JUDGMENT : LORD JUSTICE MANCE : CA : 20th February 2004.

1. This in an appeal from a decision of HHJ Seymour QC sitting in the Technology and Construction Court on 2nd October 2003, whereby he granted the claimant ("the Council") an injunction restraining the respondent ("Mowlem") from denying Warings Contractors Limited ("Warings"), or such other contractor as the Council might instruct, access, for the purpose of carrying out works the subject-matter of an architect's instruction No. 103, to a site owned by the Council of which Mowlem are currently in possession as main contractors under a contract dated 30th August 2000. The contract with Mowlem was for the restoration and regeneration of the Heritage Spa Buildings and the construction of a new building, in each case on the site.

2. The Council traces its freehold title to the hot springs in Bath, including the site, back to a grant by Queen Elizabeth I in 1590. The contract was a Millennium project designed to revive spa bathing in Bath for leisure and health purposes. There had been a history of failure of projects in Bath with a similar general aim going back to 1979. But in 1997 the Council was one of 2% of successful applicants for a lottery grant, and was awarded a grant of nearly £7 million, later increased to nearly £8 million, for the purpose. The Council had hoped to involve a third party as co-partner with it and the Millennium Commission. In the event, however, the Council became the National Lottery's sole partner, though with liberty to identify and negotiate with a new commercial partner. Only after signing the contract with Mowlem, was the Council able to enlist Thermae Development Co. Ltd. ("TDC") as a co-partner with the Millennium Commission (though not as party to the contract with Mowlem). Completion under the contract with Mowlem was expected to be in 2002, but did not occur. By mid-2003 problems were apparent in the paint coating which had been applied as part of the works in the four pools on the site. We are not of course concerned at this stage with the rights or wrongs of any dispute about the cause of such problems. As I understand it, the Council attributes responsibility to Mowlem's workmanship, while Mowlem responds that the fault lies elsewhere, in inadequate design or specification of inappropriate materials.

3. The contract with Mowlem was on JCT Standard Form, Local Authorities With Quantities, 1998 edition as amended. It provided:

*"**4. Architect's/Contract Administrator's Instructions***

4.1.1. The Contractor shall forthwith comply with all instructions issued to him by the Architect/the Contract Administrator in regard to any matter in respect of which the Architect/the Contract Administrator is expressly empowered to issue instructions…

4.1.2. If within 7 days after receipt of a written notice from the Architect/the Contract Administrator requiring compliance with an instruction the Contractor does not comply therewith, then the Employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction; and all costs incurred in connection with such employment may be deducted by him from any monies due or to become due under this Contract or may be recoverable from the Contractor by the Employer as a debt.

…..

8. Work, materials and goods

8.3 The Architect/The Contract Administrator may issue instructions requiring the Contractor to open up for inspection any work covered up or to arrange for or carry out any test of any materials or goods (whether or not already incorporated in the Works) or of any executed work, and the cost of such opening up or testing (together with the cost of making good in consequence thereof) shall be added to the Contract Sum unless provided for in the Contract Bills or unless the inspection or test shows that the materials, goods or work are not in accordance with this Contract.

…..

24 Damages for non-completion

24.1 If the Contractor fails to complete the Works by the Completion Date then the Architect/the Contract Administrator shall issue a certificate to that effect. In the event of a new Completion Date being fixed after the issue of such a certificate such fixing shall cancel that certificate and the Architect/the Contract Administrator shall issue such further certificate under clause 24.1 as may be necessary.

24.2.1. Provided:

- *the Architect/the Contract Administrator has issued a certificate under clause 24.1; and*
- *the Employer has informed the Contractor in writing before the date of the Final Certificate that he may require payment of, or may withhold or deduct, liquidated and ascertained damages,*

then the Employer may, not later than five days before the final date for payment of the debt due under the Final Certificate:
either
1.1 require in writing the Contractor to pay to the Employer liquidated and ascertained damages at the rate stated in the Appendix (or at such lesser rate as may be specified in writing by the Employer) for the period between the Completion Date and the date of Practical Completion and the Employer may recover the same as a debt;
or
1.2 give a notice pursuant to clause 30.1.1.4 or clause 30.8.3 to the Contractor that he will deduct from monies due to the Contractor liquidated and ascertained damages at the rate stated in the Appendix (or at such lesser rate as may be specified in the notice) for the period between the Completion Date and the date of Practical Completion.

