

The circumstances in which a court will consider the conduct of a party when assessing that party's reasonable costs were considered by the High Court in *Aaron v Shelton* [2004] EWHC 1162 (QB) (*NLJ*, 4 June 2004, p 853). This judgment raises the contentious issue of whether a party's conduct should be considered at the time a costs order is made or subsequently at the assessment of those costs.

The facts in *Aaron*

The claimant, a solicitor acting for himself, brought a claim arising from a dispute over the assignment of a lease. On the fourth day of a five-day trial, evidence came to light that resulted in the parties agreeing by consent that the action should be dismissed, with the claimant to pay the defendant's costs on an indemnity basis. The defendant's bill of costs was challenged by the claimant, on the basis that the defendant's conduct in the proceedings had led to an unreasonable increase in the level of costs. The court at first instance ruled in favour of the defendant, and the claimant appealed. Jack J, sitting with assessors, dismissed the appeal on the grounds that it was the duty of a party who wished to raise an issue of conduct to do so before the judge making the costs order, where appropriate, and if they did not comply with this duty, it would be an abuse of process to raise it at a subsequent assessment of costs.

Conflicting authority—*Shirley v Caswell*

In contrast to this decision is the Court of Appeal's ruling in *Shirley v Caswell* [2001] 1 Costs LR 1. In *Shirley*, the successful party had abandoned certain issues shortly before trial, and the court made a costs order limiting the costs recoverable to 60%. Chadwick LJ ruling on the appeal against the order said that: "The costs of issues abandoned, or not pursued at trial, ought, prima facie, to be disallowed against the party incurring them on an assessment of the costs of that party by the costs judge because, again prima facie, they are costs which have been unnecessarily incurred in the litigation. To take them into account in making a special costs order carries the risk that the claimants will be doubly penalised" (at para 60).

This decision was followed in another decision in the QBD, *Nugent and Killick v Michael Goss Aviation* [2002] EWHC 1281 (QB), which concerned a case where two out of the three issues pursued were struck out. Burton J, referring to *Shirley*, said that in making a costs order in the successful party's

Bad conduct can escalate "reasonable" costs

Paul Jones examines the circumstances that can cause a court to consider conduct when assessing costs

- the conflicting authorities of *Aaron v Shelton* and *Shirley v Caswell*
- reasonableness and conduct—two sides of the same coin

favour, there was no implicit ruling on the amount of those costs and, in particular, the costs of the struck out issues. This was a matter to be considered by the costs judge at assessment, where any costs of the unsuccessful issues were liable to be disallowed as being unreasonable.

The court in *Aaron* does not appear to have been referred to these earlier decisions.

Can the decisions be reconciled?

So, how can these two apparently conflicting lines of reasoning be reconciled? There seem to be three possible lines of argument:

- The judgment in *Aaron* specifically ruled that the prohibition against raising conduct at assessment only applied where it was 'appropriate' to raise the issue at the time of the costs order. One could argue that in *Shirley* and *Nugent* it was not appropriate to raise the issues at the time of the order. However, both *Shirley* and *Nugent* would appear to be exactly the kind of case that Jack J had in mind in *Aaron*, where the issues as to conduct were closely tied to the substantive issues in the case, and could well have been considered by the judge at the time the order was made.
- The issues raised in *Aaron* related to conduct, whereas in *Shirley* and *Nugent*, the issues related to failed or unreasonably pursued issues. Again, the distinction does not bear close scrutiny. Both of these matters fall under the banner of conduct as described by CPR 44.3(5), and it would surely be peculiar if general conduct issues could only be raised at the time of the order whereas issues relating to failed issues could be raised at assessment.
- The costs order in *Aaron* provided for indemnity costs to be payable. Could

this distinguish the case from *Shirley* and *Nugent*, both of which provided for costs on the standard basis? The distinction appears unlikely. In both *Shirley* and *Nugent*, the court stressed that the reason for such matters to be considered at assessment was that they were intrinsically tied to the reasonableness or necessity of the costs claimed. The requirement for costs to be reasonable is common to both the standard and indemnity bases, and therefore a distinction based upon the basis of assessment does not seem to explain the conflict.

The two lines of reasoning therefore seem to be in clear conflict with one another. Either it is right, or indeed mandatory, to raise any conduct issues at the time of the costs order, or the matter can be left for consideration at an assessment of costs. But which approach is to be preferred?

Reasonableness and conduct

The answer may be provided by considering CPR 44.5:

- *CPR 44.5(1)*: The court is to have regard to all the circumstances in deciding whether costs were... proportionately and reasonably incurred.
- *CPR 44.5(3)*: The court must also have regard to... the conduct of all the parties.

These two provisions, taken together, set out the fundamental basis upon which an assessment of costs takes place. The issue to be considered is whether the costs are reasonable (and on the standard basis proportionate). The conduct of the parties is a key factor to be taken into account when making this judgment on the costs. It is impossible to consider whether costs are reasonable without considering the surrounding circumstances.

The conduct of the parties is a major factor in setting the scene within which the costs were incurred, and therefore must be a relevant factor in determining their reasonableness. This is in keeping with the whole tenor of the CPR, wherein the courts have a duty to manage and monitor the way in which cases are progressed and an award or disallowance of costs is a major aspect of this overriding objective.

Can the court time be justified?

If the analysis above is correct, then the appropriate forum for issues of conduct relating to costs is at the assessment of those costs. One problem with this is that the costs judge may have to consider, at least in part, some of the issues that may have already been considered by the court that made the costs order. This factor appears to have been a major influence in the decision in *Aaron*. Certainly at first instance, the judge had said that to allow the conduct issues to be raised at the assessment of costs would be disproportionate. In reality, this is the kind of exercise that costs judges already undertake when considering issues such as proportionality.

In other situations, the assessment of costs may well be the first time the issues in the case have gone before a court. Jack J in *Aaron* went as far as to say that that even where a case does not go before a judge, such as when the parties agree a consent order, the onus would still be on a party who wishes to raise conduct to embody in the consent order that certain costs should be disallowed, or at least expressly reserving the issue to the assessment hearing. Unfortunately, in reality, a successful party would be most unlikely to agree to a consent order depriving them of a portion of their costs. The matter would inevitably have to go before a judge to decide the issue. It would seem more proportionate for this task to be performed by a costs judge rather than require a separate hearing before the trial judge, which might jeopardise the settlement of the substantive claim. It is surely preferable for this issue to be addressed as part of the assessment of costs, where the costs judge will be able to consider the issue in light of the costs being claimed.

Questions of conduct

The issue of conduct is one that is becoming increasingly important in relation to costs. The manner in which a successful party has conducted the litigation is now as important as the simple fact that they have ultimately been successful in a claim. The question of

how this conduct should be accounted for in the costs awarded to that party is often a complicated one but, ultimately, the fundamental question to be asked is whether the costs claimed are reasonable and the party's conduct is just one of many factors to be considered when a court exercises its discretion in determining this issue.

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