IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-877
[2016] NZHC 634

IN THE MATTER	of an application for judicial review under Part 1 of the Judicature amendment Act 1972
BETWEEN	FINANCIAL SERVICES COMPLAINTS LIMITED Plaintiff
AND	DAME BEVERLEY WAKEM Defendant

Hearing: 1 March 2016

Appearances: K Murray for Plaintiff
M Scholtens QC and RM Stoop for Defendant

Judgment: 12 April 2016

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 12 April 2016 at 11:00 am
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction and result

[1] Financial Services Complaints Ltd (FSCL) challenges the Chief Ombudsman's decision to refuse FSCL consent to using the term "Ombudsman" in its company name. In this judgment, I consider an application by the Chief Ombudsman to strike out FSCL's challenge on the grounds that the privative provision in s 26(1)(a) of the Ombudsmen Act 1975 grant the Chief Ombudsman immunity from judicial review.

[2] For the reasons given below, I dismiss the Chief Ombudsman's strike-out application, essentially on the ground that I do not consider that the decision to refuse consent was the exercise of a function falling within the scope of the privative provisions. It is not plain and obvious that FSCL's challenge by judicial review cannot succeed at trial.

Background

[3] FSCL is a not-for-profit company which offers independent dispute resolution services for financial service providers and their customers. FSCL's dispute resolution scheme was the first to be registered as an approved scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ("the FSP Act"). Membership of FSCL is open to all financial service providers; it claims to have more than 6,000 participants in its scheme.

[4] To date, three other schemes have been approved under the FSP Act by the Minister of Consumer Affairs:

(a) The Banking Ombudsman Scheme (BOS);

(b) The Insurance and Savings Ombudsman Scheme (ISOS); and

(c) Financial Dispute Resolution Service.

[5] FSCL claims that its scheme shares several similar features with the ISOS scheme. These similarities are said to have the effect of putting the two schemes in direct competition.

[6] FSCL is also interested in ensuring that the public is aware of its services and that it exhibits the qualities which are characteristic of ombudsmen under the Ombudsmen Act. Section 52 of the FSP Act requires approved schemes to satisfy the key principles of accessibility, independence, fairness, accountability, efficiency and effectiveness. FSCL submits that these are all features of ombudsmen, making the use of the name "Ombudsman" in FCSL's name appropriate. After ISOS proposed to change its name to "Insurance and Financial Services Ombudsman Scheme", FSCL became concerned about public confusion between the schemes, and realised that its current name lacks the "gravitas or mana" that the name "Ombudsman" conveys.

[7] The use of the name "Ombudsman", however, is restricted by the Ombudsmen Act. Section 28A of that Act prohibits the use of the name "Ombudsman" in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise except pursuant to statute or with the prior written consent of the Chief Ombudsman. BOS and ISOS received prior approval under that section to use the word "Ombudsman" in their names.

[8] FSCL alleges that, on 29 April 2015, its Chief Executive wrote to the Chief Ombudsman and gave notice that it would soon apply for consent to use the name "Ombudsman". The Chief Executive and Chairman of FSCL then met with the Chief Ombudsman on 11 May 2015 to discuss the proposed application.

[9] At the meeting, FSCL's Chief Executive produced a copy of decision-making criteria for s 28A applications which a previous Chief Ombudsman published in May 2001. The Chief Ombudsman allegedly told FSCL's Chief Executive that she had not seen the 2001 criteria, but said that FSCL's application should address them anyway and that FSCL's application would be considered on its merits. The Chief Ombudsman also referred FSCL's Chief Executive to other international principles, and said those could be useful.

[10] On 21 May 2015, the plaintiff formally applied for written consent to use the name "Ombudsman". The application referred to various matters, including the 2001 criteria and the international materials that were mentioned by the defendant in the 11 May meeting. On 24 June 2015, the Chief Ombudsman advised the FSCL's that the application was declined.

[11] On 6 November 2015, FSCL filed a statement of claim seeking to judicially review the Chief Ombudsman's decision to refuse consent. It asserts that the Chief Ombudsman's decision was unfair, unlawful and unreasonable. In particular, it relies on the prior approval for the use of the name by other entities providing a similar service. It asks the Court to quash the Chief Ombudsman's decision, and to direct the Chief Ombudsman to reconsider the application properly.

