IN THE COURT OF APPEAL OF NEW ZEALAND

CA162/2017
[2018] NZCA 27

BETWEEN	FINANCIAL SERVICES COMPLAINTS LIMITED Appellant
AND	CHIEF OMBUDSMAN Respondent

Hearing:	31 October 2017
Court:	Kós P, French and Winkelmann JJ
Counsel:	K I Murray for Appellant M T Scholtens QC and D W Ballinger for Respondent
Judgment:	28 February 2018 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed. The decisions of the High Court and the Chief Ombudsman are set aside.

B The Chief Ombudsman is directed to reconsider the appellant's application under s 28A(1) of the Ombudsmen Act 1975 in accordance with this judgment.

C The respondent must pay the appellant's costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Section 28A of the Ombudsmen Act 1975 (the Act) provides:

> **28A Protection of name**
>
> (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.
>
> (2) Every person commits an offence and is liable on conviction to a fine not exceeding $1,000 who contravenes subsection (1).

[2] Financial Services Complaints Ltd (Complaints Ltd) applied to the Chief Ombudsman under s 28A(1) for approval to use the name ombudsman. The Chief Ombudsman Mr Boshier declined to give consent. His decision was upheld in the High Court on judicial review by Simon France J.[1]

[3] Complaints Ltd now appeals to this Court.

[4] In order to understand the arguments raised on appeal, it is necessary to first traverse the legislative background as well as the background of the present case.

Legislative background

[5] The word "ombudsman" is Scandinavian in origin. It was the name given to a Swedish institution established in 1809 with the function of ensuring the executive was observing the country's laws and statutes.[2] Translated literally, it means people's representative.

[6] New Zealand was the first country outside of Scandinavia to adopt the concept and the name with the passing of the Parliamentary Commissioner (Ombudsman) Act 1962 (the 1962 Act).

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1 *Financial Services Complaints Ltd v Chief Ombudsman* [2017] NZHC 525, [2017] NZAR 521.
2 Regeringsform (Instrument of Government) 1809 (Sweden).

[7] Under the 1962 Act and the 1975 Act which replaced it, ombudsmen are independent officers of Parliament appointed by the Governor-General on the recommendation of the House of Representatives.[3] 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 delegated to the ombudsmen some of its own authority and power. The special role of parliamentary ombudsmen is underscored by statutory provisions preventing ombudsmen from holding any other office and by provisions relating to their funding and security of tenure.[4]

[8] New Zealand's first Chief Ombudsman Sir Guy Powles (1975–1977)[5] and a subsequent appointee Sir John Robertson (1986–1994) both actively sought legislative protection for the name ombudsman. It appears this was largely prompted by developments overseas, particularly in North America and the United Kingdom, where use of the term outside the parliamentary context had become increasingly widespread. Private entities such as universities, building societies, banks, insurance companies, and large corporations were using the name in connection with their own private dispute resolution processes. The concern was that unless a pre-emptive strike was taken, the same proliferation would happen in New Zealand, resulting in confusion, loss of public understanding of the ombudsman concept and loss of public confidence in the office. Its status and integrity, and thus its important constitutional role, would be demeaned. Sir John advocated for a complete prohibition on the use of the name.[6]

[9] The concerns received a mixed reaction in Government circles.

[10] In 1988 a Bill amending the Ombudsmen Act was introduced into the House.[7] The proposed amendment made it a criminal offence to use the name ombudsman except pursuant to statute or with the prior consent of the Chief Ombudsman. This was

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3 Parliamentary Commissioner (Ombudsman) Act 1962, s 2(2); and Ombudsmen Act 1975, s 3(2).
4 Ombudsmen Act, ss 4, 5 and 9.
5 Sir Guy Powles was appointed Ombudsman in 1962 before he became the first Chief Ombudsman.
6 John F Robertson *Protection of the Name "Ombudsman"* (International Ombudsman Institute, Occasional Paper 43, February 1993) at 2 and 6.
7 Law Reform (Miscellaneous Provisions) Bill 1988 (122-1), cl 152.

not the complete prohibition sought by Sir John,[8] but the power conferred on the Chief Ombudsman to act as a gatekeeper did mean he or she would be able to exercise some control over use. As events transpired, the Bill — the Ombudsmen Amendment Bill (No 3)[9] — was in its third reading when it was halted in its tracks by opposition from the Minister of Consumer Affairs. She considered the term ombudsman had passed into common usage and was not persuaded that its use in other countries for desirable consumer protection schemes such as banking and insurance ombudsmen had caused confusion as was being claimed.

