Neutral Citation Number: [2022] EWHC 2348 (TCC)

Case No: HT-2019-000339

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/09/2022

Before :

MR ALEXANDER NISSEN KC
Sitting as a Deputy Judge of the High Court

- -

Between :

BRACEURSELF LIMITED	**Claimant**
- and -	
NHS ENGLAND	**Defendant**

- -
- -

Jonathan Holl-Allen KC and Amardeep Dhillon (instructed by **Goodman Grant Solicitors Ltd**) for the **Claimant**
Fenella Morris KC and Benjamin Tankel (instructed by **Blake Morgan LLP**) for the **Defendant**

Hearing date: 26 July 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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ALEXANDER NISSEN KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 16 September 2022 at 10.30am.

MR ALEXANDER NISSEN KC
Sitting as a Deputy Judge of the High Court
Approved Judgment

MR ALEXANDER NISSEN KC :

Introduction

1. In these proceedings, the Claimant claims damages against the Defendant pursuant to the Public Contracts Regulations 2015. The Defendant, NHS England, is the statutory authority responsible for, amongst other things, NHS South, Central and West Commissioning Support Unit. In February 2019, the Defendant completed a nationwide procurement for the provision of orthodontic services of which Lot reference PR002368 (WSX18), located in an area of East Hampshire, formed part. The Claimant, Braceurself Ltd, was the incumbent provider and was one of two bidders for the Lot, which comprised a seven-year contract. The Claimant's bid was unsuccessful. In its proceedings, the Claimant initially sought relief against the Defendant setting aside the award of the contract to the successful bidder, Orthodontics by Eva Petersfield & Alton Ltd ("PAL"). The stay was lifted on the automatic suspension in November 2019: see [2019] EWHC 3873, (TCC). As a result, the contract was let to PAL as the successful bidder. In December 2019 the relief sought by the Claimant was amended to include a claim for damages. Those damages were claimed in the sum of £4.7m for loss of profit, bid costs of £26,500 and loss of goodwill, which was not separately quantified.

2. A feature of this case is that the outcome of the competition was very close. The Claimant's bid scored 80.25% whereas PAL's bid scored 82.5%. The difference was therefore only 2.25% in a two-horse race. It followed that even minor breaches of duty by the Defendant could have had a decisive impact on the outcome. That explains why the Claimant had cast its net quite widely in respect of its complaints. The Claimant had contended there should have been both upwards adjustments of the Claimant's score and downward revisions of PAL's score.

3. On 12 February 2021, Fraser J ordered a split trial whereby the Court would first determine issues of liability including the seriousness of any breach. The last part of that order is a reference to the requirement that a breach must be "sufficiently serious" to justify an award of Francovich damages.

4. Following a trial which concluded in March 2022, I handed down judgment on all issues save for that concerning the seriousness of any breach: see [2022] EWHC 1532 (TCC).

5. As articulated by the parties in their List of Issues, the remaining question was framed in the following terms:

> *"If there was or there might have been a material difference to the scoring of the bids, were the breaches sufficiently serious to justify an award of Francovich damages, having regard to the relevant case law touching on Francovich damages?"*

6. In respect of that question, I concluded at [192] that I would be assisted by further submissions from the parties in light of the single breach found.

7. The hearing in respect of this part of the trial was held on 26 July 2022. The Claimant was again represented by Mr Holl-Allen KC and Mr Dhillon. The Defendant was again represented by Ms Morris KC and Mr Tankel. I am grateful to all counsel for their assistance.

Summary of earlier findings

8. The full extent of my findings can be found in the judgment at [2022] EWHC 1532 (TCC). What follows is by way of brief synopsis.

9. In September 2015, the Defendant produced a "Guide for commissioning dental specialties – orthodontics" also known as the National Guide for Commissioning Orthodontics 2015. It stressed the importance of promoting equality which was said to lie at the heart of the Defendant's values. The Guide was to be used by commissioners to offer a consistent and coherent approach and described the direction required to commission dental specialist services with a view to improving dental care and outcomes for patients. The procurement exercise was in relation to services to be provided pursuant to a "Personal Dental Services" agreement for the relevant Lot area. The competition rules were set out in an "Invitation to Tender Document" ("ITT"). The same ITT was used across the NHS England South region divided across 97 lots. The ITT comprised a Call for Competition for the provision of Orthodontic Services for East Hants, carrying the procurement reference WSX18.

10. Within the ITT, the Evaluation Methodology was described in detail. The approach was conventional. Evaluators, appointed for their knowledge and experience, would complete an individual evaluation of the bids including the provision of scores and justification for those scores. Evaluations were to be of bids in their own right rather than by comparison with other bids. There would then be a process of moderation with the evaluators to discuss the consistency and appropriateness of each individual score. (This was to occur even if their scores had been the same.) Moderation would usually be an in-person meeting. A final score resulting from the moderation was then recorded for each applicable question, to which the weightings were then deployed. (After the moderation, the individual scores by the evaluators were no longer relevant.) The highest total combined score for Quality and Finance would then be recommended for an award. Scores ranged from 0 (deficient) to 4 (excellent).

