Hilary Term
[2017] UKSC 34
On appeal from: [2015] EWCA Civ 1262

JUDGMENT

Nuclear Decommissioning Authority (Appellant) *v* EnergySolutions EU Ltd (now called ATK Energy EU Ltd) (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

11 April 2017

Heard on 1 and 2 March 2017

Appellant	*Respondent*
Lord Pannick QC	John Howell QC
Joseph Barrett	Andrew Hunter QC
Rupert Paines	Ewan West
(Instructed by Burges Salmon LLP)	(Instructed by Skadden, Arps, Slate, Meagher & Flom (UK) LLP)

LORD MANCE: (with whom Lord Neuberger, Lady Hale, Lord Sumption and Lord Carnwath agree)

Introduction

1. This is an appeal on preliminary points of European Union and domestic law regarding the circumstances in which damages may be recoverable for failure to comply with the requirements of the Public Procurement Directive (Parliament and Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L134, p114) ("the PP Directive")), as given effect in the United Kingdom by the Public Contracts Regulations 2006 (SI 2006/5) ("the 2006 Regulations").

2. As recited in the Statement of Facts and Issues, the appellant, the Nuclear Decommissioning Authority ("the NDA") is a non-departmental public body established under the Energy Act 2004 ("the EA 2004"), and is responsible for 17 nuclear sites and the associated civil nuclear assets and liabilities formerly owned by the UK Atomic Energy Authority and British Nuclear Fuels Ltd. Pursuant to its duties under the EA 2004, the appellant is responsible for ensuring that, once decommissioned, sites previously used for nuclear generation are made suitable to be used for other purposes. The respondent, ATK Energy EU Ltd ("ATK"), provides integrated waste management and decommissioning services for the nuclear industry.

3. ATK has pursued against the NDA a claim for damages for breaches of the NDA's obligations under the PP Directive and the 2006 Regulations in respect of the award of a contract for the decommissioning of 12 Magnox power stations, at Berkeley, Bradwell, Chapelcross, Dungeness A, Hinkley Point A, Hunterston A, Oldbury, Sizewell A, Trawsfynydd, Wylfa and two others. An agreement of compromise has been reached in respect of the claim, but the parties wish this judgment to be issued nonetheless. In short, Fraser J held, and it is for the purposes of the present appeal to be assumed, that the NDA failed to award the contract to the tenderer which submitted the most economically advantageous offer determined in accordance with the criteria which the NDA had itself specified, in breach of obligations under regulations 18(27) and 30(1) to (4) of the 2006 Regulations read against the background of the articles 29.1, 29.7 and 53 of the PP Directive. The NDA erroneously concluded that a consortium, known as CFP, had provided the most economically advantageous offer, awarding it a score of 86.48%. It awarded a consortium known as Reactor Site Solutions ("RSS"), of which ATK and another company, Bechtel, were members, a score of 85.42%. Fraser J [2016] EWHC 1988

(TCC) found (i) that CFP should have been disqualified from the competition for failing two threshold requirements, and (ii) that, in any event, RSS would have won the competition had the NDA not made "many manifest errors" (para 944) in its assessment of the tenders, but for which the NDA would have awarded RSS a score of 91.48% and CFP a score of only 85.56%.

4. The public procurement directives in effect prior to 2004, concerning works (Council Directive 71/305/EEC (OJ 1971 L185, p5)) and supplies (Council Directive 77/62/EEC (OJ 1977 L13, p1)), contained no enforcement provisions. Following the decision of the Court of Justice in *Gebroeders Beentjes BV v State of the Netherlands* (Case C-31/87) [1988] ECR I-4635, paras 38-44, that the provisions of these Directives were unconditional and sufficiently precise to be relied upon by persons before national courts, a further Directive was introduced, Council Directive 89/665/EEC (OJ 1989 L395, p33) later amended by Council Directive 2007/66/EC (OJ 2007 L335, p31) ("the 2007 Directive"), to provide effective remedies for economic operators, including the setting aside of awards and compensation. I will refer to Council Directive No 89/665/EEC, as so amended, as the Remedies Directive. Domestic effect was given to the Remedies Directive by amendment of the 2006 Regulations by the Public Contracts (Amendment) Regulations 2009 (SI 2009/2992) ("the 2009 Amendment Regulations"). The 2006 Regulations have since been superseded by the Public Contracts Regulations 2015 (SI 2015/102). Under regulation 118 thereof, the 2006 Regulations remain, however, applicable for the purposes of this case.

5. The scheme of the Remedies Directive, as implemented and as applicable on the facts of this case, was, in outline, as follows:

(a) Under article 2a(2) of the Remedies Directive, a standstill period of at least ten days was required, from the date of receipt of a telephone or letter communication to an economic operator (such as ATK) that it had not been awarded the contract; during the standstill period the relevant contracting authority (here the NDA) could not enter into the contract; as implemented domestically by regulations 32(1) and 32A(5) of the 2006 Regulations, the standstill period was fixed as exactly ten days from the date of such receipt.

(b) Under article 2c of the Remedies Directive, the United Kingdom was required to allow a period of at least ten days from any such communication for the economic operator to issue proceedings seeking a review of the authority's decision; it implemented this requirement under regulation 47D(2) by allowing 30 days beginning with the date on which the economic operator first knew or ought to have known that grounds for starting proceedings had arisen; this was coupled with a proviso under regulation 47D(3) that it did not require proceedings to be started before the end of a

defined period, corresponding with that stated in article 2c. (Article 2f in fact required that domestic law allow a period of at least 30 days, from publication of a contract award notice or information given by the contracting authority about the conclusion of the contract, for challenges based on limited grounds of "ineffectiveness" identified in article 2d; this may, perhaps, have been an inspiration for the more general 30 day period in regulation 47D(2).)

(c) Under article 2(3) of the Remedies Directive, as implemented by regulation 47G, the authority, on becoming aware of the issue of a claim form relating to its decision to award the contract to CFP, was required to refrain from entering into the contract, if not already entered into, until court order or disposal of the proceedings.

6. In the present case, the NDA informed RSS by telephone and letter delivered on 31 March 2014 that RSS had been unsuccessful. It also informed all bidders that it would voluntarily observe an extended standstill period until 14 April 2014. RSS wrote letters on 6, 8 and 10 April 2014, by which it requested various information and ultimately asked for a further extended standstill period until 23 April 2014, saying that it might otherwise be forced to issue a claim by 14 April to protect its position. On 11 April 2014, the NDA refused to extend the standstill period, and on the same day RSS replied that this was "regrettable" and that it was actively considering commencing a claim, and urged the NDA not to enter into the contract. On 15 April the NDA repeated that it was unable to agree to refrain from taking steps to enter into the contract, explaining that delay would cause it to suffer significant additional cost. Later that day, the NDA entered into the contract with CFP and informed RSS accordingly. On 28 April 2014, and so within the 30 days referred to in para 5(b) above, ATK, though not Bechtel, issued the claim form beginning the present proceedings.

