

# YOU CANNOT BE SERIOUS!

by David Gollancz



## David Gollancz reviews the right to damages in public procurement claims following the Supreme Court judgment in *Nuclear Decommissioning Authority v EnergySolutions EU Ltd*

### The Way We Were

Breach of the public or utilities procurement legislation is a statutory tort: a breach of a statutory rule which is intended to be enforceable by someone who suffers loss or damage as a consequence; in public procurement, the legislation expands the scope of causation to the risk of loss or damage. The Public Contracts Regulations 2006 (SI 2006/5) reg. 47C provided that:

*"A breach of the duty owed [by a contracting authority to an economic operator] is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage."*

The Public Contracts Regulations 2015 reg. 91, Utilities Contracts Regulations 2016 reg. 106 and the Concession Contracts Regulations 2016 reg. 52 say the same.

The remedies available vary according to whether proceedings are started before or after the contracting authority or utility (the "contracting entity") has entered into the

contract. Start your proceedings before, and two consequences follow. First, the statute imposes the "automatic suspension": the contracting entity is prohibited from entering into the contract until either the parties have agreed that the suspension should be brought to an end, the court has made an order bringing the suspension to an end, or the matter has otherwise been settled. Second, the court has a very wide discretion as to the remedies it will order, including the setting aside of the award decision, an award of damages, or any other intervention which a court has power to make. But start proceedings after the contract has been entered into and the court can only award damages.

Until 2017, it was thought that, once breach and consequent loss or damage was proved, the successful claimant was entitled to damages as of right: the court could not conclude that the defendant had broken the rules and thereby caused the claimant loss (or damage) but that it should not have to pay any damages, for example because the defendant's breach was in some way

forgivable. Contrast this to the position in judicial review, where the court always has a discretion as to whether to grant a remedy, whether in damages or otherwise.

That position was reflected in the Court of Appeal's judgment in *Matra SAS v Home Office*<sup>1</sup>, where Buxton LJ said that the then-applicable procurement regulations

*"Create[s] a private law, non-discretionary, remedy, because within the national legal order any remedy in damages necessarily has those qualities."*

### The Long and Winding Road

Not any more. In *Nuclear Decommissioning Authority v EnergySolutions EU Ltd* (now called *ATK Energy EU Ltd*)<sup>2</sup> a five-judge Supreme Court found that entitlement to damages in procurement claims is subject to the "Francovich conditions" (named for *Franco v Italy*<sup>3</sup> (and developed in *Brasserie du Pêcheur SA v Germany*<sup>4</sup>). The *Franco v Italy* conditions are that:

<sup>1</sup> [1999] 1 W.L.R. 1646

<sup>2</sup> [2017] UKSC 34

<sup>3</sup> C-6/90 [1991] E.C.R. I-5357

<sup>4</sup> C-46/93 [1996] E.C.R. I-1029; [1996] 1 C.M.L.R. 889



- (i) the rule of law infringed must be intended to confer rights on individuals, and
- (ii) the breach must be sufficiently serious, and
- (iii) there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party.

Conditions (i) and (iii) are to the same effect as the conditions governing statutory tort in English law. Condition (ii) however has no corollary in English private law. It is this second condition which, the Supreme Court has concluded, also governs the award of damages in public procurement claims.

The EnergySolutions/NDA case's road to the Supreme Court was a winding one. At first instance, the NDA sought to argue that under the 2006 Regulations, the court had discretion not to make an award of damages even though breach and loss were proved (the NDA also argued that, by not issuing proceedings within the standstill period, EnergySolutions had broken the chain of causation, but that argument failed and does not concern us here). The point was tried as a preliminary issue. Edwards-Stuart J found that there was no such discretion and that, once breach and causation were established, the

claimant was entitled to damages. He said:

*"I regard it as significant that the [European Court of Justice] emphasised the importance of compliance with the principle of equivalence<sup>5</sup>. In the context of English domestic law I am not aware of any situation in which an award of damages is discretionary, in the sense that damages may not be awarded at the discretion of the court even though the breach of duty and consequent damage have been proved. I am not aware of any concept in English civil law of a threshold of gravity of the breach (the "de minimis" rule apart) which must be crossed before damages can or should be awarded."*<sup>6</sup>