[12] On 28 January 2016, the defendant applied to the Court for orders striking out the plaintiff's statement of claim and costs.

Strike-out principles

[13] The Court may strike out all or part of a claim if it discloses no reasonably arguable cause of action.[1] The Courts' approach to strike-out applications is well established, and it applies equally to judicial review proceedings.[2] The relevant principles can be summarised as follows:

(a) The cause of action must be so clearly untenable that it cannot possibly succeed.[3]

(b) The jurisdiction to strike out should be exercised sparingly, and only in clear cases. In all other cases, the respondent to a strike-out application should not be deprived of having the claim dealt with in the ordinary way.[4]

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1 High Court Rules, r 15.1(1)(a).
2 *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA).
3 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.
4 *Miller v Commissioner of Inland Revenue* [1995] 3 NZLR 664 (CA) at 668.

(c) The facts pleaded in the statement of claim are assumed to be true, but the court is not required to accept entirely speculative or untenable allegations.[5]

(d) The court should be particularly slow to strike out a claim in any developing area of the law.[6]

Summary of the parties' positions

[14] The Chief Ombudsman seeks an order striking out the whole of the plaintiff's claim, on the basis that the Chief Ombudsman's decision under s 28A is protected from judicial review by s 26(1)(a) of the Act, which grants[7] any Ombudsman civil and criminal immunity from anything done, reported, or said "in the course of the exercise or intended exercise of [his or her] functions under this Act".

[15] Ms Scholtens QC, for the Chief Ombudsman, submits that the decision was made in the course of the Chief Ombudsman exercising a function under the Act; namely, the exercise of the power to decline approval for the use of the name "Ombudsman" under s 28A. Accordingly, counsel argues, the decision falls under the ambit of the privative provision in s 26(1)(a). It follows that, because the Chief Ombudsman is immune from FSCL's claim, there is no arguable case and the Court should strike out its statement of claim.

[16] FSCL's case is that the strike-out application should be dismissed because:

(a) privative provisions, such as those in s 26(1)(a), should not readily be interpreted in a way that impairs the ability of people to hold public officials accountable;

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5 *Attorney-General v Prince and Gardner*, above n 3, at 267.
6 *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] 3 NZLR 786 (CA) at [16].
7 Subject to certain, non-applicable exceptions set out in s 26(2) of the Act.

(b) the wording of s 26(1)(a) limits an Ombudsman's immunity against suit to his or her investigatory functions under the Ombudsmen Act;[8] and

(c) the Court's general approach to privative clauses and applicable statutory interpretation principles indicate that immunity under s 26(1)(a) should not be extended to decisions relating to the name "Ombudsman" under s 28A.

[17] The plaintiff submits, therefore, that there are no grounds for the judicial review claim to be struck out and the Chief Ombudsman's application should fail.

The issue for determination: Does s 26(1)(a) grant immunity from judicial review of decisions made under s 28A?

[18] Because the only basis for the Chief Ombudsman's strike-out application is the claimed immunity in s 26, it is neither necessary nor appropriate to address the broader merits of FSCL's judicial review claim. The central question to be determined on the present application is whether s 26(1)(a) grants the Chief Ombudsman immunity from judicial review of decisions made under s 28A. If so, there can be no tenable basis on which the judicial review proceeding can proceed and it must inevitably be struck out.

The key provisions in issue

[19] Section 28A of the Ombudsmen Act bars all unauthorised use of the name "Ombudsman", subject to a proviso which allows use of the name if the use is pursuant to an Act of Parliament or if the Chief Ombudsman consents. The consent proviso was relied on by FSCL when it made its application to use the name. The section, in full, 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,

[8] Or other relevant legislation, such as the Official Information Act 1982 or the Protected Disclosures Act 2000.

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).

