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# Successful judgment of the Court of Appeal in Braceurself v NHS England [2024] EWCA Civ 39

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Procurement: when is a manifest error in the marking of a bid "sufficiently serious"?

Fenella Morris KC and Benjamin Tankel represented the successful Defendant, NHS England. They were instructed by Sarah Whittle and Daniel Taylor of Blake Morgan LLP.

**Background**

In a successful procurement claim, there are two main forms of possible relief:

(1) Where the contract has not already been awarded, then the contract may be awarded to the bidder that ought to have succeeded.
(2) Where the contract has already been awarded, then the bidder that ought to have been successful may recover compensatory damages.

In practice, most cases – at least in the UK – are about the second of these.

Generally, where a claimant succeeds in establishing a breach of EU law (of which procurement law is a branch), they do not automatically recover damages. In this respect, a claim for a breach of EU law differs from its domestic equivalent of a breach of statutory duty. Rather, the successful claimant must also satisfy the *"Francovich criteria"* (Francovich v Italy (C-C/90) [1991] ECR I-5357). These are that (i) the EU law in question was intended to confer rights upon individuals; (ii) that the breach of the EU law was "sufficiently serious"; and (iii) there is a direct causal link between the breach and the claimed losses.

In *R v Secretary of State for Transport Ex p. Factortame (No.5)* [2000] 1 AC 524 ("*Factortame*"), the House of Lords identified a (non-exhaustive) list of factors for assessing whether a breach of EU law was "sufficiently serious". These included, amongst other things, the importance of the principle of EU law that had been breached, and the excusability of the error.

Historically, there was a debate as to whether the *"sufficiently serious"* test, as elaborated in*Factortame*, was applicable to public procurement claims. In *Energy Solutions v Nuclear Decommissioning Authority* [2017] UKSC 34, the Supreme Court decided that it was. Ever since, practitioners have had to contend with *how* exactly it applies in practice.

Prior to *Braceurself,* the only other case in which a court had grappled in detail with whether a breach was sufficiently serious was *Energy Solutions EU Limited v Nuclear Decommissioning Authority [*2016] EWHC 3326 (TCC) per Fraser J (as he then was). The working assumption amongst most procurement practitioners was that, in a case where it could be shown that a breach of procurement law resulted in the contract being awarded to the "wrong" bidder, the *"sufficiently serious" t*est would automatically be satisfied. The focus, in other words, was thought to be squarely upon the impact of the breach upon the bidder. On at least one reading, the decision of Fraser J in *Energy Solutions w*as consistent with that approach.

**Facts of this case**

The procurement exercise was for the provision of high-street, NHS, orthodontic services in the South of England. Two bidders entered the competition: PAL and Braceurself. PAL scored 2.25% more than Braceurself and so won the competition. Braceurself challenged the decision. The automatic suspension was triggered.

In November 2019, NHS England applied to lift the automatic suspension: Reg.96(1)(a). HHJ Bird acceded to that application, in large part upon the basis that damages would be an adequate remedy [2019] EWHC 3873 (TCC). Experience shows that the vast majority of such applications are decided the same way and on the same basis. Following the lifting of the automatic suspension, the contract was awarded to PAL.

During trial (in February 2022), all of Braceurself's pleaded challenges were rejected, but a new one emerged. One of the quality questions was concerned with the issue of accessibility. Braceurself, which was located in first floor premises, proposed a "stairclimber" to assist those with accessibility issues. The evaluators mistakenly marked the bid on the basis that Braceurself had proposed a "stairlift", which is a different kind of device. They took issue with the proposal to use a "stairlift". The trial Judge concluded that, but for the confusion between a stairclimber and a stairlift, Braceurself would have submitted the highest scoring bid, albeit by just 0.25% [2022] EWHC 1532 (TCC).

NHS England contended that such a relatively trivial and innocent error was not *"sufficiently serious" to* sound in damages, notwithstanding the fact that it had caused the contract to be awarded to the "wrong" bidder. The trial judge considered each of the Factortame factors and agreed that that the breach was not "sufficiently serious" [2022] EWHC 2348 (TCC). Braceurself appealed to the Court of Appeal on a number of grounds:

(1) That if a breach of procurement law resulted in the "wrong" bidder being selected, that was automatically (without more) a "sufficiently serious" breach that would result in an award of damages.

(2) That, even if the Factortame factors needed to be considered, the "excusability" of the error was irrelevant. Bad faith might make a breach "sufficiently serious", but absence of bad faith was no more than a neutral factor.

(3) That the principle of effectiveness in EU damages required that, where a contractor had been deprived of a contract which it ought to have won, either the automatic suspension should not be lifted or damages should be awarded. Such a bidder should not be left without no remedy at all.

The Court of Appeal dismissed each of these grounds. On Ground 1, it held that if impact upon the bidder were necessarily decisive, that would collapse the second (*sufficiently serious) a*nd third *(direct causal link)* factors in *Francovich* [Jt.51-53]. Further, the *Factortame f*actors were focussed upon the nature and quality of the breach, rather than upon the consequences for the damaged party [Jt.54-56]. In addition, breaches of procurement law were usually prosaic errors by public officials in the marking of a bid; they did

not generally involve questions of high EU principle: [Jt.57-59, 63]. The foreseeability of adverse consequences for a bidder was "*plainly relevant",* and is a matter of fact that would need to be proved at trial [Jt.68]. But the relevance of a bidder in fact suffering adverse consequences would depend upon the circumstances, may have *"little weight",* and *"can never, on their own, be determinative"* of the *"sufficiently serious"* test: [Jt.70].

