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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2019] EWHC 549 (TCC)



No. HT-2018-000207

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 27 February 2019

Before:

MR JUSTICE FRASER

B E T W E E N :

SERCO LTD

Claimant/Respondent

- and -

SECRETARY OF STATE FOR DEFENCE

Defendant/Applicant

MR J. BARRETT and MR Z. SAMMOUR (instructed by DWF LLP) appeared on behalf of the Claimant.

MS S. HANNAFORD QC and MS L. OSEPCIU (instructed by Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE FRASER:

1 This is an application to strike-out, alternatively for summary judgment upon, certain passages in the Particulars of Claim and is an application brought the defendant in a procurement case. The defendant is the secretary of State for Defence (the "MoD"). The claimant is Serco Limited. It is the first hearing in a series of hearings over the next week and-a-half which are all quite close together. There is a contested hearing, or there was supposed to be a contested hearing, tomorrow in respect of disclosure. At the beginning of the week when I examined the list it seemed to me that the parties might well require a decision from me on the strike-out application today, as soon as possible, as it might impact upon tomorrow's hearing and the application by Serco for disclosure. It seems to me that the issues on this application are sufficiently clear that I can identify to the parties what the result is, and give reasons almost straightaway. I am therefore giving this judgment *ex tempore*.

2 The procurement in question is in relation to certain services to be provided by the winning bidder to the Ministry of Defence for fire prevention, protection and response services in relation to the majority of the defendant's own premises in the UK and abroad, and in support of UK forces on defence exercises and deployed on operations. The contract will not cover the provision of relevant services for aircraft while they are airborne, ships whilst they are at sea, or visiting US forces while they are stationed in the UK. The contract is a sizeable one. It is to have a life of 12 years and the value of the procurement is approximately £1.1 billion. The procurement exercise itself - I am told in the evidence, which for the defendant is from Mr Ahmad and for the claimant, Serco, is from Miss Moor - took four years. The evaluation process took about nine months and Serco was unsuccessful. The winning bidder was a company called Capita.

3 There are two bases upon which the MoD seek to strike out certain passages in the Particulars of Claim. The first is that the Particulars of Claim seeks to bring a claim not only in respect of the Defence and Security Public Contract Regulations 2011 ("the Defence Regulations"), but also the Public Contract Regulations 2015. Although the Public Contract Regulations 2015 aspect of the claim does not feature extensively within the Particulars of Claim itself, in two places it is clear that Serco seeks to challenge the procurement under both sets of regulations. The first place to start is paragraph 5, which states:

"5. Regulations within the Particulars of Claim is defined as being the Public Contract Regulations 2015 and/or the Defence and Security Public Contract Regulations 2011 (for ease of reference the applicable regulatory regime which is simply referred to herein as 'The Regulations')."

4 That averment, and others similar to it, cannot be entirely accurate for this reason. Both sets of Regulations cannot apply to the same procurement. Either one set applies, or the other. The contract notice was published in the OJEU on 17 October 2014. The Public Contract Regulations 2015 ("PCR 2015") only came into force on 26 February 2015 by virtue of the terms of Regulations 1 and 118(1). The PCR 2015 Regulations do not affect contract award procedures which have been commenced before the date of 26 February 2015. Under the transitional provisions, contract award procedures are treated as having been commenced when the contract notice was sent to the OJEU, in accordance with the precursor to the PCR 2015, which were the Public Contracts Regulations 2006. It is therefore clear on the face of

the dates themselves, which are not in dispute, that PCR 2015 cannot apply to this procurement.

5 Ms Hannaford had a variety of other points which she relied on in respect of the claim as purported to be brought under PCR 2015, but it is unnecessary to analyse what they are. This is because it seems to me that that primary point which I have just outlined is a fairly compelling one. Mr Barrett for Serco has frankly accepted today that the pleading refers to a version of the Regulations (PCR 2015) which were not in force in respect of this particular procurement, as of the date the contract notice was published. He submitted that if this was the case – and it clearly is - he would apply to amend. He has no amendment application before the court today.

