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Case No: CA-2023-000048

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
(TECHNOLOGY AND CONSTRUCTION COURT)
Alexander Nissen KC (Sitting as a Deputy High Court Judge)
[2022] EWHC 2348 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2024

Before:

LORD JUSTICE COULSON
LORD JUSTICE DINGEMANS
and
LORD JUSTICE SNOWDEN

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Between:

Braceurself Limited	**Appellant**
- and -	
NHS England	**Respondent**

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Philip Moser KC & Amardeep Dhillon (instructed by Acuity Law Ltd) for the **Appellant**
Fenella Morris KC & Benjamin Tankel (instructed by **Blake Morgan LLP**) for the **Respondent**

Hearing date: 29 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 30 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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No 2: SUBSTANTIVE APPEAL

LORD JUSTICE COULSON:

1. Introduction

1. In a public procurement claim, where an unsuccessful bidder claims damages against the contracting authority, the claimant must prove, not only a breach of the Public Contract Regulations 2015 ("PCR"), but also 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[1], or the world of public procurement challenges in particular. This appeal is perhaps a paradigm example of some of the practical difficulties which the test can create.

2. The primary issue in this appeal is whether, as a matter of principle, the judge's finding that, but for the respondent's breach, the appellant would have been awarded the contract "was decisive on the question of sufficient seriousness" (see paragraphs 26, 29 and 31 of the appellant's skeleton argument). This argument would, in many cases, mean that the *effect* of the breach automatically overrode any other factor. In addition, there are two further potential issues of principle in play, concerned with the culpability of the infringer and the principle of an effective remedy, which also arise from the 'sufficiently serious' test and the particular facts of this case. Still further, the respondent has raised, by way of a Respondent's Notice, a number of challenges to the core findings of the judge. There were therefore times during the hearing when it felt as if the entire litigation was being rerun on appeal. This risked obscuring the underlying issues of principle, which are not unimportant to those who practice in the public procurement field.

3. Accordingly, in an attempt to cut through the morass of detail, I set out in Section 2 below, the factual background, focusing on the original procurement and the various stages in the litigation. In Section 3, I identify what I consider to be the principal issues raised in this appeal. In Section 4, I summarise the relevant principles of law. Thereafter, in Sections 5-8, I deal with the three points of principle said to arise on this appeal, as well as the evaluative exercise undertaken by the judge. I address the standalone points in the Respondent's Notice in Section 9. There is a short summary of my conclusions in Section 10. The Court is very grateful to leading counsel on both sides for the focussed nature of their submissions.

2. The Factual Background

2.1 The Original Procurement

4. The respondent is the statutory authority responsible for, amongst other things, NHS South, Central and West Commissioning Support Unit. In February 2019, the respondent completed a nationwide procurement for the provision of Orthodontic Services, of which Lot reference PR002368 (WSX18), located in an area of East Hampshire, formed a part. The appellant, Braceurself Limited, was the incumbent

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[1] See Lord Hope's comments in *Factortame* at page 550C-E, where he called such an assessment "a novel task for the courts of this country".

provider and one of two bidders for the Lot, which comprised a 7-year contract worth £32.7 million over its whole lifetime.

5. The appellant's bid was unsuccessful; the Lot was awarded to a company known as PAL in these proceedings. However, the difference between the two bids was very close. PAL scored 82.5% whilst the appellant scored 80.25%, a difference of just 2.25%. It followed that even minor breaches of duty under the PCR by the respondent, either in over-scoring PAL's bid or underscoring the appellant's bid, could have had a decisive impact on the outcome of the competition.

2.2 The Lifting of the Automatic Suspension

6. The appellant issued proceedings against the respondent alleging breach of the PCR. As originally formulated, this claim was for the setting aside of the award to PAL. The respondent applied under Regulation 96(1)(a) to lift the automatic suspensions of the contract award process, and the appellant applied to add a claim for damages.

7. The applications were heard by His Honour Judge Bird, sitting as a High Court Judge. His judgment is at [2019] EWHC 3873 (TCC). The judge granted the respondent's application to lift the automatic suspension. He also granted the appellant's application for permission to add the claim for damages. The primary reason for the lifting of the suspension was Judge Bird's conclusion that "in this case damages would be an adequate remedy" [45].

2.3 The Substantive Proceedings

8. It was a feature of the substantive proceedings in this case that the appellant's claims were very wide-ranging. They attacked numerous aspects of the scoring of their own bid, and also made detailed criticisms of the scoring of PAL's successful bid.

9. One of the numerous criticisms made of the marking of the appellant's bid concerned accessibility of premises (referred to in the papers as marking area CSD02). This complaint was made in general terms at the time of the applications before Judge Bird, but the specific complaint under this head was not identified and pursued until the trial itself. The general complaint was that "Braceurself's bid had clear items relating to accessibility of premises in line with the Equality Act 2010, in contrast to PAL. There should have been no marking down for the reference to the stairlifts." But the specific point centred on the evaluators' assumption that a stairclimber – which is what the appellant had included in its bid as a means of access to the first floor – was a form of fixed stairlift, when it was in fact a rather more flexible piece of equipment. It was said that, in consequence of this manifest error, the appellant's score should have increased from a 3 to a 4 on this item, which would have added 2.5% to their score. That would have been enough to change the outcome of the competition, because it would have meant that the appellant, not PAL, was the Most Economically Advantageous Tenderer ("MEAT"), albeit by just 0.25%.

2.4 The Liability Judgment

10. The substantive trial, and all hearings thereafter, were dealt with by Mr Alexander Nissen KC, sitting as a Deputy High Court Judge ("the judge"). His judgment on liability is at [2022] EWHC 1532 (TCC). He said that he was generally impressed by

the careful way in which the evaluators had tried to carry out their functions and concluded that the procurement itself was carefully planned and well organised. He rejected all but one of the numerous challenges brought by the appellant.

11. The one complaint that the judge upheld concerned CSD02. Even then, at [121]-[126], he rejected both the appellant's arguments that PAL's score for this element of the bid should have been reduced from 3 to 2 on this item, and many other criticisms made of the scoring of the appellant's bid. However, at [127]-[149] the judge accepted the submission that a manifest error had been made in the respondent's assessment of accessibility (because of the factual misunderstanding about the nature of the stair climber) and that this impacted on its score for CSD02. As to the score which the appellant should have received, the judge explained at [186]-[188] why the appellant's score should have been increased from 3 to 4. That single increase of 2.5% meant that the appellant, not PAL, would have been the successful bidder. As the judge said at [189]:

> "It is therefore most unfortunate that in respect of one question, the Defendant fell into a manifest error, and by reason of the closeness of the two bidders, this manifest error had such drastic consequences."[2]

12. It had been everyone's intention that, as part of the liability trial, the judge should also deal with whether any breaches were "sufficiently serious" to justify an award of damages. However, as the judge explained, that was not possible at that stage because the parties had not been able to assist him on, for example, the sufficiently serious nature of the single breach in respect of CSD02. Accordingly, the issue as to the potential award of damages had to be delayed until later in the year.

2.5 The Francovich Judgment

13. What has been referred to as the *Francovich* Judgment in this case is at [2022] EWHC 2348 (TCC). Having set out the law between [13] and [25], and having set out the parties' contentions at [26]-[30], the judge then embarked on a consideration of the various factors relevant to the assessment of whether or not the breach was sufficiently serious to justify an award of damages. That assessment is from [33]-[86]. This was, like his earlier Liability Judgment, a detailed and thoughtful exercise.

14. In essence, the appellant's argument before the judge was the same as the argument now pursued on appeal, namely that the individual breach altered the outcome of the competition (because, but for the breach, the appellant would have been awarded the contract). The appellant therefore argued that this automatically meant that the breach was sufficiently serious to warrant an award of damages. The judge considered and rejected that argument in two places in his *Francovich* Judgment. First at [44] he said:

> "44. Having said that, its importance when set against the other factors remains a question of fact and degree. Although the Claimant has submitted that the failure in this case to award the contract to the operator offering the most economically advantageous tender, without more, constitutes a

[2] I address these findings of liability in greater detail in Section 9 below, when considering the Respondent's Notice.

> sufficiently serious breach entitling it to damages, I reject that submission. The mere fact that the principle breached is important cannot, of itself, be determinative. The same can be said of the second factor considered immediately below. As was clear from Factortame and Delaney, no single factor is decisive."

Later, when considering the necessary balancing exercise, the judge said:

> "88. Thus, the Claimant submits that since here an individual breach has altered the outcome of the competition, it is a sufficiently serious breach on the facts of this case, as it was in *Energy Solutions*. The Claimant argues that both of the first and second Factortame factors are in its favour and no others displace it, as in *Energy Solutions*. This is an attractive argument but, in the end, I do not agree with it. Firstly, I have found some factors operate in favour of the Defendant. Secondly, it is right to point out that Fraser J was not articulating a proposition of law that on every occasion in which a single breach has affected the outcome of the competition, the breach is necessarily sufficiently serious, irrespective of other factors. Indeed, Mr Holl-Allen accepted that Fraser J was not articulating a proposition of law to that effect. In any event, at [43], Fraser J positively excluded from his consideration a single breach case which had a powerful effect on the final score, which is just this case. I quite accept that the fact that the outcome of the competition would have been different but for the breach is a highly material one, which I take into account, but it cannot necessarily be determinative. In my judgment, it must also be relevant to consider, and weigh in the balance, the fact that the competition was very close so that even a small change had a significant effect on the outcome. The whole point about an evaluation of the sufficiency of the seriousness of the breach is that one should be able to take account of extent and degree. A breach, or series of breaches, which impacted upon the outcome of the competition (i.e., produced a different winner) where the score was increased by a mere 0.25% may be treated differently from a breach which impacted upon the outcome where the score was increased by something significantly higher than that.
>
> 89. There is force in the Defendant's point that the Claimant's key submission in this case does little more than rely on breach and causation of damage sustained, (i.e., that the infringement caused it to lose the contract) which gives no effect to the second and distinct Francovich requirement that the breach must also be sufficiently serious. The Claimant's answer, namely that it relies on the actual loss of the contract, not the mere loss of the chance of winning the contract, is at best an incomplete one."

