IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA1/2024
[2026] NZCA 30

BETWEEN	RHYS MICHAEL CULLEN Appellant
AND	PAUL JUNIOR PA'U First Respondent
	BOARD OF TRUSTEES OF MOUNT ALBERT GRAMMAR SCHOOL Second Respondent

Hearing:	27 May 2025
Court:	Courtney, Cooke and Woolford JJ
Counsel:	Appellant in person First Respondent in person P A Robertson and J Y Walpole for Second Respondent
Judgment:	25 February 2026 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the second respondent costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Courtney J)

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Introduction

[1] Between 2020 and 2023, Mr Cullen provided tutoring and mentoring services to a number of students at Mount Albert Grammar School (MAGS).[1] This mostly occurred outside school hours and off school grounds. There were, however, occasions when Mr Cullen came onto the school's grounds without complying with the school's procedures (such as signing in). He also engaged in email communications with staff that they found disruptive, and sometimes distressing. On one occasion, in a meeting with a teacher, he behaved in a way that the teacher found unacceptable.

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[1] Mr Cullen told us that he has continued to provide these services to students since 2023 but they have not given rise to any problems between him and the school.

[2] The school engaged a consultant, Mr Pa'u, to assist in managing its interactions with Mr Cullen. Acting with the authority of the Headmaster, Mr Pa'u emailed Mr Cullen on 16 March 2023 to say that the school intended to issue a trespass notice against him and that he was not to come onto either the school grounds or the premises of the Mount Albert Aquatic Centre (Aquatic Centre), which is located on land owned by the school but leased to Auckland Council and operated by a separate entity under a licence to occupy.[2]

[3] Mr Cullen issued judicial review proceedings against both Mr Pa'u and the MAGS Board of Trustees (the Board). He asserted that the email constituted a trespass notice for the purposes of the Trespass Act 1980. He alleged that Mr Pa'u had issued the notice without the Board's authority. He alleged that the Board had acted unreasonably[3] and inconsistently with his and the students' rights under the New Zealand Bill of Rights Act 1990 (NZBORA)[4] and had failed to give him an opportunity to be heard before making the decision to issue a trespass notice. He also alleged that the Board had no power to issue a trespass notice in relation to the Aquatic Centre or to trespass him from the school grounds (as opposed to its buildings) or to its buildings for the purposes of attending board meetings. The only relief Mr Cullen sought was an order setting aside the trespass notice.

[4] Campbell J dismissed the application for judicial review.[5] He accepted that the Board's decision was amenable to judicial review (which the Board had resisted).[6] He found that Mr Cullen had trespassed on school property prior to the email being sent, which entitled the Board to issue a trespass notice.[7] However, he considered it unnecessary to decide whether the email constituted a trespass notice because the Board's decision to issue such a notice was reviewable, regardless of whether it actually did so.[8] The Judge held that, while the Board's decision engaged some

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2 Although not explicit, the parties proceeded on the basis that the reference in the email to a trespass notice was to a warning given pursuant to s 4 of the Trespass Act 1980.

3 There were no pleaded particulars as to the nature of the alleged unreasonableness.

4 Mr Cullen's standing to assert breaches of rights under the New Zealand Bill of Rights Act 1990 on behalf of students was assumed by the Judge and did not arise as an issue on appeal.

5 *Cullen v Pa'u* [2023] NZHC 3782, [2024] NZAR 276 [substantive judgment].

6 At [52]. The Board did not cross-appeal this aspect of the decision.

7 At [68].

8 At [33] and [52].

NZBORA rights, it did not infringe any rights and, even if had, the limitation would have been justified under s 5 of NZBORA.[9]

[5] While the Judge accepted that the Board did not have authority to decide to issue a trespass notice in respect of the Aquatic Centre when it sent the email, that lack of authority had been cured by the operator of the Aquatic Centre subsequently approving the Board's decision.[10]

[6] Finally, the Judge held that Mr Pa'u should not have been included as a respondent in the proceeding.[11]

[7] In a separate judgment, the Judge ordered Mr Cullen to pay costs.[12]

[8] Mr Cullen appeals both judgments. The grounds of appeal against the substantive judgment can fairly be summarised as being that the Judge erred by:[13]

(a) finding that Mr Pa'u ought not have been named as a respondent;

(b) finding that Mr Cullen had trespassed on school property;

(c) failing to determine whether the email constituted a trespass notice;

(d) concluding that it was open to the Board to issue a trespass notice in relation to the Aquatic Centre;

(e) failing to consider procedural defects in the Board's decision-making process;

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9 At [60]–[65].
10 At [67].
11 At [69].
12 *Cullen v Pa'u* [2024] NZHC 1371 [costs judgment]. Mr Pa'u was self-represented and so Mr Cullen was ordered to pay Mr Pa'u's reasonable disbursements. Mr Cullen was ordered to pay the Board's costs on a 2B basis, being $21,749 and disbursements of $438.
13 These are not in the order identified in the notice of appeal. Nor do they include a challenge to some of the Judge's factual findings that were raised in the notice of appeal but not pursued in submissions.

