ms Roe also continued to maintain that the proper respondents are Ms Claire and Ms Free and she remained of the view that Ms Claire should be dismissed from her office as Chief Executive of the ADHB.

[20] Ms Roe accepted that the statement of claim will require substantial reworking. This was a change from the more obdurate stance that she had taken at the case management conferences. She protested that the proceeding should not be struck out and that she should be given the opportunity to amend her pleadings.

Analysis

[21] Ms Roe's initial statement of claim was woefully deficient.

[22] Rule 5.26 of the High Court Rules states as follows:

5.26 Statement of claim to show nature of claim

The statement of claim—

(a) must show the general nature of the plaintiff's claim to the relief sought; and

(b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action; and

…

[23] The purpose of a statement of claim is to inform the opposing party and the Court of the essential basis of the claim and the necessary ingredients of it.[7] Pleadings define the issues. They must give sufficient particulars to enable the defendant to be fairly informed of the case to be met and separately state each cause of action and set out the elements of each cause of action.[8] A statement of claim in proceedings seeking judicial review is no different. It should state simply and in a focused way what has gone wrong of such nature and degree as requires supervisory intervention.[9]

[24] Here, Ms Roe's initial statement of defence did none of these things. It did not define the issues. It did not give sufficient particulars to fairly inform the ADHB of the case it has to meet. It did not state what Ms Roe alleges has gone wrong.

[25] The so-called revised statement of claim did not improve matters in any significant way. Rather, it contained various fresh assertions which were patently speculative and without foundation. By way of example, it is Ms Roe's case that a social worker, Bella, was responsible for the conditions in which Ms Roe says she was held over the period 1 – 7 September 2020. Ms Roe sets out why she says Bella orchestrated this. She describes in detail an incident in 2014 where she assaulted a nurse at a community mental health centre. Ms Roe asserted that Bella wished to punish her for this event. She said that Bella was, in effect, able to manipulate doctors.

---

7 *Reay v Attorney-General* [2016] NZCA 519, [2016] NZAR 1672 at [16].
8 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [84].
9 *Reay v Attorney-General*, above n 7 at [16].

She went further and questioned the credentials of a number of the doctors involved and in one case, queried whether the doctor involved was a "real doctor".

[26] There is no factual foundation identified by Ms Roe to support what are, with respect, extraordinary assertions. There is no suggestion that the 2014 event involved Bella. There is nothing to suggest that Bella knew or had any affiliation with the nurse who was assaulted in 2014 by Ms Roe. There is nothing identified by Ms Roe to explain the basis for her belief that Bella "decided to teach her a lesson by involuntarily detaining her in conditions of torture". Ms Roe does not contend that Bella told her that she was detaining her because of the 2014 incident. There is nothing in the clinical records to support Ms Roe's assertions.

[27] When it was put to Ms Roe at the case management conferences that she needed to particularise her allegations, she responded that she could not do so until she had seen her clinical records. She stated that she intended to use those documents as the primary source of the evidence she would rely on.

[28] Ms Roe has had the clinical records since late May 2021. Ms Thompson has deposed that the records have been provided in full and that they have not been redacted or amended in any way. Despite encouragement by the various Judges dealing with the case management conferences to do so, Ms Roe declined to amend her pleadings. She asserted that she is entitled to receive further notes she says were made by Ms Free in her capacity as a District Inspector. She has annexed to one of her memoranda various requests she sent to Ms Free seeking copies of notes she says were made by Ms Free. In reply emails which Ms Free sent to Ms Roe, Ms Free advised Ms Roe that she does not retain such notes for more than three months, and that any notes she made have been destroyed. Despite this, Ms Roe asserted as follows:

> The notes should be recoverable. It should be possible to retrieve the electronic notes … It should be possible to system restore (e.g. via Windows or MAC OS or by Microsoft or by Google or by Cloud retrieval) the notes that were subsequently destroyed by [Ms] Free.

