THE ORDER MADE IN THE HIGH COURT ON 2 SEPTEMBER 2013 PROHIBITING PUBLICATION OF THE NAME OR ANY OTHER DETAILS WHICH MIGHT LEAD TO THE IDENTIFICATION OF THE RESPONDENT IN THIS PROCEEDING REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA143/2014
[2015] NZCA 214

BETWEEN	MORAG HUTCHINSON First Appellant	
	THE BOARD OF TRUSTEES OF GREEN BAY HIGH SCHOOL Second Appellant	
AND	A Respondent	

Hearing:	27 May 2015
Court:	Randerson, Stevens and White JJ
Counsel:	R M Harrison (by AVL) for Appellants S R G Judd and J Puah (by telephone) for Respondent M G Coleman and S J Humphrey for the Attorney-General as Intervener O C Gascoigne for the Human Rights Commission as Intervener F Joychild QC (by AVL) for IHC New Zealand as Intervener
Judgment:	5 June 2015 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed as moot.

B The fixture for the hearing of the appeal on 7 July 2015 is vacated.

C There is no order as to costs.

D The order made in the High Court on 2 September 2013 prohibiting publication of the name or any other details which might lead to the identification of the respondent in this proceeding remains in force.

REASONS OF THE COURT

(Given by White J)

Introduction

[1] This is an appeal against a successful application for review by the respondent, A, who was a special needs student, against the decisions of the first appellant, who is the Principal of Green Bay High School, and the second appellant, the Board of Trustees of the School. In the High Court Faire J quashed the decisions of the Principal and Board of Trustees made in July 2013 suspending and excluding A from the School.[1]

[2] A, who was 14 years old at the time of the High Court decision, issued the proceeding by his mother who was appointed his litigation guardian.

[3] In addition to supporting the High Court judgment on the grounds relied on by Faire J, A gave notice in March 2014 that he intended to support the judgment on a number of other grounds including:

> (c) The appellants discriminated against the respondent on the basis of his disabilities by suspending and then excluding him because of his disabilities.
>
> (d) The appellants discriminated against the respondent on the basis of his disabilities by failing to provide reasonable accommodation for his disabilities.

[4] Partly as a result of the issues raised by these wider discrimination grounds, the Attorney-General on behalf of the Ministry of Education, the Human Rights Commission and IHC New Zealand sought and obtained leave to be joined as interveners in the appeal.

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1 *A v Hutchinson* [2014] NZHC 253.

[5] In the course of the case management of the appeal a timetable was agreed for the filing of further affidavits and submissions and a fixture was allocated for 7 July 2015.

[6] Among the affidavits filed, the Principal of the School filed a second affidavit sworn on 10 April 2015 describing the attempts made by the School to accommodate A after the High Court judgment of 24 February 2014 requiring his reinstatement. She deposed that the attempts were unsuccessful and that her understanding was that A had relocated to live with his father in Kerikeri and was being accommodated at a secondary school there.

[7] A, through his counsel, objected to the Principal's affidavit, submitting that it contained irrelevant material, the accuracy of which was disputed. The Principal and the Board of Trustees submitted that the affidavit should have been admitted on appeal since the subsequent events had a bearing on what steps were reasonably available to accommodate A at their school and because it was relevant to the new arguments arising from A's notice to support the High Court judgment on other grounds that there was a right for persons with disabilities to mainstream education.

[8] In accordance with a minute of Randerson J dated 18 May 2015, the hearing before us was set down to determine two issues:

(a) the admissibility of the Principal's second affidavit; and

(b) whether, in view of the information disclosed in the affidavit, the appeal was now moot and should therefore not be heard.

[9] It is convenient to consider the second issue first because there is no dispute that A is no longer at Green Bay High School. It was confirmed by Mr Judd that A is now living with his father in Kerikeri and being educated outside the mainstream school system.