(f) concluding that the issue of a trespass notice did not breach NZBORA protected rights; and

(g) failing to recognise the effect of s 13 of the Trespass Act in relation to school buildings.

[9] The grounds of appeal against the costs judgment are that the Judge erred in failing to recognise, first, that Mr Cullen was successful on one aspect of his claim and, secondly, that the proceedings raised a matter of public interest.

Application to adduce further evidence

[10] Mr Cullen applied to adduce further evidence, namely two emails sent by Mr Pa'u, apparently on behalf of the Board, which post-dated the High Court judgment and which Mr Cullen maintained supported his argument that the email constituted a trespass notice. Mr Pa'u opposed the application. The Board abided the decision of the Court.

[11] Given that the status of the email is a question of law, it seemed unlikely that the proposed evidence could assist Mr Cullen. After a brief argument, Mr Cullen advised that he did not wish to pursue the application. We do not need to consider it further.

Factual background

[12] Mr Cullen is a former medical practitioner.[14] He has a number of qualifications but none in teaching. Nevertheless, Mr Cullen has a long-standing interest in Māori and Pacific education. In 2019 he was asked by a friend to tutor a year 10 student at MAGS. Subsequently, he began providing the same service to other MAGS students.

[13] The students became involved in a youth development service with which Mr Cullen is associated, Pro-Pare Athlete Management Trust (PAMT). They used the PAMT facilities in Onehunga for sports training and recreation. As well as tutoring,

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[14] Mr Cullen's registration was cancelled following an adverse finding by the Health Practitioners Disciplinary Tribunal.

Mr Cullen would provide transport for the students' sports team training at MAGS and would watch their games. In that regard, he spent some time on the sports fields of the school, though there was no indication that he caused any disturbance in that context.

[14] Mr Cullen also transported students to the Aquatic Centre and supervised them there. Again, there do not appear to have been any problems at the Aquatic Centre.

[15] Mr Cullen formed the view that the tutoring and mentoring services he was providing produced better results for the students than MAGS. Moreover, he considered that the school's approach to admitting these students to certain University Entrance approved courses was unfairly preventing them from advancing. Mr Cullen took the view that he supported the students to obtain additional National Certificate of Educational Achievement credits and improve their academic performance so as to obtain University Entrance.

[16] The MAGS staff had a different perspective. They considered that Mr Cullen questioned and challenged decisions made by staff which he did not agree with in a combative manner that they found challenging. They also considered that Mr Cullen was encouraging students to breach school policies and procedures. In affidavit evidence, senior MAGS staff described feeling bullied, threatened and harassed by him.

[17] There was evidence from MAGS staff that Mr Cullen came onto the school grounds without signing in at reception as is required by school protocol. Senior staff complained that Mr Cullen not only made serious allegations about them, including of lying and bullying, but also repeated the allegations outside the school and encouraged at least one student to do likewise.

[18] In summary, the evidence from senior MAGS staff was to the effect that Mr Cullen's visits to the school property and the nature of his written communications with staff undermined the authority of senior staff, caused undue stress — and sometimes distress — and made it difficult for staff to engage with and support the students with whom Mr Cullen was associated. Mr Pa'u's evidence was that when he

was engaged, the staff were feeling overwhelmed in their dealings with Mr Cullen and concerned at his combative and threatening communication style.

[19] On 16 March 2023, with the approval of the Headmaster, Mr Drumm, Mr Pa'u sent the email that is the subject of the proceeding. Relevantly, the email stated:

> Staff are feeling unsafe dealing with you because of the way you communicate with them and interact with them. Apparently, you are making their work more challenging and stressful. Staff feel that rather than working with the school to support the students that you look after, to reach their highest level of educational achievement, you insist on taking (and the boys taking) uncompromising and intractable positions on issues that for many other students and parents, is a non issue. You also advise the boys to take unduly aggressive and confrontational positions when staff attempt to mentor them.
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> …
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> Staff are tired and exasperated and do not want to deal with you [anymore]. They are not prepared to engage with you moving forward. They are not prepared to respond to any further communication from you, including communication that you draft for someone else. …
>
> **TRESPASS NOTICE**
>
> **The school is preparing a Trespass Notice that will be served on you. This means that you cannot enter onto any school property without the prior written permission of the Headmaster. I have been asked to inform you that you are not to enter school property effective today. This includes the school pool where we understand you have been meeting some of the students.**
>
> **You must not communicate with any MAGS staff. If you have anything you need to communicate with staff, that can be sent to me, and I will respond or ask for information so I can respond.**

[20] In response to the email, Mr Cullen wrote three letters to the Board. One of the letters reprised criticisms of a senior teacher. The second indicated that any formal trespass notice issued would be met with an application to the High Court to set aside the notice. Mr Cullen identified the grounds for such an application as being that the Aquatic Centre was not occupied by the school and the school therefore did not have the power to issue a trespass notice in respect of it, and that he required access to the school fields, grandstand and Aquatic Centre carpark to transport his students. He also asserted that he had a licence to enter school buildings to attend board meetings and there was no reason to exclude him from the buildings in relation to other legitimate business.

