JUDGMENT : MR JUSTICE JACKSON: TCC. 14th May 2007

1. This judgment is in seven parts, namely, Part 1 "Introduction"; Part 2 "The Facts"; Part 3 "The Present Proceedings"; Part 4 "The Law"; Part 5 "The Application for an Injunction"; Part 6 "Jarvis's Challenges to the Interim Award"; and Part 7 "Conclusion".

Part 1: Introduction

2. This is an action brought by a main contractor in order to prevent the continuance of an arbitration. The contractor seeks to achieve that result either by means of an injunction or, alternatively, by challenging an Interim Award of the Arbitrator. This litigation has been infused with some urgency because it was launched just fifteen days before the date fixed for the start of arbitration hearing.

3. J Jarvis & Sons Limited is claimant in these proceedings and defendant in the arbitration. Prior to 18th February 1997, the name of this company was J Jarvis & Sons plc. I shall refer to the company as "Jarvis". Jarvis is the subsidiary company of Jarvis plc. Blue Circle Dartford Estates Limited is defendant in these proceedings and claimant in the arbitration. I shall refer to this party as "Blue Circle". Blue Circle is a subsidiary company of Blue Circle Industries plc. The solicitors for the parties will feature occasionally in the narrative. Squire & Co are solicitors for Jarvis. Howrey LLP are solicitors for Blue Circle.

4. I turn now to other companies which will feature in the narrative of events. GEFCO (UK) Limited are forwarding agents. I shall refer to that company as "GEFCO". GP Nominees Limited is the current owner of the property which is the subject of the present dispute. I shall refer to this company as "GP". Guardian Nominees Ltd is a former owner of the property. I shall refer to this company as "Guardian". Roger Bullivant Limited was a subcontractor of Jarvis. I shall refer to this subcontractor as "Bullivant".

5. Two statutes are relevant to the present proceedings. The first is the Supreme Court Act 1981. Section 37 of that Act provides:

> *"(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*
>
> *(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."*

The other statute which is relevant for present purposes is the Arbitration 1996, to which I shall refer as "the Arbitration Act". Section 68 of the Arbitration Act provides:

> *"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award...*
>
> *(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant -*
> *(a) failure by the tribunal to comply with section 33 (general duty of tribunal)..."*

Section 69 of the Arbitration Act provides:

> *"(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.*
>
> *(2) An appeal shall not be brought under this section except:*
> *(a) with the agreement of all the other parties to the proceeding, or*
> *(b) with the leave of the court.*
>
> *The right to appeal is also subject to the restrictions in section 70(2) and (3)*
>
> *(3) Leave to appeal shall only be given if the court is satisfied:*
> *(a) that the determination of the question will substantially affect the rights of one or more of the parties;*
> *(a) that the question is one which the tribunal was asked to determine;*
> *(c) that on the basis of the findings of fact in the award:*
> *(i) the decision of the tribunal on the question is obviously wrong, or*
> *(ii) the question is one of general importance and the decision of the tribunal is at least open to serious doubt; and*
> *(d) that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.*
>
> *(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted."*

6. These are the statutory provisions which provide the framework for the present litigation. Other parts of the Arbitration Act will be referred to as and when they become relevant. Now, however, it is time to turn to the facts.

Part 2: The Facts

7. On 24th November 1995, Blue Circle (as employer) and Jarvis (as contractor) entered into a contract in the JCT standard form for the design and construction of a warehouse. Article 8 of that contract required Jarvis (upon request) to execute deeds of warranty of favour of any future occupier or purchasers of the site. Jarvis duly

proceeded with the works pursuant to that contract. Jarvis engaged Bullivant as subcontractor to design and construct the piled foundations.

8. By a Sale and Purchase Agreement, dated 22nd December 1995, Blue Circle agreed to sell the property to Guardian. By clause 10.4 of the Sale and Purchase Agreement, Blue Circle warranted that the warehouse would be completed in a good and workmanlike manner and in accordance with British Standard Specifications and Codes of Practice. Blue Circle also agreed to procure that any defects notified during the Defects Liability Period would be made good. In June 1996, Jarvis achieved practical completion. The twelve-month Defects Liability Period duly commenced.

9. Following practical completion, GEFCO (to whom the property had been pre-let) entered into occupation of the warehouse and carried on part of its business from those premises. GEFCO (as tenant) entered into a 25-year lease of the premises containing a repairing covenant.

10. On 28th August 1996, Jarvis executed a Deed of Collateral Warranty in favour of Guardian. By that deed Jarvis warranted that the warehouse had been designed with all due skill and care and had been constructed in a good and workmanlike manner. Jarvis also executed a Deed of Collateral Warranty in favour of GEFCO, although I do not know the date of that deed.

11. On 7th October 1999, Guardian sold the property to GP. On 1st February 2002, Guardian assigned to GP its rights against Jarvis under the Deed of Collateral Warranty. On 24th September 2002, Guardian assigned to GP its rights against Blue Circle under the Sale and Purchase Agreement.

