IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA149/2021
[2022] NZCA 248

BETWEEN	FINANCIAL SERVICES COMPLAINTS LIMITED Appellant
AND	CHIEF OMBUDSMAN Respondent

Hearing:	9 February 2022
Court:	Cooper, Courtney and Goddard JJ
Counsel:	K I Murray and M J Leggat for Appellant M T Scholtens QC and D W Ballinger for Respondent
Judgment:	15 June 2022 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the High Court is set aside.

C We make a declaration that FSCL is entitled to the Chief Ombudsman's consent to use the ombudsman name in connection with its dispute resolution scheme.

REASONS OF THE COURT

(Given by Courtney J)

Table of Contents

Introduction

[1] This appeal concerns a decision by the Chief Ombudsman under s 28A of the Ombudsmen Act 1975 refusing permission for a private dispute resolution service to use "ombudsman" in its name. Without that permission, it is unlawful to use the ombudsman name in connection with any business, or the provision of any service. The appellant is Financial Services Complaints Limited (FSCL). FSCL's dispute resolution scheme is approved under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act). Two other such schemes have permission to use the ombudsman name in connection with their schemes. FSCL wishes to do likewise.

[2] In 2015 FSCL's application for permission to use the ombudsman name was refused by the then Chief Ombudsman, Dame Beverley Wakem. In 2016 the application was reconsidered by the current Chief Ombudsman, Peter Boshier, who also refused permission. This Court set aside Mr Boshier's decision and directed him to reconsider the application.[1]

[3] In 2019, Mr Boshier again refused permission. The High Court set aside that decision on the ground of predetermination.[2] Grice J directed that FSCL's application be reconsidered either by an ombudsman appointed temporarily for that purpose under s 8 of the Ombudsmen Act or by a person acting under a delegation from the Chief Ombudsman under s 28(1).[3]

[4] FSCL appeals on two grounds. The first is that the Judge failed to adjudicate on eight of the nine grounds of review raised.[4] However, in advancing this ground of appeal, FSCL focused on only two of the grounds it had relied on in the High Court: the Chief Ombudsman's failure to treat like applicants alike (ground 7) and whether refusing permission was a justifiable limitation of FSCL's right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 (BORA) (ground 9).

[5] The second ground advanced by FSCL is that the Judge erred in referring the matter back for reconsideration rather than granting the substantive relief sought, namely a declaration that FSCL is entitled to the Chief Ombudsman's consent under s 28A.

[6] In judicial review proceedings the court is concerned with the lawfulness of the decision under review. Whether the decision was one the court itself might have

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1 *Financial Services Complaints Ltd v Chief Ombudsman* [2018] NZCA 27, [2018] 2 NZLR 884 [Court of Appeal judgment].

2 *Financial Services Complaints Ltd v Chief Ombudsman* [2021] NZHC 307, [2021] 2 NZLR 475 [Decision on appeal]. The Chief Ombudsman does not cross-appeal that finding.

3 At [222].

4 The grounds were: unreasonable delays (ground 1); breach of fairness and good faith by working in secret towards an amendment of s 28A (ground 2); the decision was contrary to the statutory purpose of s 28A (ground 3); acting contrary to the Robertson guidelines (ground 4); unreasonably objecting to FSCL's proposed use of the term "financial ombudsman service" as being too similar to the IFSO scheme (ground 5); unreasonably minimising the power of the ombudsman name of FSCL (ground 6); failing to treat like applicants alike (ground 7); predetermination (ground 8); and unreasonable limitation on FSCL's right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 (ground 9).

made, had it been the decision-maker, is not relevant. As a result, it is generally not for the court to substitute its decision for that of the statutory decision-maker; the appropriate relief will be a direction that the decision-maker reconsider. Nonetheless, there are cases in which the Court might legitimately substitute its own decision. This includes when the Court is satisfied that only one lawful decision was available to the decision-maker.[5]

[7] FSCL says that granting permission to use the ombudsman name was the only lawful decision available to the Chief Ombudsman so it was open to the Judge to substitute her decision for that of the Chief Ombudsman. It says that, in the circumstances of this case, that was the appropriate course. FSCL now seeks to have this Court make the declaration sought.

[8] The issues on appeal are therefore:

a. Did the Judge fail to determine grounds 7 and 9?

b. Was granting permission the only lawful decision available to the Chief Ombudsman?

c. Did the Judge err in referring the decision for reconsideration and, if so, should this Court now grant the relief sought?

Statutory scheme

[9] The statutory scheme as enacted by the Ombudsmen Act and the response of successive Chief Ombudsmen to requests for permission to use the name was canvased in some detail in this Court's earlier decision.[6] Our much briefer description is drawn from that judgment.

[10] The name and role of the New Zealand ombudsman are derived from the Swedish institution established in 1809 with the function of ensuring the Executive was observing the country's laws and statutes. Translated literally, it means people's

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5 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) at 353.
6 Court of Appeal judgment, above n 1, at [5]–[24].

representative. New Zealand was the first country outside Scandinavia to adopt the concept and the name in the Parliamentary Commissioner (Ombudsman) Act 1962, which was replaced with the current Act in 1975.

[11] In New Zealand, ombudsmen are independent officers of Parliament appointed by the Governor-General on the recommendation of the House of Representatives. They perform an important constitutional role, investigating complaints about the administrative conduct of executive government and of government agencies, thus enhancing the accountability of Ministers and officials. In effect, Parliament has shared with the ombudsmen some of its own authority and power.

[12] Initially, there was no constraint on the use of the ombudsman name by private entities. However, concern over the use of the ombudsman name by private entities in overseas jurisdictions led New Zealand's Chief Ombudsmen to seek legislative protection for the name in New Zealand. They were concerned that overuse of the name would lead to confusion and lessening of public understanding of the ombudsman concept and loss of public confidence in the office.

[13] Early efforts to either prohibit or limit the use of the name were not successful. A 1988 Bill to amend the Ombudsmen Act by making it a criminal offence to use the name except pursuant to statute or with the prior consent of the Chief Ombudsman failed; the then Minister of Consumer Affairs considered that the name was in common use and that its use in other countries had not led to the confusion that was feared. In 1991, however, the Bill was revived and s 28A enacted, precluding the use of the ombudsman name without the approval of the Chief Ombudsman. Section 28A 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 summary conviction to a fine not exceeding $1,000 who contravenes subsection (1).

[14] Parliament considered protection of the name was necessary and desirable because of the Parliamentary Ombudsman's special constitutional role. In enacting s 28A, Parliament's purpose was to provide a degree of protection for the name by strictly regulating its use, although not to the point of complete prohibition.[7]

[15] In 1992, after consultation with the Minister of Consumer Affairs and the Consumers' Institute, the then Chief Ombudsman, 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 (the Robertson guidelines).[8] There were six criteria:[9]

> 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 [to] 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 "Ombudsman" will not normally be granted for unique local or regional roles.

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7 Court of Appeal judgment, above n 1, at [44].

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

9 John Robertson and Nadja Tollemache "Report of the Ombudsmen for the year ended 30 June 1992" [1991–1993] I AJHR A3 at 36–37, cited in Court of Appeal judgment, above, n 1, at [12].

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.