[21] The third letter identified as an issue a possible breach of s 27(1) of the NZBORA, in that students who wished Mr Cullen to be present at any meeting that might affect their rights or interests would have their right to natural justice infringed if Mr Cullen were prevented from attending.

[22] There was a board meeting on 22 March 2023 at which the Board passed a motion that it:

> … supports the actions of the Headmaster in banning Mr Cullen from school property and stopping him from engaging with any MAGS staff by blocking his emails. The Board confirms that the health and safety and wellbeing of staff is one of its primary obligations. Mr Cullen's actions are also preventing the school from supporting its students to reach their highest level of educational achievement.

[23] About a month later, on 21 April 2023 the National Operations Manager of Belgravia Health and Leisure Group (Belgravia), the licenced occupier of the Aquatic Centre, wrote to the Board in the following terms:

> Thank you for providing the reasons in support of the decision to issue a Trespass Notice against Mr Cullen. I confirm that Belgravia Health and Leisure Group fully support the inclusion of the Mt Albert Aquatic Centre and its environs in the Trespass Notice against Mr Cullen.

[24] That letter was not forwarded to Mr Cullen. However, in a letter dated 4 May 2023, the presiding member of the Board, Ms Murphy, responded to Mr Cullen's letters to the Board. She confirmed that Mr Drumm, the Headmaster, had the authority of the Board to ban Mr Cullen from the school and added:

> The health and wellbeing of our students and staff is a key obligation of the Board. The decision to ban you from school property is both reasonable and justified.
>
> For the avoidance of doubt, you are also banned from the Mt Albert Aquatic Centre, the school fields, the grandstand and school buildings.

Issue (a): Mr Pa'u's position

[25] Mr Pa'u was the subject of the first cause of action in Mr Cullen's amended statement of claim. The sole allegation against Mr Pa'u was that he acted without authority in sending the 16 March 2023 email. The affidavit evidence was, however,

clear that Mr Pa'u acted with authority. Mr Pa'u maintained that the proceeding against him was an abuse of process.[15]

[26] Early on in his decision, the Judge recorded that Mr Cullen had abandoned the cause of action against Mr Pa'u at the start of the hearing.[16] Later, the Judge returned to the question of whether the proceeding against Mr Pa'u was an abuse of process, saying that since he had dismissed Mr Cullen's substantive claim in relation to the Board's decision, it was unnecessary to determine whether the claim was an abuse of process but that it "suffices to say that Mr Cullen's claim against Mr Pa'u never had any merit."[17]

[27] In the appeal Mr Cullen did not challenge the Judge's recording of the abandonment of the cause of action against Mr Pa'u. Instead, he complained that when the statement of claim was first filed, Mr Pa'u was properly named as a respondent. There is no merit in this ground of appeal. Plainly, there is no basis — and never was — for Mr Pa'u to have been named as a respondent in the High Court proceedings and there was no basis on which to have named him in the appeal.

Issues (b), (c) and (d): did the Judge err in finding that Mr Cullen had trespassed on the school grounds and in declining to determine whether the email was a trespass notice?

The issues

[28] In the High Court, Mr Cullen maintained that the email was a trespass notice in relation to both the school grounds and the Aquatic Centre under s 4 of the Trespass Act. He argued that the Board was not entitled to issue such a notice (or decide to do so) unless he had already committed a trespass, which he had not done. The Judge rejected this argument, saying: "I am satisfied that Mr Cullen has repeatedly been on the School's property without the School's authority. That is a trespass."[18] In the case of the Aquatic Centre, Mr Cullen argued that the Board had no authority to issue a trespass notice because it was not the occupier of those premises. The Judge

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15 Substantive judgment, above n 5, at [27].
16 At [26].
17 At [70].
18 At [68].

saw nothing in that argument, given Belgravia's subsequent authorisation of the decision to do so.

[29] The Judge declined to determine whether the email was a trespass notice because the fact the Board's decision to issue such a notice was reviewable meant that the character of the email would make no difference to the outcome.

[30] On appeal, Mr Cullen submitted that the Judge's conclusion that Mr Cullen had trespassed on the school grounds was wrong and, further, that the Judge should have determined the true character of the email. We agree that Mr Cullen did not trespass on either the school property or the Aquatic Centre and the character of the email needed to be considered in order to determine that issue.

Did Mr Cullen trespass on the school grounds?

[31] At common law, trespass consists of setting foot on the land of another, or remaining there, without that other's permission, express or implied, unless there is some other legal justification for doing so.[19] However, throughout this case, the parties referred to trespass only in terms of the Trespass Act, s 3(1) of which creates an offence of trespass. Under s 3(1) the concept of trespass involves entering or remaining on the land of another without that other's authority, express or implied, with the common law component of absence of legal justification arising as a defence under s 3(2).[20]

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19 *Dehn v Attorney-General* [1988] 2 NZLR 564 (HC) at 572–574; and *Wilcox v Police* [1994] 1 NZLR 243 (HC) at 246.

