



Neutral Citation Number: [2024] EWHC 394 (Comm)

Case No: CL-2023-000284
CL-2023-000349

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
Fetter Lane
London
EC4A 1NL

Monday 19 February 2024

Before:

MRS JUSTICE COCKERILL DBE

Between:

OAXACA LIMITED T/A WAHACA

Claimant

- and -

QIC EUROPE LIMITED

Defendant

Jeffrey Gruder KC and Mubarak Waseem (instructed by Edwin Coe LLP) for the
Claimants

Peter MacDonald Eggers KC and Julia Gibbon (instructed by DWF Law LLP) for the
Defendant

Hearing date: 16 February 2024

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 23 February 2024 at 10:30am

Mrs Justice Cockerill:

INTRODUCTION

1. This is an application for summary judgment in a pair of Covid-19 business interruption insurance claims involving two well-known restaurant chains against a single insurer. The application includes the combined claims of Oaxaca Ltd t/a Wahaca (“the Wahaca claim”) and Flat Iron Steak Limited (“the Flat Iron Claim”) against the insurer QIC Europe Limited. There is also an application by the Claimants for an interim payment.
2. The Wahaca claim (claim no CL-2023-000284) is brought by Oaxaca Ltd T/A Wahaca, the owners of a licensed Mexican restaurant chain operating out of 29 separate premises across England and Wales. Wahaca entered into a contract of insurance described as a “Barbican Protect Commercial Combined Policy (no P03380-1901)” with the Defendant insurer on the Jelf/BLF/v4-2019 Commercial Form of wording for the period 22 October 2019 to 21 October 2020. That policy included business interruption insurance.
3. The Flat Iron Claim (claim no CL-2023-000349) is brought by Flat Iron Steak Limited, the licensed operators of a chain of steakhouses operating out of 9 premises in London. Flat Iron Steak Limited also entered into a contract of business interruption insurance also described as a “Barbican Protect Commercial Combined Policy (no BP03348-1901)” with the Defendant on identical Jelf/BPL/v4-2019 Commercial Form of wording for the period 16 October 2019 to 15 October 2020.
4. The Claimants seek an indemnity for interruption to business on their premises as a result of the Covid 19 pandemic. The focus is on non-damage business interruption and denial of access clauses within their policies. The effect of various clauses of this type has been considered by a series of litigation dating from the decisions of the Divisional Court and Supreme Court in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) and [2021] UKSC 1. More recently there have been the decisions in *Corbin & King Ltd & Ors v AXA Insurance UK Plc* [2022] EWHC 409 (Comm), *London International Exhibition Centre PLC v Royal & Sun Alliance Insurance PLC and others* [2023] EWHC 1481, *Gatwick Investment Ltd & Ors v Liberty Mutual Insurance Europe SE* [2024] EWHC 124 (Comm) and others to which reference was made in parties’ submissions. It is an area where the devil is in the detail.

BACKGROUND

5. The factual background to these proceedings are regulations and restrictions taken by the UK government in response to outbreak of the global Covid 19 pandemic in this country in 2020. The measures taken in response to the pandemic, including general lockdown and extensive restrictions on public affairs, had significant disruptive impact on the food and hospitality sectors that have been fully canvassed in several judgments, most recently that of Jacobs J in *Liberty Mutual* [16-48]. In both Particulars of Claim, the ClaimantS plead as interruptions or interferences the following public announcements, restrictions and regulations:

- 1) The Prime Minister’s 16 March 2020 statement instructing the public to avoid pubs, clubs, theatres, and other such social venues;
- 2) The Prime Minister’s 20 March 2020 statement instructing cafes, pubs, bars, and restaurants to close as soon as they reasonably could and not open the following day;
- 3) The 21 March 2020 Regulations requiring the closure of all the Claimants’ premises from 21 March 2020;
- 4) The 26 March 2020 Regulations requiring that the Claimants’ premises remained closed ;
- 5) The July 4 2020 Regulations permitting some of the Claimants’ premises to reopen from the 4 July only with the interference of strict social distancing rules, though others remained closed;
- 6) From 18 September 2020 to 5 November 2020 the interferences caused to each of the Claimants’ premises by the “Rule of Six”; and
- 7) From 24 September 2020 to 5 November 2020 the interferences caused to each of the Claimants’ premises by the 10 pm curfew.