[11] As a result of the Minister's opposition, the Bill did not proceed but remained on the Order Paper until December 1991 when it was revived by a new Government and passed into law. In moving the Bill, the Minister of Justice noted there were signs that some organisations in the community might want to use the name.[10]

[12] In 1992, after consultation with the Minister of Consumer Affairs and The Consumers' Institute, the Chief Ombudsman of the day 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

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8 As the respondent pointed out, in a letter to the Minister dated 1987, Sir John proposed that permission to use the name could be granted. However, writing in 1993, he unequivocally states that at least initially he did seek a complete prohibition.

9 The Ombudsmen Amendment Bill (No 3) 1989 (122-3Zi).

10 (28 November 1991) 521 NZPD 5739.

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.

constantly before the consuming public. The appointed Ombudsman should have the right to make recommendations to change any provisions of the Charter.

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.

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.

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.

[13] As Sir John noted in a subsequent paper, he considered these criteria 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]

[14] In his final report to Parliament dated 28 February 1995, Sir John advised that in total he had received three applications under s 28A. One was from a small provincial newspaper wanting to use the name ombudsman for a role dealing with complaints about its articles and advertisements. Sir John declined that application.

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13 Robertson, above n 6, at 5.

The other two applications were approved, being the Banking Ombudsman Scheme and the Insurance and Savings Ombudsman Scheme.[14]

[15] In May 2000, Sir John's successor Sir Brian Elwood (1994–2003) issued revised criteria for considering applications under s 28A. The criteria (the Elwood policy) were formalised in a notice dated 4 February 2002.

[16] The notice detailed a two stage process to be followed when deciding applications.

[17] The first stage was to balance the public interest served by the establishment of an additional, non-parliamentary ombudsman against the public interest in the non-proliferation of the name.

[18] Secondly, having undertaken the balancing exercise in a particular case and having determined that the public interest in having an additional non-parliamentary ombudsman was greater than the need to limit proliferation of the name, the application for consent would be further considered against factors similar to the Robertson guidelines. The factors were:

(a) The proposed use of the name should not be in any area where an ombudsman appointed under the Act has or may be given jurisdiction.

(b) The use of the name should only be used in connection with a scheme that ensures the holder of the name is able to operate effectively and independently of the bodies or persons subject to the scheme. This includes the appointment and funding of the holder of the name.

(c) The holder of the name should have a publicly notified charter in plain language which is available and readily accessible to the public.

(d) The public charter should be subject to periodic public review to assess its credibility and effectiveness.

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[14] Robertson, above n 11, at 16; and Robertson, above n 6, at 5–6.

(e) The scheme should provide for complainants to make complaints free of charge direct to the putative ombudsman who must impartially investigate the facts and conclude with a decision to sustain or not sustain the complaint. A remedy should be provided where appropriate. The putative ombudsman should not be or be seen to be an advocate for any particular party or group and must be publicly seen to be independent and impartial.

(f) The name should be associated with a function that is of national character and application.

(g) There must be an assurance of continuing and future resources to guarantee tenure to the putative ombudsman and his/her staff and to ensure the efficient and effective administration of the scheme.

(h) The system and procedures used by the putative ombudsman must ensure fair and impartial decision making.

[19] The notice concluded with general conditions that would be imposed on consents. These included a condition that the name must not be used alone, but only in conjunction with a description that makes the role of the putative ombudsman clear.