[16] In 2000 Sir John's successor, Sir Brian Elwood, revised the basis on which applications under s 28A would be considered, adopting a two-stage process (the Elwood policy). First, the public interest served by the establishment of an additional non-parliamentary ombudsman was to be balanced against the public interest in a non-proliferation of the name. Secondly, the application was to be considered against specified factors (which broadly reflected the Robertson guidelines).[10]

[17] In 2020, s 28A was amended to preclude the use of the ombudsman name outside its parliamentary context except with the permission of the relevant Minister. The Minister may only grant permission to certain public sector agencies and organisations; private sector service providers can no longer obtain permission to use the name. The amendment contains a savings provision in respect of FSCL, so the basis on which FSCL was entitled to have its application considered was not affected.[11]

[18] The amendment was promoted by the current Chief Ombudsman, who was concerned that the Court of Appeal's decision setting aside his earlier refusal would invite further applications for the use of the name and further litigation, which would risk diminishing the status of the office of the Parliamentary ombudsman. The Chief Ombudsman's role in promoting the amendment was a focus of FSCL's case in the High Court, with assertions of unfairness in the Chief Ombudsman's ongoing communications with the Speaker of the House of Representatives, the Hon Trevor Mallard. Although these communications led the Judge to conclude that the Chief Ombudsman had pre-determined his decision to refuse FSCL's application, she found no impropriety in his promotion of the amendment.[12] There is no challenge to

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10 Court of Appeal judgment, above n 1, at [17]–[18].
11 Ombudsmen (Protection of Name) Amendment Act 2020, cl 14 of Sch 1AA.
12 Decision on appeal, above n 2, at [182].

that aspect of the judgment. Therefore, our record of the Chief Ombudsman's decision-making process largely omits reference to this aspect.

The history of FSCL's application to use the ombudsman name

Use of the ombudsman name in the financial services sector

[19] Following the introduction of s 28A, Sir John granted two applications for the use of the ombudsman name in connection with private ombudsmen schemes. These were the Banking Ombudsman Scheme (BOS) and the Insurance and Savings Ombudsman Scheme (ISOS). The purpose of these schemes was to provide a means by which banking and insurance companies could offer their customers an independent dispute resolution service in respect of complaints made about their products and services.

[20] From 2010 all financial service providers were required by the FSP Act to be a member of an approved dispute resolution scheme in respect of any financial service provided to a retail client.[13] The FSCL scheme, established in 2010, was the first scheme approved under the FSP Act. Subsequently, the BOS and ISOS schemes were also approved.[14]

[21] There was, and continues to be, competition among the schemes for customers. In 2011 FSCL wrote to the then Chief Ombudsman, Dame Beverley, expressing concern about the terms in which ISOS was using the ombudsman name to promote its scheme. FSCL proposed the continued use of the ombudsman name in relation to private schemes be reconsidered, or ISOS be required to stop using the ombudsman name as a marketing tool, or consideration be given to allowing FSCL to also use the ombudsman name. Dame Beverley advised that she would not be approving any further use of the name in the near future and FSCL did not pursue the matter.

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13 Section 48.

14 There is a fourth scheme that has FSP approval, but it is significantly smaller than the IFSO, BOS and FSCL's schemes and appears never to have sought permission to use the ombudsman name.

FSCL's application is refused for the first time

[22] Nothing further happened until 2015, when Dame Beverley allowed ISOS to change its title to "Insurance and Financial Services Ombudsman Scheme Inc" (IFSO). FSCL's view was not sought, even though the inclusion of "financial services" would result in a name very similar to its scheme. The development prompted FSCL to apply for approval to use the ombudsman name itself. In May 2015 it submitted a detailed application based on the Robertson guidelines. The application was refused. The Chief Ombudsman regarded the approvals given to the IFSO and BOS schemes as an "accident of history" and saw no public interest in allowing FSCL to use the name.

[23] FSCL began judicial review proceedings. Mr Boshier was appointed Chief Ombudsman later in 2015. The following year, after an unsuccessful application by Ombudsman Wakem to strike out the judicial review proceedings, Mr Boshier agreed to consider the application afresh.

FSCL's application is refused for a second time

[24] In its letter to the Chief Ombudsman of 27 May 2016, FSCL explained that its aim in seeking to use the ombudsman name was to raise consumer awareness and trust in its scheme. It noted that there had been some consumer confusion as a result of two other schemes operating in the financial services sector being able to use the name while it was not. There was also concern that consumers viewed the FSCL scheme as inferior to the others because it was not described as an ombudsman scheme.

[25] The Chief Ombudsman considered FSCL's application by reference to the Elwood policy, on the basis that the purpose of s 28A was to protect the public interest in ensuring that the concept of the parliamentary ombudsman's role was not undermined or diminished by allowing the name to be used more widely than necessary. He concluded that it would be generally inappropriate for the name to be used more widely unless there was a significant public disadvantage as a result of the inability to use the name. He was not satisfied that was the case. FSCL's application therefore failed at the first stage of the Elwood policy and there was no consideration of other criteria.

[26] FSCL sought judicial review of this decision. The application for judicial review failed in the High Court, but the Court of Appeal set aside the decision and ordered that it be remade.[15]

[27] This Court gave two reasons for setting aside the Chief Ombudsman's decision. First, although the Chief Ombudsman was entitled to consider the possible impact that a multiplicity of non-parliamentary ombudsmen might have on the status of the role in the public's understanding of it, the two-stage Elwood policy created an unacceptable limit on the exercise of the discretion; it precluded consideration of the stage two factors unless stage one was satisfied, despite the obvious relevance of the stage two factors (which largely related to the ombudsman-like qualities required of any private ombudsman).[16]

[28] Secondly, the Chief Ombudsman had failed to consider the effect that different treatment of similar schemes might have in terms of causing confusion about the role and status of the Parliamentary ombudsmen:

> [53] If other similar schemes in the same sector as the applicant are already using the name ombudsman, it is difficult to understand how granting the application would increase confusion. Indeed, there is a strong argument to the opposite effect. Arguably, it is more likely that what will increase confusion is treating very similar schemes in the same sector (including a scheme with part of the same name) differently. Yet that is the effect of denying consent in this case. This "different treatment" aspect of confusion was not considered by Mr Boshier and in our view was a relevant consideration that should have been taken into account whether under the rubric of confusion or simply consistency.
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> [54] To put it another way, the Chief Ombudsman is entitled to consider the possible impact a multiplicity of non-parliamentary ombudsmen might have. But in doing so, he or she must have regard to existing permissions given and the need to treat like applicants reasonably consistently. There should not be a "first mover" advantage.

[29] The Chief Ombudsman was directed to reconsider his decision.[17]

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15 *Financial Services Complaints Ltd v Chief Ombudsman* [2017] NZHC 525; [2017] NZAR 521; and Court of Appeal judgment, above n 1.

16 Court of Appeal judgment, above n 1, at [50].

17 At [62].

The Chief Ombudsman reconsiders — first provisional decision

[30] The Court of Appeal's decision was delivered in February 2018. In March 2018 the Chief Ombudsman approached a former Chief Ombudsman, Dr McGee QC, for assistance in drafting legislation to increase the protection of the ombudsman name, and then commenced his communications with the Speaker regarding the amendment to s 28A. While that was on foot, he began work on the reconsideration of his decision.

