APPEAL OF LONDON EXECUTIVE 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 London Executive Aviation Limited ("LEA"). The appeal concerns a civil penalty notice served on 30 September 2015 by the Environment Agency in respect of the failure by LEA to surrender 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 Regulations 2010, 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. LEA did not surrender any allowances on 30 April 2013. Its verified emissions required it to surrender 11,121 allowances.

4. The civil penalty notice is in the sum of £942,782.78, the sterling equivalent of 11,121 x 100 euros.

5. LEA appeared before me on 22 June and 24 June 2016, by Mr Martin Chamberlain Q.C. and Ms Emily Mackenzie. Mr Gwion Lewis, counsel, appeared for the Environment Agency. LEA's appeal was heard in conjunction with CHC's appeal. I heard evidence from Mr Nicholas Lyne of LEA and from Mr John Insole within the Agency's Registry team. Both those witnesses were cross-examined, and I heard submissions on behalf of both parties.

The grounds of appeal

6. LEA's only ground of appeal is *force majeure*.

7. I shall
   (i) consider the bulk of the evidence on this issue, and draw some critical factual conclusions on that evidence and then
   (ii) consider and apply the law on *force majeure* (in the course of which I set out and reach conclusions on the Agency's case that LEA failed to use all due care).

The key facts and evidence, and my conclusions on the facts

8. The 2012 Scheme year ended on 31 December 2012. On 22 March 2013, in response to a reminder from the Agency concerning LEA's verified emissions, and after discussions with Mr Lyne, Mr Galanopoulos of LEA registered himself online as an Authorised Representative (AR). On 25 March Mr Lyne completed an online application to open an Aircraft Operating Holding Account (AOHA), and on 26 March he sent all the necessary identification documents to the Agency, with the exception of the applicable Criminal Records Bureau (CRB) checks on its proposed ARs. The covering email addressed to Ms McDermott in the Registry told her that the CRB certificates from Disclosure Scotland "will follow ASAP." As Mr Lyne explained in paragraph 8 of his 19 May witness statement, LEA had existing CRB certificates on file but these were more than three months old, and it appears from the Agency's January 2013 guidance on opening AOHAs that such certificates have to be less than 30 days old. Mr Lyne said that his previous experience had been that such certificates "*were normally received within a few days of the request being made*": paragraph 10 of his May statement.

9. On 26 March 2013 the Agency acknowledged receipt of the packet of identity documents, and added that "*once we have the Criminal records check certificates we should be able to open your account*." I agree with LEA that, so far as LEA was concerned, this was an indication that the account would be opened without delay once the missing certificates were received. Put the other way round, had there been an obvious deficiency in the information the Agency had received, I would have

expected the Agency to say so at this stage. This inference is borne out by what actually happened; the Agency did not identify any additional deficiency in LEA's paperwork before opening the account.

10. LEA's verified emissions report had been submitted to its verifier, KIWA, and the Agency on 24 March, and on 26 March the Agency confirmed that such verification had taken place. At that stage, all that was required was filing of the same with the Agency. This was not done by the deadline of 31 March. Mr Lyne explains in his first witness statement why this was not done, namely because he thought it could not be done until the AOHA was opened. The Agency refers to the late filing of this information in its submissions, but I regard this as irrelevant to the central issue in the case, which is why the account was not opened and the surrender not made in time.

11. It had originally been agreed within LEA that Mr Galanopoulos and Mr Ratcliffe would be the ARs, but in order to deal with the paperwork swiftly, it was decided that Mr Lyne should take over the AR role from Mr Ratcliffe. On 5 April, Mr Lyne therefore applied for the two CRB certificates, and received that relating to Mr Galanopoulos on 7 April, and his own on 25 April. He says he telephoned Ms McDermott on more than one occasion prior to receipt of his own certificate and was told that he should hold on to Mr Galanopoulos's until receipt of his own. I accept this evidence.

12. At 1516 on 25 April, Mr Lyne emailed Ms McDermott to say that he had sent certified copies of the two CRB certificates to the Agency by special delivery, and gave the tracking number for the posting. He asked for confirmation of receipt, and that he be told when the account had been opened. At 1350 on 26 April, Ms McDermott asked whether the parcel had been sent via Royal Mail/Parcel Force, to which Mr Lyne promptly at 1351 replied that it had been sent by special delivery "by 1.00pm today."

