IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2022] NZEnvC 079

IN THE MATTER	of the Resource Management Act 1991
AND	of an application under s87G of the Act
BETWEEN	WOOLWORTHS NEW ZEALAND LIMITED
	(ENV-2020-CHC-001)
	Applicant
AND	CHRISTCHURCH CITY COUNCIL
	Consent Authority

Court:	Environment Judge P A Steven Alternate Environment Judge L J Newhook
Hearing:	In Chambers on the papers
Submissions:	A A Arthur-Young and L J Rapley for Woolworths New Zealand Limited B K Pizzey for Christchurch City Council A C Hughes-Johnson QC for Spreydon Lodge Limited
Last case event:	3 November 2021
Date of Decision:	16 May 2022
Date of Issue:	16 May 2022

DECISION OF THE ENVIRONMENT COURT

A: Costs are awarded to the Council in the sum of $155,174.68.

B: Costs are awarded against Spreydon in the sum of $285,581.23, plus 50% of the Crown's costs otherwise payable by Woolworths.

C: The application against the Council is declined.

REASONS

[1] On 7 September 2021, the Environment Court issued its decision ('the decision') granting consent to Woolworths for a mixed-use (residential and commercial) development at Halswell.

[2] The application was heard by the Environment Court as a direct referral following hearings in February and June 2021 involving Woolworths as applicant, Christchurch City Council ('the Council') as consent authority and Spreydon Lodge Limited ('Spreydon') and Halswell Timber Limited ('Halswell Timber') as s274 parties.[1]

[3] As the decision records, Spreydon had raised wide-ranging grounds in opposition to the proposal concerning the "scale, scope, composition, location, and orientation of the development", and contended that it would "seriously undermine the orderly development of the KAC" [North Halswell Key Activity Centre ('KAC')] and result in significant adverse economic effects to the Halswell community.[2] The Council had sought amendments to the proposal which Woolworths had successfully opposed.

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[1] Halswell Timber's involvement was confined to a 'watching brief' role, as it had resolved all issues with Woolworths prior to the hearing.

[2] *Woolworths New Zealand Limited v Christchurch City Council* [2021] NZEnvC 133 at [10].

The applications for costs

[4] There are three applications before the court:

(a) an application by the Council against Woolworths;
(b) an application by Woolworths against the Council; and
(c) an application by Woolworths against Spreydon.

Principles applying to costs in a direct referral

[5] Under s285 Resource Management Act 1991 ('RMA' or 'the Act'), the court has a broad discretion to order any party to pay costs to any other party to the proceedings. By s87G(5), s285 applies to direct referral proceedings.

[6] It is clear that the general principles for an award of costs under s285 apply:

(a) the Environment Court has a broad discretion to award costs to any party, provided they are reasonable;
(b) an award is imposed to compensate what is just, not to penalise a party;
(c) orders are commonly made against a party which has put another party to unnecessary costs; and
(d) the factors in *Bielby* apply to a consideration of an award above the normal range of costs awarded.

[7] However, there are also three presumptions in s285 for the court to apply when considering an application for an award of costs in this context, namely:

(a) that costs will not be awarded against a s274 party (see s285(5)(a)(i));
(b) that the costs and expenses of the court will be met by the applicant (see s285(5)(ii)); and
(c) that the costs and expenses of the Council in assisting the court in relation to a s87F report (relevantly) are to be met by the applicant

(see s285(8)).

[8] Of further relevance, s285(5)(b) requires the court to have regard to the fact that the proceedings are at first instance when deciding on the amount of any award it decides to make. There are a number of Environment Court decisions which have considered this provision, including *Mainpower NZ Ltd v Hurunui District Council*;[3] *Re Canterbury Cricket Association Incorporated*;[4] *Re Skydive Queenstown Limited*;[5] *and Re Waiheke Marinas Limited*.[6]

[9] Differing views are expressed in these decisions as to whether this provision reduces the likelihood or quantum of costs. The prevailing view is that whether an increase or a reduction will be dictated by the circumstances of the case. This was the position taken in *Waiheke Marina*s,[7] where the following observations in *Re Canterbury Cricket Association Incorporated* were strongly endorsed:[8]

> There are differences in the scope and conduct of a first instance hearing to determine an application for consent compared with an appeal on consent. A first instance hearing before the Environment Court may be a lengthier process involving more parties with the full range of issues (legal issues, factual and opinion evidence) yet to be determined. On appeal, the Environment Court has the advantage of hearing de novo an application that has been thoroughly explored and tested before a consent authority. Even where an appellant seeks to decline a grant of consent, the parties will usually be able to confine the matters in issue. These differences may have costs implications.