11. Overall, I was generally impressed by the careful way in which the evaluators had tried to carry out their functions. I also concluded that the procurement itself was carefully planned and well organised. Nonetheless, of the very many complaints made by the Claimant in these proceedings, I found one to have been justified. In particular, I found the Defendant made a manifest error in its scoring of question CSD 02 which led to it awarding the Claimant a score of 3 (good) in respect of that question rather than, as I found it should have done on the evidence before me, a score of 4 (excellent). In summary, CSD 02 was concerned with Clinical and Service Delivery. One aspect of this multi-faceted criterion concerned accessibility to the premises. The Claimant's premises were on the first floor which meant that its bid needed to cater for those patients who could not use the stairs to access the service. In addressing this part of the Claimant's bid, the Defendant made two errors. The Claimant had proposed to use a device called a stair climber. Mistakenly, the Defendant evaluated

the Claimant's bid on the basis that it was proposing to install a stair lift. The Defendant also mistakenly thought that, by way of partial solution, the Claimant was offering services at alternative premises at least to those patients who could not use the stairs. The suggestion was that the equipment at the alternative premises would not be of the same standard. In fact, the Claimant was only making an offer to use alternative premises as a result of a flood or fire rendering its primary site unusable. I concluded that these mistakes had a causative impact on the Defendant's scoring and were material to the outcome. Whilst I acknowledged that the Defendant was generally entitled to a margin of appreciation in its scoring of the criterion as a whole, I concluded that such margin was not relevant in determining whether a straightforward misunderstanding of the bid had taken place since that was not a question of judgment or assessment.

12. The Court was well placed to reach a conclusion as to the appropriate score which ought to have been given to the Claimant. It was clear that the issue about access had, in fact, impacted negatively on the score which the Claimant received in respect of CSD 02 and the Court was in a good position to reach its own conclusion about the appropriate score in light of the evidence as a whole. The consequence of changing the score from 3 to a 4 in respect of CSD 02 was to increase the Claimant's total bid score by 2.5% in circumstances where the difference between the two bidders had been 2.25%. But for the manifest error, the Claimant would therefore have been awarded the contract, having scored 0.25% higher than the other bidder. This was not, therefore, a loss of a chance case.

The Law – Outline Approach

13. I did not understand the broad legal framework to be in dispute although, inevitably, there were some detailed points of difference. Where relevant, I address those differences below in my considerations of the individual factors.

14. In EnergySolutions EU Ltd v Nuclear Decommissioning Authority [2017] UKSC 34; [2017] 1 WLR 1373, SC the Supreme Court held that European Union law liability of a contracting authority under the Remedies Directive for breach of the Public Procurement Directive would only exist where the minimum conditions set down by the Court of Justice were met and that, accordingly, an award of damages could only be made under EU law when a breach of the Public Procurement Directive was sufficiently serious, applying Francovich v Italian Republic [1995] ICR 722 and Brasserie du Pêcheur SA v Federal Republic of Germany [1996] QB 404. The Supreme Court considered that the Court of Appeal had erred in assuming that any claim for damages under the 2006 Regulations[1] was no more than a private claim for breach of a domestically-based statutory duty, and for that reason subject to ordinary English law rules which included no requirement that a breach must be shown to be "sufficiently serious" before damages are awarded. It was not sufficient to show an infringement of conferred rights (the first condition) and a direct causal link between the breach and the loss or damage sustained (the third condition). The breach must also be sufficiently serious (the second condition).

[1] The Claimant accepts there is no material difference between the 2006 Regulations and the Public Contracts Regulations 2015.

15. Whilst the Claimant notes a suggestion resulting from Fosen-Linien AS v AtB, Case E-16/16 that the Francovich conditions should be reconsidered, it accepts that this Court is likely to proceed on the basis that the Supreme Court's decision in EnergySolutions remains good law binding upon it. That was the conclusion of O'Farrell J in Alstom Transport UK Ltd v Network Rail Infrastructure Ltd [2019] EWHC 3585 (TCC) and I agree with it.

16. It is common ground before me that the approach to be taken in the assessment of whether the breach was sufficiently serious is (non-exhaustively) by reference to the eight factors identified by Lord Clyde in Reg v Secretary of State, Ex p. Factortame Ltd [2000] 1 AC 524, HL. That was the course which Fraser J adopted in EnergySolutions EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 3326 (TCC) at [34]; [2017] BLR 92. His judgment was itself produced in advance of the Supreme Court's decision that the Francovich conditions were applicable.

17. Both parties before me acknowledged that the language and content of some of the Factortame factors were not an easy fit when they have to be deployed in a procurement context such as the present one. It was also accepted that, in the end, it comes eventually to be a matter of fact and circumstance whether the breach was sufficiently serious: Lord Clyde in Factortame at p.554B.

18. The eight factors were summarised in Delaney v Secretary of State for Transport [2015] 1 WLR 5177, CA by Richards LJ at [36] as follows: (i) the importance of the principle which has been breached; (ii) the clarity and precision of the rule breached; (iii) the degree of excusability of an error of law; (iv) the existence of any relevant judgment on the point; (v) the state of the mind of the infringer, and in particular whether the breaches were deliberate or inadvertent; (vi) the behaviour of the infringer after it has become evident that an infringement has occurred; (vii) 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 (viii) the position taken by one of the Community institutions in the matter.

