

Interim payments

Approach under CPR r. 44.2(8)

How do you manage—and overcome—difficulties with interim payments on account of costs, including timing (before or after PODs), strategy, and knowing when enough is enough?

12 March 2025

NICOLA GREANEY KC

Types of interim payment

- Different types of interim payment
 - Payment on account of costs made in the litigation under CPR 44.2(8)
 - Interim payments during DA proceedings
- Need to set the scene in respect of r. 44.2(8) jurisdiction before considering the issues that may arise in relation to interim payments in detailed assessment proceedings

Interim payment on account: CPR 44.2(8)

- Presumption of POA: the court **will** order POA of costs pending detailed assessment (DA) **unless there is good reason not to do so**
- **“a reasonable sum”**
- Object: to enable a receiving party to recover part of expenditure before DA
- Effects:
 - Might discourage paying party from prolonging DA/reduce POD
 - Might avoid the need for an application for interim costs certificate
 - At least in budgeted cases, shifts focus away from deferment of imposition of Judgment Act interest

Determination of “reasonable sum”

- Usually 90% of budgeted costs
 - ***Thomas Pink Ltd v Victoria’s Secret UK Ltd*** [2015] 3 Costs LR 463
 - ***MacInnes v Gross*** [2017] 2 Costs LR 243: Coulson J (as he then was) 10% “*maximum deduction*”: the court should have regard to the fact that on DA the costs judge will not depart from the approved or agreed budget unless satisfied there is good reason to do so (CPR 3.18)
- Non-budgeted costs
 - Excalibur Ventures LLC v Texas Keystone Inc*** [2015] EWHC 566 (Comm)
“*The Court is not to look for an irreducible minimum but an estimate of the likely recovery subject to an appropriate margin for error and the potential effect of other factors impinging on recoverability/risk of recovery.*”
 - Often 50% - 65% of incurred costs

POA: How much will be allowed?

- Budgeted costs

Where less than 90% ordered

– ***Vainker v Marbank Construction Ltd*** [2024] EWHC 1686

80% of budgeted costs ordered (but took account of incurred and estimated costs in budget). Reduction of 10%; some of the costs related to a claim against another defendant only and ought not to be recoverable from the other defendants.

- ***Michael John Isaac v Tan Sri Dato'Vincent Tan and Anr*** [2022] EWHC 3478 (Ch) – costs budget not an accurate guide to recoverable costs (costs subject to order were issues resolved at trial; case had moved on since costs budgeting). 50% of incurred, 60% of budget.

POA: How much will be allowed?

Budgeted costs: where 90% awarded

- ***Surrey Searches Ltd v Northumbrian Water Ltd*** [2024] EWHC 2283 (Ch)

90% of budgeted costs (100% requested by D but good reason not to award whole amount) and 65% of incurred costs awarded. Note Judge refused applic for 3- month delay before JA interest ran; 21 days post order to coincide with payment of POA

- ***Irwell Riverside Developments Ltd v Arcadis Consulting (UK) Ltd*** [2024] EWHC 2110 TCC

C partially successful only so had a percentage costs order of 60%.

90% of 60% of the budgeted costs allowed and 75% of 60% of the incurred costs.

POA: How much will be allowed?

- ***Pan-NOx Emissions Litigation*** (December 2024). Payments on account at the end of the preliminary issues trial involving Lead GLOs. Pan Nox costs were budgeted for trial. Constable J allowed 90% of costs claimed (based on recovery of 50% of incurred costs and 95% of future costs). Some merit in points made on incurred costs and recovery of VAT.

POA: how much will be allowed?

- Non-budgeted costs.
- ***Matrix Receivables Ltd v Musst Holdings Ltd*** [2024] EWHC 2245 Freedman J
 - D ordered to pay C's costs of summary judgment application. £274,138.61 claimed. Initial costs schedule claimed £146,213.97
 - 60% of the costs claimed in the first schedule awarded and 50% of the additional costs.
- ***Tyson International Company Ltd v GIC Re, India, Corporate Member Ltd*** [2025] EWHC 367 (Nigel Cooper KC sitting as HCJ)
- HRs were significantly in excess of London 1 GHR
- 61% incurred costs sought and 52% of incurred awarded
- Interest to run from date 3 months after date of costs order

POA: how much will be allowed?

