IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-527
[2021] NZHC 307

IN THE MATTER	of an application for judicial review under the Judicial Review Procedure Act 2016
BETWEEN	FINANCIAL SERVICES COMPLAINTS LIMITED Plaintiff
AND	THE CHIEF PARLIAMENTARY OMBUDSMAN Defendant

Hearing: 8 and 9 July 2020

Counsel: K Murray and N F Flaws for Plaintiff
M T Scholtens QC and D W Ballinger for Defendant

Judgment: 26 February 2021

JUDGMENT OF GRICE J

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Introduction

[1] This is an application for judicial review of a decision of the Chief Ombudsman. Under s28A of the Ombudsman Act 1975 Financial Services Complaints Limited (FSCL) made an application to the Chief Ombudsman to use the name "Ombudsman" in connection with its financial dispute resolution scheme services. He refused to give consent. FSCL claims that the Chief Ombudsman's decision to refuse was unlawful, unreasonable, unfair and invalid in a public law sense. It seeks an order quashing the decision.

[2] FSCL is one of four scheme providers approved by the Minister to provide registration and dispute resolution services for financial service providers under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act). Financial service providers include banks, finance companies, insurers and other providers who offer financial services.

[3] The FSP Act makes it mandatory for a financial service provider to subscribe to a scheme. The schemes compete among themselves for financial service provider members who select their own scheme provider. Customers who wish to complain about their financial service provider must go to the scheme their provider has chosen for dispute resolution services. If a customer contacts the wrong scheme that scheme will refer them to the scheme to which their financial service provider belongs.

[4] FSCL was the first scheme approved under the FSP Act and now has more than 7,000 scheme members.

[5] The other schemes approved under the FSP Act are:

(a) The Banking Ombudsman Scheme (BOS);

(b) The Insurance and Financial Services Ombudsman Scheme (IFSO);[1] and

(c) Financial Dispute Resolution Service Ltd (FDRS).

[6] BOS and IFSO operated before the FSP Act came into force. They were established in the 1990s by the banking and insurance industries respectively who opted to make voluntary provision for dispute resolution services for customers with complaints about their services. Around the time they were established the Chief Ombudsman allowed those voluntary schemes to use the name "Ombudsman" in their titles.

[7] FSCL applied to the Chief Ombudsman for approval to use the name in order to describe itself as "A Financial Ombudsman Service". In addition, it sought approval for its Chief Executive (at present Ms Susan Taylor) to be described as "Financial Ombudsman". FSCL subsequently amended its application to seek approval for the description "FSCL – a Financial Ombudsman Service" and its CEO be described as "Financial Ombudsman and CEO".

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1 Previously the Insurance and Savings Ombudsman.

[8] FSCL, which was established in 2010, has made three unsuccessful applications to the Chief Ombudsman for consent to use the name "Ombudsman". This review relates to the second refusal by the present Chief Ombudsman.[2] His first decision of 15 July 2016 was set aside by the Court of Appeal and remitted to him for reconsideration with directions. The second decision now under review was delivered on 20 June 2019 (the 2019 decision).[3]

[9] FSCL says the Chief Ombudsman's 2019 decision to decline approval should be set aside and this Court should make an order directing the Chief Ombudsman to consent to FSCL's application.

[10] While there are various heads of claim in the application for judicial review of the 2019 decision, the crux of FSCL's case is that the Chief Ombudsman did not act in good faith and in particular he predetermined that he would refuse to grant approval for the use of the name "Ombudsman".

[11] FSCL says this is evident from an examination of the reconsideration process he undertook, the delay in making the final decision, and an analysis of the contents of the 2019 decision itself. In addition, FSCL points to evidence in the form of emails that the Chief Ombudsman exchanged with the Speaker of the House which indicated he had made up his mind to refuse the application. In essence, FSCL says that the investigation and the decision by the Chief Ombudsman was just "going through the motions".

[12] FSCL also says the delay by the Chief Ombudsman in making the decision of some 15 months verges on contempt of court. In addition, instead of embarking on a timely reconsideration as directed by the Court of Appeal, without the knowledge of

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2 That decision was judicially reviewed and the matter sent back for reconsideration on 28 February 2018: *Financial Services Complaints Ltd v Chief Ombudsman* [2018] NZCA 27, [2018] 2 NZLR 884. Mr Boshier is currently the Chief Ombudsman. He was appointed Chief Ombudsman in December 2015.

3 It was a reconsideration of FSCL's application following a direction by the Court of Appeal in February 2018 when it set aside the first decision dated 15 July 2016 when Mr Boshier had refused consent. The July 2016 decision had been a voluntary reconsideration by Mr Boshier of an earlier decision refusing consent, dated 24 June 2015, made by his predecessor as Chief Ombudsman, Dame Beverley Wakem.

FSCL, the Chief Ombudsman had approached the Speaker of the House to seek a legislative change which would restrict or prohibit the use of the name Ombudsman.

[13] The Chief Ombudsman denies that he predetermined FSCL's application or that he made any errors of law. He says he acted in good faith with an open mind throughout and that the process he followed was fair. Mr Boshier says the 15 months it took from commencing the reconsideration to his final decision is explained by the work required to investigate and consider matters relevant to the application, as well as his other obligations (including international commitments) and his workload as Chief Ombudsman. He says he allowed ample opportunity for FSCL to make submissions at appropriate times. Mr Boshier says he took into account the directions of the Court of Appeal in his reconsideration,[4] but the weighting of the relevant factors in reaching his decision was a matter for him, as was the final decision.

[14] The Chief Ombudsman says his approach to the Speaker was not sinister. He explained in his affidavit that he had been concerned about the time and cost of disputes over applications for use of the name. He wanted to avoid future disputes. The issue of legislative change had come up at the time of a March 2018 Parliamentary Officers Committee following a discussion about the Court of Appeal decision. He said he followed this discussion up by writing to the Speaker on 3 April 2018 to enquire about the possibility of future restrictions on the use of the name and to provide some options to the Speaker for an approach.

[15] Furthermore, the Chief Ombudsman explained that his approach and emails to the Speaker were quite separate from, and did not affect, his reconsideration of FSCL's application. Once he had raised the matter the parliamentary or ministerial process took over and he had little opportunity for intervention. The Chief Ombudsman said that there had been no reason to notify FSCL as he had always anticipated there would be a savings provision in any resulting legislation which would give FSCL the benefit of any approval to use the name if that was the result of his reconsideration of the FSCL application. A savings provision was proposed in a paper he had sent the Speaker.

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4 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 2.

[16] Two years after the Chief Ombudsman's approach to the Speaker the Ombudsmen (Protection of Name) Amendment Act 2020 was passed and came into force.[5] It effectively excludes any private industry body from obtaining approval to use the name in the future. The amended s 28A allows for only listed departments and public bodies to apply to the Minister for permission to use the name "Ombudsman". Savings provisions allow the continued use of the name by the Insurance and Financial Services Ombudsman Scheme (IFSO), the Banking Ombudsman Scheme (BOS) and for FSCL to use the name in terms of any approval granted as a result of the Chief Ombudsman's reconsideration of the FSCL application following the 2018 Court of Appeal decision.[6]

[17] Numerous documents were produced and referred to in the course of submissions. The Chief Ombudsman's decision-making spanned 15 months. The reasons are contained in the three provisional and final decisions produced in that period. Also included were FSCL's responses to the provisional decisions and the evidence relied upon by the Chief Ombudsman.

[18] On its face the final decision might have been unassailable. The process was fair, the delay justified in light of the iterative process adopted as well as the Chief Ombudsman's other commitments and there was sufficient evidence for the refusal. The reasons were adequate and the Chief Ombudsman took into account the directions of the Court of Appeal. It was for him to weigh the evidence and reach the final decision.

[19] However, the evidence is not confined to the face of the decisions and the decision papers. The actions and comments of the Chief Ombudsman made outside the decision-making process before the final decision was made are relevant. In particular they shed light on the views of the Chief Ombudsman and whether the decision was predetermined.

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5 Ombudsmen Act 1975, s 28A (as amended) came into force 11 March 2020.
6 Ombudsmen Act 1975, sch 1AA, pt 1.

[20] I conclude that predetermination existed so the decision must be set aside. I now consider the matter in more detail and start with the protection of the name and the history leading to the present case.

Parliamentary Ombudsmen

[21] "Ombudsman" (the name) is a protected name. The Chief Ombudsman may consent to an application by any person to use the name under s 28A of the Ombudsmen Act 1975. At the time of FSCL's application, this provided:

> **28A Protection of name**
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> (1) No person, other than an Ombudsman appointed under this Act, may use the name "Ombudsman" in connection with any business, trade or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman.
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> (2) Every person commits an offence and is liable on conviction to a fine not exceeding $1,000 who contravenes subsection (1).

[22] In 1962, New Zealand was the first country outside Scandinavia to adopt the Ombudsman concept.[7] It now exists in many countries. It was originally the name given to a Swedish institution established with the function of ensuring the executive was observing the country's laws.[8]

[23] An Ombudsman is an independent officer of Parliament appointed by the Governor-General on the recommendation of the House of Representatives.[9] Parliamentary Ombudsmen have the important constitutional role of investigating complaints about the administrative conduct of executive government and government agencies. In effect, Parliament has delegated to the ombudsmen some of its own authority and power. The special constitutional significance of this role is underscored by statutory provisions preventing Parliamentary Ombudsmen from holding any other office, the independent setting of their remuneration and their security of tenure.[10]

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7 Parliamentary Commissioner (Ombudsman) Act 1962, s 2(2); and Ombudsmen Act 1975, s 3(2).
8 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 2, at [5].
9 Parliamentary Commissioner (Ombudsman) Act 1962, s 2(2); and Ombudsmen Act 1975, s 3(2).
10 Ombudsmen Act 1975, ss 4, 5 and 9.

[24] In the 1970s, the then Chief Ombudsman, Sir Guy Powles, drew attention to the need to protect the "Ombudsman" title. By then it seems there was evidence of proliferation of the name and its use beyond the constitutional parliamentary role elsewhere. This initiative was taken up by Sir Guy Powles' successor, Sir John Robertson. Sir John was particularly concerned about the proliferation of the use of the name happening overseas. A 1995 statutory amendment incorporated s 28A, requiring consent by the Chief Ombudsman for the use of the name.

[25] Sir John Robertson drew up what he described as "some basic criteria protecting the interests of consumers" to guide the consideration of applications under s 28A(1).[11] The criteria (the Robertson guidelines) were as follows:[12]

> 1. Unless authorised by statute, no position entitled "Ombudsman" should be established in any area where the Ombudsman has or may be given jurisdiction under either the Ombudsmen Act 1975 or the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987. Such a position would confuse the public and undermine the constitutional role of the statutory Ombudsmen.
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> 2. Where it is proposed to have an "Ombudsman" type position which did not conflict with the position in (1) above, the holder of the name "Ombudsman" must be appointed and funded in a manner which enables him/her operate effectively and independently of the organisation which will be subject to the role. The position should also have a publicly notified Charter in plain language which is constantly before the consuming public. The appointed Ombudsman should have the right to make recommendations to change any provisions of the Charter.
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> 3. The role of the person proposed as an "Ombudsman" is to receive complaints directly from a complainant, free of charge, and impartially investigate the facts, and conclude with a decision to not sustain or sustain and, if appropriate, achieve a remedy. The name Ombudsman would not be agreed if the role was seen to be one of counsel or advocate for special interest groups. The position will need to be seen to be independent and impartial by both the consumer and the organization to ensure maximum effectiveness and influence.
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> 4. The use of the name by a non-Parliamentary Ombudsman will be of greatest value to consumers when the appointee operates in a jurisdiction which is national in character. Permission to use the name

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11 John Robertson "Report of the Chief Ombudsman on Leaving Office" [1993–1996] I AJHR A3A, at 16

12 John Robertson and Nadja Tollemache "Report of the Ombudsmen for the year ended 30 June 1992" [1991–1993] I AJHR A3 at 36–37.

> "Ombudsman" will not normally be granted for unique local or regional roles.
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> 5. Where all the above criteria are met the term "Ombudsman" should not be used alone, but only in conjunction with a description which makes the role clear, eg, "Banking Ombudsman"; the name on this basis is to be used in the public Charter and in correspondence and publicity.
>
> 6. All approvals will require that the approved Ombudsman will produce an annual report and make it publicly available. Additionally, it will be desirable that the Ombudsman scheme be subject to periodic public reviews to allow consumers to indicate the degree of credibility which they accord the complaint system being followed.

[26] Sir John considered these guidelines would ensure to the maximum extent possible that the name would only be used in New Zealand where the basic principles underpinning the ombudsman concept were present: namely independence, impartiality, and a non-adversarial investigative approach with the power to achieve resolutions. Further, the requirement the name be used only in conjunction with a description would minimise confusion.[13]

[27] In his term, Sir John gave consent to use the name to both ISFO and BOS.

[28] Sir Brian Elwood, Sir John Robertson's successor, was concerned about the number of approaches that were made to him for use of the name, "Ombudsman". In a report, he noted that in the year ended June 2001 there had been five approaches to use the name. One of those became a formal application – the proposal to create an Electricity Commissioner.[14] Sir Brian proposed a further policy threshold be applied to applications for approval. He said that approval should be given only rarely:[15]

> Parliament has given to the Ombudsmen some of the authority and power it would otherwise retain to investigate complaints about the administrative conduct of Executive Government and of government agencies. I have come to the view that the name '*Ombudsman'* should basically be protected to be used to achieve that purpose. *Only on rare occasions when the public interest suggests that the name should be further or more widely used in a particular circumstances, should the name be used outside of the Parliamentary process or Public Service.*

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13 John Robertson *Protection of the Name "Ombudsman"* (International Ombudsman Institute, Occasional Paper 43, February 1993) at 5.

14 Sir Brian Elwood *Report of the Ombudsmen for the year ended 30 June 2001* (Office of the Ombudsmen, 2001 Parliamentary Papers Presented to the House of Representatives, vol I, 30 June 2003) at 27.

15 At 32 (emphasis added).

FSCL's first application: Chief Ombudsman Wakem

[29] The present Chief Ombudsman's predecessor, Dame Beverley Wakem, received an application from FSCL to use the name "Ombudsman" on 27 May 2011. At that time, FSCL expressed its concern about the use being made of the title "Ombudsman" for commercial purposes by the (then) Insurance and Savings Ombudsman.

[30] Chief Ombudsman Wakem responded to FSCL's application in June 2011, saying she would not be approving any further use of the name in the near future. She noted that its use should be limited to national bodies established by governments to perform the functions of the classical ombudsman.