15. Taking into account all of the relevant factors, the judge concluded his *Francovich* assessment in the following terms:

> "90. Having regard to all the factors set out above, I have come to the firm conclusion that this breach was not sufficiently serious as to entitle the Claimant to a remedy in damages. The phrase "sufficiently serious" indicates that a fairly high threshold must be passed before it can be said that the test has been satisfied and, having regard to all the facts and circumstances, I do

not consider it to have been in this case. In short order, given what I have already said, my reasons can be summarised as follows:
(a) This was a single breach case in a very close competition where, because it was close, the single breach happened to have had a powerful impact on the outcome.
(b) The breach, arising because the evaluators made two errors in misreading the Claimant's bid, was both at the excusable end of the spectrum and minor. It was the result of a misunderstanding (cf: Lord Hope in *Factortame* at p.551H).
(c) The breach was inadvertent, rather than deliberate, and self-evidently occurred in good faith.
(d) The Defendant's purpose in carrying out the scoring of CSD 02 was to maximise access to publicly funded orthodontic services for those who have a disability. Its purpose was therefore a laudable one.
(e) Overall, the procurement itself was carefully planned and well organised, to the credit of the Defendant.
(f)Whilst I accept the impact on the Claimant resulting from the breach was significant, in that it was not awarded the contract that it should have been and may well have suffered financial loss as a result, the impact upon it was not existential. By contrast, there is no, or no material, impact on the wider public access to orthodontic treatment in the relevant Lot area. The public would have been almost equally well served by either bidder. The impact on the narrow group for whose benefit the particular factor in CSD 02 was, in part, directed is very limited.
(g) This case is far removed from the multiple breach case in *Energy Solutions*, which concerned a national multi-billion pound contract for nuclear decommissioning.

91. Lastly, I reject the Claimant's submission that a decision from this Court, namely that the breach was not sufficiently serious to warrant an award of damages, would give rise to an incoherent and unjust outcome. It points out that the automatic stay was only lifted4 on the basis that, if successful, damages would provide the Claimant with an adequate remedy. I accept the Defendant's submission that this argument is misconceived. Regulation 98(2)(c), which concerns remedies where the contract has been entered into, is in materially the same terms as Regulation 97(2)(c), which concerns remedies where the contract has not been entered into. In both cases, the Court may award damages and, in considering whether it will do so, the *Francovich* condition that any breach must be shown to have been sufficiently serious applies.
The outcome in respect of a claim for damages would, therefore, have been the same whether the question was tested before or after the award of the contract."

2.6 The Appeal

16. The original Grounds of Appeal considered by the judge were different to those which were considered by this court. However, the judge granted permission on what was then Ground 7, which raised what I have called the primary issue of principle head on. In so doing, the judge said that "it would be helpful for the court of appeal to clarify

the application of the *Francovich* principle in the context of procurement cases and, particularly, the extent to which a failure to award a contract to the most economically advantageous tender is, in and of itself, sufficient to render the breach sufficiently serious. It is arguable that it is. The need for such clarification is also a compelling reason for allowing permission in this respect." The judge refused permission on the other matters raised, noting that they were evaluative matters for a first instance judge.

17. I granted the appellant limited permission to raise one or two other points related to the issue of 'sufficiently serious' breach. I refused permission on other matters because they involved rearguing elements of the liability trial. The Respondent's Notice took a wide variety of points, a number of which sought to overturn the judge's findings on CSD02 at the liability trial. The respondent argued that, since the appellant's appeal was against the judge's refusal to award damages, other reasons to uphold that order included their arguments as to why there was no liability in the first place. This Court considered whether that was legitimate and, with some reluctance, concluded that it was, for the reasons explained at [2023] EWCA Civ 837.

3. The Issues on Appeal

18. The first issue of principle, and the one on which the judge gave permission to appeal, is concerned with the consequences of the breach. It can be formulated in this way: In considering whether the breach is 'sufficiently serious' for the purposes of *Francovich* damages, is the finding that, but for the breach, the contract would have been awarded to the appellant, decisive? I address that in Section 5 below.

19. There is a second issue of principle raised in the Grounds of Appeal. It is the appellant's case that, even if they were wrong on the first issue, so that even in a case where the breach deprived the rightful bidder of the contract it is necessary to look at what I refer to below as "culpability", this was not a case in which there were any factors to be balanced against the consequences of the breach. This was because, on the appellant's case, in the absence of bad faith, and/or because there was a manifest error, the excusability of the error and/or the state of mind of the contracting authority were irrelevant in law. Although that point, if decided in favour of the appellant, would achieve the same result as success on the first issue of principle, it is a separate issue and arises directly out of consideration of some of the authorities. I address that issue in Section 6 below.

20. If the appellant is right on either of those two issues then, subject to the points raised in the Respondent's Notice, the appeal will be successful. However, if the appellant is wrong on both, then the attack on the *Francovich* Judgment focuses on the multi-factorial evaluation exercise undertaken by the judge. That presents a much higher hurdle for the appellant to overcome. I deal with the evaluative exercise undertaken by the judge in Section 7 below.

21. Finally, there is a third point of principle, concerned with the principle of effectiveness and what was said to be the "incoherence" of a system which, on the one hand, prevented the challenge to the actual award of the contract to PAL (because at the interlocutory stage, Judge Bird held that damages were an adequate remedy for the appellant) whilst, on the other, denied the award of such damages, despite the finding

that the appellant should have been awarded the contract. That seems to me to be a third point of principle raised by this appeal.

22. The Respondent's Notice raised two standalone challenges to the judge's underlying findings of liability. First, the respondent said that the judge erred on the face of the Liability Judgment in deciding that the error that the respondent made was of any legal or other significance; they also say that, properly understood, the error of fact had no effect on the score that was awarded, because the evaluators' underlying concern about access remained valid. Secondly, the respondent argued that the judge erred in rescoring the appellant's bid at all (let alone in changing the mark from 3 to 4) or that, if he was entitled to rescore, he should have embarked on a much more extensive exercise than the one he undertook.

23. It follows that, if either of those points was correct, the result of the tender exercise would have remained unchanged, and PAL were rightly awarded the contract. Because that would remove the entire basis for the appellant's appeal, it was tempting to start with those points first. However, I have concluded that it is appropriate to deal with them at the end of this judgment (in Section 9), because the whole focus of the appeal hearing was on the potentially important points of principle which I have already identified, and it would be wrong now to duck them or put them at the back of the queue.

4. The Law

4.1 The Scope of Any Appeal

24. The judge made numerous findings of fact. He also evaluated those facts and the inferences to be drawn from them, in both the Liability Judgment and the *Francovich* Judgment. There are numerous reasons why this court will not generally interfere with such findings and evaluations, as summarised by Lewison LJ in *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5: [2014] E.T.M.R.26. He identified the reasons for that approach as including:

> "i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

25. More recently, in *Volpi & Anr v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48, Lewison LJ said at [2]:

> "2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
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> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
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> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

26. This approach has been applied in other situations where a first instance judge has to carry out a multi-factorial assessment, such as a consideration of the correct forum: see *Samsung Electronics Co Ltd & Ors v LG Display Ltd* [2022] EWCA Civ 423 at [4]-[5].

4.2 'Sufficiently Serious': General

27. In *Francovich v Italy (C-C/90)* [1991] ECR 1-5357, the CJEU identified three conditions which had to be met for State liability to pay damages for a breach of EU law. They were that: (i) the rule that has been infringed must be intended to confer rights on individuals; (ii) the breach must be 'sufficiently serious'; (iii) there must be a direct causal link between the breach and the loss of damages sustained. This case is

concerned with the second condition. That was also in issue in *Brasserie du Pecheur v Federal Republic of Germany* [1996] QB 404, where the CJEU said:

> "55. As to the second condition, as regards both Community liability under article 215 and member state liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the member state or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
>
> 56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached; the measure of discretion left by that rule to the national or Community authorities; whether the infringement and the damage caused was intentional or involuntary; whether any error of law was excusable or inexcusable; the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law."

28. These considerations were addressed by the House of Lords in *R v SoS for Transport Ex Parte Factortame (No.5)* [2000] 1 A.C. 524 ("*Factortame*"). This was a case in which the UK enacted legislation which imposed conditions of registration of fishing vessels based on British nationality. The intention was to protect British fishing communities by preventing foreign nationals from fishing against the United Kingdom's quota under the Common Fisheries Policy. Their Lordships focused on the nature and quality of the Government's breach of EU law (what I have referred to by way of shorthand below as "culpability"). Thus, Lord Slynn said at 542F:

> "Can it be said that, even if the Act of 1988 was deliberately adopted, it was an, unintentional and "excusable" breach which should prevent what was done being "a sufficiently serious breach" in that it was a manifest and grave disregard of the limits of the United Kingdom's discretion?"

29. Lord Hope said at 550D-E that "the phrases 'sufficiently serious' and 'manifestly and gravely' which the European Court has used indicate that a fairly high threshold of must be passed before it can be said that the test has been satisfied." He then went on to identify three factors which justified the conclusion that the breach in *Factortame* was sufficiently serious to entitle the respondents to damages. The first related to the subject matter of the breach which he said were "key areas" of the E.C. Treaty. As he put it "the more fundamental the breach, the easier it will be to regard it as sufficiently serious". His second factor was the potential of the breach causing damage "to those who were likely to suffer loss as a result of it." This was therefore concerned, not with the actual *consequences* of the breach, but the *foreseeability* of any loss arising as a result of any breach: hence his reference to "the potential for obvious and immediate damage". His third factor related to the method used to achieve the result.

30. Lord Hope concluded at 551E-F that, on the facts, this was more than a trivial, technical breach of the Community obligations. He said at 551F that "if damages were not to be held to be recoverable in this case, it would be hard to envisage any case, short of one involving bad faith, where damages would be recoverable". He went on at 551H to say that "this case cannot, I think, be described as one which went wrong due to inadvertence, misunderstanding or oversight".