6 I am going to strike out the part of the claim that relies on the Public Contracts Regulations 2015 for the obvious reason that they were not in force at the relevant date. They cannot therefore apply to this procurement. If Mr Barrett - and I am expressing myself neutrally - feels compelled to issue an application to amend, one of the grounds upon which it will be opposed, as has been made clear by Ms Hannaford, is not only the ground that the Defence Regulations apply to this procurement. This would be a rather obvious ground given the Defence Regulations are the regulations identified in the contract notice itself. There are also other grounds that she might have, including one that any claim under the 2006 Regulations would be rather considerably out of time. Given the tight timescales within which public procurement challenges needed to be brought, it might be though likely that an application to amend to include a claim under the PCR 2006 Regulations, when those regulations are no longer in force, have not been in force for a period of over four years, and given the procurement started in October 2014 given that it is now February 2019, might not stand the best chances of success. However, I am not going to pre-judge any amendment application that might be made, other than to observe for current purposes today that the claim in respect of the Public Contracts Regulations 2015 is indeed going to be struck out. It has no prospect of success whatsoever.

7 However, the second issue that arises is one which concerns the sufficiency of notice. Under the Defence Regulations in Regulation 52(3), particulars of breach are required to be identified in the pre-action correspondence. That has been described by Mr Barrett as the “sufficiency of notice” issue. It is, perhaps unsurprisingly, given my conclusion on the applicable regime so far as the Regulations is concerned, the issue that has taken up the majority of the argument today. On a strikeout application the test is set out at CPR 3.4(2)(a) - a matter will be struck out if it discloses no reasonable grounds for bringing the claim. That is set out in Ms Hannaford's useful skeleton at paragraph 12.

"(2) The court [will] strike out a statement of case... [where it] 'discloses no reasonable grounds for bringing or defending the claim.'"

8 Under CPR Part 24.2:

"24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if -

(a) it considers that -

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that the defendant has no real prospect of successfully defending the claim or issue..."

- 9 The wording there is slightly different. It says "real prospect" rather than "no reasonable grounds".
- 10 In the recent Court of Appeal authority in *Iiyami UK v Samsung* [2018] EWCA Civ. 220 [39] the test on an application for summary judgment was considered by the Court of Appeal. At (i), (ii), (iii), (iv), (v), (vi) and (viii) in [39] of that judgment, the judgment of the Court of Appeal written by Henderson & Asplin LJ (with whom Longmore LJ agreed) identified the correct test that should be applied on a summary judgment application. There is an overlap, but not a material difference in the tests, between striking out because a case has no reasonable grounds, or giving summary judgment because there is no real prospect of success. This is made clear from the notes in the White Book at CPR Part 3.4.6 on the basis of the cases there cited. I do not consider there is any difference in the test under those two separate rules. To be fair to Mr Barrett, he does not suggest there is any difference in the two tests either. So the application proceeds on that basis.
- 11 Turning to the sufficiency of notice issue, I am just going to identify some of the documents. Then I am going to come on to the law. The MoD wrote to Serco in a letter dated 18 June 2018, explaining that the MoD had decided to award the contract to Capita Business Services. The basis used to award the contract was the most economically advantageous tender - what is sometimes given the shorthand "MEAT".
- 12 With that letter went an annex which was described as:
- "A letter showing the marks, characteristics, relative strengths and weaknesses of the tenderer compared to your tender for each of the award criteria."
- 13 That letter had the effect of starting the standstill period the following day. This letter is the notification of the contract award. As anyone in practice in procurement law will know, there are very strict time limits for doing certain things, in particular issuing proceedings.
- 14 With that document in the annex, which runs to about 37 pages, there are a number of explanations given for the score that was obtained by Serco, taking into account weighting, and the score obtained by the winning tenderer. These are done against each of a group of numbered items which have been referred to by the parties as "RoRs", each of which relate to a different part of the bid. In the first pre-action letter which was sent by the solicitors DWF acting for Serco, the MoD's chief commercial officer was told in rather detailed terms of the dissatisfaction Serco had with that outcome. This letter is dated 22 June 2018 and has been called the first pre-action letter. Paragraph 2 of that letter states:
- "2. You will appreciate that for a procurement of this scale which has required very significant investment from our client as a bidder, it is essential our client is provided with information that enables it to fully understand the basis of the decisions that have been taken and to consider appropriate next steps. The final tender deadline in this procurement was 19 September 2018. It is an obvious cause of concern for our client that it has taken nearly nine months to complete and disclose the outcome of its evaluation exercise. At present our client has almost no information in respect of the evaluation it has