20 *Wilcox v Police*, above n 19, at 246–247. The decision was upheld on appeal, in which the issue was whether the statutory defence of necessity in s 3(2) excluded a common law defence of necessity to a charge under s 3(1): *Wilcox v Police* [1995] 2 NZLR 160 (CA).

[32] Sections 3 and 4 of the Trespass Act relevantly provide:

> **3 Trespass after warning to leave**
>
> (1) Every person commits an offence against this Act who trespasses on any place and, after being warned to leave that place by an occupier of that place, neglects or refuses to do so.
>
> (2) It shall be a defence to a charge under subsection (1) if the defendant proves that it was necessary for him to remain in or on the place concerned for his own protection or the protection of some other person, or because of some emergency involving his property or the property of some other person.
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> **4 Trespass after warning to stay off**
>
> (1) Where any person is trespassing or has trespassed on any place, an occupier of that place may, at the time of the trespass or within a reasonable time thereafter, warn him to stay off that place.
>
> (2) Where an occupier of any place has reasonable cause to suspect that any person is likely to trespass on that place, he may warn that person to stay off that place.
>
> (3) Where any person is convicted of an offence against this Act committed on or in respect of any place, the court may warn that person to stay off that place.
>
> (4) Subject to subsection (5), every person commits an offence against this Act who, being a person who has been warned under this section to stay off any place, wilfully trespasses on that place within 2 years after the giving of the warning.
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> …

[33] In *Wilcox v Police*, Tipping J explained that:[21]

> … the concept of trespass for the purposes of s 3(1) involves simply entering or remaining on the land of another without that other's authority, express or implied. If there is entry onto the land of another with authority, it is necessary for that authority to be revoked before the person concerned can be a trespasser. That means … that a person entering with authority may have to be given two requests or warnings to leave. The first request will revoke the authority to be there, thus creating the person concerned a trespasser if he does not withdraw within a reasonable time. If there is still a failure to withdraw the person concerned can then be given the warning to leave of which s 3(1) speaks.

[34] The requirement to first revoke any licence to be on the land, and for a trespass to then occur before a formal warning under the Trespass Act can be given reflects the

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[21] *Wilcox v Police*, above n 19, at 247.

fact that the warning under the Trespass Act creates the foundation for offending rather than only civil liability. The Trespass Act introduces stricter formalities as a consequence.

[35] Whether Mr Cullen had trespassed when entering school grounds before any warning was given to him under the Trespass Act accordingly depends on whether he came onto the school grounds with the Board's authority.

[36] Mr Cullen argued that the school sports fields and grandstand were places open to the public after school hours when school teams are playing and he was entitled to come onto those grounds to exercise his NZBORA rights. The Judge held that school buildings and grounds were not public places:[22]

> [48] School buildings and grounds are not public spaces. A school Board is responsible for governing the school, including by setting the policies by which the school is to be controlled and managed.[23] In this case, the Board has set a policy for trespassers. This says that the School and its grounds "are not freely accessible to the public" (which correctly reflects the legal position) …

[37] Mr Cullen submitted that this conclusion was wrong. He relied on the definition of "public place" in the Summary Offences Act 1981 which, relevantly, defines a public place as:[24]

> **public place** means a place that, at any material time, is open to or is being used by the public, whether free or on payment of a charge, and whether any owner or occupier of the place is lawfully entitled to exclude or eject any person from that place; …

[38] As Mr Robertson pointed out, however, this definition exists in the specific context of a penal Act. It is inapplicable to the question of the character of school grounds in the context of the present proceedings.[25]

[39] We agree with the Judge that the school was not a place open to the public. Any member of the public has an implied licence to come onto private property for

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22 Substantive judgment, above n 5.

23 Education and Training Act 2020, s 125.

24 Summary Offences Act 1981, s 2(1) definition of "public place".

25 Compare *Peters v Electoral Commission* [2016] NZHC 394, [2016] 2 NZLR 690 at [79]–[81], where the definition was applied in the context of the Electoral Act 1993 because the Electoral Act has expressly imported it.

lawful reasons to communicate with the occupier.[26] An occupier is, however, entitled to limit the terms on which the implied licence applies and to revoke it at any time by making it clear to the person concerned that they may no longer remain on the property.[27] If the person does not comply with the request to leave and stay away within an appropriate timeframe, they become a trespasser.[28]

[40] To the extent that Mr Cullen came onto the school grounds to meet teachers and discuss students' progress, he did so pursuant to the implied licence. However, Mr Cullen regularly came onto school grounds for the purposes of picking up students or dropping them off or meeting with them or watching them play sport. The school has a well-publicised policy under which visitors are permitted to come onto the school grounds "for a specific reason and follow[ing] [the] visitors policy". This includes visitors signing in, something that the Board complained Mr Cullen did not do.