12. Unfortunately, problems emerged in relation to the floor slab and foundations of the warehouse. Cracking to the floor slab was first noted during the Defects Liability Period. In due course, issues arose as to the adequacy of the piles which support the floor slab. Jarvis now accepts that the piles to the south of gridline two require to be replaced. These piles occupy a relatively small area. It is in issue between the parties whether more extensive replacement of the piles is required.

13. During 2001, GP's solicitors, Forsters, intimated in correspondence that GP would make claims against those parties who were responsible for the foundation problems, including both Jarvis and Blue Circle. Lovells were instructed on behalf of Blue Circle. In a letter to Forsters, dated 30th November 2001, Lovells argued that GP should pursue its remedies against Jarvis rather than Blue Circle. In the last paragraph of that letter Lovells pointed out that Blue Circle was a dormant, assetless subsidiary of Lafarge Minerals Limited, which had acquired Blue Circle Industries plc earlier in 2001.

14. During 2003, GP's legal team prepared draft Particulars of Claim against Blue Circle, Jarvis, Jarvis plc and Bullivant. The draft Particulars of Claim were circulated to all parties for information. GP did not thereafter commence proceedings against any of those parties. Indeed, GP has still not commenced proceedings against anyone in respect of the foundation problems. Nevertheless, over the last six years GP has consistently maintained that it intends to commence proceedings unless GP's claims are settled satisfactorily. In recent years, GP has concentrated primarily on its claims against Jarvis and Bullivant, but GP has not been willing to release Blue Circle from liability. All four parties participated in a mediation in late 2006, but that did not result in settlement.

15. In order to protect its own position, Blue Circle commenced arbitrations against both Jarvis and Bullivant. The arbitration against Jarvis was brought pursuant to the arbitration provisions of the Construction Contract. On 19th December 2006, Blue Circle served a "Statement of Claim" in the arbitration. In this Statement of Claim Blue Circle claimed as damages the amount of its liability to GP pursuant to the Sale and Purchase Agreement. Blue Circle further contended that the measure of those damages was the cost of remedial works. Blue Circle also claimed a declaration that Jarvis must indemnify Blue Circle in respect of any further liability which Blue Circle may incur to GP under the Sale and Purchase Agreement.

16. On 21st February 2007, Jarvis served its defence in the arbitration, denying liability on a number of grounds. A reply and then a rejoinder followed during March. The substantive hearing of the arbitration was due to start on 10th May 2007.

17. On 5th April 2007, Jarvis applied to the Arbitrator: (a) for an order staying the arbitration; alternatively, (b) for a direction that Blue Circle's claim for a declaration be tried as a preliminary issue; alternatively, (c) for an order that the hearing due to start on 10th May be adjourned so that the two arbitrations against Jarvis and Bullivant could be heard together. At a hearing on 18th April 2007, the Arbitrator, Mr Anthony Bingham, heard Jarvis's application. At the end of hearing, the Arbitrator stated that Jarvis's application was rejected and that his reasoned award to that effect would follow. Accordingly, it remains the position that the full hearing of all issues in the arbitration is due to commence on 10th May.

18. Jarvis took the view that the arbitration proceedings were oppressive, vexatious and unconscionable. Furthermore, Jarvis was aggrieved by the Arbitrator's oral decision of 18th April. Accordingly, Jarvis commenced the present proceedings.

Part 3: The Present Proceedings

19. By a Claim Form issued in the Technology and Construction Court on 25th April 2007, Jarvis sought an injunction to restrain Blue Circle from pursuing the current arbitration between itself and Jarvis before Mr Bingham. The first ground of claim, as set out in the Claim Form, was that the arbitration proceedings were oppressive in that they might result in Jarvis having to pay the same damages twice. The second ground of claim was that the arbitration

proceedings were vexatious or unconscionable for four reasons. These reasons were set out in paragraph 8 of the Claim Form as follows:

"(a) Blue Circle has no real interest to enforce or protect;

(b) when GP issues proceedings, there will be concurrent sets of proceedings (the action and the two arbitrations) dealing with the same subject matter, namely the entitlement of GP to damages in respect of defects in the building works and quantification of the same;

(c) the concurrent proceedings may result in inconsistent findings;

(d) a continuation of the arbitration proceedings serves only to run up costs to no useful purpose."

20. I shall refer to Jarvis's first ground of claim as *"the oppressive ground"*. I shall refer to Jarvis's second ground of claim as *"the vexatious ground"*.

21. On any view, Jarvis's claim was issued at a very late stage, namely some two weeks before the start date of the arbitration which Jarvis was seeking to restrain. This factor weighs against Jarvis and influences the Court in the exercise of any discretion. Nevertheless, Jarvis's claim had been issued and it had to be dealt with by this court. I, therefore, convened a directions hearing pursuant to paragraph 6.4 of the CPR Part 8 Practice Direction on the first occasion convenient to both parties and the Court. This proved to be 8.00 a.m. on Wednesday, 2nd May. At that hearing, I abridged time for acknowledgment of service and gave directions for the service of evidence. I also fixed the trial date for Tuesday, 8th May (just two days before the arbitration was due to commence).