…..
24.2.2 If, under clause 25.3.3, the Architect/the Contract Administrator fixes a later Completion Date or a later Completion Date is stated in a confirmed acceptance of a 13A Quotation, the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under clause 24.2 for the period up to such later Completion Date."

The appendix to the contract provided for liquidated and ascertained damages at the rate of £12,000 per week or part thereof pro rata.

4. By Architect's Instruction No. 103 dated 22nd August 2003 Mowlem were instructed in accordance with the provisions of clause 8.3 immediately to remove pool paint finishes and associated fillers back to substrate, in compliance with the provisions of the document "Pool Paint Works – Removal of Pool Paint Finishes and Associated Fillers" appended to the instruction. By letter dated 29th August 2003, Mowlem refused to carry out work in accordance with the instruction. By letter dated 5th September 2003, the Council gave notice to Mowlem under clauses 8.3 and 4.1.2 of the Contract that they were to comply with the requirements of the instruction within 7 days and that in the event that Mowlem did not do so the Council would instruct others to carry out the work and the costs of so doing would be charged to Mowlem's account.

5. The Council then instructed Warings, who were refused access by Mowlem. In correspondence dated 19th and 24th September 2003, Mowlem offered to accept the Council's instruction pursuant to clause 13.2 of the contract (which relates to variation/additional works) "without prejudice to the issue of liability for the pool paint finishes", and to undertake the work in parallel with referring to adjudication the question of the validity of the instruction. The judge said that to accept this suggestion could, under the contract, have had certain potentially disadvantageous consequences for the Council. There is no appeal against this conclusion. Subsequent to his judgment, Mowlem has prepared witness statements in which arguments were raised about the correct interpretation of Mowlem's correspondence, and reference is also made to a letter dated 6th October 2003, in which Mowlem did explicitly offer to do the work without prejudice to a claim to have it treated as a variation instruction. By then the injunction had been granted, and the Council, perhaps not surprisingly in view of the history, rejected the offer on 8th October 2003. I mention these matters simply to record that no such points have been advanced before us either in the notice of appeal or orally. There has been no application even to have the statements admitted.

6. Before the judge, Mowlem, represented by Mr Baatz QC, denied that the situation fell within clause 8.3, or that it was in any event convenient to grant an interlocutory injunction. The judge put the matter as follows in a passage that has not been criticised:
"….. [Mr Baatz QC's] two points were these: first, that it is arguable that when construed against the factual background which Mr Baatz submitted was material, the Architect's Instruction AI 103 was not what it purported to be, an instruction under clause 8.3, and was not justified under the terms of the contract; and also, linked with that, that it was arguable that upon proper construction against its factual background, the notice in the letter of 5 September 2003 was not a proper notice for the purposes of clause 4.1.2 of the contract. The second main point that Mr Baatz took was this: that the balance of convenience favoured Mowlem rather than the Council in the circumstances of the case."

7. As to Mowlem's submission that the situation had gone beyond testing under clause 8.3, and that the instruction was a device to avoid ordering rectification work, the judge said this:
"16. The question whether or not there is any substance in the submissions of Mr Baatz that AI 103 was not justified by the terms of clause 8.3 of the contract -- and the letter of 5 September 2003 did not fall within the terms of clause 4.1.2 of the contract -- are not matters as to which I need or should reach any final conclusion in relation to this application. I am bound

to say that I would not wish to encourage Mowlem to pursue either of these points. But that said, whatever merit they may have goes no further than to emphasise that in relation to the validity of the architect's instruction and the subsequent letter of 5 September 2003, there are serious questions to be tried as between the Council and Mowlem. That is sufficient to satisfy the trigger condition in ***American Cyanamid Company v Ethicon*** *in the passage from the speech of Lord Diplock to which I have referred, to transfer attention to the second issue, which is where the balance of convenience lies."*

There is no appeal or cross-appeal from this assessment.