13. There is a factual dispute as to when the parcel containing the certificates was received by the Agency, with LEA saying it was received on Friday 26 April, and the Agency saying Monday 29 April. I shall address this below.

14. Despite his requests for confirmation of receipt, Mr Lyne heard no more from the Agency, though he says he checked online as to whether the account had been opened. He emailed Ms McDermott at 0925 on 30 April to ask for news on the registration process. At 10.03, Ms McDermott responded by saying that the Agency had received the certificates "*but not other documentation*." At 10.49 on 30 April, Mr Lyne told Ms McDermott that *"all other documentation sent out in March and received as per email from Luke (attached). Is there anything missing?"*

15. In the event, the account was opened on 1 May 2013, without any further response from the Agency. 1 May was too late for surrender of the 2012 allowances.

16. The Agency accepts that Ms McDermott was mistaken in not marrying up the March documentation and the certificates on their receipt.

Date of receipt

17. I return to the issue of when the certificates were received by the Agency. LEA rely on the fact that the posting on 25 April was guaranteed delivery by 1pm on 26 April and on an LEA meeting note of 6 January 2014 in which a representative of the Agency, Ms Littler, is recorded as confirming receipt of the certificates on 26 April. The Agency relies on a record made by Mr Insole, some time in 2013, to the effect that the tracking number confirmed delivery on 29 April.

18. This is a difficult issue to resolve, because there is apparently cogent evidence on each side of the argument.

19. Mr Insole told me that he had made his record (p.532 of my files) in anticipation of an Agency meeting with LEA concerning a potential civil penalty notice, "sometime in 2013". He says he recalls being "quite surprised" on discovering that the documents had only been received on 29 April, given the date of despatch by LEA. The tracking record is only kept for one year, so it was not available by the time that the civil penalty notice was served. He could not help with the contents of the meeting note of 6 January 2014. He had had no direct involvement with that meeting, nor was he told what had been said at the meeting.

20. The meeting note of 6 January 2014 emerged very late in this appeal, indeed during the hearing before me. The Agency did not object to it going into evidence, and, in answer to a direct question from me, neither side wished to adjourn in the light of it. I did not hear from either of the Agency's representatives who attended the meeting, either Ms Littler (whose position was not known to Mr Insole, but he described her as his "boss's boss"), or Mr Sinton.

21. I should set out the key part of the meeting note:

"SL confirmed that the Disclosure Scotland notices was [sic] *received on 26th April 2013 and that the processing should take approximately 24 hours. However, the EA had failed to match these with original application until NL followed up….However it is estimated that it would take a further 7 or so days to set up a "trusted trader" account in order to buy and surrender the appropriate number of units, so at that point the 30th April deadline would not have been available."*

22. So, the different possibilities which arise from this note are:

(i) Ms Littler did confirm the date of receipt as 26 April to the meeting, and rightly so. Mr Insole's record of 29 April was incorrect, and he may have made a transposition error of "29/4/2013" for "26/04/2013"; it was pointed out to him in cross-examination that he had made transposition errors elsewhere in the same document, on three occasions, transposing "22/05/03" for "22/3/03"; hence, the meeting note is therefore right as to the date of receipt.

(ii) Ms Littler did <u>not</u> confirm the date of receipt of 26 April to the meeting of 6 January;

(iii) Ms Littler did give the date of 26 April to the meeting, but she had been in error to do so, because Mr Insole's record giving 29 April as the date of receipt had been provided to her prior to the meeting.

23. I reject (ii). The meeting note is a full and careful note of something of very great significance to LEA given the likely size of the civil penalty. Though Mr Lyne does not claim to remember what was said at the meeting in this respect, I accept his evidence that he checked a note of the meeting before it was typed up; he would have been well aware of the potential significance of the date of receipt.