The Council's application

[10] The Council lodged an application seeking costs against Woolworths, in relation to the costs incurred subsequent to the filing of the s87F reports. The

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[3] *Mainpower NZ Ltd v Hurunui District Council* [2012] NZEnvC 56.
[4] *Re Canterbury Cricket Association Incorporated* [2014] NZEnvC 107.
[5] *Re Skydive Queenstown Limited* [2014] NZEnvC 186.
[6] *Re Waiheke Marinas Limited* [2016] NZEnvC 18.
[7] At [13]-[17].
[8] *Re Canterbury Cricket Association Incorporated* [2014] NZEnvC 106 at [11].

Council seeks recovery of a contribution towards the total costs incurred from 20 September 2020 (after conclusion of the mediation) to the end of the hearing process in the sum of $155,174.68 (out of a total of $197,039.60) attributable only[9] to the expert witnesses and not for legal costs.

[11] Discounts have been applied to the actual costs of the economic, urban design and planning experts, limiting recovery to an amount considered to be reasonable. Reductions of 25% were made to the planning and economic witness costs, with a 20% reduction to the urban design witness costs.

[12] The Council pursues its application on the basis that its involvement was consistent with its obligation to assist the court; a duty that does not preclude the Council opposing the proposal unless further amendments are made to it. Counsel likened the role of the Council in any s87F proceeding as akin to amicus curiae, which it says aptly describes the position taken by the Council in this instance.

[13] In counsel's submissions, it is said that the Council did not advocate for a particular outcome, and only when requested to do so by the court, did it argue for decline unless requested changes were made to the proposal. Counsel further contends that the merits of the position it advanced through the evidence should have no bearing on the costs of the proceedings, as its case was consistent with the role that the Council was required to take.

[14] Counsel identifies the extent of agreement in relation to the proposal, as evidenced in the number of, and content of, the joint witness statements from various experts, who did not need to be called. As a result of discussions during the hearing, all proposed conditions were agreed with Woolworths.

[15] Counsel submits that the matters in dispute were reasonably confined

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[9] The Council's application states that the internal budgeting system does not levy a fee for legal attendances on resource consent applicants.

considering the complexity of the proposal, and related to the following matters:

(a) whether there would be economic benefits of the green corridor formed as a road, a position it took solely due to the submission of Spreydon;
(b) the location of the supermarket and its strategic need for occupation of the residential zone;
(c) the absence of buildings along the road frontage between the carpark and residential area; and
(d) the degree of inconsistency with the urban design and residential objectives and policies of the district plan.

[16] The evidence called on the disputed elements of the proposal is said to be consistent with the obligation on the Council to fully participate in order to assist the court. Counsel submits that the public confidence in the integrity and robustness of decision-making by the Environment Court would be undermined if councils are dissuaded, for reason of cost, from fully participating; that while the experts could have stayed silent on the changes it was seeking, the Council risked criticism if it had taken that stance.

[17] Shortcomings in the urban design evidence in relation to the alignment of the green corridor are acknowledged in light of the court's findings. However, counsel contends that this is irrelevant to the question of costs, as success from the Council's perspective relates to its full participation in assisting the court rather than "winning".

[18] Counsel refers to the court's criticism of the Council's evidence seeking (unspecified) changes to the proposal rather than focusing on the proposal before the court, which in counsel's submission, was also to assist the court (and Woolworths) in understanding the Council's position. Counsel notes that there should not be a punitive element to a cost award and reminds the court that utilisation of this first instance jurisdiction has saved Woolworths time and cost.

Counsel also refers to the fact that the Council's costs associated with the presentation of officer reports at a first instance hearing are recoverable from an applicant pursuant to s36 RMA.

[19] Accordingly, the Council submits that Woolworths should be required to pay the sum sought by the Council without any further discount being made to the sum it is seeking.