7. Preliminary issues ordered by Akenhead J on 10 October 2014 were decided by Edwards-Stuart J on 23 January 2015 ([2015] PTSR 1106), leading to an appeal determined by the Court of Appeal (Lord Dyson MR, Tomlinson and Vos LJJ) by judgment dated 15 December 2015: [2016] PTSR 689. The shape of the arguments has changed, leading to a position where three main issues are now presented in the Statement of Facts and Issues as arising on this appeal. Slightly reformulated to reflect the submissions before the Supreme Court, they are:

(i)(a) whether the Remedies Directive only requires an award of damages to be made when any breach of the PP Directive is "sufficiently serious" and (b) whether the answer to this question is acte clair, so that it need not be referred to the Court of Justice?

(ii) whether regulation 47J(2)(c) of the 2006 Regulations confers a power to award damages in respect of any loss or damage suffered by an economic operator (a) in the case of any breach, or (b) only in the case of a "sufficiently serious" breach, of the Regulations?

(iii) whether (and, if so, when) an award of damages under regulation 47J(2)(c) of the 2006 Regulations may be refused on the ground that an economic operator, who issued a claim form in respect of a contract award decision within the 30 day time limit prescribed by regulation 47D of the 2006 Regulations, did not do so and inform the contracting authority that it had done so before the contracting authority entered into the contract?

8. Before Edwards-Stuart J issue (i) only appears to have arisen tangentially to an argument, which no longer directly arises, that damages were discretionary. So far as he addressed it, his answer appears to have been negative (para 86). Issue (ii), he answered: (a) Yes; (b) No (para 71). Issue (iii), he held, involved a question of fact, not suitable for resolution as a preliminary issue in this case, though his views were generally discouraging of the idea that damages would be refused on any such basis (paras 42-54). In the Court of Appeal, Vos LJ, in a judgment with which the other members concurred, determined these issues to the following effect: (i)(a) Yes. (b) Yes (para 55). (ii)(a) Yes. (b) No (paras 66-70). (iii) No (paras 71-77).

9. In relation to the first issue, Vos LJ, after analysing Court of Justice case law, concluded (paras 62-65) that breaches of the PP Directive must, in the light of the Remedies Directive, be actionable under the following three minimum conditions (the "*Francovich*" conditions): (1) the rule of law infringed must be intended to confer rights on individuals, (2) the breach must be sufficiently serious, and (3) there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party. National law must also respect the principle of equivalence of EU with domestic rights (para 62). For present purposes, it is *Francovich* condition (2) which matters. As to the second issue, Vos LJ held, and this is not contentious, that it is open to national law to lay down "criteria that provide a less restrictive remedy in damages than would be provided by the *Francovich* conditions" (para 66). He went on to hold (and this is contentious) that the 2006 Regulations had this effect; whether ATK's claim was viewed as being for breach of directly enforceable EU law or for breach of domestic law enacted to give effect to the EU obligation contained in the Remedies Directive, it constituted a private law claim for breach of statutory duty, which, under English law, was not subject to any restrictive condition limiting its availability to cases of "sufficiently serious" breach (paras 66-67). As to the third issue, Vos LJ held that this involved an issue of "determination or estimation" of damages, which was for domestic law to determine (paras 55 and 71). He went on to hold that there was nothing in the 2006 Regulations or in general domestic law to oblige an economic operator to issue its claim form before the contracting authority entered into the contract, or to deprive

it of a claim to damages on the ground that it had failed to invoke any other remedy (paras 72-76). The NDA now appeals by permission of the Supreme Court.

Issue (i) - Francovich condition (2) in EU law

10. Articles 1 to 3 of the Remedies Directive read:

> "1(1). … Member states shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in articles 2 to 2f of this Directive on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.
>
> …
>
> 2(1) Member states shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:
>
> > (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
> >
> > (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
> >
> > (c) award damages to persons harmed by an infringement.

…

(7) … except where a decision must be set aside prior to the award of damages, a member state may provide that, after the conclusion of a contract …, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

3(1) The Commission may invoke the procedure provided for in paras 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of public procurement has been committed during a contract award procedure falling within the scope of Directive 2004/18/EC."

11. The *Francovich* conditions derive from the Court of Justice's decisions in *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722; [1991] ECR I-5357 and *Brasserie du Pêcheur SA v Federal Republic of Germany, R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404 ("*Brasserie du Pêcheur*"). These were decisions on state liability, in *Francovich* itself for failure to transpose a directive and in *Brasserie du Pêcheur* for domestic laws which violated European law. In the latter case, the Court of Justice set out the three *Francovich* conditions at para 51, remarking in this respect that "Community law confers a right to reparation where three conditions are met", and went on:

"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.

> 57. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the court on the matter from which it is clear that the conduct in question constituted an infringement. …
>
> 66. The aforementioned three conditions are necessary and sufficient to found a right in individuals to obtain redress, although this does not mean that the state cannot incur liability under less strict conditions on the basis of national law.”

12. In *Brasserie du Pêcheur* one issue before the Court of Justice was whether a national court was entitled to make reparation conditional on the existence of fault, whether intentional or negligent. Referring to the second *Francovich* condition, the Court said:

> “78. So, certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious: see the factors mentioned in paras 56 and 57 above.
>
> 79. The obligation to make reparation for loss or damage caused to individuals cannot, however, depend on a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. …
>
> 80. Accordingly, … reparation of loss or damage cannot be made conditional on fault (intentional or negligent) on the part of the organ of the state responsible for the breach, going beyond that of a sufficiently serious breach of Community law.”

13. The three *Francovich* conditions were in *Köbler v Republik Österreich* (Case C-224/01) [2004] QB 848, para 51, deployed in the context of state liability for failure by a final state court to apply European Union law, with the gloss (para 53) that, having regard to the specific nature of the judicial function and the legitimate requirements of legal certainty, the second condition could only be met “in the exceptional case where the court has manifestly infringed the applicable law”.

14. The question on this appeal is whether, as the Court of Appeal considered, the three *Francovich* conditions apply to a claim against a contracting authority under the PP and Remedies Directives (and whether the answer to this question is acte clair). In submitting that the Court of Appeal was wrong, ATK makes a number of points. It points to the purposes of the Remedies Directive generally, and to the terms of articles 1(1) and 2(1) in particular, as showing an intention to address and provide a remedy in damages for harm caused by infringements generally. It points to the wording of article 3 as indicating that, where there is an intention to limit provisions of the Directive to cases of serious infringement, the intention is made express. It points to the fact that, if the *Francovich* conditions apply, then no remedy at all would potentially be available in cases falling within the last words of article 2(7).

15. ATK also submits that the Court of Appeal's approach is inconsistent with the European Union's international obligations under the Government Procurement Agreement ("GPA 1994"), a plurilateral agreement contained in Annex 4 to the Agreement in 1994 establishing the World Trade Organisation and approved on behalf of the Union by article 2 of Council Decision 94/800/EC (OJ 1994 L336, p144). Article XX(2) of the GPA 1994 provided for each party to provide "effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest", while article XX(7) provided that:

> "Challenge procedures shall provide for:
>
> > (a) rapid interim measures to correct breaches of the Agreement ...;
> >
> > (b) an assessment and a possibility for a decision on the justification of the challenge;
> >
> > (c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest."