24. If (i) is correct, on what information did Ms Littler come to confirm the date of receipt to this meeting? It seems unlikely that she would have done this simply because LEA asserted it. It emerged during the hearing that the Agency kept its own record of when documents were received by it but that this record also had been destroyed by the time of these proceedings. It is therefore quite possible that independent enquiries had been made by Ms Littler or her team of the Agency's (then) extant internal records, and these had revealed receipt on 26 April, rather than 29 April. Mr Insole could not help on this point.

25. Possibility (iii), namely that Ms Littler had misread or not read Mr Insole's record and hence mistakenly gave the date as 26 April, does seem less likely. As the meeting note records, this was regarded by the Agency as a politically sensitive issue, and I would have expected that the Agency would have investigated the timing of receipt of the documents with some care prior to the meeting. Ms Littler very fairly accepted at the meeting that an error had been made by the Agency, albeit one which, it was said by her, was immaterial because there was not enough time to buy and surrender the requisite allowances before the deadline. It is also plain from the note that Ms Littler had been involved in the issue for some time prior to the meeting, sending letters and emails to LEA in the months between the deadline for surrender and the meeting in January 2014. Had she just had Mr Insole's record showing 29 April as the date of receipt before her, it is bizarre that she would have gone on to accept an earlier date of

receipt; a later date would have been more grist to the mill of her case that the mistake being immaterial.

26. I note one omission in the account which Ms Littler gave the meeting. She said that the Agency's error was immaterial because it took 7 days to set up a "trusted trader" account, and so no surrender could have taken place in time even if the Agency had not caused some delay. It was true that the "trusted trader" account took 7 days to set up, but it was not the only way in which allowances could have been obtained. She did not tell the meeting that the 7 day period was not inevitable, if LEA bought allowances from a trader, in which event the only irreducible period of delay was a mandatory 26 hour delay (imposed by regulation 36(3) of the EU Registries Regulation 1193/2011). This omission or mistake does not affect my conclusion that Ms Littler was basing her acceptance of the delivery date on some information which had been produced for her.

27. In reaching this conclusion on the date of receipt, I take into account Mr Insole's evidence. I do not doubt that he made a record when he says he did, but I think he was probably mistaken when he recalls being surprised about finding out that the certificates had only been received on 29 April. He may well have made the transposition error put to him in cross-examination. As I acknowledge above, this is not an easy decision to make, but of the two main possibilities, this seems to be the less likely one, given the meeting note of 26 April and the assumption (all other things being equal) that delivery will take place in accordance with the guarantee.

Mr Lyne's evidence about contact with traders

28. I also received evidence from Mr Lyne on steps which he says he had taken before 30 April 2013 to source potential purchases of allowances from traders. This came via a witness statement of 9 June 2016. The Agency objected to the lateness of this statement, pointing out, correctly, that the issue of any steps having been taken by LEA in this regard had been in issue from the Agency's response in January 2016. The Agency said it had not had had sufficient time to research the evidence prior to the hearing commencing.

29. I ruled, on the first day of the hearing, after hearing oral submissions, that the statement should be admitted. The Agency said that it had had not time to print out all screenshots relevant to Mr Lyne's paragraph 1(a), but this point seemed peripheral to the case. The thrust of Mr Lyne's evidence was that he had ended up doing a Google search for traders, and in due course spoke to two traders about the process. It was noteworthy that, despite the Agency's opposition to the evidence, it had made no efforts whatsoever between 9 June and 22 June to check these claims out by contacting the named traders.

30. Not surprisingly, given its lateness, Mr Lewis cross-examined Mr Lyne on this statement. Mr Lyne was a little vague as to the EA or EU website information he had consulted, but I do not think that this vagueness undermined the rest of his evidence. After all, all he was saying is that his enquiries of official websites led him nowhere; 3 years on, precisely how he reached that dead end does not seem to matter. As for the rest of his "new" evidence, I accept that during late April 2013 Mr Lyne spoke to two traders, and that he was told by Finn Payne of C.F. Partners that the whole process of acquiring allowances and transferring them to LEA's AOHA (once opened) could be completed in less than 36 hours, including the 26 hours (mandatory) delay in transfer. I return to the significance of this evidence in due course.

