Neutral Citation No [2010] NIQB 13 | *Ref:* **TRE7591**

Judgment: approved by the Court for handing down | *Delivered:* **9/02/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

IRISH WASTE SERVICES LIMITED

Plaintiff;

-and-

1. NORTHERN IRELAND WATER LIMITED
2. M T WASTE LIMITED
3. ROAD SAFETY CONTRACTS LIMITED
4. R HEATRICK LIMITED

Defendants.

TREACY J

Introduction

[1] In this action the plaintiff claims, inter alia, injunctive relief (and damages) against the first defendant restraining it, its servants and agents from entering into the (then) proposed contract for Sludge Management Services with the successful tenderer, the second defendant. The plaintiff applied at an earlier stage for an interim injunction which resulted in the first defendant giving an undertaking not to conclude the contract until the conclusion of the proceedings or further order. Following that undertaking and the plaintiff's cross-undertaking in damages the second, third and fourth defendants applied to be joined as defendants and an order to this effect was made on 22 May 2009. The third and fourth defendants are the two companies which own the second defendant.

Background

[2] Stephen Denny, the acting Head of Procurement for the first defendant, at paras.3-9 of his detailed affidavit explains the background to the impugned

contract. The first defendant is the sole provider of water and sewerage services in Northern Ireland whose strategic aim is to provide these essential services in an efficient and cost effective manner to meet the requirements of its customers and so contribute to the health and quality of life of the people of Northern Ireland. In order to provide these services the first defendant has to procure goods and services in the market place. This procurement function is vital to its business and key to the provision of these essential services. In relation to the impugned contract that the first defendant was seeking to award (the C340 contract) he averred that it is one of its key operational contracts and is critical to the operation of water and waste water treatment facilities in Northern Ireland.

[3] The plaintiff was one of seven applicants to whom an invitation to tender ("ITN") was issued on 20 February 2009. The tender process for award of the contract was conducted using the Negotiated Procedure provided for in the Utilities Contract Regulations 2006 ("the UCR 2006 Regulations"). The Regulations implement, for England, Wales and Northern Ireland, Directive 2004/17EC ("the Utilities Directive"). For the purposes of the Regulations Irish Waste is an "economic operator" and Northern Ireland Water is a "utility". Accordingly Northern Ireland Water was required to award the contract in accordance with the Directive and the Regulations and, in particular, on the basis of criteria which complied with the requirements of Regulation 30 of the Regulations. These Regulations require public utilities such as the first defendant to procure works, goods and services in accordance with tender processes that are transparent and non-discriminatory, evaluating bids fairly on the basis of award criteria that are set out in advance to bidders. The contract was to be awarded on the basis of the most economically advantageous offer under Regulation 30(1)(a) of the UCR 2006 Regulations.

[4] It was made clear to all tenderers, in Section 4.1 of the ITN, that bidders were required to pass a minimum quality threshold providing:

> **"The Contract will be awarded to the Bidder(s) who, after the conclusion of negotiations offers to enter into the Contract on the most economically advantageous terms per Lot for Northern Ireland Water. They may not necessarily be the Bidder(s) which offers the lowest price, as Bidders are required to pass a minimum quality threshold".**

This threshold standard was applied to ensure that a service of the requisite quality was delivered. No bidder, including the plaintiff, made *any* complaint or representation about the existence of, or the justification for, the threshold quality standard during the tendering process.

[5] The first defendant applied the bid valuation process set out in Section 4 of the ITN to the six bid submissions received within time. The plaintiff's bid was one of three bids that failed to satisfy the Pass/Fail quality threshold for each Lot (scoring a total 61.55 out of 100 for each Lot). In accordance with the evaluation process described in the ITN the plaintiff's bid submission was therefore not taken forward to the price evaluation part of the detailed evaluation.

[6] On 8 April 2009, in accordance with the requirements of the Regulations, the unsuccessful bidders were written to informing them of the decision to award the contract to the Preferred Bidder namely the second defendant M T Waste Limited. The letter to the Plaintiff also contained details of the outcome of the plaintiff's evaluation furnishing their scores and stating "as their bid submission failed to pass the required quality thresholds under either Lot, it did not progress to the price evaluation stage".