31. In his judgment from page 554 onwards, Lord Clyde dealt with the 'sufficiently serious' test. His general point was this:

> "But it may be too narrow an approach in the practical application of the test to make the distinction between the categorisation of what is manifest and of what is grave. A broader approach is perhaps to be preferred. Moreover the application of the test laid down by the court comes eventually to be a matter of fact and circumstance. In the judgment the court [1996] Q.B. 404, 499, para. 56 lists some of the factors which may be taken into consideration. But that list does not pretend to be complete or exhaustive. It would doubtless be premature to attempt any comprehensive analysis. But it appears to be possible to identify some of the particular considerations which may properly be taken into account, although the relevance in particular cases and the weight to be given to them in particular circumstances may obviously vary from case to case. It is to be noted that liability does not require the establishment of fault as, to use the language of the Advocate General in his opinion [1996] Q.B. 404, 476, para. 90, "a subjective component of the unlawful conduct." It is on the objective factors in the case that the decision on liability requires to be reached. No single factor is necessarily decisive. But one factor by itself might, particularly where there was little or nothing to put into the scales on the other side, be sufficient to justify a conclusion of liability."

32. Lord Clyde identified eight factors (which are sometimes referred to as the *Factortame* checklist) which are of practical assistance to judges considering this issue. Those eight factors were usefully summarised by Richards LJ in *Delaney v SoS for Transport* [2015] 1 WLR 5177 at [36] in these terms:

> "36 …Lord Clyde identified the following factors, though the list was not exhaustive: (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 the mind of the infringer, and in particular whether the infringer was acting intentionally or involuntarily (i.e. whether there was a deliberate intention to infringe as opposed to an inadvertent breach); (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. He said that the application of the "sufficiently serious" test "comes eventually to be a matter of fact and circumstance"; no single factor is necessarily decisive; but one factor by itself might, particularly where there was little or nothing to put in the scales on the other side, be sufficient to justify a conclusion of liability."

That is the numbering of the eight *Factortame* factors which has been used in the authorities, and which I adopt for the purposes of this judgment.

33. *Delaney* itself was concerned with domestic legislation in respect of uninsured drivers and whether that was incompatible with the EU law. At first instance, at [84] Jay J said:

> "84 As is well known, Lord Clyde set out in his opinion a non-exhaustive series of factors which fall to be weighed in the balance. I will be considering these subsequently. What it is important to recognise at this stage is that: (i) the test is objective (p 554D) (if a government acts in bad faith that is an additional factor which falls objectively to be considered); (ii) the weight to be given to these various factors will vary from case to case, and no single factor is necessarily decisive; and (iii) the seriousness of the breach will always be an important factor. Although not expressly mentioned by Lord Clyde, I would add that in a minimal/no discretion type of case it will be easier for the claimant to prove the requisite degree of seriousness."

34. I ought to address this paragraph specifically, given Mr Moser's subsequent reliance on it. Jay J was plainly right to say that the test was objective, and that no single factor was necessarily decisive. His reference to the seriousness of the breach always being an important factor is, with respect, superfluous, given that the whole purpose of the second *Francovich* condition is designed to test whether or not the breach was sufficiently serious. The reference to bad faith appears to be an additional factor not expressly identified by Lord Clyde, but regarded by Lord Hope at 551F as the strongest indicator of a sufficiently serious breach (see paragraph 30 above). The final sentence of Jay J's paragraph 84 seems to me to follow logically: if the breach occurs in a public law context where there is little or no discretion, excusability may have less relevance, and it may be correspondingly easier to demonstrate the seriousness of the breach. But again that must turn on the facts of the individual case.

35. It is also important to note the outcome in *Delaney*. It appears that Jay J would have been prepared to take the fact that the breach was inadvertent into account, had there been any evidence to support that proposition. But there was no such evidence. On the contrary, he concluded that the defendant in that case "must be taken to have decided deliberately to run the risk" of acting of breach of EU law. That was therefore a finding on culpability that went against the defendant. As explained on appeal by Richards LJ at [49], Jay J did not conclude that the Department knew that it was acting in breach of EU law, but he was not prepared to accept that this was a case of inadvertent breach and, on the facts, deemed the breach to have been deliberate.

4.3 The Procurement Cases

36. The court's ability to award damages in a public procurement case where the contract has been entered into is enshrined in the PCR at Regulation 98 as follows:

> "98.-(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 subparagraphs (a) and (b);
> (d) must not order any other remedies…"

37. That the award of damages in a public procurement case will only be made upon satisfaction of the *Francovich* conditions was authoritatively determined by the Supreme Court in *Energy Solutions EU Limited v Nuclear Decommissioning Authority* [2017] UK SC 34; [2017] 1 WLR 1373 (see in particular [25]-[27] and [39] of the judgment of Lord Mance). The Supreme Court dealt only with the high-level principle. It did not address how, in particular, the second *Francovich* condition was to be applied in a successful public procurement challenge.

38. An earlier ruling in the *Energy Solutions* case was, I think, the first time that a first instance judge had applied the "sufficiently serious" test to a public procurement case: see the judgment of Fraser J at [2016] EWHC 3326 (TCC). That judgment was not appealed and therefore never considered at appellate level. Fraser J went through the *Factortame* checklist and, on the facts of that case, concluded that the breach was sufficiently serious. In so doing, he made a number of comments on which both sides in this appeal have sought to rely. These include:

(a) His view at [43] that he had to take into account all of the (many) relevant breaches. He said:

> "43. However, the conclusion that the NDA was in breach of its obligations (by awarding the tender to an economic operator other than the one who had submitted the most economically advantageous tender) can only be reached after assessing the effect of other, more numerous, breaches in the actual evaluation itself. Although it is possible to consider hypothetical scenarios in which there might be only one underlying breach in the evaluation itself (either a failure to evaluate a tender at all, say, or a single breach in the actual evaluation scoring that had an individual powerful effect on the final percentage score), in this case there were a number of underlying breaches that led to the conclusion of an overall breach of the Regulations and the terms of the competition (and the Directive). Within the terms of the competition, this would be expressed as breaches within Level 3 of the Evaluation Framework leading to a breach at Level 1 (which would obviously occur via Level 2)."

(b) As to *Factortame* factors i) and ii), Fraser J said at [56] that "a failure to award the contract to the operator offering the most economically advantageous tender... goes directly to the heart of these principles", being the principles governing EU procurement law. At [65] he said that these two factors justified the finding of "sufficiently serious" breach:

> "65. In my judgment, the first and second factors, without more, are sufficient to justify a finding that the breach by the NDA of the obligation to award the contract to the most economically advantageous tenderer is

> sufficiently serious to satisfy the second *Francovich* condition. The presence of these two factors, and the facts of the case, means that the breach by the NDA represents a manifest and grave disregard of its obligations. It is not therefore necessary to consider the underlying individual breaches in paragraph 44(1) and 44(2) above."

(c) As to the state of mind of the infringer, Fraser J said at [61]:

> "There are therefore no findings that there was any deliberate intention to infringe in this case. However, so far as correction of the score of a particular Requirement is concerned, it matters little to an aggrieved tenderer why a manifestly erroneous score has been awarded; the important element is that the score was manifestly erroneous. I do not consider that this factor should be interpreted to mean that intention (or lack of it) will be of direct relevance in every case…"

(d) He noted, by reference to *Delaney*, that whilst bad faith was an additional factor which fell objectively to be considered, he did not consider that the absence of such a factor was in the contracting authority's favour: see [62] and [63].

39. In *Ocean Outdoor Ltd v Hammersmith and Fulham London Borough Council* [2019] EWCA Civ 1642; [2020] 2 All ER 966, one of the arguments advanced by the appellant was, because there had been a failure to comply with the procedural elements of the PCR, it automatically followed that the breach was sufficiently serious so as to give rise to damages. This Court rejected that argument. I said at [85] that it was wrong in principle to say that there was an automatic entitlement to damages as a result of a failure to follow the Regulations:

> "That would mean that every breach of the procedural requirements would automatically trigger a claim for damages, regardless of the other factors. That is emphatically not the law. In order to attract damages, the breach has to be 'sufficiently serious', and that will always depend on the individual facts of the case."

40. In other procurement cases, the point that an award to the wrong bidder was a sufficiently serious breach has either been agreed (such as *Alstom Transport UK Ltd v Network Rail Infrastructure Ltd* [2019] EWHC 3585 (TCC)), where Network Rail agreed that, if Alstom succeeded in establishing it had awarded these major train-building contracts to the wrong bidder, the breach would be sufficiently serious to justify an award of damages); or obviously crossed the 'sufficiently serious' threshold in any event (such as *Consultant Connect Ltd v NHS Bath and Northeast Somerset, Swindon and Wilshire Integrated Care Board and Ors* [2022] EWHC 2036 (TCC), where Kerr J found as a fact that there had been a manipulation of the entire tender process to ensure that the successful bidder won the contract).

4.4 Adequacy of Damages

41. It is trite that, when a contracting authority seeks to lift the automatic suspension on the award of the contract to the successful bidder, it needs to persuade the court that damages would be an adequate remedy for the unsuccessful bidder if their challenge turned out to be successful. The fact that damages will only be awarded if the breach

is "sufficiently serious" is therefore an additional complication to that exercise. This was pointed out by Fraser J as long ago as *Lancashire Care NHS Foundation Trust & Anr v Lancashire County Council* [2018] EWHC 200 (TCC); at 177 Con L.R. 246. He said:

> "[23] This point was not fully argued before me on the Council's application, and in the particular circumstances of this case it was not necessary for it to be fully argued. Both parties were agreed that at an interlocutory stage of a case – and, in particular, at the interlocutory stage in this particular case on these particular facts – the court could not come to a decision on the question of whether the alleged breaches were or could be classified as 'sufficiently serious'. Both parties were agreed that the point should be taken into account when considering the question of adequacy of damages as presenting an additional requirement which any claimant had to satisfy to recover damages at all. That is therefore the approach, by agreement in this case, which I adopt. It does, however, form part of the consideration necessary to arrive at a preliminary conclusion of the effectiveness of the remedy, and it may arise for further and more detailed consideration in the future."

42. In *Bombardier Transportation UK Ltd & Ors v London Underground Ltd* [2018] EWHC 3926 (TCC); 181 Com LR 119, O'Farrell J noted at [64] that counsel for the contracting authority had confirmed that, if it was established that they should have awarded the contract to the claimants then, by reference to Fraser J's judgment in *Energy Solutions*, the breach would be sufficiently serious to justify an award of damages. O'Farrell J said that this concession "would be sufficient to address the potential difficulty caused by the threshold requirement of a sufficiently serious breach".