[31] On 24 July 2018 the Chief Ombudsman wrote to FSCL with a "provisional view" that he was "inclined not to grant FSCL's application". The Chief Ombudsman acknowledged that FSCL and its Chief Executive Officer had all the significant qualities set out in the Robertson guidelines. He accepted FSCL's concern that confusion among consumers who contacted its office might damage public confidence in FSCL's services, including the risk that consumers might view FSCL as an inferior service and be less willing to refer a complaint to it or less willing to accept the outcome recommended by FSCL. Against that, he noted that FSCL could take steps itself to reduce the confusion between it and the other schemes. He also considered that there would still be confusion between the different schemes even if FSCL were able to use the ombudsman name because there would be three schemes using the label, two of which had "financial" in their name.

[32] The Chief Ombudsman was more concerned that confusion between the role of the Parliamentary and non-parliamentary ombudsmen could lead to a loss of public understanding of the ombudsman concept and a loss of public confidence in the parliamentary office. Although he acknowledged that both his office and the private dispute resolution schemes could do more to clarify the various roles and reduce the confusion, and he was committed to taking steps in that regard, he nevertheless considered that this kind of confusion would increase if FSCL were entitled to use the ombudsman name. This conclusion was based on the fact that FSCL had a much greater number of participants — 7,000 compared to IFSO's 4,600 and BOS's 19.

[33] In terms of treating applicants reasonably consistently the Chief Ombudsman did not regard FSCL as directly comparable to BOS and IFSO. He identified two

differences. The first was that the BOS and IFSO schemes obtained approval to use "ombudsman" at a time when private dispute resolution schemes were unregulated. Their success therefore depended on customers being confident that the decision-making process was independent, impartial, fair and binding. He regarded that as a strong factor in favour of granting approval for the schemes to use the ombudsman name. In comparison, FSCL's application was made at a time when it had the benefit of ministerial approval under the FSP Act.

[34] The second distinction was that FSCL's determinations were made by panels comprising the Chief Executive Officer, a consumer representative and an industry representative, which he regarded as inconsistent with the exclusive personal responsibility of an ombudsman, noting that the decision of BOS or IFSO is a personal decision of the ombudsman in question.

[35] The Chief Ombudsman acknowledged FSCL's rights under s 14 of BORA but considered that interference with that right was demonstrably justified.

[36] The Chief Ombudsman invited further information or submissions. FSCL responded on 6 August 2018. It did not accept that there was any valid distinction between the schemes based on the timing of the approval. In relation to the fact that the FSCL scheme was based on panels FSCL pointed out that, in fact, no FSCL panel had ever been convened; the CEO had been the sole decision-maker on all complaints since it began investigating in 2011. In any event, the previous month the FSCL Board had resolved, subject to consultation with its stakeholders, to remove the panel procedure.

[37] Nor did FSCL accept as valid the Chief Ombudsman's fear that approval of FSCL's application could adversely affect the parliamentary office. FSCL pointed out that Parliament had not prohibited the use of the name but had instead provided for statutory discretion to consent to the use of the name because doing so was in the public interest. In any event, proliferation of non-parliamentary ombudsmen was very unlikely because of the decision-making criteria that the ombudsman was entitled to apply in giving consent.

[38] The next day the Chief Ombudsman sent a copy of his first provisional decision and FSCL's response to the Speaker. His covering letter and subsequent correspondence were couched in terms that the High Court viewed as evidence of predetermination.[18]

The Chief Ombudsman investigates further - second provisional decision

[39] Nearly two weeks later the Chief Ombudsman wrote to FSCL seeking to "advance the conversation … on the "*confusion*" aspects that are relevant to [his] decision". The Chief Ombudsman wanted to "more fully investigate the nature and degree of confusion that arises, and the steps that might be taken to mitigate it". He proposed to meet with FSCL to gain more information and to write to IFSO, BOS and FDRS to obtain further information from them.

[40] On 23 October 2018 the Chief Ombudsman issued a second provisional decision. This letter discussed, extensively, the Chief Ombudsman's views about the confusion likely to be engendered by allowing FSCL to use the ombudsman name. This included references to information the Chief Ombudsman had obtained from BOS and IFSO (which he provided to FSCL). In relation to his concern that granting permission to FSCL would lead to a loss of public confidence in the parliamentary office, the Chief Ombudsman considered that calls to his office relating to complaints properly referred to FSCL were "evidence of damage to the public understanding of the Parliamentary Ombudsmen".

[41] The Chief Ombudsman did not consider that the Court of Appeal's statements regarding treating like applicants alike meant this was an absolute requirement and instead considered that his concerns over confusion about the role of the Parliamentary Ombudsman outweighed the desirability of consistency in this case. In any event, he considered that FSCL could be distinguished from BOS and IFSO so as to justify a different approach. Specifically, the former schemes pre-dated the FSP Act and their success had depended on ensuring consumer confidence in the independence, impartiality and fairness of the schemes. He also regarded FSCL's proposed names "Financial Ombudsman" and "Financial Ombudsman Service" as indicating too broad

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[18] Decision on appeal, above n 2, at [200].

a coverage in the financial services area, which would cause confusion and overlap with the existing schemes.

[42] The Chief Ombudsman invited further comments and FSCL responded in early 2019 in robust terms. It pointed out what it considered to be deficiencies in the Chief Ombudsman's reasoning from an administrative law perspective and provided more information to support its concern that consumers regarded the FSCL scheme as inferior to those who were using the ombudsman name. Relevantly, FSCL questioned the evidence the Chief Ombudsman had to support his concerns that granting consent would affect the status and public understanding of the Parliamentary Ombudsman, pointing out that this aspect of public interest needed to be balanced with the strong public interest in ensuring consumer awareness of FSCL's scheme. It also pointed out that in the response the Chief Ombudsman had received from IFSO, the Insurance and Financial Services Ombudsman had expressly stated that the IFSO scheme had no empirical evidence of any confusion in the minds of the public about the role or jurisdiction of the Parliamentary Ombudsman.

The Chief Ombudsman's third provisional decision

[43] In early May 2019 the Chief Ombudsman issued a third provisional decision. He confirmed his earlier conclusion that the types of confusion that had been of concern to FSCL (confusion among consumers leading to a belief that FSCL was an inferior service to that of BOS and IFSO and uncertainty as to which dispute resolution service to complain to) were of no real concern. He emphasised his view that confusion about the role of the Parliamentary Ombudsman compared with industry ombudsmen would significantly increase if FSCL were permitted to use the name.

[44] FSCL responded on 17 May 2019, critical of the delay, the Chief Ombudsman's support of the proposed amendment to s 28A and his failure to respond to the reasoning of this Court's earlier decision.

The Chief Ombudsman's final decision — FSCL's application is declined for a third time

[45] On 20 June 2019, some 15 months after being directed to reconsider the application, the Chief Ombudsman delivered his final decision, refusing permission. His refusal rested mainly on his concern that granting consent to FSCL to use the ombudsman name would likely increase the level of confusion among members of the public between the roles of the Parliamentary Ombudsman and industry ombudsmen.[19] Such confusion would undermine the effectiveness and integrity of the Parliamentary Ombudsman's processes and lead to a loss of confidence in that institution. The Chief Ombudsman set out his reasons in detail and we address those reasons later.