[31] In March 2015, Chief Ombudsman Wakem approved an application by the existing Insurance and Savings Ombudsman to change its existing title to the "Insurance and Financial Services Ombudsman Scheme Inc". This was without reference to FSCL, despite the incorporation of the words "financial services" which appeared in FSCL's title.

[32] This resulted in a further application by FSCL in April 2015. FSCL referred to its serious concern about the approval of IFSO's name change. In May 2015, FSCL followed up with a more detailed application for approval based on the Robertson criteria.

[33] A month later, Chief Ombudsman Wakem advised FSCL that its application was unsuccessful. Ombudsman Wakem expressed concern about the proliferation of the name and was not persuaded that the "greater public interest" favoured an additional, non-parliamentary ombudsman.[16] She said that the fact that the Banking Ombudsman and the Insurance and Financial Services Ombudsman Scheme had received consent to use the name were accidents of history "in that these private sector 'ombudsmen' existed prior to the advent of the FSP Act". Their approvals had no

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[16] Letter from Dame Beverly Wakem (Chief Ombudsman) to Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's application for use of the name "Financial Ombudsman" (24 June 2015).

bearing on whether other schemes should be able to use the name in their title. She said:

> I see no public interest grounds in the arguments that have been advanced by FSCL that would warrant granting it consent to the use of the name "Ombudsman". New Zealand is the only country where the name is protected. This ensures that proliferation of what is the title of a public office, the holder of which is an Officer of Parliament, is not confused with the providers of consumer complaints services, which serve different public interest purposes.

[34] FSCL issued judicial review proceedings in relation to Chief Ombudsman Wakem's decision. An application was made to strike those proceedings out on the basis that the decision was not reviewable due to the immunity provisions in the Act. In April 2016, Toogood J dismissed the application.[17] He held that the statutory immunity under the Ombudsmen Act was limited to the Ombudsman's investigative functions as outlined in the Act. His Honour distinguished those functions from the "ancillary administrative powers" of the Chief Ombudsman.[18] Immunity did not extend to ancillary powers conferred in other parts of the Act, including the Chief Ombudsman's discretion under s 28A to permit or decline the use of the "Ombudsman" name.[19]

Reconsideration – by Chief Ombudsman Boshier

[35] Mr Boshier was appointed Chief Ombudsman in 2015. Following Toogood J's decision in April 2016, FSCL agreed that Mr Boshier should reconsider the application and make the decision afresh. Mr Boshier wrote to FSCL at the time saying "I do not know what view of the matter I have at the moment, and feel that I should have an open mind …".[20]

[36] The Chief Ombudsman made a final decision to refuse approval on 15 July 2016. This decision was the subject of a judicial review application which led to the setting aside of that decision by the Court of Appeal.[21] The Court of Appeal directed

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17 *Financial Services Complaints Ltd v Wakem* [2016] NZHC 634, [2016] NZAR 717.
18 At [39].
19 At [46].
20 Letter from Peter Boshier (Chief Ombudsman) to Susan Taylor (Chief Executive Officer of FSCL) and Ken Johnston (Board Chair of FSCL) regarding the use of the name "Ombudsman" (12 May 2016).
21 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 2, at [58].

that the matter be reconsidered in terms of its judgment. It is the reconsideration that is the subject of the present review.

[37] Before turning to the grounds of review pleaded in relation to the reconsidered decision, I deal with two preliminary evidential matters. The first is a claim of parliamentary privilege and the second relates to the evidence generally.

Parliamentary privilege

[38] During this proceeding, evidence was put before the Court relating to the Chief Ombudsman's engagement with the Speaker and other officials concerning the progress of the legislation advanced to further restrict the use of the name Ombudsman.

[39] In her oral submissions, Ms Scholtens QC cautioned the Court about relying on evidence of any matters "incidental" to parliamentary proceedings. She indicated that care was necessary to ensure that evidence relied upon did not offend against the provisions of the Parliamentary Privilege Act 2014.

[40] Ms Scholtens noted that the issue of parliamentary privilege had recently been before the Court of Appeal in *Kiwi Party Inc v Attorney-General*.[22] In that case, the applicant had sought declarations concerning various gun laws enacted following the Christchurch shootings at the Al Noor Mosque.[23] The High Court had struck out a number of the causes of action. One of the reasons for doing so was that they challenged the lawfulness of the processes and decisions made by a select committee.[24] The Kiwi Party appealed. The Court of Appeal was required to consider the effect of the Parliamentary Privilege Act 2014 and whether the High Court was correct in relying on the provisions of that Act to strike out those causes of action.

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22 [2020] NZCA 80, [2020] 2 NZLR 224.
23 At [1]–[4].
24 At [28]–[45].

[41] The Court of Appeal noted that one of the principles underpinning the Parliamentary Privilege Act was set out in Art 9 of the Bill of Rights Act 1688. This states:[25]

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

[42] The relevant provision in the 2014 Act is:[26]

> **11 Facts, liability, and judgments or orders**
>
> In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, *concerning proceedings in Parliament*, by way of, or for the purpose of, all or any of the following:
>
> (a) questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament:
>
> (b) otherwise questioning or establishing the credibility, motive, intention, or good faith of any person:
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:
>
> (d) proving or disproving, or tending to prove or disprove, and fact necessary for, or incidental to, establishing any liability:
>
> (e) resolving any matter, or supporting or resisting any judgment order, remedy, or relief, arising or sought in the court or tribunal proceedings.

[43] The Court of Appeal noted that the term "parliamentary proceedings" was now clearly defined in s 10(1) of the Act as follows:[27]

> **Proceedings in Parliament**, for the purposes of Article 9 of the Bill of Rights 1688, and for the purposes of this Act, means *all words spoken and acts done in the course of*, or for purposes of *or incidental to, the transacting of the* business of the House or of a committee.

[44] The statements subject to parliamentary privilege in *Kiwi Party* were not made during the deliberations of a select committee, but in a media interview.[28] Nevertheless, the challenges were to the validity of an Order in Council and questioned

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25 At [38].
26 Parliamentary Privilege Act 2014, s 11 (emphasis added).
27 *Kiwi Party Inc v Attorney-General*, above n 22, at [42] (emphasis added).
28 At [44].

the processes and decisions of the select committee.[29] The Court of Appeal agreed with the High Court and said the causes of action were untenable.[30]

[45] Ms Scholtens argued that the actions of the Chief Ombudsman in initiating and subsequently liaising with the Speaker, Ministers, or officials could be regarded as "incidental" to the transacting of business in the House or a committee.

[46] Mr Murray responded for FSCL saying that the issue of parliamentary privilege had not been raised by the defendant in its pleadings or written submissions. He had been taken by surprise that the matter was raised in oral submissions, particularly as the matter had earlier been resolved by agreement during discovery, with the defendant conceding the relevant emails were outside the parliamentary process such that parliamentary privilege did not apply. Mr Murray said he had taken particular care to focus the challenge in these proceedings on the actions of the Chief Ombudsman, and that what transpired in the parliamentary process concerning the progress of the legislation was entirely collateral.

[47] Ms Scholtens conceded that the letter from the Ombudsman to the Speaker suggesting the legislative change would likely not be caught by parliamentary privilege. However, she said the emails of 7 and 8 August 2018, in which the Chief Ombudsman queried the Speaker about the progress of the legislative proposal and made comments about the decision under consideration, might be privileged. Ms Scholtens indicated she could take the matter no further, other than saying care should be taken before they were relied upon.

[48] Whether the evidence of the exchange between the Chief Ombudsman and the Speaker and others is privileged under s 11 of the Act is a matter of statutory interpretation. The accepted approach to statutory interpretation is to first consider the ordinary meaning of the words taken in context.

[49] The words "incidental to" in the statutory definition of "proceedings in parliament" have a wide meaning. Nevertheless, to be privileged the material must

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29 At [44].
30 At [45].

relate to the "transacting of the business in the House or a committee". Where the material is peripheral to the parliamentary process it will be a fact specific enquiry as to whether privilege applies. The words "incidental to" must be interpreted in context. The impugned material must have more than just a passing reference to proceedings in Parliament to be subject to s 11.

[50] The evidence arising from the 7 and 8 August emails that is relevant to this case are the comments of the Chief Ombudsman updating the Speaker on and providing his views on the reconsideration decision he had yet to finalise.[31] FSCL points to these comments to suggest the Chief Ombudsman was not acting in good faith and more particularly he had predetermined the application.

[51] Parliamentary privilege is not for the defendant to waive. Nevertheless, Mr Murray noted that the relevant emails were produced, discovered, or otherwise made available by, or with the knowledge of, the Crown Law Office. It did not seek to appear to argue in support of any claim of privilege for the material. The emails were produced by agreement in the bundle of documents for these proceedings. In addition, the Chief Ombudsman referred to and commented on the emails in his affidavit.

[52] I am of the view that the emails of the Chief Ombudsman to the Speaker were not "incidental to" the transacting of the business of the House or of a committee. They are not offered to challenge, question or even comment on Parliamentary proceedings or persons involved in them. They are tangential to the progress of the proposed legislation and Parliamentary proceedings. They relate to the Chief Ombudsman's decision on the application for approval by FSCL. The emails may be offered in evidence without breaching s 11 of the Parliamentary Privilege Act.

[53] In February 2019, at the request of officials, the Chief Ombudsman made a submission on the Ombudsman (Protection of Name) Amendment Bill then before Parliament. There is a stronger argument that this submission was incidental to Parliamentary proceedings and so might attract privilege.

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31 The text of the emails is set out at [186]-[187] of this judgment.

[54] In conclusion, I am satisfied I am able to rely on the relevant 3 April and 7 and 8 August 2018 emails. However, I put to one side the February 2019 submission on the Bill by the Chief Ombudsman.

[55] The second issue relates to the evidence generally before the Court in this matter.

Evidence in judicial review cases

[56] Evidence in this matter was adduced by way of affidavit. Affidavits were filed:

(a) On behalf of FSCL affidavits from the Chief Executive of FSCL, Ms Susan Taylor (dated 2 September 2019, 10 February 2020 and 15 May 2020).

(b) On behalf of the Chief Ombudsman affidavits from:

(i) Mr Peter Boshier (dated 19 March 2020).

(ii) General Counsel to the Chief Ombudsman, Mr John Pohl (dated 17 March 2020).

[57] At an earlier stage of the proceeding FSCL had signalled that it may require interrogatories to be answered. It was also then contemplating seeking leave to cross-examine the defendant's witnesses. However, Mr Murray did not pursue those applications as the defendant voluntarily provided the further documents sought.[32] FSCL was then able to gain a picture of what had occurred.

[58] On obtaining the material Mr Murray considered it unnecessary to cross-examine the Chief Ombudsman. While cross-examination is generally not encouraged in judicial review proceedings, Mr Murray could have made an

[32] Material was also obtained under the Official Information Act.

application. Such cross-examination is allowed where appropriate and has been permitted in other cases in which allegations of predetermination have been made.[33]

[59] If there is a dispute about the evidence in a judicial review application then, in the absence of cross-examination, the facts in the defendant's evidence are usually assumed to be correct.[34] This is particularly where the evidence is uncontradicted.[35]

[60] The Supreme Court in *Ririnui* emphasised that the "fact dependent" nature of judicial review:[36]

> means that those whose decisions are challenged have a duty to explain the decision-making process, the relevant factual and other circumstances and the reasons for the decision — the so-called "duty of candour."

[61] Mr Murray said that the required high level of candour of the decision-maker had not been shown here. He said there were gaps in the Chief Ombudsman's explanations. In particular, he said that the Chief Ombudsman had failed to provide details of the discussions with the Speaker and Ministers predating the Chief Ombudsman's letter to the Speaker of 3 April 2018, when he formally raised the issue of legislation to further protect the name.[37] In that letter the Chief Ombudsman said:

> I write pursuant to a brief I have already given you on the subject and a discussion which occurred on it at our Officers of Parliament Select Committee hearing. I feel it now time for me to raise this matter for formally…

[62] Mr Boshier, in his affidavit, explained that he had earlier raised the matter with a former Ombudsman, Dr McGee QC, who had then prepared a paper suggesting options for legislative protection of the name and recommended a prohibition on its

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33 For instance, *Anderton v Auckland City Council* [1978] 1 NZLR 657 (SC) at 691. Extensive oral evidence appears to have been heard at that hearing.

34 *R (Safeer) v Secretary of State for the Home Department* [2018] EWCA Civ 2518 at [19].

35 David Blundell *Of Evidence and Experts: Recent Developments and Fact Finding and Expert Evidence and Judicial Review* (2018) 23 JR 243 at 243–247, citing *R v Board of Visitors of Hull Prison exp St Germain (No 2)* [1979] 1 WLR 1401 (QB) at 1410H per Jeffery Lane LJ.

36 *Ririnui v Land Corp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [105].

37 The Court of Appeal decision was delivered on 28 February 2018. The time period for appeal expired on 28 March 2018.

use with a savings provision for FSCL's application. In an email to Dr McGee of 16 March 2018, Mr Boshier refers to having:[38]

> the distinct feeling that if the Speaker, and Ministers Little and Parker had a further view on how the matter might be approached, sourced from you, that would be heavily influential.

[63] Given the duty of candour, the Chief Ombudsman should have explained what was said at his earlier briefing of the Speaker and the detail of his discussions with the Ministers to which he refers in his email to Dr McGee. I am also of the view that the Chief Ombudsman has not clearly explained the meaning of the comments in his emails of 7 and 8 August to the Speaker. I deal with these and the Chief Ombudsman's evidence in more detail below.

Grounds of review

[64] In its amended statement of claim, FSCL pleaded as general grounds that the Chief Ombudsman's 2019 decision was "unlawful, unreasonable, unfair and invalid". It particularised that general pleading under nine headings. In his oral submissions, Mr Murray further divided the particulars into two main categories. The first, he said, were errors apparent from the decision itself and the second were errors in process. The list of the particulars pleaded and categorised by Mr Murray is attached (Attachment 1).

[65] The particulars include claims that the decision was flawed in that it was contrary to the legislative purpose, was unreasonable, failed to treat like applications the same, and that the process breached elementary standards of fairness and good faith in that the Ombudsman was secretly promoting legislation which would defeat the application. In addition, FSCL says that the decision was made in breach of the right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 (BORA).

[66] I now turn to the legal principles.

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[38] Email from Peter Boshier (Chief Ombudsman) to Dr David McGee QC regarding the protection of the Ombudsman name (16 March 2018).