8. The decisive question is therefore whether or not an injunction should be granted as a matter of convenience. Again, the issues have narrowed. The judge dealt with them as follows:

"17. So far as the balance of convenience was concerned, Mr Baatz relied upon two points. First of all, he invited attention to the consideration emphasised by Lord Diplock at page 408C in the report that it was very important whether an applicant for an injunction, if he were to succeed at trial in establishing his right to a permanent injunction, would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of trial. The second factor which Mr Baatz identified was his contention that if an injunction were granted, the defendant, Mowlem, would be prejudiced because Warings or any other contractor complying with the terms of Architect's Instruction 103 would, in the course of the work there referred to, destroy not only the paint finish which had been applied to the pools, but also the substrate to which that paint finish had been applied. That would have the effect, submitted Mr Baatz, that it would be impossible hereafter to determine the validity or otherwise of complaints as to the workmanship of Mowlem in relation to the application of the paint-work or the preparation of the substrate to which it was applied.

18. I am bound to say that, far from that appearing to me to be a disadvantage to Mowlem, it seems to me to be an advantage positively to them because it would mean that, if and insofar as there was no existing evidence as to deficiencies in workmanship, the evidence upon which the Council might otherwise be able to rely would be destroyed if Mr Baatz's fears were well-founded. In fact there does seem to be a considerable dispute as to whether those fears are well-founded. I have already quoted paragraph 1.9 of the document attached to AI 103 from which it is far from clear that the removal of paint would proceed in one operation and inevitably involve grit-blasting, and inevitably have the effect of destroying the substrate. Indeed the terms of AI 103 and the document attached to it contemplate that the object of the exercise is to expose the substrate so that it can be inspected. If and insofar as there was a fear that the paint finish itself would be destroyed -- and indeed that does seem ultimately to be the result intended by Architect's Instruction 103 -- the fact of the matter is that paint finish has already been inspected by Mr Yates of the Building Research Establishment and by an expert from the Paint Research Association instructed on behalf of Mowlem. Consequently, in my judgment, there seems to be little, if any, substance in the suggestion that the destruction of the paint finish would result in any significant prejudice to Mowlem.

19. In relation to the question of damages being an adequate remedy, Mr Baatz embarked upon a somewhat elaborate analysis of various elements of potential loss set out in the witness statement of Mr Christopher Cavanagh on behalf of the Council dated 24 September 2003. Although that witness statement was referred to during the course of submissions in open court, and although I have referred to it for the purposes of this judgment, it does contain confidential material of some sensitivity, and I therefore direct that the witness statement is not to be treated as having been referred to in open court or as having been referred to in this judgment. It is enough for present purposes to say that the effect of Mr Baatz's analysis was, on the one hand, to say that any loss which the Council said it was going to suffer was financial and Mowlem is in a position to pay any sum which was properly due to the Council in respect of such loss; and on the other hand to say that the Council was not entitled to recover such loss anyway. Although Mr Baatz did not draw the ultimately logical conclusion, as it seemed to me, from the effect of his submissions, what it seemed to be was this:- Under the terms of the contract between the parties the Council was on any view confined to recovering only amounts of liquidated and ascertained damages for which the contract made provision. If that is so (as to which I need express no concluded view), then it seems to me not to support the position of Mowlem, but rather to emphasise that the Council will sustain damage which will not be adequately compensated by an award of damages unless the injunction which is sought is granted.

20. It is, frankly, ridiculous to suggest in a situation in which there is no obvious disadvantage to Mowlem if an injunction is granted that the court should decline to grant an injunction and thereby leave sterilised in some sort of limbo the completion of the Bath Spa Project for who knows quite how long. It is right to say that there were rather vague protestations of good faith on the part of Mowlem in witness statements which I was shown indicating a professed intention to bring the project to a conclusion. But it is right to say that those protestations of earnest intention do seem to have been rather hedged around with qualifications the general effect of which was: provided terms satisfactory to Mowlem to deal with the financial consequences can be agreed.

21. In all of the circumstances I am entirely satisfied that damages would not be an adequate remedy so far as the Council is concerned if I did not grant the injunction which is sought, and that the balance of convenience overwhelmingly favours the Council."