A similar provision appears in the more recent revised GPA to which the EU became party on 6 April 2014: Council Decision 2014/115/EU (OJ 2014 L68, p1). ATK submits that article XX(7) contemplates that damages must always be recoverable for a breach (and cannot be restricted to cases of serious breach), even if they may be limited to costs for tender preparation or protest. It points to the principle,

endorsed in *Řízení Letového Provozu ČR, sp v Bundesamt für Finanzen* (Case C-335/05) [2007] STC 1509, para 16, and *Association Justice & Environment zs v Commission of the European Communities* (Case T-727/15) 23 January 2017, para 77, that secondary EU legislation should, so far as possible, be interpreted consistently with international agreements concluded by the European Union.

16. Finally, but most importantly, ATK submits that Court of Justice case law supports its position. The debate in this area turns on two principal authorities: *Stadt Graz v Strabag AG* (Case C-314/09) [2010] ECR I-8769 (decided 30 September 2010 by the Third Chamber, without an Advocate General's opinion) and *Combinatie Spijker Infrabouw-De Jonge Konstruktie v Provincie Drenthe* (Case C-568/08) [2010] ECR I-12655 (Advocate General's opinion delivered 14 September 2010; Judgment of the Second Chamber 9 December 2010).

17. In *Stadt Graz* the basic question referred was whether the Remedies Directive precluded national legislation which made the right to damages for an infringement of public procurement law by a contracting authority conditional upon the infringement being culpable. The legislation in question included a presumption that the contracting authority was at fault, and a provision that the authority could not rely on a "lack of individual abilities". The court, in holding that such legislation was impermissible, said this:

> "33. … Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement … If there is no specific provision governing the matter, it is therefore for the domestic law of each member state to determine the measures necessary to ensure that the review procedures effectively award damages to persons harmed by an infringement of the law on public contracts …
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> 34. Although, therefore, the implementation of article 2(1)(c) of Directive 89/665 in principle comes under the procedural autonomy of the member states, limited by the principles of equivalence and effectiveness, it is necessary to examine whether that provision, interpreted in the light of the general context and aim of the judicial remedy of damages, precludes a national provision such as that at issue in the main proceedings from making the award of damages conditional, in the circumstances …, on a finding that the contracting authority's infringement of the law on public contracts is culpable.

35. In that regard, it should first be noted that the wording of article 1(1), article 2(1), (5) and (6), and the sixth recital in the preamble to Directive 89/665 in no way indicates that the infringement of the public procurement legislation liable to give rise to a right to damages in favour of the person harmed should have specific features, such as being connected to fault - proved or presumed - on the part of the contracting authority, or not being covered by any ground for exemption from liability.

36. That assessment is supported by the general context and aim of the judicial remedy of damages, as provided for in Directive 89/665

37. According to settled case law, while the member states are required to provide legal remedies enabling the annulment of a decision of a contracting authority which infringes the law relating to public contracts, they are entitled in the light of the objective of rapidity pursued by Directive 89/665 to couple that type of review with reasonable limitation periods for bringing proceedings, so as to prevent the candidates and tenderers from being able, at any moment, to invoke infringements of that legislation, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements …

38. Furthermore, the second subparagraph of article 2(6) of Directive 89/665 reserves to the member states the right to limit the powers of the body responsible for the review procedures, after the conclusion of a contract following its award, to the award of damages.

39. Against that background, the remedy of damages provided for in article 2(1)(c) of Directive 89/665 can constitute, where appropriate, a procedural alternative which is compatible with the principle of effectiveness underlying the objective pursued by that directive of ensuring effective review procedures … only where the possibility of damages being awarded in the event of infringement of the public procurement rules is no more dependent than the other legal remedies provided for in article 2(1) of Directive 89/665 on a finding that the contracting authority is at fault.

> 40. ... it makes little difference in that regard that, by contrast with the national legislation referred to in *Commission of the European Communities v Portugal* (Case C-275/03), the legislation at issue in the main proceedings does not impose on the person harmed the burden of proving that the contracting authority is at fault, but requires the latter to rebut the presumption that it is at fault, while limiting the grounds on which it can rely for that purpose.
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> 41. The reason is that that legislation, too, creates the risk that the tenderer who has been harmed by an unlawful decision of a contracting authority is nevertheless deprived of the right to damages in respect of the damage caused by that decision, where the contracting authority is able to rebut the presumption that it is at fault. …
>
> 42. At the very least, that tenderer runs the risk, under that legislation, of only belatedly being able to obtain damages, in view of the possible duration of civil proceedings seeking a finding that the alleged infringement is culpable."

18. ATK submits that, although the immediate focus of *Stadt Graz* was on the impermissibility of any limitation of liability by reference to a requirement of fault, its whole tenor was that the Remedies Directive contemplates a general right to damages for any infringement of the public procurement legislation, neither subject, nor capable of being made subject, to any specific features. A requirement that the breach should be "sufficiently serious" would, it submits, be an example of a special feature.

19. *Spijker* concerned a situation not dissimilar to the present. The claimant's tender had come second in circumstances which the claimant ("*Combinatie*") alleged breached the PP Directive. The defendant Provincie, following an interim administrative court order that the contract should be awarded to no-one else but Machinefabriek Emmen BV ("MFE"), awarded it to MFE. The claimant sued the Provincie for damages in the civil courts. One issue which the civil court, the Rechtbank Assen, identified was whether any unlawful act fell to be attributed to the Provincie. The court, taking the view that the Provincie might have acted unlawfully, asked the Court of Justice by questions 4(c) and (d):

> "(c) If [the] authority is required to pay damages, does Community law set criteria for determining and estimating those damages, and if so, what are they?

> (d) If the contracting public authority cannot be deemed liable, is it possible, under Community law, for some other person to be shown to be liable, and on what basis?"

20. Advocate General Cruz Villalón said (para 5), in connection with question 4(c) that:

> "the present case offers the opportunity to clarify certain points of Directive 89/665 which are of great significance for the purpose of upholding the legality which European Union law requires in the context of public procurement."

In the course of his opinion, he said (para 77) that:

> "In my view, it is solely for the Rechtbank to assess(40) points such as whether there was any liability and whether, where appropriate, it must be attributed to the Provincie, to the State - on account of the actions of the judge dealing with interim relief proceedings - or to any other person taking into consideration the evidence which has been shown to be relevant: the fact that the Provincie did not wait before making the award or appeal against the interim measures; the possible alternatives (if any) to making the award to MFE; the circumstances surrounding the provisional enforcement of the order of the judge dealing with interim relief proceedings, and the Combinatie's voluntary withdrawal of the appeal lodged against that order."

Footnote 40 to this passage read:

> "40. In order to do so, it must take into account all the factors which characterise the situation which has been brought before it, 'in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under … article [267 TFEU]' (Case C‑224/01 *Köbler* [2003] ECR I‑10239, para 55), a sufficiently serious infringement of European Union law occurring 'where the decision concerned was made in manifest

breach of the case law of the court in the matter'." (Joined Cases C‑46/93 and C‑48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I‑1029, para 57, and *Köbler*, para 56.)