[7] Following notification that it had been unsuccessful the solicitors for the plaintiff made representations to the first defendant in relation to the way in which the bid had been evaluated. There was *no* complaint at this stage in relation to the particular procedure which had been adopted. The first defendant in response to the issues raised by the plaintiff provided it with detailed information on the process and the scoring of bids in a series of letters and met with the plaintiff on 29 April 2009 to provide a debrief. At that meeting the first defendant agreed to postpone the award of the contract until 6 May to enable the plaintiff to consider the outcome of the meeting.

[8] At paragraph 34 of his affidavit Mr Denny stated:

> **"Accordingly I believe that the defendant has bent over backwards to accommodate the plaintiff's concerns as to the scoring of its bid submission and has been transparent as to the way in which the evaluation process was conducted. It was therefore with some surprise and astonishment that on 30 April 2009, the day after the meeting, I received a further letter from the plaintiff's solicitors, setting out a totally novel argument which had been raised for the very first time, namely, that the tender process was fundamentally flawed because of the way in which it addressed the relationship between quality and price."**

[9] Notwithstanding the earlier focus of the correspondence and the meeting of the 29 April the Plaintiffs Managing Director, Jason McPolin, in his grounding affidavit made it clear the plaintiff did *not* propose to proceed with a challenge as to the level of scoring awarded to the plaintiff company.

The plaintiff has thus abandoned any claim which it may have had in relation to the way in which his tender was marked and has sought instead to rely, inter alia, on the matters referred to in the letter of 30 April 2009.

[10] The matters raised for the first time in this letter constitute a fundamental challenge to the procedure communicated in the ITN issued on 20 February 2009 – that this is so is *expressly* acknowledged in the body of the letter of 30 April which states:

> **"The Regulations do not permit a 'two stage' process with threshold elimination before proceeding to consider price. Regulation 30(3) clearly requires a weighting to be allocated to each of the criteria (therefore including price) and for all the criteria to be taken into account and the assessment**."

In respect of this point the letter goes on to state**:**

> **'This is a new and different point entirely unconnected to the issues that we have raised with you to date. You will appreciate that this challenge does not concern NIW's assessment of our client's tender submission, but rather that it constitutes a *fundamental challenge to the procedure itself*'."** [Emphasis added]

[11] The other criticism of the tender process is in the following terms:

> **"It is clear that price is one of the criteria to be used by NIW to establish the 'most economically advantageous terms'. The invitation to negotiate does not make it clear precisely what the other criteria were, although it is recognised that scores comprising, in aggregate, a maximum score of 100% have been allocated to the various questions raised under the heading 'Business Operations and Service Continuity'. We do not believe that questions can be equated with criteria and submit that there is insufficient clarity about the criteria to satisfy the overarching obligations of transparency and equal treatment."**

[12] In the plaintiff's skeleton argument it sought to impugn the tender procedure on the grounds adumbrated in the letter of 30 April as well as two further grounds that the defendants submitted were not identified in the letter, namely, that some of the criteria used by NI Water were criteria which were essentially linked to the evaluation of the tenderer's *ability to perform* the

contract and accordingly were not permitted criteria (the *Lianakis*[1] point) and that the relevant weighting given to each of the criteria was not (it was asserted) stated.

Legislative Background

[13] The 55th recital to the Utilities Directive provides:

> **"(55) Contracts must be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".**
>
> **To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation – established by case-law – to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting entities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting entities may derogate from indicating the weighting of the criteria for the award of the contract in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.**
>
> **Where contracting entities choose to award a contract to the most economically advantageous tender, they should assess the tenders in order to determine which one offers the best value for money. In order to do this, they should determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting entity. The determination of these criteria depends on the object**

[1] Case C-532-06 [2008] All ER (D) 172

of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. In order to guarantee equal treatment, the criteria for the award of the contract must enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting entity to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting entity may use criteria aiming to meet social requirements, in particular in response to the needs – defined in the specifications of the contract – of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong."