[29] I cannot see that such notes as Ms Free made could assist Ms Roe. According to Ms Roe, she managed to contact Ms Free and arranged for her to attend sometime

towards the end of her stay in hospital. The actions in respect of which Ms Roe complains are prior actions taken by employees of the ADHB – not by Ms Free. Discovery is not an opportunity to gather information in the hope of finding evidence that might corroborate serious claims amounting to misfeasance. Such claims should not be made without prima facia evidence to support them and the scope of discovery sought must be tethered to properly pleaded causes of action.[10]

[30] It is my clear view that the neither the original statement of claim nor the so-called revised statement of claim currently disclose a reasonably arguable cause of action against the ADHB. I agree with Mr Perkins' submission that the allegations made are vague and entirely speculative. No attempt has been made at providing a foundation for any of them. As a result, the proceeding as it stands is an abuse of the processes of the Court. Further, it would be unfair and oppressive for employees of the ADHB to face allegations of the sort made. This unfairness is exacerbated by the fact that Ms Roe seeks to have two senior employees of the ADHB removed from office. Even if some justiciable error by the staff of the ADHB can be made out, such an order is beyond the powers of the Court. It is an abuse of process to bring proceedings where it is inevitable that the remedy sought will be refused.[11]

[31] Normally, the appropriate response would be to strike out the pleadings. However, where a defect in a pleading challenged as disclosing no reasonably arguable cause of action can be cured by amendment, which the party responsible for the pleading is willing to make, the Court will almost always permit amendment rather than striking the pleading out.[12]

[32] At the case management conferences, Ms Roe clearly indicated that she was unwilling to amend her initial statement of claim. Before me, her position softened. She accepted that the statement of claim requires substantial amendment.

[33] I am not certain that aspects of the statement of claim cannot succeed. While I suspect that there are significant difficulties in Ms Roe's path, some matters are

---

10 *Deep v Auckland Gold Line Co-Operative Taxi Society Ltd* [2018] NZHC 2362.
11 *Rabson v Judicial Conduct Commissioner* [2016] NZHC 2539, [2016] NZAR 1679; *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC) at [31].
12 *Marshall Futures Ltd (in liq) v Marshall* [1992] 1 NZLR 316 (HC).

unclear. For example, it is unclear from the clinical records who the responsible clinician was and what medical treatment he or she directed. It appears that, at least initially, Dr Grandi requested Dr Ahmed to complete Ms Roe's medication chart. Further, whether or not Ms Roe's stay in hospital between 7 – 9 September 2020 was voluntary is uncertain. Dr Young, in her clinical notes referred to in [9(e)] above, recorded that Ms Roe was agreeable to spending a further period in hospital "involuntarily". This may be a typographical error but that conclusion cannot be reached in the context of a strike-out application. Further, in Dr Young's clinical notes it is recorded that Ms Roe was to have "escorted leave" to go home and retrieve items. There is also a reference to the ADHB's "lock down" policies and it may be that the need for an escort was a reference to the COVID-19 pandemic, but again, this conclusion cannot be reached in the context of a strike-out application.

[34] In these circumstances, in my view, it is not appropriate to strike out the proceedings at this point. Rather, it is preferable to stay the proceedings pursuant to r 15(3) to give Ms Roe a reasonable opportunity to amend the same, so as to comply with the High Court Rules.

[35] Accordingly, I decline to strike out the proceedings. I direct that the proceedings are stayed pending compliance by Ms Roe with the terms of this judgment. In particular, I direct that Ms Roe is to file and serve an amended statement of claim complying with the High Court Rules within one month of the date of this judgment. The matter is to be listed for further call in the Judicial Review List on the first available date thereafter.

Costs

[36] The ADHB has substantially succeeded in its application even though the proceedings have not been struck out. It was forced to proceed with the application because Ms Roe refused to file an amended statement of claim, despite being put on notice of the defects in her pleading at the case management conferences and despite being invited to rectify the position.

[37] In my judgment, the ADHB is entitled to its reasonable costs and disbursements of and incidental to the application.

[38] I direct as follows:

(a) any application for costs and/or disbursements is to be made by way of memorandum within 10 working days of the date of release of this judgment;

(b) any response to the application for costs and/or disbursements is to be made by way of memorandum within a further 10 working days;

(c) memoranda are not to exceed five pages.

I will then deal with the application on the papers unless I require the assistance of counsel for the ADHB and Ms Roe.