31. Another point put by Mr Lewis was that it was improbable that Mr Lyne had <u>not</u> been told by these traders that it was sensible to acquire allowances before the AOHA had been opened. I was not persuaded by this point. If the trader or traders thought that acquisition of the allowances could be completed in 10 hours or so prior to the (26 hour) transfer, then there does not seem to be any powerful reason to take this step in advance of opening the account. The point would only arise if the conversation had taken place very very close to the effective deadline. In any event, and insofar as it matters, I accept that Mr Lyne was not told by the traders that LEA should commission this trade in advance of opening the AOHA.

32. Mr Lyne accepted Mr Lewis's proposition that with hindsight it would have been a good idea to have contacted the Registry concerning the acquisition of allowances in advance of the opening of the AOHA. Mr Lewis relied upon this as "lack of care" but I cannot see that such an enquiry, had it been made, would have changed the outcome in the events which happened. The key event is that the account was not opened before the deadline.

An offer by the Agency to open an AOHA/de-prioritisation?

33. LEA noted from the CHC appeal papers that CHC had been offered by the Agency the opportunity of the Agency opening an account on CHC's behalf even though CHC had not obtained its CRB checks from Disclosure Scotland. In this respect, their respective positions were similar if not identical. The offer was made to and accepted by CHC on 23 April. I also note from the AJW appeal that a similar offer was made to AJW on 17 April. All the operators had to do to accept the offer was to return a signed letter of authority.

34. LEA therefore contends that the Agency should have made such an offer to LEA, which LEA would have accepted. Had it done so, on or before 23 April, then in all probability, the account would have been opened in time for the transfer of allowances into it before the deadline of 30 April. There was no evidence that the possibility of such offers was publicised to others than those to whom the offer was made.

35. The Agency, via Mr Insole, explained that such an offer was made to those whom the Agency thought were clearly struggling in their attempts to open an AOHA. Some 58 offers were made to operators, of which 44 were accepted and accounts accordingly opened. Mr Insole eschewed description of these offers as amounting to a policy to do so, but in reality that is what it was.

36. LEA also relies on evidence from Mr Insole to the effect that as the deadline approached, the Agency's focus shifted from opening new accounts to assisting those with accounts to comply with their surrender obligation.

37. Hence, LEA submits that LEA was hit by a combination of two policies, the de-prioritisation by the Agency of its efforts to open accounts for those who appeared not to be struggling, and preferential treatment (not offered to LEA) for those who were struggling.

38. I do not consider that the lack of such an offer by itself amounts to a reason why LEA should not be held to its duty to surrender in time. I have some considerable sympathy for the Agency as it faced the first deadline for surrender of allowances in the aviation sector. Late in the process, it came up with a pragmatic way of trying to help the obvious strugglers. I do not consider it was under a duty to make such an offer to all those who had not completed the opening of their accounts by a given date in mid or late April. From its perspective, it knew that LEA was awaiting one CRB certificate, and everything else appeared to be in order.

39. More importantly, whatever the change of focus of which Mr Insole speaks, I am not persuaded that this made any difference to the course which events took. LEA was not disabled from its efforts to open an account because its application sat well down an Agency queue of applications, which were dealt with strictly in turn, or that its application was in fact ignored whilst other help was given to other applicants. On the contrary, for the period between receipt of the certificates and Mr Lyne's follow-up at 10.49 on 30 April, the delay was caused by a simple mistake by Ms McDermott. No submission was made to me that this simple mistake resulted from, or could properly result from, some winding down of effort of the Agency concerning unopened accounts. Indeed, it is telling that Ms Littler (in the passage from the meeting note of 6 January 2014) is recorded as accepting that processing by the Agency of an application such as LEA's (i.e. one in good order) "*should take approximately 24 hours"*.

Would earlier action by the Agency on receipt of the certificates probably have led to surrender before the deadline?

40. LEA says that receipt on 26 or 29 April, in the absence of Ms McDermott's mistake, would have enabled surrender in time.

41. The Agency says that, even in the event of receipt on 26 April, it was too late for surrender in time. The combination of proper processes within the Agency and LEA's need to obtain a trade and secure transfer of allowances would in all probability have taken too long. Hence, LEA would have been liable to the civil penalty, even if Ms McDermott had not made the mistake she did.

