IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 69
EMPC 406/2021

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application for strike out of proceedings
AND IN THE MATTER OF	an application for a stay
AND IN THE MATTER OF	an application for security of costs
BETWEEN	ALLAN HALSE Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	TURUKI HEALTHCARE CHARITABLE TRUST Second Respondent
AND	CULTURESAFE NZ LIMITED (IN LIQUIDATION) Third Respondent
AND	TRACEY SIMPSON Fourth Respondent

Hearing:	20 September 2022; 15 March 2023 (Heard at Auckland); (Heard by telephone)
Appearances:	A Halse, applicant in person Appearance excused for first respondent A F Drake and R Judd, counsel for second respondent No appearance for third and fourth respondents
Judgment:	2 May 2023

JUDGMENT OF JUDGE J C HOLDEN

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[1] Turuki Healthcare Charitable Trust (Turuki) has applied to strike out an application for judicial review brought by Mr Halse in respect of four "acts" of the Employment Relations Authority (the Authority). The first of these acts identified by Mr Halse is the issuing of proceedings by Turuki against Mr Halse in 2018; the other three acts comprise three determinations of the Authority.[1] Turuki also has applied for security for costs, in the event that its application to strike out the judicial review is unsuccessful.

[2] Submissions were heard on Turuki's applications in September 2022. Mr Halse then filed an application for a stay of proceedings which was heard in March 2023. He has also sought copies of the written transcripts for both the hearings.

CultureSafe NZ Ltd briefly acted for a former employee of Turuki, including at mediation

[3] The background to these proceedings is summarised as follows.

[4] In late 2017, CultureSafe NZ Limited (CultureSafe) acted for a former employee who brought a personal grievance against Turuki. That personal grievance went to mediation on 13 November 2017; Mr Halse and Ms Simpson, from CultureSafe, attended the mediation and represented the former employee. The personal grievance was settled at mediation and a record of settlement was signed by the parties.

[5] The terms of settlement included that all matters discussed in mediation were to remain, so far as the law allows, confidential to the parties and to the representatives of CultureSafe, and that neither party, including CultureSafe, was to make derogatory remarks or disparaging comments about the other. The terms specifically included that CultureSafe was not to make any reference whatsoever to the employment relationship problem in any publication, including on social media.[2]

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1 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA 95 (Member Crichton) [*Turuki – Interim Determination*]; *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA 136 (Member Crichton) [*Turuki – Substantive Determination*]; and *Turuki Health Care Services v Makea-Ruawhare* [2018] NZERA 177 (Member Crichton) [*Turuki – Costs Determination*].

2 *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165, [2020] ERNZ 398 at [12].

[6] There was a delay in some terms of the settlement being met.[3] Mr Halse, Ms Simpson and CultureSafe (the CultureSafe parties) then made a number of statements critical of Turuki.

[7] The Authority found that the CultureSafe parties had breached the confidentiality of the settlement and ordered them to pay penalties and general damages.[4] On a challenge to the Authority's substantive determination, the Court agreed that the CultureSafe parties had breached the confidentiality of the settlement and were liable to penalties under s 149(4) of the Employment Relations Act 2000 (the Act). However, it set aside the order for general damages, and reduced the penalties.[5]

[8] Mr Halse applied to judicially review the Authority's determinations and this Court's judgment in the Court of Appeal, but the Court of Appeal struck out his application.[6] His application for leave to appeal that judgment to the Supreme Court was dismissed.[7] He then filed the application for judicial review in this Court which is the subject of Turuki's application to strike out.

[9] Although the former employee was named in the Authority determinations, no orders were made against her, and she has not been involved in these proceedings.

Mr Halse seeks a stay pending Court of Appeal proceedings

[10] Mr Halse seeks an order that the Court not issue its judgment on the application to strike out pending the Court of Appeal dealing with an application for judicial review that Mr Halse is intending to file in separate proceedings involving another employer party. Mr Halse says the Court should have the benefit of the Court of Appeal's decision before determining the application to strike out as similar issues arise.

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3 *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust*, above n 2, at [14]–[17].
4 *Turuki – Substantive Determination*, above n 1, at [46].
5 *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust*, above n 2, at [59], [75] and [92].
6 *H v Employment Relations Authority* [2021] NZCA 507, [2021] ERNZ 858.
7 *H (SC 135/2021) v Employment Relations Authority* [2021] NZSC 188, [2021] ERNZ 1380.