22. On Friday, 4th May, three events of some significance occurred. First, Forsters sent a letter to Howrey LLP (who had replaced Lovells as Blue Circle's solicitors) setting out GP's position. In that letter Forsters wrote:

"We understand from Miss Willems of Howrey that the current position in the arbitration between your client, Blue Circle Dartford Estates Limited (BCDE), and J Jarvis & sons plc (Jarvis) is as follows:

(a) The arbitration hearing is due to commence on Thursday, 10th May 2007 before Mr Tony Bingham with an estimated duration of four days.

(a) In his award the Arbitrator will consider inter alia issues of liability and quantum between Jarvis and BCDE in connection with the defects to the piles and to the floor slab at the site.

(b) You have confirmed that you will pay any monies awarded to BCDE in relation to the above defects in full or partial satisfaction of BCDE's liability to Guardian. Guardian is, however, not bound in any way by the result of the arbitration, or by any findings made on liability or quantum in the arbitration, or by the way the parties present their cases in the arbitration, and you will accept this. Nor will any sum paid by Jarvis to BCDE to reduce Guardian's entitlement against Jarvis unless and until this is paid over to Guardian (which for the avoidance of doubt Guardian will then apply against its claim in such manner as Guardian may see fit)....

We confirm on behalf of Guardian that:

1. Guardian's primary concern is to ensure either that the site's defective piles and floor slabs are repaired so that it is fit for purpose, or that it receives damages equivalent to the cost of carrying out these repairs, together with loss of rental and any other losses and expenses; alternatively, damages representing the diminution in value of the site as a result of these defects, with interest as may be appropriate.

2. To that end, absent any action by any of the potentially liable parties to remedy the defects and in the light of failure of the parties to reach agreement at the mediation which took place at the end of November 2006, Guardian believes that it has no alternative but to issue proceedings to recover its loss. Its intention is to issue proceedings against Blue Circle, Jarvis and Bullivant's in the very near future. Guardian is at present finalising the form of the proceedings to be issued, including the heads of loss and the quantification of those losses. Guardian is not aware of the way in which BCDE is presenting its case on quantum in the arbitration or of the extent to which this corresponds to the case Guardian will be pursuing once proceedings are issued. However, as stated above, Guardian will not be bound by the result of the arbitration proceedings, and you accept this.

3. In relation to the forthcoming arbitration hearing, although Guardian is not a party to it and therefore is not bound by any award of the Arbitrator, Guardian is nonetheless mindful of the fact that such an award may assist in the overall resolution of the dispute - in particular if BCDE is awarded a substantial sum in respect of the defects which is then paid over to Guardian.

4. In the light of confirmation given in paragraph (c) above that sums received by BCDE in relation to the defects will be paid over to Guardian, and given the timing of the arbitration which is imminent, Guardian (while not being bound by the findings of the Arbitrator and while reserving the right at any time to issue separate proceedings to recover any shortfall, alternative heads of loss or costs from any of the potential parties, BCDE, Jarvis and Bullivant's) believes that it is in the interests of all the parties to this dispute to allow the arbitration to take its course."

23. The second event was that Howrey circulated draft amendments to Blue Circle's Statement of Claim in the arbitration. The effect of these amendments was to add a claim for costs which Blue Circle had incurred to date in dealing with the defects. These costs principally comprised legal fees and expert fees and totalled £520,137.

24. The third event on 4th May was that the Arbitrator issued an Interim Award (a) confirming his oral decision of 18th April to dismiss Jarvis's various applications and (b) setting out the reasons for that decision.

25. On Tuesday, 8th May, Jarvis's proceedings in this court came on for trial. Mr Ronald Walker, QC, instructed by Squire & Co, represents Jarvis. Miss Melanie Willems (Solicitor Advocate) assisted by Mr Robert Blackett (Barrister) represent Blue Circle. Miss Willems is a partner in Howrey LLP and Mr Blackett is an associate of that firm.

26. In the course of the hearing on Tuesday, the advocates on both sides made full and detailed submissions both in relation to the oppressive ground and in relation to the vexatious ground. In addition, Mr Walker applied to amend Jarvis's Claim Form in order to challenge the Arbitrator's Interim Award pursuant to sections 68 and 69 of the Arbitration Act. Miss Willems, very sensibly, consented to that amendment in order that all matters could be dealt with together. Thus, the hearing on Tuesday comprised: (a) the final hearing of Jarvis's claim for an injunction; (b) Jarvis's challenge to the Interim Award pursuant to section 68 of the Arbitration Act; and (c) a "rolled up" hearing of Jarvis's application for leave to appeal and (if granted) Jarvis's appeal against the Interim Award. Unsurprisingly, the argument lasted all day.

27. At the end of the hearing on Tuesday, Miss Willems said that her clients wished to consider giving an undertaking to the Court which might allay Jarvis's fears about paying damages twice. She stated that her clients would consider the matter and would circulate their decision both to Jarvis and the Court by 12.00 noon on Wednesday, 9th May.