42. I have found above that the certificates probably arrived on 26 April. If so, the most likely time for their arrival at the Agency's offices in Warrington would have been around the guaranteed time of 1pm. Mr Insole explained that post arriving at 1pm would arrive in the relevant part of the Registry at about 3pm or 4pm. Hence, it is not surprising that the certificates had not found their way to Ms McDermott by 1350 when she emailed Mr Lyne to ask about the identity of the despatcher.

43. Receipt by the Registry of the certificates by 3pm or 4pm on Friday 26 April would in my view have led to prompt action by Ms McDermott had she been aware that the existing documentation was on file. I see no reason to doubt that the account would have been opened reasonably promptly on receipt that afternoon, or at latest by about 12 noon on Monday 29 April. There was no reason not to do so.

44. I also consider the alternative possibility that the certificates arrived on 29 April. In that event, they would most likely have arrived first thing in the morning at Warrington. Allowing for a little bit of time for them to make their way to the Registry, they would have arrived there by about 1100 or 12 noon on the Monday. But the Agency still had to open the account, and Mr Lyne still had to purchase allowances from a trader.

45. As noted above, LEA did not in fact commission a trader to obtain allowances for it in advance. The question then arises when it would have sought to do so had Ms McDermott married up the paperwork, as she should have done. I think she probably would have acknowledged receipt by email of the material, given Mr Lyne's recent request for this, and the continuing email and telephone traffic which had occurred between her and Mr Lyne over the previous weeks. In that event, and once the account opening was on its way, I consider that Mr Lyne may have started upon the process of re-contacting one or other trader to whom he had already spoken, most probably Mr Finn Payne with whom LEA was in due course to contract.

46. Given the 26 hour mandatory delay on transfers, LEA was right to accept that the latest theoretical time for a transfer to be initiated and to meet the surrender deadline was 1500 UK time on 29 April, thus allowing surrender by 1700 on 30 April.

47. I am satisfied that, had the Agency enabled opening of the account by, at latest, 12 noon on 29 April, LEA could and would probably have met the deadline, though evidently it would have been fairly close to the wire. I accept that it is possible things might have taken longer. Two of the other appeals illustrate this possibility. In the Gulfstream appeal, it took 6 days from the contract with the trader for the trader to make the transfer, because of a very slow credit approval process. In AJW, due to the trader erroneously trying to transfer from a Swiss rather than an EU account, the transfer (even before the 26 hour delay) was delayed by some 24 hours or more. But I am not satisfied that one of these hiccups would probably have occurred with C.F.Partners, accepting as I do Mr Lyne's evidence about what he was told pre-deadline, and his experience of what actually occurred when he purchased allowances from Mr Payne.

48. Had the certificates arrived first thing on 29 April, I consider it is less probable than not that LEA would have achieved surrender in time. In that event, that day, the certificates would have to have made their way to the Registry, the Agency would have to have opened the account in response to the combined paperwork, LEA would

have to been informed that this had been done or was impending, and LEA would have to have had a binding contract and initiation of transfer, all by 1500 on 29 April. This, in my view, is possible but unlikely.

The law of force majeure

49. 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.

50. 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.

51. 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.

52. 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].

53. Two cases in particular bear on the question of "*all due care*." In C-50/92 *Molkerei-Zentrale Sud* (known as the *BALM* case), the ECJ considered the position of much-delayed paperwork retained by the Italian government preventing the exporter applicant from achieving a refund of a security. The exporter took due care where it "*took regular action, in person or through the intermediary of an agent, so as to request the competent administration to perform the requisite operations.*" [16]. The regular action consisted of repeated requests from some 8 months before the 18 month deadline, for part of that period at weekly intervals: [8] at 1(b).

54. The second case, much relied upon by LEA, was C-71/87 *Greek State v. Inter-Kom.* Inter-Kom had bought olive oil from the Greek intervention board by tender. It was required by an EC regulation to remove the oil within 90 days of the award, failing which it was subject to storage charges. The purpose of this part of the regulation was to ensure rapid disposal of the oil, balanced against a sufficient period to allow removal of large quantities of product by purchasers. The period for removal had been extended to 90 days at the request of operators.

