

APPEAL OF AJW AVIATION LIMITED

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 appeal by AJW Aviation Limited (“AJW”). The appeal concerns a civil penalty notice served by the Environment Agency on 30 September 2015 in respect of the failure by AJW to surrender the requisite number of allowances in respect of aviation emissions in the 2012 Scheme year. The deadline for surrender was 30 April 2013.
2. The duty to surrender arises under regulation 26 of the Aviation Greenhouse Gas Emissions Trading Scheme 2010 Regulations, and regulation 38 sets a civil penalty of €100 per tonne of carbon dioxide emissions. This penalty is mandatory and is derived from Article 16(3) of Directive 2003/87/EC as amended.
3. AJW’s verified emissions required it to surrender 475 allowances, which it did not do.
4. The civil penalty notice is in the sum of £40,268.13, the sterling equivalent of 475 x 100 euros.
5. AJW requested that the appeal be determined on the papers, and the Agency agreed with this. However, AJW’s appeal was sent to me at the same time as two other appeals in which oral hearings had been requested. All raised *force majeure* defences, and it seemed sensible to have the oral hearings first and for me to determine the 4 remaining appeals after those hearings. So I heard appeals from CHC Scotia Limited on 22 June 2016, and from London Executive Airlines on 22 and 24 June 2016. The Agency appeared by Mr Gwion Lewis. AJW were given notice of this public hearing

but did not wish to attend. I can confirm that no submissions were directed to the facts of AJW's case by Mr Lewis.

The grounds of appeal

6. AJW's main ground of appeal in its letter of 21 October 2015 is that it faced challenges in opening an account and finding a broker able to sell allowances in the modest quantities required. The allowances were purchased in time and the request to surrender also was submitted in time. AJW also rely on the lack of intent or wilfulness in respect of their non-compliance. *Force majeure* was not specifically identified in AJW's letter (drafted by a non-lawyer), but it is plain that AJW's case involves consideration of this principle, and so I assume that such a case had been advanced by AJW.

Force majeure

The key facts

7. The 2012 Scheme year ended on 31 December 2012. Prior to the end of year, AJW were sent a Registry mailshot inviting AJW to make online application for an Aircraft Operator Holding Account (AOHA) by 25 January 2013. It is plain that there was no formal regulatory backing for this deadline, though the Agency explained its position in the light of the timescale which may be needed to obtain the documents necessary for the opening of the AOHA. AJW had plainly made some steps towards completing its application for the AOHA, though it is evident from certain emails (14 February and 27 March 2013) that this process was not complete. It did however submit its verified emissions report on 28 March 2013, prior to the deadline of 31 March.
8. On 17 April 2013, the Agency offered to open the account for AJW, on terms set out in a Letter of Authority (LOA) to be returned by AJW before the Agency proceeded. I heard about this procedure in both the LEA and CHC appeals, not least because LEA contended that it should have had extended to it such an offer as was made to CHC. The gist was that the offer was made to those whom the Agency thought had been struggling in their efforts to open an account, and a similar version is given at para.6.8 of the Agency's written representations on AJW's appeal.

9. On 22 April 2013 AJW returned the signed LOA, and as a result on 23 April 2013, the Agency opened the AOHA. Though I have not seen the relevant message, I accept the Agency's contention that automatic confirmation of this would have been sent on 23 April to AJW by the Central Administrator of the EU Registry, together with the necessary account number. On 26 April 2013, a Friday, the Agency confirmed the relevant account number to AJW.

10. On 29 April 2013 AJW sent the Agency an email saying that "*we have transferred in 476 EUAs into our account today.*" The Agency queried this, because it could tell from its own access to the account that there were no allowances in the account, and in response AJW sent a screenshot which it believed demonstrated that this was wrong.

11. In fact, it is plain that no allowances were transferred into the AOHA on 29 April. Email traffic shows that AJW had contracted with a Swiss trading company, Mercuria SA early in the morning of 29 April, and a confirmation of the trade was sent by Mercuria to AJW at 07.08 that day. At 0935, Mercuria said that they "*were in the process of transferring*" the allowances even though they had not received payment, and at 0951, Mercuria sent the screenshot to AJW which was later forwarded to the Agency. The screenshot identifies a delivery account, and states the delivery date to be 30 April 2013. I assume the delay between the intent to transfer and actual delivery was intended to be a reference to the mandatory 26 hours delivery laid down by Article 36(3) of the 2011 Registry Regulation.