- These cases turn very much on their own facts
- ***Dana Gas PJSC v Dana Gas Sukuk Ltd*** [2018] EWHC 322 (Leggatt LJ)
- Payment was linked to reasonable and proportionate costs and allowed 23% of costs claimed as payment on account.
- Receiving party had sought 60%
- In absence of budget or statement of costs, sum awarded likely to be conservative

POA when indemnity costs order

- Budgeted costs
 - **Lejonvarn v Burgess** [2020] 4 WLR 43: assessment of costs on indemnity basis is not constrained by approved costs budget
 - But still orders of 90% of budgeted costs are made: **Patel v Barlows (No 2)** [2020] EWHC 2795, **Bell v Commissioner of Police of Metropolis (No 2)** [2024] EWHC 650
- Budgeted and non-budgeted
- **Magomedov v TPG Holdings LP [2025] EWHC 304** (Comm), Bright J
- Costs order arising successful applics by multiple Ds for summary judgment/challenges to jurisdiction
- Begin with incurred costs (incl consideration estimate provided at security hearing and role D played at hearing) and apply 70% if costs awarded on indemnity basis and 60% if on standard basis

When “good reason” not to order POA?

- Fact specific
- The potential for a set-off may militate against a POA: ***Rawlinson v Hunter Trustees SA v ITG Ltd*** [2015] EWHC 1924. Interim order in D’s favour, no POA.
- But may be different if cross-orders: ***Benyatov v Credit Suisse Securities (Europe) Ltd*** [2020] EWHC 682, unless too difficult to calculate because issue-based orders: ***Bilta (UK) Ltd (In Liquidation) v SVS Securities PLC*** [2022] EWHC 1431 (CH)

Stage when order for POA can be made

- Previous thinking was 2 stages: at same time as costs order by the Judge and then after request for a DA hearing. Nothing in between.
- Also thought if no order for POA made at time of costs order, had to wait until after request for filing a DA made
- WRONG! No temporal restriction.
- An order for POA can be made after r. 44.2(8) order has been made and sealed (***Culliford v Thorpe*** [2018] EWHC 2532) and is not a power that only the trial judge can exercise (***Global Assets Advisory Ltd v Grandlane Develops Ltd*** [2020] 1 WLR 128 (deemed order CPR 44.9))
- ***Blackmore v Cummings (Practice Note)*** [2009] EWCA Civ 1276
- ***Trotman v Master Brickwork London Essex Limited*** [2023] EWHC 2791, Master McCloud (more than one application can be made)

When to consider an interim payment in DA proceedings?

- Points to consider:
 - Whether POA made pursuant to r. 44.2(8) – usually yes
 - Deemed order
 - Level of POA made pursuant to r. 44.2(8), reasons given by Judge for %
 - What has changed between POA and commencement of DA proceedings? Is bill higher than anticipated?
 - What interest is accruing on balance of costs?

When to consider an interim payment in DA proceedings

- Has there been an order for costs ADR such that there has been a further period of delay?
- If budgeted case, good reason to depart from budget – upwards or downwards?
- From perspective of PP, does information provided in bill indicate that RP likely to receive in excess of sum already paid on account?
 - Is realistic that costs judge will be more generous than % allowed by trial judge?
 - Does further information in bill allow PP to form a more accurate view of those costs that fall within costs order?
 - Has judge hearing 44.2 application adopted cautious approach due to lack of information or for specific reasons e.g. HRs claimed above GHRs when PP likely to justify as reasonable on DA?

When to consider an interim payment in DA proceedings

- Is it a case where point of principle has substantial impact e.g. on retainer, such that costs judge's decision on DA is determinative factor on quantum. May not be situation for further interim payment but offer to compromise DA proceedings.
- How willing would costs judge be to order an interim costs certificate?
 - ***Bashford v East Sussex CC*** [2014] 3 WLUK 352, Master Simons. Most relevant factor was how much party likely to recover on DA. Err on side of caution, strong possibility bill would be reduced to less than interim payment made; application for £20K refused. Offer made by PP was irrelevant.
 - ***Briggs & Ors v First Choice Holidays***, 23/9/2016, Master James. Group litigation in respect of holiday illness claims. Applic for interim costs certificate stayed pending determination of preliminary issues. Then refused. £1.8M already paid on account was reasonable sum in light of decisions on preliminary issues.

Timing of interim payment in DA proceedings

- PP needs to know scope of challenges in POD and impact on bill. Otherwise risk undermining POD.
- Safer to do the calculations and coincide interim payment with POD.
- Balance against interest that is accruing.

Level of interim payment

- Identify key areas of dispute on DA and financial impact
- Carry out best realistic case and worst realistic case analysis
- Ensure interim payment is no less than your best realistic case on DA

Interim costs certificate

- Don't forget – RP can apply for an interim costs certificate under CPR 47.16.
- **After** the RP has filed a request for a DA hearing
- Interim costs certificate “*may*” be issued for such sum as the court considers “*appropriate.*”
- Wide discretion

THE END

QUESTIONS?

39essex.com

BARRISTERS • ARBITRATORS • MEDIATORS

LONDON • MANCHESTER • SINGAPORE • KUALA LUMPUR