43. That informal position between the parties was rather more regularised in *Boxxe Ltd v SoS for Justice* [2023] EWHC 533 (TCC); 2017 Con LR 259. There, the point arose directly because the defendant had pleaded that the alleged breach was not sufficiently serious to justify an award of *Francovich* damages. However, as noted by Constable J at [43], the defendant was prepared to give an undertaking that, should the suspension application succeed, but it was ultimately established that the contract should have been awarded to the claimant rather than the successful bidder, the defendant would not pursue its pleaded case that the breach did not meet the *Francovich* conditions. As the judge said, this was a sensible way to cut through that issue at the interlocutory stage. He also added that it could not be right that, whenever the question whether the breach satisfied the *Francovich* conditions was in issue, damages would automatically be rendered inadequate for the purposes of considering whether or not to lift a suspension.

44. In *Alstom*, O'Farrell J had said that, if a breach was not sufficiently serious enough to justify the *Francovich* conditions, it was unlikely to be sufficiently serious to justify setting aside the contract under challenge, Constable J said in *Boxxe* that there was force in that observation. I agree. In my experience, the present case is therefore unusual, if not unique, because of the vast gap the judge found between the very low culpability on the part of the respondent, and the extreme consequences of the single marking error.

4.5 Summary

45. In order to recover damages from the contracting authority, an unsuccessful bidder must satisfy the three *Francovich* conditions: see *Energy Solutions* in the Supreme Court. The most authoritative guidance as to the second condition (was the breach sufficiently serious?) can be found in *Factortame.* In the public procurement context, at first instance, that test has been found to have been made out where the breaches meant that the winning bidder should have been disqualified, and the claimant should have been awarded the contract, and where there was nothing in the balance the other way (*Energy Solutions*, before Fraser J); and where the process had been deliberately manipulated in favour of the winning bidder (*Consultant Connect*, before Kerr J).

46. The test was found not to have been made out where the breaches were procedural (*Ocean Outdoor* before O'Farrell J, subsequently upheld by this Court). *Ocean Outdoor* was the first case in which a claimant had sought (unsuccessfully) to short-circuit full consideration of the *Factortame* factors by arguing that a particular type of breach or result automatically meant that the 'sufficiently serious' test had been made out; this case is the second.

5. The First Issue: Is The Effect Of The Breach - That The Appellant Should Have Been Awarded The Contract - Determinative Of The 'Sufficiently Serious' Test?

5.1 The Competing Arguments

47. On behalf of the appellant, Mr Moser KC argued that the manifest error in respect of CSD02 meant that the appellant had been wrongly deprived of the contract and that this was sufficient, without more, to demonstrate that the 'sufficiently serious' test had been made out. This is borne out by his skeleton argument where he said that the judge's findings as to the consequences of the breach were "decisive": see, for example, paragraphs 26, 28, 29, 31 and 34. He said that the relevant principle of EU law was the need to award the contract to the Most Economically Advantageous Tenderer (the so-called 'MEAT' principle) and that this was at the heart of EU law and the PCR. He relied heavily on those passages of Fraser J's judgment in *Energy Solutions* identified at paragraph 37(b) above which, on one view, gave some support to that approach. In his oral submissions, he said that "the judge over-emphasised the minor nature of the breach, rather than the drastic nature of the consequences".

48. On behalf of the respondent, Ms Morris KC submitted that no factor could ever be decisive in determining whether the breach was sufficiently serious, and that any other conclusion would fetter the court's discretion and be contrary to the authorities noted above. In particular, she relied on all the judgments in *Factortame*, and in particular Lord Hope's three factors, to submit that what went wrong in the present case was not "due to inadvertence, misunderstanding or oversight". She also took issue with the identification of the infringed principle, saying that, on analysis, the relevant principle behind EU public procurement law was the opening up of the internal market, not the awarding of a contract to the MEAT.

49. The judge expressly found that the relevant principle of law was the MEAT principle. He found that this was clear, and had been breached in this case. He therefore found that factors i) and ii) in the *Factortame* checklist had been made out in the appellant's

favour. However, he found that that was not on its own determinative or decisive: see [44] and [88] of his judgment, set out at paragraph 14 above.

50. In my view, the judge was right to find that these factors were not, without more, determinative. Thus the answer to the first question of principle is No: the effect of the breach is not and cannot be determinative of the issue as to whether the breach itself was sufficiently serious to attract an award of damages. There are a number of reasons for that conclusion.

5.2 The Risk of 'Collapsing' Francovich Conditions (ii) and (iii)

51. First, it needs to be remembered that the 'sufficiently serious' test is only the second of the three *Francovich* conditions. The third is concerned with causation: the need to prove that the breach caused the loss complained of. On the judge's findings, of course, that third condition was made out here, by reason of his conclusion that, but for the stairclimber/stairlift error, the necessary remarking meant that the contract would have been awarded to the appellant. In this way, the third *Francovich* condition must be the relevant stage at which the effect of the breach primarily falls to be considered.

52. I therefore consider the submission that, if *Factortame* factors (i) and (ii) are found to exist, such that the contract was awarded to the wrong bidder, that will *automatically* give rise to a sufficiently serious breach, is contrary to *Francovich* itself. If the appellant's argument as to the first principle is right, and the breach is sufficiently serious because the wrong bidder got the contract, regardless of the circumstances of the breach itself, then the second *Francovich* condition would add nothing. The appellant would be able to argue that, because it has established the necessary casual connection between the breach and the loss, that is the end of the argument about the sufficiently serious nature of the breach.

53. In this way, I consider that Mr Moser's argument runs the risk of collapsing the second and third *Francovich* conditions into one, and thus ignores the separate exercise of proving a 'sufficiently serious' breach. That would be wrong in law.

5.3 The Nature and Quality Of The Breach

54. Secondly, the authorities are clear: what matters for the purposes of the second *Francovich* condition is the breach, not its effect. It is important not to stray too far from the principles to be derived from the speeches in *Factortame*. There has, perhaps, been too much of a focus in the subsequent cases on the checklist in Lord Clyde's speech, applied as if it were a series of statutory requirements, and not enough attention paid to the other speeches in *Factortame*, or indeed his own general remarks. In particular, it is of paramount importance that all their Lordships focused on the nature and quality of the breach in question, and not the consequences of the breach. That explains, for instance, why Lord Hope's second factor was concerned with the foreseeability of harm, rather than any actual harm itself. A deliberate decision to do something with a high chance that loss will be caused is at one end of the culpability spectrum; something going wrong due to inadvertence, misunderstanding or oversight, is at the other.

55. Accordingly, I consider that any approach to the second *Francovich* condition which favours the consequence or effect of the breach, as opposed to the nature and quality of that breach, is wrong in principle. The passage from *Brasserie du Pecheur,* to which I have referred at paragraph 27 above, makes plain that the 'sufficiently serious' hurdle arises from the test as to whether the contracting authority "manifestly and gravely disregarded" the relevant Regulations. That is not concerned with consequences at all: it is properly concerned with the nature and quality of the breach itself.

56. If the appellant was right in this case, and that all that mattered were *Factortame* factors i) and ii) (because they did not get the contract and they should have done), then the nature of the breach (deliberate? inadvertent? etc) would be ignored, and the court would simply be focusing on the consequences of the breach. That would be a back-to-front way of approaching the question of whether the breach itself was sufficiently serious to justify damages. Indeed, I consider that anything that elevates the consequences of the breach to be the decisive answer to the question of whether the breach was 'sufficiently serious' is wrong in principle.

5.4 The Particular Considerations in Public Procurement Cases

57. Thirdly, I consider that particular care is needed when translating the guidance in *Factortame*, particularly factors i) and ii), to public procurement cases. *Factortame* and *Delaney* were concerned with UK legislation that was at odds with EU Law. They therefore concerned Government decision-making at a high level. How that breach had come about, and whether it was deliberate or inadvertent, and how clear or otherwise the principle being breached actually was, therefore mattered very much.

58. Public procurement challenges do not generally involve such high-flown issues. They are more prosaic, if just as important to the parties involved. More often than not, they are concerned with whether or not a particular score or scores for an individual element of a bid were fair or appropriate. The challenge is usually determined by reference to the PCR generally, and the tender documents in that specific case. So here, as one would expect, the appellant's pleading is all about the detailed marking of its tender and that of PAL. The pleaded claim made no reference to the more elevated principles of EU law now relied on as part of its case on the second *Francovich* condition. So if a consideration of the quality and nature of any breach in a public procurement case is to be realistically rooted in the real world, then the underlying principles of EU law may be of some, but often limited, relevance.

59. To the extent that it is necessary, for the purposes of the 'sufficiently serious' test, to consider the principle behind the PCR against which any breach is to be measured, I would say that the most relevant principle is that of fair and open competition[3]. Of course, that may very well involve, in a particular case, a consideration of the MEAT principle too, but it is the principle of fair, equal and transparent competition that matters most.

60. I can pause here to deal with (and reject) two points raised by Ms Morris in the Respondent's Notice. First, she said that there was no authority for the proposition

[3] Support for that proposition can be found in the speech of Lord Hope in *Risk Management* cited in the next paragraph of this judgment.

that the awarding of a contract to the most economically advantageous tenderer was a relevant principle of EU law for this purpose. I disagree: Lord Hope made that very point at [10] of his judgment in *Risk Management Partners Ltd v Brent London Borough Council & Anr* [2011] UK SC 7; [2011] 2 AC 34.

61. Secondly, she also complained that the judge erred because he rejected the idea that the relevant EU principle, by reference to Professor Arrowsmith's book *The Law of Public and Utilities Procurement* was to remove barriers to the internal market. The judge said at [40] that, whilst the distinction may be relevant in another context, it did not apply to a consideration of whether the breach was sufficiently serious. I respectfully agree with the judge. All the authorities dealing with public procurement law, derived as it is from EU law, make plain that the principle behind public procurement law is to hold a fair and open competition and, at the end of it, to award the contract to the most economically advantageous tenderer who has emerged as the winner of the competition. So the reference to removing barriers to the internal market is really a distinction without a difference. Whilst the method adopted by the EU was to remove barriers to the internal market, the intended result of that methodology was to increase fair and open competition. Ensuring that a contractor in Slovakia could tender for the refurbishment of the public toilets in Gravesend was not an end in itself; it was designed to ensure that, because of the proper operation of the internal market, the competition was open and fair.

