

Is the EU law principle of “*sufficiently serious breach*” still relevant for the award of damages under the Procurement Act? What is the value of EU law going forward?

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The context

- Reg 98, PCR 2015:

(1) Paragraph (2) applies if—

(a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and

(b) the contract has already been entered into.

(2) In those circumstances, the Court—

(a) **must**, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 100 requires the Court not to do so;

(b) **must**, where required by regulation 102, impose penalties in accordance with that regulation;

(c) **may** award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in sub-paragraphs (a) and (b);

(d) **must not** order any other remedies.

Energy Solutions v NDA

- Judgment of Edwards-Stuart J. [2015] EWHC 73
 - Domestic cause of action
 - No reference in PCR to nature or gravity of breach
 - Once established breach, damages should be assessed by reference to ordinary principles
 - “May” explained by: (i) simply follows the Remedies Directive; (ii) avoidable loss / mitigation; (iii) no obligation to award nominal damages where extent of damage not proven

Energy Solutions v NDA

“[NDA’s] submissions require too much to be read into the use of the verb “may” in regulation 47J(2)(c). I consider that much clearer wording would be required if the Regulations were intended to introduce the novel (in English law) concept of discretionary damages”.

Court of Appeal [2015] EWCA Civ 1262

- Is the claim for damages under the PCR a discretionary one? *“I am sure that it is not”* (Vos LJ).
- No requirement in English law for a breach of statutory duty to be shown to be "sufficiently serious" before damages must be awarded.
- *“A breach is a breach. Once a breach is established, the victim of that breach is entitled to be compensated in damages such as to put the victim in the position he would have been in had there been no breach”*.
- The second *Francovich* condition is a more restrictive condition for liability in damages than prevails in English law and is therefore displaced by the national rules.
- The Government *“did undoubtedly intend that English law principles should be applied to the determination and assessment of damages awarded under the Regulations”*.

Supreme Court [2017] UKSC 34

- *Where the Court of Appeal in the present case went in my opinion clearly wrong was in its assumption that any claim for damages under the 2006 Regulations was no more than a private law claim for breach of a domestically-based statutory duty, and for that reason subject to ordinary English law rules which include no requirement that a breach must be shown to be “sufficiently serious” before damages are awarded”.*
- *“...the UK legislator will not go further than required by EU law when implementing such a scheme, without considering this and making it clear. That is fortified by the legislator’s clear intention not to gold plate when substituting the new Part 9 scheme for the old in 2009. In these circumstances, I consider that the 2006 Regulations as amended in 2009 should be read as providing for damages only upon satisfaction of the Francovich conditions. That is also consistent with the use of the word “may” which otherwise seems to me to have no real significance”.*

PA 2023

- Section 104: the court “*may*” make an order for damages
- Coulson LJ in *Braceurself*: “*In a public procurement claim, where an unsuccessful bidder claims damages against the contracting authority, the claimant must prove...that the breach is 'sufficiently serious' to warrant an award of damages (sometimes called Francovich damages). Although this is a concept originating in European Law, it remains unamended by the new Procurement Act 2023. It is not a test that fits very easily either into the English common law generally, or the world of public procurement challenges in particular*”

Principles of construction

- **Bennion 25.1**: *“The common law and earlier statutes are potentially relevant to the interpretation of an enactment as they provide the conceptual framework within which it operates. For example, a word or phrase used in a context dealing with a particular branch of law may need to be interpreted in light of the established meaning that it has in that area of law, which may then have the effect of attracting a large body of law relating to that concept”*
- **Bennion, 24.6 and the “Barras principle”**: *Where a new Act retains the wording used in the previous iteration of that legislation then a rule of statutory interpretation is that Parliament intended there to be continuity in the interpretation of that provision, subject to any evidence to the contrary*

Green Paper & consultation docs

- Original proposal was to cap damages
- The risk of speculative claims *“has been mitigated to some extent by recent UK court rulings which have set a legal test whereby damages can only be awarded where the breach is ‘sufficiently serious’”*
- Cap proposal was dropped: *“existing case law principles already mitigate against the risk of unjustified compensation payments”*

Hansard

Lords, Seventh Sitting, Alex Burghart (Parliamentary Secretary, Cabinet Office)

“In common with the existing regime, the award of damages to a supplier following a breach of statutory duty is discretionary, and judges can continue to make an appropriate assessment on the award of damages, including quantum, taking into account all the circumstances of the case, including the nature of the breach and its consequences”.

Factors relevant to “*sufficiently serious*”

- *Braceurself* [2024] EWCA Civ 39
 - Focus on nature of breach, not effect
 - Focus on conduct and state of mind of infringer
 - Depends upon all facts and circumstances of breach, rather than any one finding being determinative
 - The “*culpability spectrum*”: deliberate decision to do something with a high chance of loss v going wrong due to “*inadvertence, misunderstanding or oversight*”
 - Foreseeability is relevant
 - Effect of breach may be a relevant factor but caution is required

Which factors are relevant to PA 2023 discretion?

Potentially persuasive areas of case law?

- Established yardstick provided by EU law
- Tort but damages are recoverable as of right
- HRA – discretionary damages; “*necessary to afford just satisfaction*”; equitable approach

Public funds & public interest

“In any claim against a public authority for financial compensation in respect of past discrimination it must be remembered that the general public (often the general body of taxpayers) will be footing the bill. In determining the requirements of just satisfaction...regard should be had not only to the victim’s rights but also to the interests of the public generally”

Lord Browne of Eaton-under-Heywood, *R (on the application of Wilkinson) v IR Commissioners* [2005] UKHL 30

Deterrence and ensuring compliance by public bodies

- One function of awarding damages can be to ensure that “*lessons are learned*” and to ensure compliance in the future: Lady Hale in *A v Essex CC* [2010] UKSC 33
- Damages “*will – or ought to – concentrate the mind of the wrongdoer, especially where the latter is a public authority which is capable, unless it changes its ways, of repeating its error*”: *Faulkner v SS for Justice* [2011] EWCA Civ 349

Scale and manner of violation

“In addition to the violation committed being particularly serious, the manner or way in which the violation took place has in some cases been considered sufficiently serious to lead the ECtHR to award damages”

Anufrijeva v London Borough of Southwark
[2003] EWCA Civ 1406

Compensation

“The fundamental principle underlying the award of compensation is that the Court should achieve what it describes as restitutio in integrum. The applicant should, insofar as this is possible, be placed in the same position as if his Convention rights had not been infringed. Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded”

Anufrijeva v London Borough of Southwark [2003] EWCA Civ 1406

Awards for pecuniary loss

- *Gas and Electricity Markets Authority v Infnis Plc* [2013] EWCA Civ 70: award of £94,393.62
- *Breyer Group Plc v Department of Energy and Climate Change* [2015] EWCA Civ 408: settled for £60m
- *Yukos v Russia* 59 EHRR SE12: £1.9 billion

Role of EU law

- Persuasive status, as with other jurisdictions, when reasoning from first principles
- When considering relevant factors to HRA discretionary damages, courts have referred to approach in Canada and South Africa: *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406
- “*A Global Community of Courts?*”, Frontiers in Physics, 6 July 2021
- “*Widening Horizons*” The influence of comparative law and international law on domestic law, Lord Bingham

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