21. The Court addressed question 4(c) as follows:

> "85. By its fourth question, part (c), the referring court asks, in essence, whether, if the awarding authority has to make good the damage arising from an infringement of EU law on the award of public contracts, EU law provides criteria on the basis of which the damage may be determined and estimated and, if so, what those criteria are.
>
> 86. Article 2(1)(c) of [the Remedies Directive] clearly indicates that member states must make provision for the possibility of awarding damages in the case of infringement of EU law on the award of public contracts, but contains no detailed statement either as to the conditions under which an awarding authority may be held liable or as to the determination of the amount of the damages which it may be ordered to pay.
>
> 87. That provision gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. According to case law developed since the adoption of the [Remedies Directive], but which is now consistent, that principle is inherent in the legal order of the Union. The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals ([the *Francovich* case] para 35, the *Brasserie du Pêcheur* case] paras 31 and 51; and [the *Danske Slagterier* case] paras 19 and 20).
>
> 88. As matters stand at present, the case law of the Court of Justice has not yet set out, as regards review of the award of public contracts, more detailed criteria on the basis of which damage must be determined and estimated.

89. As regards EU legislation, it should be noted that Directive 89/665 has been largely amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC (OJ 2007 L 335, p 31), adopted after the date of the facts which gave rise to the dispute in the main proceedings. However, on that occasion, the EU legislature refrained from adopting any provisions on that point.

90. In the absence of EU provisions in that area, it is for the legal order of each member state to determine the criteria on the basis of which damage arising from an infringement of EU law on the award of public contracts must be determined and estimated (see, by analogy, Case C-315/01 *GAT* [2003] ECR I-6351, para 46; and Case C-314/09 [the *Stadt Graz* case [2010] ECR I-8769], para 33) provided the principles of equivalence and effectiveness are complied with (see, to that effect, Joined Cases C-295/04 to C-298/04 *Manfredi and others* [2006] ECR I-6619, para 98).

91. It is apparent from well-established case law that 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 (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) ...

92. Therefore, the answer to the fourth question, part (c) is that, as regards state liability for damage caused to individuals by infringements of EU law for which the state may be held responsible, the individuals harmed have a right to redress where the rule of EU law which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals. In the absence of any provision of EU law in that area, it is for the internal legal order of each member state, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with.

> 93. In view of that answer, there is no need to reply to part (d) of the fourth question."

22. ATK argues that, in the light of para 93, these paragraphs must be taken to contain answers to both questions 4(c) and (d), that paras 89 and 90 indicate that no EU law conditions attach to liability of a contracting authority of the sort covered by question 4(c), whereas para 92 (and presumably para 87 on which para 92 is evidently based), which refer to the *Francovich* conditions, cover question 4(d) and are confined to the liability of the state and those for whom the state may be liable who are not contracting authorities.

23. I am unable to accept this interpretation of the Court of Justice's judgment. It converts an apparently clear exposition of the position regarding question 4(c) into an incoherent mixture of two differing schemes between which the text, on ATK's interpretation, jumps back and forwards. In my view, the text is clear. Paras 85 and 86 set the scene, viz that what is about to be discussed is the liability of an "awarding authority" for damage arising from an infringement of the PP Directive, and para 87 proceeds by making clear that the liability of an awarding authority is to be assessed by reference to the *Francovich* conditions. Subject to those conditions being met, paras 88 to 90 go on to make clear that the criteria for damages are to be determined and estimated by national law, with the further caveat that the general principles of equivalence and effectiveness must also be met (para 91). Finally, para 92 summarises what has gone before, repeating the need to satisfy the *Francovich* conditions. This is also exactly what the Advocate General had indicated in footnote 40 of his opinion. As to para 93, the inference is that the Court considered that the same principles must govern any claim against the State itself or a body for which the State is answerable (such as perhaps the administrative court which issued the interim order in *Spijker*). That is of course logical.

24. The Court of Justice in *Spijker* was aware of the recent decision in *Stadt Graz*, cited it in para 90, and clearly did not consider it in any way inconsistent with what the Court of Justice said about the general applicability of the *Francovich* conditions. Nor was it inconsistent. Whether an error is excusable or inexcusable is a matter that a court may take into account when considering whether a breach is sufficiently serious to justify an award of damages under the second condition: see *Brasserie du Pêcheur*, para 57, quoted in para 11 above. But the introduction of a fixed requirement of fault as a condition of State liability, on whichever party the burden of proving or disproving fault is placed, is well-established as illegitimate on a line of authority which goes back to *Brasserie du Pêcheur* itself (see para 12 above), and to *Commission of the European Communities v Portugal* (Case C-275/03) EU:C:2004:632 and which was merely reflected in the decision in *Stadt Graz*. The clarity of EU law in this respect was, no doubt, why the decision was taken that no Advocate General's opinion was required in *Stadt Graz*.

25. In these circumstances, there is in my view very clear authority of the Court of Justice confirming that the liability of a contracting authority under the Remedies Directive for breach of the PP Directive is assimilated to that of the state or of a public body for which the state is responsible. It is in particular only required to exist where the minimum *Francovich* conditions are met, although it is open to States in their domestic law to introduce wider liability free of those conditions. In the light of *Spijker,* ATK's submissions based on the general wording of articles 1 and 2 of the Remedies Directive cannot lead to a contrary conclusion. Article 3 is dealing with a different subject matter, which, even by way of contrast, could not throw much light on the scope of articles 1 and 2, and certainly cannot in the light of *Spijker*. Nor is ATK's argument by reference to the EU's international obligations under the GPA 1994 capable of leading to a contrary decision on any points. Any impetus which article XX(7) can give to ATK's argument is very weak at best. That article requires no more than either correction of the breach or compensation, and the compensation required may fall far short of covering the actual loss or damage suffered (since it "may be limited to costs for tender preparation or protest"). There is, apparently, no WTO authority on the interpretation of article XX(7) (or as to whether it might not itself be read subject to a condition such as the second *Francovich* condition). The argument based on GPA 1994 cannot in any event withstand the clear impact of the Court's judgment in *Spijker*.

26. Finally, the Supreme Court, during the course of submissions, asked about academic authority, and was shown a further article additional to any in the agreed bundles. That was Professor Steen Treumer's article *Basis and Conditions for a Damages Claim for Breach of the EU Public Procurement Rules* in Fairgrieve and Lichère, *Public Procurement Law* (2011). Professor Treumer wrote then of a lack of clarity in cases such as *Commission v Portugal*, of confusion arising from, and fundamentally different approaches taken in, the cases of *Stadt Graz* and *Spijker* and of differing approaches taken in national law, presumably before those cases. For the reasons I have already given, I do not see any such lack of clarity or confusion. Further, the Supreme Court was shown in the agreed bundles a more recent article, by a serving judge of the General Court, Judge Anthony M Collins, *Damages in Public Procurement - An Illusory Remedy?* in Chapter 21 (p 339) in *Of Courts and Constitutions - Liber Amicorum in honour of Nial Fennelly* (ed Bradley, Travers and Whelan) (2014). Setting out the criteria for the recovery of damages for breaches of the procurement rules, Judge Collins explains *Spijker* precisely in the sense which I consider that it obviously bears. It harmonises liability for such breaches "irrespective of the identity of the author of the alleged illegality", with the minimum *Francovich* conditions applying to all such breaches (p 340), and with the result (p 341) that:

> "… the requirements that the rule breached must be intended to confer rights on individuals and that the breach of such a rule must be '*sufficiently* serious', means that not every legal error

> in the course of an award procedure can ground an action in damages."