19. At first-instance in Delaney, Jay J had said of Factortame at [84]:

> *"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."*

20. In the Court of Appeal, it was accepted by the parties that Jay J's approach had been correct one: [37].

21. Before addressing the eight individual factors in turn, it is helpful to (briefly) review the legal landscape in which such an assessment has previously been undertaken. It is necessarily brief because, in the procurement field, there are not many cases which have addressed the question of whether any breach is sufficiently serious. The most

detailed consideration given to the point is contained in the first-instance EnergySolutions case, to which I shall have to return. In that case, Fraser J held that each of the breaches of obligation in respect of the Evaluation Requirements in that case was sufficiently serious when, or if, their effect individually or cumulatively, upon the scoring was such that the outcome of the competition would be altered: [69]. At [43], he said he did not find it necessary 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)." (My emphasis)*

22. In Ocean Outdoor UK Ltd v Hammersmith and Fulham LBC [2019] EWCA Civ 1642; [2020] PTSR 639, CA the Court of Appeal emphasised the fact sensitive nature of the assessment at [85]:

> *"In my view, it would be wrong in principle to hold that (subject to the separate point about the causal link) a claimant in the position of Ocean was automatically entitled to claim damages as a result of a contracting authority's failure to follow the Regulations. That would mean that every breach of the procedural requirements would automatically trigger a claim for damages, regardless of any other factor. 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."*

23. In Alstom Transport UK Ltd v Network Rail Infrastructure Ltd [2019] EWHC 3585 (TCC), the first-instance Court was concerned with the question of whether to lift the automatic suspension. In that preliminary context, it was not in a position to determine whether the alleged breaches, individually or cumulatively, would be sufficiently serious to satisfy the second Francovich condition. However, the Judge observed at [37] that:

> *"it is likely that any breach of the Regulations that deprived Alstom of a framework contract worth £1.8 billion would amount to a sufficiently serious breach to satisfy the Francovich conditions."*

24. In that case it was conceded by Network Rail that, if Alstom were to succeed in establishing that it had awarded the contracts to the wrong bidder, the breach would be sufficiently serious to justify an award of damages: see [38].

25. In a judgment handed down after the hearing in the present case, namely Consultant Connect Ltd v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board and ors. [2022] EWHC 2037 (TCC), Kerr J addressed each of the eight factors mentioned by Lord Clyde in Factortame. He concluded without difficulty that the breaches found were sufficiently serious to justify an award of damages in

circumstances where there had been a manipulation of the process to ensure that the successful bidder won the contract unless it should seek to charge too much.

The Parties' contentions in outline

26. The Claimant's position, that the breach found in this case was sufficiently serious, was heavily focussed on the pivotal and drastic impact of the manifest error found. It submitted that the error caused the Claimant, the incumbent provider of orthodontic services, to lose a contract which it should have won, and with it a very significant proportion of its business. As a direct consequence of the error, the Defendant was in breach of its fundamental obligation to award the contract to the most economically advantageous tenderer. The first and second of the list of factors in Factortame were engaged and none of the others displaced their application. The Claimant particularly relied on the EnergySolutions case because it showed that an award of damages was warranted where, as here, the breach or breaches would have affected the conclusion of the competition. The Claimant emphasised that it was not necessary to show flagrant misconduct, moral culpability or egregious conduct; nor intentional or negligent fault or bad faith on the part of the authority. It was sufficient that, if the Claimant had been marked a 4, not a 3, its bid would have been successful and that such a reduction in its score was due to a manifest error on the Defendant's part. The Claimant criticised the Defendant for placing too much focus on culpability (or the lack of it) and not enough on the principle breached and the effect of the breach.

27. The Defendant's submission was that, viewed in the round, this was a well-run procurement in which a single manifest error had been made. Even in respect of the single breach, the accessibility issue related only to one bullet point in a non-exhaustive list. The Defendant contended that the Claimant was, effectively, saying that breach and loss caused thereby were enough to entitle it to damages, which was to attribute no weight to the second Francovich condition at all. In truth, it was hard to conceive of a more minor breach in a procurement context. Where there was a minor breach, it should be considered as one which was not sufficiently serious for an award of damages to be required. The phrase "sufficiently serious" has been used to indicate a fairly high threshold must be passed: see Lord Hope in Factortame at p.550D.

28. The Claimant made a separate submission that, as it was a fundamental part of the Court's reasoning when lifting the statutory stay on the award of the contract that damages were considered to be an adequate remedy, it would be unjust and incoherent to leave the Claimant without a remedy in damages for its losses were the Court now to conclude that the breach was not sufficiently serious to meet the Francovich condition. That is because this Court has now concluded that the Claimant ought to have been awarded the contract. As to that, the Defendant submitted there was no injustice or incoherence resulting from the lifting of the stay because the test applied by the Court at that stage would have been the same.

29. At one stage, the Defendant appeared to submit that the approach taken by Fraser J in the EnergySolutions case ought to be reconsidered in light of the Supreme Court's later decision in the same case. In the end, I did not understand Ms Morris to pursue that submission but, to the extent that it was maintained, I reject it. As Mr Holl-Allen submitted, the Supreme Court did not provide detailed guidance as to the approach to

be adopted in respect of the test. Rather, it decided simply that the Francovich conditions were applicable.