[11] Although these Court of Appeal proceedings have been foreshadowed for some time, nothing has been filed. At the hearing of Mr Halse's application for a stay, he said he hoped the Court of Appeal proceedings would be filed by the end of March 2023.[8] That has not happened.[9]

[12] Mr Drake, counsel for Turuki, had suggested at a directions conference that a better course might be for Mr Halse to seek leave to provide further submissions on the application to strike out. Mr Halse, however, wished to pursue the application for a stay.

The Court may issue a stay

[13] On occasion, proceedings are stayed pending some other process being completed, such as arbitration or mediation, but that is not the situation here.[10]

[14] A stay also may be granted where there are similar proceedings currently before the courts and there are common issues of fact or law that will be determined in the similar proceedings and those determinations are likely to be dispositive of substantial issues to be resolved in the proceedings at hand. Various factors will be taken into account, mainly to prevent duplicate proceedings being conducted in different courts.[11]

[15] The principal consideration for deciding whether there should be a stay of proceedings is the interests of justice in the particular case.[12]

The application for a stay is unsuccessful

[16] The situation is then that there are no relevant proceedings in the Court of Appeal or elsewhere. Further, even the foreshadowed application for judicial review

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8 In previous hearings, Mr Halse had said he anticipated filing by the end of January and then by the end of February: see *Halse v Employment Relations Authority* [2023] NZEmpC 9 at [5] and [12].

9 Mr Halse has recently suggested they may be filed soon.

10 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL); *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 (SC); and *Braid Motors Ltd v Scott* (2001) 15 PRNZ 508 (HC).

11 *Martin v Solar Bright Ltd (in liq)* [2021] NZEmpC 58 at [13].

12 At [12].

does not include Turuki as a party.[13] Turuki is entitled to a judgment on its application to strike out, which has now been outstanding for over six months.

[17] It is not in the interests of justice for there to be a stay of these proceedings. The application for a stay is unsuccessful.

[18] The submissions filed for the application for a stay went beyond that application and revisited and amplified submissions made on the application to strike out. At the end of the hearing for the application for a stay, the parties agreed that it would be appropriate for the Court to consider the additional submissions filed for the application for a stay which addressed the application to strike out.

Judicial review proceedings can be struck out

[19] The Court, via reg 6 of the Employment Court Regulations 2000, has a discretion to strike out all or part of a pleading under r 15.1 of the High Court Rules 2016 if the pleading:

> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
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> (b) is likely to cause prejudice or delay; or
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> (c) is frivolous or vexatious; or
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> (d) is otherwise an abuse of the process of the court.

[20] The principles applying to an application to strike-out are well settled. The pleaded allegations of facts, whether admitted or not, are assumed to be true. The jurisdiction to strike out on the ground that it discloses no reasonably arguable cause of action is to be exercised sparingly, and only in clearly untenable cases.[14] Special caution is required where a claim involves a developing area of the law.[15]

[21] These principles apply in the Employment Court.[16]

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13 Mr Halse says Turuki will be named in the body of the judicial review application but would not be a party.

14 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

15 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

16 *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union* [2005] ERNZ 1053 (CA) at [13].

[22] The power to strike out under r 15.1 has historically been applied to judicial review proceedings,[17] but now is possibly subject to the Court's control over judicial review proceedings in ss 13 and 14 of the Judicial Review Procedure Act 2016.[18]

Turuki entitled to apply to strike out proceedings

[23] At the hearing of the application to strike out, and subsequently, Mr Halse's primary submission became that his application for judicial review cannot be struck out because the Authority has not filed a statement of defence.[19]

[24] In respect of his primary submission, Mr Halse relies on s 10(1) of the Judicial Review Procedure Act 2016. That subsection provides that a respondent to an application for judicial review must file a statement of defence unless otherwise directed by a Judge under s 14. To support his argument, Mr Halse also points to s 27 of the New Zealand Bill of Rights Act 1990, whereby people are entitled to apply, in accordance with law, for judicial review of determinations that affect their rights, obligations, or interests protected or recognised by law.[20] He claims that s 27 gives him a fundamental right of judicial review of the Authority.

[25] The Authority is a tribunal.[21] It was named as a respondent pursuant to s 9(3) of the Judicial Review Procedure Act.