28. At this stage, there was a practical problem. The arbitration was due to start on the morning of Thursday, 10th May unless restrained by injunction or by a reversal of the Arbitrator's Interim Award. Therefore, a decision was urgently required from this Court. On the other hand, I had matters listed for trial and for hearings over the next three days. Therefore, the following procedure was agreed. I would consider at lunchtime on Wednesday, 9th May any undertaking or further material lodged by Miss Willems. Having considered the advovates' submissions together with Miss Willems's supplementary material, I would notify the parties by e-mail by 2.00 p.m. on Wednesday, 9th May whether or not the arbitration hearing could commence on the following day. Thereafter, I would give judgment at the first opportunity, namely on Monday morning, 14th May.

29. On the morning of Wednesday, 9th May 2007, Miss Willems forwarded an undertaking given by her clients, Blue Circle Industries plc. I shall read out the whole of that undertaking so that it is formally recorded in the judgment:

> *"1. Blue Circle Dartford Estates Limited ('Blue Circle') is a wholly owned subsidiary of Blue Circle Industries plc, trading as 'Lafarge Cement'.*
>
> *2. This undertaking is given by Blue Circle Industries plc. I am the Company Secretary and a director of Blue Circle Industries plc and I am duly authorised to give this undertaking on behalf of the company.*
>
> *3. Blue Circle is presently claimant in arbitration proceedings before Mr Anthony Bingham to which J Jarvis & Sons Limited ('Jarvis') is respondent ('the arbitration proceedings'). In the arbitration proceedings Blue Circle seeks to recover (inter alia) damages in respect of its liability to GP Nominees under an agreement referred to as 'the Sale and Purchase Agreement'.*
>
> *4. Terms used in this undertaking are as defined in Blue Circle's Statement of Claim and Reply in the arbitration proceedings.*
>
> *5. Blue Circle will offer to pay to GP Nominees an amount equal to any damages awarded to Blue Circle in the arbitration proceedings for the cost of remedial works to the Premises to GP Nominees in full and final settlement of Blue Circle's liability to GP Nominees ('the Offer')."*
>
> A footnote to paragraph 5 reads: *"For the avoidance of any doubt, this excludes any monies awarded to Blue circle in respect of its own costs and expenses, including the fees of experts, consultants and legal costs, that have been incurred in connection with the defects and subsequent dispute."*
>
> *"6. In the event that GP Nominees accepts the Offer, Blue Circle Industries plc will pay to GP Nominees an amount equal to any such damages in satisfaction of GP Nominees' claim.*
>
> *7. In the event that GP Nominees has not accepted the Offer and an award of damages is in made in the arbitration proceedings, Blue Circle Industries plc will pay an amount equal to such damages to a third party corporate trustee or other appropriate trustee, to be held on trust in accordance with the provisions of paragraph 8.*
>
> *8. That amount referred to above will be held on trust and applied as follows (subject to paragraph 9, below):*
>
> *(1) in the event that GP Nominees accepts the Offer on or before 30th June 2009, the amount then being held on trust shall be paid to GP Nominees;*
>
> *(2) in the event that GP Nominees obtains a final judgment which is no longer subject to appeal against Blue Circle and/or Jarvis in respect of the costs of remedial work to the Premises, an amount equal to the lesser of the amount then being held on trust and the damages so awarded shall be paid to GP Nominees, with any balance being paid to Jarvis; and*
>
> *(3) in the event that the circumstances referred to in (2) above have not occurred on or before 30th June 2017, the amount then being held on trust shall be paid to Jarvis.*

9. The following provisions shall apply in respect of the trust referred to above and any monies being held on trust:
(1) interest shall follow the principal
(2) the trustee(s) shall be entitled to be paid their fees and expenses out of the monies being held on trust
(3) the trustee(s) shall be provided with such indemnity and other protection as would be normal for a trust of this nature; and
(4) reasonable legal costs and other costs and expenses incurred in setting up the trust shall be deducted from the monies to be paid to the trustees (by way of indication that such costs should not be much in excess of £10,000).

10. This undertaking will be governed by English law and subject to the exclusive jurisdiction of Courts of England and Wales.

11. This undertaking shall expire upon the establishment of the trust referred to in paragraph 7 to 9 above, and Blue Circle Industries plc shall at that time be fully discharged from any obligations that may arise under this undertaking."

30. During the course of Wednesday, 9th May, I considered the undertaking given by Blue Circle Industries plc in conjunction with the other evidence before the court and the submissions of the advocates. I then notified both Howrey LLP and Squire & Co by e-mail that the arbitration could commence on Thursday, 10th May and could proceed as planned, subject to a short interruption on the morning of Monday, 14th May, so that the parties could attend this judgment.

31. Having recited the somewhat unusual history of this litigation, I must now turn to the law.

Part 4: The Law

32. In ***The 'Oranie' and The 'Tunisie'*** [1966] 1 Lloyd's List LR 477, a complex dispute between four ship owners was the subject of arbitration in London. At a very late stage, namely twenty-four days before the substantive hearing of the arbitration, one of the ship owners applied for an injunction to prevent the arbitration from proceeding. The grounds of application were that there were concurrent proceedings between some of the parties in the French courts and the English courts and that there was a risk of inconsistency between (a) the court decisions and (b) the arbitrators' decisions. McNair J refused the application for an injunction. The plaintiff's delay in applying for the injunction was a powerful factor in McNair J's reasoning.