The NDA appealed; the Court of Appeal cited regulation 47A of the 2006 Regulations, which referred to a contracting authority's duty to comply (at paragraph (1)(a)(i)) with the Regulations and separately (at paragraph (1)(a)(ii)) to its duty to comply with "any enforceable EU obligation." Accordingly, the court considered that the Regulations set out both a mechanism for the enforcement of EU law rights under the relevant Directives<sup>7</sup>, and a domestic law cause of action for breach of statutory duty. The former was subject to the *Francovich* conditions but, if the national law implementing the Directives provided a less restrictive remedy in damages

than would be available if the *Francovich* conditions were applied, national law would prevail – regardless of whether the infringements in question were of directly effective provisions of the Directive only, or of the Regulations. Moreover English law does not require a breach of statutory duty to be "sufficiently serious" before the claimant is entitled to damages, and the principle of equivalence demands that the remedy of damages be no more difficult to obtain. Accordingly, the English court has no discretion as to making an award of damages to a claimant under the Regulations if it is shown to have suffered loss as a consequence of breaches of duty established against a contracting authority under the Regulations.

The Court of Appeal's judgment was delivered on 15 December 2015, while the first instance trial of liability in the case was under way before Fraser J. In May 2016 the Supreme Court gave the NDA permission to appeal; in July 2016 Fraser J gave his judgment on liability, finding the NDA liable for a number of breaches of the Regulations. The parties and court agreed that, rather than await the Supreme Court's judgment and then, if it were determined that breaches did have to be sufficiently serious, re-hear evidence, Fraser J should try the question whether the breaches he had identified in his July judgment were sufficiently serious to warrant an award of damages.

<sup>5</sup> The EU law principle that domestic remedies for breaches of EU law must be no less favourable than those available for equivalent breaches of domestic law

<sup>6</sup> *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2015] EWHC 73 (TCC) §71

<sup>7</sup> At the time, Directive 2004/18/EC, setting out the obligations on contracting authorities, and Directive 89/665/EEC as amended by Directive

2007/66/EC (the "Remedies Directive"), setting out the remedies available to economic operators for breach of those obligations

The parties submitted a long list of issues for determination: three “headline” issues, the third of which was divided into eight sub-issues; sub-issue (v) was divided into eight sub-sub-issues. Fraser J considered that two of the sub-sub-issues were matters for the Supreme Court alone. In relation to two others – whether and how the size or value of the contract in question, or the scale and complexity of the procurement, were to be taken into account in assessing the seriousness of a breach – he thought it “inconceivable” that the Supreme Court would not deal with them and refrained from doing so.

While avoiding any comment which might suggest a view as to whether sufficient seriousness was a requirement (although he did permit himself the observation that “There is a degree of artificiality in applying the dicta of the courts that consider discretion on the part of a Member State (or the EU), and comparing or applying it to discretion on the part of an authority conducting a procurement competition”), Fraser J considered what “sufficiently serious” meant. In doing so he relied principally on the judgments of the House of Lords in *R v Secretary of State for Transport ex parte Factortame Ltd (No.5)*<sup>8</sup>, and of the Court of Appeal in *Delaney v Secretary of State of Transport* [2015]<sup>9</sup>. These cases establish a number of principles and a “multifactorial” approach to identifying whether a breach is sufficiently serious to entitle a claimant to damages. The principles can be summarised as:

- (1) The test is objective: bad faith is a factor to be objectively considered;
- (2) Moral culpability/egregious conduct/flagrant misconduct not necessary;
- (3) The weight to be given to each factor will vary from case to case, no single factor is necessarily decisive;
- (4) The seriousness of the breach will always be an important factor; and
- (5) Where the authority had minimal or no discretion, it will be easier for the claimant to prove sufficient seriousness of the breach.