9. The Council's submission that damages would not be an adequate remedy was based on the witness statement of Christopher Cavanagh dated 24th September 2003, to which the judge referred in paragraph 19. Mr Cavanagh said that, if instruction No. 103 was not implemented, there would be "an indefinite stalemate while the parties dispute the causation of the pool paint defect", that completion of the works would in effect be put in limbo and that damages would not be an adequate remedy because the Council would suffer significant loss and damage which was "unidentifiable, intangible and unquantifiable" and "in excess of the rate of liquidated and ascertained damages payable under the Building Contract ….". Under the former head, Mr Cavanagh referred to the negative effect of delay on economic regeneration (loss of extra visitors, loss of additional trade for local hotels and restaurants, loss of additional car parking revenue and general loss of "spend" in the local economy) and on public confidence in the Council (with consequential negative implications for further Council projects). Under the latter head, he estimated that the Council's actual weekly loss, in relation to the items of pure cost which had been taken into account when the sum of £12,000 was agreed, would exceed that contractual sum of £12,000 by over £3,700 per week. But there would be further items of loss, including (a) the cost of releasing Mr Cavanagh to devote more time to the Bath Spa project (£1,800 per week), (b) further senior management time (said to be "more significant still"), (c) delay in receipt of building payments and a lease premium from TDC (the financing loss in respect of the lease premium being put at £2,770 per week), (d) loss of rent and water charges (put at between £69,000 and £194,500 in 2004) and (e) potential loss of fund-raising possibilities. Mr Cavanagh goes on to say that, without an interlocutory injunction, "The validity of AI 103 …. will only probably be decided at a full hearing and, in the meantime, the project will be further delayed and this will cause the difficulties and costs consequences set out earlier in this statement"

10. The judge dealt with the submissions in this area in paragraphs 19-21 of his judgment which I have already set out. The notice of appeal is confined to one short point relating to those paragraphs and reads:

"1. He correctly held that no interlocutory injunction should be granted if the Claimant Employer ("BANES") could be adequately compensated by an award of damages for the Defendant Contractor ("Mowlem") continuing to do what it was to be enjoined from doing.

2. He misdirected himself by deciding that issue on the basis that if at trial BANES would be confined to recovering liquidated and ascertained damages under the contract and BANES's actual loss were greater than the liquidated damages, BANES could not be adequately compensated by an award of damages.

3. The Judge should have held that the liquidated damages provision in the contract between BANES and Mowlem was a mutual covenant binding both parties as to the pre-agreed amount of recoverable damages for delay both at the time of trial and at the time of the application for an interlocutory injunction. He should have held that payment to BANES by Mowlem of the liquidated damages would have adequately compensated BANES for Mowlem continuing to do what it was to be enjoined from doing. He should therefore have refused to order the injunction."

The Council responds in two ways; it maintains, first, that Mowlem is wrong as a matter of law, and, second, that in any event the judge did not decide the application on the narrow basis which Mowlem suggests, but with reference to wider considerations mentioned in Mr Cavanagh's statement.

11. The jurisdiction to grant an interlocutory injunction is stated in s.37(1) of the Supreme Court Act 1981:

"The High Court may by order (whether interlocutory or final) grant an injunction ….. in all cases in which it appears to the court to be just and convenient to do so."

The *locus classicus* on the application of s.37 is Lord Diplock's speech in ***American Cyanamid Co. v. Ethicon Ltd.*** [1975] AC 396, which contains these passages:

(A) [Page 406E-F] "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."

(B) [Page 408B-H] "….. the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

(C) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

(D) Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."

I have added the lettering (A) to (D) for ease of reference. I note that, in summarising the effect of ***American Cyanamid*** **in** ***N. W. L. Ltd .v. Woods*** [1979] 1 WLR 1294, 1306H, Lord Diplock paraphrased his first guideline by referring to the possibility that, if no injunction were granted, the plaintiff "may in the meantime have suffered harm and inconvenience for which an award of money can provide no adequate recompense" (p.1306H).

12. Lord Diplock's speech in ***American Cyanamid*** is not itself a statute. Mr Elliott QC for the Council pointed out that this court has recently reminded itself in ***Smithkline Beecham plc v. Apotex Europe Ltd***. [2003] EWCA Civ 137 that the statutory jurisdiction is not formally limited by considerations such as whether damages are recoverable or the extent of any such damage: cf para. 14 in the judgment of Aldous LJ with which Carnwath LJ specifically agreed. The point has been made on previous occasions and at higher level: see ***Reg. v. Secretary of State for Transport, ex p. Factortame Ltd***.[1991] 1 AC 603, 671E-674A per Lord Goff, with whose speech Lords Brandon and Oliver agreed. Lord Goff referred to Lord Diplock's speech as laying down guidelines for the exercise of the court's discretion and went on:

"I use the word "guidelines" advisedly, because I do not read Lord Diplock's speech as intended to fetter the broad discretion conferred on the courts by section 37 of the Supreme Court Act 1981; ….."