[46] The Chief Ombudsman also acknowledged the need to treat like applicants alike and referred to this Court's earlier decision. However, he maintained his view that FSCL was not in a directly comparable situation to that of BOS and IFSO when they were granted approval for the use of the ombudsman name. Whilst recognising that FSCL competed in the same market as those schemes and that consistency and fairness made it desirable for FSCL to be able to use the ombudsman name, he reasoned that the public interest considerations are different now to when BOS and IFSO obtained their consent. Any problems over the similarity between the use of "financial services" in the IFSO scheme and FSCL's name was a matter for the Registrar of Incorporated Societies.

[47] Finally, the Chief Ombudsman considered the effect of refusing permission on FSCL's BORA right to freedom of expression. Whilst acknowledging that refusing permission would be a limit on that freedom the Chief Ombudsman did not consider the free speech interest of an organisation in using the ombudsman name as particularly strong because its use for marketing purposes and competitive advantage was not "a form of expression which contributes in any significant way to the marketplace of ideas or social and political decision making". He concluded that the

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[19] The Chief Ombudsman had, in both his provisional and final decisions, also identified the possibility of consumers perceiving FSCL's scheme as inferior to those of IFSO and BOS and also confusion among consumers as to which dispute resolution scheme to complain to. However, he concluded that neither presented a significant concern.

interference with FSCL's free expression was demonstrably justified in a free and democratic society to avoid additional confusion among members of the public about the different role of Parliamentary and industry ombudsmen.

Did the Judge fail to adjudicate on grounds 7 and 9?[20]

[48] From the outset the Judge regarded predetermination as the main issue. Although she noted the various grounds advanced in support of the judicial review application she considered that "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"".[21] Early on, she signalled her conclusion that the decision had been predetermined and would therefore be set aside.[22] Although the Judge briefly recorded the other grounds of review[23] only the issue of predetermination was the subject of analysis of the relevant principles[24] and the evidence.[25]

[49] The only substantive reference to grounds 7 and 9 appeared in the context of the Judge's review of the three provisional decisions and the final decision:

> [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 marketplace 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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> [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, 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. It was

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20 Ground 7 was failure to treat like applicants alike and ground 9 was unreasonable limitations on FSCL's rights to freedom of expression under s 14 of the New Zealand Bill of Rights Act.
21 Decision on appeal, above n 2, at [10].
22 At [20].
23 At [64]–[65].
24 At [73]–[88].
25 At [93]–[213].

> for the Chief Ombudsman to weigh the considerations and reach a conclusion. The weight he attached to the considerations was a matter for him.
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> [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". He accepted that FSCL and the industry ombudsman schemes were alike, and all had been approved by the Minister under the FSP Act.
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> [145] The difference he isolated was that the two ombudsman schemes had been approved when the banking 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 and consumer confidence in the voluntary schemes needed at the time. Given the "mana and gravitas" of (sic) 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 ombudsmen were approved. He noted FSCL had attracted a significant market share and established a reputable scheme without the name.
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> [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.
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> [147] On the face of the decisions and the Chief Ombudsman's findings, the conclusions regarding s 14 of BORA were supportable.
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> (Footnotes omitted.)

[50] The Judge made no further reference to grounds 7 and 9 until the end of her analysis of the predetermination issue where she said:

> [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.
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> [213] … 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.

[51] Ms Scholtens QC, for the Chief Ombudsman, submitted that the way the Judge had dealt with ground 7 meant that, in substance, the ground for review was dismissed. However, we consider that the Judge merely recorded the Chief Ombudsman's

statements regarding the need to streat like applicants alike, without any independent analysis or reasons. This did not amount to adjudication of the issue.

[52] In relation to ground 9, Ms Scholtens submitted that the Judge's statement that the Chief Ombudsman's findings were supportable amounted to a finding on whether there had been a breach of FSCL's s 14 rights. Again, we do not accept that the Judge's conclusion, reached without any analysis, amounted to an adjudication of the issue. We also note that in the High Court, FSCL had explicitly submitted that the asserted breach of its s 14 BORA rights stood independently of the first eight grounds of review. For that reason, it was not open to the Judge to proceed, as she did, on the basis that her finding of predetermination meant that it was not necessary to consider the BORA issue.

[53] Ms Scholtens submitted that if we were to decide (as we have done) that the Judge did not adjudicate on these issues, the case should go back to the High Court for determination. We do not accept that would be the proper course. These issues were squarely before the Judge. It would be unfair to expect FSCL to return to the High Court to rerun the argument. We therefore address the grounds substantively as we consider the next issue: whether there was only one lawful outcome.

Was there only one lawful decision available to the Chief Ombudsman?

[54] FSCL's case depends on showing that the only conclusion available to the Chief Ombudsman, if he was acting lawfully, was to grant FSCL's application. This would lay the foundation for the argument, in reliance on *Fiordland Venison*, that the case was one in which the Court could properly substitute its decision for that of the Chief Ombudsman.[26] Although the Judge referred to the Chief Ombudsman's decision to refuse permission as being within the range of available outcomes, she did so in the context of her conclusion on pre-determination and without any reference to *Fiordland Venison*.[27] As a result, FSCL's argument appears not to have been fully considered.

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26 *Fiordland Venison Ltd*, above n 5.

27 Decision on appeal, above n 2, at [211].

[55] Ms Scholtens submitted, relying on *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*, that the present case is one where the decision to refuse approval would depend for its justification on a judgment about the future impact of alternative causes of action.[28] Thus, there may not be a single correct answer as to whether interference with the subject right is justified. Mr Ballinger, who also made submissions on this aspect for the Chief Ombudsman, argued that the present case is different from *Fiordland Venison*, and, instead, comparable to *Grant v Restructuring Insolvency & Turnaround Association New Zealand Inc*[29] and *Te Pou Matakana v Attorney-General*,[30] in which the impugned decisions were remitted for reconsideration.

[56] We agree that the facts of *Fiordland Venison* are different to those in the present case. In *Fiordland Venison* the Minister was obliged under the Game Regulations 1975 to grant a pack-house licence if satisfied on five specified matters. There was no residual discretion.[31] This Court held that there was no evidence on which the Minister could reasonably or properly have determined that he was not satisfied as to those matters. On that basis, it granted a declaration that the appellant was entitled to a licence.[32]

[57] In comparison, there is no statutory obligation on the Chief Ombudsman to grant permission under s 28A — the giving of permission to use the ombudsman name involves the exercise of a discretion. Nevertheless, it is possible for a decision-maker exercising a discretion to find themselves with only one available decision if they have acted in accordance with the purpose of the statutory discretion conferred and taken into account all of the relevant considerations. In *Fiordland Venison*, the Court discussed *Padfield v Minister of Agriculture*,[33] which concerned the power of a Minister to refer a complaint to a statutory committee of investigation. The Court said:[34]

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28 *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 at [32].

29 *Grant v Restructuring Insolvency & Turnaround Association New Zealand Inc* [2020] NZHC 2876, [2021] 2 NZLR 65.

30 *Te Pou Matakana v Attorney-General* [2021] NZHC 3319, [2022] 2 NZLR 178.

31 *Fiordland Venison Ltd*, above n 5, at 344.

32 At 353.

33 *Padfield v Minister of Agriculture* [1968] AC 997; [1968] 1 All ER 694 (HL).

34 *Fiordland Venison*, above n 5, at 350–351.