30. Finally, I should record that although the Claimant's sole witness, Mr Kostantinos Spathoulas, addressed the seriousness of breach at paragraphs 32 to 45 of his witness statement (on which, as I recall, there was no or no significant cross examination), Mr Holl Allen did not seek to rely on any of the evidence therein contained.

Assessment

31. Although I will shortly review each of the eight factors identified by Lord Clyde in Factortame, the Defendant was also right to emphasise the relevance of some of the passages within the speech of Lord Hope (with whom Lord Nicholls and Lord Hoffman agreed) in the same case at p.550/1.

> *"It is a novel task for the courts of this country to have to assess whether a breach is sufficiently serious to entitle a party who has suffered loss as a result of it to damages. The general rule is that where a breach of duty has been established and a causal link between the breach and the loss suffered has been proved the injured party is entitled as of right to damages. In the present context however the rules are different. The facts must be examined in order that the court may determine whether the breach of Community law was of such a kind that damages should be awarded as compensation for the loss. The phrases "sufficiently serious" and "manifestly and gravely" which the European Court has used indicate that a fairly high threshold must be passed before it can be said that the test has been satisfied."*
>
> *"…the nature of the breach will always be a highly relevant factor in the assessment. The more fundamental the breach, the easier it will be to regard it as sufficiently serious."*
>
> *"This was then more than a trivial or technical breach of the Community obligations."*
>
> *"So this case cannot, I think, be described as one which went wrong due to inadvertence, misunderstanding or oversight."*

32. I must now review the eight factors identified by Lord Clyde in turn, recognising that they need not be exhaustive, that the weight to be given to each will vary from case to case, that no single factor is necessarily decisive and that the seriousness of the breach will always be an important factor.

(i) The importance of the principle which has been breached

33. As in EnergySolutions, the Claimant submitted that the principle in play is the obligation to award the contract to the most economically advantageous tenderer who has emerged as the winner of the competition. The Claimant pointed to the

importance attached to that principle which Fraser J identified in EnergySolutions at [53] to [56]. He considered that the significance of this principle operated in that claimant's favour.

34. The Claimant further points out that this is not a loss of a chance case where the failure *may* have resulted in an award of the contract to the wrong party. It is case where the failure *did* in fact result in the key principle being breached.

35. In a new argument, not foreshadowed in writing, the Defendant submitted that Fraser J was wrong in EnergySolutions to have characterised the requirement to award the contract to the most economically advantageous tenderer as a principle of European law (and thus subject to the first Factortame factor) rather than concluding it was actually part of the domestic law. For that reason, on its case, the first Factortame factor is not engaged at all. To support this proposition, Ms Morris relied on passages within The Law of Public and Utilities Procurement, Vo1 1 by Professor Arrowsmith. According to Arrowsmith,:

> *"the main aim of the current EU policy on public procurement is to remove barriers to the internal market" (at 3-07) and "the directive's main objective is to promote the internal market" (at 3-12)*

whereas

> *"value for money is a key objective of the regulatory rules of most national procurement systems and is promoted by various policy measures and legal rules in the UK domestic system."*

36. Based on those and similar quotes from the same book, Ms Morris submitted that the underlying EU principle was concerned with the maintenance of the internal market whereas it was a principle of UK domestic law to obtain value for money by means of the regulatory procurement rules.

37. Subject to that threshold point, the Defendant alternatively submitted that the principle breached was the need to award a lawful score for each of the evaluation criteria and that, were CSD 02 to have been marked afresh, a score of anything between 2 and 4 could have been a lawful score in relation to that criterion. In terms of economic efficiencies, it was submitted that there were pros and cons to both bids and it was open to decision makers to decide which would have better delivered the service being procured. The Defendant also submitted that, in the context of the assessment of the Francovich condition, it was permissible for the contracting authority to make any "reverse arguments" that the preferred bidder's bid ought to have been scored even higher or that the claimant's bid ought to have been scored even lower, those arguments not being available for deployment before the test of sufficient seriousness comes to be applied.

38. On each of these points, I prefer the Claimant's submissions. As to the threshold point, I am satisfied that the correct principle in play is the obligation to award the contract to the most economically advantageous tenderer who has emerged as the winner of the competition and that such a principle is an important one which lies at

the heart of the procurement process. That was the principle which Fraser J applied in EnergySolutions at [53] to [56]. At [53] he emphasised the European origin of the principle when he said:

> *"The broad purpose of the Directive and the Regulations is to open up the field of public works contracts to fair competition. Lord Hope made this clear at [10] in* ***Risk Management Partners Ltd v Brent London Borough Council*** *[2011] UKSC 7, [2011] 2 AC 34, which concerned what is called the Teckal exemption, where a public authority contracts with another public authority or with a body which is owned by such authorities, and only provides goods and services for public functions. He stated:*
>
> > *"The 2006 Regulations were made under section 2(2) of the European Communities Act 1972. They give effect to Council Directive 2004/18/EC of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L134, p 114). The broad object of Directive 2004/18/EC, and of the Regulations that give effect to it, is to ensure that public bodies award certain contracts above a minimum value only after fair competition, and that the award is made to the person offering the lowest price or making the most economically advantageous offer.""*

39. At [54] he said:

> *"There is no need to embark upon an analysis of economic doctrine in order to realise that fair competition, whether across borders in different Member States or internally in domestic markets, is considered highly beneficial to society. Regardless of its benefits, it is what the Directive and the Regulations require."*

40. In light of this authority, I am unpersuaded that the distinction drawn by Professor Arrowsmith, whilst it may be relevant in other contexts, has any application in this one.