This article reinforces my view that there is no uncertainty or confusion in the Court of Justice's case law, and that the Supreme Court can be safe in relying on the clear language and ruling in *Spijker* as settling the position, whatever may have been previous doubts or differences of view at national level.

27. For these reasons, I consider that the Court of Appeal answered the first question correctly, and in a manner which does not call for any reference by the Supreme Court, as the final court of appeal, to the Court of Justice.

Issue (ii) - Francovich condition (ii) at domestic law level

28. This is a domestic law issue. The question is whether the UK legislator has, by the 2006 Regulations, gone further than European law requires, by making any contracting authority breaching the Regulations liable for any damages thereby caused, irrespective of whether the breach would under the second *Francovich* principle be sufficiently serious to require domestic law to make available a remedy in damages.

29. The relevant Regulations read as follows:

> "32.- Information about contract award procedures
>
> [Award decision notice]
>
> (1) Subject to paragraph (13), a contracting authority shall, as soon as possible after the decision has been made, inform the tenderers and candidates of its decision to -
>
> (a) award the contract; or
>
> (b) conclude the framework agreement,
>
> and shall do so by notice in writing by the most rapid means of communication practicable.

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include -

(a) the criteria for the award of the contract;

(b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by -

(i) the economic operator which is to receive the notice; and

(ii) the economic operator

(aa) to be awarded the contract; or

(bb) to become party to the framework agreement,

and anything required by paragraph (10);

(c) the name of the economic operator -

(i) to be awarded the contract; or

(ii) to become a party to the framework agreement; and

(d) a precise statement of either -

(i) when, in accordance with regulation 32A, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or

(ii) the date before which the contracting authority will not, in conformity with regulation 32A, enter into the contract or conclude the framework agreement.

(2A) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include -

(a) the reasons why the candidate was unsuccessful; and

(b) the information mentioned in paragraph (2), but as if the words "and relative advantages" were omitted from sub-paragraph (b).

…

47A. Duty owed to economic operators

(1) This regulation applies to the obligation on -

(a) a contracting authority to comply with -

i. the provisions of these Regulations, other than regulations 14(2), 30(9), 32(14),40 and 41(1); and

ii. any enforceable [EU] obligation in respect of a contract or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and

(b) a concessionaire to comply with the provisions of regulation 37(3).

…

47C. Enforcement of duties through the Court

(1) A breach of the duty owed in accordance with regulation 47A or 47B is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 47D to 47P apply to such proceedings.

…

47I. Remedies where the contract has not been entered into

(1) Paragraph (2) applies where -

(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 47A or 47B; and

(b) the contract has not yet been entered into.

(2) In those circumstances, the Court may do one or more of the following-

(a) order the setting aside of the decision or action concerned;

(b) order the contracting authority to amend any document;

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

(3) This regulation does not prejudice any other powers of the Court.

47J. Remedies where the contract has been entered into

(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 47A or 47B; 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 47L requires the Court not to do so;

(b) must, where required by regulation 47N, 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 sub-paragraphs (a) and (b);

(d) must not order any other remedies.

…"

These Regulations were all introduced by the 2009 Amendment Regulations, to implement the 2007 Directive.

30. The 2006 Regulations and 2009 Amendment Regulations were made under the power contained in section 2(2) of the European Communities Act 1972, to make provision for the purpose of implementing EU obligations of the United Kingdom and/or dealing with matters arising out of or related to any such obligation. The *Francovich* conditions are no more than minimum conditions, which domestic law

is free to relax or ignore. There is therefore no *Marleasing* presumption that the United Kingdom legislator intended to reflect the *Francovich* conditions (*Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135). Further, it is not suggested that it would be outside the scope of section 2(2) for the United Kingdom legislator to provide for the recovery of damages in respect of breaches which were not sufficiently serious to meet the EU law minimum requirement that a damages remedy be available: see *United States v Nolan* [2015] UKSC 63; [2016] AC 463, para 63.

31. ATK relies on the wording of the 2006 Regulations as introducing unconditional actionability of breaches, coupled with unconditional domestic liability for breaches of any domestically-based statutory duty. It points to the obligation contained in regulation 47A(2) and the duty, breach of which is by regulation 47C(1) prescribed as actionable by any economic operator who in consequence suffers loss or damage. ATK submits that there is no warrant for reading into these Regulations any condition that the breach must be "sufficiently serious" before it is actionable in damages.

32. Although there was no requirement to do so, or presumption that this would be done, the NDA invites the Supreme Court to conclude that it was the intention of the UK legislator simply to give effect to the minimum EU requirements regarding damages. It points to the uses of the word "may" in regulations 47I(2) and 47J(2)(c). It does not suggest that this gives rise to any general discretion. But it suggests that it is consistent with a limitation of damages by reference to the *Francovich* conditions. It picks up, in domestic law, the requirement under article 2(1) of the Remedies Directive that domestic law shall include a "power" to award damages to an economic operator harmed by an infringement, a requirement which, as I have held, is limited by the *Francovich* conditions. ATK in response submits the word "may" can be explained as a reference to the possibility that the contracting authority might have a defence, for example due to failure by the economic operator to mitigate its loss. That to my mind is a somewhat slender explanation for the introduction of the word "may", especially as loss arising from a failure to mitigate is commonly regarded as not having been caused by the breach: see eg *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605.

33. The Court of Appeal dealt with this issue quite shortly. It noted that the 2009 Amendment Regulations had been preceded by an Explanatory Memorandum and a Transposition Note as well as a Consultation Document of April 2009, "all of which [it said] make it reasonably clear that the Government's intention was to do only what was necessary to implement the Remedies Directive without any 'gold plating' save where such was expressly identified" (para 17). But it viewed the claim provided by the 2006 Regulations, as amended in 2009, as an ordinary private law claim for breach of statutory duty, to which no restrictive condition applies under English law, and saw it as irrelevant in this context whether or not the legislator

intended to "gold plate" the EU law on public procurement when introducing the Regulations (para 67).