> The House of Lords held that mandamus should go to the Minister to consider the complaint of the appellants according to law, notwithstanding that the statute merely empowered the Minister to refer such a complaint to the committee, as opposed to requiring him to do so, and did not specify any considerations that he must take into account. The principles were stated by Lord Reid:
>
> > It is implicit in the argument for the Minister that there are only two possible interpretations of this provision — either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.
> >
> > … I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act.
>
> The order there did not go as far as directing the Minister actually to refer the complaint to the committee, but the House accepted, applying what had been said in *Julius v Bishop of Oxford*, that situations can arise in which there is a legal duty to exercise what is apparently only a statutory power. *Moreover it was also accepted, as we read the speeches, that such a situation can arise when the statute expressly or impliedly limits the reasons for which an exercise of the power can be refused and on the particular facts the considerations all point one way.*
>
> (Citations omitted and emphasis added.)

[58] In the present case the statute does not expressly limit the reasons for which an exercise of the power could be refused, but it is clear that Parliament intended that permission could be granted in an appropriate case. In our view, the Robertson guidelines can be taken as expressing the kinds of consideration that the legislature must have thought would be relevant in deciding whether permission should be granted or refused. Further, as we come to shortly, save for the Chief Ombudsman's concern over whether confusion would arise between the Office of the Parliamentary Ombudsman and industry ombudsmen, those considerations all point one way here.

[59] We see the cases of *Grant* and *Te Pou* as quite different to the present case. The former required an evaluative judgment of character requirements for membership of a professional body. Muir J considered the decision was far from clear-cut and, for that reason, regarded it as appropriate to remit the decision for reconsideration.[35] In *Te Pou* Gwyn J remitted the Ministry of Health's decision not to provide vaccination information to a Māori organisation for the purposes of assisting with vaccine rollout. The decision was remitted notwithstanding a significant number of factors said to favour the release of the information. The Judge did not regard the case as being as clear-cut as *Fiordland Venison* because, even where the relevant statutory factors had been satisfied, the decision-maker retained a residual discretion.[36] But that was not the basis on which substantive relief was refused. Rather, it was the fact that an ongoing consultation process between the parties that post-dated the decision in question was too valuable to waste.[37] Instead, the Ministry was directed, within a short time, to complete its consideration of further data and review its decision.[38]

[60] It is open to FSCL to advance the argument that none of the Chief Ombudsman's reasons for refusing permission were supportable and that, as a result, the only decision he could lawfully make was to grant the permission. That submission requires a careful consideration of the reasons given by the Chief Ombudsman for deciding as he did.

[61] Mr Ballinger argued that the Chief Ombudsman's decision required consideration of a number of factors, which all pointed in different directions. He accepted that FSCL satisfied the Robertson guidelines, which favoured approval. However, he argued that the decision otherwise required a broad evaluative assessment which involved weighing intangible factors as well as these specific factors.

[62] The reasons given by the Chief Ombudsman for his decision were:

a. allowing FSCL permission to use the ombudsman name would increase the level of confusion between industry and Parliamentary Ombudsmen

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35 *Grant*, above n 29, at [96]–[98].
36 *Te Pou Matakana*, above n 30, at [176].
37 At [177]–[178].
38 At [179].

and lead to loss of confidence in the role of the Parliamentary Ombudsman;

b. the FSCL scheme differed from the IFSO and BOS schemes in a way that justified treating them differently; and

c. refusing permission was a justified limitation on FSCL's s 14 BORA rights.

Confusion leading to loss of confidence in the role of the Chief Ombudsman

[63] The Chief Ombudsman's main reason for refusing FSCL's application was that it would lead to a level of confusion that risked undermining public understanding of and confidence in the role of the Parliamentary Ombudsman:[39]

> 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.
>
> 52. In my assessment, granting consent to FSCL to use the name 'ombudsman' would likely increase the third type of confusion. Consumers exposed to the industry ombudsman will be less likely to understand that the Parliamentary Ombudsmen:
>
> a. have a very different inquisitorial and investigative role;
>
> b. use recommendatory processes, which are seen as a strength; and
>
> c. occupy an important constitutional position in addressing issues and enhancing accountability within executive government.
>
> 53. In addition, I am concerned that the third type of confusion might damage the understanding and integrity of the Parliamentary Ombudsmen's role in the whistleblowing process under the Protected Disclosures Act 2000, and the public's confidence in the Parliamentary Ombudsmen as New Zealand's National Preventive Mechanism under the Convention Against Torture. None of these roles are dispute resolution roles of the nature exercised by the industry ombudsman.
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> …

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[39] The "third type" of confusion referred to by the Chief Ombudsman refers to confusion between the industry ombudsmen and the Parliamentary Ombudsmen.

> 55. People's experience of one ombudsman can colour their views of another ombudsman. They will reasonably assume that they have much the same function, or will act in a similar way. Thus the numbers of people who may be affected is relevant. To get a sense of scale of the potential increase of exposure to the industry ombudsman concept, I have considered the following numbers:
>
> a. FSCL has nearly 7,000 participants and answered more than 4,300 inquiries and complaints in the 2017 year.
>
> b. IFSO has around 4,600 participants and received 3,541 complaints and inquiries in the 2017 year.
>
> c. BOS has 19 participants and received 2,741 complaints in the 2017 year.
>
> 56. I appreciate I need to assess the impact of one body joining two existing "*ombudsman services*". However the reach of FSCL's services is potentially very broad. I remain concerned that large numbers of members of the public would be less likely to appreciate the constitutional significance of their right to bring complaints to the Parliamentary Ombudsmen against executive government, and the Ombudsmen's ability to investigate and make recommendations to improve democratic accountability.
>
> 57. I note your view that some of the telephone calls to the Parliamentary Ombudsmen relating to banking, insurance and financial services come from would-be complainants against members of FSCL's scheme because they are unaware that FSCL's scheme has the status of an ombudsman in every aspect except name. I accept your point that calls to my office relating to financial service complaints that should be referred to FSCL may in some cases be due to the first or second type of confusion. My concern remains that these calls are evidence or symptoms of undesirable confusion around the public understanding of the very different roles of the industry and Parliamentary Ombudsmen.
>
> (Footnotes omitted.)

[64] Ms Scholtens submitted that there was ample evidence to support the Chief Ombudsman's decision. However, having reviewed the facts relied on by the Chief Ombudsman we do not accept that there was any objectively reliable evidence to support his decision.

[65] We start with the Chief Ombudsman's reference to the approximately 25 calls his office fielded each month relating to financial services that needed to be referred to the relevant agencies. We agree that an inference may be drawn that this shows a level of confusion in the community about the role of the Parliamentary Ombudsman. We do not accept, however, that this modest number of misdirected telephone calls provides any basis for an inference that the use of the term "ombudsman" by FSCL,

or for that matter by the existing private "ombudsman" schemes, would materially undermine public understanding of and confidence in the role of the Parliamentary Ombudsman.

[66] The second fact relied on was that the Chief Ombudsman's office was receiving about 80 formal complaints per year that related to financial services, which were outside the Chief Ombudsman's jurisdiction. Again, we agree that this suggests a level of confusion about the Chief Ombudsman's role, but it does not follow that the confusion is attributable to people being exposed to industry ombudsmen. Indeed, in his final decision, the Chief Ombudsman accepted FSCL's point that some of the calls relating to financial services came from would-be complainants against members of FSCL's scheme who were unaware that FSCL's scheme has the status of an ombudsman in every aspect except name. And again, we do not accept that this modest number of misdirected complaints provides any basis for an inference that the use of the term "ombudsman" by FSCL would materially undermine public understanding of and confidence in the role of the Parliamentary Ombudsman.