[41] The school's policies created a licence to come onto school grounds for legitimate purposes, and we consider that, prior to the email being sent on 16 March 2023, when Mr Cullen came to the school to meet the students, he did so pursuant to such a licence and was therefore present with authority. In our view, his failure to sign in, while potentially a breach of the terms of the licence, did not actually vitiate the licence, though the Board would have been entitled to revoke the licence for that reason.

[42] Mr Cullen had not been asked to leave the school at any time prior to the 16 March 2023 email (notwithstanding his failures to sign in). It follows that he was not a trespasser at the time the email was sent. Nor is it clear that the Board had reasonable cause to suspect Mr Cullen was likely to trespass. Therefore, the Board had no basis on which to give, or decide to give, a warning under the Trespass Act.

Did the Board issue a warning under the Trespass Act?

[43] We have held that Mr Cullen was not trespassing at the time the 16 March 2023 email was sent and the Board accordingly had no basis for issuing a warning under the

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26 *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145 at [11]–[12].
27 At [12]–[13].
28 At [13].

Trespass Act. The 16 March email therefore was not effective as a formal warning. Nevertheless, it clearly conveyed to Mr Cullen that he was no longer authorised to come onto the school grounds. Likewise, the letter of 4 May 2023 made it clear that he was no longer authorised to come onto the grounds of the Aquatic Centre. We consider that the effect of the 16 March email and 4 May letter was to revoke Mr Cullen's licence to come onto those premises.

[44] We also consider that the Board did not, as a matter of fact, actually purport to give a warning under the Trespass Act. Its communication to Mr Cullen simply advised that the Board was "preparing" a notice under the Trespass Act. But, as the Judge said, that did not prevent Mr Cullen bringing these proceedings challenging the Board's decision to revoke his right to come onto school property. If the Board's decisions are not successfully challenged, a warning under the Trespass Act can be given if Mr Cullen comes on school grounds again.

[45] Mr Cullen argued that the Board had no authority to give any notice in relation to the Aquatic Centre as it was not the occupier of that place. We accept that there is an issue whether the Board had the authority to revoke any licence Mr Cullen had to enter the Aquatic Centre when it gave the notice on 16 March 2023. But given Belgravia confirmed its support of the Board's decision in its letter of 21 April 2023 nothing turns on this. Mr Cullen's licence to go to the Aquatic Centre has been revoked with the agreement of Belgravia, and this has been communicated to Mr Cullen. If he now enters the school grounds or the Aquatic Centre, a formal warning notice can be given under the Trespass Act which will lead to an offence if the warning is disobeyed.

[46] The fact that Mr Cullen may have wished to exercise NZBORA rights on school grounds and the Aquatic Centre did not preclude the Board and Belgravia from revoking the implied licence. We agree with the Judge that NZBORA applied when these decisions were made.[29] But, as we come to later, the rights Mr Cullen asserted were either not engaged, or not limited by the decision or, if they were limited by the decision, such a limitation can be demonstrably justified under s 5 of the NZBORA.

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[29] See [52] below.

Issue (e): did the Judge fail to consider procedural defects in the Board's decision-making process?

Was Mr Cullen entitled to be heard in relation to the Board's decision?

[47] In his pleadings, Mr Cullen only particularised one procedural defect, namely that he was denied an opportunity to be heard before the Board made its decision — that is, he alleges a breach of natural justice. The Judge did not refer to this complaint and we accept Mr Cullen's submission the Judge erred in not addressing it. However, we see no merit in the complaint itself.

[48] The requirements of natural justice depend on the context.[30] As discussed, Mr Cullen's right to come onto the school grounds arose under a licence which the school was entitled to revoke. The school's well-publicised code of conduct for visitors coming onto school grounds, which applied to all forms of communication and conduct, included treating everyone with respect. Examples of "unsuitable conduct" included "threats, bullying, harassment" and "placing unreasonable and excessive expectations on staff time or resources". Possible responses to contravention of the code included:

> The school (headmaster, board member, or staff member) may ask a person to leave the school premises by revoking their permission to be on the school grounds, then asking them to leave under section 3 of the Trespass Act 1980.

[49] We consider it may be necessary for the daily operation as a school, and the safety of staff and students, for such powers to be able to be exercised quickly and efficiently, and without undue formality when appropriate. We do not consider that Mr Cullen was entitled to be heard before the licence was revoked in the present circumstances. The students, and their parents/caregivers continued to be able to exercise their rights in relation to school grounds, and Mr Cullen was able to engage with the Board to seek to have his rights restored. In these circumstances, there was no basis on which Mr Cullen could have expected to be heard before the licence was revoked.

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30 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141 per Cooke J.

Did the Board act unreasonably?