Wylie J

Chapter 2

Judgment of Justice Wylie as to Costs (18 August, 2021)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-000248
[2021] NZHC 2162

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for Judicial Review
BETWEEN	KELLY ALEXANDRA ROE Applicant
AND	AUCKLAND DISTRICT HEALTH BOARD Respondent

Hearing: On the papers

Judgment: 18 August 2021

JUDGMENT OF WYLIE J
[Costs]

This judgment was delivered by Justice Wylie
On 18 August 2021 at 11.00 am
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
C Campbell, Auckland District Health Board/A J F Perkins QC

Copy to:
K A Roe, applicant

[1] I refer to my judgment of 15 July 2021. I held that the respondent, the Auckland District Health Board ("ADHB") was entitled to its reasonable costs and disbursements and directed the filing of memoranda.

[2] The ADHB has filed a memorandum seeking costs on a 2B basis in the sum of $5,616.50.

[3] Ms Roe has not filed a memorandum. Rather, she has filed an email saying that she will not be filing any memorandum on costs but rather will seek to progress the matter in the Court of Appeal.

[4] I have considered the costs claimed by the ADHB. Insofar as I can glean from the file, the costs claim is accurate and properly reflects work undertaken, calculated on a 2B basis.

[5] Accordingly, I award costs in favour of the ADHB and against Ms Roe, in the sum of $5,616.50.

_____

Wylie J

Chapter 3

Judgment of Justice Clifford (7 September, 2021)

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA: Nil
[2021] NZCA 441

BETWEEN	KELLY ALEXANDRA ROE Applicant
AND	AUCKLAND DISTRICT HEALTH BOARD Respondent

Court: Clifford J

Counsel: Applicant in Person
No appearance for Respondent

Judgment: (On the papers) 7 September 2021 at 10.30 am

JUDGMENT OF CLIFFORD J
Review of Registrar's Decision

The application for review of the Deputy Registrar's decision is declined.

REASONS

[1] This is an application by Ms Roe to review a decision of the Deputy Registrar declining to accept an appeal for filing on the basis that leave for that appeal first had to be applied for from the High Court.

Background

[2] On 12 February 2021, Ms Roe commenced proceedings in the High Court to judicially review actions of the Auckland District Health Board and certain of its personnel for events which occurred in September 2020. Ms Roe had voluntarily attended at the Emergency Department at Auckland Hospital. On the basis of her

presentation at that time the procedures of the Mental Health (Compulsory Assessment and Treatment) Act 1992 were invoked. Ms Roe claims that subsequent action breached various of her rights. By way of relief, Ms Roe seeks the removal from office of the Chief Executive of the Auckland District Health Board and the most senior clinician involved in the incident.

[3] The District Health Board applied to strike out Ms Roe's proceeding on the basis that the pleading disclosed no reasonably arguable cause of action, that the relief sought was beyond the power of the Court; and that the proceeding was an abuse of process. Wylie J declined that application but, agreeing with the District Health Board that Ms Roe's statement of claim was inadequate, required her to replead.[1] On the basis that the District Health Board had largely succeeded, its complaint all along having been the inadequacy of the pleading, the Judge awarded costs to the District Health Board payable by Ms Roe.[2]

[4] It is that costs order which Ms Roe seeks to appeal to this Court.

Analysis

[5] An application to strike out a proceeding is an interlocutory application. Section 56(3) of the Senior Courts Act 2016 relevantly provides:

> (3) No appeal, except an appeal under subsection (4), lies from any order or decision of the High Court made on an interlocutory application in respect of any civil proceeding unless leave to appeal to the Court of Appeal is given by the High Court on application made within 20 working days after the date of that order or decision or within any further time that the High Court may allow.

[6] Section 56(4) provides an exception to that rule: that is, a decision of the High Court striking out all or part of a proceeding, claim, or defence may be appealed from the High Court to this Court as of right.

[7] The District Health Board's strike out application was an interlocutory application. That application was declined. The order of costs against Ms Roe was

---

1 *Roe v Auckland District Health Board* [2021] NZHC 1780 at [21] and [34]–[35].
2 *Roe v Auckland District Health Board* [2021] NZHC 2162.

an order of the High Court made on that interlocutory application. The exception in subs (4) does not apply. Subsection (3) does apply.

[8] The Deputy Registrar declined to accept Ms Roe's notice of appeal because of the applicability of s 56(3).

[9] That decision was correct.

Result

[10] The application for review of the Deputy Registrar's decision is declined.