The factors to be taken into account are:

- (1) The importance of the principle which has been breached;
- (2) The clarity and precision of the rule breached;
- (3) The degree of excusability of an error of law;
- (4) The existence of any relevant judgment on the point;

- (5) The state of the mind of the infringer, and in particular whether the infringer was acting intentionally or involuntarily (ie whether there was a deliberate intention to infringe as opposed to an inadvertent breach);
- (6) The behaviour of the infringer after it has become evident that an infringement has occurred;
- (7) The persons affected by the breach, including whether there has been a complete failure to take account of the specific situation of a defined economic group; and
- (8) The position taken by one of the Community institutions in the matter.

It may be thought that it is difficult to reconcile the principle that the test is objective with the fifth, and possibly the third, of the factors.

Applying these principles and those of the factors which were applicable to the facts, Fraser J found that:

*“Failure to award a contract to the tenderer whose tender ought to have been assessed as the most economically advantageous offer, is in itself a sufficiently serious breach of the contracting authority’s obligations to warrant an award of damages.*

*Individual breach of obligations is sufficiently serious to warrant an award of damages if it is a breach of obligation in relation to a threshold requirement, or one that was designated “Pass/Fail”. Other breaches of obligation in relation to evaluation requirements are sufficiently serious if they would have affected the conclusion (whether individually or cumulatively) of the competition and which tenderer had submitted the most economically advantageous tender.”*

It is suggested that in the great majority of procurement claims at least the second of these conditions, or factors, will be satisfied, and in most so will the first. Claimants usually allege that there has been a failure properly to carry out the evaluation of a tender, whether simply by reason of a flawed assessment or because there has been some inequality of treatment as between tenderers. It is suggested too that Fraser J’s findings refer to the consequences, rather than the character, of the breach. That might look like a common-sense approach - a serious breach is one which has serious consequences – but it seems clear that the second *Francovich* condition, and the factors identified in *Delaney*, treat the seriousness of the infringement as a

factor independent of the seriousness of the outcome. This is perhaps most clearly apparent in the concept of an “excusable” breach, which suggests that a breach with serious consequences may still not be sufficiently serious.

Fraser J’s judgment was given on 16 December 2016. The parties settled but the NDA’s appeal continued (EnergySolutions had now changed its name to ATK Energy EU Ltd.). The parties’ positions were succinctly summarised by the Supreme Court. ATK contended that the Court should find that EU law required a remedy for any breach of the Regulations, not only when the breach was sufficiently serious; alternatively, that the question should be referred to the CJEU. The NDA sought to overturn the Court of Appeal’s conclusion that the domestic law is less restrictive than EU law and confers a right to damages for any breach. The NDA also sought to establish that there should be a trial as to whether an award of damages may in the circumstances of this case be refused to an economic operator.

### **A Whole New World**

On 11 April 2017 the Supreme Court gave judgment. The Court adopted the same approach as had been taken by the Court of Appeal in identifying two bases on which a claim might be advanced: breach of the Directive, and breach of the Regulations. As to the first, the Court agreed with the Court of Appeal, holding that the CJEU case law clearly established that claims under the Directive were governed by all three of the *Francovich* conditions. The fact that the cases held that a right to damages could not be made dependent on “fault” or “culpability” on the part of the contracting authority did not contradict the principle that a breach must be sufficiently serious. There was no doubt such as to require a reference to the CJEU.

As to the second basis for a claim, the Regulations, the Supreme Court also agreed with the Court of Appeal that it was open to a member state to introduce, in the domestic law transposing the Directives, less restrictive conditions on liability for damages. However the Court concluded that there was nothing in the Regulations to indicate that the Regulations conferred any wider entitlement to damages than the Directives. The Court held that the Public Contracts (Amendment) Regulations 2009 (SI 2009/2992), which transposed the amended Remedies Directive, had amounted to a “whole new package of substituted provisions”, which amounted to a “new start, based on the Remedies Directive”. The Explanatory Note, the Explanatory Memorandum and the Impact Assessment which had accompanied the



introduction of the 2009 Regulations had all emphasised the legislator's intention to avoid "gold-plating" the European law and to do the minimum necessary to transpose the Directive. Both provisions concerning damages, at regulations 47I(2) and 47J(2) (c), provided that the court "may" award damages, suggesting that damages did not necessarily follow a finding of liability. The Court concluded that the right to damages under the Regulations is subject to the requirement of sufficient seriousness.