[50] The allegation of unreasonableness was not particularised in the pleadings. On appeal, Mr Cullen argued that the Board had acted unreasonably because it made its decision for an improper purpose. The improper purpose was said to be that, although the Board was only entitled to issue a trespass notice for the purposes of protecting its property rights, it acted as it did because it disliked Mr Cullen's views and wished to prevent him from meeting with students.[31]

[51] Given that this complaint had not been pleaded, the Judge did not err in failing to consider it. Nor do we consider there is any merit in the ground. As we have explained, the only authority Mr Cullen had to come onto the grounds of the school and the Aquatic Centre was the licence which the Board and Belgravia were entitled to (and did) revoke. There was no obligation to identify a purpose connected with their property rights and confine the reason for that decision to such a purpose. We also consider the Board's purposes in revoking the licence were proper ones.

Was the Board required to consider NZBORA rights in making its decision?

[52] The High Court Judge found that the decisions to issue a trespass notice involved a judicially reviewable power, and that the NZBORA applied to the Board's decision.[32] Whether the decisions of a school board involve public functions such that s 3(b) of the NZBORA applies, and judicial review is available, will depend on the nature of the decisions being made.[33] Here we agree with the High Court that the NZBORA applied given the Board's public functions under the Education and Training Act 2020, including the functions arising from the duty of ensuring a physically and emotionally safe place for staff and students under s 127(2)(c)(i). Section 127(2)(c)(ii) also obliged the Board to ensure that student rights under the NZBORA are given effect to. The Board was also exercising public

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31 In submissions, this complaint was reframed to include an assertion (not pleaded) that the Board had taken into account irrelevant considerations. This new allegation does not add to the existing complaint in any significant way and we do not consider it separately.

32 Substantive judgment, above n 5, at [51]–[52] and [57]; and New Zealand Bill of Rights Act, s 3(b).

33 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [38]–[49]. Schools are Crown entities in accordance with s 7(1)(d) of the Crown Entities Act 2004.

functions when restricting Mr Cullen's mentoring of students in association with their schooling.

[53] Mr Cullen's pleaded claim was that the Board's decision infringed his and the students' NZBORA rights.[34] In this Court, however, Mr Cullen argued — for the first time — that the Board had a separate obligation to consider the potential effect on his NZBORA rights as part of its decision-making process in addition to its obligation to make a decision that did not substantively infringe his NZBORA rights, and the Judge erred in failing to consider this aspect of the decision-making process.

[54] The new argument rested on the decision in *New Health New Zealand Inc v Director-General of Health*.[35] However, at the time of Mr Cullen's appeal in this case, an appeal against the *New Health* decision was pending, and due to be heard by a full court of this Court the following month. In the course of the hearing, we indicated that our decision should await the Full Court's decision. However, it is not known when that decision will be delivered, and we now consider it unnecessary to delay our decision further. This is because we are satisfied the outcome will be the same, regardless of the result in the *New Health* appeal.

[55] In *New Health*, Radich J held that:[36]

> [84] It seems sufficiently clear on the basis of New Zealand authorities that, when discretionary decisions on the part of those captured by s 3 of the Bill of Rights Act might restrict a right protected under the Act:
>
> (a) the decision-maker must address that restriction and consider whether it is demonstrably justified under s 5; and
>
> (b) the Court must be satisfied that any such restriction is so justified.
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> …

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34 Specifically, the rights under ss 14, 16, 17, 19 and 27(1). The complaint of a breach of s 27(1) was that the trespass notice that Mr Cullen contended had been issued would infringe the rights of the students to be represented by him at meetings with the staff, which was different from the complaint of breach of natural justice raised on appeal and discussed earlier.

35 *New Health New Zealand Inc v Director-General of Health* [2023] NZHC 3183, [2024] 2 NZLR 1. This decision was delivered only weeks before Campbell J's decision. Mr Cullen did not raise it and the Judge (understandably) did not refer to it.

36 Footnote omitted.

> [86] It follows as a matter of course that a finding in favour of a claimant on either of the two requirements mentioned in [84] above would enable the Court to go on and consider the question of relief. In that sense, it can be said that the first of the two requirements is a mandatory relevant consideration.

[56] However, Radich J went on to observe that, even if the only complaint was the failure to consider whether the proposed restriction on a NZBORA right was demonstrably justified, the court will likely consider both requirements in any event before determining whether relief should be granted:[37]

> [89] … in the event that there was a finding in favour of a claimant on the first of the two requirements, the Court will need to consider the exercise of its discretion to grant relief. One of the factors for a Court in exercising that discretion is that relief must be of a possible practical value. A Court will not be likely to exercise its coercive powers to no purpose. And so, if, despite a procedural error, the substantive Bill of Rights Act outcome is sufficiently clear — one way or another — the Court may simply say so. There may be no point in those circumstances in sending it back to be reconsidered.

[57] For the reasons we come to shortly, we agree with the Judge that the Board's decision to revoke the implied licence either did not engage Mr Cullen's NZBORA rights or did not infringe those rights or, if there was infringement of the rights, the limit was demonstrably justified under s 5 of the NZBORA.[38] Even if the Full Court upholds the decision in *New Health* and concludes that there is a separate obligation on a decision-maker to subjectively consider whether rights are being unjustifiably limited, there would no basis for granting relief in the present case, given our conclusion that the Board's decision was demonstrably justified, and given that the Board did consider that limiting Mr Cullen's ability to be on school grounds was justified.