Legal principles – Judicial review

[67] Mr Murray submitted a heightened standard of review was applicable in this case due to the circumstances of the decision and because the Chief Ombudsman did not act in good faith. He pointed to the dicta of Wild J in *Wolf v Minister of Immigration* as supporting or suggesting a variable standard of review. His Honour said:[39]

> [47] I consider the time has come to state – or really to clarify – that the tests as laid down in *GCHQ* [outrageousness] and *Woolworths* [overwhelming] respectively are not, or should no longer be, the invariable or universal tests of 'unreasonableness' applied in New Zealand public law. Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: *upon who made it; by what process; what the decision involves (ie its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them … "*

[68] Mr Murray said that in this case intensity of review was higher because the *Wolf* factors as they related to the decision were as follows:

(a) **The nature of the decision:** a simple statutory discretion which must be exercised in good faith, based on a correct interpretation of the power to give effect to the legislative purpose; requiring balancing the public interest in protecting the ombudsman concept with the public interest in private dispute resolution schemes using the name.

(b) **Who made it:** an important constitutional official who holds central and local government to account to high standards of public administration; who by dint of section 28A is required to act as judge in his own cause; and who is accountable to the courts.

(c) **By what process:** a fair and transparent process; applying policy guidelines (the Robertson criteria) as directed by the Court of Appeal.

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[39] *Wolf v Minister of Immigration* (2004) 7 HRNZ 469 (HC) at [47] square brackets contain words added (emphasis added).

(d) **What the decision involves (ie its subject matter and the level of policy content in it):** use of the "Ombudsman" name involving a narrow policy content relating to an assessment of the public interest.

(e) **The importance of the decision to those affected by it, in terms of its potential impact upon, or consequence for, them:** for FSCL this turns on whether there will be two or three private dispute resolution schemes using the "Ombudsman" name. It is the final chance before the legislative door slams shut to use the "Ombudsman" name. For the hundreds of thousands of users of FSCL's 7000 members, use of the name would allow an awareness that they can complain to an ombudsman.

[69] I do not agree with Mr Murray's characterisation of the *Wolf* factors as they apply here in some respects. In particular, the Court of Appeal indicated that the relevant considerations were not limited to the Robertson criteria (or Ombudsman-like qualities). The Chief Ombudsman was entitled to take into account the effects of any further approvals on the reputation and status of the Parliamentary Ombudsman. Therefore, the suggestion by FSCL that consent was inevitable once those criteria were met is incorrect.

[70] Ms Scholtens responded that the Chief Ombudsman had acted in good faith and in accordance with the law. She pointed to the approach to judicial review articulated by Cooke J in *New Zealand Council of Licenced Firearms Owners* which resisted the concept of the "intensity" or "standard of review". He said:[40]

> [83] ... I addressed these issues in *Patterson v District Court, Hutt Valley* in the following way:
>
> > [14] … At its heart judicial review involves the Court exercising a supervisory jurisdiction to ensure that powers are exercised in accordance with law. Usually those powers will be contained in statute or delegated legislation, where the limits of the power are identified as a matter of statutory interpretation. But the legal limits of discretionary powers may also arise from other sources, such as common law requirements. An example is the rules of natural justice, albeit in the present case such requirements are

[40] *New Zealand Council of Licenced Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [83] and [85] (footnotes omitted).

> also to be found in the statute. Most judicial review involves the Court assessing whether a decision is made in accordance with the express and implied requirements of the empowering instrument, both in terms of the substantive decision and the procedures followed to reach it. …
>
> …
>
> [85] The complications involved in variable standard review, and in identifying the standard or intensity to be applied in a particular case, can lead a Court into error. It distracts from the key questions which are directed to the nature and extent of the power given to the decision-maker, and whether the decision-maker has acted in accordance with that power together with any other requirements or limits imposed by law. Judicial review begins and ends with those questions notwithstanding the occasional case where it can be said the unreasonableness of the decision itself evidences material error.

[71] I prefer the approach of Cooke J rather than the variable standard approach suggested by Mr Murray. This approach focuses the Court's supervisory jurisdiction on whether the decision is made in accordance with the law rather than attempting to define a standard of review in each case. As Cooke J noted, sometimes the statute constrains the decision-maker to such an extent that the ultimate outcome is inevitable. However, it is a matter of construction of the empowering provision to ascertain the extent of the powers.[41]

[72] Under FSCL's general grounds of review (unlawful, unreasonable, unfair and invalid), the particulars allege not only failure by the Chief Ombudsman to exercise his discretion in terms of the legislative requirements but also that he acted in breach of the common law requirement to act in good faith. While put in a number of different ways, this amounted to a claim of predetermination.

Predetermination/predisposition

[73] Mr Murray emphasised that the allegation was not of bad faith with connotations of corruption, fraud, dishonesty or bias. Rather, he alleges that the Chief Ombudsman had a closed mind or had predetermined the outcome of FSCL's application and simply went through the motions of making a decision.

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41 *Patterson v District Court, Hutt Valley* [2020] NZHC 259, cited in *New Zealand Council of Licenced Firearms,* above n 40.

[74] Mr Murray said this was a case where any predisposition by the Chief Ombudsman was improper. Moore J, in *Save Chamberlain Park Inc v Auckland Council*,[42] considered the difference between predisposition and predetermination. He concluded that predisposition, for instance by a Minister or a local authority where it was unavoidable that the person might be influenced by the policy and political considerations, was not objectionable. Similarly, members of Local Authorities or planning bodies may hold preliminary or "in-principle" views on matters which must be decided. That predisposition alone does not amount to predetermination. However, when they come to make the actual decision, they must do so with a mind open to other alternatives. An open mind means that the decision maker is amenable to persuasion and does not commit to a particular outcome in an individual case.[43]

[75] In that case Moore J also noted that predetermination was concerned with "closed mind" decision making. That was conceptually different from bias which is concerned with public perceptions as to impartial decision making.[44] Moore J noted the importance of context and, in particular, the legislation and factual setting.[45]

[76] In *CREEDNZ*,[46] the Court of Appeal dealt with an allegation of predetermination in a challenge to the validity of an Order in Council which bypassed all statutory planning procedures and fast-tracked the approval process for the construction of the Aramoana aluminium smelter. It was apparent that some Ministers responsible for the decision favoured the fast track approach. Richardson J said:[47]

> It is not expected that Ministers will approach their consideration … with perfect detachment. Before the decision can be set aside on the grounds of disqualifying bias it must be established on the balance of probabilities that in fact the minds of those concerned were not open to persuasion and so, if they did address themselves to the particular criteria under the section, they simply went through the motions.

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42 [2018] NZHC 1462.
43 At [178], referring to observations made in Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [25.5.5].
44 At [180].
45 At [184].
46 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).
47 At 194.

[77] Ms Scholtens also pointed to a recent decision of the High Court in *Rangitira Developments*.[48] This involved a challenge, by way of judicial review, to a ministerial decision refusing approval for a licence which would have effectively allowed mining on a site on the West Coast. It was alleged the Minister had predetermined the application. The Minister had a strong conservation background and had consistently voiced her opposition to mining over many years. In the past, the Minister had been employed by an organisation which had opposed developments of the nature proposed by the plaintiff and had actively opposed proposals for the development on the specific site for which the license in question was sought. She had robustly expressed her own views against mining in the region and recently had been part of the initiative to introduce a government policy which opposed any new mining generally. According to the plaintiff, the Minister had displayed a general hostility to mining operations right up to the time she made the impugned decision and refused the licence sought.

[78] In assessing pre-determination in that case, Clark J posed the question to be answered as:

> [35] … whether RDL has established on the balance of probabilities that, notwithstanding Ms Sage's long-held strong opposition to mining operations and this mining proposal in particular, her mind was not open to persuasion and she did not therefore address the particular statutory criteria to which she was required to have regard.
>
> [36] The evidence of this Minister's personal association with and opposition to this particular mine prima facie suggests predetermination but the ultimate question for this Court will be whether the evidence tends to show the Minister failed to consider the application with a mind open to persuasion.

[79] Her Honour found the evidence did not justify an inference of predetermination, nor a conclusion that the Minister had failed to take into account the relevant legislative purposes or had a closed mind. The Judge noted it was to be expected that Ministers would be influenced by policy and political considerations.[49] Nevertheless, Her Honour noted that "the 'scrupulous impartiality' expected of judicial officers is reasonably to be expected of ministers in their approach to their exercise of statutory powers and decisions."

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48 *Rangitira Developments Ltd v Sage* [2020] NZHC 1503.
49 At [167].

[80] While she found no predetermination, the Judge was concerned about the level of predisposition shown by the Minister. She suggested that where a Minister had an unusually close association with the very matter calling for decision, concerns about the possible impact on public confidence and the integrity of the process might be accommodated by appointing a different Minister to make the decision.[50]

[81] Mr Murray submitted that *any* predisposition by the Chief Ombudsman was improper and indicated predetermination. Ms Scholtens favoured the approach articulated in *Rangitira* and *Save Chamberlain Park*. She said it was not improper for the decision maker to have a predisposition to a certain view. In order to establish predetermination here, she submits that the plaintiff must establish on the balance of probabilities that the decision-maker had a closed mind and/or was not open to persuasion.

[82] I accept Ms Scholtens' submissions. The *Rangitira* approach is the appropriate approach in this case.

[83] The Chief Ombudsman was not required to approach his consideration with "perfect detachment".[51] He was entitled to have a predisposition. Indeed, it was almost inevitable that a Chief Ombudsman would have views on the use of the name. His position was akin to that of the Minister in *Rangitira*. He was nominated to make the decision precisely because of the knowledge and experience he had. Further, any decision made as to the use of the "Ombudsman" name would affect him and his office.

[84] I am satisfied that the Chief Ombudsman did have a predisposition against granting approval for the use of the name to private organisations or persons. This was apparent from the outset of the reconsideration process. The Chief Ombudsman's approach to the Speaker suggesting changes to further protect the name demonstrates a predisposition. This predisposition was not due to political policy views such as those displayed by the Minister in *Rangitira Developments*.[52] Rather, the

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50 At [167].
51 *CREEDNZ*, above n 46, at 194.
52 *Rangitira Developments Ltd v Sage*, above n 48.

predisposition stemmed from his experience in the role of Chief Ombudsman and his view that the title should be protected in the public interest and used only by parliamentary counsel so as to diminish its status.[53]

[85] However, I do not accept FSCL's submission that the views of past Chief Ombudsmen could give rise to an inference of institutional predisposition. Predisposition must relate to the state of mind of the actual decision-maker.

[86] The Chief Ombudsman's predisposition does not, on its own, amount to predetermination in the legal sense, nor does it give rise to an error of law in this case. However, it is a factor to be taken into account when looking at the evidence as a whole. Clark J referred to predisposition as prima facie evidence of predetermination. However, it is put, the Court must assess all the evidence and will only find predetermination on the actual evidence if it is satisfied on the balance of probabilities that the decision maker had a closed mind and was not open to persuasion.[54]

[87] Whether or not the Chief Ombudsman's mind was, or became, so closed in the course of making the decision such that he gave no genuine consideration to the material before him, requires a consideration of the decision papers and the process by which the decision was reached, as well as the surrounding circumstances and importantly, the decision-maker's comments in his emails of 7 and 8 August 2018.

[88] I now turn to consider the legislation and other sources of guidance.

Legislation and guidelines

[89] The starting point is the empowering statute. There is little guidance in s 28A itself. Thus, the Court of Appeal in its review of Mr Boshier's first decision has provided useful guidance for determining applications under the previous s 28A. In the review of Mr Boshier's first decision, the High Court noted it would be incorrect to interpret a provision in the Ombudsmen Act that protects the name Ombudsman as

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53 In his letter of 3 April 2018 to the Speaker the Chief Ombudsman says "… the wider use of the name outside [Parliamentary Officers] is considered to diminish its status and to confuse the public…" This is consistent with his conclusions in the earlier decision set aside by the Court of Appeal".

54 At 194.

having nothing to do with protecting the office which the Act established.[55] The Court of Appeal did not disagree with the High Court on that point.[56] It expressly noted that the special constitutional role of the Parliamentary Ombudsmen, and, related to that, the impact that a multiplicity of non-parliamentary ombudsmen might have on both the status and public understanding of this role, must be a relevant consideration . The Court of Appeal also said that the Chief Ombudsman was not limited in his consideration to the "ombudsman-like" qualities of an applicant as listed in the Robertson criteria.[57]

[90] The Court of Appeal concluded that the Chief Ombudsman had unduly elevated the "Elwood policy"[58] which emphasised the protection of the name and the prevention of the proliferation of private industry ombudsmen. The application of that policy as a preliminary threshold had restricted the scope of the Chief Ombudsman's discretion to a degree not contemplated by Parliament and had precluded the decision-maker from taking into account other relevant considerations in addition to proliferation and the risk of confusion.[59] The other relevant considerations included the Robertson guidelines.[60]

[91] The second ground on which the appeal was allowed was the failure of the Ombudsman to consider the effect of different treatment of similar schemes. This was a consideration that the Court of Appeal noted might be considered either under the rubric of confusion or simply consistency.[61]

[92] With this guidance in mind, the Chief Ombudsman embarked on a reconsideration of the FSCL application.

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55 *Financial Services Complaints Ltd v Chief Ombudsman* [2017] NZHC 525, [2017] NZAR 521at [30].
56 The Court of Appeal allowed the appeal on other grounds.
57 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 2, at [45].
58 See [28] above.
59 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 2, at [59].
60 See [25] above.
61 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 2, at [54]

The decision-making process following the Court of Appeal decision (from 28 February 2018)

[93] On 3 April 2018, general counsel for the Chief Ombudsman wrote to FSCL indicating there would be no appeal and that the Chief Ombudsman was taking advice on how to implement the decision but would not be in a position to write to FSCL until he returned from overseas on 28 May 2018.

[94] FSCL responded on 9 April expressing disappointment at the delay, noting the Court of Appeal had given "a very clear indication" that once the unlawful first limb of the Elwood policy had been removed, FSCL could expect to have its application considered on the same basis as the two other "almost identical" Ombudsman schemes that had been approved. FSCL indicated that should approval be granted it wished to start promoting itself as an ombudsman scheme from the start of its reporting and financial year, on 1 July 2018. FSCL said that it was willing to provide further information in relation to the reconsideration and had kept a record of consumers who were either confused by the fact that FSCL was not an "ombudsman scheme" or had viewed FSCL's scheme as an inferior complaints scheme by saying, for instance, "they would appeal" against FSCL's decision to the Insurance and Financial Services Ombudsman.

[95] The Chief Ombudsman replied to FSCL on 11 April. He noted that he had responsibilities as Ombudsman and "wide ranging commitments" and was not going to be rushed into a decision without due consideration of what it required. He set out his understanding of the Court of Appeal decision as follows:[62]

> If FSCL understands matters differently, please let me know in what respects we differ and what FSCL considers the Court's direction requires of me.
>
> I consider the following matters to be of relevance:
>
> > The Court allowed the appeal on two grounds only. These were that:
> >
> > > I applied a policy that fettered my discretion; and
> > >
> > > I failed to take account of a relevant consideration, namely the effect different treatment of similar schemes in the same

[62] Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's application for use of "Ombudsman" name (11 April 2018).

