

Petrofac and payments on account

How has Petrofac [2025] EWCA changed existing thinking on (1) interim payment on account and (2) security for costs - and how do you advise your clients?

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Petrofac – setting the scene

- Appeal against an order that sanctioned restructuring plans under Part 26A of the Companies Act 2006. The dispute related to the plan companies of the Petrofac group and two dissenting creditors, Saipem and Samsung.
- Rs to pay As' costs of the applications on the standard basis.
- As' costs totalled about £6.2m (increased on breakdown to £6.4m)
- As sought interim payment of £3.75m – 60%. Rs offered £500k.

Petrofac – how much?

“extraordinarily high level of costs that has been seen in recent Part 26A cases is a matter of very considerable concern”

Interim payments – “let’s start at the very beginning”

- CPR 44.2(8) Where the court orders a party to pay costs subject to detailed assessment, it **will** order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

Security for costs – CPR 25.26

- (2) An application for security for costs must be supported by written evidence.
- (3) Where the court makes an order for security for costs, it must determine the amount of security, and direct the manner and time within which the security must be given.

Interim payments – procedure?

- Court of Appeal noted that "the CPR does not prescribe any particular information or form for determination of an interim payment on account of costs"
- Court therefore directed that the Appellants should "serve and file a schedule of costs, providing sufficient detail for the Court to determine the amount of a payment on account".

Bills, bills, bills

- As' Solicitor provided a breakdown which contained two tables summarising invoices received with copies of those invoices.
- The table broke down the sums charged into profit costs and disbursements, but no further detail was available.
- The invoices included some minor detail, including some details of tasks undertaken and hourly rates, with the highest rate shown as £1,096 per hour.

So what is a reasonable sum?

- Top of the costs cases
- Excalibur Ventures LLC v Texas Keystone Inc. [2015] EWHC 566 (Comm),
- Kazakhstan Kagazyp plc v Baglan Abdullayevich Zhunus [2015] EWHC 404 (Comm)
- Athena Capital Fund SICAV-FIS SCA v Secretariat of State for the Holy See [2022] EWCA Civ 1061

Excalibur – what it's not

- It may be that in any given case the only amount that it is reasonable to award is the irreducible minimum. I do not, however, accept that that means that "irreducible minimum" is the test.

Excalibur – an estimate

"What is a reasonable amount will depend on their circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation."

Excalibur – all relevant factors

- “In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.”

Kazakhstan Kagazyp – every paying party's favourite quote

- “The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances.”
- what a party might subjectively consider reasonable to pay to advance its own interests in litigation is not the relevant test - Petrofac

Athena

- "Counsel's fees are not subject to guideline rates in the same way that solicitors' fees are, but it is nevertheless important to stress that, whatever clients may be prepared to pay their own counsel, only a reasonable and proportionate fee may be recovered from the other side." - Males LJ

Athena – if you don't challenge ours ...

- "It is a striking feature of the present situation, that although almost every possible point has been taken on both sides in the course of this appeal, there has been no challenge either to the appellants' solicitors' hourly rates or to the brief fees and other fees charged by their counsel. However, the costs payable by the losing party on the standard basis are limited to those which are reasonable and proportionate. Where the costs of the paying party are also disproportionately high, that can make no difference. In any event the court will scrutinise cost schedules in order to keep levels of recovery within reasonable bounds."

Guide to Summary Assessment of Costs

- "The costs which the paying party has incurred for its own representation may be relevant when considering the reasonableness and proportionality of the receiving party's costs. However, they are only a factor and are not decisive. Both parties may have incurred costs which are unreasonable and disproportionate, but only reasonable (and, on the standard basis, proportionate) costs may be allowed."

Working hard for the money? GHRs

- GHRs are relevant – London Band 1 – “very heavy commercial and corporate work”
- : a clear and compelling justification must be provided to justify a significantly higher rate – *Males LJ - Samsung Electronics Co Limited v LG Display Co Ltd [2022] EWCA Civ 466* at §§4-6
- Our hourly rates are above the guideline rates, but that is almost always the case in competition litigation – not good enough!

Tell me more tell me more

- This is key
- The information provided by the Appellant's was "inadequate to enable [the court] to include, with any degree of confidence that they [were] likely to recover anything approaching £6.4m on a detailed assessment".
- The descriptions/narrative of work done by the solicitor didn't identify the work done, the hours worked, seniority of fee earners or their individual charging rates.

Tell me more tell me more

- Inadequate justifications for significant uplift in GHRs
- No counsel fee notes and no detail of time spent and rates applied.
- Insufficient detail as to work done and need for financial advisers' involvement
- Total lack of information as to how expert charges had been calculated

Back to the broad brush?!

- “... notwithstanding the manifest deficiencies in the information provided, we think that it is likely that Saipem and Samsung will recover materially more than the £500,000 offered by the Plan Companies.
- 44. In our judgment we consider that the appropriate sum to order as a payment on account, which reflects the substantial level of uncertainty we have identified, is £2 million.”

Petrofac and security for costs

- Same reasoning must apply – unless you can justify the costs which you say you have and will incur with proper evidence the court is likely to take a stricter approach to the level of security it will order
- Mere assertions as to the level of costs are not enough – there must be evidence

Petrofac – a summary

- Petrofac [2025] EWCA has transformed interim-payment and security-for-costs practice from a broad-brush, percentage-based exercise into a stricter, evidence-driven discipline requiring detailed justification of hourly rates, case strategy, and proportionality.

Key take away points

- Increased level of scrutiny re interim payments and security for costs
- Need for sufficient detail – evidence based justification
- Clear and compelling justification for exceeding GHRs
- If you cannot justify your own costs with proper evidence, the court will take a much firmer line on the level of interim payment/security you can demand or resist.

Thank you!

Any questions?

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