actually conducted and the decisions that have been made by the MoD. However, even on the basis of the very limited amount of information contained in the MoD letter, our client has serious and legitimate concerns that the MoD has acted in a manner contrary to (a) Regulation 5(2) of the Defence and Security Public Contracts Regulations 2011, which requires the MoD treats bidders equally and in a non-discriminatory way and act transparently; and (b) Regulation 19(29) which requires that in conducting its competitive dialogue procedure the MoD must 'assess the tenders received on the basis of the aware criteria specified in the contract notice or descriptive document...'

"3. Serco's review of the content of the MoD letter is currently ongoing. However, the serious concerns that have already arisen to date include the following points..."

- 15 There then appear against different headings certain points which Serco draw to the MoD's attention. (A) Apprehended breaches of the evaluation of Capita's bid. In respect of that, certain RoRs are identified by number. (B) Apprehended breaches in relation to Capita's bid. Certain RoRs are identified by number. (C) Apprehended breaches in relation to Serco's bid. Again, certain RoRs are identified by number. At (D) the standstill period is sought to be extended. It says at paragraph 41:

"41. As the MoD is unable to progress its award until the expiration of this period, we request the MoD extend the standstill period to this date too. That will allow Serco sufficient time to consider the MoD's substantive response to this letter."

Then a (E), under "A lack of transparency in cost evaluation", paragraph 42 states:

"42. The MoD letter contains a table which is intended to explain how the MoD has decided the total costs liability for each bidder. However, there is no transparency in relation to how the list provided in the table relate to the MoD's calculation for the figures given in the right-hand column of the table."

- 16 Under (F) "provision of information", complaint is made between paragraphs 46 and 51 about the amount of information available to Serco. At paragraph 46 the letter says:

"46. You will understand it is a function of the bidding process that an unsuccessful bidder in our client's position has only very limited visibility of the evaluation process you have undertaken."

"47. With that in mind we set out below further information we ask you to provide at this stage. Our client does not at present have sufficient understanding of the evaluation process actually undertaken so as to be able to be confident that the process has been carried out lawfully."

There may be a word missing in that last sentence, but its meaning is fairly clear.

"48. It is necessary for us to have the information we seek now so that we can assess whether it is appropriate to bring claims against

you. It is also necessary that this further information be provided promptly so our client is not put in a position where it is required to issue proceedings immediately in order to protect its position.

"49. We have a limited understanding of how you have approached the evaluation of the tenders you received in connection with this procurement. It is essential we are now provided with contemporaneous documents that will enable us to understand the basis upon which the scores awarded were determined."

17 There is then a conclusion paragraph which says, at paragraph 55:

"55. If we do not receive a response from you by [a deadline which had already been specific earlier in the letter] our client will have no option than to consider issuing proceedings in order to protect its opposition."