34. The Court of Appeal was right in para 17 to identify the legislator's intention in 2009 as having been not to gold plate. The Explanatory Note to the 2009 Amendment Regulations said that "except where otherwise stated" (none of the respects so stated being presently relevant) the Regulations implemented the Directive. The Explanatory Memorandum laid before Parliament referred to the Regulations as implementing articles in the Directive "that need to be transposed" and to the amendments to the 2006 Regulations as "needed to implement" the Directive. The Impact Assessment, prepared by the Office of Government Commerce ("the OGC") and attached to the Explanatory Memorandum, concluded by saying that the OGC had adhered to guidance including "avoidance of 'gold-plating' and taking a minimalist approach to implementation … insofar as is possible within the context of this implementation" and that the impact assessment had "examined, article by article, the choices available for the UK and identified a range of options", "invariably" selecting those which "represent the least cost and greatest benefit within the confines of the mandate laid down in the Directive" (para 72). The Impact Assessment contained a detailed account of the choices available and made. None relates to or suggests a choice in 2009 to implement the Directive by introducing domestic liability for damages in circumstances not required under EU law.

35. The Explanatory Note, the Explanatory Memorandum and the Impact Assessment are all potentially admissible as aids to the understanding of the legislator's intentions in 2009, on the principle identified by the House of Lords in *R v Montila* [2004] UKHL 50; [2004] 1 WLR 3141, para 35. However, ATK submits that 2009 is not the relevant date. It points out that, although regulations 47A through to 47P (Part 9) of the 2006 Regulations as amended by the 2009 Amendment Regulations were introduced as a complete substitute for the previous section 47 (Part 9) and were the product of extensive re-writing of previous text with many new elements, the bare outline of regulations 47A to 47C, 47I and 47J can still be detected in the much more limited language of regulation 47(1), (6), (8) and (9) of the earlier 2006 Regulations, which can in turn be traced back to the Public Services Contracts Regulations 1993 (SI 1993/3228), regulation 32(1), (2), (4) and (5). ATK submits that there is no reason to suggest that the legislator in 2009 intended any different approach to the damages recoverable under the earlier 1993 and 2006 Regulations, and that there is no material to show that avoidance of "gold-plating" had the same weight at those earlier dates. As to this, it is true that there is no material bearing directly on the legislator's intentions at those earlier dates (though there is equally nothing to show that it was necessarily any different). But in my view it is unrealistic, when construing regulations 47A through to 47P, to ignore the legislator's intention in 2009 to introduce a whole new package of substituted provisions which should, save where a deliberate choice to the contrary appeared,

have no greater force than EU law requires. What happened in 2009 was effectively a new start, based on the Remedies Directive.

36. ATK also points to *Matra Communications SAS v Home Office* [1999] 1 WLR 1646. There the Court of Appeal specifically expressed the view (p 1655B) that damages under the Remedies Directive 89/665/EEC were not subject to the *Francovich* conditions (described by the Court of Appeal as *Norbrook* conditions, after *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* (Case C-127/95) [1998] ECR I-1531). The Court of Appeal went on (para 1655D-G) to express the view that the "damages provided by domestic law remain damages on the basis envisaged by Directive (89/665/EEC); but regulation 32(5)(b)(ii) none the less thereby creates a private law, non-discretionary, remedy, because within the national legal order any remedy in damages necessarily has those qualities". The Court of Appeal in *Matra* can now be seen to have been wrong in treating the *Francovich* conditions as irrelevant. Its further view that domestic law damages "remain damages on the basis envisaged by [the] Directive" might however be read as consistent with the NDA's case on the present issue.

37. Where the Court of Appeal in the present case went in my opinion clearly wrong was in its assumption that any claim for damages under the 2006 Regulations was no more than a private law claim for breach of a domestically-based statutory duty, and for that reason subject to ordinary English law rules which include no requirement that a breach must be shown to be "sufficiently serious" before damages are awarded (para 67). The Court of Appeal appears to have assumed that the categorisation in domestic law of a claim based on EU law as being for breach of statutory duty freed it automatically from any conditions which would otherwise apply under EU law. That this is not so is clear if one takes the simple case of a domestic claim against the State for failure correctly to transpose EU law. Such a claim is subject to the *Francovich* and *Brasserie du Pêcheur* principles and conditions.

38. Sir Andrew Morritt put the matter correctly, with references to past authority, when he said in *Phonographic Performance Ltd v Department of Trade and Industry* [2004] 1 WLR 2893, paras 11 to 12:

> "11. At the outset it is necessary to consider the nature of PPL's claim. The decisions of the European Court of Justice in *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722 and *Brasserie du Pêcheur SA v Federal Republic of Germany* (Joined Cases C-46 and C-48/93) [1996] QB 404 have established, and it is not disputed, that a member state may incur liability to a person under Community law where three conditions are satisfied. They are that (1) the rule

> of Community law infringed is intended to confer rights on individuals; (2) the breach is sufficiently serious, and in particular that there was a manifest and grave disregard by the member state of its discretion; and (3) there is a direct causal link between the breach of the obligation resting on the member state and the damage sustained by the injured party. As I have already pointed out for the purposes of these preliminary issues I have to assume that all those conditions will be established.
>
> 12. The nature of such a claim in English law was considered by Hobhouse LJ in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 5)* [1998] 1 CMLR 1353. In that case the Divisional Court concluded that liability had been established and went on to consider whether exemplary damages could and should be awarded. It was in that context that Hobhouse LJ considered (para 173) that the liability was best understood as a breach of statutory duty. In so doing he relied on the dictum to the same effect of Lord Diplock in *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130, 141 and the conclusion of Mann J in *Bourgoin v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, 733 that the duty was imposed by the relevant article and section 2(1) European Communities Act 1972. Transposed to the facts of this case the duty for the breach of which the Crown is sued is that imposed by article 8.2 of the Rental Directive and section 2(1) [of the] European Communities Act 1972."

39. The scheme of the Remedies Directive is a balanced one. The *Francovich* conditions represent the Court of Justice's conclusion as to the appropriate minimum protection by way of damages which an economic operator can expect. Although there is no *Marleasing* imperative to construe the scheme so far as possible consistently with the *Francovich* conditions, it is I think a natural assumption that the UK legislator will not go further than required by EU law when implementing such a scheme, without considering this and making it clear. That is fortified by the legislator's clear intention not to gold plate when substituting the new Part 9 scheme for the old in 2009. In these circumstances, I consider that the 2006 Regulations as amended in 2009 should be read as providing for damages only upon satisfaction of the *Francovich* conditions. That is also consistent with the use of the word "may" which otherwise seems to me to have no real significance.

Issue (iii) - failure to claim before the contract was made

40. Issue (iii) is whether, if proceedings have been started within the 30 day time limit prescribed by regulation 47D of the 2006 Regulations, an award of damages under regulation 47J(2)(c) of the 2006 Regulations may nonetheless be refused on the ground that the economic operator did not issue its claim form in respect of a contract award decision and inform the contracting authority that it had done so before the contracting authority entered into the contract?

41. Issue (iii) arises from the difference between the periods set by the domestic legislator for a standstill and for the commencement of proceedings by a person aggrieved by the decision to award a public procurement contract. The UK legislator *could* have implemented articles 2a(2) and 2c of the Remedies Directive by assimilating the standstill period and the period for applying for a review. The former had under article 2a(2) to be at least ten days from sending by fax or electronically or from receipt of the contract award decision. The latter could under article 2c have been at least ten days from the same moment. While regulation 32A(2) reflected the period identified in article 2a(2), regulation 47D(2) gave a period for proceedings for review (not involving a claim of ineffectiveness) 20 days longer than the minimum required by article 2c. Thus, in the present case, the NDA was free after ten days (extended voluntarily for four further days) to enter into the contract, but ATK had another 20 (or, after the voluntary extension) 16 days within which to issue its claim form for damages.