The Policy

6. As noted above, both Wahaca and Flat Iron received BI insurance in a contract on Jelf/BPL/v4-2019 terms.
7. The relevant terms of the NDDA Clause is as follows:

“This Section extends to include any claim resulting from interruption of or interference with The Business carried on by the Insured at The Premises in consequence of

[...]

(b) action by the Police Authority and/or the Government or any local Government body or any other competent authority following danger or disturbance in the immediate vicinity of The Premises which shall prevent or hinder use of The Premises or access thereto

[...]

Provided that

1 after the application of all other terms, conditions, and provisions of this Section the liability of the Insurer shall not exceed [...] (ii) GBP 1,000,000 in respect of (b) above any one loss”. (the ‘Extension’).”

Issues

8. The Claimants seek summary judgment on the Scope of Cover issues in the List of Issues and a declaration of coverage under each Policy. This in turn raises two points: the meaning of the Policy and its application to the pleaded facts.
9. The defined issues on Scope of Cover in the Wahaca Claim are as follows (with the issues in the Flat Iron Claim being materially identical):
 - 1) Was there interruption of and/or interference with the Business carried on by the Claimant at each of the Claimant's premises in consequence of action by the Government and/or any other competent authority following danger or disturbance in the immediate vicinity of each of the Claimant's premises which prevented or hindered use of each of the said premises or access thereto, as a result of the matters pleaded at paragraphs 42(1)-(8) of the Amended Particulars of Claim?
 - 2) If so, did the interruption and/or interference with each of the Claimant's businesses arise in consequence of actions taken by "the Government" or "Other Competent Authority" which prevented or hindered use of each of the said premises or access thereto for the reasons pleaded at paragraph 43 of the Amended Particulars of Claim?
 - 3) Further or alternatively, did the interruption and/or interference with each of the Claimant's businesses arise in consequence of actions taken by "the Police Authority" or "Competent Authority" which prevented or hindered use of each of the Claimant's Premises or access thereto since restrictions set out in the various Regulations were enforceable and enforced by the police and the local authority which was also "the Police Authority" or "Competent Authority" as set out in the Denial of Access cover?
 - 4) Was the use and access of each of the Claimant's Premises prevented or hindered due to a danger in the immediate vicinity of each of the Claimant's premises for the reasons set out at paragraphs 45(1)-(4) of the Amended Particulars of Claim?
 - 5) Alternatively, as the Defendant contends, on the true construction of the Denial of Access cover under the Policy, is a business interruption loss indemnifiable only if there has been a local or localised danger or disturbance in the immediate vicinity of the premises? If so, is the Defendant right to contend that since action by the UK government or any other relevant authority was taken in response to the Covid-19 pandemic, which was a global and nationwide pandemic, and not a local or localised danger or disturbance in the immediate vicinity of the Premises, any business interruption loss resulting therefrom is not indemnifiable under the Denial of Access cover under the Policy?
10. Issues (2) and (3) were not live. Issues (1) and (5) principally concern the construction of the policy. Issues (1) and (4) involve a factual determination as to whether the Defendant suffered loss, and whether there was a "danger in the immediate vicinity of the premises" preventing access thereto.
11. On Issue (5) the Claimants' approach has been recently reaffirmed by this court in *Liberty Mutual* [131-135], and that the approach to causation in NDDA/DOA clauses

taken in *Corbin & King* was also settled by Jacobs J in *LIEC v RSA* [177-8]. The Court of Appeal is due to be hearing these debates shortly in the appeal of *LIEC v RSA*. The debate before me was considerably curtailed by the acceptance by the Defendants that Issue (5) was therefore realistically closed to them pending any review of the authorities by the Court of Appeal. The only real issues were whether I should grant summary judgment on that construction issue to enable it to be appealed with the *LIEC* case and secondly whether I could grant a wider summary judgment, on the “Coverage Issue” as a whole. On this second issue the question was whether the Claimants could, at this stage and on the material before me, satisfy me that the argument that they had not suffered any loss was “fanciful”.