Issue (f): did the Board unjustifiably limit Mr Cullen's and the students' NZBORA rights?

[58] Mr Cullen asserted that the 16 March 2023 email constituted a breach of NZBORA rights enjoyed by both him and the students with whom he was associated. The Judge held that these rights either were not engaged or had not been infringed or that any limitation on them were reasonable. On appeal, Mr Cullen challenged the

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37 Footnote omitted.

38 See below at [58]–[62].

Judge's conclusions regarding the rights to freedom of expression, peaceful assembly and association.[39]

The right to freedom of peaceful assembly

[59] Mr Cullen had argued that he wished to exercise this right by being on the school's sports fields or at the Aquatic Centre. The Judge held that this right was not engaged because an assembly in this context was a gathering of several persons for a particular reason and Mr Cullen had not identified any such gathering that he would have wished to attend, but for the email. He concluded that, even if the right were limited, the limitation would have been reasonable, given Mr Cullen's failure to comply with school policies and his disruptive approach in meetings.[40]

[60] In this Court, Mr Cullen reframed his argument slightly, submitting that the right to peaceful assembly extended to the school's sports fields and grandstands, where he has regularly assembled with various students to support school sports teams. Mr Cullen also submitted that the right encompassed his meetings with students at the Aquatic Centre. We do not accept Mr Robertson's submission that the right to peaceful assembly is best viewed in the context of protests rather than private meetings. The right extends more broadly to include ordinary gatherings that form part of community life.[41] We therefore accept that this NZBORA right was limited. However, we agree with the Judge that Mr Cullen's conduct meant that the Board's decision to revoke Mr Cullen's implied licence to be on the school grounds was a reasonable limitation of that right under s 5 of the NZBORA.

The right to freedom of association

[61] Mr Cullen had argued that a trespass notice would infringe his freedom to associate with the students to whom he provided services. The Judge did not accept that a trespass notice would constitute a limit on that right and found that, in any event,

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39 In the High Court Mr Cullen had also complained that his rights to freedom from discrimination on the basis of political views and to natural justice had been infringed. He did not pursue these on appeal.

40 Substantive judgment, above n 5, at [61].

41 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [110] per McGrath J; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [15.5.1].

such a limit would be justified.[42] We accept that the decision limited Mr Cullen's rights of association, given that he wished to associate with the students in connection with their wider education as part of his tutoring/mentoring programme. But we agree with the Judge that this limitation was demonstrably justified under s 5 of the NZBORA. The limitation was confined to activities on school grounds that the Board considered had become disruptive to staff and other students. In a practical sense, however, Mr Cullen was not prevented from associating with the students because he was entitled to (and did) continue to meet with students outside the school grounds. Given the circumstances that led to the implied licence being revoked, it was entirely reasonable for the school to exclude Mr Cullen from its grounds.

The right to freedom of expression

[62] Mr Cullen had argued that the right to freedom of expression was engaged because it could be inferred from the Board's decision that members of the school community who hold views critical of the school can be trespassed. The Judge considered that the evidence did not support that inference — the Board's actions had been a response to Mr Cullen's flouting of school policies, and his argumentative and combative approach to meetings with teachers and staff.[43] We agree with the Judge that, to the extent that Mr Cullen's freedom of expression was limited, the limitation was demonstrably justified.[44] In any event, Mr Cullen remained free to express his views about the school and its teachers. The revocation of the implied licence did not affect that.

Issue (g): did the Judge err in considering the effect of s 13 of the Trespass Act?

[63] In his amended statement of claim, Mr Cullen relied on s 13(c) of the Trespass Act to assert that the Board was not entitled to trespass him, revoke his implied licence to enter or otherwise extinguish his rights to access the MAGS grounds or buildings or the Aquatic Centre. Relevantly, Mr Cullen pleaded that he was entitled to enter school buildings in order to attend meetings of the Board and to inspect the minutes of board meetings.

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42 Substantive judgment, above n 5, at [62].
43 At [60].
44 See *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 33 at[67]–[104].

[64] Section 13 provides that:

> **13 Savings**
>
> Nothing in this Act shall derogate from anything that any person is authorised to do by or under any other enactment or by law, or restrict the provisions of any of the following enactments and instruments:
>
> …
>
> (c) any enactment or instrument conferring a right of entry on any land.

[65] The Judge dealt with this issue as follows:[45]

> [34] The Board acknowledged that Mr Cullen is entitled, by virtue of the Local Government Official Information and Meetings Act 1987 [LGOIMA] to attend Board meetings. The Board said that, as the proposed trespass notice would prohibit Mr Cullen from entering the School to attend those meeting in person, they would facilitate his attendance by video conference. Mr Cullen's response was that the [LGOIMA] requires attendance to be in person. This issue was not raised on the pleadings, there was no evidence that Mr Cullen had ever attended Board meetings or wanted to, and the parties made only passing reference to it in their submissions. It is not a matter that I need to decide.