33. By the time this case reached the Court of Appeal, the arbitration had taken place and the Arbitrator had prepared (but not issued) his award. The Court of Appeal upheld McNair J's decision. At page 484 to 485 Sellers LJ said this: *"But the writ to stay these arbitration proceedings was no earlier than Nov. 19, 1965, in relation to a hearing which had been fixed, after application of the parties, for Dec. 13, 1965. It is well established that delay is most prejudicial to the granting of an injunction. That ground alone, I think, would be sufficient to justify the refusal by the learned Judge to make the order asked for."*

34. At page 487, Sellers LJ stated the principles upon which the court acts in these terms:

"The cases establish the power in the Court whether the action impeaching the agreement to arbitrate is in this country or abroad, but whether the power should be exercised must depend on the circumstances.

I have already said that delay is a powerful factor against granting an injunction. The guiding principles are:

(1) that the stay must not cause injustice to the claimant in the arbitration, and (2) that the applicant for a stay must satisfy the Court that the continuance of the arbitration would be oppressive or vexatious to him or an abuse of the process of the court: in short, that it would be unjust."

35. Danckwerts and Salmon LJJ delivered concurring judgments. They both attached considerable weight to the plaintiff's delay in applying to the court. Indeed, Salmon LJ put the matter quite robustly on page 489 at the top of column 2.

36. In ***The University of Reading v Miller Construction Limited*** [1994] 75 BLR 91, the university employed Miller to carry out construction work under two contracts. The second contract (but not the first) contained an arbitration clause. The university also employed HLM as architects and RSA as consulting engineers in connection with the building works. Pursuant to the arbitration clause in the second construction contract, Miller brought arbitration proceedings against the university, claiming £1.8 million. The university then brought proceedings in the Official Referees' Court, making claims against Miller, RSA and HLM in respect of the building works which had been the subject of both construction contracts. Miller applied, pursuant to section 4 of the Arbitration Act 1950, for a stay of those proceedings insofar as they related to the second construction contract. Judge Bowsher QC dismissed the application for a stay. The university then applied unsuccessfully to the Arbitrator to stay or adjourn the arbitration proceedings until after the trial of the court proceedings. Having failed before the Arbitrator, the university then applied to the Official Referees' Court for an injunction to restrain the arbitration from proceeding. Judge Humphrey Lloyd QC acceded to that application. He granted an injunction retraining Miller and the Arbitrator from taking further steps in the arbitration until after the trial of the court proceedings. In reaching his decision, Judge Lloyd applied the principles stated by Sellers LJ in ***The 'Oranie' and The 'Tunisie'*** at page 487. He noted that the Court's power to restrain the continuance of an arbitration would only be exercised sparingly. Judge Lloyd concluded that the proposed injunction would not cause injustice to Miller. Furthermore, in the circumstances of that case, it would be vexatious and oppressive for the university to be involved in concurrent proceedings before the court and before the Arbitrator.

37. On 31st January 1997, the Arbitration Act came into force. The principles upon which the Arbitration Act was based effected a significant shift in the law of arbitration in this country. Section 1 of the Arbitration Act provides:

"General Principles.
The provisions of this Part are founded on the following principles and shall be construed accordingly:
a. the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
b. the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
c. in matters governed by this part the court should not intervene except as provided by this part."

38. Two of the principles set out in section 1 are respect for party autonomy and self-restraint by the courts when intervening in the arbitral process. Those two principles are reflected in the detailed provisions of Arbitration Act. Those principles were emphasised by Lord Steyn in his well-known speech in ***Lesotho Highlands Development Authority v Impregilo SpA*** [2005] UKHL 43; [2006] 1 AC 221 at paragraphs 17 to 21.

39. The question therefore arises whether the Court's jurisdiction to restrain continuance of an arbitration on the grounds identified in ***The 'Oranie' and The 'Tunisie'*** survives the enactment of the Arbitration Act 1996. It is clear from two decisions of the Commercial Court (with which I respectfully agree) that the jurisdiction does survive, but its exercise will now be even more sparing than before. See ***Intermet FCZO v Ansol Limited*** [2007] EWHC 226 (Comm) and ***Elektrim SA v Vivendi Universal SA*** [2007] EWHC 571 (Comm)). In both of those cases the existence of the jurisdiction was acknowledged, but the Court refused to grant an injunction. In **Elektrim** one of the reasons why Aikens J did not derive assistance from ***University of Reading*** was because that case had been decided before the Arbitration Act 1996 came into force. Indeed, despite their industry, neither advocate has been able to find any case since 31st January 1997 in which the Court has granted an injunction to halt an arbitration.

40. From this review of authority I derive four propositions:

(i) The Court's power under section 37 of the Supreme Court Act 1981 to grant injunctions includes a power to grant an injunction to restrain an arbitration from proceeding.