The Utilities Contract Regulations

[14] Insofar as it is material, regulation 30 of the Regulations provides:

> **"30.- Criteria for the award of a contract**
> **(1) Subject to regulation 31 and paragraphs (6) and (9) of this regulation, a utility shall award a contract on the basis of the offer which-**
> **(a) is the most economically advantageous from the point of view of the utility; or**
> **(b) offers the lowest price.**
>
> **(2) A utility shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including delivery date or period for completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after sales service and technical assistance, commitments with regard to parts, security of supply and price or otherwise.**
>
> **(3) Where a utility intends to award a contract on the basis of the offer which is the most economically advantageous, it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents.**

> **(4) When stating the weightings referred to in paragraph (3), a utility may give the weighting a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.**
>
> **(5) Where, in the opinion of the utility, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the utility shall indicate the criteria in descending order of importance in the contract notice or contract documents.'**

[15] Regulation 45(1) of the UCR 2006 Regulations provides that the obligation on a utility to comply with the provisions of the Regulations (omitting irrelevant exceptions) and with any enforceable Community obligation in respect of a contract such as the Contract is a duty owed to an economic operator. Regulation 45(4) provides that a breach of that duty is actionable by any economic operator which, in consequence suffers, or risks suffering, loss or damage.

Delay

[16] All of the defendants challenged the bringing of these proceedings on the grounds they were barred by operation of Regulation 45(5)(b) of the UCR 2006 Regulations. In the case of the additional grounds relied upon by the Plaintiff, which it was claimed the first defendant had not been informed of until the letter of 30 April, the Defendants also relied on 45(5)(a). Regulation 45 provides:

> **"Proceedings under this Regulation may *not* be brought unless –**
>
> **(a) The economic operator bringing the proceedings has *informed the utility of the breach* or apprehended breach of the duty owed to it in accordance with paragraphs (1) or (2) by that utility and of its intention to bring proceedings under this Regulation in respect of it; *and***
>
> **(b) Those proceedings are brought *promptly* and in any event within three months from the date when *grounds for the bringing of the proceedings first arose* unless the court considers that there is good reason for**

extending the period within which proceedings may be brought."

[17] Accordingly Regulation 45 lays down two conditions precedent *both* of which the Plaintiff must satisfy otherwise proceedings may not be brought. The first condition [under 45(5)(a)] is what I shall call the "notification requirement". The second condition is what I shall call the "promptness requirement".

[18] Relying on ***Amaryllis*** **[2009] EWHC 962** at paras.44-58 and the cases referred to therein including the judgment of Coghlin LJ in **Henry Brothers [2009] BLR 118** the plaintiff submitted that grounds for bringing these proceedings did not arise until Irish Waste received the letter dated 8 April 2009. Accordingly it was argued that the proceedings were not only within the three month time period but were also prompt having regard to the various steps taken between the letter of 8 April 2009 and the commencement of proceedings. They did not in their skeleton argument or in their grounding affidavit seek any extension of time or advance any reasons as to why such an extension, if required, should be granted. They also contended that there had been no breach of the notification requirement.

When did grounds for bringing proceedings first arise?

[19] In order to answer the question as to whether the proceedings are out of time it is necessary to address the critical issue of "*when grounds for the bringing of the proceedings first arose*".

[20] After the conclusion of the hearing in this case the court's attention was drawn to the judgment of the English Court of Appeal in ***Brent LBC v Risk Management*** **[2009] EWC Civ 490.** So far as the issue of delay is concerned the Court of Appeal decision in ***Brent*** was concerned with the provisions of Regulation 47(7)(b) of the Public Contracts Regulations 2006 which are in identical terms to Regulation 45(5)(b) of the UCR 2006 Regulations.

[21] According to that decision time starts to run as soon as there is an actual breach of the Regulations and it is not open to a plaintiff to wait until the end of the process before complaining.