18 There was an answer on 4 July 2018 from the Government Legal Department on behalf of the MoD. That included copies of the AWARD records of the individual and consensus scores for Capita and Serco for the evaluation criteria which had been identified in the 22 June letter at each stage of the procurement process, but it did not include records for the other criteria so far as I can tell. AWARD is an evaluation database. The actual pre-action response, again from the Government Legal Department, came on 9 July 2018. In that, at paragraph 3, the Government Legal Department stated, on behalf of the MoD:

"Our client further denies your client has almost no information in respect of the evaluation it has actually conducted and the decisions that have been taken by the MoD. On the contrary, your client was provided with a 40 page letter, including annexes, by way of the contract award decision notice communicated on 18 June 2018. Since then your clients have been provided with further information and documents in response to the requests made at para.51 of the letter of 22 June and repeated in your letter of 27 June 2018."

19 That letter then identifies, in particular at paragraphs 6 to 19, the general approach that was said in the letter to have been adopted by the MoD in the evaluation. Mr Barrett for Serco makes the point, not only in respect of this but in respect of various points arising out of today's proceedings, that the tender response was 9,000 pages long. It is therefore perhaps to be put in context that the annexure which run to 37 pages, the communication with the contract award notice, is perhaps not as fulsome necessarily as one would expect. It certainly enabled the unsuccessful bidder (Serco) to identify some RoRs in respect of which complaint was made, and some of those detailed points were responded to in the pre-action response letter that I have just identified. However, it is highly unlikely that there was enough detail in a 37 page document to identify all of the grounds with which Serco was dissatisfied in terms of evaluation of a 9,000 page tender response.

20 That led to a second pre-action letter. This one is dated 11 July 2018. Again, it is a fairly lengthy letter. I am not going to read a great deal of it out. It is not as long as the first pre-action letter. In paragraph 3 it says,

"3. Our client's aim in entering into correspondence has been to seek to provide MoD with the opportunity to disclose documents and

information that would enable it to have assurance that the procurement was conducted awfully. Regrettably MoD has not done so. In summary the MoD response (a) has not provided the documents requested by your client relating to the evaluation of tenders; (b) has refused to provide any information or documents relating to the evaluation of price; (c) has not provided the sufficient response to a significant number of the concerns raised in the DWF initial letter in respect of the procurement; and (d) includes a number of statements that appear to amount to admissions that MoD conducted the evaluation procedure in a manner that involved a number of departures from the published evaluation criteria and/or the application of undisclosed award criteria.

"4. In the circumstances, our client's serious concerns in respect of the legality of the procurement has increased. The approach adopted in the MoD response if maintained would leave our client with no option but to issue proceedings. Our client does not wish to take this step unless it is necessary. We therefore invite the MoD to reconsider its position."

- 21 There is then a heading. "MoD's change in approach to evaluation of SRDs following submission of final tenders." There are a lengthy number of paragraphs under that heading that go from (5) to (15). The final sentence of paragraph 5 makes it clear that -

"This criticism applies to comments which have been addressed in the context of each RoR."

Paragraph 6 says:

"6. This is incorrect and is contrary to the approach taken by the MoD at previous stages of the procurement."

The final sentence in paragraph 6 states:

"The MoD has therefore varied its approach to evaluating SRD compliance between the ISDS and the ISFT stages, which demonstrates that the MoD did not evaluate tenderers in accordance with the pre-disclosed evaluation criteria.

"7. In addition, the RoR specifically detailed which SRDs are mandatory, and specify any evaluation sub-criteria that, for example, to be awarded a score of high confidence bidders must 'fully response to all of the requisite SRD/ID references'."

I should say "SRD" means service requirement document specification.

- 22 The final sentence in paragraph 9 states:

"9. The MoD's actual approach to evaluation appears to have diverged from the approach explaining the published evaluation criteria."

23 At paragraph 16 onwards there are some examples given. They run for a couple of pages. At paragraph 26, under the heading "provision of information", further information is sought by Serco in respect of the evaluation of its tender. At paragraph 29 it is said:

"29. Without provision of evaluators' comments in relation to Serco's bid, our client has been unable to determine whether the MoD has complied with the Defence Regulations in evaluation of Serco's bid. In particular this concern relates to how the MoD has reached consensus scoring. Our request for these documents is therefore not a fishing exercise but a genuine attempt to remove concerns regarding the MoD's approach to evaluation following submission of final tenders. As our client has only been provided with the scores for its RoRs, it is difficult to understand the MoD's approach to evaluation, particularly concerning RoRs 3.1.1 and 1.3.4."