[10] One other relevant development to be noted is that in an affidavit filed for IHC New Zealand, Patricia Grant, the IHC Director of Advocacy, deposed that there

are currently proceedings before the Human Rights Review Tribunal in which issues relating to discrimination against students with disabilities are raised in the education context.[2]

Mootness

[11] It is well-established as a general principle that appellate courts will not determine appeals where there is no longer a live issue between the parties.[3] The principle reflects the reluctance of courts to consider academic or abstract questions of law when there is no longer any dispute between the parties to be resolved.[4]

[12] At the same time appellate courts have recognised that if the issue of costs remains at large there may be a sufficient dispute between the parties to keep the appeal live.[5]

[13] In recent years appellate courts have also recognised that where there is an issue involving a public authority as to a question of law the court has a discretion to hear the appeal even if there is no longer a dispute to be decided that will directly affect the rights and obligations of the parties.[6] The courts have made it clear, however, that this is an exception to the general principle which must be exercised with caution and only if there is good reason in the public interest for doing so.

[14] In *Gordon-Smith v R* the Supreme Court adopted the approach of the Supreme Court of Canada in *Borowski v Attorney-General*[7] in identifying the

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2 The most recent decision of the Tribunal in these proceedings is *IHC New Zealand v Ministry of Education* [2014] NZHRRT 20.

3 *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 (HL) at 113; *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 (CA) at 199, 202 and 206–207 (petition for special leave to appeal to the Privy Council dismissed 20 March 1986); and *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721 at [14].

4 *Sun Life Assurance Co of Canada v Jervis*, above n 3, at 113; and *Ainsbury v Millington* [1987] 1 All ER 929 (HL) at 930.

5 *Westminster City Council v Croyalgrange Ltd* [1986] 2 All ER 353 (HL) at 354; *Elders Pastoral Ltd v Bank of New Zealand* [1990] 3 NZLR 129 (PC) at 134; and *Bovaird v J* [2008] NZAR 667 (CA) at [2].

6 *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450 (HL) at 456–457; *Attorney-General v David* [2002] 1 NZLR 501 (CA) at [11]; and *Gordon-Smith v R*, above n 3, at [15].

7 *Borowski v Attorney-General* [1989] 1 SCR 342 at 353.

following main reasons for the general policy of restraint by appellate courts in addressing moot questions:[8]

(a) the importance of the adversarial nature of the appellate process in the determination of appeals;

(b) the need for economy in the use of limited resources of the appellate courts; and

(c) the responsibility of the courts to show proper sensitivity to their role in our system of government. In general advisory opinions are not appropriate.

Submissions for the parties

[15] In the present appeal Mr Harrison for the Principal and the Board of Trustees accepted that now that A had left Green Bay High School the specific issues raised in his case were no longer live. Mr Harrison submitted, however, that the appeal should proceed because the issue of costs was live and because, in any event, wider issues of public importance relating to discrimination against students with disabilities and breach of the Human Rights Act 1993 were raised in the context of the education sector. Of particular concern was the existence or otherwise of an obligation on schools to reasonably accommodate students with disabilities.

[16] Mr Harrison was supported by Ms Joychild QC for IHC New Zealand who submitted that the appeal raised important practical and everyday issues for parents of children with disabilities and schools endeavouring to deal with them, particularly in the disciplinary area. She submitted that it would therefore be extremely helpful if the courts were able to provide clarity around the duties of schools in this area. In this case, with the involvement of the interveners, the Court would have the benefit of an adversarial process.

[17] Mr Judd advised us that A would abide the decision of the Court. There was no cross-appeal as A had obtained the remedy he had sought. He had filed the notice

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8 *Gordon-Smith v R*, above n 3, at [18].

to support the High Court judgment on other grounds because they had not been determined by Faire J. While he considered those grounds might be able to be determined by this Court if the appeal proceeded, it was not necessary for that to occur as far as A and his mother were concerned, especially as they had found the High Court proceeding incredibly stressful. Mr Judd also confirmed that his client did not accept all aspects of the Principal's second affidavit.

[18] Ms Coleman for the Attorney-General and Mr Gascoigne for the Human Rights Commission advised that their clients also abided the decision of the Court. At the same time both noted that:

(a) the factual issues necessary for the Court to determine the discrimination grounds relied on by A in the notice had not been addressed by Faire J in the High Court;

(b) determination of the judicial review proceeding in the High Court had been essentially fact-specific; and

(c) the other proceedings currently before the Human Rights Review Tribunal might address the wider discrimination issues.