[26] Section 10, on which Mr Halse relies, was considered by Palmer J in *Fraser v Central Hawke's Bay District Council*. After addressing the history and purpose of ss 9 and 10 of the Act, and implicitly acknowledging the argument now being run by Mr Halse, his Honour concluded that ss 9 and 10 do not require or entitle the decision-maker to take an active role in the proceeding if the Court would not be assisted by that.[22] In short, the situation regarding the Authority's filing of a statement of defence

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

18 *Ngāti Tama Ki Te Waipounamu Trust v Tasman District Council* [2018] NZHC 2166, [2019] NZAR 1732 at [17].

19 The Authority has filed an appearance abiding the decision of the Court. The Authority was excused from further attendance in this matter.

20 New Zealand Bill of Rights Act 1990, s 27(2).

21 *Claydon v Attorney-General* [2002] 1 ERNZ 218, [2004] NZAR 16 (CA) at [61]–[71] and [112].

22 *Fraser v Central Hawke's Bay District Council* [2021] NZHC 2981 at [21].

is not governed by s 10(1), but by s 10(2). Pursuant to that subsection, the Authority *may* file a statement of defence, but it is not required to do so.

[27] Indeed, it is unusual for a decision-maker to file a statement of defence, and usually inappropriate. This is because it is a well-established principle that decision-makers should not become protagonists in challenges of their own decisions.[23] They speak through their decisions and should not seek to justify them further. That is particularly the case where, as here, the decision-maker has exercised a judicial or quasi-judicial function in deciding between competing submissions of two or more parties. Those parties then carry the argument in the judicial review proceeding.[24] The proper course is for the decision-maker to abide the decision of the Court, as the Authority has done here, and not enter the fray.[25]

[28] There is an exception to this general principle so that a decision-maker may be allowed to appear where considerations of public interest and the effective administration of an Act arise.[26] A court will also sometimes allow a decision-maker to appear and be heard on questions of jurisdiction.[27] This may occur particularly where there is no contradicting party, as the adversarial system then loses balance and the Court lacks assistance with one side of the issues.[28] However, although the Court may allow a decision-maker to appear in such circumstances, there is real doubt as to whether the Court can compel a decision-maker to do so.[29]

[29] Here, there was no requirement on the Authority to file a statement of defence; indeed, it would have been inappropriate for it to do so.

[30] Rather, the Authority has filed an appearance advising it will abide the decision of the Court, which was appropriate, and its attendance was excused.

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23 *Goodman Fielder Ltd v Commerce Commission* [1987] 2 NZLR 10 (CA) at 13; and *Fraser v Central Hawke's Bay District Council*, above n 22, at [16].
24 *Fraser v Central Hawke's Bay District Council*, above n 22 at [16]
25 *Secretary for Internal Affairs v Pub Charity* [2013] NZCA 627, [2014] NZAR 177 at [27].
26 *Goodman Fielder Ltd v Commerce Commission*, above n 23, at 20.
27 *Secretary for Internal Affairs v Pub Charity*, above n 25, at [27].
28 *Fraser v Central Hawke's Bay District Council*, above n 22, at [17].
29 *Hugel v Cooney* HC Tauranga CP17/98, 20 August 1998; and *Hugel v Cooney* HC Tauranga CP17/98, 9 April 1999.

[31] In any event, regardless of the position of the Authority, Turuki is separately named as the second respondent and applies to strike out the proceedings on its own behalf, as it is entitled to do.

[32] For these reasons, Mr Halse's primary submission fails.

The Court's jurisdiction to judicially review the Authority is limited

[33] The Employment Court's jurisdiction to consider applications for judicial review comes from s 194 of the Act and includes that the Court has full and exclusive jurisdiction to hear and determine any application to judicially review the exercise or purported exercise of a statutory power or statutory power of decision of the Authority.

[34] Section 184 of the Act limits that power to where the grounds for judicial review are a lack of jurisdiction of the Authority, defined in s 184(2) as where:

(a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or

(b) the determination or order is outside the classes of determinations or orders which the Authority is authorised to make; or

(c) the Authority acts in bad faith.

[35] Mr Halse's substantive case is that the Authority lacked jurisdiction to make orders against him as he was not in an employment relationship with Turuki.

[36] He says the grounds for review are based on errors of law and errors of fact. He also says the Authority acted in bad faith through knowingly erring.

Turuki relies on several grounds in its application to strike out

[37] The grounds upon which Turuki seeks to strike out the application for judicial review are that the application for judicial review:

(a) is misconceived;

(b) discloses no reasonably arguable case;

(c) is frivolous and vexatious; and

(d) otherwise is an abuse of the process of the Court.