> > > sector might have in terms of causing confusion and reducing public confidence in the integrity of the FSCL scheme.
> >
> > The Court emphasised that the policy that had been applied did not involve considering irrelevant matters inconsistent with the statutory purpose of section 28A, but that using the public interest as a preliminary threshold matter applied an unduly restrictive approach and precluded the taking into account of other relevant considerations in addition to proliferation and the risk of confusion.
> >
> > The Court expressly agreed with the High Court's view that:
> >
> > > The potential impact of an application under s 28A on the special constitutional role of an Ombudsman must be a relevant consideration;
> > >
> > > I am entitled to consider the possible impact that a multiplicity of non-parliamentary ombudsmen might have on the status of that role and the public's understanding of it; and
> > >
> > > The discretion is not confined to a consideration of the ombudsman-like qualities of an applicant.
>
> From this I understand the Court to be saying that in reconsidering my decision I am required:
>
> 1. Not to consider, as a preliminary issue, the public interest in granting consent to the use of the name 'Ombudsman", but only after having also taken into account the relevant consideration identified by the Court as having been overlooked;
>
> 2. To take account of existing permissions and the need to treat like applicants reasonably consistently by considering whether FSCL's lack of the name 'Ombudsman' creates confusion and reduces public confidence in its scheme.

[96] The Chief Ombudsman went on to say that he believed he would be acting in accordance with the Court's direction by considering:

1. The degree to which FSCL has *'ombudsman-like qualities'*;

2. Whether FSCL's lack of the name Ombudsman has created confusion and reduced public confidence in it;

3. The degree to which FSCL's situation is comparable to that of the Banking Ombudsman and the (now) Insurance and Financial Services Ombudsman;

4. Whether the requirement to treat like applicants reasonably consistently applies in the context of FSCL's application making it necessary or appropriate to grant it consent; and

5. Whether, having regard to all the considerations the Court has identified or confirmed as relevant to the exercise of my discretion, consent should be granted.

[97] The Ombudsman asked FSCL to confirm whether or not it agreed with the proposed approach "as being in accordance with the Court of Appeal's direction". He also asked for the records referred to by FSCL to be provided.

[98] FSCL responded on 19 April confirming that the factors the Chief Ombudsman had listed constituted a "generally correct approach to the reconsideration directed by the Court of Appeal".[63] FSCL also attached a summary of nine relevant "confusion" incidents taken from its records. Each example was described in two to three lines. They were dated from 11 July 2017 to 20 March 2018.[64] FSCL said that its Early Assistance Team received several queries a month from consumers asking why FSCL was not an ombudsman scheme or whether it differed from an ombudsman scheme.

[99] FSCL also drew attention to the Court of Appeal's reference to the New Zealand Bill of Rights Act, s 14.[65] It concluded by saying "more generally FSCL continues to maintain that a correct approach to the exercise of the s 28A discretion indicates that your consent should be forthcoming and that to refuse consent would be unreasonable in administrative law terms".

[100] Over the next 14 months the Chief Ombudsman made three provisional decisions and one final decision on 20 June 2019, all refusing approval to use the name. After each provisional decision he invited further submissions from FSCL. On receipt of those the Chief Ombudsman undertook further investigations. I now set out in general terms the content of those decisions.

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63 Letter from Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) to Peter Boshier (Chief Ombudsman) regarding FSCL's application for use of "Ombudsman" name (19 April 2018).

64 Reference in the record to 21 August 2018 is a typographical error and should read 21 August 2017.

65 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 2, at [51].

First provisional decision (24 July 2018)

[101] On 24 July 2018, the Chief Ombudsman wrote to FSCL setting out his first provisional decision in a nine-page letter.[66] The Chief Ombudsman noted that FSCL generally agreed with his proposal that he should conduct reconsideration by having regard to the factors set out in his letter of 11 April and added:

> 6. In taking this approach, I emphasise that I am not applying Sir Brian Elwood's two-stage policy. In assessing the degree to which FSCL has the appropriate qualities for qualifying to use the name, I will have regard to the guidelines originally produced by Sir John Robertson.

[102] In the provisional decision the Chief Ombudsman noted:

(a) FSCL had the appropriate qualities set out in the Robertson guidelines.

(b) If FSCL were able to use the name ombudsman there would be less scope for consumers to be confused and view FSCL as providing a service inferior to BOS and IFSO. This was noted as a significant factor in favour of the granting of consent.

(c) Consent would not eliminate confusion between the financial resolution providers. The word "financial" would be in the name of two of the schemes.

(d) FSCL, IFSO and BOS however, were in a position to reduce the degree of confusion by taking steps to clarify that FSCL was no different from the other two schemes. This would decrease the amount of confusion between the financial dispute resolution schemes that may currently exist.

(e) FSCL, BOS and IFSO were similar in that they had ministerial approval as dispute resolution schemes. Each had appropriate qualities and as a

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66 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's application for use of "Ombudsman" name (24 July 2018).

basic principle, like should be treated as like. However, the difference between FSCL and the other two was that the ombudsman schemes had gained approval for use of the name when there was no statutory recognition or ministerial approval of financial providers' dispute resolution schemes. Importantly, the earlier approvals had been given in order to provide customers with confidence in the schemes which had lacked statutory authority. In any event, FSCL had a significant market share without the use of the name.

(f) FSCL differed from the other two in that it had established a panel allowing decisions by majority. This was contrary to the concept of the exclusive personal responsibility required of an ombudsman.

(g) Granting consent would cause members of the public to experience additional confusion between the finance industry ombudsmen and the Parliamentary Ombudsman. This was a significant concern due to the potential that confusion would undermine the effectiveness and integrity of the special constitutional status of the Parliamentary Ombudsman.

(h) The Parliamentary Ombudsman relies on the "special status and mana" of the office for effective compliance by Government departments with its recommendations. The protection of the name was a protection of the special constitutional role. Proliferation of non-parliamentary ombudsmen would result in confusion, loss of public understanding of the concept and loss of public confidence in the office. Regular confusion between the role of Parliamentary Ombudsman and the two industry ombudsman evidenced that. Eight calls a day were received by the Parliamentary Ombudsman's office relating to banking, insurance, or financial services. They needed to be referred to the correct scheme. In addition, the office received 80 complaints per year related to banking, insurance or finance companies.

(i) The industry ombudsmen made "determinations" which might lead members of the public to expect "determinations" not "recommendations" from the Parliamentary Ombudsmen.

(j) Confusion would increase if FSCL were to be called an ombudsman due to its size. It had nearly 7,000 participants and answered more than 4,300 enquiries and complaints in the 2017 year. The number of consumers exposed to an industry ombudsman would therefore significantly increase. This could adversely affect the role of the Parliamentary Ombudsman and undermine the effectiveness and integrity of the processes. Members of the public could be less likely to use the Parliamentary Ombudsman in order to hold government departments to account.

[103] The Chief Ombudsman's provisional conclusion on the public interest issue or "confusion" supported the refusal of the application. The Chief Ombudsman's significant concern was that there would be an increase in those who were confused about the differing roles of the Parliamentary Ombudsman and industry ombudsmen. This would adversely affect the constitutional status of the Parliamentary Ombudsman.

[104] The Chief Ombudsman considered that the right to freedom of expression was engaged under s 14 of BORA but that the interference with FSCL's freedom of expression was demonstrably justified. The justification was that that confusion would undermine the effectiveness and integrity of the Parliamentary Ombudsmen.

[105] FSCL responded to the first provisional decision on 6 August. It said that the Chief Ombudsman had combined steps three and four of the approach that he had proposed. Step three had been the degree to which FSCL's situation was comparable to that of BOS and IFSO and step four was whether the requirement to treat like applicants reasonably consistently applied making it necessary or appropriate to grant it consent. FSCL also noted the Chief Ombudsman had added a fourth step, being the potential impact of approval on the special constitutional role of the Parliamentary

Ombudsman and the "impact that a multiplicity of non-parliamentary ombudsmen might have on the status of the role and the public's understanding of it".

[106] FSCL went on to express concern that the overall approach in the Chief Ombudsman's provisional decision had elevated the "multiplicity of non-Parliamentary Ombudsman" issue to be determinative of the outcome. It said this was an administrative law error as it determined the application on "numeric considerations", contrary to the warning by the Court of Appeal.[67]

[107] FSCL said in reality there was never likely to be a high number of private schemes because of the difficulty that any other applicant would have in exhibiting the characteristics inherent in the Ombudsman concept. It said that the provisional decision was indicative of what was, in effect, a complete ban on the further private use of the "Ombudsman" name contrary to the Court of Appeal's judgment, albeit that this time it was not grounded in an unlawful policy.

[108] FSCL made further submissions in relation to the specific issues raised in the provisional decision. In particular, it criticised the Chief Ombudsman's justification for treating FSCL differently from BOS and IFSO. FSCL said its application was stronger now than theirs because:

(a) When BOS and IFSO were approved they did not have statutory requirements to act in accordance with the Robertson guidelines or maintain the "essential characteristics" of an ombudsman.

(b) The success of those schemes depended on confidence in the nature of their dispute resolution services. That remained the case today which is why FSCL sought to use the title.

(c) The "FSCL Panel" had never been convened and would be abolished in any event.

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67 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 2, at [51]–[54].

(d) FSCL was identical to BOS and IFSO in "nearly every way", such as in industry area, governance, scheme rules and processes.

[109] FSCL also criticised the weight the Chief Ombudsman had placed on the concern that allowing use of the name could adversely affect the special constitutional role of the Parliamentary Ombudsman. It noted that many of the calls to the Chief Ombudsman's office relating to the banking, insurance and financial services might be from would-be complainants who were unaware that FSCL had the status of an ombudsman in everything but name. FSCL said in any event it was only speculation that there would be adverse effects. It said the provisional decision was inconsistent with the Court of Appeal's views that the public interest in protecting the name needed to be weighed against the public interest of the tens of thousands of New Zealanders who used FSCL's financial services.

[110] FSCL concluded that the provisional decision could not stand and, in particular, the Chief Ombudsman had not established that there was no demonstrably justifiable reason to decline FSCL's application in terms of s 14 of BORA. It offered to meet to expand on its letter.

[111] On 20 August 2018 the Chief Ombudsman responded to FSCL, emphasising that he retained an open mind but that the Court of Appeal decision had not directed him to consent and he intended to investigate the nature and degree of "confusion" further. [68]

Second Provisional decision (23 October 2018)

[112] Following the first provisional decision, FSCL met with the Chief Ombudsman and provided him with further information. The Chief Ombudsman also made his own further enquiries. He then issued the second provisional decision on 23 October 2018, again indicating a refusal of FSCL's application. He invited further comments from FSCL by 6 November 2018.

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[68] Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's Application for Use of "Ombudsman" Name (20 August 2018) at [5].

[113] In the second provisional decision the Chief Ombudsman summarised the main factors in favour of the grant of consent. He concluded that FSCL had the appropriate qualities in terms of the Robertson guidelines. The Chief Ombudsman also accepted that granting consent would reduce the perception of FSCL held by some consumers "as an inferior service to BOS and IFSO" which might adversely affect confidence in FSCL's services. However, he did not regard this type of confusion as particularly strong, or of significant concern. On the other hand, he considered that a further industry ombudsman would lead to "a significant increase in confusion about the important constitutional role of the Parliamentary Ombudsman in enhancing accountability within an executive government". He concluded that on balance he considered the public interest in "reducing confusion does not lie in favour of granting FSCL's application".[69]

[114] In this second provisional decision the Chief Ombudsman said that it was desirable to treat FSCL "reasonably consistently" with IFSO and BOS but noted that the Court of Appeal indicated differential treatment might be justified.

[115] FSCL took some time to obtain further advice and gather information. It substantively responded to the second provisional decision in a letter of 10 January 2019 saying that the second provisional decision seemed "to be further evidence of a determination … to decline consent for an application which on objective grounds we believe should be approved".[70] FSCL said the Chief Ombudsman's minimisation of the significance of the name for FSCL, while relying on the importance of the title as grounds to refuse consent, in administrative law terms would likely be found by a Court to be "in defiance of logic".[71]

[116] FSCL noted that the Chief Ombudsman had accepted that FSCL's application met the Robertson guidelines. Therefore, refusing consent, even if a Court accepted

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69 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's Application for Use of "Ombudsman" Name (23 October 2018) at [36].

70 Letter from Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) to Peter Boshier (Chief Ombudsman) regarding FSCL's Application for Use of "Ombudsman" Name (10 January 2019) at [1].

71 At [4].

some or all of the Chief Ombudsman's stated concerns, meant the decision was not "demonstrably justified" in terms of s 14 of BORA.[72]

[117] The further information which FSCL provided was:

(a) A letter from Ms Jamie-Lee Day, dated 27 November 2018. Ms Day was Allianz's Disputes Resolution Manager. Allianz was a member of FSCL and a large travel insurer. Travel insurance accounted for FSCL's largest category of complaints, at about 25 per cent of total complaints. Ms Day supported FSCL's application to use the name.

(b) Details reported by Ms Taylor (FSCL's CEO) of comments made at a Consumer Awareness Workshop that FSCL had hosted in South Auckland in November 2018. A Papatoetoe CAB adviser had commented that she thought FSCL was "dodgy" because it had "Limited" in its name and must be wanting to make money, or profit, from complaints. The case manager had explained that FSCL was the same as an Ombudsman scheme, "except that we cannot use the name", and the adviser then understood FSCL's role.

[118] In addition, FSCL questioned the reliability of information supplied to the Chief Ombudsman by representatives of the other ombudsman schemes (IFSO, BOS and FDRS). It said that that information should be given little weight, because they represented competing schemes and had no interest in supporting FSCL's application, in fact IFSO's CEO actively opposed it. The Chief Ombudsman had also made enquiries of Mr Slater who was employed by the scheme, FDRS. He had previously been employed for some years as a General Manager at FSCL. FSCL said he had left FSCL three and a half years earlier and, in any event, had little to do with complaint investigations while at FSCL. FSCL criticised the reliability of Mr Slater's views in the circumstances.

[119] FSCL also noted it had taken heed of the Chief Ombudsman's comments on the confusion which might result from FSCL being called a "Financial Ombudsman

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72 At [22].