62. But this is all a world away from what actually happens in a public procurement exercise. Evaluators have both the ITT[4] and detailed evaluation guidance as they go, item by item, through the competing tenders. Those who are involved in this sort of process do not say to themselves: "I must get this right, otherwise I will be in breach of a major principle of European competition law". They say: "I must get this right, to ensure an open and fair competition". It is, therefore, unrealistic to elevate an error in the scoring of a tender for orthodontic services into a breach of some major principle of EU law, solely in order to argue that, in a case where the bids were so close, one simple misunderstanding was, without more, a sufficiently serious breach to justify an award of damages.

63. On that basis, therefore, the judge may, if anything, have overstated *Factortame* factors (i) and (ii). It is in any event a third reason which firmly militates against the suggestion that the judge should have found that those two factors were somehow decisive of the *Francovich* issue, without even considering culpability.

5.5 The Proper Scope of Factortame Factors i) and ii)

64. Fourthly, even on a rigorous adherence to the *Factortame* checklist, an approach that makes factors i) and ii) decisive of the 'sufficiently serious' test is not in accordance with the domestic authorities. In *Factortame* itself, the House of Lords made it plain that the 'sufficiently serious' test depended on all the facts and circumstances of the breach. They did not say that anyone finding or factor would, in principle, be determinative. On the contrary, their approach was to the opposite effect. Whilst Mr Moser is right to note that Lord Clyde said that one factor might be sufficient, that was not on the basis that the other factors would not even be considered; it was

[4] The Invitation to Tender, which will contain full details as to how the bids will be scored.

instead on the basis that, having considered those other factors, the court might conclude that they did not outweigh the single factor that went the other way.

65. The appellant lays great stress on what Fraser J said in *Energy Solutions*. But in that case, Fraser J looked carefully at all the *Factortame* factors, and did not stop his analysis at the first two. At [65] he was careful to say that the presence of those first two factors "and the facts of the case" satisfied the test. That was because, not only were the first and second *Factortame* factors present, but there was, on his analysis, really nothing in the balance the other way. *Energy Solutions* was a strong case on the facts, where not only were there multiple scoring errors in respect of the claimant's bid, but also a failure to disqualify the winning bidder's tender altogether. In addition, there was nothing to demonstrate any sort of excuse or other mitigating factors.

66. *Energy Solutions* should not therefore be read as a case in which it was suggested that a claimant was entitled *automatically* to a finding of sufficiently serious breach, merely because the first two *Factortame* factors were present, and they had not been awarded the contract when they should have been. But I acknowledge that there are one or two passages which might be read that way, and the first preliminary issue, drafted by the parties and answered in the affirmative by Fraser J, said as much. Accordingly, if (contrary to my reading of his decision in the round) Fraser J did intend to suggest that the failure to award the claimant the contract was automatically decisive of the *Francovich* damages test then, for the reasons I have given above, he was wrong to do so, and that approach should not be followed. To test whether the breach was sufficiently serious requires a consideration of all the circumstances of the breach, not just *Factortame* factors i) and ii).

5.6 Is the Effect of the Breach Immaterial?

67. I have explained the reasons why the appellant's first point of principle is wrong, and that the 'sufficiently serious' test cannot be automatically satisfied simply because the unsuccessful bidder should have been awarded the contract. Those reasons all arise out of the simple proposition that the necessary focus must be on the breach itself, not the effect of the breach. Furthermore, I have pointed out a number of respects in which I consider that some passages in the judgment of Fraser J in *Energy Solutions* may go too far in emphasising the consequences of the breach and minimising the culpability of the infringer. Whilst I am in no doubt that the balancing exercise in that case pointed to an unequivocal result in favour of the claimant, some of the points of emphasis in that judgment are not in accordance with the approach in *Factortame*. So where does that leave the effect of the breach and its relationship with the second condition in *Francovich*? Is it only relevant to the third condition or can it be relevant to the second condition as well?

68. The first point to make is to emphasise the distinction I have already made between foreseeability of loss, on the one hand, and the nature of the loss actually caused, on the other. Foreseeability of loss is plainly relevant: see Lord Hope in *Factortame*. But that issue does not arise on the facts of this case: it was not argued, and the judge did not find, that the error in respect of the stair climber/stairlift would foreseeably give rise to the award of the contract to the wrong bidder. Foreseeability is in any event a fact sensitive investigation.

69. As to the general principle of taking into account the actual consequences of the breach when considering the second *Francovich* condition, I do not rule out any consideration of the consequences of the breach at that stage. To require the court to ignore the consequences may be artificial: the court may well want to look at the consequences of the breach as part of its overall consideration of the *Francovich* conditions. So the effect of the breach may, on the facts, be a relevant consideration. But caution is still required. Whilst the particular consequences of a breach should, in an appropriate case, be weighed in the balance, the drastic (or otherwise) nature of the consequences of the breach is not a matter identified in any CJEU authority concerned with the 'sufficiently serious' test. In addition, it was not a factor highlighted in *Factortame*.

70. In a public procurement case, it is likely to be a relevant consideration that, for example, the contract was awarded to the wrong bidder because of an error by the contracting authority. In this case, that effect would be a factor in favour of the appellant. Depending on the facts, in other cases, the consequences of the breach may have little weight. But what matters for the purposes of this appeal is that, contrary to the appellant's case, the consequences of the breach can never, on their own, be determinative of the 'sufficiently serious' test. That would be contrary to the European cases, and contrary to *Factortame.*

5.7 Summary on the First Issue

71. For those reasons, therefore, I consider that the answer to the first issue is No. There was no breach of principle by the judge. He weighed all the factors in the way in which he was obliged by law to do.

6. The Second Issue: In The Absence Of Bad Faith, Are Excusability/State Of Mind Irrelevant?

6.1 The Competing Arguments

72. On behalf of the appellant, Mr Moser argued that *Factortame* factor iii), excusability, was limited to mistakes of law, and not mistakes of fact. He said that this derived from *Factortame*, where what was being addressed under this head was whether the government had an excuse for misunderstanding the relevant principle of EU law. He also said that a manifest error could not be excusable in principle.

73. As to *Factortame* factor (v) (state of mind), Mr Moser said that, in the absence of bad faith, this ought not to arise for consideration at all: see paragraph 50 of his skeleton argument. This argument was based primarily on what Jay J said in *Delaney* (which was not the subject of the appeal in that case) and [62] of *Energy Solutions,* where Fraser J said that he thought it was difficult in a procurement case to consider the state of mind of the infringer, and that it made no difference to the aggrieved tenderer how the error had come about. Fraser J did not regard state of mind as a factor to be given any particular weight in that case.

74. On behalf of the respondent, Ms Morris said that the judge had been right to treat excusability as applying to any error, whether of fact or law, and that there was no reason to conclude that, even if a manifest error had been made, it could not be excusable. As the state of mind of the infringer, she submitted that, in *Energy*

Solutions, Fraser J had misunderstood what Jay J said in *Delaney* and that the authorities make plain that bad faith is simply a potential additional factor: indeed as Lord Hope noted at 551F of *Factortame*, a case involving bad faith would almost always give rise to a sufficiently serious breach. But Ms Morris argued that, in a case where there was an absence of bad faith, such as this one, it was still important to consider the state of mind of the infringer (and indeed excusability generally), in order to form a view as to the nature and quality of the breach. Any failure to do so was a failure to follow the relevant principles.

75. The judge found at [55] that the single breach made by the respondent "was at very much at the excusable end of the spectrum"; the misunderstanding made by the evaluators "were neither egregious nor gross. On the contrary, they were minor". At [62]-[70] he dealt carefully with the state of mind of the evaluators. The judge said it would be too narrow an approach simply to focus on whether the breach was committed in bad faith. The judge concluded at [69]:

> "69. Having established that, in principle, it can be relevant to take account both whether the breach was inadvertent and the purposes of the infringer, I now turn to the facts of this case. I am satisfied that, in this case, it is relevant to take into account that the breach was inadvertent, rather than deliberate, and self-evidently occurred in good faith. I am also satisfied that the Defendant's purpose in carrying out the scoring of CSD 02 was to maximise access to publicly funded orthodontic services for those who have a disability. Its purpose was therefore a laudable one."

76. If Mr Moser was right, so that mistakes of fact and questions of state of mind were, in the absence of bad faith, irrelevant to the *Factortam*e balancing exercise, then the outcome would be that there was nothing to set in the balance against the judge's findings on factors (i) and (ii), and a sufficiently serious breach should have been found. On the other hand, if the judge had been right to take into account those factors, even in the absence of bad faith, then Mr Moser's second point of principle must fail. In my view, the judge was plainly right in the approach that he adopted to this issue. There are five reasons for that.

6.2 Excusability

77. In my view, there is nothing in the appellant's first argument that *Factortame* factor iii) was solely concerned with errors of law. The investigation must be concerned, amongst other things, with whether what went wrong was excusable. In *Factortame*, that involved a point of law; here it involved a point of fact (the failure to realise that a stairclimber was not a stairlift). There is no material difference in principle between errors of law and errors of fact for the purposes of the 'sufficiently serious' test, and it would make even more of a meal of the *Francovich* conditions to differentiate between them. Moreover, as the judge observed at [53], in this context, a manifest error is, or is akin to, an error of law. And, since *Factortame* factor v) will have the effect of addressing the excusability of the error in any event, the distinction makes no difference anyway.

6.3 The Relevance of Manifest Error

78. Secondly, I reject Mr Moser's bold submission that a manifest error can never be excusable. Breaking it down into its component parts, this involved separate propositions to the effect that: (i) a manifest error is equivalent to a 'no discretion' case, so no question of excuse can arise; and (ii) where the manifest error leads to the wrong bidder getting the contract, the error is "egregious" and automatically sufficiently serious to meet the second *Francovich* condition. No authority was cited in support of either submission and I think that they fly in the face of common sense. They are further attempts by the appellant to skip over and avoid any consideration of what I have called 'culpability'.