THE SUMMARY JUDGMENT APPLICATION

12. The principles of summary judgment were not controversial. We are dealing with the well-known line between “real” and “fanciful”. This was not a case which involved any need to focus closely on that distinction or any particular elaboration of it.
13. The Claimants submit that there is no real prospect of success on the “Construction Issue” and no compelling reason for it to go to trial. As to this I accept that there is no real prospect of success at this level, but that the point is (as previous grants of permission reveal) eminently arguable at a higher level. The question is really how that issue is best dealt with given the fact of those other granted permissions, and the trial date (with a window ample to decide all issues).
14. On the question of a wider summary judgment, and the conclusion that it is fanciful to suppose that no loss will be proved at trial, the Claimants maintain there is little need for detailed evidence saying that:
 - 1) The measures pleaded in the Amended Particulars of Claim arising out of the governmental response to the Covid 19 pandemic are common ground;
 - 2) The Claimants submit that those measures alone resulted in the closure of business premises, with the consequent business interruption of around £6 million in combination, while quantum is to be determined at a later stage the loss is self evident and is supported by means of witness evidence and the financial accounts of both Wahaca and Flat Iron.
15. The Claimants contended that for these purposes there was no need to prove or evidence the full extent of this loss. All they needed to do was to show that they had suffered some loss. They submitted evidence on the remaining coverage grounds – danger in the vicinity and loss – in two witness statements and exhibits including a FCA Calculator Table and a Covid Tracking Spreadsheet recording illness at certain Wahaca premises. The Claimants also submitted witness evidence which in broad terms attested to the suffering of loss – a £4 million “cash burn” on the part of Wahaca.
16. The Claimants submit that in relation to “many of the premises”, they “*would be likely to be able to prove at least one case of Covid-19 in the immediate vicinity of many of the premises at relevant times*”. This was because the premises “*were in city centres and many in Central London*”, and Wahaca (at least) tracked cases of Covid-19 amongst staff in many of its branches in March 2020, which substantiates actual cases

of Covid-19. The Claimants also rely on the FCA Calculator to show that there were likely to be cases of Covid-19 at relevant times in the immediate vicinity of the premises – however one defines that phrase. Since, on the Claimants’ construction, the limitation of “£1,000,000 any one loss” is a “per premises” limitation, and the losses from the closure of the premises before giving credit for furlough payments are, taken together, said to be very likely to substantially exceed £1 million, the final amount of recovery would be very substantially greater than this sum even giving credit for furlough payments.

17. Notwithstanding this concession on construction, the Defendant opposes the relief. It submits that a declaration of coverage and interim payment can only be ordered on the basis of trigger and loss. This flows from the principle of indemnity – that coverage exists only where a claimant can show an occurrence resulting in a subsisting loss (e.g., had not been extinguished by later recoveries) which attracts indemnity. The heart of the Defendant’s case is that these are factual issues which cannot be dealt with at a summary stage without appropriate interrogation of the evidence.

Discussion

18. Having carefully considered the parties' skilled submissions I have concluded that I will not order summary judgment on the Coverage Issue as sought by the Claimants, but will grant summary judgment and permission to appeal on the Construction Issue. There are a number of factors which feed into this decision.
19. The distance between the alleged and the provable loss is punctuated by a number of issues. One was the issue as to the meaning of “immediate vicinity”. That was accepted by the Claimants to be a matter for trial. It may have a significant impact on quantum, because the more narrowly it is drawn the greater the chance that one or more venues will not be able to prove the requisite danger. I pause here only to note that in the public second Award of Sir Richard Aikens in the *Salon Gold Policy v Canopus Managing Agents Ltd* arbitration he dealt with a similar clause calibrated by reference to vicinity, rather than “immediate vicinity”. His award grappled with the areas which would in each of 13 test cases comprise the relevant vicinity, reaching a conclusion that they differed significantly in area based on a number of inputs. The size of some of the areas he delineated are significant; but that was vicinity, not immediate vicinity.
20. Another issue which he did decide was that the emergency (the equivalent there to danger) did not itself have to be in the vicinity of the premises. That decision is of course not binding on me and I am not strongly invited to decide it now.
21. A still further issue is one Sir Richard Aikens left open: whether the emergency/danger could compass not just Covid 19 itself but also the threat of it. Mr Gruder KC for the Claimants submitted that they are entitled to summary judgment on the basis that a “danger” includes the risk or threat of future cases of Covid 19. They submit that this analysis was conceded by the insurers in the FCA case before the Divisional Court at paragraphs [424], [430], [437], [442], as well as the Declarations of the Divisional Court at 21.4. In addition, reliance is placed the absence of submissions to the contrary in *Corbin & King* or *Liberty Mutual*. But the position was effectively conceded in the Divisional Court, as can be seen from the passages to which I was referred; that was part of the balance struck on the conventional causation analysis. It does not follow that the position must be the same when the Supreme Court's analysis of causation is