(ii) That power may be exercised if two conditions are satisfied, namely: (a) the injunction does not cause injustice to the claimant in the arbitration, and (b) the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

(iii) The Court's discretion to grant such an injunction is now only exercised very sparingly and with due regard to the principles upon which the Arbitration Act 1996 is expressly based.

(iv) Delay by the party applying for an injunction is material to the Court's exercise of discretion and may in some cases be fatal to the application.

41. Having reviewed the relevant authorities, I must now tackle the application for an injunction in the present case.

Part 5: The Application for an Injunction

42. Let me start with the oppressive ground. Mr Walker points out that Blue Circle is claiming the cost of remedial works in the arbitration. Mr Walker submits that if that claim (which he maintains is misconceived) should succeed, then Jarvis may end up paying the same damages twice over. The first payment would be made to Blue Circle pursuant to whatever award the Arbitrator may make. The second payment would be made to GP pursuant to whatever judgment this Court may give at the end of the litigation which GP proposes to bring. Mr Walker points out that Blue Circle is not agent or trustee for GP. Therefore, whatever may be Blue Circle's intentions now, there can be no assurance that Blue Circle will pay to GP all or any of the monies awarded by the Arbitrator. For example, Blue Circle may find itself compelled to pay those monies to some other creditor.

43. In support of his submissions that this is a real risk rather than a fanciful scenario, Mr Walker draws attention to the letter which Lovells (Howrey LLP's predecessors) wrote on behalf of Blue Circle on 30th November 2001. That letter places reliance upon the fact that Blue Circle is a dormant, assetless company. The implication of that letter was that Blue Circle was not worth powder and shot.

44. As matters stood during the trial on Tuesday, there was some force in these submissions. The picture changed, however, on the following day, when Blue Circle gave to the Court the undertaking which I read out in Part 3 above. For obvious reasons, I have not heard argument about the wording of the undertaking or its precise effect across the range of possible future scenarios. I am prepared to assume in Jarvis's favour that skilled commercial counsel would be able to expose shortcomings in the precise formulation of the undertaking. It was, after all, drafted under considerable pressure of time. Nevertheless, the intent of the undertaking is clear. Having regard to all of the evidence before the Court and also to Miss Willems's submissions on Tuesday, I am satisfied that Blue Circle Industries plc intends to abide both by the letter and by the spirit of the undertaking which it has given. In my judgment, the risk of Jarvis being mulcted in damages twice over is now so low that the Arbitration cannot be characterised as oppressive for that reason.

45. Let me now turn to the vexatious ground. Mr Walker makes a number of points under this rubric. First, proceedings by GP against Jarvis are imminent. Once those proceedings have been launched, there will then be concurrent proceedings both in court and before the Arbitrator concerning the same subject matter. This carries the

risk of inconsistent findings. Costs will be duplicated. Both Jarvis and Blue Circle will be fighting on two fronts before different tribunals about the same subject matter.

46. All of those observations are true, but they do not mean that the arbitration is vexatious. It is an inevitable consequence of the mandatory language of section 9 of Arbitration Act that from time to time there will be concurrent proceedings in court and before an arbitrator. Indeed, ***Taunton-Collins v Cromie*** [1964] 1 WLR 633 (an authority much relied upon by counsel under the old regime) would have been decided differently if section 9 had been in force. Furthermore, if section 9 of Arbitration Act had been in force in 1994, the ***University of Reading*** proceedings would have taken a different course. In particular, Judge Bowsher would have allowed rather than dismissed Miller's application for a partial stay of the litigation. That circumstance may have caused Judge Humphrey Lloyd to refuse the application for an injunction.

47. I, therefore, conclude that the prospect of concurrent proceedings in the present case, with all the usual consequences of concurrent proceedings, does not make the arbitration either vexatious or unconscionable or an abuse of process.

48. Let me now focus on Mr Walker's further arguments which are specific to this case. Mr Walker contends that because of GEFCO's repairing covenant, GEFCO will be required to repair the defects. Accordingly, neither GP nor Blue Circle will suffer any loss. Furthermore, says Mr Walker, the measure of GP's loss is not the cost of remedial works but the damage to GP's reversion, which may be nil. On top of that, the value of GP's claim against Blue Circle is impossible to assess in advance of the litigation. Furthermore, it is not at all likely that GP will trouble to sue Blue Circle as a dormant, assetless company. Therefore, it is vexatious and unconscionable for the arbitration to go ahead in advance of the litigation. Mr Walker developed his submissions by reference to the House of Lords' decision in ***Alfred McAlpine Construction v Panatown Limited*** [2001] 1 AC 518. The majority speeches in that case demonstrate, says Mr Walker, that an employer in the position of Blue Circle is not entitled to recover damages based upon its performance interest.