Service" and its CEO being titled "Financial Ombudsman" given the existence of an Insurance and Financial Services Ombudsman and Banking Ombudsman scheme. Therefore, FSCL amended its application for consent to refer to itself as "FSCL – A Financial Ombudsman Service" and its CEO to have the title "Financial Ombudsman and CEO". FSCL said that despite the fact it had some large insurance company members it did not seek to use the word "Insurance" in its name.

Third Provisional decision (3 May 2019)

[120] There followed a period of further investigation by the Chief Ombudsman. On 3 May 2019, the Ombudsman wrote to FSCL indicating that he was still not convinced at that stage that he would grant FSCL's amended application.[73]

[121] The Chief Ombudsman acknowledged that FSCL had amended the scheme name and Chief Executive title sought in its application in response to his comment that FSCL would be in a stronger position if it had a focus on one sector of the market and the new proposed title would delineate its focus. However, he said the amendment did not address his concern that the use of the term "Financial" suggested that "FSCL – A Financial Ombudsman Service" had coverage of all financial service providers when that was not the case.[74]

[122] The Chief Ombudsman again concluded that he was not persuaded that the use of the name was:[75]

> … of sufficient significance to FSCL or that it is causing a level of damage to the public interest in the confidence and integrity of financial dispute resolution schemes such that I should exercise discretion to grant consent.

[123] He went on to find that on balance the public interest lay in favour of the default position that FSCL could not use the "Ombudsman" name. Therefore, any interference with FSCL's right to free expression in relation to the amended application was demonstrably justified for the reasons set out in earlier correspondence.

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73 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's Application for Use of "Ombudsman" Name (3 May 2019).

74 At [20]–[22].

75 At [23].

Final decision (20 June 2019)

[124] On 20 June 2019 the Chief Ombudsman issued his final decision. He reiterated that it had not been his intention to delay determining the application but "only to fully and properly consider the matter".

[125] The Chief Ombudsman declined to approve use of the name. He referred and incorporated his earlier decisions but summarised the reasons as follows:

> **Overall assessment**
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> 77. Summarising the position, I note FSCL clearly has appropriate qualities and is operating as a successful and robust dispute resolution service under the FSP Act. However, the lack of the name ombudsman is causing some complainants to be confused about its role and status compared with BOS and, in particular, IFSO. If FSCL were able to use the name ombudsman there would be less scope for such confusion and the view that FSCL is an inferior service.
>
> 78. Mitigating this point is the 2015 Review, the MBIE Review in 2016 and FSCL's own Annual Reports, which consistently see no evidence to support the proposition that having four dispute resolution schemes and FSCL not having the name *"ombudsman"* is confusing for consumers or having a negative effect on consumer awareness.
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> 79. Further, I consider FSCL is in a position to reduce the degree of confusion by taking steps to clarify that it is no different to the other schemes. These are recommendations that I have already made in the context of informing users of the schemes under the FSP Act. Co-operation between the various schemes could contribute to the lessening of confusion by educating financial services customers on the similarities between the schemes and differences in relation to the Parliamentary Ombudsman. These factors decrease the amount of weight I have given to the confusion between the financial dispute resolution schemes. I note too that granting consent would not eliminate confusion between the financial dispute resolution providers. *FSCL – A Financial Ombudsman Service* would still be similar to *"Insurance and Financial Services Ombudsman"* and might raise questions as to why insureds must use a scheme whose name does not refer to insurance.
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> 80. An important point telling in favour of approval is that FSCL operates in a market where the two other significant competitor services have approval to use the name 'ombudsman'. Arguments of fairness and consistency are properly raised. While important, I note the public policy considerations that drove consent 25 years ago no longer exist, given the regulation under the FSP Act. While I give careful weight to the importance of fairness in the market to FSCL, and the value of consistency, I do not find this factor overwhelming.

81. Most significantly, use of the name by FSCL would increase the likelihood that members of the public would experience confusion about the difference between the Parliamentary Ombudsman and the FSP schemes that are called ombudsman. This is a significant concern for me due to the important constitutional status of the Parliamentary Ombudsmen. Such confusion between the Parliamentary and non-parliamentary ombudsmen impinges on democratic values and accountability. These are factors of a different quality to the private interests of financial services customers in being able to access dispute resolution for personal financial matters, which interests are protected in this case by the FSP Act.

82. I note that if the application came from a discrete, independent body with a narrow function and serving a small section of the public, there would likely be a lesser degree of confusion with the Parliamentary Ombudsman, and the public interest considerations may fall differently.

Decision

83. Having weighed up all the relevant factors including the submissions and information that FSCL has put before me considering the Court of Appeal's decision, I decline FSCL's application to use the name 'ombudsman'.

84. I understand FSCL will be disappointed with this decision, and you have indicated that, if the decision is a negative one, you will seek to have the matter back before the Court by way of judicial review as soon as possible. In that event, I advise that Mary Scholtens QC is authorised to liaise with your counsel on my behalf to facilitate that process.

Analysis of three provisional decisions and final decisions

[126] I consider that on the face of the decision papers alone the Chief Ombudsman:

(i) followed a meticulous process.

(ii) reached a conclusion which was open to him after a significant investigation.

(iii) took into account the matters that the Court of Appeal had directed be taken into account in his reconsideration.

[127] The Court of Appeal had allowed the appeal on two grounds: first the decision maker had applied a policy that improperly fettered the exercise of his discretion by elevating the status of the Elwood policy to a preliminary threshold; and secondly, the

Chief Ombudsman had failed to take into account a relevant consideration, namely the effect different treatment of similar schemes in the same sector might have in terms of causing confusion and reducing public confidence in the integrity of the FSCL scheme.[76]

[128] This time the Chief Ombudsman did not apply the Elwood policy as a threshold. He applied and had found that FSCL met the Robertson guidelines and so had taken into account the "ombudsman-like qualities" possessed by FSCL. FSCL has maintained in its responses to the provisional decisions and in its submissions in this court, that once it had met those criteria, approval should have been forthcoming. I do not agree. The Court of Appeal acknowledged the effects of approval on the important constitutional role of the Parliamentary Ombudsmen was a relevant consideration to be taken into account.

[129] The manner in which the Chief Ombudsman approached the balancing of the public interest concerns was by an analysis of three types of "confusion" and their respective significance on the public interest. The Court of Appeal had identified an important public interest factor was that of ensuring public confidence in the FSCL scheme. The Chief Ombudsman concluded that public interest was able to be considered by looking at the evidence of confusion for three types of confusion:

(i) The first type was confusion of the public resulting in detriment to FSCL who might view FSCL as inferior to an industry Ombudsman because it could not use the name Ombudsman.

(ii) The second type was that of people not knowing to which of the four industry schemes they should complain.

(iii) The third type was the confusion between the industry ombudsmen and the Parliamentary Ombudsmen. This third type of confusion was the source of the adverse effects that the proliferation of the use of the name

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[76] *Financial Services Complaints Ltd v Chief Ombudsman* [2018] NZCA 27, [2018] 2 NZLR 884 at [58].

would have on the public's understanding of and respect for the important constitutional role of the Parliamentary Ombudsmen.

[130] In his first provisional decision the Chief Ombudsman had identified only two types of confusion. On the first type of confusion, the Chief Ombudsman found that on the evidence there was reason to suggest that some consumers might have considered FSCL's scheme inferior to IOS and IFSO.[77] In that provisional decision the Chief Ombudsman found that there was a "significant" degree of confusion between FSCL and the two ombudsman schemes (particularly IFSO) which might damage public confidence in FSCL.[78] There he concluded this confusion could be ameliorated by providing more information to complainants and the public about the schemes and by better cooperation between the schemes.[79] In addition he was of the view that even if FSCL was granted approval confusion would remain. Those factors led to a "decrease in the amount of weight" to be given to that confusion. The second type of confusion he referred to was that affecting the Parliamentary Ombudsmen and the status of the name.

[131] Then on 20 August he wrote to FSCL saying that "you have challenged my analysis and so I am prepared to look a little closer at the objective evidence."[80] There followed a period of further investigation in which the Chief Ombudsman met with FSCL representatives and others including representatives of the BOS, IFSO and FDRS.

[132] In his second provisional decision (23 October 2018) the Chief Ombudsman referred to the further information he had gathered which included speaking to the representatives of the other financial dispute resolution schemes, including Mr Slater.[81] In that decision he analysed three types of confusion. He bifurcated his

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77 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's Application for use of "Ombudsman" name (24 July 2018) at [19].

78 At [25].

79 At [25].

80 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's Application for use of "Ombudsman" name (20 August 2018) at [7].

81 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's Application for use of "Ombudsman" name (23 October 2018).

original first type of confusion into two types of confusion: that relating to a misapprehension that the quality of FSCL's services were inferior to those of BOS and IFSO due to its lack of the "Ombudsman" name; the second was confusion by complainants about which of the four dispute resolution service providers they should complain to. The third type was the confusion affecting Parliamentary Ombudsmen.[82]

[133] Between his first provisional decision and his final decision, the Chief Ombudsman undertook a considerable amount of further investigation.

[134] The evidence taken into account by the Chief Ombudsman included:

(a) A one-page list of nine examples of confusion provided to FSCL before the first provisional decision. The Chief Ombudsman found three of these were likely examples of detrimental confusion. He had sought the background papers such as file notes and/or emails on those but did not receive them so found them difficult to evaluate. However, he considered that it appeared that the complainants in those examples would be unlikely to change their misperception of FSCL if it had use of the name "Ombudsman". He commented that it appeared they were complainants who were dissatisfied with the outcome of FSCL's services and that such complainants would always exist. Therefore, he did not consider the fact that some consumers might want to appeal or review FSCL's decision to an industry ombudsman had any real consequence for FSCL or the public interest. He said there was no evidence, for instance, that those aggrieved complainants were spreading their view that FSCL was inferior.

(b) An interview with Ms Day, the former dispute resolution manager of Allianz. This was arranged by the Chief Ombudsman after the second provisional decision and in response to a letter from Allianz supporting FSCL's application and provided to the Chief Ombudsman by FSCL. The letter referred to customer confusion and "negative emotions" when Allianz advised its insureds that it was a FSCL scheme member

82 At [10].

rather than a member of the IFSO scheme. [83] Ms Day had said in the letter that she supported FSCLs approval to use the name and felt that it would "greatly minimise customer confusion"[84] if FSCL could use the name ombudsman. When interviewed on behalf of the Chief Ombudsman, Ms Day indicated that there were only a few complainants for whom her explanation about FSCL's role was "not enough".[85] From this the Chief Ombudsman calculated that one or two per month, or 12 to 24 per year (three to eight per cent of complaints that went to Stage 2 of the Allianz complaints process) would express the view that they were going to the "Ombudsman" to Ms Day. Of those, only a handful would not accept her explanation that FSCL was the same as IFSO. The Chief Ombudsman concluded a simple explanation seemed to diffuse the issue.[86]

(c) Information from FSCL that its early assistance team had received several queries a month from consumers asking why FSCL was not an ombudsman scheme and whether it differed from an ombudsman scheme. In addition, Ms Taylor (the Chief Executive) said that there were not infrequent phone calls from consumers who thought FSCL was of a lower standard asking why they could not go to the insurance ombudsman.

(d) Notes in a log provided by Ms Taylor. She said this was a "record" from the "previous week" and a "fairly typical example". The log contained one entry with a short summary as follows: "Questioned why they couldn't come to FSCL with AIG complaint, who we were and if we were like an ombudsman".[87] Mr Boshier said he had difficulty

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83 Allianz was a large insurance member of the FSCL scheme insurance complaints made up the 25 per cent of FSCLs complaints

84 Letter from Jamie-lee Day (Dispute Resolution Manager for Allianz Partners) to Susan Taylor (Chief Executive Officer of FSCL) supporting FSCL's Application for use of "Ombudsman" name (27 November 2018).

85 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's Application for use of "Ombudsman" name (20 June 2019) at [26].

86 At [27].

87 Email from Susan Taylor (Chief Executive Officer of FSCL) to Peter Boshier (Chief Ombudsman) regarding consumer confusion about FSCL's role (10 September 2018).

understanding what the consumer was confused about. Had said he had asked for clarification from FSCL about the confusion but that had not been forthcoming. He noted that FSCL had not provided any further updates or information from the log.

[135] In his final decision the Chief Ombudsman concluded that the log notes and examples provided without the detail he would have expected from FSCL did not enable him to get any sense of the scale of the problem for FSCL. However, taking into account the information from Ms Day he accepted there was information to support concern about consumer confusion.

[136] Although the Chief Ombudsman accepted there was some confusion and some people held the misperception that FSCL was inferior in quality to the industry ombudsman schemes, he was "unable to conclude" that it was difficult for consumers to accept the explanation that FSCL was no different to the industry ombudsman scheme or those consumers were damaging FSCL's reputation. He noted that he had not seen any evidence of consistent commentary from consumers viewing FSCL as inferior and/or any problem relating to the public interest concerning confidence in the scheme. He concluded the confusion as to the quality of FSCLs service or its inferiority was not significant.

[137] The Chief Ombudsman noted that his conclusion was supported by FSCL's own annual reports and a 2015 review of FSCL which included in its terms of reference whether there was any "disadvantage" to FSCL in not using the name "Ombudsman". The report found little disadvantage to FSCL, only commenting that the name "Ombudsman" might have helped FSCL's growth in participant numbers. The Chief Ombudsman considered that this was only a commercial matter. He also referred to a July 2016 review of the FSP Act by the Ministry of Business Innovation and Employment, which contained no reference to or concern that two of the schemes used the name "Ombudsman". He noted that these findings were repeated in MBIE's findings and proposals in the regulatory impact statement for the proposed 2020 amendments to the FSP Act.

[138] The Chief Ombudsman also referred to the information provided by Mr Slater, the former General Manager of FSCL. Mr Slater said he had not seen any evidence of people coming to FDRS wanting to complain to an ombudsman scheme, nor did he see any evidence of that when he was General Manager at FSCL.

[139] The Chief Ombudsman found that the confusion between the four schemes would likely increase if FSCL used the name "Ombudsman", because two of the schemes would have "financial" and "Ombudsman" in their names.[88] He found this confusion would not be significant and, in any event, the confusion that existed could be dealt with as it was currently, by each scheme referring any complainant who was not a customer of one of their members to the correct scheme.[89]

[140] In relation to the third type of confusion, that between the industry ombudsmen and the Parliamentary Ombudsman, he said:[90]

> 51. My office regularly sees evidence of the confusion between the role of the Parliamentary Ombudsmen and the two industry ombudsmen. We receive approximately 25 calls per month relating to banking, insurance or financial services that need to be referred to the relevant agency. Some of these are requests to review decisions of the industry ombudsmen. We also receive about 80 formal complaints per year that are out of the Ombudsmen's jurisdiction and relate to banks, finance companies and insurance companies.