42. The significance of this issue is that, if ATK had issued its claim form before the NDA entered into the contract, then

(a) the NDA would have been required under regulation 47G(1) to refrain from entering into the contract;

(b) If this requirement to refrain continued, and ATK's challenge succeeded, ATK would in due course be awarded the contract and avoid the GBP 100m loss claimed.

However, it should be noted that:

(c) the NDA could have applied under regulation 47H(1) to bring the requirement to an end;

(d) the court would then under regulation 47H(2) have been obliged to consider whether, apart from regulation 47G(1) it would be appropriate to make an interim order requiring the NDA to refrain from entering into the contract;

(e) assuming that the court concluded that ATK's challenge had some merit (which it would in this case presumably have been seen as having, since it ultimately succeeded), the court would have considered whether "it would not be appropriate to make an interim order … in the absence of undertakings or conditions" (regulation 47H(3)), and would have had the power to require or impose undertakings or conditions in relation to the requirement that the NDA refrain from entering into the contract;

(f) the NDA would in this way, assuming that it was ordered to continue to refrain from entering into the contract while ATK's challenge was resolved, have had the benefit of a cross-undertaking and/or security, which would, if the NDA defeated ATK's challenge, cover loss or damage which the NDA suffered through not being able to enter into the contract.

43. The NDA contends in these circumstances that ATK failed to mitigate (or avoid) its loss by deliberately deciding not to issue a claim form until after the NDA had entered into the contract. ATK's response is that the NDA's case conflicts with the scheme of the 2006 Regulations, as well as with a general principle that it is open to a party to elect as it chooses between remedies, particularly between seeking interim relief and relying on a claim for damages. ATK also submits that the NDA's case amounts to imposing a time limit which would be shorter than that required by EU law or stipulated by domestic law and/or incompatible with EU principles of legal certainty and effectiveness.

44. There is Court of Justice authority that national law may recognise a general principle of mitigation along the lines for which the NDA contends in respect of breaches by the State of EU law. The Court of Justice said this in *Brasserie du Pêcheur*, paras 83-85:

> "83. In the absence of relevant Community provisions, it is for the domestic legal system of each member state to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.

> 84. In particular, in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.
>
> 85. Indeed, it is a general principle common to the legal systems of the member states that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself *Mulder v Council and Commission of the European Communities* (Joined Cases C-104/89 and C-37/90) [1992] ECR I-3061, 3136-3137, para 33."

The court reiterated the substance of these paragraphs in *Danske Slagterier v Bundesrepublik Deutschland* (Case C-445/06) [2010] All ER (EC) 74, paras 59-61.

45. It is, in my opinion, clear that the Court of Justice was here leaving it to domestic law to determine whether and how far to apply any such principle, even though it expressed the view that it was "a general principle common to the legal systems of the member states that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself".

46. The general legislative schemes, constituting the background to this issue under EU and domestic law, have been summarised in paras 5 and 42 above. In the context of an argument about mitigation, it is worth underlining one feature. Both the Remedies Directive and the 2006 Regulations treat a contracting authority's decision to award a contract in circumstances where the substantive requirements of the PP Directive or the 2006 Regulations have not been observed as an actionable infringement or breach of duty to any economic operator thereby disadvantaged. This is so, although no contract will at that point have been entered into. Proceedings may be begun, within the relevant time limit, before or after the entry into the contract, but in either case they involve the same complaint, viz failings in the prescribed procurement process, leading to the decision to award the contract to the wrong person. In this context, the actual entry into any contract appears in effect to be treated not as the relevant breach, but as the consequence of the prior breach consisting in the prior wrongful decision to award the contract. This is also consistent with the way in which ATK's present claim was formulated and litigated before Fraser J who gave judgment on 29 July 2016, holding that the NDA had failed properly to conduct the procurement process and ought to have awarded the contract to ATK. If that proves to be the right analysis, it at least opens the way to a

submission under domestic law that the duty to mitigate arose as from the date of ATK's receipt of the decision to award the contract to CFP. I do not understand ATK to have contested that in their submissions.

47. Accordingly, since the appeal is concerned with what the Remedies Directive and the 2006 Regulations treat as an existing infringement, an argument that ATK failed to mitigate is in principle open to the NDA. But issue (iii) as formulated before the Supreme Court (para 7(iii)), falls to be answered with reference to the circumstances of this appeal. We are not concerned with a familiar form of mitigation, such as a failure to take steps to seek alternative business to replace the contract wrongly awarded to a competitor. We are concerned with a very unusual form of mitigation, whereby, it is suggested, ATK should have taken steps to prevent the NDA giving effect to the NDA's infringement, even if ATK thereby had to expose themselves to the risks associated with the possibility of their challenge to the contract award decision failing.

48. That the so-called duty to mitigate may in some circumstances require the victim of a breach to take steps by way of legal action is, in my opinion, clear. Lord Pannick QC, representing the NDA, was able to refer to cases in which English courts have held that the victim of a breach of duty should, by way of mitigation, pursue available legal remedies, before, for example, suing his professional advisers for negligence: *Western Trust & Savings Ltd v Travers & Co* (1998) 75 P & CR 200; *Walker v Geo H Medlicott & Son* [1999] 1 WLR 727. See also the discussion of these and other cases in Jackson & Powell on *Professional Liability* 8th ed (2017), paras 11.336-11.339. The principle that a breach may call for mitigation, by third party action of this sort, is therefore uncontroversial. If my builder leaves my front door open and squatters enter, I cannot say that I have lost my house. I must take steps, legal steps if necessary, to recover possession.

49. Lord Pannick also referred to cases on the exercise of a discretion, where the failure to seek interim relief as against the person or body alleged to have been in breach of duty was regarded as a relevant factor. In one, Evans LJ expressed a view that a failure to seek interim relief was relevant to the exercise of discretion to give leave for judicial review of a local authority decision to award a waste disposal contract to a competitor of the claimant: *Mass Energy Ltd v Birmingham City Council* [1994] Env LR 298. In another, *R (Gavin) v Haringey Borough Council* [2004] 1 PLR 61 David Richards J took into account an objector's failure to apply for interim relief - reasonable though it was since such an application would have involved giving an undertaking in damages - as relevant to an issue whether planning permission should be quashed; the developer had a reasonable case for considering that the planning permission was valid, and the objector's failure had enabled the developer, reasonably, to continue to incur costs on the development. The factors relevant to an exercise of discretion can be very wide. But the awarding of damages for a breach, or their refusal on account of a failure to mitigate, is not discretionary.