55. Inter-Kom started loading the oil, onto a vessel chartered for that purpose, 4 days before the expiry of that period. The potential *force majeure* was a power cut and/or deterioration in the weather. The ECJ was asked about the consequences for Inter-Kom's argument that it had only started loading 4 days before expiry. It said that in principle time limits were to be used to the full by operators, in a manner suited to their own economic interests. It was a matter for a prudent operator to assess how long was a sufficient period to allow completion of loading; it did not have to leave a safety margin for events capable of amounting to *force majeure*, but correspondingly did have take account of normal and foreseeable events such as the location of the port, the quantities to be loaded, loading capacity, and usual seasonal weather conditions at the place of loading.

56. There was no dispute as the law of *force majeure* before me. The dispute was as to its application to the facts.

The parties' cases

57. LEA says that the mistake by Ms McDermott is an external cause of LEA's failure to surrender, extraneous to LEA. Given the information provided by LEA to the Agency (concerning progress of the application, reference numbers of delivery tracking numbers), this mistake was an abnormal and unforeseeable event. LEA had taken due care.

58. The Agency says that it was entirely foreseeable that a completed application delivered (on their case) only one day before expiry may not lead to an account open in such time as to allow surrender. The account was not opened because of LEA's own delay. LEA did not exercise all due care. The Agency relies upon regulations and informal guidance from the Agency in support of its plea of due care.

Regulations about timing of AOHA applications

59. The Agency relied on the obligation contained with Articles 16(1) and 16(2) of the EU Commission's Registries Regulation 2010 (920/2010) and Article 15 of the Registries Regulation 2011 (1193/2011) under which either the competent authority or the operator (if the former so decides) shall provide all the information needed to open an AOHA "*within 20 working days from the approval of the monitoring plan, or by 1 January 2012, whichever is the later…*"

60. The obligations under these Regulations were not however placed upon the operator in domestic legislation until 1 January 2013, via regulation 80(4) of the GG-ETS Regulations 2012. LEA had had its monitoring plan approved in 2010. This means that operators were not bound at all to apply for an AOHA under domestic law until 2013, and I am not persuaded in those circumstances that there was a set timescale applicable to those who had submitted monitoring plans before 1 January 2012 at the latest.

61. In oral submissions, Mr Lewis relied upon Article 15(3) of the 2011 Regulations under which national administrators were obliged to open an AOHA within 40

working days of receipt of a full set of the information required by the Regulations. This, it was said, meant that all information needed to be supplied to the administrator so as to give the administrator 40 working days in order to open the account.

62. Like Mr Chamberlain for LEA, I do not consider that Article 15(3) imposes a binding timescale applicable to LEA as to a deadline by which it had to supply complete information enabling an AOHA to be opened. It is a deadline placed upon national administrators, not operators.

Guidance on application timing

63. That said, to enable it to take advantage of the *force majeure* defence, LEA still have to use due care, given the deadline of 30 April and any other information received from the Agency, to enable the opening of the account in time.

64. The Agency relies on various guidance documents sent to operators during 2012 and early 2013, via mailshots and newsletters. These are set out at paragraphs 27 and 29 of the Agency's skeleton.

65. In summary, in August 2012, it was said that the process of opening an AOHA can take up to six weeks. Warnings were given in October 2012 that the Agency would guarantee to open all AOHAs for which application had been made by 16 November 2012, and a similar warning on 20 December 2012 with a guarantee applicable to applications made by 25 January 2013. On 17 January 2013, operators who had not opened an AOHA were asked to do this as soon as possible. The Registry Account Opening Guide of January 2013 distinguished between the process of applying for an AOHA (which would be held in the Agency's work queue) and final approval of the same, once all documentation had been received and checked; it added (at A.2.2) that it usually takes time to obtain CRB information. On 27 February 2013, it was said that operators should open an AOHA as a matter of urgency, and they were warned that it could take "several weeks" to complete the process from application to activation.

66. It will be recalled that LEA completed the application process between 22 and 26 March 2013, subject to provision of the CRB certificates and approval by the Agency.

67. It is a reasonable inference that had LEA started that process by earlier application, it would in fact have received the second certificate (for Mr Lyne) earlier than 25 April, and hence (if Ms McDermott had made a similar error) matters would have been resolved correspondingly earlier.