[22] The judgment of Moore-Bick LJ deals with delay in relation to the procurement claim at issue in that case at paras.238-252. At paras.251-252 he concludes that there is fundamental distinction between anticipatory proceedings based on an apprehended breach and proceedings based on a breach which has already been committed. If a plaintiff chooses not to bring anticipatory proceedings, time does not start to run until there is an actual failure to comply with the prescribed procedure.

[23] In my judgment if the plaintiff's arguments in this case are well founded there was an *actual* breach of the proscribed procedure when the unlawful criteria were published in the ITN documents in February 2009. It was at that stage that the grounds for bringing the proceedings first arose. Consistent with the judgment of the Court of Appeal in ***Brent*** time started to run when the unlawful criteria were published.

[24] At para.244 in ***Brent*** the Court of Appeal set out a passage from the judgment of Langley J in ***Keymed*** **[1998] ELR 71** with which the court expressly agreed in which he stated:

> **"… Grounds will first arise for the bringing of proceedings once it could be shown that they were not complied with from the outset of the award procedure. If it were otherwise and a supplier could select the last breach available to him, … it would mean that he could sit back and do nothing even in respect of breaches of which he was aware or which he apprehended. That would again be contrary to much of the purpose of Reg. 29 …"** (This was a case concerning the Public Supply Contracts Regulations which contained a provision in substantially the same terms as the regulation at issue in these proceedings).

[25] At para.245 referring to the above quoted decision in ***Keymed*** Moore-Bick LJ continued:

> **"That is a helpful description of the nature of the duty imposed by the Regulations in this case, with which I agree. It is reflected in the approach taken by this court in Jobsin … [2002] 1 CMLR 1258 in which Dyson LJ approached the question of the date on which grounds for the bringing of the proceedings first arose *by reference to the date in which the right of action accrued*. It is accepted that that is a matter to be judged objectively and does not depend on the claimant's knowledge."**

And at para.246 he cited the case of ***Holleran*** **[2004] EWHC 2508** in which Cooke J had to consider the corresponding provisions of the Utilities Contract Regulations 1996 and said:

> **"That case also concerned an alleged failure to comply with the prescribed procurement procedure. He held that, as a matter of ordinary language,**

> ***grounds for bringing of proceedings first arise when the facts constituting the basis of complaint occur.***"

In my judgment the facts constituting the basis of this complaint occurred with the publication in February 2009 of the procedure to be followed. This is the procedure which these proceedings seek to condemn. The grounds of complaint arise *ex facie* from the document itself. The intrinsic nature of the matters grounding the present complaint relate to the procedure to be followed. The matters relied upon by the plaintiff to challenge the procedure were available from the point of publication.

[26] Rejecting the idea that the approach to promptness in judicial review proceedings promulgated in ***Burkett*** **[2002] 1 WLR 1593** could be simply transposed to a claim under the regulations the court stated at para 250:

> "…**The contrast with a claim under the regulations is clear: the latter is an action to vindicate private rights in the context of a procedure that in many cases will still be in progress….a failure to comply with the procedure at *any* stage inevitably undermines the integrity of all that follows. Accordingly, the right of action is complete immediately and cannot be improved by allowing the procedure to proceed to a conclusion. Where there has been a failure to comply with the proper procedure the later award of the contract does not constitute a separate breach of duty; it is merely the final step in what has already become a flawed process.**"

[27] In the short concurrent judgment of Hughes LJ at paragraph 255(x) he stated:

> **"…any failure by a contracting authority to comply with *any* step in the required procedure involves an actual breach and it is accordingly not open to a putative claimant to await the last in a series of actual breaches and to contend that time only runs from then."**

[28] I do not consider that the decision in ***Henry Brothers*** is in the circumstances of the present case of any assistance to the plaintiff. That decision exemplifies a category of cases, as the defendants have argued, where the challenges were dependent upon knowledge of *unknown or uncertain material*. For example, in ***Henry*** the challenge related to the plaintiff *discovering* the content of the assumption upon which the invitation to tender

was based. It was this factual assumption which was found in para.28 of the judgment to constitute the "manifest error" upon which the claim was based. Moreover Coghlin LJ at para.35 of his judgment made it clear that his conclusion about when the breach occurred was "in the circumstances of this case". In ***Henry*** the procedural flaw as *not* something which appeared *ex facie* from the contract documents. The breach rather lay in the evaluation process.