[20] As will be apparent, the second stage considerations are very similar to the Robertson guidelines. What was new was the introduction of a first stage. In his decision, Simon France J described the notice as "engraft[ing]" onto the Robertson guidelines "a public interest criteria [giving] pre-eminent weight to protecting the Office of Parliamentary Ombudsman from confusion stemming from proliferation of the name".[15] As the Judge also noted, Sir Brian considered the amendment was necessary because of the confusion he said had arisen since the initial two approvals were given.[16] There is a suggestion too in the contemporary records that the change

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15 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 1, at [8].
16 At [8].

may have been prompted by the large number of applications Sir Brian received during his tenure, none of which he granted.[17]

[21] It is clear that Sir Brian considered applications to use the name outside of the parliamentary process or public service should only be granted on rare occasions,[18] a view which he expressly confirmed in his final report to Parliament in 2003.[19]

[22] We were told that since the enactment of s 28A in 1991, only three applications have been granted, namely the two granted in the 1990s by Sir John and a third granted in 2011 by the then Chief Ombudsman Dame Beverley Wakem (2009–2015). Justice Simon France described this latter approval as an outlier.[20]

[23] It involved a New Zealand resident Mr LaHatte obtaining a position as the Internet Corporation for Assigned Names and Numbers (ICANN) Ombudsman, a post previously held by a person based in Canada. ICANN is a non-profit organisation which at the time had a contract with the United States Department of Commerce to oversee global IP address allocation and other information necessary to the working of the internet. Although most of Mr LaHatte's work related to overseas issues, there was always the possibility of a complaint being made to the ICANN Ombudsman by a New Zealander and for that reason Mr LaHatte sought permission to use the name in this country.

[24] Approval was granted subject to strict conditions that emphasised the disassociation of the position from New Zealand. We agree with Simon France J that this approval does not shed any light on the likely exercise of the statutory discretion as regards use of the name ombudsman within New Zealand.

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17 Brian Elwood *Report of the Chief Ombudsman On Leaving Office* (Office of the Ombudsmen, 2003 Parliamentary Papers Presented to the House of Representatives vol I, A3A, 30 June 2003) at [6.4].

18 Brian Elwood and Anand Satyanand *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, A3, 30 June 2001) at 32.

19 Elwood, above n 17, at [6.5].

20 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 1, at [34].

Background of this case

[25] Under the Financial Service Providers (Registration and Dispute Resolution) Act 2008, (Financial Services Dispute Act), financial service providers providing services to retail clients are required to join a dispute resolution scheme that has been approved by the Minister of Consumer Affairs.[21]

[26] In order to gain Ministerial approval, a dispute resolution scheme must satisfy the Minister amongst other thing that the scheme is accessible, independent, fair, accountable, efficient and effective.[22]

[27] To date, the Minister has approved four schemes including the appellant Complaints Ltd. Complaints Ltd was the first scheme to be approved under the Act and now has more than 6,500 participants. Of the four approved schemes, it has the largest membership. It is open to all financial service providers.

[28] The other approved schemes are:

- the Banking Ombudsman Scheme;
- the Insurance and Savings Ombudsman Scheme; and
- the Financial Dispute Resolution Service.

[29] As regards use of the name "ombudsman", it will be recalled that the Banking Ombudsman Scheme and the Insurance and Savings Ombudsman Scheme had already received approval under s 28A of the Ombudsmen Act from Sir John in the 1990s for use of the name.

[30] In 2015, the Insurance and Savings Ombudsman Scheme proposed to change its name by replacing "savings" with "financial services." It sought approval to continue to use the word "ombudsman" in association with its new name. The then Chief Ombudsman Dame Beverley gave her consent on 31 March 2015.

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21 Financial Service Providers (Registration and Dispute Resolution) Act 2008, ss 48 and 50.
22 Section 52(2).

[31] As mentioned, the phrase "financial services" is also part of Complaints Ltd's name. When it heard what its competitor was proposing, Complaints Ltd was galvanised into seeking approval to use the name ombudsman itself, fearing amongst other things that otherwise its scheme would be perceived as inferior. Its application sought permission for the company to be able to describe itself as a Financial Ombudsman Service and for its Chief Executive Officer to have the title "Financial Ombudsman". By letter dated 24 June 2015, Dame Beverley followed the Elwood policy and declined the application.

[32] Dissatisfied with this outcome, Complaints Ltd issued judicial review proceedings. There was a preliminary legal issue about whether a decision by a Chief Ombudsman under s 28A was amenable to review. When that issue was resolved by Toogood J in Complaints Ltd's favour,[23] the then new Chief Ombudsman Mr Boshier agreed to reconsider Complaints Ltd's application afresh. The judicial review proceedings were accordingly put on hold.