[66] There was no challenge to this aspect of the decision. Instead, Mr Cullen complained that, in the later discussion regarding the reviewability of the Board's decision, the Judge had misinterpreted this Court's decision in *Board of Trustees of Nelson College v Fitchett*.[46] That case was concerned with the right of a board to exclude or remove a person from a meeting under ss 48 and 50 of the Local Government Official Information and Meeting Act 1987 and the effect of doing so on the person's entitlement to attend later meetings. Mr Cullen made the following submission:

> … The High Court read the decision [in *Fitchett*] as saying that a Board of Trustees could not issue a trespass notice with the intention of excluding a member of the public from attending its meetings. That is true but the decision has wider applicability than this. It is not the case that a member of the public is excluded from attending meetings of a school board when a s4 notice has been issued for another purpose. Properly read, *Fitchett* says that a Board of Trustees cannot issue a s4 notice that excludes a member of the public from attending its meetings.

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45 Substantive judgment, above n 5.

46 *Board of Trustees of Nelson College v Fitchett* [2017] NZCA 572, [2018] NZAR 327.

[67] Mr Cullen then sought to apply what he says is the effect of *Fitchett* on a person attending a suspension or other disciplinary meeting as a parent or representative.

[68] The argument Mr Cullen now wishes to advance has no basis in his pleadings. He did not seek to amend the pleadings in this Court. Moreover, since we have concluded that the email was not a trespass notice and that the Board was not entitled to issue a trespass notice, *Fitchett* can have no effect on this case. We therefore decline to engage with this ground of appeal.

Appeal against the costs decision

[69] The fixing of costs is a matter of discretion to be exercised by reference to the principles set out in the High Court Rules 2016.[47] Since an appeal against a costs decision is an appeal against the exercise of a discretion, an appellant must show that the Judge acted on a wrong principle, failed to take into account a relevant matter, took account of an irrelevant matter or was plainly wrong.[48]

[70] Mr Cullen submitted that the Judge erred in ordering him to pay costs in the High Court for two reasons. First, because he was partially successful in that the Judge held the Board's decision was reviewable and, secondly, because he was trying to raise an issue of public importance in terms of the relationship between the NZBORA and the exercise of statutory powers of decision-makers.

[71] As to the first, r 14.7(d) of the High Court Rules provides that the court may refuse to award costs or reduce the amount payable if the successful party "has failed in relation to a cause of action or issue which significantly increased the costs of the party opposing costs". In the High Court, Mr Cullen submitted that costs should be reduced because the Board failed in its argument that its decision was not susceptible to judicial review. The Judge had rejected this submission on the basis that the Board had succeeded overall and that his conclusion on the issue was a middle ground between the parties' respective positions.[49] Before us, the Board submitted, without challenge, that most of the hearing in the High Court focused on the alleged breaches

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47 High Court Rules 2016, rr 14.1–14.10.
48 *Harrington v Wilding* [2019] NZCA 605 at [49].
49 Costs judgment, above n 12, at [4].

of the NZBORA, rather than whether the decision was susceptible to review. In the circumstances, we see no error in the Judge's decision not to reduce costs on the basis of Mr Cullen's partial success.

[72] Rule 14.7(e) provides that the court may refuse to award costs or reduce the amount payable if "the proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding". The unsuccessful party needs to establish that the proceeding concerned a matter of genuine public interest, was of general importance beyond the interests of the particular litigant and had merit.[50]

[73] Whether costs should have been refused or reduced on account of public interest does not appear to have been raised in the High Court. In this Court, Mr Cullen says that he was trying to raise the relevance of the NZBORA to statutory decision-making in the same way the issue had been raised in *New Health*. We agree that the question is one of some public importance. However, it does not appear that the issue was raised in this way in the High Court, either substantively or in relation to costs. The case advanced in the High Court focussed on Mr Cullen's own position and had limited significance beyond that. There is no basis to interfere with the costs decision on this ground.

Costs on appeal

[74] The Board sought increased costs on the appeal because Mr Cullen did not file a compliant case on appeal.[51] The non-compliance was due to issues with the hyperlinks in the electronic case on appeal. Katz J waived the requirement to file a compliant case on appeal on 12 April 2024. Increased costs are not warranted. Costs will be awarded on the usual basis.[52]

[75] Mr Pa'u did not seek costs.

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50 *Taylor v District Court at North Shore (No 2)* HC Auckland CIV-2009-404-2350, 13 October 2010 at [9]; and *Fluoride Action Network (NZ) Inc v Hastings District Council* [2025] NZCA 315 at [15].

51 In accordance with r 40 of the Court of Appeal (Civil) Rules 2005.

52 Mr Cullen has been adjudicated bankrupt but that does not preclude an award of costs being made: see *Rabson v Chapman* [2016] NZCA 45 at [12]–[13].

Result

[76] The appeal is dismissed.

[77] The appellant must pay the second respondent costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:
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