Ground 2 turned in large part upon a close reading of previous domestic authorities. Of more interest, the Court of Appeal held that the concept of excusability related equally to errors of fact and of law [Jt.77]. Further, the concepts of *"manifest error" a*nd *"excusability"* were not mutually exclusive. For example, a factual error (such as the difference between a stairclimber and a stairlift) could be obvious in hindsight but understandable at the time it was made [Jt.79]. That an inadvertent error was *'very much at the excusable end of the spectrum"* would be *"plainly relevant"* to a consideration of the seriousness of the breach [Jt.83]. As such, contracting authorities will therefore wish to adduce evidence of good intentions, or at least inadvertence (if that be the case) [Jt.87]. It may also be relevant that, with the exception of a proven error(s), a procurement exercise was otherwise carried out well [Jt.91].

As to Ground 3, that would (*ex hypothesi)* only arise for consideration in a case in which the sufficiently serious test was not otherwise met. As such, it essentially involved the submission that the principle of effectiveness overrode the Francovich test. There was no authority for that proposition [Jt.110-111]. In any event, the principle of effectiveness was concerned with ensuring a party could access pre-existing rights; it did not create a remedy where there otherwise was none, such as where the sufficiently serious test was not made out [Jt.113]. In any event, it was an inherent feature of the procurement regime that the purpose, procedure, and tests to be applied at the stage of the application to lift the automatic suspension were different from those at trial. This contained the in-built possibility of potentially "inconsistent" results that would leave a bidder without a remedy [Jt.118-119].

**Respondent's Notice**

Whilst it was not the main focus of the appeal, and will be of limited wider interest, it is worth briefly noting that NHS England filed a Respondent's Notice contending amongst other things that on the facts of the case the stairclimber/stairlift error should not have led to an adjustment of the scores at all. That issue gave rise to a judgment on the proper scope of a Respondent's Notice ([2023] EWCA Civ 837) that is interesting in its own right as a point of general civil procedure but is beyond the scope of this article. For present purposes, it is worth briefly noting that the Court of Appeal agreed that, on the facts of this case, the scores should not have been adjusted at all. Strictly speaking, that means that the *Francovich* points did not arise on the facts of the case. However, the Court of Appeal correctly described the *Francovich* arguments as being the focus of the appeal and, subject to any appeal to the Supreme Court, the decision of the Court of Appeal on the *Francovich* point is likely to be authoritative.

**Appeal to the Supreme Court?**

It remains to be seen whether Braceurself will seek leave to appeal to the Supreme Court. The tone of the Court of Appeal's judgment makes it appear as though it is intended to be the final word on the matter. The Supreme Court may also be reluctant to interfere in a case in which, as it eventually transpired, the point did not even arise on the facts of the case (see the Respondent's Notice section above).

**Points for practitioners to consider**

*General impact:* The decision of the Court of Appeal in Braceurself reverses the received wisdom as to the recoverability of damages in procurement claims. It does so by placing the focus upon the nature and quality of the breach rather than upon the consequences for the aggrieved bidder. The judgment is likely to make it materially more difficult to recover damages in procurement claims. As such, it will be a highly relevant factor in the calculation of risk for any potential claimant considering whether to bring a procurement claim.

*A case confined to its own facts?* A key question for practitioners is likely to be whether this was an exceptional case that will be confined to its own facts. At [44], the Judge observed that the case was *"unusual, if not unique"* because of the large gap between the low culpability of the contracting authority and the extreme consequences for the bidder of a single marking error. In our experience, however, it is not uncommon to find cases in which the scores are very close, and where potentially material errors may have been inadvertent.

*Disclosure:* At the start of a procurement claim, the bidder will usually have a relatively limited range of documents: the ITT, their own bid, the scoring, and any reasons contained in an *Alcatel letter.* It can already be difficult to identify potential breaches on the face of the documents usually available at the start of a claim. It is likely to be even more difficult, based on documents of this kind, to make an assessment of the state of mind of the alleged infringer. Evidence of state of mind is only likely to emerge later, with disclosure of evaluation notes and perhaps even exchange of witness evidence. This too is likely to increase the risk of bringing a procurement claim. Might it necessitate changes to the disclosure regime? In some European countries, where procurement claims are dealt with by specialist tribunals, full disclosure is given automatically upon the making of any challenge.

*Interim applications:* The decision might also have a bearing upon what takes place at the stage of any application to lift the automatic suspension. There is obvious scope for interaction between (i) the risk of not being able to establish sufficient seriousness; and (ii) consideration of the adequacy of damage at the interim stage.

*Evidence:* In their witness evidence, contracting authorities will wish to place particular focus upon the *Factortame* factors. This will include, for example, evidence of good intentions, of inadvertence, that a procurement exercise was otherwise carried out well, and that harm was not foreseeable (should those things be the case).

**References**

This claim has given rise to a number of published judgments, as follows:

(1) Application to lift the automatic suspension: [2019] EWHC 3873 (TCC)
(2) Judgment on liability: [2022] EWHC 1532 (TCC)
(3) Judgment on whether the second limb of Francovich made out: [2022] EWHC 2348 (TCC)
(4) Judgment on proper scope of Respondent's Notice: [2023] EWCA Civ 837
(5) Judgment on appeal: [2024] EWCA Civ 39