[33] Complaints Ltd considered it had a strong case for obtaining consent. In particular it relied on the fact that the qualities required for approval under the Financial Services Dispute Act are akin to the qualities or characteristics ascribed to parliamentary ombudsmen as identified in the Robertson guidelines and stage two of the Elwood policy.

Mr Boshier's decision

[34] In his decision, Mr Boshier endorsed the Elwood policy and consistent with that policy first addressed the public interest threshold. He identified the purpose of s 28A as being to protect the public interest in ensuring that the concept of the parliamentary ombudsman's role was not undermined or diminished by permitting the name to be used more widely in New Zealand than is necessary. He said he considered it would generally be inappropriate for the name to be used more widely than at present unless an applicant can show significant public disadvantage as a result of the inability to use the name. Complaints Ltd had not been able to show that and accordingly the

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[23] *Financial Services Complaints Ltd v Wakem* [2016] NZHC 634, [2016] NZAR 717.

application must fail at the stage one hurdle, making it unnecessary for him to go on and consider the stage two factors.

[35] In concluding that the public interest in non-proliferation of the ombudsman name outweighed the public interest in granting Complaints Ltd's application, Mr Boshier took into account the following matters:

(a) The absence of any suggestion in the Financial Services Dispute Act or its history that a dispute resolution scheme approved under it was intended to have the status and function of an ombudsman.

(b) The absence of any evidence that Complaints Ltd was in any different position than other consumer complaint mechanisms that operate apparently successfully without being called ombudsman, such as the Independent Police Conduct Authority.

(c) The fact that since s 28A was enacted Parliament has not attached the name to any other structure created by statute, including those which have similar attributes to ombudsmen.

(d) The fact Complaints Ltd was the largest of the three dispute resolution schemes under the Financial Services Disputes Act indicated it had not been harmed or disadvantaged in any material way by its inability to use the name ombudsman.

(e) The protection of the public provided by the legislative requirement that all financial service providers must be members of an approved scheme has not been injuriously affected by Complaints Ltd's inability to call itself an ombudsman.

(f) Arguments that using the name ombudsman would enhance consumer awareness of Complaints Ltd's role and status were not compelling. Under the legislative regime, the consumer had no choice but to use the dispute resolution mechanism of their service provider.

(g) The experience of the parliamentary ombudsmen following the consent given to the two private sector schemes in the 1990s was that it created confusion in the minds of the public about what an ombudsman is and does.

(h) The fact that these two previously existing industry schemes had consent to use the name was not of itself sufficient to justify granting Complaints Ltd's application. Indeed, the addition of a third scheme was liable to increase rather than reduce confusion in New Zealand about parliamentary ombudsmen.

(i) Extending the use of the name to Complaints Ltd was not only unnecessary, it was likely to have similar detrimental effects to those previously experienced.

The High Court decision

[36] On receipt of Mr Boshier's adverse decision, Complaints Ltd amended its judicial review proceeding to focus its challenge solely on Mr Boshier's decision. Dame Beverley's decision, it argues, nevertheless remains relevant because it evidences the degree of opposition by successive Chief Ombudsmen to private ombudsman schemes after Sir John's retirement.

[37] The statement of claim pleads the following grounds of review:

(a) The Elwood policy was unauthorised by Parliament and hence unlawful.

(b) Mr Boshier made his decision for the improper purpose of preventing proliferation of the ombudsman name.

(c) By applying the Elwood policy, Mr Boshier fettered his statutory discretion to consider Complaints Ltd's application on its merits, adopted a fixed rule of declining all applications to avoid proliferation of the name and predetermined the application by invoking a public

interest threshold rather than considering the extent to which the application exhibited all the essential features of an ombudsman's jurisdiction.

(d) The decision was inconsistent with the consents already given to the Banking Ombudsman and Insurance and Savings Ombudsmen schemes, those being schemes virtually identical to Complaints Ltd's scheme.