*"There is the possibility that a claimant who proves breach and causation will be left with no remedy, while the defendant will escape any sanction."*

The Supreme Court's decision leaves us with two problematic questions.

First, it is difficult to see how the introduction of a condition of sufficient seriousness, as an element of the domestic tort, satisfies the requirement of equivalence.

Second, there is the possibility that a claimant who proves breach and causation will be left with no remedy, while the defendant will escape any sanction (other, perhaps, than an adverse award of costs). Once the automatic suspension invoked by the issue and notification of proceedings has been terminated and the defendant has entered into the contract, the claimant is confined to its remedy in damages. If the court then finds at trial that, although the defendant breached its obligations and the claimant thereby suffered or risked suffering loss or damage, the breach was not "sufficiently serious" – for example because it was "excusable", whatever that may turn out to mean – the claimant will be left with no remedy at all, and the defendant, although liable, will escape any sanction. Can it be said that such an outcome satisfies the purpose of the legislation? It might be thought that this would bear on the way in which the court deals with applications to terminate the suspension, for example by a greater willingness to order specific disclosure prior to deciding whether to terminate the suspension. A submission apparently along those lines was made in *Cemex UK Operations Ltd. v Network Rail Infrastructure Ltd.* [2017] EWHC 2392 (TCC). Coulson J said:

*"Whilst I acknowledge that that part of the decision in EnergySolutions came as something of a surprise to procurement*

*"Failure to award a contract to the tenderer whose tender ought to have been assessed as the most economically advantageous offer, is in itself a sufficiently serious breach of the contracting authority's obligations to warrant an award of damages."*

*practitioners, the ramifications for bread and butter procurement disputes of the type with which this court is familiar are not yet clear, mainly because they do not feature in the judgments in the Supreme Court at all. However, there is nothing in those judgments to indicate that the court was making fundamental changes to the way in which the Regulations operate or the way in which the court polices procurement challenges. There is nothing in EnergySolutions which bears on the proper approach to an early application for specific disclosure."*

It may be that those remarks, especially coupled with Fraser J's findings in the December 2016 hearing in the EnergySolutions litigation, indicate that the court will resist attempts by the parties, on either side, radically to reinterpret the basis on which procurement claims are managed and determined. But it is suggested that the Supreme Court's judgment does make a fundamental change to the operation of the Regulations by introducing a third condition for the award of damages.

That position has been complicated with the 31 October 2017 judgment of the EFTA Court in *Fosen-Linjen AS*<sup>10</sup>. The EFTA Court, trying the same question, came to the opposite conclusion. The Court noted that the European Commission, in its comments, took the view that a condition from general principles should not be "re-imported" to the express terms of the Remedies Directive, and that "any infringement of public procurement law should be followed up and should not be

left unattended because the breach is not "sufficiently serious". The Court observed that it was desirable that breaches of public procurement law should be corrected before the contract takes effect, but in some cases the only remedy available to the claimant may be an award of damages. The Court also made a distinction between action in the exercise of public power (where, by implication, "sufficient seriousness" might be a requirement) and a commercial act, in this case the conclusion of a contract (cf Fraser J's comment on the artificiality of treating member state liability in the same way as the liability of an individual contracting authority). The EFTA Court concluded that sufficient seriousness was not a condition for the award of damages:

*"A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1) (c) of the [Remedies Directive], provide that the other conditions for the award of damages are met, including, in particular, the condition of a causal link."*

The absence from the Supreme Court's judgment of any discussion of the difficulty it creates for the claimant who has to decide whether to pursue a claim for damages alone, or any comment on the concept of an excusable error of law, or on the relevance or otherwise of matters such as the scale or value of the contract in issue or the complexity of the impugned procurement, left open a wide field for doubt, which has grown wider still with the judgment in *Fosen-Linjen*.