41. Turning to the other points, the Claimant is right to observe that, as with EnergySolutions, its case is stronger than a simple loss of a chance case. I reject the Defendant's attempt to reframe the principle in this context by reference to the granular need to award a lawful score to a particular question. As the Claimant submitted, that may be a relevant principle but it is not the key one which arises here. The bigger picture is that the competition was expressly run on the basis that the tenderer that won the competition would be awarded the contract as the most economically advantageous tenderer. As there were pros and cons to both bids, they should have been properly scored by reference to the criteria. It was open to the

decision makers to frame the appropriate questions, to allocate the appropriate weight to the questions and to properly mark the tenders by reference thereto. The entity with the highest score should then have been awarded the contract.

42. As to the Defendant's last point, whilst I am prepared to accept in principle that it is open to the Court at this stage of its consideration to take into account the so-called "reverse arguments", the fact is that at the main trial (when the Defendant would have understood this issue to have fallen for decision) the Defendant called no evidence and made no submissions to the effect that the preferred bidder's bid should have been scored even higher or that the Claimant's bid should have been scored even lower. It is, therefore, a theoretical point that goes nowhere. For the Court now to take into account the mere possibility that PAL's bid could have been scored higher or that the Claimant's score could have been lower, in either case for unarticulated reasons, would undermine the clear conclusion already reached by the Court that the contract should have been awarded to the Claimant but for the manifest error: see [186] and [188].

43. This first factor operates in the Claimant's favour.

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 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.

(ii) The clarity and precision of the rule breached

45. The second factor does not add much weight to the first in this context. Drawing again on EnergySolutions, at [57], the Claimant submits that the rule breached is both clear and precise and is not to be confused with any discretion or margin of appreciation within the evaluation process.

46. The Defendant submits that Fraser J had been wrong to focus solely on the clarity and precision of the rule, in circumstances where complex facts arise. In Factortame, Lord Clyde had said, at p.554G:

> *"The application to complex facts even of a rule which is reasonably clear in itself may render the situation open to doubt."*

47. On its case the accessibility issue was but one facet of a composite exercise. (It will be recalled that it concerned a single bullet point in a non-exhaustive list.) It said there was no competition rule specifying the weight to be attached to the point about access and its weight was for the Defendant to determine in its discretion. There was, it said, no right or wrong answer to the question of how well a solution complies with the Equality Act.

48. Again, I agree with the Claimant's position in respect of this second factor. The manifest error made here does not arise from any factual complexity - it arose out of very simple facts - so the distinction sought to be drawn cannot properly be made in this case even if would be right to do so in other cases. In my judgment, the Defendant has wrongly focussed on the supposed lack of precision (or clarity) within the scoring of the particular question. That is too granular an approach and would give rise to practical complications in assessing this second factor in any case where multiple breaches have occurred. In my judgment, the second factor is concerned with the clarity and precision of the over-arching procurement rule breached. The absence of any competition rule specifying the weight to be attached to the particular point about access is neither surprising nor relevant.

49. In EnergySolutions, Fraser J said that the obligation to award the contract to the most economically advantageous tenderer was clear and precise: [57]. I agree. As he said, the authority does not have any discretion at all once the conclusion of the competition had been reached. He said, and I agree, that it is misleading to concentrate on any discretion afforded within the evaluation itself and seek to elide that with the discretion to award the contract upon conclusion of the competition.

50. Once again, though, I add that this factor in combination with the first cannot, of itself, be decisive in the Claimant's favour.

(iii) The degree of excusability of an error of law

51. The Claimant's submission is that this factor does not arise for the same reasons as those given by Fraser J in EnergySolutions at [58], namely that this factor is primarily concerned with cases where liability for legislative or policy acts fall to be considered. To the extent that it is relevant to consider the excusability of errors at all, it submits they were only errors of fact here, not law.

52. The Defendant submitted that Fraser J's observations fall to be reconsidered in light of the Supreme Court's decision in the same case at [24]. The Defendant also prayed in aid that its objective had always been to maximise access to orthodontic services for those with a disability, itself an important principle of Community law. It also relied upon my earlier findings that, generally, the evaluators had been careful in the performance of their duties and that the procurement itself had been carefully planned and well organised.

53. When applying the language of the factors identified in Factortame in a procurement context such as this, it is not clear whether this particular factor should be limited to considerations of excusability for errors of law, rather than errors of fact. In any event, the distinction may be a fine one as it either is, or is akin to, an error of law for the Defendant to have made a manifest error in its evaluation of any particular criterion[2].

[2] In Bechtel Ltd v High Speed Two (HS2) Ltd [2021] EWHC 458 (TCC), 195 Con LR 123, Fraser J considers the nature of the Court's role in respect of allegations of manifest error: see [19] to [28]. Manifest error was said to be simply another way of expressing irrationality: [23].