[20] Sections 26(1)(a) and (2) are the provisions on which the Chief Ombudsman relies in this strike-out application. They say:

26 Proceedings privileged

(1) Subject to subsection (2),—

(a) no proceedings, civil or criminal, shall lie against any Ombudsman, or against any person holding any office or appointment under the Chief Ombudsman, for anything he may do or report or say in the course of the exercise or intended exercise of his functions under this Act or the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 or the Protected Disclosures Act 2000, unless it is shown that he acted in bad faith:

(2) Nothing in subsection (1) of this section applies in respect of proceedings for—

(a) An offence against section 78 or section 78A(1) or section 105 or section 105A or section 105B of the Crimes Act 1961; or

(b) The offence of conspiring to commit an offence against section 78 or section 78A(1) or section 105 or section 105A or section 105B of the Crimes Act 1961; or

(c) The offence of attempting to commit an offence against section 78 or section 78A(1) or section 105 or section 105A or section 105B of the Crimes Act 1961.

The statutory setting

[21] Headings divide the Ombudsmen Act into three main parts. The first part is entitled "Ombudsmen", and contains general provisions which, among other things, require the appointment of one or more Ombudsmen as officers of Parliament;[9] provide that one of them shall be Chief Ombudsman with responsibility for the

[9] Ombudsmen Act 1975, s 3(1).

administration of the office and the co-ordination and location of work;[10] and provide for the appointment by the Chief Ombudsman of such officers and employees as may necessary for the efficient carrying out of the functions, duties and powers of the Ombudsmen under the Act.[11]

[22] The second part of the Act, which runs from ss 13 to 26, is entitled "Functions of Ombudsmen". Section 13 is also headed "Functions of Ombudsmen"; it is the key enabling provision for the Ombudsmen. It is lengthy and it is sufficient for present purposes to set out only part of subsection (1), as follows:

> **13 Functions of Ombudsmen**
>
> (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or organisations named or specified [in the Act] … or by any officer, employee, or member of any such Department or organisation in his capacity as such officer, employee, or member ….[12]

[23] The heading to s 18 reads "Proceedings of Ombudsmen". The provision sets out certain procedural directions for the conduct of investigations by the Ombudsmen. Other provisions in the second part include provisions allowing Ombudsmen to refer complaints to, and consult with, the Privacy Commissioner, the Health and Disability Commissioner and the Inspector-General of Intelligence and Security.[13] Section 22 describes what is to occur once an investigation is completed.

[24] At the end of the second part of the Act are two privative provisions, of which s 26 is one. Section 25 is the other; it provides:

> **25 Proceedings not to be questioned or to be subject to review**
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> No proceeding of an Ombudsman shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of an Ombudsman shall be liable to be challenged, reviewed, quashed, or called in question in any Court.

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10 Section 3(4).
11 Section 11(1).
12 Section 14 imposes time limits on some investigations.
13 Sections 17A, 17B, 17C, 21A, 21B and 21C.

[25] At first sight, there appears to some overlap between ss 25 and 26, particularly so far as s 25 purports to prevent any court from judicially reviewing or questioning a "decision of an Ombudsman". I return to the relationship of the two sections below at [42].

[26] The third part of the Act is entitled "Miscellaneous provisions". This part of the Act contains provisions which, among other things, describe the rights of Ombudsmen to enter the premises of any department or organisation under investigation; provide for the delegation of powers by an Ombudsman; and require the Ombudsmen to report annually to Parliament. Section 28A, the protection of name provision, falls within this part.

Legislative history of the relevant provisions

[27] Section 26 has its genesis in the Act's predecessor, the Parliamentary Commissioner (Ombudsman) Act 1962. Although the provision has been amended a number of times since its enactment, the portion relevant to this case corresponds to its 1962 predecessor.[14] The Hansard debates on both the 1962 and 1975 Bills do not shed any light its intended meaning. The explanatory note for the corresponding provision in the 1962 Bill states only:[15]

> *Clause 22: Subclause (1)* protects the Commissioner and his staff against civil or criminal proceedings for anything they may do or say in the exercise of their functions, unless it is shown that they acted in bad faith.

[28] Section 28A, the protection of name provision, was inserted into the current Act by the Ombudsmen Amendment Act 1991, which passed through the House as part of the omnibus Law Reform (Miscellaneous Provisions) Bill 1989. The law change appears to have been initiated by the 1988 Annual Report of the Ombudsmen, which stated:[16]

> The term "Ombudsman" has become accepted and understood in New Zealand as being synonymous with a constitutional right of a person to have a grievance against executive government, whether central, regional or local, investigated … If others use the term "Ombudsman" it will inevitably lead to

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14 Parliamentary Commissioner (Ombudsman) Act 1962, s 22.
15 Parliamentary Commissioner For Investigations Bill 1962 (8-1) (explanatory note) at v.
16 Report of The Ombudsmen for the year ended 31 March 1988 at 12-13.