49. One always listens to arguments about the effect of ***Panatown*** with a measure of admiration. This case has been no exception. In my view, however, all of the arguments about the quantification of Blue Circle's damages (if any) against Jarvis are matters for the Arbitrator (who is the parties' chosen tribunal) and not for me. As Miss Willems has pointed out, all of Jarvis's arguments in this regard are arguments which Jarvis is entitled to advance in the arbitration. If, upon analysis, the correct quantification of Blue Circle's claim against Jarvis is nil, then I must assume that that is what the Arbitrator will award. If, upon examination of the evidence, it emerges that Blue Circle's damages cannot yet be quantified, then I must assume that the Arbitrator will either adjourn his decision on quantum, or, alternatively, will limit the relief granted to a declaration. It will be recalled that one of the remedies claimed by Blue Circle in the arbitration is a declaration that Jarvis must indemnify Blue Circle against future liabilities to GP. It is not appropriate for this court, so to speak, to barge into the arbitration and take any of the above issues out of the hands of the Arbitrator.

50. There is a plea in the Particulars of Claim that Blue Circle has no real interest to enforce or protect. This point, although mentioned by Mr Walker, was not pursued with any vigour. It seems to me that this point really loses much of its force now that it is clear that GP not only has a claim against Blue Circle but also intends to pursue that claim.

51. There are two further obstacles in Jarvis's path which should be mentioned. First, at the present time there are no concurrent proceedings in court. GP says that such proceedings are imminent, but it has been saying that for the last six years. It is far from clear when GP will actually get round to issuing proceedings against those whom it holds responsible for the foundation problems. I cannot approach Jarvis's present claim on the basis that there are, or there almost are, concurrent proceedings in court as well as before the Arbitrator.

52. The second obstacle in Jarvis's path is Jarvis's delay in bringing these proceedings. The arbitration has been on foot for many months. A hearing date has been fixed. Expert evidence and legal submissions have been prepared. Yet Jarvis did not apply to the Arbitrator for a stay until about a month before the hearing date. Jarvis did not commence proceedings in this court until two weeks before the hearing date. The timing of Jarvis's proceedings in this court has been such as to disrupt the orderly preparation of both parties for the arbitration. Jarvis's delay in proceeding is a factor which points strongly against the grant of an injunction. See the reasoning of the Court of Appeal in ***The 'Oranie' and The 'Tunisie'***

53. Let me now draw the threads together. I have set out in Part 4 above the legal principles which are relevant to Jarvis's claim. Upon applying those principles to the facts of this case, the balance comes down decisively against the grant of an injunction. Accordingly, Jarvis's claim for an injunction is dismissed.

Part 6: Jarvis's Challenges to the Interim Award

54. The Arbitrator's Interim Award, dated 4th May 2007, consists of procedural decisions, as is made clear on page 18 of the award. The Interim Award does not decide or purport to decide any of the substantive issues between the parties. The Arbitrator rejected Jarvis's stay application for three principal reasons. First, the Arbitrator took the view that concurrent proceedings were not on foot and, given GP's past conduct, it was uncertain whether and when GP would commence such proceedings (see pages 12 and 13 of the Interim Award). Secondly, in relation to causation and quantum, the Arbitrator rejected the contention that Jarvis's arguments were so strong and Blue Circle's arguments were so weak that the arbitration hearing would be either pointless or premature. Thirdly, the

Arbitrator did not accept that the risk of Jarvis having to pay the same damages twice made the arbitration proceedings oppressive.

55. The Arbitrator then turned to Jarvis's alternative application, namely that the forthcoming hearing should be limited to Blue Circle's claim for a declaration of entitlement to indemnity. The Arbitrator's reasons for rejecting that application were stated concisely on page 15 of the Interim Award and I will quote them:

"The Arbitrator is conscious of his s.33 duty and in particular savings on times and costs. The Quantum Experts are ready; it may well be more expensive to have a split hearing. However, the Arbitrator will constantly review the position during the hearing. The Directions remain unaltered but the application can be renewed.

The Alternative Application does not succeed."

56. It should be noted that the Arbitrator kept this matter open for review at the substantive hearing.

57. By draft amendments made to its Claim Form on the day of trial, Jarvis contends that the Interim Award should be set aside for serious irregularity, pursuant to section 68 of the Arbitration Act; alternatively, Jarvis should have permission to appeal and on appeal the Interim Award should be varied pursuant to section 69 of the Arbitration Act.

58. Let me deal first with the challenge under section 68. The grounds of challenge are set out in paragraphs 1 and 4 of the draft Amendments to the Claim Form. These read as follows:

"1. The Arbitrator's refusal to stay or adjourn all or any part of issues in the arbitration constituted a serious irregularity which will cause substantial injustice to Jarvis, the serious irregularity being a failure to comply with the Arbitrator's duty under section 33(1)(b) of the Act...

4. The refusal to stay or adjourn all or any of the issues in the arbitration, thereby giving rise to the risk of inconsistent findings and of Jarvis having to pay damages twice over, was a serious irregularity."

59. Section 33 of the Arbitration Act which Jarvis invokes by these amendments provides as follows:

"1. The tribunal shall...
(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."