Whether or not by coincidence, the day before Lord Goff handed down this speech, Butler-Sloss LJ had also described Lord Diplock's speech as containing "guidelines which could not and, as subsequent decisions of the House of Lords and of this court have shown, did not cover every eventuality": ***Lansing Linde Ltd. v. Kerr*** [1991] 1 WLR 251, 269A-D. She referred inter alia to ***N. W. L. Woods Ltd. v. Woods*** **[**1979] 1 WLR 1294 (HL). She went on to say that: "The question arises in each application for an interlocutory injunction as to the point on a broad spectrum at which the particular circumstances of the case in question may fit in, and what additional factors there may be to place into the balance of convenience".

13. Mr Baatz submits that these were all exceptional cases which cannot be allowed to undermine the general application of Lord Diplock's guidelines. He points out correctly that they were all concerned with very different situations to the present. In ***Factortame*** the assumption was that there was no remedy in damages at all against the Secretary of State if the UK legislation proved to be contrary to European Community law. In *Lansing Linde* and *Woods* further consideration of the merits was held to be appropriate in a case where the grant of an injunction would in its effect determine the outcome of the action. Mr Baatz submits that it is for us, therefore, to apply Lord Diplock's first guideline (cf (B)

above), and in that connection he focuses on Lord Diplock's statement that, if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted. He submits that the liquidated and ascertained damages stated in the JCT contract between the parties represent a contractually agreed measure of adequate compensation. So, he continues, it is impossible and impermissible for the Council to suggest that an award of such damages would not adequately compensate them for any delay in the period up to trial. He accepts that at trial a final injunction might well be granted. But he submits that the Council cannot surmount the first hurdle involved in Lord Diplock's remarks at (B) above, in order to obtain an interlocutory injunction.

14. The submission depends, firstly, upon treating the parties' agreement that any financial compensation should be fixed at £12,000 per week and pro rata as an agreement that this amount constitutes a fair measure of the full loss likely to be suffered by the Council. But, as Mr Baatz himself stressed, a large number of intangible and unknown considerations may play a part in fixing such a sum. Whatever they may be and whatever the terminology used to describe the sum, it cannot be assumed that the parties either regarded or agreed it as the measure of the full loss likely to be suffered or recoverable at common law, apart from their agreement. The parties may well, for commercial reasons, have concentrated on and covered only certain easily quantified items of cost (as Mr Cavanagh's statement suggests they did here). Or they may deliberately have agreed to *limit* the financial loss recoverable. "It was open to the parties to agree what they liked provided it did not amount to a penalty": see ***Temloc v. Errill Properties Ltd.*** (1987) 39 BLR 30 (CA), 35 per Croom-Johnson LJ, who referred to the possibility that liquidated damages might be agreed at the rate of £1 a week, or even (as was held to be the position in that case) to "£ nil" per week. Mr Baatz carried his submissions to the logical conclusion that, even if the parties had clearly agreed a limitation clause or a cap on liquidated damages (so that for example after six weeks no further damages were recoverable), the court must still ignore the fact that, after the limit or cap had been reached, the building owner would continue to suffer irrecoverable loss. To my mind that logical conclusion throws doubt on the soundness of the whole argument.

15. Secondly, and assuming for this purpose that the damages are viewed as an attempted measure of the full loss likely to be suffered or recoverable at common law by the Council, apart from the agreement, Mowlem's case treats the parties' quantification of such loss as conclusive not merely in the context of a claim to recover damages, but also in the context of a claim to an injunction which is designed to avoid any further financial loss and any cause for a claim to such damages. The Council accepts - indeed it asserts - that it would be bound in any claim for damages by its contractual agreement regarding liquidated and ascertained damages. The Council is not seeking to avoid that agreement, but to rely on it. It is the reason why the Council seeks an injunction, and why the Council submits that interlocutory injunctive relief is appropriate. Mowlem is not entitled to breach its contract. The agreement on liquidated and ascertained damages is not an agreed price to permit Mowlem to do so, and it does not preclude the court granting any other relief that may be appropriate. In my view, the Council's case is right in principle.