54. Whilst the very concept of an "excusable breach" is a slightly odd one, it is clear that this factor should, in a given case, have regard to why the breach occurred and whether, whilst it was nonetheless a breach, it is at least understandable why it occurred. Mitigating factors for the occurrence of the breach can be considered.

55. The Claimant submits that these errors were not excusable (in the sense described) since the true nature of the Claimant's bid was plain on its face. In my judgment, that is to re-argue the fact it is a breach, rather than to consider its excusability. In my judgment, the single breach made by the Defendant in this case was very much at the excusable end of the spectrum. Amongst the plethora of detail which they had to consider and take into account both in the bid as a whole and in respect of CSD 02, the evaluators made two errors in misunderstanding the Claimant's bid. The misunderstandings were neither egregious nor gross. On the contrary, they were minor.

56. I do accept the Defendant's submission that, at some point in the assessment presently being undertaken, it would be material to take into account the earlier findings of this Court about this procurement. It cannot be right to ignore the fact that, subject to the single breach found, this had been a carefully planned and well organised procurement. In short, during this procurement, the Defendant got a lot else right and I take that into account.

57. Overall, this factor operates in the Defendant's favour.

(iv) The existence of any relevant judgment on the point

58. The Claimant observes that there is no judgment going to the point in question. In EnergySolutions, Fraser J suggested at [59] that this factor could be read in a broader way to include all judgments in the field of procurement proceedings. Such cases have emphasised the importance of the principle of fair competition and the award of the contract in question to the winner. The Claimant submits that the competition was not fair in the respect upheld by this Court as PAL was not the true winner of the competition.

59. The Defendant simply submits that there is no settled case law on the precise issue in this case.

60. In Consultant Connect Ltd, at [346], Kerr J considered it relevant that, although there was no case on all fours with that one, there are plenty of cases in which non-transparent behaviour and unequal treatment have been condemned in court.

61. It is common ground that there is no case on all fours with the present one. I am quite prepared to accept that there are procurement cases which emphasise the importance of fair competition and the award of the contract in question to the winner and that this fourth factor may require account to be taken of those cases. But, in reality, the emphasis made in those cases does no more than explain the need to apply the relevant procurement principles which are themselves well known. In the present context, I would regard this as a neutral factor.

(v) The state of mind of the infringer

62. The Claimant rightly accepts that in this case there was neither bad faith nor deliberate wrongdoing on the part of the Defendant. For that reason, on the Claimant's case, this fifth factor does not apply to its own advantage. On the other hand, it submits that the mere absence of bad faith is not to be regarded as a point in the Defendant's favour, citing Fraser J in EnergySolutions at [62]. There he said:

> *"However, although the presence of such a factor would undoubtedly count against the NDA, I do not consider that the absence of such factors means that this is in the NDA's favour. I agree with Jay J who stated in* ***Delaney*** *[84] at [2015] 1 WLR 5177 at 5201:*
>
> > *".....What it is important to recognise at this stage is that: (i) the test is objective.... (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." (emphasis added)*
>
> ...
>
> *It is also very difficult for any court, in a procurement case, to consider the state of mind of the infringer if that is taken to mean the individual evaluators. Here, some of the SMEs gave evidence, and others did not. An authority could potentially, in an extreme case, choose to defend a procurement challenge without calling any evidence at all. Not all the relevant SMEs may be available, or even employed by the authority by the time of a trial. Requiring express consideration of not only whether an evaluation was manifestly erroneous, but also why it had happened, would expand the scope of the enquiry very widely and could in many cases simply not be possible. I do not therefore consider that this factor will arise to any appreciable extent in the vast majority of procurement cases, and certainly not in this one."*

63. The Defendant contended that it would be right to take into account in its favour the fact, if it be so, that the breach was inadvertent, or the result of misunderstanding or oversight, rather than one which was deliberate or calculated.

64. The Defendant' further submission is that the factor should be interpreted more broadly so that, rather than being limited to considerations of a negative state of mind operating against the infringer, the Court can take account of any positive motives which operate in the infringer's favour. On this basis, its contention is that the Defendant was seeking to maximise access to the orthodontic service for those to whom stairs would be a barrier. The purpose was to promote the interests of the

Community. It had no self-interest in scoring the Claimant's bid as it did. NHS orthodontic services are provided at no direct cost to the public at the point of delivery.

65. I accept both of the Defendant's submissions. The starting point is what Lord Clyde had said in Factortame, at p.555B/C:

> *"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."*

66. This paragraph shows that it would be too narrow an approach simply to focus on whether the breach was committed in bad faith. Bad faith may be an "additional factor" (per Jay J in Delaney) but its presence or absence is not the only consideration in this fifth Factortame factor as explained by Lord Clyde. Instead, it can be material to consider whether the breach was deliberate or inadvertent. I accept the Defendant's submission that, in Delaney, Jay J would have been prepared to take into account the fact that the breach was inadvertent had there been evidence to demonstrate this: see [113]. It was just that, on the evidence, he was unable to draw that inference. The Court of Appeal considered Jay J had directed himself correctly. I also accept that it can be relevant to take into account whether the infringer's motive was a well-intentioned one e.g., to advance a Community interest. Mr Holl-Allen had submitted that there can have been no purpose where, as here, the breach was the result of an inadvertent act but, in my judgment, that is to view the question of purpose or motive too narrowly.