> confusion in the minds of the public as to what an Ombudsman is and does as a complaints authority of the last resort, and that will undermine the effectiveness and integrity of the existing constitutional process.

[29] The Report goes on to state that the Chief Ombudsman referred the matter to the Deputy Prime Minister, and that a statutory amendment to protect the name will be initiated. The brief Hansard debate at the Bill's third reading confirms this policy rationale.[17]

The parties' positions on the language of ss 26(1)(a) and 28A

The Chief Ombudsman

[30] For the Chief Ombudsman, Ms Scholtens QC submitted that the decision to turn down FSCL's s 28A application was the exercise of a "function" of the Chief Ombudsman which s 26(1)(a) exempts from review by the Court. Counsel argued:

(a) Courts are bound to give effect to privative provisions when they are expressed in clear and unambiguous language.

(b) Public policy reasons favour upholding the Chief Ombudsman's view of the application of s 26(1)(a) in this case.

(c) Although there is no definition of "functions" in the interpretation section of the Act, other provisions indicate that the Ombudsmen's "functions" are wide-ranging and encompass statutory powers beyond the conduct of investigations.

(d) While it may be possible to draw distinctions between powers and functions,[18] the statutory context of s 28A indicates that decisions pursuant to the provision are made in the exercise of a "function", and are therefore subject to s 26(1)(a).

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17 (28 November 1991) 521 NZPD 5739.

18 See *South Taranaki Energy Users Association Incorporated v South Taranaki District Council* HC New Plymouth CP5/97, 26 August 1997.

(e) The mandatory nature of the prohibition in s 28A means that deciding whether to approve the use of the name is a "function". Because only the Chief Ombudsman has the ability to grant consent for use the use of the name, decisions in that respect are not the exercise of a mere "power".

FSCL

[31] For FSCL, Mr Murray submitted that the Chief Ombudsman's decision to reject the application for consent under s 28A was not made in the exercise of a "function" as the legislature meant that term to be understood, and is therefore not covered by s 26(1)(a). Mr Murray argued:

(a) Courts should apply a narrow interpretation to privative provisions.

(b) The placement of s 26 in the part of the Act headed "Functions of Ombudsmen" strongly implies that the word "functions" in s 26 refers only to matters contained in that part.

(c) The location of s 28A in the "Miscellaneous provisions" part of the Act reinforces this distinction.

(d) The heading to s 26, "Proceedings privileged" is a clear contextual link to s 18, "Proceedings of Ombudsmen", which refers to Ombudsmen's investigative functions. This indicates that s 26 protects only the investigative activities of the Ombudsmen.

Legal principles in respect of the interpretation of the s 26(1)(a) privative provision

[32] The starting point for the resolution of any statutory interpretation issue is s 5 of the Interpretation Act 1999, which provides:

> **5 Ascertaining meaning of legislation**
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> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[33] On its face, s 26 purports to provide Ombudsmen with a statutory immunity from both civil and criminal proceedings in respect of anything done in respect of the Ombudsmen's functions, except for cases of bad faith. The wording of s 26 and the explanatory note suggests the section is concerned with the protection of the individuals from suit rather than with the sanctity of their decisions. The section has received only cursory analysis by the Courts.[19]

[34] In *De Bres v McCully*,[20] a full bench of the High Court considered an analogous provision from the Human Rights Act 1993.[21] Goddard and Doogue JJ approached the provision from the standpoint that courts will be cautious when interpreting provisions which seek to limit rights of access to the courts and scrutinise them carefully.[22] Accordingly, the Court had no difficulty in concluding that a narrow interpretation should be applied to the provision in question. They noted, however, that any interpretation must not go so far as to deny effect to the provision.[23]

[35] Hammond J, writing for the Full Court of Appeal in *Crown Health Financing Agency v P*, cited *De Bres v McCully* approvingly, albeit with the proviso that Courts must, in the end, "bend the knee to the dictates of Parliament."[24]

[36] This general approach to privative provisions is common ground between the parties. Ms Scholtens, however, submits that two countervailing policy considerations justify a broader interpretation of s 26. The first consideration was

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19 See *Attorney-General v O'Neill* [2008] NZAR 93 (HC); *Pope v Human Rights Commission* [2014] NZHRRT 3.

