

Assessing the Supreme Court's approach to public procurement challenges & remedies (NDA v EnergySolutions EU Ltd)

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Public Law analysis: Emily Heard, partner and head of procurement, competition and State aid at Bevan Brittan, advises that the UK Supreme Court's judgment in *Nuclear Decommissioning Authority v EnergySolutions EU Ltd* (now called *ATK Energy EU Ltd*) will impact the way in which parties conduct public procurement challenges in future.

Original news

Nuclear Decommissioning Authority v EnergySolutions EU Ltd (now called *ATK Energy EU Ltd*) [\[2017\] UKSC 34](#), [\[2017\] All ER \(D\) 53 \(Apr\)](#)

*The Supreme Court allowed the appellant non-departmental public body's appeal in part, in proceedings arising out of the tendering process to decommission sites formerly used for nuclear generation. The court considered the application of the principles in *Francovich and Bonifaci v Italy*, Cases [C-6/90](#) and [C-9/90](#), [1991] ECR I-5357 and held that, among other things, the Public Contracts Regulations 2006, [SI 2006/5](#) (PCR 2006) as amended, had to be read as providing for damages only upon satisfaction of the *Francovich* conditions.*

What is this case about?

Public procurement practitioners have followed with interest the long-running £100m claim by EnergySolutions against the Nuclear Decommissioning Authority (NDA). The dispute concerned the NDA's procurement of a contract for the decommissioning of 12 different Magnox nuclear facilities in the UK.

In the latest (and perhaps final) instalment, the Supreme Court has delivered a judgment which will have an impact on the way in which parties conduct public procurement challenges, in particular in relation to whether or not a breach has to be sufficiently serious in order to entitle a claimant to damages. The judgment also clarifies whether a claimant can choose to claim damages rather than trigger the automatic suspension.

Can you provide some background to the dispute?

This dispute has entailed numerous court hearings. First, the parties raised preliminary issues about remedies and damages in public procurement challenges. Those preliminary issues were appealed all the way to the Supreme Court and it is those preliminary issues that are the subject of this analysis.

It is important to note that the determination of the claim itself took place in tandem with the hearings on those preliminary issues—the High Court determined the substantive claim itself in favour of the claimant, EnergySolutions (resulting in the 324 page decision of Fraser J handed down on 29 July 2016 in *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [\[2016\] EWHC 1988 \(TCC\)](#), [\[2016\] All ER \(D\) 16 \(Aug\)](#)).

Fraser J had found that the NDA 'fudged' the outcome of the qualification process, such that the winning bidder, the Cavendish Fluor Partnership, ought to have been disqualified from the competition. The High Court had also found that the NDA made manifest errors in the way it evaluated bids.

In a subsequent judgment (*Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [\[2016\] EWHC 3326 \(TCC\)](#)) Fraser J noted the existence of the appeal to the Supreme Court on the preliminary issues, and gave judgment on whether or not the breaches by the NDA were 'sufficiently serious'.

While the NDA had filed an appeal against the Fraser J decision, on 27 March 2017 Energy Secretary Greg Clark, released a [written ministerial statement](#) to say that the contract with the Cavendish Fluor Partnership was to be terminated early, and that the NDA had settled the matter with EnergySolutions (and indeed with Bechtel, the other member of EnergySolution's consortium) for a combined total of approximately £95.5m.

It seemed then, that the long-running litigation was at an end, albeit that the conduct of the original public procurement exercise would be the subject of an independent inquiry led by Steve Holliday, the former chief executive of National Grid.

By the time Greg Clark made his announcement, the parties had already appeared before the Supreme Court to argue the position on the important preliminary issues referred to it. No doubt in recognition of the importance of those issues to the wider field, the parties requested that the Supreme Court deliver its judgment despite the settlement of the underlying dispute.

On 11 April 2017, the Supreme Court therefore handed down its judgment in *Nuclear Decommissioning Authority v EnergySolutions EU Ltd (now called ATK Energy EU Ltd)* [[2017\] UKSC 34](#), [[2017\] All ER \(D\) 53 \(Apr\)](#). The judgment concerns three preliminary issues arising under the PCR 2006 (now repealed), which were the applicable regulations to this particular procurement.

The judgment will also be relevant to procurements conducted under the replacement Public Contracts Regulations 2015, [SI 2015/102](#) (PCR 2015) because the remedies regime (with which the judgment is concerned) is the same in both sets of regulations (albeit with minor changes).

What were the key issues raised in this case, and what did the court decide?