(e) The decision was unreasonable and failed to take into account a relevant consideration, namely the consent given to Insurance and Financial Services Ombudsman Scheme to use the name in connection with a scheme that incorporated part of Complaints Ltd's name.

[38] As will be apparent, the various grounds of review overlap. To a significant extent, they are variations on a central theme, namely the alleged invalidity of the Elwood policy.

[39] In his decision, Simon France J rejected all of the grounds of review. He held that Mr Boshier had not misinterpreted the width and purpose of s 28A and that the Elwood policy was consistent with the statutory purpose.[24] The Judge relied in particular on the fact that Parliament had made a deliberate choice to include the provision as an amendment to the Ombudsmen Act rather than include it in general legislation (the Flags, Emblems, and Names Protections Act 1981) as had initially been proposed. That was significant because of the emphasis in the Ombudsmen Act on the special constitutional role of the parliamentary ombudsmen. It followed that matters such as the status and integrity of the office were relevant considerations and Mr Boshier was entitled to take them into account.[25]

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[24] *Financial Services Complaints Ltd v Chief Ombudsman*, above n 1, at [38]; relying on *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42; and *Practical Shooting Institute (NZ) Inc v Commissioner of Police* [1992] 1 NZLR 709 (HC) at 718.

[25] At [28]–[30].

[40] The Judge further held that on its face, the Elwood policy genuinely allowed for approval to be given in appropriate cases and was therefore not an unlawful fetter on the Chief Ombudsman's discretion.[26]

[41] As for the reasonableness of the decision, Simon France J considered Mr Boshier was entitled on the facts before him to decide the balance lay where he found it did.[27]

Arguments on appeal

[42] On appeal counsel for Complaints Ltd, Mr Murray, advanced the same arguments raised in the High Court with one modification. He accepted that proliferation and the risk of possible confusion in the minds of the public were relevant factors to be taken into account under s 28A. However, he submitted it was unlawful for the Chief Ombudsman to rely in this case on proliferation per se as the sole criterion. In Mr Murray's submission, the main purpose of s 28A was to protect the name against the proliferation of organisations not exhibiting the salient features of the parliamentary ombudsmen.

[43] Counsel for the Chief Ombudsman, Ms Scholtens QC, argued the decision was made with primary regard to the potential impact of consent on the integrity and value of the office and that there were good reasons for Mr Boshier's concerns. The decision was consistent with the statutory purpose and the policy which it followed was lawful and reasonable.

Analysis

[44] Prior to the enactment of s 28A, there was no restriction on the use of the name ombudsman. In our view, it is clear that 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 a complete prohibition. It is also clear that the reason Parliament considered protection was necessary and desirable was because of the parliamentary ombudsmen's special constitutional role.

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26 At [36].
27 At [40]–[41].

[45] We therefore agree with Simon France J that the potential impact of an application under s 28A on that special constitutional role must be a relevant consideration. More specifically, we further agree that the Chief Ombudsman is entitled to consider the possible impact that a multiplicity of non-parliamentary ombudsmen might have on the status of the role and the public's understanding of it. It also follows that like Simon France J we reject the contention that the s 28A discretion is confined to a consideration of the ombudsman-like qualities of an applicant.

[46] However, we part company with Simon France J when it comes to the issue of whether the Elwood policy improperly fettered the exercise of the s 28A discretionary power.

[47] As noted by Tipping J in *Practical Shooting Institute (NZ) Inc v Commissioner of Police*, the authorities identify three categories of discretionary powers:[28]

(a) Powers that require an individual case by case examination without any predetermined fetter other than what might be explicit or implicit in such criteria as may be set out in the enabling instrument.

(b) Powers that by dint of the nature of the subject matter justify the establishment of a carefully articulated policy, but always with the reservation that no case is to be automatically rejected because it does not fit the policy.

(c) Powers where the discretionary decision maker is implicitly authorised to exercise his discretion to establish for themselves an immutable policy admitting of no exceptions.