Woolworths' position

[20] Woolworths did not respond directly to the Council's application although it made applications of its own, including against the Council for an award of costs in responding to parts of the Council's case. The grounds for that application (in large measure) meet the application made by the Council against Woolworths. On that basis, we find it useful to refer to Woolworths' application against the Council.

Woolworths' applications

[21] As stated above, Woolworths has made an application for costs against both the Council and Spreydon, seeking recovery of 75% of the costs directly incurred in relation to the proceedings, in the sum of $346,434.95.

[22] The sum sought is apportioned as follows:

(a) an award against the Council in the sum of $60,853.72; and
(b) an award against Spreydon in the sum of $285,581.23.

[23] The costs comprise of legal fees in the sum of $207,654.85 (including disbursements but excluding GST) and expert costs (including disbursements but excluding GST). Copies of the relevant invoices were attached to Woolworths' application.

[24] In addition, Woolworths seeks a contribution from Spreydon in the order

of 50% of the costs of the Crown otherwise payable by Woolworths.

[25] The costs of the Crown are $78,594.73 excluding GST.

Application against the Council

[26] Woolworths accepts that the court will generally be slow to award costs against a council, unless it can be shown that the council has neglected a duty. Its application refers to the statutory presumptions earlier referred to and notes that it has already contributed $183,321.35 (excluding GST) towards the Council's costs, a sum it described as significant and (in the case of some of the invoices) excessive.

[27] No contribution is sought in relation to the costs associated with preparing joint statements of evidence or in responding to the Council experts, with the exception of the urban design, planning and economic statements about which adverse comments had been made by the court in its decision.

[28] Woolworths submits that it ought to be able to recover costs against the Council on the basis that its actions in pursuing further amendments to the application were unsubstantiated by evidence, were poorly thought out and presented, and were ultimately rejected by the court. Counsel refers to the court's confusion as to the rationale for the amendments in light of the opposition raised to aspects of the proposal on policy grounds in the district plan context.

[29] Woolworths further submits that the Council's position was unreasonable given the significant refinements that had already been made to the application, as evidenced in the 10 joint statements of evidence presented by the Council and Woolworths. Counsel notes that this had been an initiative of Woolworths to ensure an efficient hearing.

[30] Woolworths submits that the Council had failed in its duty to provide reasonable assistance to the court as required by s87F RMA. Woolworths relies

on the presence of *Bielby* factors to justify the extent of the award that it is seeking.

[31] We note that after receiving the application, the court had sought additional submissions in light of the High Court decision of *EPA v BW Offshore Singapore PTE Limited* ('*BW Offshore*')[10] after becoming aware of the decision after the application by Woolworths was lodged. It is useful to refer to that decision and to counsel's submissions.

[32] In *BW Offshore*, the High Court had overturned an Environment Court decision awarding a higher than usual award of costs against the Environmental Protection Agency ('EPA'), who was a party to the court's proceedings and appeared to signal a departure from reliance on the *Bielby* factors, making the observations (relevantly) that:

(a) while acknowledging that the Environment Court is a specialist court and there will be particular factors relevant to its specialist jurisdiction that need to be considered in an award of costs, the general costs principles developed by the wider civil justice system should be considered where they are relevant; and
(b) while the *Bielby* factors are sound principles for considering an uplift, it may be appropriate to also consider the High Court Rules 2016 as the "most up to date" principles for costs awards where it is relevant to do so.

[33] In supplementary submissions, counsel for Woolworths refer to the factors that apply under the High Court Rules where an increased award is being sought. Counsel observes that these rules are broadly analogous to the *Bielby* factors, the intention of each being to identify conduct that leads to the unnecessary incursion of costs by a party.

[34] While noting that there are some factors in the High Court Rules which are

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[10] *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577.

not relevant in the Environment Court context, counsel refers to the discretion conferred upon the High Court by rule 14.6.(3)(d) to consider other reasons in determining an award of costs, which, in counsel's submission, reflects that wide discretion of the Environment Court to a costs application.

[35] Counsel also points to the fact that the *Bielby* factors are incorporated into the Environment Court Practice Note 2014, and while often being guided by these factors, other considerations are generally always referred to as being of relevance to a costs determination in any given case.