79. As to the first proposition, an error may be held, in hindsight, to be manifest because, as the judge found had happened here, the evaluator made an obvious factual error. But that does not mean that the error cannot be found to be excusable when considering the 'sufficiently serious' test. My lord, Lord Justice Snowden, asked Mr Moser why the obviousness of the error in hindsight meant that, as a matter of principle, it was not excusable. With respect to him, he provided no cogent answer to that question. I consider that it must always turn on the facts.

80. In *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch), Morgan J made a distinction between cases where a contracting authority had not complied with its obligations as to equality, transparency or objectivity, and those cases where the contracting authority erred in relation to matters of judgment or assessment: see [36]-[37]. In relation to the former category, there was no margin of appreciation (or discretion); in the latter case, there was such a margin of appreciation/discretion, such that the decision could only be disturbed if there was a manifest error.

81. But in the context of the second *Francovich* condition, it is of little utility to say that a manifest error is "a matter where there can be no discretion" (appellant's skeleton argument, paragraph 44). It is true that potential liability for a manifest error cannot be avoided by reference to the contracting authority's margin of appreciation/discretion, but that simply means that there has been a breach: it does not mean that *Factortame* factors iii) and v) are inapplicable when considering the separate question of whether that breach is sufficiently serious. Thus in *Robins' Case* [2007] ICR 779 at [71], the ECJ were clear that, even in a 'no discretion' case, the mere infringement of community law "*may* be sufficient" (not *will* be sufficient) to establish a sufficiently serious breach. In other words, contrary to Mr Moser's submissions, it is not automatic.

82. As to the second proposition, namely that if the error led to the wrong bidder getting the contract, the breach was "egregious" and therefore automatically sufficiently serious, I consider that that too flies in the face of the authorities. In *R (Negassi) v SoS for the Home Department* [2013] EWCA Civ 151: [2013] 2 C.M.L.R. 45, Maurice Kay LJ at [20] found that the misunderstanding in that case was not deliberate and that, because it was the result of a misunderstanding of new provisions, it was neither cynical nor egregious. Again, that provides further confirmation that what is necessary is a consideration of excusability/state of mind, and that a proper evaluation of those issues cannot be short-circuited.

6.4 The Absence of Bad Faith

83. Thirdly, the authorities do not say that, in the absence of bad faith, questions as to excusability/state of mind, and whether the breach was deliberate or inadvertent, are irrelevant to a consideration of the second *Francovich* condition. On the contrary, all Jay J was saying in *Delaney* was that bad faith was an additional factor which, in an appropriate case, fell to be considered. That is plainly right. But the opposite of bad faith is an inadvertent breach or, as the judge put it here, a single breach "very much at the excusable end of the spectrum". That is plainly relevant to a consideration of the seriousness of the breach. *Delaney* is manifestly *not* authority for the proposition that, in the absence of bad faith, the state of mind of the infringer is irrelevant (which Jay J made plain in the result, as explained at paragraph 35 above).

84. There is nothing in any of the speeches *Factortame* to suggest that, in some way, these factors - namely excusability and state of mind of the infringer - were somehow immaterial unless there was bad faith, in which case they would be a further factor against the contracting authority. On the contrary, bad faith is seen by Lord Hope as the paradigm example of conduct which would demonstrate a sufficiently serious breach. He does not say that, without it, these factors of excusability and the state of mind of the infringer somehow become irrelevant.

85. Accordingly, I reject the submission made on behalf of the appellant that, in the absence of bad faith, these two factors (in Mr Moser's words) "become neutral" as a matter of principle. That is contrary to authority.

6.4 The Focus on the Infringer

86. Fourthly, *Factortame* factors iii) and particularly v) focus squarely on the conduct and state of mind of the infringer. To that extent, when Fraser J at [61] of *Energy Solutions* remarked that "it matters little to the aggrieved tenderer why a manifestly erroneous score has been awarded", he was, with respect, looking at it from the wrong standpoint. The view of the aggrieved tenderer does not matter for this purpose. What matters is the view the court takes of why it was that the infringer went wrong. If Mr Moser was right, and these two factors did not call for consideration by the court, the two factors going most obviously to the degree of culpability on the part of the infringer would fall out of account. That would again be wrong in principle.

87. There are two other observations in [61] of Fraser J's judgment in *Energy Solutions* (set out at paragraph 38 above) with which I should deal, because they arose in argument. First, he said that intention (or lack of it) will not be of direct relevance in every case. That may be right following a consideration of the evidence. But, for the reasons set out in *Factortame*, intention will at least be a relevant consideration in every case: see the passage from Lord Clyde's speech in *Factortame* quoted in paragraph 89 below. On a consideration of intention, there may be no evidence either way, but that is a different point.

88. Fraser J also suggested that it might be hard, in a procurement case, to find out the identity of the person who made the relevant error, so that state of mind may not matter very much. In some cases, I am sure that is right. However, in my experience, and as this case shows, it is often quite easy to track a mistake made during an evaluation process back to its source; indeed, that is the whole point of there being a

proper 'paper trail' relating to the tender evaluation, which an aggrieved tenderer can follow to see precisely where the process went wrong. Moreover, evidential difficulties cannot be allowed to obstruct principle; if necessary, the judge can draw inferences from the evidence he or she does have (as Jay J did in *Delaney*).

6.5 Culpability

89. Finally, if the absence of bad faith rendered excusability/state of mind irrelevant, then there would be no analysis of the gravity of the conduct which *Brasserie du Pecheur* says is so important. In his speech in *Factortame* at 542F, Lord Slynn asked whether the breach in that case "was an unintentional and 'excusable' breach which should prevent what was done being a 'sufficiently serious breach'...?" (see paragraph 27 above). Lord Clyde, who identified the state of mind of the infringer as a relevant consideration, said of it at page 555B-C:

> "5. It is also relevant to look at the state of mind of the infringer, and in particular whether the infringer was acting intentionally or involuntarily. A deliberate intention to infringe would obviously weigh heavily in the scales of seriousness. An inadvertent breach might be relatively less serious on that account. Liability may still be established without any intentional infringement. More broadly, the purpose of the infringer should be considered. If the purpose was to advance the interests of the Community a breach committed with that end in view might be seen as less serious than one committed with the purpose of serving merely national interests."

All of that demonstrates beyond peradventure that the House of Lords considered that the degree of culpability on the part of the infringer was of the utmost importance.

90. In this way, I consider that the second principle advanced by the appellant was an attempt to avoid issues of culpability being factored into the equation *at all*. If these two factors, excusability and state of mind, had been ignored, it would have meant that the judge would not have grappled with the critical issue that arises in any consideration of the second *Francovich* condition.

91. When everything else is stripped aside, the real problem here was that there was a single misunderstanding that, on the judge's findings, had a drastic consequence. But as the judge said at [189] of the liability judgment, in view of the numerous positive aspects of the evaluation, that result was "most unfortunate". Accordingly, even before the judge came on to deal with the *Francovich* issue, the scene was already set for the critical conflict in this case: between the consequences of the failure, and the numerous positive findings that the judge made about the evaluation and the inadvertent nature of the error. To use an imperfect analogy with the sentencing guidelines used in the Crown Court, it might be said that, in this case, culpability was low but harm was high. To ignore the culpability side of the equation because the error was manifest, or that the absence of bad faith rendered it a neutral factor, or because the aggrieved tenderer did not care how the error had come about, would be wrong in principle.

6.6 Summary

92. For these reasons, I consider that the answer to the second issue of principle raised by the appellant is No.

7. The Balancing Exercise Undertaken By The Judge

7.1 General

93. The judge's judgment on the *Francovich* damages point was careful, and wrestled with the inherent conflict to which I have already referred. In my view, for the reasons set out in Sections 5 and 6 above, the judge made no error of principle. In those circumstances, it seems to me that we are in classic *Fage*/*Volpi* territory. The judge undertook a multi-factorial evaluation and reached a conclusion that, on the face of it, he was entitled to reach. Therefore there is no obvious basis for an appeal against the outcome of that exercise. Questions of weight were a matter for him. As Richards LJ put it at [63] of his judgment in *Delaney*, "if there is no material error or omission in the judge's analysis, then there will in practice be only limited room for disagreement as to the overall assessment of seriousness of breach."

94. That said, I go briefly through the judge's evaluation of the *Factortame* factors, to demonstrate that, in my view, the judge properly took account of all relevant matters.

7.2 Factortame Factors (i) and (ii): The Importance of the Principle that has been Breached and the Clarity and Precision of the Rule Breached.

95. The judge found that both these factors were in play and they both operated in favour of the appellant. Although Grounds of Appeal 1(i), 1(ii) and 1(iii) make various criticisms of the judge's approach, these appear to be simply different ways of putting the appellant's underlying complaint, which I have dealt with by reference to the first issue of principle in Section 5 above. The judge found these points in favour of the appellant. The weight he gave them was a matter for him.

96. I therefore reject the respondent's criticism of the judge's consideration and application of *Factortame* factors i) and ii).

7.3 Factortame Factors (iii) and (v): Excusability/State of Mind

97. I have already dealt with this as a matter of principle in Section 6 above. Grounds of Appeal 1 (iv) and (v) seek to criticise the judge for taking these matters into account because "a manifest error is a matter where there can be no discretion". I have already dealt with that argument. A manifest error is a clear and obvious error, but such an error can still be made, to quote Lord Hope again, "due to inadvertence, misunderstanding or oversight": see Section 6 above.

98. There is a particular criticism of the judge's finding in the liability trial that the evaluators were seeking to maximise access to the orthodontic services for those to whom stairs would be a barrier. It was said that there was no evidence of that. That is a bad point. It was plain from the nature of the questions in the tender that maximum access was what was required, and the judge was quite entitled to reach this view on the totality of the evidence that he heard.

99. For these reasons, there can be no criticism of the judge's assessment of *Factortame* factors (iii) and (v).

7.4 Factortame Factors (iv), (vi) and (vii).

100. The judge found that these did not arise on the facts of the case. There is no appeal, by either side, in relation to those findings.