50. No authority was cited to us on a situation directly comparable to the present, where it is submitted that the victim of a breach may be regarded as acting unreasonably, by not taking steps to stop the perpetrator of the breach from carrying it into effect. The NDA does not suggest that ATK's conduct, in delaying the issue of a claim form, would necessarily or always fall to be regarded as unreasonable. The NDA's proposition is that, on a full examination at a trial of all the circumstances in the light of evidence, including in particular examination of the reasons for ATK's conduct, ATK may be held to have acted unreasonably and thereby to have failed to avoid the loss of the contract, so disabling itself from claiming damages for any loss arising from the NDA's entry into the contract with CFP, rather than with RSS.

51. In this connection, the NDA surmises, plausibly, that the reason why ATK did not issue its claim form at a time when this would have put an automatic stop on the NDA entering into the contract is that it appreciated that this would lead to the NDA seeking to lift the stop. In that case, it would very probably only have been possible to maintain the stop if ATK was ready and able to put up security for any loss which the NDA would suffer through the continuation of the stop. This, ATK may well not have been. But another possible reason why ATK might not have been able to maintain the stop (or not have thought it sensible to bring about a stop in the first place, by issuing a claim form before the contract was entered into) was that it could not show that damages would not constitute an adequate remedy if the NDA proved to have failed wrongly to award the contract to the RSS consortium to which ATK belonged.

52. The question therefore arises whether and on what basis it could be said to be unreasonable for ATK to delay commencing proceedings until after the entry into the contract. If ATK regarded damages as an adequate remedy, there would be no point in bringing about a stop in the first place. Even if it did not regard damages as an adequate remedy - and confident though it may have been in the prospects of success of its (ultimately successful) challenge to the NDA's contract award decision - it may in its own interests have preferred to rest on a claim for damages if its challenge to the contract award decision succeeded, rather than give a cross-undertaking and expose itself to an indeterminate liability thereunder if its challenge failed.

53. It is true, as Lord Pannick submits, that the scheme of the Remedies Directive and the 2006 Regulations aims specifically at giving an economic operator the opportunity to stop the wrongful award of a procurement contract to a competitor. But that does not mean that the economic operator is obliged to take advantage of the opportunity. The scheme gives both parties choices as to how to proceed and how to protect themselves. It assimilates the position, after a stop has been placed on the entry into a contract by the issue of a claim, with that which exists when a party is seeking an interim injunction: see para 42(d) above. An economic operator

is, under the scheme as enacted in the United Kingdom, thus left free to issue a claim for damages after awaiting the entry into the contract. If, on the other hand, it issues a claim before entry into the contract, it is, on the face of it, also entitled to consider in its own interests whether or not to give an undertaking or put up security, if that is later required as the price of continuing the stop on entry into the contract.

54. The provision of an undertaking or security as a condition of the continuation of a stop order or stay is a matter of free choice for a party. There is no basis for regarding the victim of an alleged breach seeking interim relief as obliged to exercise that choice in the interests of the other party, or indeed of anyone save itself. I am unable to accept the NDA's proposition that, because the court could reasonably demand a cross-undertaking or security as a condition of a continuation of the stop order, it would or could be regarded as unreasonable for ATK to refuse to put this up. For the court to impose a condition as the price of continued relief which a party is seeking is quite different from treating the victim of a breach as acting unreasonably if it fails to seek a particular form of relief or to back it with an undertaking or security.

55. The present issue only arises, by definition, in a context where the contracting authority proves to have infringed procurement rules by its contract award decision. Under the scheme, the contracting authority also has a choice as to whether and how to act and to protect itself in a context where this is alleged or is a possibility. If it wishes to avoid the exposure resulting from having entered into the contract in circumstances where there is still time for an aggrieved economic operator to issue a claim form, it can delay entering into the contract until after the expiry of the 30 day period allowed to the economic operator for issue of a claim form. The delayed entry into the contract could involve the contracting authority in some loss, over and above that due to the minimum ten day standstill anyway required under the Remedies Directive and the 2006 Regulations. In the event that the contract award decision proved not to have involved any infringement, the contracting authority would have to bear that loss, without any recourse. But some loss of this sort could anyway result under the scheme from the ten day standstill period (and from the period which might elapse between the imposition of any stop and its discharge, in a case where the Court did not see fit to continue the stop by requiring an undertaking or security). The loss would on any view be unlikely to be anything approaching that which would arise from entering into the contract with one economic operator and being held liable to another for having wrongly done so.

56. In summary, an economic operator is entitled, in the face of what it views as (and later proves to have been) a breach of duty by the contracting authority, to leave it to the authority to take the risk of implementing its wrongful award decision. The economic operator cannot be said to be acting unreasonably if it fails to stop the authority from perpetrating a breach of duty which the authority could itself stop perpetrating. It cannot be said to be acting unreasonably if it refuses to give an

undertaking or put up security in order to maintain a stop which it has in the first instance obtained by issuing a claim form before the authority has entered into the contract to give effect to its wrongful contract award decision.

57. I add that it has not been - and could not be - suggested that the NDA entered into the contract only because it thought that it was not exposed to a subsequent claim by ATK. Indeed, NDA's submissions before the Court of Appeal said this (para 51):

> "The [NDA] makes no bones about the fact that, because of the financial implications of delay, it would have applied to lift the suspension and (if successful) signed the contract, had [ATK] sought to trigger and maintain the suspension without offering a cross-undertaking in damages. The [NDA] does not know what it would have done if a cross-undertaking had been offered - it would have depended upon advice that was not in fact sought, and factors such as the likely date of an expedited trial that did not become known, because of the way that [ATK] in fact acted."

The second sentence indicates that the NDA might have sought to remove any stop on its entry into of the contract, even if ATK had offered a suitable cross-undertaking in order to achieve its continuation. In other words, the NDA may, even in that context, have preferred to run the same risk that it did by entering into the contract in this case.

58. For the reasons I have given, I do not consider that there are any circumstances in which ATK could be regarded as having failed unreasonably to mitigate its loss arising from the NDA's wrongful contract award decision, by failing to initiate or pursue steps to prevent the NDA from implementing that decision by entering into the contract with ATK's competitor, CFP. Under the scheme of the Remedies Directive and 2006 Regulations, each side had choices which it was entitled to, and no doubt did, exercise in its own interests. In these circumstances, the answer to issue (iii) is in the negative as the Court of Appeal held.

Conclusion

59. Under issue (i), ATK's case in this Court was that European Union law requires a remedy in damages for any breach, whether serious or not, or that this issue should at least be referred to the Court of Justice. This case would, if accepted, have constituted a reason for reaching the same result as the Court of Appeal did by

reference to domestic law. The Supreme Court does not however accept ATK's case on this issue. Under issue (ii), the NDA's case has been the Court of Appeal was wrong to hold that, even though European Union law only requires a remedy in damages for a serious breach, domestic law goes further by requiring a remedy in damages for any breach, whether serious or not. The NDA has succeeded, and its appeal should be allowed, on this issue. Under issue (iii), the NDA also sought to establish that there should be a trial as to whether an award of damages may in the circumstances of this case be refused to an economic operator. The NDA has failed, and its appeal should be dismissed, on this issue.