Supreme Court rules no requirement to issue claim within standstill period, but damages only available for "sufficiently serious" breach

On 11 April 2017, the Supreme Court handed down its judgment on certain preliminary issues in the long-running challenge by ATK Energy EU Ltd (formerly, *Energysolutions EU Limited*) to the Nuclear Decommissioning Authority's ("**NDA**") award of a 14-year contract for the decommissioning of 12 Magnox power stations and two others (the "**Magnox Contract**") to a consortium known as CFP. ATK was a member of the Reactor Site Solutions ("**RSS**") consortium that made an unsuccessful bid for the Contract.

The matter came before the Supreme Court following a first instance judgment of Edwards-Stuart J on 23 January 2015 and an appeal determined by the Court of Appeal (Lord Dyson MR, Tomlinson and Vos LJJ) on 15 December 2015. Lord Mance JSC – with whom Lord Neuberger, Lady Hale, Lord Sumption and Lord Carnwath JJSC agreed – reached the following conclusions on the three preliminary issues before him:

1. That Council Directive 89/665/EEC as amended by Council Directive 2007/66/EC (the "**Remedies Directive**") only requires Member States to provide for an award of damages for breach of Directive 2004/18/EC (the "**Classic Directive**") where the breach in question is "*sufficiently serious*" within the meaning of the second so-called *Francovich* condition for state liability under EU law.

   His Lordship **upheld** the Court of Appeal on this point following a close analysis of two cases of the Court of Justice of the European Union: Case C-314/09 *Stadt Graz* and Case C- 568/08 *Spijker*.

2. That a breach of the Public Contracts Regulations 2006 ("**PCR06**") – which implement in England, Wales and Northern Ireland the Classic and Remedies Directives – sounds in damages only if it is "*sufficiently serious*" within the meaning of the second *Francovich* condition.

   His Lordship **reversed** the findings of Edwards-Stuart J and the Court of Appeal on this point. He placed great weight on the Explanatory Note and Explanatory Memorandum to the Public Contracts (Amendment) Regulations 2009 - which amended PCR06 in light of the 2007 amendment of the Remedies Directive. The Explanatory Note and Memorandum as well as a contemporaneous Impact Assessment produced by the Office of Government Commerce indicated an intention to take a "minimalist" approach to implementation of the amendments and to avoid "gold-plating".

3. That an economic operator's failure to bring proceedings during the 10 day standstill period provided for in regulation 32A PCR06 – triggering an automatic suspension of contract award – cannot provide a basis for refusal or reduction of an award of damages where proceedings are brought within the 30 day limitation period in regulation 47D and the cause of action is in other respects well founded.

   His Lordship **upheld** the Court of Appeal on this point, reversing Edwards-Stuart J who had held that whether reasonable mitigation of loss required proceedings to be brought within the standstill period is a factual question unsuitable for determination as a preliminary issue.

The Classic Directive and PCR06 have now been repealed and replaced with, respectively, Directive 2014/24/EU and the Public Contracts Regulations 2015 ("**PCR15**"). These changes do not, however, affect the Remedies Directive or its implementation in England, Wales and Northern Ireland. The relevant remedies provisions of PCR06 have been retained unchanged in PCR15.

The Supreme Court's conclusions on both preliminary issues have significant implications for public procurement litigation in England and Wales. At least since the Court of Appeal's judgment in *Matra Communications SAS v Home Office* [1999] 1 WLR 1646, such litigation has proceeded on the basis that any breach of PCR06/PCR15 that causes or risks causing loss may sound in damages regardless of seriousness. However, the Supreme Court has confirmed that an unsuccessful challenger is not required to incur the costs and exposure of issuing a claim during the standstill period, including dealing with the automatic suspension, at the risk of losing an entitlement to damages that would otherwise arise.

Shortly before the Supreme Court judgment, the NDA announced the early termination of the Magnox Contract with CFP and its settlement of the underlying *ATK v NDA* litigation before the imminent hearing by the Court of Appeal of the NDA's application for permission to appeal two judgments by Fraser J handed down on 29 July 2016 and 20 December 2016 holding, respectively: (i) that the NDA had breached PCR06 in its award of the Magnox Contract to CFP – in particular, in its scoring of both the RSS and CFP tenders ("the Liability judgment") and (ii) (in anticipation of the Supreme Court's ruling on the preliminary issue) that the NDA's breach of PCR06 was "*sufficiently serious*" within the meaning of the second *Francovich* condition ("the Sufficiently Serious judgment"). At the same time the NDA also announced the settlement of a claim against the NDA by Bechtel Management Company Limited, the other member of the RSS consortium, which had been brought after publication of the Liability judgment.

***Ewan West** acted for ATK Energy EU Ltd throughout the Magnox Contract litigation and appeared for ATK before the Supreme Court.*

***Philip Moser QC** acted for the NDA in the Court of Appeal in respect of the Liability judgment and the Sufficiently Serious judgment.*

***Michael Bowsher QC** and **Ligia Osepciu** acted for Bechtel Management Company Limited and **Philip Moser QC** acted for the NDA in the Bechtel claim.*

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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