24 The point is then made that: "This information should be primarily and readily available on the AWARD system."

25 At paragraph 31 is the paragraph which Ms Hannaford relies on, which says,

"31. As specified in paragraph 3 of the DWF initial letter of 22 June 2018, our client's review of the contract award notice was ongoing and the apprehended breaches contained in that letter are not the entirety of our client's concerns. Our client has subsequently identified further issues, concerns and examples of breaches under the headings contained in that initial letter, which have not been addressed or resolved in the light of the fact that the MoD has consistently refused to provide meaningful information which demonstrates its compliance with the Defence Regulations as explained in this letter. Many issues and concerns of our client may be remedied if the MoD provided evaluators' comments on the forms."

26 The conclusion is a demand for further information which includes copies of the full award records of all the evaluators, in respect of all the RoRs and records and information relating to the MoD's evaluation of cost.

27 I should say that letter received no meaningful response, but in accordance with the strict time limits in procurement cases, on 17 July 2018 proceedings were issued by Serco. Those proceedings, in the brief details of claim, sought to bring a claim both under the Public Contracts Regulations and the Defence and Security Public Contract Regulations. I have dealt with the first of those earlier in this judgment. They were followed by the Particulars of Claim. I am going to identify what effectively amounts to the crux of Ms Hannaford's submissions now before I turn to the pleading. Ms Hannaford's argument is that what is required to comply with the Regulations, and Regulation 52 in particular, is a clear statement of the alleged breach in the pre-action correspondence. I will come on to the authorities dealing with that in a moment. She maintains that because that requires identification in the letter, any numbered RoRs which are *not* separately identified in either of those two letters have not been sufficiently identified in advance, as required by the Regulation, and reference to them in the Particulars of Claim should be struck out. That will require consideration, firstly, of what those letters have to include to comply with the

Regulations, and then applicability of that principle to the facts, which is why I have read those letters out in a rather tedious and lengthy way.

- 28 I am just going to deal briefly with the pleading because it is relevant to the amount of information that was available to Serco at the time. In paragraph 23 of the Particulars of Claim, which has been settled both by Mr Barrett and Mr Sammour who appear before me today for Serco, at paragraph 23 this reads as follows.

"The award notification was accompanied by a table setting out the quality related scores awarded to Serco and Capita (the debrief information) accompanied by what appears to be partial and/or amended excerpts from the reasoning of the evaluators justifying the relevant scores."

- 29 That was pleaded to in the defence which was settled by leading counsel - not Miss Hannaford but Mr Moser QC - together with Mr Webster and Ms Opsecui, who appears before me today, and also Ms Katidja. The following is stated in paragraph 23 of the defence.

"Paragraph 23 is admitted save for the suggestion that the evaluator feedback included in the debrief information was (a) in some way improperly redacted or amended; or (b) overly brief or limited is denied. It is averred that the feedback contained in the debrief information which consisted of some 36 pages in landscape format appropriately summarised the consensus feedback of the evaluators for each relevant RoR, albeit it did not provide the full level of detail contained in the consensus feedback and in some cases could have been expressed more precisely."

That plea is undoubtedly a correct one based on the entries within that 37 page document that I have looked at in some detail, but it is also necessary to put into context the sufficiency of notice when one comes to that in a moment, having looked at the legal principles.