16. I would only add that the fact that difficulty of quantification is an acknowledged basis for treating damages as an inadequate remedy means that the court recognises, when deciding whether to grant an interlocutory injunction, that it can be unjust to leave a party to a claim to damages which the court would if necessary have to quantify. The court may in other words be sufficiently lacking in confidence about its own ability fairly and adequately to quantify damages *after* the event to prefer to grant an injunction. The court ought not to discourage parties from agreeing liquidated and ascertained damages. But it ought to recognise that the assessment of the totality of any likely loss *before* the event is an even more rough and ready and difficult exercise than after the event; and that such an assessment may prove in the event not to give rise to adequate compensation, so that to leave a party to a claim in damages may mean that it will suffer loss which the grant of an interlocutory injunction would completely avoid.

17. Mr Baatz relied upon statements in this court in ***Polaroid Corp. v. Eastman Kodak Co***. [1977] RPC 379, 394-5 per Buckley LJ and 397 per (Reginald) Goff LJ and ***Peaudouce SA v. Kimberley-Clark Ltd***. [1996] FSR 680, 692 per Robert Walker LJ. The former case is at least authority that damages are not an adequate remedy, if they would be *"difficult to quantify"* (p.395 per Buckley LJ) or if loss would be suffered *"of a character which …. cannot be properly ascertained, and is damage of a kind for which [the relevant party] cannot adequately be compensated in money"* (p.397 per Goff LJ). But Buckley and Goff LJJ also expressed provisional views that relevant damage, for the purposes of applying Lord Diplock's words to a plaintiff claiming an interlocutory injunction against alleged patent infringement, was limited to damage to the interest protected by the patent, and did not extend to potential economic damage to other business activities (the plaintiff's "peel-apart" process) unrelated to the patent. Goff LJ thought that the point might also be viewed as one of remoteness and on the basis that a plaintiff *"is not entitled to an injunction to avoid damages which, if suffered, would be too remote"*. Robert Walker LJ referred to these statements in *Peaudouce*, again in the context of a patent action, saying*: "In general (and I am putting on one side actions based on the apprehension of non-economic loss, such as some breaches of confidence, and other special cases such as antisuit injunctions) injunctions are granted in order to protect a plaintiff from loss which would sound in damages, not from loss which would not sound in damages"*.

18. In ***Smithkline Beecham plc v. Apotex Europe Ltd.***, however, Aldous LJ said that:
"Care must be taken before extrapolating the views expressed in the Polaroid and Peaudouce cases into a rule of law or practice applicable to other cases. The facts in those cases were not typical and questions of recoverability of damages could have been critical. However it must be remembered that the grant of an interlocutory injunction is a discretionary remedy that should be available to prevent injustice. It would be unusual to grant an interlocutory injunction to protect a property right if no damages for infringement could be recovered. But if the claimant has a cause of action to protect a property right recognised by the law, there is no reason in principle why the court should not grant an interlocutory injunction to protect that right, even if damages are not recoverable."

Carnwath LJ agreed with Aldous LJ's reasoning and added:
"The purpose of an interlocutory injunction is protection, not just against "loss which would sound in damages", but against violation of any right where damages would not be adequate compensation. An obvious example of the need for that wider formulation is the case of trespass to land. ….. With great respect to Robert Walker LJ, therefore, I think that the passage in Peaudouce may be too narrowly stated. I also think that he would be surprised by the use sought to be made of it by Mr Watson [counsel for the unsuccessful appellants in that case]."

19. I would agree with these statements by Aldous and Carnwath LJJ. They are in general accord with the tenor of Lord Goff's speech in the ***Factortame*** case. They were of course related to the context of property, which the claimant had a cause of action to protect. But here the Council has a contractual right which it has a cause of action to protect and in respect of which it is accepted that it would be likely to obtain a final injunction if the matter were to be left to go to trial and it then succeeded.

20. For the reasons given in paragraphs 14 and 15 above, I consider that it is open to the Council, despite the liquidated and ascertained damages clause, to rely on the probable higher level of the actual loss that it would suffer without an injunction, in order to show that it would not be adequately compensated if it were left to a claim in damages. Even if one assumes that remoteness can be relevant in this context (as to which I need express no view), no question of remoteness arises in respect of such higher loss which relates to heads which would ordinarily be recoverable at law.

