

APPEAL OF JET AIRWAYS (INDIA) LIMITED (No.2)

UNDER THE AVIATION GREENHOUSE GAS EMISSIONS TRADING SCHEME REGULATIONS 2010

1. I have been appointed by the Secretary of State for Energy and Climate Change to determine this second appeal by Jet Airways (India) Limited (“Jet”). Jet’s first appeal was against a notice of determination of emissions issued by the Environment Agency (EA) on 4 June 2014. That notice related to the 2012 Scheme year and determined Jet’s aviation emissions to be 150 tonnes of carbon dioxide. The notice of determination was served because Jet did not report its emissions for 2012 to the EA by 31 March 2013, as required by regulation 21 of the 2010 Regulations.
2. On 27 March 2015 I dismissed Jet’s first appeal, and so the notice of determination stood in respect of these emissions.
3. The present, and second, appeal concerns a civil penalty notice served in respect of the failure by Jet to surrender allowances in respect of those same emissions in the 2012 Scheme year. The deadline for surrender was 30 April 2013, so (because Jet did not participate in the process earlier) it expired before the notice of determination. The duty to surrender arises under regulation 26 of the 2010 Regulations, and regulation 38 sets a civil penalty of €100 per tonne, or €15,000 in all. This penalty is mandatory and indeed was laid down by Directive 2003/87/EC as amended, in Article 16(3).
4. Jet points out that it responded quickly to its first appeal being dismissed, by surrendering allowances for the 2012 Scheme year (and indeed 2013 and 2014), within about a month of my ruling that it was bound by the EU-ETS.

5. But the only substantive legal point it takes in respect of the civil penalty notice (given the fixed nature of the penalty) is *force majeure*, saying that, until my ruling, it was bound to follow various directions emanating from the Government of India not to participate in the EU-ETS.
6. I considered a similar contention in my earlier ruling, when I decided that those directions from the Indian Government could not oust the application of the EU-ETS, as and when Jet flew to and from EU aerodromes and thus bound itself to the EU-ETS. I shall return to the detail of this below, coupled with a further point taken in Jet's reply that Jet had to comply with the directions from the Indian Government because of the terms of the Indian Aircraft Rules of 1937.

Force Majeure

7. This concept is not expressly set out in either the Directive or the 2010 Regulations, but it is a general principle of European law and was adopted in a closely-related context in the case of *C-203/12 Billerud*. The Billerud operators had failed to surrender EU-ETS allowances for a stationary installation due to an administrative oversight, despite having had enough allowances enabling it to do so at the critical time. The CJEU said that the fact that the Billerud companies had those allowances was no defence to an Article 16(3) breach and to the penalties therein set out. It stated that the only potential defence was *force majeure*. For this, and drawing on well-established case law, it had to be shown that the Billerud companies “*despite all due care having been exercised in order to comply with time limits, were faced with unusual and unforeseeable circumstances beyond their control...and that went beyond mere internal breakdown.*” [31]. See also to the same effect *C-99/12 Eurofit* to which Jet refers in its reply.
8. The precise question is therefore whether Jet's non-surrender of allowances by the deadline of 30 April 2013 relating to the specific (intra-EU) flights between EU/EEA airports in Belgium, Cyprus, Czech Republic, Iceland and Ireland made during 2012 was due to *force majeure*.

The legal status of the directions from the Indian Government

9. I considered the legal status of the directions from the Indian Government in my last determination. I said this: *“I note that all these directions proceed on the basis that the ICAO resolutions are inconsistent with the EU ETS. In addition, the views of the Indian Government do not purport to be laws binding Jet; they are plainly political views based upon that Government’s view as to the state of negotiations between the EU member states and the rest of ICAO who appear to have wanted to negotiate globally. Had they been binding laws, whether primary or secondary legislation, I am sure that this would have been identified somewhere in the various letters from the Ministry of Aviation, and the EA’s request for clarification of the legal status of these directions (2.14) went unanswered.”*

10. The specific directions issued prior to 30 April 2013 (the surrender deadline) were these. On 25 November 2011, the Government of India stated that *“there was no need for Indian Carriers to submit any data to European Union under EU-ETS.”* On 10 January 2012, the Government of India told carriers that they should not correspond with the EU, but that if this proved absolutely necessary this should be done with prior consent. On 9 April 2012, carriers were prohibited formally by the Under-Secretary of the Ministry of Civil Aviation from participating in the EU-ETS *“in continuation of this Ministry’s letter of...25 November 2011”*.