The three issues (paraphrased) before the Supreme Court were whether:

- the Remedies [Directive 2007/66/EC](#) only requires an award of damages to be made when any breach of [Directive 2004/18/EC](#) (since replaced by [Directive 2014/24/EU](#)) is ‘sufficiently serious’
- PCR 2006, reg 47J(2)(c) confers a power to award damages only in the case of a ‘sufficiently serious’ breach
- whether an award of damages under PCR 2006, reg 47J(2)(c) may be refused on the ground that an economic operator did not issue a claim before the contracting authority entered into the contract

Whether or not a breach has to be ‘sufficiently serious’

The first and second issues related to a body of EU case law which establishes that three conditions must be met in order for a state body to be required to compensate for damage caused by a breach of Community law, referred to as the *Francovich* conditions. These conditions are that:

- the rule of law infringed must have been intended to confer rights on individuals
- the breach must be sufficiently serious
- there must be a direct causal link between the breach of obligation and the damage sustained by the injured party

The issue before the Supreme Court related in particular to the second *Francovich* condition.

In the High Court (*EnergySolutions EU Ltd v NDA* [[2015\] EWHC 73 \(TCC\)](#), [[2015\] All ER \(D\) 191 \(Jan\)](#)) and in the Court of Appeal (*EnergySolutions EU Ltd v NDA* [[2015\] EWCA Civ1262](#), [[2015\] All ER \(D\) 147 \(Dec\)](#)), NDA had unsuccessfully argued that in order for EnergySolutions’ claim for damages to succeed, it would first have to satisfy the second *Francovich* condition, and establish that the breach was sufficiently serious. The Court of Appeal had disagreed with this and had distinguished a cause of action arising under our own national legislation (ie the PCR 2006 (as amended)) as giving rise to a private law statutory right which was not dependent on compliance with the *Francovich* conditions.

The Supreme Court held that there was clear authority that a claim under the Remedies Directive for breach of [Directive 2004/18/EC](#) (ie a claim based on EU law) would lead to damages only where the breach is sufficiently serious. In relation to whether a claim based on national law (ie under the PCR 2006 (as amended)) also has to be ‘sufficiently serious’ before damages can be claimed, the Supreme Court saw no reason to make a distinction. While the Supreme Court accepted that it was open to individual EU Member States in their domestic law to introduce wider liability free of those conditions, it did not accept that the UK legislature did so when it transposed the Remedies Directive, which was undertaken on a ‘copy-out’ approach. The explanatory note to the Public Contracts (Amendment) Regulations 2009, [SI 2009/2992](#) made clear that the intention was to adopt a minimalist approach to transposition and to avoid gold-plating. Mance LJ, delivering the leading judgment, therefore concluded (at para [39]):

'I consider that the 2006 Regulations as amended in 2009 should be read as providing for damages only upon satisfaction of the Francovich conditions.'

Whether or not a claimant can choose its remedy

The third issue related to whether or not a claimant can choose between triggering the automatic suspension (preventing the contract being entered into) and claiming damages (after the contract has been entered into), or whether a claimant loses the right to claim damages if it does not attempt to hold the process up by issuing a claim before contract award.

The NDA had argued that the claimant had lost the right to claim damages at all because it had failed to mitigate its position by issuing a claim during the standstill period, at a time when its loss might have been avoided altogether by holding up the contract award. In the court of first instance, Edwards-Stuart J had declined to decide the issue, saying that it was a question of fact whether or not the claimant had failed to act reasonably to avoid its loss in this way. The claimant had appealed Edwards-Stuart J's refusal to determine this question as a preliminary issue to the Court of Appeal. In the Court of Appeal, Vos J agreed that it was a question of law capable of being determined as a preliminary issue, and found in favour of the claimant on this issue, that there was no requirement to issue a claim before the contract was entered into in order to claim damages. The NDA appealed this to the Supreme Court, which upheld the Court of Appeal's decision in favour of the claimant, and made clear that an economic operator has a choice under the PCR 2006 (as amended) whether or not to wait until the contract is entered into before issuing a claim for damages. The fact that it chooses to wait is expressly provided for in the regulatory scheme.

What is the impact of this?

As a Supreme Court judgment, the judgment will be binding on all future public procurement challenges. In every case, the claimant will therefore have to show that its claim is 'sufficiently serious' if it is to succeed in an action for damages.

Does this add anything new to the existing hurdle claimants must clear before they can bring a claim for damages?

The judgment does refer to a 'decisive test' for community liability, which was set out in another of the EU cases from which the *Francovich* conditions were derived (see *Brasserie du Pêcheur SA v Federal Republic of Germany* C-46/ 93, *R v Secretary of State for Transport, ex p Factortame Ltd*, C-48/ 93 [\[1996\] QB 404](#)). That test can be summarised in the following terms:

- whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion' (see *Brasserie*, as referred to at para [11] of the Supreme Court judgment)
- although this cannot depend on any concept of fault (intentional or negligent) going beyond that of a sufficiently serious breach of Community law (see *Brasserie*, as referred to at para [12] of the Supreme Court judgment)
- relevant factors include:
 - the clarity and precision of the rule breached
 - the measure of discretion left by that rule to the authority
 - whether the infringement and the damage caused was intentional
 - whether any error of law was excusable
 - whether the position taken by a community institution may have contributed towards the omission
 - whether national measures have been adopted which are contrary to Community law

Contracting authorities may well be keen to show that they have not 'manifestly and gravely' disregarded the limits on their discretion. A critical question is therefore what are the limits or fetters on that discretion? Current case law establishes that, so far as equal treatment and transparency are concerned, there is no margin of appreciation in any event (see *Lion Apparel Systems v Firebuy Ltd* [\[2007\] EWHC 2179 \(Ch\)](#), [\[2007\] All ER \(D\) 177 \(Sep\)](#)).

