
When Two Worlds Collide:

Damages - Where are we now?
+
Manifest Error post ES v NDA

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Overview

- **Sufficiently Serious:** where are we?
 - UK
 - Ireland
 - EU
 - **Manifest Error:** Where are we?
 - How did we get here? (*public law v private law dichotomy...*)
 - Where do we want to be?
 - Discussion points
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Before we begin... (two of them...)



“The Red Corner” and “The Blue Corner” includes:

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- Francovich (1991)
 - Brasserie du Pêcheur /Factortame (1996)
 - *Combanatie Spijker* (CJEU) 2010
 - *EnergySolutions v NDA* (Supreme Court) (2017)
 - *WordPerfect Translation Services* (Irish Court of Appeal)
 - [*Stadt Graz v Strabag AG*] ? (2010)
- *EnergySolutions v NDA* (Court of Appeal (2016) [*in part*])
 - *EnergySolutions v NDA* (No 3) (TCC) (2016)
 - *Fosen–Linjen AS v AltB AS* (EFTA Court + the Commission as intervener)
 - *Bombardier v LUL* (2018)
 - [*Stadt Graz v Strabag AG*] ? (2010)
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ES v NDA - Reprise

Key Facts

- Magnox competition: 10 + 2 sites. Four Bidders
- Competitive Dialogue
- RSS = ES (40%) + Bechtel (60%): 2nd placed
- CFP awarded contract (Bid Value £3.8 billion)
- **1.06%** delta on evaluation
- Manifest error challenge to evaluation
- 717 Requirements per bidder (x2 = **1434**)
- **40** of those challenged; **22** upheld/conceded
- Common ground: all good faith/non-deliberate errors. See e.g. No 3 Judgment Para 61:

“There are ... no findings that there was any deliberate intention to infringe in this case”
- Oral witness evidence at trial
- Consolidation process

Timeline / Sequence

- Competition: April 2012 to March 2014.
- Standstill: 31 March 2014 – 15 April 2014
- Proceedings issued: 28 April 2014 (+2 subsequently)
- **TCC Preliminary issues Judgment (No 1)**: 25 January 2015
- Liability Trial: November 2015
- **Court of Appeal (PI) Judgment**: December 2015 (SC permission May 2016)
- **TCC Liability Judgment (No 2)**: 29 July 2016 (part confidential)
- **TCC Liability (PI) Judgment (No 3)**: 20 December 2016)
- **Supreme Court (PI) Judgment**: 2/3 March 2017
- Settlement / CFP Contract termination / Holliday Inquiry: 27 March 2017
- **Supreme Court (PI) Judgment**: 11 April 2017

State Liability Principles + Damages

- **Factortame factors**

- Rule of law intended to confer rights
- Breach must be **sufficiently serious**:

Multifactorial test/manifest & grave disregard

- Direct causal link between breach and damage
- See also *Delaney v MIB*
- Remedies Directive / 89/665/EEC
- Subsidiarity

PCR 2015 Reg 98(2) (prev 47(J)(2)2006)

“In those circumstances, the Court

a) Must, if it is satisfied that any of the grounds for ineffectiveness ...

b) Must, where required by Reg 102 [47N] impose penalties ...

c) May award damages to an economic operator which has suffered loss or damage as a consequence of the breach ...

- UK Procurement rights = Statutory tort

Combanatie Spijker

- **Referred question:** *“If [the] Authority is required to pay damages, does community law set criteria for determining and estimating those damages, and if so what are they?”*
 - **Answer (Para 86 – 87)**
 - 86. *“Article 2(1)(c) [Remedies Directive]... contains no detailed statement either as to the conditions under which an awarding authority may be held liable or as to the determination of the amount of damages which it may be ordered to pay”*
 - 87. *“That provision gives concrete expression to the principle of state liability for loss and damage caused to individuals as result of breaches for which the state can be held responsible ... The court has held that individuals harmed have a right to reparation where ... [the Factortame conditions are met] ...”*
 - CJEU cross-referenced its finding to the *Stadt Graz* judgment
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- Domestic Austrian statute: “*Culpable infringement*” = *Tender costs; Loss of Profit referred to the Courts*
 - Case C-70/06 Commission v Portugal
 - **Question referred:** “*Do Articles 1(1) & 2(1)(c) ... preclude a national rule under which claims for damages ... are subject to the requirement of fault ...*”
 - **Answer (Para 45):**
“*Directive 89/665 must be interpreted as precluding national legislation which makes the right to damages ... conditional on that infringement being culpable ...*”
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Approach of ...

- **Court of Appeal** in *ES v NDA*:
Factortame applies; conscious UK use of statutory (private law) tort mechanism
- **Supreme Court** in *ES v NDA*
 - *Combanatie Spijker* definitive
 - Noted *Spijkjer* reference to Stadt Graz (Para 90)
 - No inconsistency: *Acte Claire* so no CJEU reference
 - Noted UK conscious/explicit decision not to gold plate implementation
 - *Matra* (CA) disapproved
 - Subsidiarity
- **EFTA Court** in *Fosen–Linjen*:
 - Commission intervention: Remedies Directive v TFEU Principles submission
 - Principle of Effectiveness
 - Acting as public authority vs ‘as merchant’ (commercial act)
 - Preferable to remedy error before award but damages important
 - Concern that breach may = damages in one member state but not in another
 - Simple breach of procurement law by definition = ‘sufficiently serious’
- **TCC in Liability judgment No 3** – *ES v NDA*

Relevance to Adequacy of Damages

- American Cyanamid test
 - *Wordperfect Translation Services (Ireland CA) (2018)*
Contrast e.g with:
 - *Bombardier v LUL – TCC (2018)*
 - Impact on prospect of definitive Appeal rulings on ‘*sufficiently serious*’ if balance of convenience = ‘new normal’ as the deciding factor?
 - For earlier example of that approach see *Alstom v Eurostar No 1 (2010)*
 - Where this leaves bidders (and authorities) ...
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Manifest Error (not transparency aspects)

- Principles : *Letting International v Newham*; *Lion v Firebuy*; *Woods Building Services v Milton Keynes* etc

- *SRCL v NHSE (2018) Judgment at 197:*

“...The courts have made it clear...that their function is not to reconsider and remark every evaluation of every tender in which a challenge is brought. In matters of judgement the contracting authority has a margin of appreciation. In matters of evaluation, only manifestly erroneous conclusions or scores will be reconsidered. The approach has its parallel in other public law fields, for example decisions of Ministers. In general terms in judicial review, the test the court applies is not whether it agrees with the decision of the Minister in question, but rather whether the decision was reached lawfully by taking account of all relevant matters, and not taking into account irrelevant ones”

Manifest Error: ES v NDA

- The two stage approach (Judgment paras 296, 276):
 - First stage – Lawfulness of the decision to be assessed by reference only to reasons given at the time
 - Second stage: other reasons/evidence are relevant to causation but not breach
 - “*Necessary re-marking exercise*” by the Court (*para 786*) if stage 1 not passed by the authority in order to decide “*what the mark should have been*”.
 - Brief examples in practice
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Thank you



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