APPEAL OF GULFSTREAM AEROSPACE CORPORATION

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 Gulfstream Aerospace Corporation ("Gulfstream"). The appeal concerns a civil penalty notice served by the Environment Agency on 30 September 2015 in respect of the failure by Gulfstream 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. Gulfstream's verified emissions required it to surrender 243 allowances, which it did not do so.

4. The civil penalty notice is in the sum of £20,600, the sterling equivalent of 243 x 100 euros.

5. Gulfstream requested that the appeal be determined on the papers, and the Agency agreed with this. However, Gulfstream's appeal was sent to me at the sametime 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 and then for me to determine the 4 remaining appeals. 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. Gulfstream 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 Gulfstream's case by Mr Lewis.

The grounds of appeal

6. Gulfstream's main ground of appeal in its letter of 22 October 2015 is that there was inadequate mechanisms in place to transfer allowances, and that the systems took an inordinate amount of time.

7. There were also complaints about the complexity of the reporting and surrendering processes, the difficulties faced by processes carried on by smaller operators and the consequent role of the pilots themselves.

8. Their main claim is that they did not surrender their allowances through any fault of their own.

Force majeure

The key facts

9. The 2012 Scheme year ended on 31 December 2012. After various efforts by the Agency to remind Gulfstream of the process, Gulfstream applied on 17 April 2013 on-line for an Aircraft Operating Holding Account (AOHA). On 18 April 2013, the Agency, by Luke Smith, reported the opening of this account to Gulftstream's named representatives, though various original documents were missing from those received by the Agency. On 23 April the Agency confirmed receipt of the original documents and sent enrolment keys to Gulfstream enabling access to the Registry. The Agency also gave some links to potential suppliers of allowances.

10. On 24 April 2013, Gulfstream entered into a contract with BP Gas Marketing Limited for the sale and purchase of the required allowances, and on 25 April (a Thursday before the deadline on 30 April, the next Tuesday) Gulfstream paid for the 243 allowances in the sum of 850.50 euros. BP, via a broker, Lenny Hochschild of

Evolution Markets, said that once this payment had arrived in their account, they would deliver the 243 allowances into Gulfstream's Registry account. On the same day, Gulfstream spoke to the Agency Registry to confirm that it was in the process of getting its emissions entered and verified and would then surrender.

11. I have seen the emails over the few days prior to the expiry of the deadline on 30 April 2013, and an important one from Jamie Wallace of BP of 0553 hours on 30 April. This informed Evolution that the Gulfstream credits (i.e. allowances) had been transferred and should be in the account "tomorrow pm" (namely too late). He also said that Gulfstream "made every effort to be compliant" and he would say it was "our" i.e. BP's, internal procedures which caused Gulfstream to miss its deadline "if this would help". He said he "had no idea our account opening team would take so long to clear the counterparty – I had thought it was as (sic) formality." Gulfstream observed in its letter of appeal of 22 October 2015, that same day credit is typical of other environmental markets, and I accept this as a general proposition.

12. Gulfstream tried to surrender the allowances when they arrived on 1 May, but by now there was an automatic rejection of any remaining Phase II EU ETS allowances.

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 BP's failure to transfer the allowances between 25 April and 30 April is capable of being an external cause within the meaning of the principle of *force majeure. Billerud* does not directly decide this, because the problem was indeed "internal breakdown".

18. 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…"

19. 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".*

20. Applying this ruling, it is plain that any defaults by BP in this case, lasting 3 or 4 working days, though they may have been crucial to the failure to surrender, have to be regarded as an "ordinary commercial risk and therefore are not "unforeseeable" within the context of *force majeure.*

21. Gulfstream cannot therefore rely upon them as an *external* cause.

22. I have noted the other arguments addressed by the Agency in response to the *force majeure* defence, at para.7.3 of its submissions. The Agency contends that Gulfstream failed to exercise all due care as is required by the defence. I am not satisfied that any of those criticisms are made out on the facts as amounting to lack of due care, and in any event I consider that they did not in fact lead to the failure to surrender. The AOHA was opened on 18 April. On 24 April, Gulfstream entered into the critical transaction (with some time to run before the deadline), and there is nothing on the documents before me suggesting it was responsible for any culpable delay.

23. I now turn to the other matters raised in Gulfstream's letter of 22 October 2015.

Industry challenges

24. In my determination on the Jet No.1 case I held, in effect, that it was not open to an airline to claim force majeure in the light of government lobbying efforts, by the Indian, US or other governments. Irrespective of whether a government opposes the underlying principle of an aviation trading scheme, the EU had imposed a system in

which if an airline wanted to participate in intra-EU flights it had to participate in the EU-ETS. That much would have been apparent on taking legal advice, and in any event I do not see that such alleged confusion had any relevance to why Gulfstream did not surrender. It was trying to do so by the deadline of 30 April, of which it was well aware, and the only reason it did not manage this (on the evidence put before me) was because the slowness of BP from whom it purchased a very small parcel of allowances.

Complexity/impracticability

25. The above point really disposes of the remaining points made in Gulfstream's letter of 22 October 2015. I accept from this case and the other 3 cases with which I am concerned (CHC, LEA and AJW Aviation) that there are complexities in obtaining all the relevant information in the time available, but I do not consider that this played any part in the reason why Gulfstream did not surrender these allowances by the deadline on 30 April 2013.

26. There is one delay built into the system, which is the mandatory 26 hours between initiation and finalisation of the transfer, but this is set down in Article 36(3) of Commission Regulation 1193/2011 and therefore Gulfstream or its advisers should have been well aware of its importance. Ignorance of the law is no defence.

27. Gulfstream's last contention is that there are operators who have not complied with any EU-ETS requirements and are not on the EU Commission's Operator List. No details of this have been provided to the Agency, and it may be that the Agency would be assisted by such information, but, whatever the true position, this cannot excuse Gulfstream on the precise point at issue.

My conclusions on force majeure

28. I accept that Gulfstream were on target to surrendering sufficient allowances by the deadline but were let down by the party from whom they sought to buy allowances. I cannot see in the circumstances what more Gulfstream itself could or should have done, but European law makes a principal liable for its agent's defaults in these circumstances.

29. On the information before me in these 4 cases, it appears that Gulfstream could have obtained allowances swiftly and in such time as would enable the mandatory 26 hours to expire well before the deadline, and it was unfortunate that it ended up trading with a trader who either did not tell Gulfstream of the delays to which the proposed trade would be subject or did not overcome those delays given the imminence of the deadline.

30. That said, because I determine that BP's actions or inactions do not amount to *force majeure* under EU law upon which Gulfstream can rely, Gulfstream remain liable for this civil penalty.

My determination

31. For all these reasons, I dismiss Gulfstream's appeal. The Agency's civil penalty notice of 30 September 2015 therefore stands.

DAVID HART Q.C.

24 July 2016