[36] We are in broad agreement with counsel's submissions although when considering the Council's role in the proceedings, we note that the High Court's comments were influenced by the context and nature of the litigants being a public body and a private actor. For that reason, the case had been distinguished from others involving two-party disputes. The decision in *Aitchison v Wellington City Council* ('*Aitchison*')[11] was referred to as an example. The High Court observed that the neutrality considerations at play in *BW Offshore* did not arise in *Aitchison.*

[37] *Aitchison* involved declaratory proceedings relating to a boundary dispute between two neighbours where the Council was the decision-making authority, although on appeal it had aligned itself with one of the parties. An award of costs had been made against the Council in that case. In an appeal to the High Court, Clark J observed that the position taken by the Council was not analogous to the role of a primary consent authority explaining its decision to the Environment Court.[12]

[38] In *BW Offshore*, the EPA was the only party other than the applicant to the proceedings before the Environment Court. The High Court observed that there is a public interest in a statutory decision-maker taking an active role in opposition

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[11] *Aitchison v Wellington City Council* [2018] NZHC 1674.
[12] At [25].

to an appeal where there is otherwise no opposing party.

[39] When considering the Council's position in this context, we find that neither of those situations apply here, as the Council was performing the role required of a council, as per s87F(6) and (7).

[40] In the ordinary course, a high threshold will apply where an order of costs is sought against a council in its capacity as a first instance decision-maker/consent authority; its actions must be found to be "in some way blameworthy".[13] We consider that the principle has equal application in answering the following questions arising here:

(a) is the s285(8) presumption refuted in the context of the Council's application against Woolworths?; and
(b) is Woolworths entitled to a cost award against the Council?

[41] Woolworths argues for an award against the Council due to the presence of *Bielby* factors in the Council's case against the proposal. In contrast, the Council advances its own application on the basis that it presented its case in a manner that was consistent with the role it was required to take in assisting the court, there being nothing blameworthy about its conduct.

[42] We doubt that it is relevant to consider either application, specifically in terms of whether any or all of the *Bielby* factors are present. However, if we are to answer 'yes' to either of the questions we pose in paragraph [40](a) and (b), we consider that the Council's actions must be blameworthy in some way, or to put it another way, was neglectful of its role in assisting the court as contemplated by ss 87F(6) and (7). In that event, we will consider whether *Bielby* factors were present alongside other relevant matters, including s285(5)(b).

[43] The role of the Council in s87F(6) and (7) has been succinctly stated in the

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[13] *Emma Jane Ltd v Christchurch City Council* C020/09, 1 April 2009.

Mainpower decision:[14]

> … on a direct referral the consent authority has a duty to assist the Court by providing evidence on the subject matter of the direct referral.

[44] In *Brookby Quarries Limited v Auckland Council*,[15] the Environment Court expanded on this by observing that:

> … the function of a Council, … must assist the Court by providing the relevant subject matter and assistance, including plans, and the availability of the witness who has prepared the s87F report ….

[45] The court stated that a council could go further and take a position in respect of the application, however it observed that it must be a position supported by the relevant experts.

[46] In this context, we find that the Council was for the most part addressing the court on matters raised in the s87F report, for the purpose of providing assistance. Although the court did not agree with all the opinions of the authors of the reports, that of itself does not mean that the Council stepped outside of its role to an extent that amounted to a neglect of its duty.

[47] We further note that the Council had engaged with Woolworths prior to the court hearing and reached agreement on a number of matters, and although agreement was not reached on all matters, that does not necessarily amount to a breach or neglect of the Council's duty.

[48] That said, we were *not* assisted by the position taken by the Council, nor with the evidence of the experts insofar as they sought to explain grounds of opposition to elements of the proposal and to justify the changes they were seeking. These changes were mostly hypothetical, were ill-thought-out in terms of

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[14] *Mainpower NZ Ltd v Hurunui District Council*, above n 3 at [46].
[15] *Brookby Quarries Limited v Auckland Council* [2012] NZEnvC 168 at [18].

the implications for other elements of the proposal, were not able to be justified, and in fact were contradicted by the relevant district plan policy provisions.

[49] We agree with Woolworths that this part of the Council's case was a departure from the role that the Council was required to take in this context. To this extent, the Council's conduct in bringing this evidence could be described as blameworthy.