[141] The Chief Ombudsman went on to say that FSCL's reach was 7,000 participants compared to IFSO's participants of 4,600 and BOS's participants of 19. FSCL also received a higher number of enquiries and complaints in the 2017 year.[91] . He said that this may generate much more confusion about the roles of the

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88 He did not consider this would be altered by FSCL's amendment to its application to title itself as "FSCL – A Financial Ombudsman Service" and its CEO as "Financial Ombudsman and CEO".

89 This was easily achieved by reference to the statutory register.

90 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding the decision on FSCL's application for permission to use the "Ombudsman" name (20 June 2019) at [51].

91 FSCL received 4,300 enquiries and complaints compared to the 3,541 received by IFSO and 2,741 received by BOS.

Parliamentary Ombudsmen and industry ombudsmen, particularly as it was joining two existing "ombudsman services". He said:[92]

> 59. Granting consent to FSCL would significantly increase the numbers of consumers who would encounter an industry ombudsman in the course of making a complaint, and who might subsequently become confused about the different roles of the industry ombudsmen compared with the Parliamentary Ombudsmen. Confusion undermines the effectiveness and integrity of the Parliamentary Ombudsmen's processes because members of the public will be less likely to understand the role of Ombudsmen as independent Officers of Parliament in resolving complaints against executive government. A public that is not clear on the role of the Parliamentary Ombudsman will be less likely to use that office to hold government organs to account, and less likely to be confident with the integrity of the process and the recommended outcome in the event they do make a complaint. Exposure to industry ombudsmen, who make binding decisions on service providers, may lead members of the public to expect that the Parliamentary Ombudsmen will have the same powers. The fact that they do not can be confusing for members of the public and may lead to a loss of confidence in the role of the Parliamentary Ombudsmen.

[142] On the issue of s 14 of BORA (freedom of expression) the Chief Ombudsman found that the free speech rights in FSCL using the label Ombudsman was not particularly strong. He considered the real interest for FSCL was in using a name for marketing purposes and competitive advantage rather than being an expression which contributed "in any significant way to the market place of ideas or social and political decision making". The Chief Ombudsman concluded the interference with FSCL's free expression such as it was, was demonstrably justified for the reasons given for refusing consent. He specified, in particular, the need to avoid additional confusion amongst members of the public as to the different roles of Parliamentary Ombudsmen and industry ombudsmen.

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92 At [59] (footnotes omitted).

[143] The Court of Appeal had recognised that the constitutional importance of the Parliamentary Ombudsman role was a relevant consideration to be taken into account, as was the multiplicity of non-parliamentary ombudsman,[93] the size of FSCL's membership and the fact that consumers had no choice but to use the dispute resolution service of their financial service provider.[94] It was for the Chief Ombudsman to weigh the considerations and reach a conclusion. The weight he attached to the considerations was a matter for him.

[144] The Court of Appeal had also directed that the Chief Ombudsman take into account the need to treat similar applicants consistently. The Chief Ombudsman specifically took that into account. In his provisional decisions and in his final decision the Chief Ombudsman accepted that as a basic principle "like cases should be treated alike".[95] He accepted that FSCL and the industry ombudsman schemes were alike, and all had been approved by the Minister under the FSP Act.[96]

[145] The difference he isolated was that the two ombudsman schemes had been approved when the banking and insurance dispute resolution schemes were voluntary and so needed a special "mark of quality assurance" which was otherwise unavailable. This was the use of the name ombudsman so at that stage there was an important reason to give the schemes the use of the name. It was a recognition of the public interest in consumer confidence in the voluntary schemes needed at the time.[97] Given the "mana and gravitas" of name, the Chief Ombudsman recognised some inherent unfairness in refusing FSCL approval, but the public interest considerations were not the same now as at the time the two industry ombudsman were approved. He noted FSCL had attracted a significant market share and established a reputable scheme without the name.[98]

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93 *Financial Services Complaints Ltd v Chief Ombudsman,* above n 2, at [45].
94 At [55].
95 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding the decision on FSCL's application for permission to use the "Ombudsman" name (20 June 2019) at [67].
96 At [68].
97 At [69].
98 At [70]–[72].

[146] The Chief Ombudsman said the similarity of name between the Insurance and Financial Services Ombudsman and FSCL's name was a matter for the Registrar of Incorporated Societies under ss 11 and 11A of the Incorporated Societies Act 1908.[99]

[147] On the face of the decisions and the Chief Ombudsman's findings, the conclusions regarding s 14 of BORA were supportable.

Delay and process

[148] I note the Chief Ombudsman's reconsideration process took place over some 15 months. Mr Murray pointed to this delay as evidencing bad faith and effectively predetermination. He said FSCL had a right to have immediate reconsideration of its application and failure to do so was tantamount to contempt of court. I do not agree. In my view there was nothing in the delay or the manner in which the Chief Ombudsman undertook the investigation that was improper. The Chief Ombudsman was entitled to take the time to undertake a thorough reconsideration.

[149] Given both the other commitments of the Chief Ombudsman and the extensive nature of the investigations carried out in the decision-making process, the delay on its face was not excessive. He followed a fair process and ensured that FSCL had the opportunity to comment on the evidence that he gathered. The Chief Ombudsman gave adequate reasons based on the evidence before him. The process on its face was meticulous.

[150] As I flagged at the outset, the decisions and material gathered in the course of the investigation cannot be taken in isolation. It is now necessary to consider the actions taken by the Chief Ombudsman during the period of reconsideration of FSCL's application and in particular the comments he made in email exchanges with the Speaker.

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[99] Under s 11A, the Registrar may require a registrant to change its name where its name so resembles another "as to be calculated to deceive".

Other actions by the Chief Ombudsman

[151] FSCL was unaware that the Chief Ombudsman was having discussions with the Speaker and others concerning the possibility of placing further restrictions on use of the name until a year after those discussions had occurred. On 13 March 2019 it received advice from the Minister about the proposed legislative changes. FSCL wrote to the Chief Ombudsman on 17 May 2019, expressing its concern about his role in supporting legislation to further restrict the use of the name "Ombudsman".[100] It said:

> During this extended period of non-compliance with the Court's order we now know that in breach of elementary standards of fairness you have been working assiduously since at least July 2018 to secure a Cabinet decision to support legislation that could seriously affect FSCL's position and circumvent the Court of Appeal judgment. These circumstances are an indication that FSCL's application is not being considered in good faith. In this regard, we record that we only learned of these developments from the Minister of Justice in his letter of 13 March 2019. We have also now just discovered from the Cabinet paper released this week that the original legislative proposal was to remove FSCL's rights under the existing law and the Court of Appeal's judgment.

[152] FSCL did not know the detail of the emails by the Chief Ombudsman to the Speaker until it obtained copies of the relevant documents in discovery and under the Official Information Act.

[153] The Court of Appeal decision was delivered on 28 February 2018. On 3 April 2018, the Chief Ombudsman wrote to the Speaker formally suggesting that consideration be given to providing greater legislative protection for the "Ombudsman" name than was currently available under s 28A. In that letter the Chief Ombudsman noted that he was to reconsider FSCL's application for approval pursuant to the Court of Appeal's direction and would do so "without any prejudgment of the outcome".

[154] On that same day, his General Counsel wrote to FSCL on behalf of the Chief Ombudsman, indicating the Court of Appeal decision would not be appealed, and he was taking advice on how to implement the Court's decision. It was noted the Chief Ombudsman was to be overseas until 28 May 2018 and would write to FSCL

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[100] Mr Murray said that if FSCL had known about the proposed legislation earlier it would have lobbied against it, as it did as soon as it heard from the Minister about it.

on his return. FSCL responded objecting to the delay. The Chief Ombudsman then wrote to FSCL outlining the process that should be undertaken for his reconsideration on 11 April 2018.[101]

[155] Prior to this, the Chief Ombudsman had engaged in discussions concerning the protection of the "Ombudsman" name with Dr David McGee QC, a former Parliamentary Counsel and Ombudsman. In a 16 March 2018 email the Chief Ombudsman requested Dr McGee's views on s 28A and options for future protection.[102] In this email, the Chief Ombudsman indicated that he might suggest at the upcoming Officers of Parliament meeting that the matter was sufficiently serious that Parliament should re-look at protection "with some degree of priority". This meeting of the Officers of Parliament apparently took place on 22 March 2018.

[156] A paper prepared by Dr McGee on this topic was enclosed in the Chief Ombudsman's 3 April letter to the Speaker. Dr McGee's paper had suggested that use of the name should be exclusive to the Parliamentary Ombudsmen and should not be arrogated by anyone else, whether in the public or private sectors. The paper noted that the name was now a reasonably common descriptive term but was not a common title in New Zealand. The paper indicated that there should be a savings provision which should allow the FSCL application to proceed to be determined under s 28A so it would not be deprived of the "fruits of its victory in the Court of Appeal".[103]

[157] The first provisional decision that consent would be refused was dated 24 July 2018. FSCL responded on 6 August 2018. It expressed concern that "no matter how meritorious FSCL's application" the firm view of the Chief Ombudsman's office was it was not appropriate FSCL be permitted to use the name. FSCL said following the Court of Appeal decision it "expected" that, taking into account the further submissions it made in its response letter, consent would be forthcoming and that it hoped taking into account the further submissions it made in its response letter, consent

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101 Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's Application for use of "Ombudsman" name (11 April 2018).

102 Email from Peter Boshier (Chief Ombudsman) to Dr David McGee QC regarding protection of the name "Ombudsman" (16 March 2018).

103 Letter from Peter Boshier (Chief Ombudsman) to Rt Hon Trevor Mallard regarding Legislative Protection of the name "Ombudsman" (3 April 2018).

would be forthcoming and "a further judicial review proceeding [could] be avoided". It offered to meet and expand on the submissions in the letter.

[158] The following day, the Chief Ombudsman sent a copy of his provisional decision, together with the response by FSCL, to the Speaker of the House. The Chief Ombudsman said in the email to the Speaker that "it would be of enormous benefit to [him] if, before [he] made the final decision, Parliament decided to make a move on the issue". He said:

> It would just reinforce my hand that much more. I think I will do nothing in finalising a decision in the hope there may be movement on this? But perhaps you can let me know whether I should just box on.

[159] The Chief Ombudsman prefaced those comments by saying "what I must do next is make a final decision. Undoubtedly, if I decline, a fresh set of judicial review proceedings will be issued."

[160] The Speaker emailed a response on the same day. The following day, on 8 August 2018, the Chief Ombudsman again emailed the Speaker thanking him for the information and saying:

> …obviously I am going to have to follow legal advice on what to do with the present application, but my every instinct is to try and kick the ball into touch and hope that no line-out occurs quickly. I risk another turnover!

[161] Without mentioning his emails to the Speaker, on 20 August 2018 the Chief Ombudsman wrote to FSCL, responding to its letter of 6 August 2018. The Chief Ombudsman emphasised that he retained an open mind on FSCL's application. He said "there is no firm view that FSCL's application will not receive consent". He said he intended to more fully investigate the issue of confusion.

[162] Mr Boshier says he happened to "bump into" the Minister of Justice on 19 September 2018 on the street. There was a brief exchange on the progress of the further protection legislative proposal. Mr Boshier said the sense he got from the Minister's comments was that the officials were working on legislation "to cover the future situation". He said that his reconsideration of FSCL's application was not discussed with the Minister.

[163] The Chief Ombudsman then made his further enquiries into the issue of confusion and issued his second provisional decision declining consent on 23 October 2018. It was in this decision that Mr Boshier divided his analysis on confusion into three categories. FSCL replied on 2 November 2018, seeking further time to gather information concerning the three types of confusion.

[164] In December 2018 the Chief Ombudsman became aware, through his general counsel, that while the Minister had proposed there would be a savings provision for BOS and IFSO, no savings provision would be made allowing FSCL to use the name "Ombudsman" even if approval were granted to use the name. Mr Boshier said he was given that information in confidence. He was surprised as it was contrary to his proposal and to his understanding of constitutional principle.

[165] The Chief Ombudsman says he did not mention this to FSCL as he took the view that the proposal for future protection of the name was subject to a parliamentary process about future applications not FSCL's application. When he discovered that FSCL might be deprived of the benefit of any approval following the reconsideration he said he felt unable to pass that on to FSCL as he had been given that information in confidence by the Ministry. The Ministry of Justice wrote to the Chief Ombudsman's general counsel on 22 January 2019 confirming no letter had yet been sent to FSCL and that all discussions should be treated as confidential.

[166] The Chief Ombudsman was told in January 2019 by IFSO and BOS that they had been notified of Cabinet's decision to amend the legislation with savings provisions for each of them to continue to use the name.

[167] Officials sent the Chief Ombudsman a copy of a draft Bill amending s 28A on 12 February 2019, together with associated policy documents. The amendment restricted approval of the name in general terms to government agencies. There was no savings provision for FSCL's application in the draft.

[168] The Chief Ombudsman made no comment to the Minster on FSCL's position. He explains this by saying he took the view that the legislation was far from finalised and, in any event, there would be final input from Crown Law on whether the

legislation complied with BORA or possibly a report from the Attorney-General under s 7 of that Act.

[169] On 26 February 2019, the Chief Ombudsman's office was advised by officials there had been a change and there would in fact be a savings provision for FSCL.

[170] FSCL first became aware of the proposed legislation when it received the letter from the Minister dated 13 March 2019. That letter advised there would be a savings provision for FSCL's application. The amendment later enacted, in general terms, limited any future approvals to use the name to Government or public bodies with savings for the use of the name to BOS and ISFO and, if approved, to FSCL.

[171] FSCL responded to the Minister on 25 March 2019. It recorded that it had not been consulted about the legislative changes and opposed the change on the basis that it seemed unnecessary. FSCL emphasised the public interest in consumers being able to have their complaints determined by a high quality private sector organisation which was readily identifiable by the use of the "Ombudsman" name.

[172] The Chief Ombudsman then issued his third provisional decision on 3 May 2019. This indicated the application would be declined. It enclosed notes of interviews with Mr Slater (of FDRS) and Ms Day (formerly of Allianz) and sought comment from FSCL.

[173] On 17 May 2019, FSCL wrote and expressed its concern to the Chief Ombudsman about his role in relation to the proposed legislation.[104] FSCL said that if the Chief Ombudsman's decision on the application was adverse they would like to have it referred back to court without delay given the uncertainty of FSCL's legal position. The bill further restricting the use of the name was before parliament.

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[104] Letter from Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's application for use of the "Ombudsman" name (17 May 2019).