21. Independently of this conclusion, I also consider that it is open to the Council on the facts of this case to rely on the likelihood that delay would cause further loss which would be felt by the general public, through the negative effect of delay on economic regeneration (loss of extra visitors, loss of additional trade for local hotels and restaurants, loss of additional car parking revenue and general loss of "spend" in the local economy) and through general loss of public confidence in the Council (with consequential negative implications for further Council projects). These items represent the type of unquantifiable, and in substantial measure, irrecoverable damage to public interests that may well be suffered if a Millennium project undertaken by a public authority moves (as Mr Cavanagh puts it) from the status of "Eden" to "Dome".

22. In ***Factortame***, when Lord Goff gave examples of cases in which damages might not be an adequate remedy, he identified (a) the case where as a matter of law the applicants had in law no right to

damages in respect of the invalid administrative action against which they sought an injunction (p.672H) and (b) the case of an authority acting in the public interest which *"cannot normally be protected by a remedy in damages because it will itself have suffered none"* (p.673A). The present case is not concerned with the performance or breach by the Council of any public duty. It is concerned with a commercial enterprise, which the Council also intended to benefit the locality generally, as Mowlem must presumably have recognised. I do not see why the court should not, in deciding whether damages would be an appropriate and adequate remedy, take into consideration unquantifiable and uncompensatable damage to the Council's general public aims which would result if this project is not speedily progressed.

23. Mr Baatz submitted that an approach which took into account under the first guideline whether agreed liquidated and ascertained damages were adequate to compensate for the actual loss a claimant was likely to suffer would place a party who agreed to liquidate and ascertain damages in advance at a disadvantage to a party who did not. But like cases lead to like results, and the reverse. In any event, if such a party would, as a consequence of the grant of an interlocutory injunction, be likely to suffer loss that could not be adequately compensated in damages, that would fall to be taken into account and would be a potential ground for refusing the interlocutory injunction under the second guideline.

24. It follows that in my judgment the Council is right on both the grounds summarised in paragraph 10 above on which it seeks to support the judge's reasoning; and that, in relation to Lord Diplock's first guideline, assuming the Council to succeed at trial in obtaining a permanent injunction restraining Mowlem from denying access for the purpose of carrying out works under architect's instruction No. 103, the Council would not be adequately compensated by an award of damages for the loss it would sustain, as a result of Mowlem continuing to deny such access between now and the likely trial date, if no interim injunction were granted. There is no suggestion that the grant of an interlocutory injunction would cause Mowlem any loss which could not be adequately compensated in damages under the second guideline. Indeed, the judge said in paragraph 20 that the grant of an injunction would cause Mowlem *"no obvious disadvantage"*.

25. No other ground of appeal was advanced by Mowlem. During oral submissions, amplified in supplementary written submissions after the oral hearing, Mr Baatz referred to various alternative steps which the Council might have taken under the contract or by seeking adjudication. His skeleton below touched on these, but they lie outside the scope of this appeal, and have not been documented or put before us in any way which would make it appropriate to consider them, still less to disagree with the judge's conclusion on the basis of proper argument that they afforded no reason to refuse the interlocutory injunction. All I would therefore say with reference to them is that the Council was entitled to choose any particular contractual step which it regarded as open to it, and I see no basis on which Mowlem can in this case properly complain that the Council should have taken some other step than that which it did. As to statutory adjudication, from what we were told, that might have proved an even quicker route to an order along the same lines as the judge made (with the disadvantage that the adjudicator's order would not of itself have been enforceable as an injunction). But it certainly cannot be predicated that it would have led to an opposite result unfavourable to the Council. The Council was entitled to evaluate the course most favourable to it, and there is nothing in the alternative possibility of adjudication, at least as explained to us, which gives me any ground to consider that the judge should not have granted the relief that he did.

26. For these reasons, therefore, I would uphold the judge's decision to grant the interlocutory injunction and dismiss this appeal.

27. **Mr Justice Park:** I agree.

28. **Lord Justice Brooke:** I also agree.

Mr Nicholas Baatz QC & Miss Chantal-Aimée Doerries (instructed by Messrs Withy King) for the Appellant,
Mr Timothy Elliott QC & Mr Adam Constable (instructed by Messrs Veale Wasbrough) for the Respondent