[48] Ms Scholtens submitted correctly in our view that the power conferred on the Chief Ombudsman under s 28A(1) is a category two power. Thus although s 28A does not itself contain any guidelines, the Chief Ombudsmen were entitled to develop their

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[28] *Practical Shooting Institute (NZ) Inc*, above n 24, at 718. The existence of the third category was described by Tipping J as having "tenuous authority". He suggested at 718 a case would only be placed in that category if the enabling legislation clearly and necessarily implied it.

own criteria and policies to guide them in deciding whether or not to grant consent. Developing guidelines was eminently sensible and appropriate in the interests of administrative efficiency and consistency of decision making.

[49] However, while a decision maker may adopt policy rules — even restrictive policy rules — it may not adopt a fixed rule of policy that leaves no room for judgment or discretion or that sets a threshold so high it constitutes an unacceptable limit on the exercise of the discretion.[29]

[50] In our view, the Elwood policy offends against these latter principles as a result of its two stage approach. Under the Elwood policy, the decision maker can only proceed to the stage two matters if stage one is satisfied. It does not admit of any exceptions. Further, the policy artificially and irrationally excludes the stage two factors from the assessment of the public interest at stage one. This, despite the fact that as a matter of logic, ombudsman-like qualities must bear on the potential impact consent might have on the integrity and value of the Parliamentary office, something Ms Scholtens accepted was an if not *the* primary stage one consideration.

[51] The effect of the exclusion of the stage two factors is that numeric considerations are elevated to such primacy that the policy effectively amounts to a complete ban on the use of the name ombudsman as in fact has happened since the introduction of the policy. Yet a complete ban was plainly not what Parliament intended and is contrary to s 14 of the New Zealand Bill of Rights Act 1990 (the right of freedom of expression).

[52] When asked by us to identify the legislative authority for making the number of ombudsmen the determinative factor, Ms Scholtens submitted that proliferation was a concern about confusion, rather than about numbers as such. However, if that were so, Mr Boshier's assessment of confusion was problematic.

[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

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[29] *Criminal Bar Assoc of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [119].

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.

[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.

[55] A related point arising out of different treatment is unfair consumer perception of Complaints Ltd. Mr Boshier and Simon France J rejected this argument on the grounds of the size of Complaints Ltd's membership and the fact consumers have no choice but to use the dispute resolution scheme of their service provider.[30] Those matters, while relevant, do not however address the public interest in consumers having confidence in the integrity of a dispute resolution scheme and thus more readily accepting the outcome. It is not unreasonable to suggest that consumer confidence in the integrity of Complaints Ltd's scheme may be reduced by the absence of the name ombudsman especially when other similar schemes including one with a similar name are called ombudsman.

[56] The errors we have identified in the decision under review are in our assessment of a nature and degree that warrant judicial intervention. We have therefore concluded that the decision of the Chief Ombudsman should be set aside and Complaints Ltd's application considered afresh.

[57] In light of these conclusions it is unnecessary to consider the ground of review regarding the reasonableness of the decision.

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30 *Financial Services Complaints Ltd v Chief Ombudsman*, above n 1, at [41].

Summary of findings

[58] We have concluded the appeal should be allowed on two grounds, namely that the Chief Ombudsman:

(a) Applied a policy that improperly fettered the exercise of his discretion.

(b) 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 Complaints Ltd scheme.

[59] We reiterate that our objection to the Elwood policy is not that it involves consideration of irrelevant matters inconsistent with the statutory purpose. Rather our concerns centre on the policy's preliminary public interest threshold which has the effect of:

(a) unduly restricting the scope of the discretion to a degree not contemplated by Parliament; and

(b) precluding the decision maker from taking into account other relevant considerations in addition to proliferation and the risk of confusion.

[60] For completeness, we add we have not overlooked a statement in the Chief Ombudsman's correspondence that acknowledges the general principle of allowing room for exceptions to policies. However, the policy in question did not allow for exceptions, there was no evidence the policy had ever been amended in practice and Mr Boshier applied it without any appropriate consideration of the possibility of an exception.

Outcome

[61] The appeal is allowed. The decisions of the High Court and the Chief Ombudsman are set aside.

[62] The Chief Ombudsman is directed to reconsider the appellant's application under s 28A(1) of the Ombudsmen Act 1975 in accordance with this judgment.

[63] There is no reason why costs should not follow the event. We therefore order that the respondent must pay the appellant's costs for a standard appeal on a band A basis with usual disbursements.

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