factored in. As for *Corbin & King* and *Liberty Mutual* the point did not arise. Thus while on the face of it the Claimants have the better of this argument on the authorities, there is no binding authority and the position is less clear than it seems. The point is certainly arguable, and that was reflected in the Claimants' tacit concession that the Court might “*not think that the resolution of this issue is appropriate for decision in summary judgment proceedings*”.

22. That deals with the conceptual issues which would define the area within which loss might fall. They demonstrate that there are issues which may impact on the quantum.
23. Then there is the basic issue of the scope of cover. Mr MacDonald Eggers KC took me to the policy wording. As is usual there is a good deal of precision in what is covered; it is not impressionistic. The policy provides:

“The Insurer will pay as indemnity in respect of

(a) Reduction in Turnover - the sum produced by applying the Rate of Gross Profit to the amount by which the Turnover during the Indemnity Period falls short of the Standard Turnover in consequence of the Damage

(b) Increase in Cost of Working - the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which but for that expenditure would have taken place during the Indemnity Period in consequence of the Damage but not exceeding the total of the sum produced by applying the Rate of Gross Profit to the amount of the reduction thereby avoided plus GBP 250,000 for the purpose of maintaining The Business during the Indemnity Period

Rate of Gross Profit - The Rate of Gross Profit earned on the Turnover during the financial year immediately before the date of the Damage

Gross Profit - the amount by which (i) the sum of the Turnover and the amount of the closing stock and work in progress shall exceed (i) the sum of the amount of the opening stock and work in progress and the Uninsured Variable Costs The amounts of the opening and closing stocks (including work in progress) shall be arrived at in accordance with the Insured's normal accountancy methods due provision being made for depreciation”

24. It follows from this that recoverable loss will have to be considerably more tightly defined than a simple look at the bottom line. This is reflected in the agreement of the parties that there should be expert evidence on quantum at trial. The Defendant's case is that the issue of loss is one which is reliant on the Claimants providing material. The Claimants (outraged) riposte was that the Defendant has had the Claimants' financial information for over a year. It may well be the case that the Defendant is probably now in a position to have a real sense of whether the claim as advanced is susceptible of wholesale challenge or not. But the reality is that the parties have set a timetable for marshalling that evidence and none of it is before me at this hearing – on either side. Nor do I have much clarity from the pleaded case: the loss is pleaded by a short

schedule with headline loss figures per establishment. There is no explanation of the calculation of those figures, and they are verified by the Claimants' solicitor. The evidence I have for this application does not advance matters in this respect.