68. But, as set out above by reference to the *Inter-Kom* case, that is not necessarily the answer to the "due care" question. However, as all the cases stress, application of the *force majeure* principle is specific to both the legal and factual circumstances in play.

Conclusions on force majeure

Extraneous

69. I have no difficulty in concluding that the delay from 26 April (when I find receipt to have occurred) to 30 April, when Ms McDermott had her mistake pointed out to her, was extraneous to LEA, and I have found that, but for such delay, LEA would have been able to surrender its allowances in time.

Abnormal and unforeseeable circumstances

70. From the Agency guidance, it appears as if LEA were or should have been aware that there might be some time lag between receipt of an application and its approval, though it is fair to say that much of the guidance does not sharply distinguish between the time taken for an application to be finalised on the one hand, and the decision taken by the Agency on the other.

71. But it is necessary to identify the circumstances in question, characterised, rightly in my view, by LEA as the mishandling of the certificates in the light of the information provided by LEA. Was that abnormal and unforeseeable? In my view, it was both. It should have been an entirely straightforward exercise given that both sets of documents were now held by the Agency.

All due care

72. I conclude that there can be no possible criticism of LEA as to it not exercising all due care after the point when it started the application process in earnest on or about 25/26 March. I pressed Mr Lewis on whether independent allegations of lack of due care were being made in this later period, and, with the exception of the allegation about failing to telephone the Registry (which I have dismissed above as being irrelevant) he did not identify any specific instances on which he sought to rely.

73. To that end, I have re-read the correspondence from 25 March onwards, during which time Mr Lyne was seeking to progress the AOHA application. To my mind, he was acting conscientiously on behalf of LEA, aware as he was of the deadline at the end of April. He was also careful to keep the Agency, and Ms McDermott in particular, informed as to progress.

74. To my mind, the allegation of lack of due care distils down to whether, by 25/26 March 2013, LEA had shown lack of due care by not applying for the AOHA earlier, or in the words of *Billerud* at [21], "*all due care having been exercised in order to comply with time limits"*.

75. I consider that some guidance can be got from the *Inter-Kom* case, though there are differences between the circumstances. Time limits are there to be used to the full. However the purchaser of the olive oil may have an obvious economic interest in delaying loading until the end of the 90 days, whereas there is not the same direct benefit in LEA delaying opening of the AOHA (as distinct from delaying the purchase of the allowances to be transferred into that account). That said, a prudent operator may make his own assessment of the process, which would have to reflect the time he needed to carry out certain steps and the time in the present context which the Agency may need to respond to a properly completed application.

76. That said, the question has to be answered in the round. Did LEA delay unreasonably, and hence show lack of prudence, in not applying for opening of the account prior to 25 March, in the light of what it was told by the Agency in its guidance, and, equally importantly, in LEA's understanding of how long the process might take? In the light of LEA's own experience that CRB certificates could be obtained relatively swiftly, and its appreciation of the time it would take to produce the rest of the material for the application (in fact quickly done), I do not consider that LEA showed lack of "all due care" prior to 25 March.

In terrorem

77. I was pressed by Mr Lewis in his closing submissions with a version of the floodgates or "in terrorem" argument. It was said that if I allowed this appeal, it would have very grave implications for the Agency. It would send a message that frantic last-minute application exercises were acceptable.

78. I do not accept this argument. LEA applied for this account more than one month before the deadline, with all the paperwork bar the CRB certificates. On my findings of fact, it would have been able to surrender its allowances in time but for a mistake by the Agency at a critical point in the process. I cannot see that allowing this appeal against a civil penalty notice in those circumstances would send any signal toward last-minute applicants. I would hope and expect that the sort of mistake made here by the Agency happened on relatively few occasions, and it would seem highly unlikely that operators would tailor their conduct, given the onerous and mandatory sanction applicable to non-surrender, on the basis that the Agency might make such a mistake. I am simply applying the well-established law of *force majeure* to what I suspect is a rare set of facts.

My determination

79. For all these reasons I allow LEA's appeal. The EA's civil penalty notice of 30 September 2015 therefore is to be set aside.

DAVID HART Q.C.

24 July 2016