[38] In his notice of opposition, Mr Halse opposed the application to strike out on the basis that it is misconceived, and that it failed to distinguish between a challenge (his previous proceedings before the Court concerning these parties) and an application for judicial review (presently before the Court).

Issuing proceedings not a statutory power

[39] Turuki says the issuing of proceedings against Mr Halse (and the other CultureSafe parties) is not the exercise of a statutory power or statutory power of decision and is not capable of judicial review under s 194 of the Act; and in that respect Mr Halse's application is misconceived.

[40] I agree. Mr Halse's application for judicial review of the Authority's statutory power for Turuki's issuing of proceedings is misconceived. It is not the exercise of a statutory power or statutory power of decision by the Authority. It is therefore struck out.

Turuki argues no reasonably arguable case

[41] Turuki says the remainder of the application raises no reasonably arguable case. It points to the tight control over judicial review provided by s 184 of the Act and submits that the Authority did not lack jurisdiction to make the determinations at issue in Mr Halse's judicial review application. Accordingly, Mr Halse is barred by statute from bringing claims of that nature by way of judicial review to the Court.

[42] Although Mr Halse is endeavouring to judicially review three determinations of the Authority, the first of those determinations, covering interim orders (the interim determination), was superseded by the second determination (the substantive determination), and the third determination (the costs determination) simply followed

the event of the substantive determination. Accordingly, it is the substantive determination that is central to Mr Halse's claim.

[43] As noted, this substantive determination was challenged in the Court. The Court's judgment on the challenge stands in the place of the Authority's determination, which is set aside.[30] Accordingly, there is no longer an extant substantive determination capable of judicial review by the Court. The application to strike out therefore succeeds on that basis.

[44] In any event, Mr Halse has submitted that the grounds for review are based on alleged errors of law and errors of fact. Section 184 does not permit judicial review of Authority determinations on the basis of error of law.[31]

[45] The position with respect to Mr Halse's application for judicial review is on all fours with the application for judicial review he filed in the Court of Appeal against the decisions of the Employment Court. There, the Court of Appeal found that the proceeding was more accurately viewed as an appeal on a question of law, challenging the Employment Court's finding (within its jurisdiction) that the power in s 149(4) extended to Mr Halse.[32] That is, of course, essentially what Mr Halse has already done by way of his challenge.

[46] Mr Halse's assertion that the issue was one of bad faith must also fail. While some aspects of the Authority's determination were not upheld on challenge, the fundamental proposition central to the case was upheld. There is no suggestion or indication that the Authority knowingly, or intentionally erred on the matters which were not upheld. Bad faith does not extend to making a determination that is later found to be wrong in law.

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30 *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust*, above n 2, at [67]; and Employment Relations Act 2000, s 183.

31 *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201; and *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256 while these cases considered s 193, their reasoning equally applies with respect to s 184.

32 *H v Employment Relations Authority*, above n 6, at [38]; see also *Halse v Employment Relations Authority* [2022] NZEmpC 167, [2022] ERNZ 808 at [73].

[47] Although my finding on this argument means the strike out succeeds, I nevertheless deal with the other points raised.

Turuki says the proceedings are vexatious

[48] A vexatious proceeding contains "an element of impropriety".[33] A proceeding may be vexatious even though it raises some issues which are arguable. Vexatiousness might be manifested, for instance, by the unreasonable and tendentious conduct of litigation, extreme claims made against other people involved in the case or perhaps a history of unsuccessful proceedings and unmet costs orders.[34] Some of the features of vexatious proceedings include a deeply entrenched pattern of behaviour, characterised by a refusal to accept adverse decisions; extravagant and baseless allegations against a wide range of people including judicial officers; an abject failure to comply with the rules of Court; the filing of prolix and confusing pleadings; and a failure to recognise any distinction between pleadings, evidence and submissions.[35]

[49] Turuki submits that this application for judicial review meets the criteria of a vexatious proceeding.

[50] The interim determination made orders that then were made permanent in the substantive determination. Accordingly, the interim determination was superseded by the substantive determination, which, as noted, in turn was set aside by the Employment Court by virtue of its judgment on the challenge.

[51] The costs determination is of no moment in these proceedings. There is no point taken with respect to the way the costs were determined by the Authority, in this case they simply followed the event. There is nothing requiring the Court's determination.

[52] Here, the genesis of Mr Halse's complaints arise from a settlement at mediation in November 2017. The employee at that mediation is no longer involved in these

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33 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].