20 *De Bres v McCully* [2004] 1 NZLR 828 (HC)

21 Human Rights Act 1993, s 130.

22 At [3] and [23] – [24].

23 At [22] and [28], citing Kirby J's dissenting judgment in *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at [58] – [66].

24 *Crown Health Financing Agency v P* [2009] 2 NZLR 149 (CA) at [224] [225]. Hammond J was dissenting in part, but not on this point.

identified by Professor Kenneth Keith, as he was then, in a 1982 article considering the role for the courts in supervising the Ombudsmen. Professor Keith observed:[25]

> … [T]here are several important features of the law relating to the ombudsmen that suggest judicial caution. One is that they can, in the end, 'do no more than recommend or comment.' A second is that they are control agencies rather than themselves the direct wielders of public power. A third is that the statutes confer the powers in broad, non-technical terms, with flexible procedures to match.

[37] Secondly, Ms Scholtens submits that policy rationales should support interpreting the privative clause in a manner that grants the Ombudsman immunity from challenge in relation to s 28A name applications. She says that Parliament's decision to bestow the ability to guard the name "Ombudsman" on the Chief Ombudsman is consonant with the role's independence from the executive and judicial branches of government. The Chief Ombudsman was given the power to independently determine the use of the name and, therefore, should be able to conclusively determine its use without interference with from the executive or judiciary.

Discussion

[38] I see no difficulty in adopting a cautious and narrow interpretative approach to s 26. Although there is no doubt that the Chief Ombudsman is a unique actor in New Zealand's constitutional structure, the Chief Ombudsman should not be beyond the reach of the law unless Parliament has expressed so in the clearest possible language.

[39] The need to ensure equality before the law is paramount and the constitutionally independent role of the Ombudsmen should not grant the Chief Ombudsman wider protection from the law than that which is clearly provided for in ss 25 and 26. In any case, Professor Keith's rationale for judicial caution is not relevant to decisions made under s 28A. It is clear from the passage set out at [36] that Professor Keith was referring to the powers of the Ombudsmen in exercising their investigative functions, not to the ancillary administrative powers of the Chief Ombudsman. In refusing FSCL consent to the use of the name "Ombudsman", the

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[25] Kenneth J Keith "Judicial Control of the Ombudsman?" (1982) 12 VUWLR 299 at 322.

Chief Ombudsman did not merely recommend or comment; she wielded a direct power of control in accordance with a specific statutory discretion. Furthermore, the decision is one directly affecting FSCL's freedom of speech and what would otherwise be its right to give itself such name as it wishes, and it has an arguable commercial impact upon the applicant. The third point made by Professor Keith is plainly confined to investigation proceedings.

[40] It is helpful to consider the power of the Chief Ombudsman conferred by s 11, to appoint officers and employees. Section 11 provides as follows:

> **11 Staff**
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> (1) The Chief Ombudsman may appoint such officers and employees (including acting, temporary, or casual officers and employees) as may be necessary for the efficient carrying out of the functions, duties, and powers of the Ombudsmen under this Act.
>
> (2) Except where this Act otherwise expressly provides, the Chief Ombudsman shall have all the rights, duties, and powers of an employer in respect of the persons appointed under subsection (1) of this section.
>
> (3) The Chief Ombudsman shall operate a personnel policy that complies with the principle of being a good employer.
>
> (4) No person appointed under subsection (1) of this section shall be deemed to be employed in the service of Her Majesty for the purposes of the State Sector Act 1988 or the Government Superannuation Fund Act 1956 by reason of that person's appointment under this section

[41] Section 11 confers ancillary powers and duties on the Chief Ombudsman in order to enable the Ombudsmen to carry out their functions effectively under the Act. They are analogous to the power given to the Chief Ombudsman to control the use of the name "Ombudsman" in order to avoid confusion in the minds of the public and to protect the effectiveness and integrity of the Ombudsmen's constitutional investigation processes. In enacting s 26(1)(a), it could not have been Parliament's intention to prevent officers and employees appointed under s 11 from taking court proceedings to enforce the Chief Ombudsman's statutorily imposed duties as an employer.