60. I do not accept that the Arbitrator's refusal to stay or adjourn either the whole arbitration or, alternatively, the quantum issues amounted to a serious irregularity. Properly interpreted, the Arbitrator's Interim Award is simply a decision that he will not prejudge the issues in the case before the substantive hearing has commenced. Jarvis is fully entitled to argue all of its quantum points at the substantive hearing. Jarvis is also fully entitled to argue at the substantive hearing that the risk of double payment is such that no damages should be awarded. (The recent undertaking given to the Court by Blue Circle Industries plc may possibly make that argument more difficult). Jarvis is also fully entitled to argue that the Arbitrator should only grant a declaration of entitlement to indemnity, on the ground that assessment of damages is not yet possible. These are serious issues, but they are all matters for the Arbitrator and not for me. The occasion for the Arbitrator to consider these issues is at the substantive hearing, which is now in progress. The Arbitrator was quite correct in his refusal to prejudge the answers to those questions at a procedural hearing three weeks before the main arbitration hearing began.

61. For all of these reasons, Jarvis's challenge to the Interim Award under section 68 of the Arbitration Act is dismissed.

62. I turn now to the application for leave to appeal under section 69. The questions of law upon which Jarvis seeks leave to appeal are formulated as follows in paragraph 3 of the draft Amendments to the Claim Form:

"3. The central question of law was what considerations the Arbitrator ought to have taken into account when determining the application, and in particular:
(1) whether he had power to grant a stay or adjournment when 'GP is merely considering litigation' or whether the litigation had actually to be in existence;
(2) whether there was any evidence to support Blue Circle's assertion that the litigation on foot would end with arbitration award;
(3) whether there was any evidence to support Blue Circle's argument that any risk of GP pursuing Jarvis was 'extremely remote';
(4) whether he was right to accept Blue Circle's primary case that the measure of its damages in the arbitration was the cost of repairs;
(5) whether there was any evidence to support the assertion that, following the award, Blue Circle could 'quickly and painlessly settle with GP' (which assumes that GP's claim against Blue Circle would necessarily be satisfied by the sum recovered from Jarvis by Blue Circle);
(6) whether he was right to ignore or give no weight to (a) the risk of inconsistent findings, or (b) the risk of Jarvis being made to pay the same damages twice over.
(7) whether he was right to accept that the measure of GP's claim against Blue Circle is the costs of repair."

63. So far as paragraph 3(1) is concerned, it is common ground that this identifies a question of law. Mr Walker submits that the Arbitrator was "obviously wrong" within the meaning of section 69(3)(c)(i) of the Arbitration Act. As Mr Walker graphically put it, the fact that GP's action did not begin yesterday but will begin tomorrow should

make no difference to the Arbitrator's decision. Miss Willems, on the other hand, urges that the Arbitrator was correct in his approach, or, at the very least, he was not obviously wrong.

64. On this issue I prefer and accept the submissions of Miss Willems. The Arbitrator was quite entitled to refuse a stay application based upon the effect of concurrent proceedings. The Arbitrator's first ground of decision, namely that the concurrent proceedings had not yet started and GP's intentions were uncertain, was a perfectly proper ground. That part of the Interim Award neither contains nor betrays any error of law.

65. Paragraphs 3(2) to 3(5) of the draft Amendments to the Claim Form do not, in my view, raise any question of law at all. Furthermore, they are based upon a misreading of the Interim Award. The Arbitrator did not decide the questions to which those sub-paragraphs are directed. The Arbitrator left these matters open, having refused to decide them summarily in Jarvis's favour at an interlocutory hearing.

66. As to paragraph 3(6) of the draft Amendments to the Claim Form, the two matters there set out were considered by the Arbitrator but he was not persuaded to grant a stay on those grounds. This does not raise any question of law upon which the Arbitrator was "*obviously wrong*". The Arbitrator was entitled to take the view that those two considerations were not so powerful that the arbitration should be stopped in its tracks.

67. Paragraph 3(7) of the draft Amendments is based upon a misreading of the Interim Award. The Arbitrator has not accepted Blue Circle's argument as to the measure of GP's claim against Blue Circle. He has left that matter for decision at the substantive hearing. For all of these reasons, leave to appeal pursuant to section 69 of the Arbitration Act is refused.

68. Let me now draw the threads together. Jarvis's various challenges to the Interim Award under sections 68 and 69 of the Arbitration Act are unsuccessful.

Part 7: Conclusion

69. For the reasons set out in Parts 5 and 6 of this judgment, Jarvis is unsuccessful in all of its claims for relief.

70. I cannot part with this case without congratulating the advocates and solicitors for both parties upon the excellence of their work. At a time when they were preparing for a substantial arbitration, both legal teams have also conducted this litigation with conspicuous efficiency. Indeed, they have progressed this action from issue of Claim Form to final judgment within the space of nineteen days.

71. The outcome, as previously indicated, is that Jarvis's claim is dismissed.

MR RONALD WALKER, Q.C. (Instructed by Squire & Co) appeared on behalf of the Claimant.
MISS MELANIE WILLEMS (Solicitor Advocate) and MR ROBERT BLACKETT (Barrister) (Instructed by Howrey LLP) appeared on behalf of the Defendant.