[29] Mr Hanna at para.43 of his skeleton argument relied heavily on the judgment of Colson J in ***Amaryllis.*** Although this decision was not referred to in the judgment of the Court of Appeal in ***Brent*** I am informed by Mr Griffin QC (who appeared in that case) that it was drawn to the attention of the court. In my view as a result of the decision in ***Brent*** the position is now clear. The approach of the Court of Appeal is in accordance with the wording of the Regulations and also with the powerful reasoning of the Court of Appeal in ***Jobsin*** **[2001] EWCA Civ 1241**.

[30] Courts have always in public procurement cases emphasised the importance of challenges being made promptly in the public interest and in the interests of third parties affected by such a challenge. As pointed out by the second defendant bidding costs in relation to contracts of any size and sophistication are likely to be substantial. Preparing to start work under a new contract is likely to involve time and expense, and delay in putting a new contract into effect is likely to affect the delivery of services to the pubic and/or the costs of those services. Thus when a contracting authority makes it clear, as it did in this case by the publication of the ITN, that it will conduct the procurement in a particular way then the party who wishes to contend that the criteria set out in the document are unlawful must make its challenge promptly. It is then, in accordance with Reg.45(5)(b), that the grounds for bringing the proceedings first arise. The challenging party cannot wait until the outcome of the process before deciding whether to challenge the legality of a process which is said to be *ex facie* unlawful. The outcome is merely the final step in the process – a process which on the plaintiff's argument was flawed *ab initio* and therefore subject to the requirement of prompt challenge in the public interest.

[31] It is worth recalling what the Court of Appeal said in ***Jobsin*****:**

> **"26. I cannot accept that the right of action alleged by Jobsin first arose on 17th November. In my view, it arose on or about 14th August. It is clear that, as soon as the Briefing Document was issued without identifying the criteria by which the most economically advantageous bid was to be assessed, there was a breach of regulation 21(3). I do not understand Mr Lewis to dispute this. Moreover, it was a breach in consequence of which Jobsin, and indeed all other tenderers too, were then and there**

at risk of suffering loss and damage. It is true that it was no more than a risk at that stage, but that was enough to complete the cause of action. Without knowing what the criteria were, the bidders were to some extent having to compose their tenders in the dark. That feature of the tender process inevitably carried with it the seeds of potential unfairness and the possibility that it would damage the prospects of a successful tender.

27. Mr Lewis submits that neither the loss nor the risk of loss was caused by the breach of regulation 21(3) until Jobsin was excluded from the tender process on 17th November. I reject that submission for the following reasons. First, it gives no meaning to the words "risks of suffering loss or damage" in regulation 32(2). It seems to me that those words are of crucial significance. They make it clear that it is sufficient to found a claim for breach of the regulations that there has been a breach and that the service provider may suffer damage as a result of the breach. It is implicit in this that the right of action may and usually will arise before the tender process has been completed.

28. That brings me to the second reason. It would be strange if a complaint could not be brought until the process has been completed. It may be too late to challenge the process by then. A contract may have been concluded with the successful bidder. Even if that has not occurred, the longer the delay, the greater the cost of re-running the process and the greater the overall cost. There is every good reason why Parliament should have intended that challenges to the lawfulness of the process should be made as soon as possible. They can be made as soon as there has occurred a breach which may cause one of the bidders to suffer loss. There was no good reason for postponing the earliest date when proceedings can begin beyond that date. Mr. Lewis suggests that there is such a reason. He points out that if, in a case such as this, the limitation period runs from the date of publication of the tender documents, it will be possible for the contracting authority to rule out any real possibility of a challenge by issuing an invitation in breach of the regulations and then not taking any further steps in relation to tenders until after the three months

> **period has expired. I confess that I find this an unlikely state of affairs, but I can see that it might conceivably happen. If it did, a service provider who wished to bring proceedings might have a good case for an extension of time: it would all depend on the facts. In my view, this cannot affect the plain meaning of regulation 32(2). I would therefore hold that the right of action which Jobsin asserts in the present case first arose on or about 14th August 2000. The essential complaint which lies at the heart of the proceedings is that there was a breach of regulation 21(3), in that the Briefing Document did not identify the criteria by which the DOH would assess the most economically advantageous bid."**

[32] Although no grounds for extending time were relied upon in the present case the comments of the Court of Appeal in ***Jobsin*** underscore the public policy in play when there has been delay.