[67] Further, the Chief Ombudsman did not appear to recognise, or at least give weight to, the possibility of a general lack of understanding among members of the public about the office and powers of the Parliamentary Ombudsman that is unrelated to the existence of the industry ombudsmen, and would not be affected by the decision made in relation to FSCL's application. In her article *New Zealand's Ombudsmen Legislation: The Need for Amendment After Almost 50 Years*, Mai Chen noted the widespread ignorance of the ombudsman's office, inconsistent application of the Parliamentary Ombudsman's jurisdiction and confusion generated by the fact that the Parliamentary Ombudsman does not have jurisdiction to investigate administrative decisions, recommendations or acts done or omitted by local authorities at full council meetings.[40] Although the Chief Ombudsman drew on this article in his final decision, he did not refer to these observations.

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[40] Mai Chen "New Zealand's Ombudsmen Legislation: The Need for Amendment After Almost 50 Years" (2010) 41(4) VUWLR 723 at 746, noting the provision in s 32 allowing the Governor-General by Order-in-Council to add or remove the departments or organisations subject to the ombudsmen's jurisdiction. See also at 740 and 749–750.

[68] Thirdly, although we accept the Chief Ombudsman's point that those exposed to industry ombudsmen might reasonably assume that the Parliamentary Ombudsman will function in the same way and thus misunderstand the very different nature of the Parliamentary Ombudsman's role and processes, we do not accept that the scale of the problem is nearly as significant as the Chief Ombudsman suggests. The Chief Ombudsman relied on figures taken from FSCL's, IFSO's and BOS's annual reports for the 2016–2017 year. In 2017 the IFSO and BOS schemes combined had 4,619 participants and received 6,282 complaints. In 2017, FSCL had nearly 7,000 members who generated approximately 4,300 enquiries and complaints — proportionately less than IFSO and BOS. Assuming that FSCL's use of the ombudsman name led to a corresponding increase in calls to the Chief Ombudsman's office, the increase, less than a doubling, would still be very small in relation to New Zealand's population. Moreover, the Chief Ombudsman himself acknowledged that there was more that could be done to avoid confusion in the mind of the public. And even if there is confusion of this kind, that does not (as already mentioned) necessarily imply any undermining of public understanding of and confidence in the role of the Parliamentary Ombudsman.

[69] Fourthly, in identifying the risk of increased confusion between industry and Parliamentary Ombudsmen in the event of FSCL being permitted to use the name, the Chief Ombudsman made no reference to two pieces of credible information indicating the risk of confusion regarding the role of Parliamentary ombudsmen from private ombudsman schemes is low. This information came from IFSO and from the Ministry of Justice.

[70] As part of his further investigations into the level of confusion that might be generated by allowing FSCL to use the ombudsman name, the Chief Ombudsman made enquiries of IFSO and BOS. The ombudsman of the IFSO scheme, although opposed to FSCL being permitted to use the ombudsman name, advised that:

> … the IFSO scheme has no empirical evidence that there is any confusion or overlap in the minds of the public about respective roles, or a potential overlap in jurisdiction with the Parliamentary Ombudsman.
>
> Our complaints enquiries data does not capture complaint enquiries from consumers which are intended for the Parliamentary Ombudsman, because we receive so few. …

> Nor is the IFSO scheme aware of any evidence that "*confusion potentially damages the status and mana of the Parliamentary Ombudsmen and the public's understanding of it*."[41]

[71] When FSCL responded to the Chief Ombudsman's second provisional decision it drew these comments to the Chief Ombudsman's attention, setting out the passage above in full.

[72] As part of his ongoing contact with the Ministry of Justice over the proposed amendment to s 28A, the Chief Ombudsman was provided with a regulatory impact report prepared by the Ministry, which advised that:

> The evidence of need for any significant change in approach is inconclusive. The Parliamentary Ombudsman's long-standing public profile and status already affords a high degree of public confidence and trust. To the extent there is public confusion over the role or jurisdiction of the Parliamentary Ombudsman this does not appear solely, or even mostly, attributable to the use of the name 'ombudsman' by the two existing private-sector bodies.

[73] We conclude that there is no objectively supportable basis for the Chief Ombudsman's view that allowing FSCL to use the ombudsman name would lead to such confusion in the mind of the public and to undermine the office of the Parliamentary Ombudsman. This conclusion is consistent with the Ombudsman's jurisdiction, which is stated at s 13(1) of the Ombudsmen Act:

> …it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted… relating to a matter of administration and affecting any person or body of persons in his or her personal capacity, in or by any of the public service agencies or organisations named in Parts 1 to 1C and 2 of Schedule 1 or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee or member of any such public service agency or organisation in his capacity as such officer, employee or member.

[74] The statutory function makes it clear that the Ombudsman's jurisdiction affects only central and local government bodies and public agencies. The industry ombudsmen have a completely different role. Any possible confusion could be quickly dispelled.

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41 This was a reference to the Chief Ombudsman's inquiry of IFSO in which the Chief Ombudsman identified, as a matter of concern, confusion between the roles of the Parliamentary Ombudsman and the financial dispute resolution schemes which could potentially damage the status and mana of the Parliamentary Ombudsman and the public's understanding of it.

Treating like cases alike

[75] The Chief Ombudsman was required to adhere to the principle of treating like cases alike, stated by the Privy Council in *Matadeen v Pointu*:[42]

> As a formulation of the principle of equality, the court cited Rault J in *Police v Rose*: "Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently". Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational …
>
> (Footnotes omitted.)

[76] In his final decision the Chief Ombudsman acknowledged this principle and expressly noted the signal from this Court in its earlier decision that he was to "have regard to existing permissions and the need to treat like applicants reasonably consistently". However, although the Chief Ombudsman accepted that the FSCL, IFSO and BOS schemes are similar because they were all approved under the FSP Act, he nevertheless considered that FSCL was not directly comparable to IFSO and BOS because their schemes pre-dated the FSP Act so that the context in which they had secured permission to use the ombudsman name was different:

> 69. … The success of those schemes depended on the customers being confident that decisions would be made in a way that was independent, impartial, fair and binding on the members against whom a decision was made. There was no regulated means to achieve that at the time. It was the emergence of the voluntary, industry-backed Banking Ombudsman Scheme at the same time that s 28A was enacted, and the recognition of this public interest in consumer confidence attaching to the name 'ombudsman', that [led] primarily to the qualification on the prohibition on the use of the name. …
>
> 70. … FSCL's application is made against a very different background. It has Ministerial approval under the FSP Act, which provides a statutory assurance that these qualities exist. It is subject to ongoing regulation under that Act. This has enabled it to attract a significant market share and establish a reputable scheme. So that aspect of the rationale for granting approval to BOS and IFSO is not present for FSCL.
>
> 71. Rather, the key benefit to FSCL would be the mana and gravitas that comes from the name. I also accept there may be an inherent unfairness in the fact that, by dint of historical circumstances, FSCL must operate in

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[42] *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 109, cited in *Ririnui v Landcorp Farming* [2016] NZSC 62, [2016] 1 NZLR 1056 at [94].