[50] That said, the Council's application acknowledges that there were many hours spent by the Council's economic, urban design and planning experts in preparation for and attendances at the hearing. The actual costs of those witnesses were reduced to limit recovery to a reasonable contribution. Reductions made by the Council amount to the sum of $41,864.92.

[51] In all the circumstances, we find that this was an appropriate discount for the Council to have made and had that discount not been made by the Council, we would have applied one.

[52] Otherwise, we must account for the fact that had this been a first instance hearing before the Council, its actual costs would be recoverable under s36 RMA.

[53] Accordingly, we consider that the Council's application should otherwise succeed. Woolworths is therefore to pay the Council the sum of $155,174.68 toward its costs.

Evaluation of the Woolworths' application against the Council

[54] We now turn to the application by Woolworths for a contribution towards its costs in meeting the Council's case. The application seeks a contribution from the Council in the sum of $60,853.72, which in addition to the costs that it seeks from Spreydon is said to be a portion only of the significant costs incurred on the application since lodgement with the Council, and is said to be reasonable and just.

[55] The amount sought from the Council is approximately 18% of the legal and expert costs that Woolworths has claimed in relation to the proceedings from October 2020 to June 2021, and approximately 13% of the total costs incurred by Woolworths over that same period. Of the sum sought from the Council:

(a) $36,553.01 is for a contribution towards the legal costs; and
(b) $24,300.71 is for a contribution towards the costs of the experts (two architects, a planner, an economist and a transportation expert).

[56] The application sets out the basis for the apportionment of the legal costs as between Spreydon and the Council, which in simple terms, results from carving out a percentage of attendances solely attributable to Spreydon's involvement in the case.

[57] However, and for reasons that have already been expressed in relation to the Council's own application, we decline this application for costs against the Council.

Application against Spreydon

[58] Costs are sought from Spreydon without prejudice to Woolworths' rights to pursue costs from Spreydon under ss 308G and 308H RMA on the grounds, in summary, that:

(a) Spreydon is not entitled to the benefit of the starting presumption not to award costs against a s274 party, and that it should also contribute 50% of the Crown costs associated with the direct referral process that Woolworths is otherwise liable to pay;
(b) Spreydon had deliberately breached the RMA in pursuing arguments that were related to the effects of trade competition, thus "directly and repeatedly" contravening the provisions of the RMA that proscribe the involvement of a trade competitor; and
(c) Spreydon had repeatedly refused to refine its case, despite being on

> notice that Woolworths considered it to be a trade competitor, putting Woolworths to additional and unnecessary (and substantial) costs.

[59] Counsel refers to the explicit denial from Spreydon that it was a trade competitor of Woolworths when the issue was first raised by the Council, a position that Spreydon maintained throughout the hearing, and describes Spreydon as a sophisticated party that was well resourced and represented. Counsel submits Spreydon was well aware of the risks associated with its involvement as a s274 party opposing a grant of consent and is not entitled to rely on the presumption against liability for costs.

[60] Woolworths refers in particular to the economic evidence from Mr Thompson, who had provided the supposed economic basis for the opposition to the proposed location of the fine-grained retail. Counsel points to the court's findings that the evidence related to the effects of trade competition and not the broader retail distribution effects. Counsel also refers to the court's finding that the evidence of the economist was "unsatisfactory across the board".

[61] The application points to other similar findings in relation to the planning evidence of Mr Roberts, who relied on the economist's evidence – all of which put Woolworths to unnecessary costs in the preparation of extensive rebuttal evidence. This includes from Ms Hampson, who had to address unsubstantiated claims which the court ignored in its substantive consideration of the issues.

[62] Woolworths makes similar claims in relation to the urban design evidence of Mr Riley on the location of the fine-grained retail, which was also ignored by the court, noting that the architect and urban designer engaged by Woolworths had to respond to that evidence at considerable cost.

[63] In relation to the location of the supermarket, Woolworths notes that the court held that Spreydon's concerns could have been genuine and not related to trade competition, although the claimed effects were not proven on the evidence

put to the court (referring in particular to the evidence of Mr Riley and Mr Roberts).

