

# What is a “Serious Breach” of the Procurement Regulations?

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**What is considered to be  
a “sufficiently serious breach,”  
in the context of the remedy of damages  
being available only when there is  
a “sufficiently serious breach” of the  
procurement regulations?**

- Origin and meaning of “serious breach” – ***Frankovich***  
Conditions?
- ***Energy Solutions v NDA***
- The EU approach – ***Fosen-Linjen*** in the EFTA Court
- The UK law and its application in ***Energy Solutions***
- Subsequent cases
- When is a breach not sufficiently serious?

# Francovich Conditions



3 conditions to be satisfied:

- 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 the obligation** resting on the State and the **damage sustained** by the injured parties

*Brasserie du Pecheur* and *Factortame* paragraph 51

# *Energy Solutions v Nuclear*

## *Decommissioning Authority (NDA)*



- Decommissioning 12 Magnox Power Stations + 2 others for the Nuclear Decommissioning Authority (“NDA”)
- Claimant part of an unsuccessful consortium bidder – **RSS**, who scored **85.42%**
- Contract awarded to **CFP** who scored 86.48%
- Energy Solutions challenged after the expiry of the 10 day standstill and after the contract was awarded
- Claim for damages £100 million

## Held

- CFP should have been disqualified from the competition for failing two separate threshold requirements
- In any event, RSS would have won the competition had the NDA not made “many manifest errors” in its assessment of the tenders, but for which NDA would have awarded RSS a score of 91.48% and CFP a score of only 85.56%



- Whether an award of damages was only required when the breach was “sufficiently serious” (*Francovich*)
- Whether the Public Contracts Regulations 2006 conferred a power to award damages (a) in the case of any breach or (b) only in the case of a “sufficiently serious” breach

# *Energy Solutions v NDA* (2017) SC findings on preliminary issues



- ***Francovich*** applies to the Directive, so that an award of damages was only required when the breach was “sufficiently serious”
- ***Francovich*** also applied to the enactment of the Directive in UK law – so that under the Regulations the Claimant has to show that a breach was “sufficiently serious”

Commission argued:

- A simple breach of a sufficiently clear rule of EU law should be sufficient
- To attempt to “re-import” a condition from the general principles to the Remedies Directive would be inappropriate

Commission argued:

- As damages are frequently the only remedy available, they should not be made more difficult or less advantageous to obtain than other remedies under the Remedies Directive
- Remedies Directive is clear that any infringement of public procurement law should be followed up and should not be left unattended because the breach is not sufficiently serious



## EFTA Court's analysis

- CA carrying out a commercial act in a tender process, not an act of public authority
- Preferable that a breach is corrected before contract takes effect, but there may be cases where it can only be remedied by damages
- Remedies Directive precludes national legislation which requires proof of fault or has a general exclusion or limitation to specific cases e.g. breaches of a certain gravity

## Conclusion:

- The gravity of a breach of the EEA rules on public contracts is irrelevant for the award of damages
- An award of damages does not depend on whether the breach was (i) due to culpability and conduct deviating markedly from a justifiable course of action, or (ii) occurred on basis of material error or (iii) attributable to existence of a material, gross and obvious error

## Conclusion:

- A simple breach of public procurement law is in itself sufficient to trigger the liability of the CA to compensate the person harmed for the damage incurred, pursuant to Art. 2(1)(c) of the Remedies Directive, provided that the other conditions for the award of damages are met including, in particular, the existence of a causal link

# Current UK Law?



- The EFTA case is persuasive but not binding
- The SC has spoken, albeit their decision was a surprise to many of us
- No further guidance from the SC on what “sufficiently serious” might mean, or what they referred to as an “excusable” breach might be
- Going to look at how the Courts here are likely to approach the question

# Principles in *Factortame* and *Delaney*



- Objective test
- Bad faith is a factor to be objectively considered
- Moral culpability/egregious conduct/flagrant misconduct not necessary
- The weighting of each factor varies from case to case, no single factor necessarily decisive
- Seriousness of the breach will always be an important factor
- Where the CA had minimal or no discretion, it will be easier to prove sufficient seriousness



(1)

(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 mind of the infringer and in particular whether the infringer was acting intentionally or involuntarily (i.e. deliberate or inadvertent breach);



(2)

(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.

# How multifactorial approach was applied in *Energy Solutions*



- Overall breach was the failure to award to the MEAT tenderer
  
- Underlying breaches
  - 2 Disqualification breaches
  - 20 Scoring breaches, of which 10 were also breaches of equal treatment and were 6 breaches of transparency

# Overall breach – award to non MEAT



- Factors 1 and 2 satisfied; clear, precise requirement and no discretion whether or not to award to MEAT tenderer
- These factors alone sufficient to satisfy test
- Factors 3, 4 and 8 do not arise
- Factors 5 and 6 – no allegation of bad faith and NDA decision not to extend standstill was when they believed the procurement was unlawful
- Factor 7 – RSS powerfully affected, lost £4.2 billion contract; personnel redundant and UK business sold

- The 2 threshold breaches also each on their own sufficient to satisfy the test
- Their individual effect is the same as the overall breach – the winning bidder should have been disqualified and RSS should have won

# 20 separate breaches of evaluation requirements



- each of the breaches in respect of the Evaluation Requirements are sufficiently serious when, or if, their effect (either individually or cumulatively) upon the scoring is such that the outcome of the competition would be altered
- the same principles apply regardless of how breaches of obligation are characterised, whether manifest error, breaches of the obligations of equal treatment; and/or transparency

# *Cemex UK v Network Rail (2017)*



## **(1) – Early disclosure**

### **Automatic suspensions and early disclosure**

per Coulson J (as he then was)

*“Whilst I acknowledge that ... the decision in Energy Solutions came as something of a surprise to procurement 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.*

# *Cemex UK v Network Rail (2)*



*“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.”*

## Automatic suspension

- Court could not conclude at an interlocutory stage whether or not the alleged breaches were “sufficiently serious”
- Point to be taken into account in considering the adequacy of damages as an additional requirement the Claimant had to satisfy to recover damages at all
- The questions was part of the consideration necessary to arrive at a preliminary conclusion as to the effectiveness of the remedy

# When is a breach not sufficiently serious?



- No effect on the outcome of the competition?
- Loss of a chance?
- Minor or trivial breaches?
- “Excusable”?

**Thank you for listening**

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