12. The allowances were not in the AOHA by the deadline at 1700 UK time on 30 April 2013. I accept the Agency's explanation of what is likely to have happened, which accords with the documentation produced by AJW on this appeal. Mercuria tried to transfer from its Swiss holding account, but this account was not linked to the EU Registry. Mercuria would then have realised this mistake, and would have sought to

make the transfer from its French account. However, because of its mistake, it would have missed the deadline (taking into account the 26 hours mandatory delay) and, under the standing rules, the allowances would not have been credited to the account.

The principle of force Majeure

13. The concept of *force majeure* is not expressly set out in either the Directive or the 2010 Regulations, but it is a general and long-standing principle of European Union law and it was adopted as a potential defence to a failure to surrender case by the Court of Justice of the European Union in the case of *C-203/12 Billerud*, decided in October 2013.
14. The Billerud operators had failed to surrender EU-ETS allowances for a stationary installation due to an administrative oversight, despite having had enough allowances owned by it which would have enabled it to do so at the critical time. The CJEU said that the fact that the Billerud companies already had those allowances was no defence to an Article 16(3) breach and to the penalties therein set out.
15. The Court stated that the only potential defence was *force majeure*. For this to apply, there must be an “external cause” which had “*consequences which are inexorable and inevitable to the point of making it objectively impossible for the person involved to comply with its obligations*”. So 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] – my underlining.
16. Earlier ECJ case law, C-124/92, *An Bord Bainne Cooperative*, had explained that the concept of *force majeure* was not “*limited to absolute impossibility but must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the trader concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice...*” :[11].

Its application here

17. The question therefore arises whether Mercuria's failure to transfer the allowances sometime on 29 April is capable of being an external cause within the meaning of the principle of *force majeure*. It is plain that, had this been initiated by 1500 hours UK time or 1600 hours Central European Time, the allowances could have been surrendered by the deadline (some 26 hours later) of 1700 hours UK time on 30 April.

18. *Billerud* does not directly decide this issue, because the problem in that case was indeed "internal breakdown" within the Billerud companies.

19. However, *Billerud*, and indeed the Agency submissions, do refer to the case of C-99/12 *Eurofit*, a case about export refunds under Article 11(1) of Regulation No 3665/87, in circumstances where the exporter's intermediary had been guilty of fraud. At [43], the CJEU stated that

"Even if the fault or error committed by the contracting partner is apt to constitute a circumstance beyond the control of the exporter, they are none the less an ordinary commercial risk and cannot be considered to be unforeseeable in the context of commercial transactions. The exporter is fully at liberty to select his trading partners and it is up to him to take the appropriate precautions, either by including the necessary clauses in the contracts which he concludes with them or by effecting appropriate insurance..."

20. According to the CJEU, a similar principle disposed of the *force majeure* defence: At [46], the Court noted that

"Furthermore, Eurofit cannot rely on the exception of force majeure provided for by the first indent of the third subparagraph of Article 11(1) of Regulation No 3665/87. It is undisputed that Eurofit's contractor had been criminally convicted for falsification of documents in respect of export refunds. In accordance with the case-law cited at paragraph 43 of the present judgment, such a circumstance falls within the scope of an ordinary commercial risk in the context of commercial transactions and cannot, therefore, be considered to be unforeseeable in contractual relations entered into on the occasion of an export qualifying for a refund".

21. Applying this ruling, it is plain that any defaults by Mercuria, in the critical 24 hours over 29-30 April, in not ensuring that the transfer was made from its French account

in the first place, would have to be regarded as an “ordinary commercial risk” and therefore would not be “unforeseeable” within the context of *force majeure* as identified by the CJEU.

22. If so, the defence of *force majeure* in response to the civil penalty notice must fail. Given that, it is not necessary to consider the Agency’s additional arguments concerning the exercise of all due care.

Other points made in AJW’s letter of 21 October 2015

23. I have set out the narrative above from which it is clear that, contrary to the main first paragraph of the letter of 21 October 2015, it was the Agency which opened the account because AJW were not making sufficient progress with it. It is not clear to me when AJW started its enquiries in respect of brokers, and AJW produced no substantive reply to the Agency’s response setting out any detail of when AJW did what, other than via the emails appended to AJW’s initial letter of appeal. The Agency’s response also explained why it was that Mercuria could not transfer via a Swiss account, and hence why the critical 24 hour window was lost.
24. I note that AJW made the point that it did not try not to comply nor indeed was it wilfully neglectful in not complying with the deadline. I accept this entirely. There was nothing wilful in AJW’s conduct in the time before the deadline, or indeed generally. However, as the *Billerud* case explains, lack of compliance gives rise to strict liability, subject only to the application of the *force majeure* defence, which, for the reasons explained above, I have rejected.

My determination

25. I therefore dismiss this appeal. The Agency’s civil penalty notice of 30 September 2015 therefore stands.

DAVID HART Q.C.

24 July 2016