25. Then there are the other evidence issues, which also impact on this. The Defendant maintains that there are other factual disputes running to the extent of the Claimants alleged financial loss which cannot be decided on a summary basis and the extent of which are unclear. This includes: whether the restaurants permanently closed by Wahaca were closed as a result of Covid 19 and not other business concerns, the state of the Claimants finances, and the precise extent of the actual loss (if any) that the Claimants suffered in the light of the fact that the Claimant's evidence on the extent of recoveries made by the Claimants under the Coronavirus Job Retention Scheme cannot be accepted without interrogation: following the decision in *Liberty Mutual* affirming the recoverability of CJRS payments, if the Defendant could demonstrate that the full amount of the recoveries made extinguished the Claimant's loss, there would be no basis for summary judgment on coverage.
26. The Defendant also takes issue with the Claimant's evidence on occurrence of danger within the vicinity. It submits that the Claimants' submitted evidence in the form of the FCA Tracker Table and Tracking Spreadsheet are deficient in their supplied form. For example, the Tracker table is lacking in provenance and explanation, receiving only passing reference in the witness statement evidence. Equally, the Tracking Spreadsheet – which in itself is only supplied for the Wahaca claim – can only show suspected cases of covid as it is dated to a period prior to accessible Covid 19 testing, and in addition appears to contain irrelevant medical evidence. The Defendant submits that these evidential deficiencies plainly demand further interrogation at trial. The Claimants do not shy away from the difficulties with their evidence: noting that the FCA Calculator cannot be dialled down to a radius smaller than 1 km – making the case for the proof of threatened cases of Covid 19 in the “immediate vicinity” irretrievably inferential.
27. These points clearly engage issues significant enough to be in the Quantum section of the agreed List of Issues.
 - “9. Is the Claimant obliged by the terms of the Policy and/or as a matter of law to give credit against its alleged loss for sums or discounts received as a result of the CJRS and/or Business Rates Relief?
 10. What is the quantum of the indemnity to which the Claimant is entitled (if any) and what (if any) interest should be awarded”?
28. The net result of this exercise is that I conclude that there is no certainty about any recovery by the Claimants. As was no doubt intended, the impression created by the Defendant's arguments was to create a sense that on any analysis the quantum will do well to reach the figures pleaded (unparticularised as they are) and to leave me quite sure that I cannot be sure of any – even ballpark - level of recovery.
29. Does the argument succeed to the point that I conclude that it is not fanciful, but realistic that there will be no recovery? On an impressionistic level the answer to that is no. I have much sympathy with Mr Gruder's argument that a zero recovery is implausible. But that is an impression based wholly on assumptions. When the question

is viewed unemotionally through the prism of the evidence before me only it is not, in my judgment, a fanciful argument.

30. I am not dealing with a situation where the starting point pleaded has been properly explained and verified by the person making the calculation in the application before me. I am not therefore dealing with a situation where I can be relatively confident of a starting point and an allowance can be made from a fixed baseline, for the impact of the various arguments. On the contrary, I know how much was paid by way of furlough payments, and I know that for present purposes I must accept that that figure is set off against loss proved – but I do not have any real sense of what that starting figure will be once the experts have reported.
31. Accordingly bearing that uncertainty in mind and factoring in the various not insignificant points which can impact on quantum both at a coverage and evidential level I am not satisfied that the Defendant’s case is fanciful. It follows that summary judgment on coverage must be refused.
32. I take note that that conclusion is broadly consistent with the guidance at page 675 of the White Book volume 1: that states that in advance of a trial that will largely depend on the expert evidence relied on by each side, it will “usually be inappropriate” to grant summary judgment unless the application is made after the experts have discussed the case and produced a joint statement (citing *Hewes v West Hertfordshire Hospitals NHS Trust* [2018] EWHC 2715 (QB)).
33. However that leaves the question of summary judgment on the Construction Issue only. On this I would not have been minded to grant this if it would create a single self standing appeal. However there is a substantial hearing listed by the Court of Appeal in June of this year, which will consider the issue as it presents on the basis of slightly different wordings. The Court’s consideration is likely to be benefitted by having a second iteration and its arguments before it at the same time. Further I understand that, based on the estimate of a half day for this issue as a “bolt on” to that June hearing, this appeal could be accommodated at that time.
34. I will therefore grant summary judgment on that issue only, and permission to appeal. Time for service of a Notice of Appeal/Respondent’s Notice will be abridged to the greatest extent the parties can accommodate.

INTERIM PAYMENT

35. The Claimants’ application for an interim payment also fails, essentially for the same reasons.
36. Interim payment, as defined by s.32(5) of the Senior Courts Act 1981, means “*a payment on account of any damages, debt or other sum (excluding any costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party.*” CPR r 25.7 sets out the conditions to be satisfied and the matters to be taken into account by the court.