- 30 There are a number of cases, but not very many, which deal with the sufficiency of notice. This is because cases such as this under the Defence Regulations do not often come before the court, and although there used to be a similar approach across other regulations, there is only a handful of cases. They are summarised in the decision of Coulson J (as he then was) in *Amaryllis Limited v HM Treasury sued as OGC Buying Solutions* [2009] EWHC 962 (TCC). In that judgment, which was on a strike-out application in the same vein as this one but under the 2006 Public Contracts Regulations, Coulson J considered the authorities. The relevant regulation there was Regulation 47, but the fact that it is a different regulation does not, in my judgment, dilute the effect of this decision, which is very useful. At [31] to [37] Coulson J identified the relevant three authorities. The first is *R v Portsmouth City Council Ex Parte (1) Bonaco Builders Limited*. As the title suggests, that is a judicial review case. Again, that does not matter because the procurement challenges are brought by judicial review, and even today they are still brought sometimes both by judicial review in the Admin Court, and by Part 7 proceedings in the TCC. In that case Keene J (as he then was) considered the language of that Regulation 47 which referred to "the" (using the definitive article) breach of duty rather than "a" (the indefinite article) breach of duty, suggesting that the actual breach complained of must be identified as the notice. His judgment says, as follows:

"If that is so, then it reinforces the natural meaning which one would attach to the language of the paragraph, because a breach can only be remedied if it is first identified with some specificity. The fact that in the present case no precise remedy of the breaches could have been achieved cannot affect the interpretation of this provision. I conclude that it is a requirement of the 1991 Regulations that before proceedings may be brought under Regulation 31, the contractor must have informed the authority of the breach of duty which is alleged and not merely of a breach of duty."

- 31 That case went to the Court of Appeal and before it got to the Court of Appeal there was a European Court of Justice decision in a case known as "*Wallonne Buses*." Because of that decision, the Court of Appeal made certain findings not connected with the adequacy of notice under the Regulations and overturned the result at first instance. As Coulson J correctly identifies in [33], that was on an entirely different point.
- 32 The next case in the series is *Keymed Limited v Forest Healthcare NHS Trust* [1998] EuLR 71, although the reference copy in the authorities' bundle is a Westlaw reference. The complaint in the notice concerned the advertisement of the proposed contract. The part of the notice that was said to relate to the breach complained of read as follows:

" Had that contract been advertised on the basis of the documents now disclosed our clients would have had the opportunity to tender. They have the expertise to fulfil the technical requirements and if that would have been means by which they could supply the medical equipment they would have been prepared to undertake responsibility for the other aspects which could have been met by them as easily as any other contractor."

Langley J [as he then was] concluded that this letter was sufficient to comply with the Regulation, because it brought to the Trust's attention the allegation that it had wholly failed to comply with the Regulation relating to advertisement of contracts..."

- 33 Langley J had concluded that "that the letter adequately fulfilled the purpose and letter of the notice provision in the relevant Regulation."
- 34 The third case in the series is *Luck T/a G Luck Aboricultural & Horticulture v LB Tower Hamlets* [2003] EWCA Civ. 52. As one might guess from the title, that also was a judicial review case. It went to the Court of Appeal first on the refusal of permission to allow judicial review. That appeal was allowed and then the judicial review itself took place, and the case went to the Court of Appeal again. However, the alleged notice was in remarkably brief terms, as Coulson J says at [35].

"35. ... It merely said that the Council's decision to exclude the claimant from the tender process was unlawful, without giving any details as to how and why it was said to be unlawful. When those details were sought by the Council, the claimant's solicitors merely said that they had been instructed to issue proceedings."

"36. In those circumstances, the Court of Appeal had little difficulty in concluding that the alleged notices did not refer to the Regulations either expressly or implicitly, and did not refer to the breach or apprehended breach of the duty owed. They therefore concluded that any claim under the Regulations was barred by reason of the lack of notice."

35 Mr Justice Coulson's summary of those authorities is one which I gratefully accept and adopt in [37]. He says:

"37. In my judgment, these authorities are clear. A general reference to an alleged breach of the Regulations is not enough; the notice must identify the actual breach complained of. That did not happen in either *Portsmouth* or *Luck*. However in *Keymed*, where the notice was found to be sufficient, detailed or lengthy particulars were not required. What mattered was a clear statement of the alleged breach by reference to the Regulations, and a stated intention to commence proceedings."