[174] The Chief Ombudsman responded to that criticism in the letter of 20 June 2019 in which he delivered his final decision.[105] He said:

> 2. … I reiterate that it is not and has not been my intention to delay determining FSCL's application, only to fully and properly consider the matter. Certainly it has taken longer than I would have liked and longer that any of us expected. However I hope you will understand that the delays occurred in the context of my other priorities and availability, together with the complexity and importance of this matter. As I have explained, I consider my decision has potentially significant effects on both the financial disputes resolution market and on the understanding of and confidence in the Parliamentary Ombudsman. I have provided three draft decisions since the judgment, and on each occasion FSCL has responded in a way, and/or with information, that has led me to make further inquiries.

[175] He went on to say that he was disappointed at FSCL's contentions that he lacked good faith. He said:

> 3. … You are wrong in your conclusions that I have been *"working assiduously to secure a Cabinet decision ..."* and that your application is not being considered in good faith. As an Officer of Parliament I am not a policy adviser to the executive. I report to the Officers of Parliament Select Committee through the Speaker, and not to a Minister or Cabinet. I was aware the implications of the Court of Appeal's decision were to be considered by Parliament, but do not find that unusual or improper.

[176] The Chief Ombudsman explained that the judgment on the form of the Bill was for Parliament, not for him, to decide, although he agreed with the expressed purpose of the Bill. He assured FSCL:

> I cannot and do not treat the Bill as relevant to my reconsideration under s 28A of the Ombudsmen Act, other than to note that, as it stands, the proposed legislation will not affect FSCL's position.

[177] He also noted that he had "always expected that any amendment legislation would need to include a savings provision of that nature".

[178] The Chief Ombudsman indicated in his final decision letter that he endeavoured to maintain an:

> open process, providing you copies or records of the information I have considered and taking into account your comments on that information,

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[105] Letter from Peter Boshier (Chief Ombudsman) to Jane Meares (Board Chair of FSCL) and Susan Taylor (Chief Executive Officer of FSCL) regarding FSCL's application for use of the "Ombudsman" name (20 June 2019).

> further information from you and comments on my provisional decisions. That correspondence records matters which I have considered along this journey, although in the end some did not seem particularly relevant to, or carry much weight in, my ultimate decision.

Evidence of the Chief Ombudsman

[179] The Chief Ombudsman filed an affidavit in these proceedings dealing with, among other things, his exchange of emails with the Speaker. He noted FSCL's allegations that he had not conducted the decision-making process in good faith and said he was responding to that serious allegation.

[180] In summary, the Chief Ombudsman's evidence, as is relevant to his involvement in the legislative proposal, was:

(a) He is an Officer of Parliament and reports to Parliament via the Officers of Parliament Select Committee. He is independent of the government and not a policy adviser to the executive. He raised matters with Members of Parliament in cases where he identified issues of government policy or legislation that affected his role or matters within his jurisdiction, but the parliamentary process was not a matter in which he was directly involved.

(b) The role of Chief Ombudsman covers a breadth of responsibilities, including protected disclosures[106] and monitoring places of detention.[107] He had staff of 140 to assist but ultimately the discharge of the function was his responsibility and he was the only ombudsman currently appointed.

(c) Following the Court of Appeal decision he became concerned about the broader impact of the decision for the future of the Parliamentary Ombudsman and the likelihood that if future applications were refused judicial review litigation would occur.

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106 Under the Protected Disclosures Act 2000.
107 Under the Crimes of Torture Act 1989.

(d) On 22 March 2018 he raised his concerns with the Speaker following his appearance before the Officers of Parliament Select Committee where an examination of his budget had led to a discussion about the then recently-issued judgment of the Court of Appeal. Once he had Dr McGee's advice he wrote to the Speaker on 3 April to formally request consideration be given to an amendment to s 28A.

(e) The Chief Ombudsman felt that any amendment was a matter first for the responsible Minister and officials with expertise in policy development, then the Executive, and it was ultimately for Parliament to decide whether to amend the legislation. He said he provided input when requested.

(f) It was not his place to disclose to FSCL that he had written to the Speaker to seek amending legislation, as "Any legislation was a matter for the Executive and Parliament not me".

(g) The email to the Speaker on 7 August 2018 was precipitated by the significant amount of time it had taken to undertake the reconsideration of FSCL's application. He was concerned that future applications would become a significant burden on the Chief Ombudsman.

(h) The preliminary decision of 24 July 2018 on FSCL's application and FSCL's response of 6 August 2018 were provided to the Speaker as evidence of the resource-intensive nature of the exercise and enquiry as to the movement on any proposed amendment. He considered that any views expressed by Parliament might be relevant to his final decision or he might defer his decision awaiting those views.

(i) He had always understood that any legislation would preserve FSCL's position. He became aware in December 2018 that there may not be a savings provision for FSCL but that was contrary to his proposal and to his understanding of constitutional principle. He said he could not alert

FSCL because the advice from officials was headed "Confidential …" and was marked "with sensitivity".

(j) When he received a copy of the draft Ombudsman (Protection of Name) Amendment Bill which did not have a savings provision for FSCL, he took the view it was not his place to comment on that position and that, in any event, the legislation was far from finalised.

(k) On 12 March 2019 the Ministry of Justice advised that the Bill could have a savings provision for the FSCL reconsideration.

[181] The Chief Ombudsman, in simple terms, says the parliamentary process was distinct from his reconsideration of the decision. He was entitled by virtue of his position to raise the issue of further protection of the name given the time and resource taken up by dealing with the matter and his concern that the same problem would arise if there were other applications in the future. He anticipated and recommended (in the McGee paper) that there would be a savings provision for the reconsideration of FSCL's application. When he became aware there might not be a savings provision, he felt bound by confidentiality not to raise the matter with FSCL. In any event he anticipated that any final version of the legislation would likely incorporate a savings provision for FSCL.

[182] I am satisfied that in principle it was not improper, in the public law sense, for the Chief Ombudsman to ask the Speaker to consider an amendment to better protect the name in the future. The Chief Ombudsman reports to Parliament via the Officers of Parliament Select Committee which is chaired by the Speaker. The FSCL decision was one which would affect the Chief Ombudsman's office. The Chief Ombudsman was concerned about the implications for his office in terms of resourcing if he faced future applications. The costs and resources involved in the FSCL approval process was a relevant topic for the Chief Ombudsman's report to the Select Committee and briefing of the Speaker. It was not improper nor unlawful in the public law sense for him to raise that matter with the Speaker and others leading up to and including in the 3 April 2018 letter to the Speaker.

[183] At this stage, the Chief Ombudsman was not required to advise FSCL of his approach to the Speaker. When he approached the Speaker, the evidence contained in the McGee paper suggests that the restrictions of use would only apply to future applications and would not have affected the reconsideration of FSCL's application.

[184] It would have been preferable if the Chief Ombudsman in his affidavit had explained in more detail his earlier briefing of the Speaker and other discussions he had had with Ministers. However, as it appears the focus of the discussion on future prohibition of the "Ombudsman" name, in the absence of cross-examination I accept Mr Boshier's evidence on the reasons he wrote to the Speaker about the issue.

[185] However, the further exchanges with the Speaker by email on 7 and 8 August 2018, which occurred when the Chief Ombudsman was in the midst of considering the application for approval, required a more detailed explanation. On their face the emails indicate that the Chief Ombudsman had made up his mind to refuse the application.

[186] The two emails were sent by the Chief Ombudsman to the Speaker on 7 and 8 August 2018. The text of those emails is important and so I set them out in full below:[108]

> I thought I would update you as to where we are at with the decision I must make as to whether or not to grant this organisation use of the name ombudsman.
>
> I do not suggest for a moment you need to read the **attached** documents. But I send them for a reason. The first is my provisional decision, fully setting out my reasons and my rationale for declining, and the second is their response just received.
>
> What I must do next is make a final decision. Undoubtedly, if I decline, a fresh set of judicial review proceedings will be issued.
>
> I must say, it would be of enormous benefit to me if, before I make a final decision, Parliament has decided to make a move on this issue. *It would just reinforce my hand that much more. I think I will do nothing in finalising a decision in the hope that there may be movement on this? But perhaps you can let me know whether I should just box on.*
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> …

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[108] Email from Peter Boshier (Chief Ombudsman) to Rt Hon Trevor Mallard (Speaker of the House) regarding the use of Ombudsman name (7 August 2018) (emphasis added).

[187] The next morning, 8 August 2018, in response to the reply by the Speaker Mr Boshier emailed the Speaker:[109]

> Very helpful indeed, and thank you very much. Obviously I am going to have to follow legal advice on what to do with the present application, *but my every instinct is to try and kick the ball into touch and hope that no lineout occurs quickly. I risk another turnover!*
>
> …

[188] The explanation given by the Chief Ombudsman for these emails is:

> 26. I acknowledge that one consideration that appears to have crossed my mind when I composed my emails to the Speaker on 7 and 8 August 2018 was that any views expressed by Parliament on the envisaged amendment to section 28A might be of relevance when I came to make my final decision on FSCL's application. It also crossed my mind in what must have been a moment of optimism in the face of the complex task ahead that I might defer my consideration of FSCL's application until I had Parliament's views. But as I noted to the Speaker, I intended to take and follow legal advice on how I processed FSCL's application.
>
> 27. Having taken that advice, I appreciated that I would need to complete my reconsideration of FSCL's application. I reminded myself that any change in the law or expression of views by Parliament was not relevant to the decision that I had to make.

[189] FSCL also says further evidence of lack of good faith is evident in the failure of the Chief Ombudsman to take any positive steps to ensure the outcome of the FSCL reconsideration would be protected by a savings provision. It says the Chief Ombudsman knew from December 2018 that there may not be a savings provision for an approval for FSCL. At that stage the Chief Ombudsman was still actively considering the approval. He was awaiting a response from FSCL in relation to the second provisional decision of 23 October 2018 refusing approval. The effect of no savings provision for FSCL would have been to render any approval nugatory.

[190] The Chief Ombudsman's explanation is that it was not his place to comment on the position and that the legislation was far from finalised. It had not been introduced into Parliament, and he was aware that provision would be subject to

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[109] Email from Peter Boshier (Chief Ombudsman) to Rt Hon Trevor Mallard (Speaker of the House) regarding the use of Ombudsman name (8 August 2018) (emphasis added).

further advice from Crown Law on whether it complied with BORA or whether a report from the Attorney-General under s 7 of the Act was required. The Attorney-General's report apparently did recommend a savings provision for FSCL. On 12 March 2018, the Chief Ombudsman was advised a FSCL approval savings provision would be inserted.

Analysis: Pre-determination

[191] Actual predetermination must be established on an objective assessment of the evidence.[110] Actual predetermination requires a conclusion based on the evidence before the Court that the decisionmaker did not have an open mind.

[192] In *Rangitira*, Clark J was satisfied that the Minister was of a predisposition which prima facie suggested predetermination.[111] However, the Judge noted that the ultimate question for the Court was whether the evidence tended to show the Minister failed to consider the application with an open mind to persuasion. Clark J said:[112]

> (f) But before a decision can be set aside on the grounds of disqualifying bias "it must be established on the balance of probabilities that [their minds] were not open to persuasion" and that they did not address themselves to the particular criteria the legislation required them to address. In determining that issue the Court must look at all of the circumstances appearing from the material …

[193] Ultimately, Clark J found that predetermination was not established. The Judge took into account that the relevant Ministers had met on four occasions to discuss the application, there had been discussion with officials about the criteria and the predisposed Minister had spent most of one weekend reading the extensive materials. This was evidenced by the markings on the briefing papers and on the application which indicated the Minister had actually turned her mind to the relevant information and applied the criteria.[113]

[194] In *Anderton v Auckland City Council* this Court upheld claims of predetermination.[114] These were levelled at a mayor and the council who were

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110 *Save Chamberlain Park Inc v Auckland Council,* above n 42, at [185].
111 *Rangitira Developments Ltd v Sage*, above n 48, at [36].
112 At [34].
113 At [41]–[47].
114 *Anderton v Auckland City Council,* above n 33.

authorised by statute to hear and determine the objections to a scheme in a planning consent process. In that case there was evidence of a strong predisposition on the part of the mayor to see the proposed scheme proceed. This was supported by his actions over the previous six years to support the scheme. Under cross-examination the mayor said that no matter how firm his opinion was, he was always open to have his opinion changed. The Mayor also said he would "yield" to "the legal procedures".[115] The Court noted that the mayor was very able and experienced and may have been able to put his views to one side, but found his attitude verified the allegations of the applicants that the council intended to implement the proposal, unless precluded from doing so by some insuperable legal impediment.[116] The Judge noted that the proceedings may superficially be beyond reproach but evidence of collateral circumstances could provide evidence of predisposition [117]

[195] *Anderton* was decided at a time when predetermination was treated as an aspect of bias. Therefore, the Court refers to "real likelihood of bias" or "reasonable suspicion" test.[118] Nevertheless, the Judge adopted an approach requiring actual bias "to have been antecedently present".[119] The Court also noted that the case for the applicant might be "reinforced by the manner in which the proceedings were conducted".[120]

[196] In *Anderton*, the Court said that the Council could justify "in isolation each one of the enumerated factors". However, it held that in the context of the predetermination inquiry, "it is the cumulative effect of those enumerated factors which must be the ultimate determinant."[121]

[197] That applies in this case. I must consider the evidence in the round when considering the issue of predetermination. Each separate piece of evidence may be explained on its own but what is important is the picture as a whole.

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115 At 691.
116 At 691.
117 At 687.
118 At 688.
119 At 697.
120 At 688.
121 At 696. See also Lord Widgery CJ, noting in *R v McLean, ex parte Aikens* [1974] 139 JP 261 (QB) at 4–5 that it is not right to take each factor and destroy them individually without looking at the whole.

The evidence in the round

[198] Mr Murray pointed to a number of indicia which he said provided evidence in support of that pre-determination. In summary these are:

(a) Institutional – the history of Chief Ombudsmen attempting to protect the name and, in particular, the applications by FSCL that had been declined.

(b) The process adopted by Mr Boshier and, in particular, the 15 month delay in reaching the final decision.

(c) The decision process itself. The responses to the three provisional decisions each resulted in more investigations by Mr Boshier to the extent that FSCL referred in its submissions of 17 May 2019 to the Chief Ombudsman's "continuing determination to try and find some basis" to decline.

(d) The actions and correspondence of the Chief Ombudsman dating back to the initial stages of reconsideration in April 2018, the subsequent 2 August emails to the Speaker and failure to intervene when it appeared there would be no savings provision for a FSCL approval in the proposed legislation.