34 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [39].

35 *Attorney-General v Heenan* [2009] NZAR 763 (HC) at [138]; upheld by the Court of Appeal in *Heenan v Attorney-General* [2011] NZCA 9, [2011] NZAR 200.

proceedings. They are being brought by Mr Halse, who was the employee's representative pursuant to s 236 of the Act.

[53] The dispute has been ongoing since March 2018, proceeding through the Authority, the Employment Court, the Court of Appeal and Supreme Court. In each hearing Mr Halse was taking the same position as is being advanced in these proceedings – that orders ought not have been made against him for breaching the terms of his client's settlement.

[54] The judicial review proceedings meet the test of being vexatious, giving grounds to strike them out.

Turuki also claims abuse of process

[55] The final head under which Turuki applies to strike out Mr Halse's application for a judicial review is abuse of process. It says that, in light of the Employment Court's decision[36] and the Court of Appeal's decision to strike out Mr Halse's application for judicial review,[37] Mr Halse's application for judicial review is an attempt to relitigate matters already determined by the Employment Court and amounts to an abuse of process.

[56] Abuse of process captures instances of the misuse of the Court's processes and can include attempts to relitigate matters already determined or bringing substantively the same proceeding "in a different garb".[38] That is what has happened here. While I acknowledge the difference between a challenge and an application for judicial review, here the Court's judgment on the challenge examined the same issues that Mr Halse is now asking the Court to reconsider by way of judicial review.

[57] The application for judicial review is an abuse of process and this also gives grounds for it to be struck out.

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36 *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust*, above n 2.

37 *H v Employment Relations Authority*, above n 6.

38 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 541; *Collier v Butterworths of New Zealand Ltd* (1997) 11 PRNZ 581 (HC) at 586; *Bryant v Collector of Customs* [1984] 1 NZLR 280 (CA) at 282; *Link Technology 2000 Ltd v Attorney-General* [2006] 1 NZLR 1 (CA); and *Marphona Trustees Ltd v NYX* [2022] NZHC 792.

No need to deal with application for security for costs

[58] In the alternative to a strike out, Turuki had sought security for costs on the application for judicial review. There is no need to deal with that in view of the findings made on the application to strike out.

Transcript of submissions hearing to be provided

[59] As noted, Mr Halse sought a copy of the written transcript of the hearing for the application for a stay. He had previously also sought a copy of the written transcript of the hearing of the application to strike out last September. The parties have already been advised that the written transcripts will be provided. The reasons for that are set out below.

[60] Mr Halse seeks the written transcripts so that he can provide them to advisors who are assisting him with his various proceedings. Those advisors have not appeared in Court, and are not on the record of any of Mr Halse's proceedings. I accept, however, that Mr Halse is obtaining assistance with these matters.

[61] In dealing with an application such as this, the Court looks to the Senior Courts (Access to Court Documents) Rules 2017 (the Rules), which are applied via reg 6 of the Employment Court Regulations 2000 and/or by way of helpful analogy.

[62] The electronic record of a hearing is not part of the "formal Court record" and is not subject to the right of access to formal Court records.[39] There is, accordingly, no general right to the written transcript of a submissions hearing; rather it is a matter for the discretion of the Court after considering the reasons given for seeking a transcript.[40]

[63] In the present circumstances, the hearings have been transcribed so there is no issue of using Court resources to produce the transcript for the parties.

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39 Senior Courts (Access to Court Documents) Rules 2017, rr 4 and 8.

40 *Te Whatu Ora - Health New Zealand v CultureSafe New Zealand Ltd (in liq)* [2022] NZEmpC 230 at [15].

[64] I acknowledge the reason given by Mr Halse, and that his advisors may be assisted by having access to the written record of the oral submissions made before the Court.

[65] It is for that reason, that, in this instance, I granted Mr Halse's request for a copy of the written transcripts. Those written transcripts will be provided to the parties at the same time as this judgment.

Turuki entitled to costs

[66] As the successful party, Turuki is entitled to costs on these proceedings. If they cannot be agreed between the parties, Turuki may apply to the Court by memorandum filed and served within 20 working days of this judgment. Mr Halse may respond by memorandum filed and served within a further 15 working days, with Turuki entitled to file and serve a memorandum in reply within a further five working days. Costs will then be determined on the papers.

J C Holden
Judge

Judgment signed at 11.15 am on 2 May 2023