36 I would repeat the clause in the middle of that final sentence "by reference to the Regulations", because in my judgment what Ms Hannaford seeks to do (although she portrays it as a notice requiring a clear statement of alleged breach) is effectively urging that the notice must include specific allegations of a failure to evaluate a particular RoR, which in my judgment is more correctly characterised as full particulars of a breach. That can be tested by looking at the facts in the *Amaryllis* case, in my view. In [18] it can be seen that the letter which was sent stated in its second paragraph:

"We have not been provided with any proper explanation of the reasons for our non-selection and consider that our response to the Pre-Qualification Questionnaire was not considered fairly or equally. We also consider that the process was not transparent. In particular, we were not aware (and remain unaware) at the relative importance and weightings of the questions in the Pre-Qualification Questionnaire."

That "Pre-Qualification Questionnaire was also given the shorthand "PCC".

37 It is plain, therefore, that the score of which complaint was made is identified in [23] where, in the middle of that paragraph, it says:

"However, it is plain that it was this information, as to how the tender was evaluated (or 'marked') by the defendant, which lies at the heart of the proceedings. Accordingly, for the purposes of the application to strike out, it is important to identify the precise basis of the claims now made. Miss Hannaford puts those under four headings as follows..."

38 They then follow in that paragraph as (a) Previous Experience and Comparable contracts. (b) is Criteria and Weightings; (c) is Environmental Management; and (d) is Business Activities. When Coulson J comes, at [38] to [43], to consider whether or not there was sufficient notice in accordance with the Regulations in the letter which I have identified, he concluded there was. He said:

"39. First, there can be no doubt that the Regulations themselves were plainly and obviously identified ... So too was the statement of the intention to commence proceedings..."

"Secondly ... the actual breach complained of was clearly identified."

39 Thirdly he accepted the submission that " the adequacy of the notice has to be considered against the backdrop of the information made available to the claimant by the defendant."

40 Considering each of those three points in this case, based on the adequacy of the information provided in the 37 page annexe and the information identified in the two pre-action letters, I consider that that is sufficient to cover all numbered RoRs, and not just the numbered RoRs contained in the letter.

41 However, there is a subsidiary point which applied in *Amaryllis*, and in my judgment also applies here. The learned judge, at [42] said:

"42. ... For the reasons which I have given, that led to what I consider to be the entirely adequate notice of the 4th June but, to the extent that there is any legitimate complaint that the notice lacked specificity, then in my judgment that stems from the defendant's default. It cannot, therefore, avail the defendant in mounting a challenge under Regulation 47(7)(a). "

42 When one considers that the response from the Government Legal Department was to provide the AWARD documentation only in respect of the numbered RoRs, which were identified in the first letter, and which stated on their face that they were only part of the exercise in terms of what the complaint was, it is very difficult to see how there could be any legitimate criticism that other further numbered RoRs were not identified. In dealing with what I should say is a subsidiary or supplementary argument of Ms Hannaford, she places great store on the paragraph at the end of the second pre-action letter which identifies that Serco has identified other breaches which are not specifically identified within that letter by way of numbered RoRs. However, the introductory first two or three pages of that letter makes it clear that an attack is made upon the whole of the scoring criteria. The Regulations are particularly specified in both the second pre-action letter and the first pre-action letter. On the facts of this case, I have come to the conclusion that at this stage of the proceedings it would be wrong to decide, applying the test as I must, that there are no reasonable grounds for allowing the claim to continue or that the claims under those RoRs which have been identified in the particulars, but are not identified in the first pre-action letter by number, have no real prospect of success. Accordingly, in all the circumstances that limb of Ms Hannaford's application fails, but as I said, her first limb in respect of the applicable regulatory regime succeeds.

CERTIFICATE

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