So far as claims based on manifest error are concerned, contracting authorities do have a margin of appreciation, so that the court will only interfere with the exercise of discretion where an error has clearly been made. Claimants may argue that once they have proven a manifest error, if they can also show that the breach has caused them loss, or to risk suffering loss, the requirement of gravity is also satisfied. On one analysis therefore, whether or not the breach is

sufficiently serious will be a balancing exercise (as it is now) involving an assessment of the gravity of the breach in terms of consequences for the claimant.

The real question is therefore whether this judgment adds anything to the existing requirement for there to be a connection between breach, causation and loss. Before this judgment, as it stood anyway, in order to succeed on a challenge, claimants had to show that they suffered, or risked suffering, loss or damage as a consequence of a breach of the PCR 2015, [SI 2015/102, reg 91\(1\)](#) (and formerly PCR 2006, reg 47C(1)):

'A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.'

This link between causation and loss already has the effect of weeding out claims where the breach is unlikely to have affected the outcome of the competition.

This can be seen through the following example. A losing bidder argues that a contracting authority has manifestly erred in its evaluation of question number nine of 20 questions. The losing bidder argues that it ought to have received top marks for question nine. If the losing bidder were to be re-scored in respect of question nine and to be awarded top marks for question nine, the losing bidder would still be behind the winning bidder. The breach about which the losing bidder complains has therefore not caused the bidder to suffer any loss because the losing bidder still would not have won, even if the breach had not occurred.

In reality of course, a claimant often points to the cumulative effect of numerous small errors which, only when taken together, have significantly affected the scoring.

What are the practical considerations and key takeaway points for practitioners?

What the Supreme Court decision clarifies without doubt is that a claimant can wait until the end of the standstill period and allow an authority to enter into a contract before issuing its claim without losing its right to claim damages. It can therefore 'choose' to claim damages alone.

The judgment (and size of the settlement) has highlighted the high price for contracting authorities of entering into a contract while a claim for damages can still be brought. It may cause contracting authorities to think twice about rushing into a contract, and to extend the minimum standstill period so that the limitation period expires. This will help authorities avoid the risk of paying a contractor once for delivering the service and then facing additional liability in the form of damages to a losing bidder.

In his judgment on whether or not the NDA's breaches were 'sufficiently serious', delivered in anticipation of the Supreme Court judgment, Fraser J held that a failure to award a contract to the tenderer whose tender ought to have been assessed as the most economically advantageous offer is a sufficiently serious breach. Likewise, any breach which has affected the outcome of the competition.

What remains to be seen is how the courts will apply the 'sufficiently serious' test after the Supreme Court judgment, and whether it will add anything to the existing requirement for a connection between breach, causation and loss. If concerned that this will be a problem, some claimants may decide to omit a claim for damages when issuing their claim form. There is already a deterrent in this regard in the form of the greatly increased court fee if a claimant wishes to pursue a claim for damages, as compared to fee for seeking a declaration (which would include a claim to stop the procurement).

The risk with this approach is that a claimant is then limited to non-financial remedies in the form of an automatic suspension and, as we have seen, the court may be likely to lift the suspension if the test in *American Cyanamid v Ethicon* [1975] UKHL 1, [\[1975\] 1 All ER 504](#) is met. The 'claim an injunction first and add damages later if the injunction is lifted' tactic may encounter difficulties in the form of the subsequent action for damages being time-barred and/or it being an abuse of process.

Given the court's approach to lifting the automatic suspension, this would then leave the claimant with no remedy. Caution should be exercised before running an argument that damages are inadequate simply because they have not been claimed. It would be open to the court to respond that a claimant's decision not to pursue damages in circumstances where that course of action was reasonably open to it, cannot be a material factor in the application of the *American*

Cyanamid test. It would also be unattractive for a claimant to say that the reason it has not claimed damages is for fear that the breach about which it complains is not 'sufficiently serious' to entitle it to damages.

Emily Heard's practice involves dealing with all aspects of contentious and non-contentious procurement law. She is recognised as one of the country's foremost procurement litigators, having led on a number of complex and high profile actions that have contributed to the development of this area of law.

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