67. Looking at the other cases, in EnergySolutions, at [61] Fraser J recorded that he had found neither bad faith nor a deliberate intention to infringe on the part of the NDA. On that basis, he considered this fifth factor did not apply to the case before him. He pointed out that this factor should not be interpreted to mean that intention, or lack of it, would be of direct relevance in every case. I agree that it is not in every case that the absence of bad faith or lack of deliberate intent operates positively in the infringer's favour. It can do so but depends on the facts of a given case whether it should. As I read [62], Fraser J's observation that "this factor" was unlikely to arise to any appreciable extent in the vast majority of procurement cases was intended as a reference to the sixth factor (subsequent behaviour), given that is the subject matter with which [62] is primarily concerned.

68. In Consultant Connect Ltd at [347], Kerr J considered whether the infringer acted deliberately or inadvertently. At [348], he said that the inadvertent breach (i.e., a naive belief held by some that the conduct was not unlawful) did not afford much mitigation on the facts before him because it had to be viewed against the deliberate decision by

others to undertake a secret selection exercise. This suggests that, on other facts in a procurement case, it would be appropriate mitigation to take positive account of the mere inadvertence of the breach.

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.

70. Overall, this factor positively weighs in favour of the Defendant.

(vi) The subsequent behaviour of the infringer

71. The Claimant accepts that the Defendant's breach was not evident until the handing down of the Judgment and, on this basis, submits that this factor does not count against the Defendant. It is neutral.

72. The Defendant agrees that this is not a relevant factor on the facts of this case, albeit for a slightly different reason, namely that the specific allegation upheld by the Court did not come into focus until the trial, years after the contract had been awarded and by which time it was too late to do anything about it.

73. Either way, both parties are agreed that this factor does not arise in the assessment.

(vii) The persons affected by the breach

74. The Claimant submits that, as a group of one, it has been profoundly affected by the breach in a direct way in that it was not awarded the contract in circumstances where it should have been. It submits that it should make no difference that the unsuccessful tenderer was a group of one.

75. The Defendant submits that this consideration reaches far more broadly, taking account of the lack of impact on persons other than the Claimant who might otherwise be affected by the breach. On this broader basis, it is relevant to consider the patients for whose benefit the procurement was carried out: the breach only affected a subset of the patient population. Both bidders offered alternative solutions to the same problem and there is no evidence that the Defendant's failure to select the Claimant's bid has made it harder for patients to access orthodontic services. The Defendant contends it is relevant to note that this was a carefully planned procurement exercise matching supply of NHS orthodontic services with demand across a large region, and this particular lot was one of many. The Defendant also contrasts this contract with the flagship contract in the EnergySolutions case, for many billions of pounds, and in which the loss of the bid was catastrophic for the loser.

76. In EnergySolutions, Fraser J said at [63]:

> *"The final factor therefore is the seventh one, namely 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. There are two groups directly affected by the breach in this case, rather different in scale. The first group is the other tenderers, in particular RSS. This is a very small group. It has however been very powerfully affected by the breach. A tenderer who should have won the procurement competition did not do so, with the effect that a very sizeable and valuable contract (over £4.2 billion in value, for a contract period of 14 years) was awarded to a competitor. Its personnel were, for the most part, made redundant and its UK business sold. The second group is not a defined economic group, and so does not come to be considered within this factor, but is a wider group. It could be said that the whole of society has been affected in that such a very sizeable public contract has been awarded to a tenderer that is not the most economically advantageous tenderer. However, I doubt whether Lord Hope intended to include such considerations within his seventh factor in a case such as this one. I do not therefore consider that second wider group to be relevant. However, were I to do so, it would only reinforce my conclusion as that factor could only weigh towards a finding that this was a sufficiently serious breach."*

77. In Ocean Outdoor UK Ltd v Hammersmith and Fulham LBC [2018] EWHC 2508 (TCC), O'Farrell J had concluded that the breaches were not sufficiently serious, in part because there was no direct impact on public services [158]. The Court of Appeal, at [2019] EWCA Civ 1642 (CA), found no reason to interfere with her findings, which it concluded the judge was entitled to make: [87]. Thus, as Mr Holl-Allen was prepared to accept, there is judicial endorsement for consideration by the Court of the impact of the breach on the availability of public services.

78. Similarly, in Consultant Connect Ltd at [351], Kerr J was prepared to take account of the impact upon the taxpaying general public.

79. I accept the Claimant's submission that I should consider the impact on the Claimant, notwithstanding it was the only other bidder than the successful one, as it is a person directly affected by the breach. However, I also accept the Defendant's submission that it is appropriate in this case to consider the impact of the breach both on the Claimant and on any wider classes that may have been affected by it. Although Mr Holl-Allen accepted that, in law, the Court can consider whether others were affected by the breach, he submitted that the overwhelming consideration should be its effect on the losing bidder. He also drew a distinction between considering the demonstrable impact of the breach on certain groups on the one hand, which was permissible, and considering the absence of any impact on certain groups on the other, which was not.