7.5 Factortame Factor (vii): Persons Affected

101. The judge dealt with this factor at [74]-[84]. Following a careful analysis, he concluded that the factor operated in favour of both parties in different ways. There was the impact on the appellant, but that had to be balanced against the lack of any impact within the wider community.

102. On behalf of the appellant, and in support of Ground 1(vi) of the Appeal, Mr Moser argued that the impact on the appellant was "existential" and that the judge erred in concluding that the public would have been almost equally well served by either practice and failed to have regard to the fact that all patients would now be served by a bidder who was not the lowest tenderer.

103. In response, Ms Morris said there was no evidence of an existential threat to the appellant and that, in any event, the judge was prepared to assume in the appellant's favour that the loss of the contract might be significant. Furthermore, the judge was entitled to conclude that the relevant difference between the two bids was minor. She said that *Ocean Outdoor* was authority for the proposition that a judge could find that a breach that had no direct impact on public services did not meet the sufficiently serious threshold.

104. In my view, the judge was entitled to treat this item as finely balanced between the parties in the way that he did. There was no evidence that the threat to the appellant was existential. Furthermore the judge was quite able, on all the material that he heard, to conclude that there was almost no difference between the two bids insofar as they impacted upon the public. This again was classically a matter for the judge.

7.6 Summary

105. In the absence of any errors of principle, I consider that the evaluation exercise was a matter for the judge: see *Fage/Volpi.* But I also reject the detailed criticisms made of that exercise. In essence, the judge concluded that, as per Lord Hope in *Factortame*, the error had come about due to inadvertence, misunderstanding or oversight. It was not sufficiently serious so as to meet the second *Francovich* condition. On his findings of fact, he was entitled to come to that view.

106. The analysis in Section 5, 6 and 7 above means that the appeal comes down to the appellant's third point of principle, dealt with in Section 8 below.

8 The Third Principle: Has The Appellant Been Left Without An Effective Remedy?

8.1 The Competing Arguments

107. On behalf of the appellant, Mr Moser argued that, both as a matter of EU law and domestic common law, the appellant was entitled to an effective remedy and effective judicial protection when its rights under the PCR had been breached. He said that the court was obliged to ensure that an effective remedy remained even after the suspension had been lifted. In other words, he maintained that the judge was obliged in law to award damages in this case because Judge Bird had found, when the suspension had been lifted, that damages would be an adequate remedy. In his oral submissions, he agreed that this had the effect of giving the appellant an automatic right to damages and was thus a way to short-circuit the second *Francovich* condition.

108. Ms Morris rejected that submission. She noted that the principle of effectiveness was not an absolute rule and that the continuation of interim measures and the award of damages are not contiguous. The court has an unfettered discretion at both stages. She cited the CJEU decision in *Combinatie Spijker Infrabouw-De Jong Konstruktie and Others v Provincie Drenthe (C-568/08)* ("*Spijker*") in support of her submissions. There the court held that it would not be a breach of the Remedies Directive if a stay were lifted at the suspension hearing on a basis that, when the matter subsequently came to trial, was found to be erroneous. This was because the court noted the substantive and procedural differences between the two stages, saying at [77]:

> "77. On the one hand, the court hearing an application for interim measures is called upon to give a decision in the context of an urgent procedure in which both the gathering of evidence and the examination of the pleas of the parties is necessarily more cursory than in the context of the proceedings on the substance. On the other hand, the intervention of the court hearing an application for interim measures is not designed, like that of the court hearing the substance, to rule definitively on the claims presented to it but to protect provisionally the interests at stake, possibly by balancing them."

Ms Morris argued that, although the error there concerned an interpretation of EU law, there was no difference between an error of fact and an error of law for these purposes.

109. This third issue of principle was not a matter addressed by the judge, because it was not argued at the *Francovich* damages hearing. Mr Moser (who did not appear below) suggested that the judge should have addressed it in any event. I do not agree: the judge was assiduous in dealing with the numerous points raised by the parties across three lengthy judgments (liability, *Francovich* and costs). It was not for him to root about in the undergrowth to find yet more points which the parties had not taken. That would ordinarily be a reason to reject this argument without further ado. But I deal with the substance of it because the court heard argument about it and it raises a potentially important point of practice.

8.2 Can the Francovich Conditions Be Overriden?

110. The first issue is where, if at all, this third point of principle fits in to the overall picture. As debated with Mr Moser at the appeal hearing, if he was right on either of

his first two issues of principles, then the appeal would be allowed. Thus, it seems to me that this argument only arises if he was wrong on those first two principles, which I have concluded that he is. This means that he now needs to show that, despite that, there was some other overriding principle which, because of the procedural history of the case, entitled the appellant to damages, even if the appellant was unable to demonstrate that the *Francovich* conditions had been fulfilled.

111. That is, in my view, an insurmountable hurdle for the appellant. There is no authority for the proposition that, in a case of this sort, the *Francovich* conditions can be overridden or ignored. It is necessary to show a sufficiently serious breach in order to trigger the entitlement to damages, and no element of the procedural history in this, or any other, case can alter that.

8.3 The Principle of Effectiveness

112. The related issue is whether, because Judge Bird found that in this case damages were an adequate remedy, the principle of effectiveness required the judge to ignore the 'sufficiently serious' test and to award damages anyway? The answer must be No.

113. In my view, this argument is based on a misunderstanding of the principle of effectiveness. That principle is concerned with ensuring that a party entitled to a remedy can obtain that remedy in court. The principle of effectiveness is concerned with whether or not there is a proper remedial process. It does not provide a guarantee of success; neither does it create an entitlement where otherwise there is none. There is no authority for the proposition that, in the circumstances of a case like this, the *Francovich* and *Factortame* tests are rendered irrelevant because, in principle, the court had said at the interlocutory stage that damages were an adequate remedy. Nor is there any case in which it is said that this creates a conflict with the principle of effectiveness.

8.4 Two Different Regimes

114. I accept that, in a public procurement challenge, there is a potential conflict between the result at the interim stage of the litigation (when the respondent sought to remove the stay) and the final stage (when the judge came to consider whether the breach that he had found was sufficiently serious to warrant damages). But that is not unusual. Take for example, an application summarily to enforce a decision worth £2 million in favour of X by an adjudicator, because he found that Y had wrongfully repudiated the contract. The TCC will almost certainly enforce that decision by way of CPR Part 24. The payer Y will therefore have to pay the sum found due. But Y may then issue court proceedings in which, following a full trial, it becomes apparent that it was X who repudiated, and it is X who owes Y £500,000. That is not incoherent; it is the consequence of there being two different exercises (one interlocutory and one final), involving two different sets of evidence and two different sets of governing principles. They may produce differing results. In my judgment, that is what has happened here.

115. In my view, the decision in *Spijker* demonstrates this principle in practice. The potential difference in outcome between the interlocutory and final regimes was expressly accepted by the CJEU. Moreover, although Mr Moser sought to rely on later paragraphs of that judgment, in my view, those passages only serve to confirm

that proposition. As the court said at [91], "the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law". It cannot be suggested that the appellant's right to challenge this tender evaluation has been made either practically impossible or excessively difficult. On the contrary, the civil justice system in the UK, through the agency of the TCC, has provided prompt and detailed consideration of every point raised by the appellant, and at every relevant stage.

116. Judge Bird said damages would be an adequate remedy *in principle*. So they were. The judge said that damages were not recoverable *in fact* because the breach was not sufficiently serious. He was right about that too. In all the circumstances, I consider that this is a relatively straightforward case where the court has exercised its discretion by reference to different criteria at two different stages of the litigation. That does not make either of the answers "wrong" or give rise to a novel method of recovery.

8.5 The Appellant's Factual Difficulties

117. Although it would be unsatisfactory if it was the only answer, I am also bound to note that this point is not, strictly speaking, open to the appellant in any event. At the time of the application to lift the suspension, damages were not claimed. Moreover, although Judge Bird was faced with a raft of allegations about the scoring of the appellant's tender and the tender submitted by PAL, the specific claim in relation to the stairclimber/stairlift aspect of CSD02 had also not been raised: it was added later. Finally, it is not suggested that Judge Bird was not entitled to come to the conclusion that, based on the allegations that were made, damages would be, in principle, an adequate remedy. Judge Bird therefore made no finding in relation to the appellant's entitlement to damages in this case, much less that, if everything failed except the allegation in respect of the stair climber/stairlift, damages would be an adequate remedy. In those circumstances, I do not consider that this point is open to the appellant in any event.

8.6 Summary as to the Third Principle

118. I acknowledge that there is some tension between the test to be applied at the interim stage, and the *Francovich* conditions. That tension was first identified by Fraser J in *Lancashire Care*, and ways to ameliorate the practical issues that can arise were noted in *Bombardier* and *Boxxe*[5] Furthermore, I acknowledge that, as per O'Farrell J in *Alstom*, it is not a tension that is likely to come to the surface very often, since in most cases, a breach that would have reversed the result of a tender process is more likely than not to be sufficiently serious to justify *Francovich* damages.

119. That of course brings us straight back to our starting point. This was a very unusual and, as the judge said, "most unfortunate", situation. It was also, in my experience, very rare. A single, inadvertent breach in an otherwise impressive and careful

[5] During the course of his submissions, Mr Moser suggested that the sort of undertaking given in *Boxxe* arose because of the decision of the judge in this case. I disagree: this complication was identified by Fraser J in 2018 and gave rise to the agreement noted in *Bombardier* in 2019.

procurement exercise caused the wrong result. The judge agonised over the competing factors and in the end concluded that *Francovich* damages were not justified. Some judges might have come to a different view: that is not the point. The only issue is whether the judge erred in principle in undertaking that exercise. For the reasons that I have given, I conclude that he did not.

120. Accordingly, if my Lords agree, I would dismiss the appeal.

9. The Respondent's Notice

9.1 The Standalone Points in the Respondent's Notice

121. In the analysis set out above, I have dealt with the points raised by the appellant in its Grounds of Appeal. I have also dealt, along the way, with a number of points in the Respondent's Notice concerned with the *Factortame* balancing exercise.