37. As the White Book commentary to r 25.7 makes clear, the jurisdiction to order an interim payment is an exception to the general principle that a Defendant has a right not to be held liable to pay until liability has been established by a final judgment. It is subject to the strict restrictions stated in r 25.7(1): the court “may only order” an interim payment in the circumstances listed in r 25.7(1) but not otherwise. In ordering an interim payment, the court must not order an interim payment of “*more than a reasonable proportion of the likely amount of the final judgment*” (r 25.7(4)) and must take into account any relevant set-off or counterclaim (r 25.7(5)).
38. The Claimants’ case is that they have met two of the gateways under r. 25.7(1):
- “(b) the Claimant has obtained judgment against that Defendant for damages to be assessed or for a sum of money (other than costs) to be assessed; and
- (c) [the court] is satisfied that, if the claim went to trial, the Claimant would obtain judgment for a substantial amount of money (other than costs) against the Defendant from whom he is seeking an order for an interim payment whether or not that Defendant is the only Defendant or one of a number of Defendants to the claim.”
39. For the reasons already given, I am not satisfied that the coverage point is suitable for summary determination. Gateway (b) accordingly fails.
40. But what of the gateway at r. 25.7(1)(c)? On its face that permits of ordering an interim payment even where judgment is not entered. It is submitted that even if the summary judgment application fails I should still order an interim payment under this rule.
41. The starting point is the judgment of the Court of Appeal in *FII Group Litigation v Revenue and Customs Commissioners (No 2)* [2012] EWCA Civ 57; [2012] 1 WLR 2375 per Aikens LJ at [33 -38]:

“33.... it is obvious that the claimant seeking the interim payment has the burden of satisfying the court that the necessary conditions have been fulfilled for it to consider exercising the power to grant an interim payment order. An interim payment order is one that is obtained in civil proceedings. Whatever conditions have to be satisfied must be to the usual standard of proof in civil proceedings unless there is an express indication in a statute or rule of court to the contrary ...In the case of an application for an interim payment order under CPR r 25.7(1)(c), of course, the claimant has to satisfy the court on a balance of probabilities about an event that has not, in fact, occurred; that is, that if the claim went to trial, he would obtain judgment (and for a substantial amount of money)....

36. That leads on to the next and more important question: of what does the claimant have to satisfy the court? To which the answer is: that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money from this defendant. Considering the wording without reference to any authority, it seems to me that the first thing the judge considering the interim payment application under paragraph (c) has to do is to put himself in the hypothetical

position of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this claimant would obtain judgment for a substantial amount of money from this defendant?...

38. The second point is what precisely is meant by the court being satisfied that, if the claim went to trial, the claimant ‘would obtain judgment for a substantial amount of money’? In my view this means that the court must be satisfied that if the claim were to go to trial then, on the material before the judge at the time of the application for an interim payment, the claimant would actually succeed in his claim and furthermore that, as a result, he would actually obtain a substantial amount of money. The court has to be so satisfied on a balance of probabilities. The only difference between the exercise on the application for an interim payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have heard all the evidence that has been led at the trial, then will have decided what facts have been proved and so whether the claimant has, in fact, succeeded . . . The court must be satisfied (to the standard of a balance of probabilities) that the claimant would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was ‘likely’ that the claimant would obtain judgment or that it was ‘likely’ that he would obtain a substantial amount of money.”

42. That summary was (save in one immaterial respect) approved by the Court of Appeal very recently in *Buttar Construction Ltd v Arshdeep* [2021] EWCA Civ 1408; [2022] 1 WLR 1239 per Stuart-Smith LJ at [8]-[9].
43. Where the court is satisfied that there would be judgment for a substantial sum of money without being satisfied what precisely that sum would be the court has to decide “*the likely amount of the final judgment*” (r 25.7(4)) and cannot order an interim payment of more than a reasonable proportion of that likely amount (*Makdessi v Cavendish Square Holding BV* [2017] EWHC 650 (Comm) per Teare J at [6]).
44. The problem for the interim payment application in this case is manifest upon reading the extract from *FII*. I have decided that I am not satisfied on the evidence before me that the Claimants will prove a loss and obtain judgment on liability. I cannot therefore, consistently with principle, reach the conclusion that “the Claimant[s] **would** obtain judgment for a **substantial amount of money**” [my emphasis]. A sense that it is likely that such a judgment will eventuate is not enough. As *FII* makes clear “*It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was ‘likely’ that the claimant would obtain judgment or that it was ‘likely’ that he would obtain a substantial amount of money.*”
45. In these circumstances, I can neither conclude on the evidence before me that on the balance of probabilities the Claimants will succeed at trial in a cause of action which requires proof of loss, nor can I determine on that evidence the likely amount of the final judgment.

46. For these reasons, the conditions for ordering an interim payment are not met and the application fails.