[199] The Chief Ombudsman was the person charged with making the decision by the legislature under s 28A. As I have found earlier, he displayed a legitimate predisposition in favour of protection of the name from at least 3 April 2018. This was a personal predisposition, not an institutional predisposition by virtue of his position as Chief Ombudsman. It was not improper for him to take his concerns about future applications to the Officers of Parliament Select Committee, the Speaker or others, as long as the focus was on the future protection of the name and not on the application before him for reconsideration. Nevertheless, the existing predisposition is a matter to be taken into account when considering all the evidence.

[200] The comments made by the Chief Ombudsman in the emails of 7 and 8 August, in my mind, provide evidence which weighs heavily toward the fact that the Chief Ombudsman had closed his mind and was not amenable to persuasion. In particular, the comment that if Parliament had made a move it "would *reinforce [his] hand* that much more" indicates that a decision to refuse FSCL's application had already been made by the Chief Ombudsman, and he was looking for material in order to support that decision and would delay giving the final decision to obtain that evidence.

[201] The further reference in the email of 8 August that his "every instinct is to try and kick the ball into touch and hope that no lineout occurs quickly. I risk another turnover" reinforces his intention expressed in the earlier email to refuse the application and hope that no immediate judicial review application followed.

[202] A casual remark or even a robust comment indicating a strong predisposition in general made before the decision-making process begins may well not carry significant weight when the evidence is looked at as a whole. However, in this case the remarks were made at a time the decision-maker was seized of the material. The email exchange occurred immediately after the Chief Ombudsman had delivered his first provisional decision, and well before the final decision was made. He had received a response from FSCL criticising the reasoning in the decision. The comments were made at a critical time in the course of the reconsideration process.

[203] In addition, his views are set out in writing in two separate emails. This distinguishes the present case from *Rangitira,* where the comments and views of the Minister were not expressed in relation to the particular application nor were they made during the process of consideration of the application. Here the Chief Ombudsman was the sole decision maker and as an experienced decision maker understood the importance of a fair process and knew how to undertake such a process. But his unguarded emails indicated he had decided to refuse the application. The unfiltered comments exposed the Chief Ombudsman's real views on the matter and undermine statements made by the Chief Ombudsman to FSCL at later dates that on their face may otherwise have indicated an open mind.[122]

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[122] For instance, the Chief Ombudsman said in a letter to FSCL on 20 August 2018 "you have challenged my analysis and so I am prepared to look a little closer at the objective evidence".

[204] The Chief Ombudsman says in his affidavit that he intended to take and follow legal advice on how he "processed" FSCL's application. This suggests that the next steps in the reconsideration were a matter of process only. Following an otherwise proper process does not cure a decision which has been predetermined.

[205] On the evidence as a whole I am satisfied on the balance of probabilities that the Chief Ombudsman's legitimate predisposition fell into predetermination. If the first provisional decision had been a final decision it may well have withstood judicial review. But the decision-maker's frank comments to the Speaker on 7 and 8 August 2018 on top of an existing predisposition, leads me to an inevitable conclusion that he had decided to refuse the application and would only "go through the motions" if required to continue the process by his legal advisor. Other matters which are justifiable in isolation, such as delay, then support that conclusion. The inference is that the decision was delayed to collect evidence to reinforce the Chief Ombudsman's hand in doing what he had already decided to do: refuse the approval.

[206] Other evidence in the decision-making might also suggest the Chief Ombudsman was intent on shoring up his refusal. For instance in the first provisional decision he found "significant" confusion between FSCL and the two industry ombudsman schemes. When this was challenged by FSCL the Chief Ombudsman determined that he would further investigate confusion. In the next provisional decisions and in the final decision he found the confusion was "not significant". To achieve this conclusion the Chief Ombudsman had bifurcated the confusion into a first type which related to a perception that FSCL was inferior and a second type which was confusion between the industry schemes as to which scheme applied. In isolation, that may be justified, but when viewed in light of the August 2018 emails, a determination to find evidence contrary to FSCL's assertions at all costs might be inferred. The Chief Ombudsman's own investigations into confusion related to FSCL's inferiority were largely carried out after those emails.

[207] The meaning of the unguarded comments of the Chief Ombudsman are supported by his failure to advocate for a savings provision for FSCL in the draft Ombudsman (Protection of Name) Amendment Bill. While the Chief Ombudsman explained that he had received the information in confidence so was unable to pass it

on to FSCL, that does not explain why no steps were taken to persuade officials that it would be unfair if any decision favourable to FSCL would be rendered otiose by legislation or otherwise indicate his support for a savings provision. He was under an obligation to take steps to prevent the reconsideration of FSCL's application being rendered a pointless exercise. That obligation came into existence because he had been directed by the Court of Appeal to reconsider the decision and following that he had instigated a process leading to further statutory protection. FSCL knew nothing of the situation so was powerless to protect itself. Although the content of the submission is privileged, I note that the Chief Ombudsman did submit on the draft Bill. There was ample opportunity for him to advocate for FSCL on its behalf.

[208] The fact that in the end the savings clause was inserted is beside the point. The inference that might be drawn from the Chief Ombudsman's lack of advocacy on behalf of FSCL in relation to such clause is that the Chief Ombudsman had decided he would refuse the application regardless of further submissions. Therefore, a savings clause was not needed.

[209] In summary, I am satisfied that the Chief Ombudsman had predetermined that he would refuse the application for the following reasons in particular:

(a) The Chief Ombudsman was predisposed against granting use of the name to any private organisation but, in particular, to FSCL from the time he commenced his reconsideration in April 2018. By itself the predisposition was legitimate.

(b) The comments in emails to the Speaker on 7 and 8 August 2018 indicated the Chief Ombudsman fell from predisposition into a predetermination that he would refuse the approval. His candid comments were made at a time when the application was under active consideration. The Chief Ombudsman in his evidence said he intended to take and follow legal advice on the reconsideration and how he "processed" FSCL's application. Predetermination cannot be cured by a subsequent apparently fair process.

(c) The Chief Ombudsman failed to take steps to attempt to obtain a savings provision for FSCL to ensure that if approval was granted it would be effective. The omission to do so, inferentially supports a finding of predetermination in that the lack of a savings provision would have effectively been a refusal of the application.

[210] In addition, inferences can be drawn from the delay and the process of the decision-making which support predetermination.[123]

[211] If the evidence were confined to the provisional decisions and the final decisions as well as the investigation process and exchanges between the Chief Ombudsman and FSCL, I do not consider it supports a finding that the Chief Ombudsman acted improperly or made any errors of law. However, I must consider the evidence in the round. The final decision to refuse the applications would have been within the range of available outcomes. However, approval of the application was also within that range. It was for the Chief Ombudsman to weigh up the considerations and come to a conclusion. However, once predetermination has been established, regardless of the meticulous process and the content of the decision, it must be set aside.

[212] It follows that once I have found predetermination it is not necessary to consider the implications of BORA. By definition predetermination that the application would be refused is not a justified interference with freedom of expression.

[213] I am satisfied that when the evidence is viewed in the round, predetermination is established on the balance of probabilities. As the decision was made with a closed mind I have no option but to set aside the final decision. In light of my finding of predetermination, it is not necessary to canvass the grounds for judicial review or particulars claimed in any further detail. Each of the issues raised in the particulars has been touched upon in my decision.[124]

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123 At [205]-[206].

124 The particulars were reformulated in the course of the hearing and are set out in Attachment 1.

Conclusion

[214] I am satisfied that the Chief Ombudsman predetermined FSCL's application for approval. Therefore, the decision is unlawful and must be set aside. The effect will be that no decision has been made for the purposes of the savings provision. The application remains at large in terms of the savings provision in the amendment to the Act as follows:[125]

> **4 Savings provision in respect of application by Financial Services Complaints Limited to use "Ombudsman"**
>
> (1) This clause applies if the Chief Ombudsman consents (whether before or after the commencement of the Amendment Act) to FSCL's application under section 28A(1) of the Ombudsmen Act 1975 to use the name "Ombudsman".
>
> (2) If this clause applies, FSCL may use "Ombudsman" in its name in accordance with the consent given by the Chief Ombudsman as if the Amendment Act had not been enacted.
>
> (3) In this clause, FSCL means Financial Services Complaints Limited, the appellant in the proceedings that were the subject of the judgment of the Court of Appeal reported in *Financial Services Complaints Limited v Chief Ombudsman* [2018] NZCA 27.

Relief

[215] My finding leads me to the issue of what happens next. Mr Murray, for FSCL, urged that if a reviewable error was found, the decision should be quashed and that this Court should substitute its own decision.

[216] The decision is important. It involves matters of policy which are outside the expertise of the Court and are not appropriate for it to assess. The importance of the role of the Parliamentary Ombudsman, and the fact that the decision was entrusted to the Chief Ombudsman, support my view that it is not for this Court to make the decision on the merits. I am aware this has been a long process for FSCL. However, on balance it is important to ensure the substantive decision is made as envisaged by the legislation, albeit with appropriate safeguards.

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[125] Ombudsmen (Protection of Name) Amendment Act 2020, s 6: inserting scb 1AA, pt 1, cl 4 (Savings provision in respect of application by Financial Services Limited to use "Ombudsman") into the Ombudsmen Act 1975.

[217] In those circumstances I consider the decision should be set aside and be referred back for reconsideration.

[218] In view of my findings, it is not appropriate for the Chief Ombudsman to undertake the reconsideration, without putting in place arrangements to manage the risk of predetermination in any further reconsideration. While under s 28A the prior written consent of the Chief Ombudsman is required to permit the use of the name,[126] it is possible under the Ombudsmen Act 1975 for another Ombudsman to reconsider the matter.

[219] The Courts will strive to find a practical solution if available and adopt a construction in cases of ambiguity or a hiatus so the statute is "made to work".[127] It would be "inimical to the orderly administration of the Act" to find that no other person could consider an application if the Chief Ombudsman is for some reason unable to do so.[128]

[220] With that in mind, the provisions of the Act allow for some practical options for the resolution of this issue. It is the Chief Ombudsman who is responsible for the administration of the office, and the coordination and allocation of work between Ombudsmen.[129] Nevertheless in the present circumstances it is an option for another Ombudsman to do an investigation and make a recommendation to the Chief Ombudsman on the issue.[130] Section 8 provides that an Ombudsman may investigate any matter and make a report. The Ombudsmen are each independent and are required to "faithfully and "impartially" perform their duties.[131] In addition, temporary appointments of Ombudsmen may be made under s 8(1) of the Ombudsmen

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126 Ombudsmen Act 1975, s 28A (as at 14 November 2019).

127 *R v Salmond* [1992] 3 NZLR 8 (CA) at 13, per Cooke J.

128 See *Vu v Ministry of Fisheries* [2010] NZSC 162, [2011] 3 NZLR 1 at [9]. To find that the Chief Ombudsman was the only person who could consider the application would be the "sort of stultifying interpretation which Courts rightly struggle to avoid".

129 Ombudsmen Act 1975, s 3(4).

130 Section 3 of the Act contemplates the Governor-General appointing one of the other Ombudsman to act for the Chief Ombudsman in the event of incapacity which includes not only illness or absence but, also for "other sufficient cause", which incapacitates him from performing the duties of his office.

131 Ombudsmen Act 1975, s 10(1).

Act 1975. A temporary appointment to be made for the purpose of considering the application under s 28A.[132]

[221] Another option would be to use the powers of delegation.[133] There appears no reason why the power of decision under s 28A by the Chief Ombudsman should not be delegated.

[222] I therefore order the Chief Ombudsman's decision of 20 June 2019 be set aside and refer the matter back for reconsideration under s 28A. Such reconsideration to be undertaken on the report and recommendation of an ombudsman appointed for that purpose or under a delegation from the Chief Ombudsman.

Costs

[223] There appears no reason why costs should not follow the event on a 2B basis. With that indication counsel may be able to agree on costs. Failing agreement a memorandum should be filed by the plaintiffs on or before 10 days of this judgment, a response within a further seven days and any reply within a further three days on costs should be filed and served following above process.

Grice J

Solicitors:
Michael Leggat, Barrister & Solicitor, Wellington for Plaintiff
Simpson Grierson, Wellington for Defendant

[132] Section 13(5) allows the Prime Minister, with the consent of the Chief Ombudsman, to refer a matter to an Ombudsman for investigation and report.
[133] Ombudsmen Act 1975, s 28.

Attachment 1 – plaintiff's detailed grounds for review (particulars)

20 June decision 44. The defendant's decision-making and decision of 20 June 2019 is unlawful, unreasonable, unfair and invalid upon the grounds particularised as follows:	
Particular	Process/decision issue: as followed allocated in oral submissions
1. Contrary to the plaintiff's right to have an immediate reconsideration of its application (subject only to appeal considerations) the defendant engaged the plaintiff in a further extended decision-making process of more than a year while he awaited the passage of legislation to prevent any further use of the "Ombudsman" name.	Process
2. The defendant's further extended decision-making process, during which he and his office worked in secret with the Executive branch of Government on legislation that would have defeated the plaintiff's rights under the Court of Appeal judgment, was a breach of elementary standards of fairness and good faith.	Process
3. The decision is contrary to the legislative purpose of section 28A of the Ombudsmen Act 1975 (as evidenced by Hansard) that it is in the public interest for the "Ombudsman" name to be available for use by private consumer dispute resolution schemes.	The decision
4. The Robertson decision-making criteria were promulgated to give effect to the legislative purpose and the plaintiff's s28A application satisfied all the Robertson decision-making criteria (as accepted by the defendant subsequent to the Court of Appeal's judgment).	The decision
5. The defendant's objection to the use of the term "financial services" by the plaintiff in association with the "Ombudsman" name is unreasonable and perverse given that his predecessor approved such use by ISOS without consulting the plaintiff even though the words "financial services" are part of the plaintiff's name.	The decision
6. The defendant's reasoning and decision-making process includes extensive tendentious minutiae which seeks to minimise the power of the "Ombudsman" name for the plaintiff while at the same time relying on the power of the name as the principal ground for declining the s28A application which is unreasonable, irrational perverse and in defiance of logic.	The decision
7. The decision is unreasonable in failing to comply with the administrative law requirement of treating like circumstances alike in that the plaintiff's scheme is almost identical to the BOS and IFSO schemes which are entitled to use the "Ombudsman" name.	The decision
8. The defendant's exercise of the section 28A discretion is unlawful as having been predetermined by a fixed policy adopted in the Ombudsmen's office subsequent to the BOS and ISOS consents that no further applications should be approved.	The decision
9. The decision infringes the plaintiff's right to freedom of expression in s 14 of the New Zealand Bill of Rights Act 1990 (BORA) in that the defendant has not established and could not establish that it is necessary in a free and democratic society to restrict the use of the "Ombudsman" name to only two of the three principal and identical consumer dispute resolution schemes in New Zealand.	BORA breach