[64] Counsel refers to comments made by the court that these witnesses had failed to discharge their overriding duty to the court to assist it impartially on relevant matters within the experts' area of expertise. These concerns had led the court to comment that the opposition raised to this aspect of the proposal could also be viewed as being motivated on trade competition grounds.

[65] Woolworths describes the opposition raised by Spreydon as "steadfast", noting that it proposed no amendments to overcome its concerns, unlike the Council who had proposed amendments that were not supported by Spreydon.

[66] Counsel refers to the significant attempts it had made to overcome concerns and narrow the issues prior to and during the hearing, whilst noting that throughout this dialogue, Spreydon's position had remained unchanged.

Spreydon's response

[67] Woolworths' application was resisted by Spreydon, who relies heavily on the presumption against an award of costs in s285(5)(b) being made to a s274 party.

[68] Mr Hughes-Johnson, QC for Spreydon, cited *Verseput v Tauranga City Council*[16] as authority for the proposition that exceptional circumstances must be made out for the presumption to be rebutted. Counsel submitted that this presumption reflects the immunity from costs before a council hearing and should not be easily displaced, and even if there are found to be circumstances justifying rebuttal of the presumption, the philosophical approach to costs reflected in this assumption should still inform the court's approach to the application.

[69] Counsel elaborated on this by explaining that Spreydon's liability should be

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[16] *Verseput v Tauranga City Council* [2014] NZEnvC 56.

limited to that part of the case found to be 'tainted' by trade competition imperatives, whereas the balance of the case that was properly presented by Spreydon should not give rise to any liability for costs. Counsel submits that this approach is consistent with s5(1) of the Interpretation Act 1999, in that the purpose of the enactment is to provide a measure of protection to s274 parties which should only be removed if there are exceptional circumstances justifying this.

[70] Counsel refers in some detail to the cases dealing with the principles which apply to costs in a direct referral case. In the context of s285(5)(b) in particular, counsel refers to the comments in *Skydive Queenstown* where the court had diverged from the consensus otherwise expressed in the decisions, emphasising the following observation:[17]

> In our view the facts that, on the one hand, the direct referral is the first (and only) hearing of the substantive merits, and on the other, that the hearing involves more detailed evidence and testing of it (by caucusing, rebuttal evidence and cross-examination) may work against each other on the issue of costs. The first point may be more important because of the statutory direction that we must, when considering costs, have regard to the fact that the hearing is the first hearing. That suggests we should be slow to order costs, especially on applications for land use because land occupiers or owners are entitled to test the application rules which restrict their property rights.

[71] Drawing from *Skydive Queenstown*, counsel submits that the following factors are relevant in considering the application against a s274 party:[18]

(i) s285(5) represents a two-tiered approach to the protection of s274 parties and parties in first instance proceedings;
(ii) the public interest and participatory nature of the process;
(iii) it is the applicant for a resource consent who makes the election to leapfrog

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[17] *Re Skydive Queenstown Limited,* above n 5 at [24].
[18] Submissions of Spreydon Lodge Limited in opposition to application for costs by Woolworths New Zealand Limited, dated 3 November 2021 at [2.13].

the usual hearing before the local authority;

(iv) had the hearing been before the local authority, no costs questions would have arisen in relation to the conduct of the hearing by the s274 party (subject to the costs of a commissioner if requested by the s274 party and not the applicant);

(v) the fact that the level of evidence may be significantly greater than could be expected at a local authority hearing does not arise because of any action of the s274 party. Undoubtedly there is likely to be a step-up in the level of evidence which is required before the Environment Court but it is submitted that this does not provide a principled basis for awarding costs against a party.

[72] In the absence of a clear legislative direction in s285(5), counsel submits that the imprimatur in s285(5)(b) should be interpreted as reducing the likelihood and/or the quantum of costs in first instance cases.

[73] Counsel addressed the implications of *BW Offshore* in the context of the Environment Court jurisdiction on costs, and while those submissions are comprehensive, they need not be set out in any detail other than to note that the court generally agrees that the High Court's supporting application of the *Bielby* factors that were referred to in Woolworths' submissions pre-dates the statutory regime which introduced the direct referral system, such that they must be read with caution given the direct referral context.