> competition with two other approved schemes who have the benefit of the name. I take this into account.

[77] The Chief Ombudsman concluded that:

> 72. In summary, I accept that FSCL competes in the same market as BOS and IFSO and that it would be desirable as a matter of consistency and fairness for FSCL also to be able to use the label ombudsman. That is an important factor that favours granting approval. However I do not consider the public interest considerations for this application to be the same as existed when BOS and IFSO were granted consent.

[78] FSCL submitted that the Chief Ombudsman's decision was unreasonable because the distinction he identified — IFSO and BOS having secured their permission prior to the FSP Act — did not justify treating FSCL differently and accorded a "first mover" advantage to BOS and IFSO, which this Court had expressly cautioned against.[43]

[79] Ms Scholtens submitted, first, that FSCL's argument that the final decision was substantively unreasonable because it accorded a "first mover" advantage to BOS and IFSO, was new and should not be taken into account. However, in FSCL's written submissions in the High Court, it expressly submitted that the Chief Ombudsman's reasoning was unreasonable because this Court had made it clear that the IFSO's and BOS's status as "first movers" did not provide any basis for treating FSCL differently. The argument is therefore not new in this Court.

[80] Ms Scholtens' second response was that the decision was not unreasonable because, but for the Chief Ombudsman's predetermination of the application generally, the difference relied on by the Chief Ombudsman would have complied with this Court's direction to have regard to existing permissions and the need to treat like applicants reasonably consistently. We respectfully think that this approach misunderstands the effect of the Court's statements. The reference to existing permissions having to be taken into account must be read together with the observation that there should not be a "first mover" advantage, meaning that the fact that some schemes obtained permission at an earlier stage ought not count against a subsequent applicant where the schemes are substantially similar. Where parties are otherwise

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[43] Court of Appeal judgment, above n 1, at [54].

similar, their historically different circumstances should not affect the decision. To do otherwise risks arbitrariness.

[81] Ms Scholtens also submitted that FSCL's argument that the absolute requirement for consistency of treatment would be inconsistent with this Court's earlier finding that the s 28A discretion is not confined to a consideration of ombudsman-like qualities; to do so, she argued, would lead to all approved financial dispute resolution schemes being entitled to use the name under s 28A (as it stood before the 2020 amendment), which would have been contrary to Parliament's intention to protect the use of the name.

[82] We do not understand FSCL to be arguing for an absolute standard of consistency. The principle requires consistency unless there is a valid reason for treating otherwise similar parties differently. FSCL simply says that there is no valid reason to do that in this case. For the reasons just canvassed, we agree with FSCL.

FSCL's s 14 BORA rights

[83] Section 14 of BORA protects all forms of expression.[44] This includes the expression of information for commercial purposes. However, as this Court noted in *Taylor v Chief Executive of the Department of Corrections*, not all types of speech have an equal value.[45] This difference is relevant in the assessment of whether a decision limiting the right is demonstrably justifiable in a free and democratic society.[46]

[84] The Chief Ombudsman accepted that the use of the ombudsman name in connection with FSCL's scheme engaged s 14. But he regarded the value of the proposed use as "not particularly strong" and, when made against the value of protecting the role of the Parliamentary Ombudsman, considered refusal to be a demonstrably justifiable limitation:

> 75. … The interest for FSCL is in using the name for marketing purposes and competitive advantage. This is not a form of expression which contributes

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44 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].

45 *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477 at [70], citing *R v Secretary of State for the Home Department*, *ex parte Simms* [2000] 2 AC 115 (HL) at 127.

46 New Zealand Bill of Rights Act 1990, s 5.

> in any significant way to the marketplace of ideas or social and political decision making. I consider that the interference with FSCL's free expression is demonstrably justified in a free and democratic society, essentially for the reasons I have already identified.
>
> 76. The justification for interfering with FSCL's free speech in these circumstances is to avoid additional confusion amongst members of the public as to the different role of the Parliamentary Ombudsmen compared to industry ombudsmen. If I were to approve FSCL's application, there would be a significant increase in the numbers of people exposed to industry ombudsmen. Thus there would be a significant potential increase in confusion as to the role of the Parliamentary Ombudsman, which in my experience will undermine the effectiveness and integrity of the Parliamentary Ombudsman.

[85] Any limitation on a BORA right must be rationally connected to its objective and impair the right or freedom as little as possible.[47] The approach to the question of proportionality in relation to administrative decisions has, in recent times, settled on the balancing of the right against countervailing considerations in the manner discussed in *Taylor* and in *Moncrief-Spittle v Regional Facilities Auckland Ltd and Auckland City Council*.[48] Both counsel proceeded on the basis that this was the appropriate approach in this case and we agree.

[86] We start with the nature of the right FSCL seeks to protect. Ms Scholtens acknowledged that there is room for debate about whether FSCL's right to determine how it names and promotes itself ought to be framed as a commercial marketing exercise or otherwise. But she resisted any comparison with *Moncrief-Spittle* on the basis that the Council's decision in that case affected rights of members of the public and was therefore not a strictly commercial decision whereas the decision facing the Chief Ombudsman would affect only FSCL. The effect of Ms Scholten's submission would be that the balancing exercise would start from the position that, while FSCL's right to freedom of expression is protected, any limitation on that right is more easily justified than would be the case if the expression engaged forms of expression connected to political views, as was the case in *Moncrief-Spittle*.

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47 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J, [120]–[124] per Tipping J, [203]–[204] per McGrath J and [272] per Anderson J.

48 *Taylor*, above n 45, at [83]–[84]; *Moncrief-Spittle v Regional Facilities Auckland Ltd and Auckland City Council* [2021] NZCA 142, [2021] 2 NZLR 795 at [117]–[122].

[87] Mr Murray, for FSCL, submitted that the decision should be regarded as engaging a level of public interest and that the reasons advanced by the Chief Ombudsman do not demonstrate a justifiable limitation on its rights.

[88] It is common ground that FSCL is a commercial entity which competes for clients. But it cannot be said that the schemes operated by FSCL and its competitors occupy a purely commercial space in the market. These dispute resolution schemes can only operate with ministerial approval.[49] Approved schemes underpin the dispute resolution provisions of the FSP Act, which require every financial service provider to be a member of an approved dispute resolution scheme in respect of a financial service provider to a retail client.[50] The stated purpose of the dispute resolution provisions of the FSP Act are:[51]

> … to promote confidence in financial service providers by improving consumers' access to redress from providers through schemes to resolve disputes. The schemes are intended to be accessible, independent, fair, accountable, efficient, and effective.

[89] The Chief Ombudsman's view of FSCL's free speech interest as "not particularly strong" failed to recognise that, although FSCL is a commercial entity, it operates its scheme within a statutory framework that exists for the public interest. The interest of a commercial entity in using the ombudsman name may not be particularly strong when viewed only through a commercial lens, but when the statutory purpose of the scheme is taken into account the interest is much stronger by virtue of the associated public interest in the scheme being available to consumers in the financial services sector.