[42] The statutory structure – particularly the grouping of the Act's provisions under headings – and the wording of the relevant provisions lead to the firm conclusion that Mr Murray is right to submit that Parliament intended that s 25 of the Act would prevent the courts from reviewing or questioning the exercise of the Ombudsmen's investigative functions as described in s 13. Section 26(1)(a) is a companion provision limiting the personal civil and criminal liability of the Ombudsmen, and the officers and employees appointed under s 11, for anything done or said in carrying out those functions. The remaining provisions of s 26 provide related protections from disclosure of information obtained, and immunity from suit for defamation.

[43] I refer in particular to the following as supporting the view that Parliament did not intend to extend immunity from judicial review or scrutiny to decisions made under s 28A:

(a) The language used in s 26 grants immunity only to things done, reported, or said in the course of the exercise, or intended exercise, of the Ombudsman's "functions" under the Act.

(b) Section 26 is included in the part of the Act entitled "Functions of Ombudsmen", which part contains all the provisions necessary for the Ombudsmen to perform their investigative activities.

(c) There is no language in s 28A to indicate that decisions made in respect of s 28A are "functions" of the Ombudsman.

(d) Decisions made in respect of s 28A are not related or connected to the Ombudsman's investigative activities in any way.

(e) Section 28A is included in the "Miscellaneous provisions" part of the Act, not in the "Functions of Ombudsmen" part.

(f) If Parliament had intended the decisions in respect of s 28A to be a "function" of the Ombudsman, it could have said so with much

clearer language. It could have expressly provided for that fact, or it could have inserted s 28A into the "Functions of Ombudsmen" part of the Act.

[44] I accept Ms Scholten's point that the Act does not neatly distinguish the Ombudsmen's functions from their powers. Indeed, it is not unusual for statutes to use the terms "functions" and "powers" in a loose and interchangeable manner.[26] Courts will, however, distinguish the terms in cases where it is necessary or appropriate.[27] In this case, the above factors indicate that Parliament did not intend the term "functions" in s 26 to include the Ombudsmen's ancillary administrative power in s 28A.

[45] Section 26 continues to have meaning and full effect when it is applied only to the "Functions of Ombudsmen" part of the Act. The narrow interpretation I prefer leaves s 26 with the potential to be an effective immunity provision. It gives the Chief Ombudsman, and his or her staff, immunity from claims made in relation to the Ombudsmen's investigatory functions and it remains consistent with the public policy reasons Professor Keith suggested in favour of a judicially cautious approach to reviewing the Ombudsmen's functions.

[46] Accordingly, I regard the statutory immunity granted to the Ombudsmen and their officers and employees under s 26 to be limited to matters done in connection with the investigative functions outlined in the "Functions of Ombudsmen" part of the Act. I do not think that it extends to ancillary powers conferred in the other parts of the Act, including the Chief Ombudsman's discretion under s 28A to permit or decline the use of the name "Ombudsman".

Result and costs

[47] Given my conclusion that s 26 does not grant the Chief Ombudsman immunity from judicial review of decisions made under s 28A, and considering

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[26] *North Shore City Council v Local Government Commission* HC Auckland M1197/96, 15 April 1997.

[27] *South Taranaki Energy Users Association Incorporated v South Taranaki District Council*, above n 18.

FSCL's statement of claim in light of the strike-out principles summarised at [13], I do not consider FSCL's case to be so untenable that that it cannot succeed. The threshold for a successful strike-out application is not met.

[48] I dismiss the Chief Ombudsman's application to strike out FSCL's statement of claim.

[49] The defendant's application having failed, the plaintiff is entitled to costs assessed on a category 2B basis, and disbursements, related to the application. If the parties cannot agree on the amount to be paid, the plaintiff shall have until 29 April 2016 to file and serve a costs memorandum. The defendant shall have until 20 May 2016 to file and serve a memorandum in response. Costs shall then be determined on the papers, unless the Court directs otherwise.

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Toogood J