[74] However, there is an additional and more relevant factor at play on this occasion, namely, the involvement of a trade competitor whose case transgressed the statutory constraints on its lawful involvement. The application of s285(5)(b) does not inoculate Spreydon, as a trade competitor of Woolworths, from liability for a cost award in this direct referral context.

[75] It suffices to emphasise that the RMA contains a strong proscription against the involvement of a trade competitor where the case is motivated by anti-competitive imperatives.

[76] These provisions commence with the requirement for a declaration as to whether a submitter is, or is not, a trade competitor of the applicant, which is a requirement that cannot be lightly ignored, although it was not complied with in this context.

[77] Spreydon now acknowledges that the court found that Spreydon is a trade competitor despite maintaining a contrary position throughout the hearing. It also now accepts the court's finding that the economic and planning evidence opposed the fine-grained retail, as the evidence was found to relate to the effects of trade competition on Spreydon.

[78] We acknowledge that other aspects of the Woolworths' proposal that had been opposed by Spreydon were not so easy for the court to make a call on in the s308B context. However, the court cannot neatly unbundle that part of the case that is said to be untainted by trade competition as Spreydon's counsel submits that we ought to do. The majority, if not all of the issues raised by Spreydon, were inter-related (to varying degrees) as evidenced in the passage stating precisely that in Spreydon's opening submissions which we cite at the commencement of this decision.

[79] The opposition raised by Spreydon to the Woolworths' proposal was found to be wholly without merit, to an extent that we question whether Spreydon would have opposed any aspect of Woolworths' proposal at all had it not been in competition with Woolworths, such was the weakness of every element of its opposition on the merits.

[80] We are not prepared to accept that a hearing would have been needed even without the involvement of Spreydon. We note that the Council had opposed similar elements of the proposal as Spreydon, albeit the opposition was raised for different reasons.

[81] We note that the Council had been willing to engage with Woolworths on changes that could be made to the proposal, whereas the changes sought by the

Council had not been acceptable to Spreydon.

[82] We think it likely that the involvement of two parties raising opposition to similar elements, albeit with differing solutions, compounded the problem for Woolworths in coming to an acceptable solution. However, we cannot rule out that agreement may have been reached with the Council had Spreydon not been involved as a party.

[83] We are not prepared to determine costs on a contrary basis.

[84] With those comments in mind, we find that there are factors present that justify rebutting the starting presumption in s285(5) in relation to the involvement of a s274 party.

No need for exceptional circumstances

[85] We doubt that we need to consider whether there are exceptional circumstances to justify an award against a s274 party who is a trade competitor, and whose case was found to transgress s308B, as contended by counsel.

[86] We note that the *Verseput* case did not go to a contested hearing as all matters in issue with submitters were resolved, except in relation to the question of costs against s274 parties.[19]

[87] The court there had been critical of the applicant for the direct referral in circumstances where there had been no indication to the court in advance at a pre-hearing conference that exceptional grounds existed for rebutting the statutory presumption on costs, particularly, as the applicant had refused to attend mediation that had been sought by those initially in opposition to the proposal.

[88] More relevantly however, the case did not involve the participation of a

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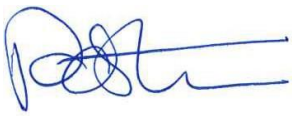
[19] *Verseput v Tauranga City Council*, above n 16.

trade competitor as a s274 party. Accordingly, while we accept that the *Verseput* facts did not amount to exceptional circumstances, the facts before the court in the present context are very different.

[89] We consider that the involvement of a trade competitor whose case (or even part thereof) has been found to transgress s308B, is sufficient to rebut the presumption against an award of costs to a s274 party, whether or not a test of exceptional circumstances applies, as suggested in *Verseput*.

[90] Accordingly, we make an order for payment of costs by Spreydon to Woolworths of $285,581.23. While seemingly large, we are satisfied that all the costs incurred by Woolworths are entirely explained to the court's satisfaction by the lengths Woolworths was forced to go in meeting the case by Spreydon.

[91] For all the same reasons, we find that it is reasonable to order Spreydon to pay 50% of the Crown's costs otherwise payable by Woolworths of $39,297 (exclusive of GST).



P A Steven
Environment Judge

L J Newhook
Alternate Environment Judge