11. Jet now relies, for the first time in its reply of 14 August 2015, on the Indian Aircraft Rules 1937, as amended. Rule 134(1), concerning Scheduled Air Transport Services, requires that operators shall do so with permission of the Indian Government. Rule 1A provides that the Central Government *“may with a view to achieving better regulation of air transport services and taking into account air transport services of different regions in the country, direct by general or special order issued from to time, that every operator...shall render service in accordance with such order including any conditions relating to their due compliance.”* Penalties for breach of conditions contained in any such order include imprisonment as well as fines: see Schedule VI to the Rules.

12. I have re-read the directions of the Indian Government in the light of Jet's submission, and have re-visited my conclusions in the last determination in the light of them and the Rules. On the material provided to me, it seems highly unlikely that the Government was purporting to exercise its powers under Rule 134(1A) when it gave those directions. Most obviously, the Government does not say it is doing so, nor does it say it is making a general or a special order as the Rule contemplates, and nor does it identify any prohibition as a condition to such an order. It also seems unlikely that the contents of the directions was within the intent of the Rule which is about better regulation of flights, rather than the specific matter in play here. It also seems improbable that the Government would have expressed itself in relatively informal terms if it was intended that the order carried the weighty sanctions provided for under the Rules.

13. I remain therefore of the view that Jet has not demonstrated that it was legally bound under Indian law to follow these directions, however much politically it may have wished to do so.

Force majeure

14. But, assuming either that Jet was bound by these directions as a matter of Indian Law, or Jet thought it was, is *force majeure* made out?

15. The first and underlying problem with such a contention is that Jet did not have to make the relatively modest number of intra-EU flights the subject of the notice of determination. There was no external force compelling it to do so.

16. The second is that I am not satisfied that Jet took "*all due care*" within the meaning of the *force majeure* principle. Very early in the 2012 Scheme year, on 11 January 2012, (and despite the governmental direction of which the EA was made aware) the EA warned Jet that it had to comply with the provisions of the EU-ETS. In its response on this appeal, the EA has challenged Jet on whether it took advice during this process (at 6.6 of its representations). Jet did not rise to this challenge in its reply, and I infer

from this that it did not take advice on the position under EU law at any stage prior to expiry of the deadline. This was an obvious question as and when its flights involved landing in the EU. Had it taken advice, it would in all probability have been advised that they were bound by EU law, if they wished to continue take off from or landing in the EU. In that event, if it wished to observe the directions of the Indian Government, it would have had a straightforward choice of either complying with the EU-ETS or not flying to and from Europe.

17. I also agree with the submissions made by the EA that the scope of the force majeure defence is a narrow one, particularly in circumstances in which Jet's argument amounts to no more than saying that it got the law wrong. Indeed, I see no inconsistency between the EU principle of *force majeure* and the domestic principle that ignorance of the law is no defence.
18. Jet has therefore not made out a defence of *force majeure* in respect of the civil penalty notice.
19. In its conclusion, Jet refers to the need to apply fair and equitable justice in the present case. I previously determined that this principle could not help Jet if (as I ruled) it was bound by the EU-ETS Directive, as amended, and the EA was duty-bound under regulation 22 of the 2010 Regulations to determine emissions in those circumstances. It equally follows that this principle does not provide Jet with a defence to the civil penalty, if, as I have determined, it cannot establish that the principle of *force majeure* is applicable.
20. For all these reasons I dismiss Jet's appeal. The EA's civil penalty notice of 12 May 2015 therefore stands.

DAVID HART Q.C.

12 October 2015