Costs live?

[19] In the High Court Faire J reserved costs, expressing the hope that counsel might well agree.[9] We were informed by counsel that the parties had been able to reach agreement on the issue.

[20] While the notice of appeal seeks an order from this Court setting aside "the award of costs given in the judgment", it is clear that there was no order in the High Court and, with the issue now resolved by agreement, there is no live question for this Court to keep the appeal live on that ground.

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9 *A v Hutchinson*, above n 1, at [85].

An issue of public importance?

[21] In the High Court Faire J determined the application for judicial review solely on the grounds that neither the Principal nor the Board of Trustees had sufficiently examined the facts of A's case before making the decisions of suspension and expulsion under ss 14 and 15 of the Education Act 1989 respectively.[10] The parties accepted that as A is no longer a pupil of Green Bay High School the fact-specific issues relating to these decisions were moot and, in any event, not of general public importance.

[22] Faire J recorded that the issue whether the decisions to suspend and exclude A were discriminatory and in breach of the Human Rights Act 1993 had been raised as a "subsidiary issue", but was not the subject of detailed submissions.[11] The Judge made no factual findings in respect of this issue.

[23] We accept that issues relating to discrimination against students with disabilities in the education sector are of considerable public importance. Adopting the cautious approach mandated by the Supreme Court in *Gordon-Smith*,[12] however, we do not agree with Mr Harrison and Ms Joychild that this is the appropriate case for their resolution for the following reasons.

[24] First, there are no High Court factual findings on which an appeal relating to those issues could be pursued. Appellate courts almost always require factual findings to be made by the first instance court. Generally, litigants should produce all reasonably discoverable evidence and put up their best case at trial.[13]

[25] Second, to the extent that aspects of the relevant evidence for the determination of these issues is contained in the affidavits of the Principal and IHC's Director of Advocacy filed in this Court after the High Court hearing, it would be necessary for this Court to conduct a factual hearing because their evidence is in dispute and cross-examination would be required. It would be very unusual for this

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10 *A v Hutchinson*, above n 1, at [78].
11 At [69].
12 *Gordon-Smith*, above n 3, at [22].
13 *Rae v International Insurance Brokers* [1998] 3 NZLR 190 (CA) at 192 and 194.

Court to conduct a hearing of that nature when the issue had not been determined by the High Court.

[26] Third, the appropriate process for the resolution of issues of this nature is for them to be raised in the first instance before the Human Rights Review Tribunal which is constituted with its own specialist jurisdiction under the Human Rights Act.[14] The appellate structure under that Act also involves a first appeal to the High Court sitting with additional members appointed from a panel of suitably qualified persons.[15] This is no doubt why the other proceedings have been commenced before the Tribunal.

[27] Finally, in this context this Court would not normally consider an appeal on an issue of law of this nature which had not previously been considered by the High Court.

[28] We are therefore satisfied that the general principle is applicable here and that because this appeal is now moot it should not proceed to a hearing.[16] In the circumstances of this case where neither the relevant factual issues nor the issues of law have been determined by the High Court it would not be in the public interest for this Court to do so on appeal.

[29] For completeness we note that if it had been necessary to do so we would not have granted leave for the further affidavits to be admitted to the extent that they contain evidence relating to issues not determined in the High Court. We would also have found it necessary to consider whether the leave granted to the interveners should have been revoked.

Result

[30] Accordingly, the appeal is dismissed and the fixture for 7 July 2015 is vacated.

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14 Human Rights Act 1993, s 93.
15 Sections 101 and 126.
16 *Orlov v ANZA Distributing New Zealand Limited (in liq)* [2010] NZCA 536; leave to appeal refused in *Orlov v ANZA Distributing New Zealand Limited (in liq)* [2011] NZSC 8.

[31] In the circumstances costs should lie where they fall.

Solicitors:
Harrison Stone, Auckland for Appellants
Youth Law Aotearoa, Auckland for Respondent
Crown Law Office, Wellington for Attorney-General as Intervener
Russell McVeagh, Wellington for Human Rights Commission as Intervener
Duncan Cotterill, Wellington for IHC New Zealand as Intervener