[90] It is implicit that accessibility to these schemes, one of the stated purposes of the dispute resolution provisions, means accessibility in a broad sense. In our view, confusion as to the nature and quality of the competing schemes must be regarded as a barrier to accessibility. If comparable schemes appear different, there is a risk of the public being deprived of the opportunity to make a fully informed decision as to which to use.

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49 Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 50(1).
50 Section 48(1).
51 Section 47.

[91] The countervailing interest identified by the Chief Ombudsman is the risk that members of the public seeking access to an industry dispute resolution scheme will end up confused about the status and role of the Parliamentary Ombudsman which would undermine the effectiveness and integrity of that office. We agree that there is a strong public interest in the continued effectiveness of the Parliamentary Ombudsman's role. That requires a good level of understanding in the community generally and of public confidence in that office. However, for the reasons we have given, we do not consider that there is any objectively supportable evidence on which to conclude that FSCL's use of the ombudsman name would lead to a lessening in public understanding of and confidence in the role of the Parliamentary Ombudsman. It follows that there is no rational connection between refusing FSCL's application to use the ombudsman name and the risk that the office of the Parliamentary Ombudsman will be undermined. The refusal of permission was therefore an unreasonable limitation on FSCL's s 14 BORA right.

Was there only one lawful decision available?

[92] We have reached the point that, in our view, there was no objectively reliable basis for the Chief Ombudsman's final decision.

[93] The facts on which the Chief Ombudsman relied to demonstrate a genuine risk of confusion in the public mind leading to a lessening of confidence in the Parliamentary Ombudsman do not support that conclusion. It is true that, as Ms Scholtens argued, there is an element of the unknown about the effect granting permission to FSCL to use the ombudsman name will have. However, judgments about the future almost invariably rest on an assessment of what is currently known. What is currently known strongly suggests that the risk to the Parliamentary Ombudsman's role and status is negligible.

[94] Nor was there any rationally justifiable basis on which to distinguish FSCL from the IFSO and BOS schemes.

[95] Refusing FSCL permission to use the ombudsman name was an unreasonable limitation on its s 14 BORA right, given FSCL's moderately strong s 14 BORA interest and the low countervailing risks.

[96] As there were no factors that, objectively, justified refusing FSCL's application, the discretion to refuse permission was only of the most residual kind. We consider that the only lawful decision the Chief Ombudsman could have made was to grant FSCL the permission it sought.

The appropriate relief

[97] The Judge declined to make a declaration that FSCL was entitled to the Chief Ombudsman's consent under s 28A of the Ombudsmen Act because:[52]

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

[98] In light of the finding of predetermination, the Judge accepted that it was not appropriate for the Chief Ombudsman himself to undertake any reconsideration of the decision without putting in place arrangements to manage the risk of pre-determination in any further reconsideration.[53] The Judge was nevertheless satisfied that there were practical options to address this problem. She identified the provision under s 8(1) for the appointment of an ombudsman for a temporary purpose and the provisions of s 28 for the Chief Ombudsman to delegate any of his powers to another person.[54]

[99] Relevantly, s 28 of the Ombudsmen Act provides:

> (1) Any Ombudsman may from time to time, by writing under his hand, delegate to any person holding any office under him any of his powers under this Act, except this power of delegation and the power to make any report under this Act.
>
> …

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52 Decision on appeal, above n 2.
53 At [218].
54 At [220]–[221].

> (4) Any such delegation may be made subject to such restrictions and conditions as the Ombudsman thinks fit, and may be made either generally or in relation to any particular case or class of cases.

[100] The Judge ordered that the decision be referred back for reconsideration:

> [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.

[101] In a subsequent decision granting a stay pending determination of this appeal the Judge recorded that the Chief Ombudsman had "already taken steps to commence the reconsideration by preparing a delegation to a suitable person and approaching two QCs and a former Supreme Court Judge who each indicated willingness to act". Before us, Mr Ballinger, who carried this aspect of the argument for the Chief Ombudsman, referred only to the Chief Ombudsman's office having approached two Queen's Counsel with significant public law experience who were available for appointment and did not have any conflict of interest.

[102] However, FSCL says that the mechanism settled on by the Chief Ombudsman for reconsideration of the decision is impractical. That fact, coupled with the long delays to date and (it says) the persistent and serious unlawfulness of the Chief Ombudsman in deliberately disregarding this Court's earlier decision, meant that the appropriate course for the Judge was to substitute her own decision for that of the Chief Ombudsman and grant the substantive relief sought. It now seeks that relief from this Court.

[103] Mr Ballinger defended the appropriateness of the Judge's refusal to grant substantive relief, objecting to FSCL's characterisation of the Chief Ombudsman's conduct and the suggestion that it ought to justify this Court substituting its own view. Mr Ballinger described the conduct as merely a legitimate predisposition that fell into predetermination, but which could not be characterised as serious unlawfulness. He also submitted that inviting the Court to express a view on the seriousness of the error of law or process in question risks expanding the scope of judicial review in a way that is both unnecessary and undesirable.

[104] We agree that it is unnecessary for us to formally characterise the seriousness of the error in this case beyond the findings of the Judge. The greater concern is the manner in which the decision is to be reconsidered. Given that the Chief Ombudsman's decision was set aside for predetermination, it is recognised by all concerned that independence of the decision-making process now is of the utmost importance. Mr Ballinger submitted that the process for reconsideration directed by the Judge was appropriate.

[105] However, we have a number of concerns with the proposed process. First, under s 28, the delegate must be a person "holding any office under [the Chief Ombudsman]". Thus, although Mr Ballinger submitted that the proposed process would avoid the matter being dealt with again by the Chief Ombudsman, the statutory basis for delegation is contrary to genuine independence. Moreover, we were told that the Chief Ombudsman proposed to brief the person engaged to undertake the reconsideration himself. We cannot see how any decision reached by a delegate holding office under the Chief Ombudsman and briefed by the Chief Ombudsman could be described as a genuinely independent decision. The statutory basis for delegation and the proposed approach to the briefing of the delegate carries an unacceptable risk of the independence of the process being undermined or, at least, having that appearance. This is, of course, no reflection on those proposed for the task (whose identity is unknown to us).

[106] Mr Ballinger also pointed out that the Chief Ombudsman's decision-making process was inquisitorial and that the QC engaged could, likewise, undertake their own inquiries, whereas this Court could not. We accept this point. It does however engage one of the objections raised by Mr Murray, that if the decision is made by a QC engaged for the purpose, FSCL will find itself in a position of having to put its case again to that person which, given the long history of this matter, would be unfair. We make the additional observation that, given the exhaustive process to date, it is difficult to see what further inquiries are left to be made.

[107] The remaining factor is the long delay in resolving this matter. FSCL first made its application in 2015. Seven years on, and with two decisions having been set aside by this Court, it is now proposed that the decision be revisited not by the statutory

decision-maker but by a delegate in a process that, for the reasons just discussed, risks being subject to further judicial review proceedings. It is not in FSCL's interests, nor in the interests of justice generally, to allow this matter to continue. In all the circumstances, we consider that there is no reasonably viable alternative to the Court substituting its own view.

Result

[108] The appeal is allowed.

[109] The decision of the High Court is set aside.

[110] We make a declaration that FSCL is entitled to the Chief Ombudsman's consent to use the ombudsman name in connection with its dispute resolution scheme.

Solicitors:
Michael Leggat, Wellington for Appellant
Office of the Ombudsman, Wellington for Respondent