122. There are two other points in the Respondent's Notice with which I have not dealt. One is concerned with the judge's treatment of the mistake as to the stair climber/stairlift, and is linked to a concern that the judge failed to place proper weight on evidence about access difficulties for parents with buggies and related evidential points; the second concerns the judge's rescoring of CSD02 for the purposes of the *Francovich* damages claim.

123. It is, strictly speaking, unnecessary to deal with these points, given my conclusions on the primary issues between the parties. But since they were both argued, and I have formed clear views about them both, I should set out briefly those conclusions. The first is of particular significance: because I have concluded that the respondent's criticism of the judge's approach on liability is made out, that provides an entirely separate basis for dismissing this appeal against the judge's order.

9.2 Point 1: The Scope/Effect of the Misunderstanding

124. In relation to accessibility, there were two issues. First, it was said that the respondent mistakenly thought that the reference to a stairclimber was a reference to a stair lift, when in fact a stair climber was a different mechanism which allowed, for example, someone in a wheelchair to be lifted to the first floor (which, of course, a fixed stairlift could not do). The second issue was that a reference to alternative premises was mistakenly thought to refer to premises which were routinely available, whereas it was in fact only available if the first-floor premises became inaccessible (eg through floods/fire).

125. The judge found that both mistakes had been made. His focus was on the first mistake which he correctly said was "obviously the more significant" (Liability Judgment [148]); although the second mistake was also established, the judge found that its relevance was that it should have "heightened the evaluators' concerns about the perceived inadequacies of the stairlift".

126. The relevant evaluator, OF, accepted that it was an error for her to have interpreted the stair climber as a type of fixed stairlift. Furthermore, her mistake was not unimportant, because the record of the moderation meeting, held between the three evaluators, showed that the other two would have awarded the appellant a score of 4

for CSD02, whereas OF persuaded them to agree with her to score it at 3 "due to the need to use alternative practice for patients who are unable to use the stair riser; it is felt that these patients will be disadvantaged as equipment will not be of the same standard."

127. Given the admission of the mistake, and the potentially causative effect of that mistake, it would appear that *prima facie*, the judge's conclusion as to manifest error was justified. That seemed to be confirmed by the judge's decision at [147][6] – which it seems to me was open to him – to give no weight to opinion evidence about stair climbers from another evaluator who was not involved in this aspect of the evaluation, and his view at [146] (again in my view a correct one) that this issue should be decided primarily on the written records.

128. However, the written records revealed that the misunderstanding about the stair climber/stairlift was not in fact causative of OF's score of 3. The analysis is this. In her contemporaneous note that justified her score of 3, OJ said that "the proposal is to install a stair lift which is not really adequate, as this is not only about wheelchair users but people with reduced mobility and pram access and therefore needs to be easy to use". The subsequent oral evidence focused on patients with limited mobility (see [139]). But it did not address the separate point that OJ had made about mothers with prams and buggies and the general need for the access arrangement to be easy to use.

129. The judge at [140] dismissed the respondent's justification of the score of 3, because he found that:

(a) The concern about parents with buggies and the like was not specifically mentioned in the contemporaneous documents and may have been an afterthought;

(b) The principal focus on accessibility under the Equality Act is on the patient, not the able-bodied parent with a pram or buggy.

130. It seems to me that both of those reasons for rejecting the respondent's defence on this critical point were, on the face of the Liability Judgment, wrong. The particular question of prams and buggies *was* expressly raised by OJ in her evaluator's notes, as recorded by the judge at [134]. So it was not an afterthought; on the contrary, it was fairly and squarely recorded in the contemporaneous documents. Moreover, on the wider access point, both the other two evaluators referred in their notes to "access limitation" and "limited accessibility for patients/carers with limited mobility needs". So this was not only not an afterthought, but a concern that was raised and recorded by all three evaluators at the time. It was a concern which was entirely independent of the stair climber/stairlift issue.

131. In addition, the judge was wrong to say that the Equality Act is focused on the patient; it is of general application. And CSD02 was concerned about accessibility generally, not just the question of compliance with the Equality Act. Again, therefore, the judge's reasoning for dismissing this aspect of the defence was unjustified.

[6] This and subsequent paragraph references are to the Liability Judgment.

132. I am of course acutely aware of the *Fage/Volpi* restrictions on appeals against findings of fact. I have come to these conclusions with reluctance. But it seems to me that, not only was the judge wrong to dismiss the point about parents with buggies and prams on the face of his judgment (because OJ had raised it in her contemporaneous notes and it was also reflected in the notes of the other two evaluators), but it was also a good point: a stair climber would be as useless to such people as the stairlift that OJ had wrongly assumed the stair climber to be. So OJ's mistake about the nature of the stair climber did not detract from her wider concerns about the accessibility of the first-floor premises generally, and in particular for those who could not use the stair climber, such as parents with buggies.

133. For these reasons, it seems to me that this is one of those rare occasions when the strictures of *Fage/Volpi* cannot apply. The judge should have had regard to that contemporaneous evidence so as to evaluate whether the misunderstanding really was a manifest error, or had had any detrimental effect on the score of 3 which had been awarded. He overstated the significance of the misunderstanding about the stair climber/stairlift, and he failed to consider the wider concerns about accessibility which had been raised by the evaluators. On all the material that I have seen, it seems to me more likely than not that, if the judge had realised these points, he would not have found this to be a manifest error or, at the very least, would have found that it was of very limited effect and would not have justified an increase in the appellant's score from 3 to 4. The overarching accessibility problem that led to the original score of 3 remained.

134. On that basis, therefore, I consider it more likely than not that the scores would have remained unchanged, and the contract was properly awarded to PAL. So on that analysis, this was not a case where the contract had, in fact gone to the wrong bidder, after all.

9.3 Point 2: The Rescoring

135. The respondent's second argument concerned the judge's rescoring exercise. This covered a bewildering number of alternatives. First, it was said that the judge should have declined to rescore this element of the bid (primarily because there were pros and cons to both bids so it was very difficult, and because there were gaps in the evidence). Alternatively, it was said that the judge should have looked at the totality of the evidence and rescored CSD02 "completely afresh". It was also suggested that the judge should have reconsidered the rescoring exercise at the time of the *Francovich* judgment (in other words, to go through at least part of the exercise again), "to contextualise the breach by, amongst other things, considering the different available scores that might have been available" (see paragraph 37b of the respondent's skeleton argument). I reject these arguments for reasons very briefly outlined below.

136. I disagree with the suggestion that the judge should have declined to rescore at all. The judge followed the approach in *Lion Apparel* and *Bechtel Ltd v High Speed 2 (HS2 Limited)* [2021] 195 Con LR 124; [2021] EWHC 458. Whilst it is not the judge's task to embark on a remarking exercise and to substitute his or her own views for those of the evaluators, the judge has to ascertain if there was a manifest error and, if so, to determine whether that error in the marking of the tenders would have led to a different result. He or she has to do that on the basis of the evidence provided.

137. That is what the judge did. He was prepared to roll his sleeves up and make the best of what he had. It is wrong in principle to suggest that he should, at the last minute, have somehow declined to arrive at a result, either because the exercise was potentially complicated, or because there were some gaps in the evidence. Any gaps were relatively small matters of detail: that is inevitable in a case like this. At the end of the lengthy liability hearing in this case, to decline to rescore this element would have been like a detective gathering all the suspects into one room and then refusing to identify who did it. That is not the way to resolve a procurement challenge based on the scores awarded.

138. Furthermore, I consider that, if he had been right in his approach to the stair climber/stairlift, the judge was entitled to rescore in the way he did. It is inevitable, when a judge is obliged to ascertain whether a manifest error made a difference to the outcome, that he or she will ascribe it a score (if possible) and then gauge the effect. Here, as we know, one inadvertent error was found to give rise to a major consequence. If (which I now do not accept) the judge had been right in his ascertainment of the manifest error, I consider that he was right to decide to rescore that part of the exercise by looking at a relatively limited number of potential variables. He was not obliged to go through some lengthy remarking exercise of CSD02 as a whole, taking into account, for example, opinion evidence that was not and never would have been available at the time of the evaluation, and considering every possible permutation of available scores. The errors found by the judge were of small compass and he was entitled to restrict his remarking to that very limited element of the bid.

139. That answer is also applicable to the final argument, that the judge should have redone the exercise (or part of it) again at the *Francovich* stage. Realism is required. It is unrealistic to require a judge who has identified a manifest error and the consequences of that error, to then embark on a fresh round of remarking, in order to consider “the different available scores that might have been available” for the purposes of the *Francovich* evaluation. On the face of it, that would be an exercise in over-complication.

140. For these reasons, I reject the second point arising out of the Respondent’s Notice.

9.4 Summary in respect of the Respondent’s Notice

141. I conclude that the judge erred in finding that OJ’s misunderstanding about the stair climber/stairlift had the wide-ranging consequences that he identified. In particular, it seems to me more likely than not that, because of the difficulties of access which were recorded in the contemporaneous documents and remained unresolved, the judge would not have found a manifest error, and/or would have retained the original score of 3. I reject the second suggestion in the Respondent’s Notice, to the effect that the judge should not have rescored the exercise or done it a different way. The judge had all materials necessary to undertake the exercise.

10. Conclusions

142. For the reasons set out in Sections 5 and 6 above, I reject the two primary points of principle relied on by the appellant which sought, in one way or another, to get away from the nature and quality of the breach of the PCR, and to focus instead on the

consequences. For the reasons set out in Section 7 above, I consider that the judge carried out the balancing exercise in accordance with the applicable principles. For the reasons set out in Section 8 above, I conclude that there is no incoherence or breach of the principle of effectiveness as alleged by the appellant, and therefore no way round the application of the second *Francovich* condition.

143. Furthermore, for the reasons set out in Section 9.2 above, I would allow the first point in the Respondent's Notice and find that the judge erred in attaching legal significance to the misunderstanding about the stair climber/stair lift and/or failing to note that the underlying concerns about access were both valid and made in the contemporaneous documents. It is more likely than not that, but for those errors, the judge would have retained the score of 3 for CSD02.

144. All of these conclusions mean that, if my Lords agree, this appeal will be dismissed. The judge was right to dismiss the appellant's damages claim.

LORD JUSTICE DINGEMANS:

145. I agree.

LORD JUSTICE SNOWDEN

146. I also agree.