> **"33. … But I am in no doubt that the judge was wrong to exercise his discretion to extend time in the circumstances of this case. First, I do not accept that it was unreasonable to expect Jobsin to start proceedings before they were excluded from the tender process. On or about 14th August they were aware of all the facts that they needed to know in order to start proceedings. The judge seems to have been influenced by two factors in deciding that there was a reasonable objective excuse for Jobsin's failure to start proceedings before they were excluded from the short list. These were that (a) they had no reason to believe that there had been any breach of the regulations and therefore no reason to consult solicitors to obtain advice as to the true legal position, and (b) even if they had known that there was a breach of the regulations, there were strong commercial reasons why it would have been reasonable for them to decide not to start proceedings until the tender process had been completed. I do not accept that either of these was a sufficient reason to extend time. As regards (a), in my view the lack of knowledge of the legal significance of facts of which a bidder is aware will not usually be a good reason for extending time. Although the maxim "ignorance of the law is no excuse" is not a universal truth, it should not in my view be lightly brushed aside. Regulation 32(4) specifies a short limitation period. That is no doubt**

for the good policy reason that it is in the public interest that challenges to the tender process of a public service contract should be made promptly so as to cause as little disruption and delay as possible. It is not merely because the interests of all those who have participated in the tender process have to be taken into account. It is also because there is a wider public interest in ensuring that tenders which public authorities have invited for a public project should be processed as quickly as possible. A balance has to be struck between two competing interests: the need to allow challenges to be made to an unlawful tender process, and the need to ensure that any such challenges are made expeditiously. Regulation 32(4)(b) is the result of that balancing exercise. It may often be the case that a service provider is not aware of the intricacies of regulations such as the 1992 regulations, and has little or no understanding of how they should be interpreted. If ignorance of such matters were routinely to be regarded as a good reason for extending the time for starting proceedings, the clear intent of regulation 32(4)(b), that proceedings should normally be started promptly and in any event not later than three months after the right of action first arose, would be frustrated.

38. As for (b), it is a fairly startling proposition that, even where a tenderer knows that he has grounds for starting proceedings, he has a good excuse for not doing so because such proceedings may imperil his relationship with the contracting authority and may jeopardize his prospects of securing the contract. It seems to me that a tenderer who finds himself in such a situation faces a stark choice. He must either make his challenge or accept the validity of the process and take his chance on being successful, knowing that the other tenderers are in the same boat. In my view, it is unreasonable that he should sit on his rights and wait to see the results of the bidding process on the basis that, if he is successful he will remain quiet, but otherwise he will start proceedings. I do not believe that a tenderer who deliberately delays proceedings in an attempt to have his cake and eat it has good reason for an extension of time if the outcome of the process is not to his liking."

[33] In light of the foregoing I am satisfied having regard to the nature of the plaintiff's challenge that the grounds of challenge *first arose* when the ITN was published in February 2009. Accordingly in my view the plaintiff's delay in bringing these proceedings is fatal to their claim given the provisions of Reg.45(5)(b). I do not consider it necessary to address the Plaintiffs substantive submissions save to record that I was far from persuaded as to their substantive merit.

[34] Although of less moment in light of my primary conclusion I accept the defendant's submission at least in relation to what has been referred to as the "Lianakis" point namely that it is barred by operation of Reg.45(5)(a) since it was not referred to in the letter of 30 April from the plaintiff's solicitors. Consequently the notification requirement in 45(5)(a), which is one of the condition precedents to bringing a claim, was not satisfied in respect of that ground of challenge.

[35] Accordingly the plaintiff's claims are dismissed.