80. Turning first to the impact on the Claimant, I have heard no evidence on quantum. Despite the Defendant's invitation to take into account the difficulties which the

Claimant will face in proving any loss at all having regard to the financial template, I am prepared to assume that the loss of this contract may have been significant for the Claimant, at least in respect of its NHS work[3]. Although I am prepared to assume the Claimant's losses in respect of its NHS work may have been significant, it is clear that it remains in business even now so the loss was not existential, as it was for RSS in the EnergySolutions case. That is not to say that only losses so grave as to be existential are of importance, but it is a factor.

81. In my judgment, it is also relevant within this factor to take account of the impact (or, more accurately in this case, to take into account the absence of any impact) on any wider group of people who may be expected to be directly affected by the breach. I do not accept the submission that the overwhelming consideration should always be the effect on the losing bidder. That is too narrow an approach. The relative impact on the losing bidder and on other groups will depend on the facts of each case. Nor can I accept that the Court's consideration should be limited to any demonstrable impact of the breach on given groups. In determining the seriousness of a breach, it is surely just as relevant in a given case to take into account the absence of any impact as it is to take into account the presence of an impact. As noted earlier, in Ocean Outdoor, O'Farrell J took into account the fact that, in the case before her, there was no direct impact on public services. As Ms Morris submitted, the absence of any wider impact is an indicator that the breach was at the less serious end of the spectrum.

82. In this case, it is relevant that this was a competition in which the scores were extremely close. It can truly be said that the broader public would have been almost equally well served by either practice. Although the result of the competition should, narrowly, have tipped the other way it cannot really be said that the wider public access to orthodontic services within the Lot area has been materially affected in any way. The only direct material impact is that those very few patients who are unable to access the first-floor premises of PAL are treated at its nearby premises, with a taxi ride elsewhere for an OPG, rather than having access to a stair climber at the subject premises owned by the Claimant. All other features of the two orthodontic practices are equivalent. This is therefore a case in which the breach has had a very, very low impact on wider public access to orthodontic treatment in the Lot area. Mr Holl-Allen accepted that the impact on the public was not dramatic.

83. This type of case is also far removed from the national contracts considered in EnergySolutions, (£4.2 billion) and in Alstom (£1.8 billion). It was a relatively routine contract for one Lot area of many within the UK in which, on the Claimant's pleaded case, the NHS income would have been £2.7m over its whole lifetime.

84. In summary, this factor operates in favour of both parties in different ways. It requires the impact on the Claimant to be balanced against the lack of any impact within the wider community.

[3] Noting paragraph 17 of the Amended Particulars of Claim, more than half of the Claimant's claim is for loss of private income said to be derived from the loss of the NHS contract because fewer NHS patients will now come to the practice and subsequently elect for private treatment. Whether that is a sound basis for the recovery of damages against the NHS having regard to the principles of remoteness would be an argument for another day.

(viii) The position taken by one of the Community institutions in the matter

85. Both parties are agreed that this factor does not arise.

Other matters

86. As I have said, the factors are not exhaustive. The Defendant further prays in aid that the breach has had no impact on service delivery. I agree this is relevant but have already accounted for it in my assessment of the seventh factor. The Defendant also invites me to take account of the fact that the Claimant cast its net widely and only succeeded in one minor respect which was not identified until the commencement of this litigation. I doubt that these points add to what has gone before. In determining the seriousness of the breach found by the Court, it is not material to consider the nature and extent of other allegations of breach which were not upheld by the Court although, as I have said, it is relevant to take into account that, subject to this one error, it was a well run procurement. It is of marginal relevance that the breach was identified at a later stage in the litigation process but it is relevant that the breach was excusable and minor. That has already been accounted for.

The balance

87. As I have earlier noted, the Claimant's submission draws heavily on EnergySolutions because of the importance attached by Fraser J to the impact of the breach on the outcome of the competition. At paragraphs [69], [71] and [72] he said this:

> *"[69] In my judgment, each of the breaches of obligation in respect of the Evaluation Requirements are sufficiently serious for the purposes of the second Francovich condition when, or if, their effect, either individually or cumulatively, upon the scoring is such that the outcome of the competition would be altered.*
>
> *...*
>
> *[71] ... it is their effect upon the outcome of the competition (that is, the overall score of the tender) that is important.*
>
> *...*
>
> *[72] For all other breaches of obligation in relation to Evaluation Requirements, these are sufficiently serious to warrant an award of damages if they would have affected the conclusion (whether individually or cumulatively) of the competition and which tenderer had submitted the most economically advantageous tender."*

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 EnergySolutions. The Claimant argues that both of the first and second Factortame factors are in its favour and no others displace it, as in EnergySolutions.

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.

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 EnergySolutions, 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 lifted[4] 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.

Conclusion

92. In conclusion, in respect of Issue 23, my answer is as follows:

> *"Q. If there was or there might have been a material difference to the scoring of the bids, were the breaches sufficiently serious to justify an award of Francovich damages, having regard to the relevant case law touching on Francovich damages?"*
>
> *A. The breach was not sufficiently serious to justify an award of Francovich damages.*

93. It follows, I believe, that I should dismiss the Claimant's claim for damages. I will leave it to the parties to draw up an appropriate order in due course. The matter should be listed for further hearing in respect of all consequential matters including costs.

[4] See [2019] EWHC 3873, (TCC).