APPEAL OF CHC SCOTIA 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 CHC Scotia Limited ("CHC"). The appeal concerns a civil penalty notice served on 30 September 2015 by the Environment Agency in respect of the failure by CHC 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. CHC surrendered 40,387 allowances on 30 April 2013. Its verified emissions however required it to surrender 44,456 allowances, leaving a shortfall of 4,069 allowances.

4. The civil penalty notice is in the sum of £344,949.48, the sterling equivalent of 4069 x 100 euros.

5. CHC appeared before me on 22 June 2016, by Mr Mark Bisset of Clydes. I also heard from Duncan Trapp of CHC who explained various points made in Mr Bisset's written submissions. Mr Gwion Lewis, counsel, appeared for the Environment Agency. He did not wish to cross-examine Mr Trapp on his explanations. The oral submissions from Mr Bisset and Mr Lewis lasted about 2 hours.

The grounds of appeal

6. CHC's chief ground of appeal, Ground 1, is *force majeure*. CHC also relies on lack of proportionality, discretion and delay. Ground 5, alleged errors in its 2012, is not now relied upon.

Ground 1: force majeure

The key facts

7. The 2012 Scheme year ended on 31 December 2012. In January 2013, CHC sought a Criminal Records Bureau (CRB) check on the representatives it proposed for its Aircraft Operating Holding Account (AOHA). On 4 April 2013 (shortly after the deadline of 31 March 2013 set by regulation 21 of the 2010 Regulations), CHC reported its verified emissions on line via the ETS Workflow Automation Project or ETSWAP, as 44,456 tonnes. At this stage, CHC could not open its AOHA because the CRB checks had not been received, and the Agency required all necessary information before allowing such an account to be opened.

8. However, on 23 April 2013, the Agency offered CHC the option of opening an AOHA account as agent for CHC. This was to be on the terms set out in a Letter of Authority which CHC signed and returned to the Agency. Consequently the AOHA was opened the same day, 23 April.

9. On 24 April, the Agency emailed CHC seeking clarification of CHC's emissions reported via ETSWAP; in particular, were they 44,455 tonnes or 45,830 tonnes? This email and a chain which followed it were produced by the Agency during the course of the hearing, without objection from Mr Bisset. There were of considerable assistance in understanding the chronology of the critical last few days before the deadline for surrender expiring on 30 April.

10. On the same day, 24 April, Vertis, the broker appointed by CHC to obtain allowances on its behalf, told CHC that there was a shortfall of 40,225 allowances once CHC's 4,220 free allowances had been accounted for. On 25 April, the Registry credited the AOHA with those free allowances.

11. On 26 April, and evidently after some instruction from CHC to Vertis (see the email chain of 10 May), Vertis transferred 36,167 allowances from its trading account into the AOHA – not the 40,225 identified by Vertis on 24 April. This made a total of 40,387 allowances in the account including the free allowances. I was told and accept that Vertis retained in its trading account a further 4,058 allowances held to the order of CHC, which, if transferred, would have left a shortfall of 11 allowances. Hence, prior to this transfer, Vertis plainly had held the 40,225 it had previously identified as being necessary.

12. At 22.47 on 29 April, CHC, via Mr Trapp confirmed to the Agency that the correct tonnage was 44,455.5 tonnes (or 44,456 tonnes after rounding up).

13. By this time, it was too late for further allowances to be transferred before the deadline expiring on 30 April, because of the mandatory 26 hour delay imposed by regulation 36(3) of the EU Registries Regulation 1193/2011.

14. On 30 April the Agency on CHC's behalf surrendered the 40,387 allowances then standing in the AOHA.

15. The Letter of Appointment signed by CHC stated that CHC was obliged to ensure that there were enough allowances in the AOHA to cover the verified emissions, and that it would purchase additional units if there was a shortfall.

Force Majeure

16. 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.

17. 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.

18. 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.

19. 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].

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

CHC's case

21. CHC say that the transfer of the incorrect number of allowances on 26 April (36,167 rather than 40,225) resulted from various late changes made by the Agency in the

criteria for calculating emissions combined with a software error, leading to different figures reported to the Agency. It admits that an administrative error was made on its part, albeit in the context of the above problems. It said that its agent, Vertis, could have transferred on 26 April an additional 4,058 allowances. It also relies on the fact that it did not have access to the information contained in the AOHA because of the circumstances in which the Agency had opened the account. It argued that the Agency should have informed CHC of the shortfall in its account prior to 30 April.

22. Mr Trapp helpfully explained to me the complexities which resulted from the application of the Aviation ETS, designed for fixed wing aircraft flying to set point A to set point B, to offshore helicopters, and the way in which these were operated in the North Sea shuttling around various offshore rigs. CHC had helped the Agency in evolving the criteria for calculating emissions in this context. The software which it used and adapted for offshore helicopters (and which in the end threw up various errors) was an industry standard. The difficulties which its use threw up on such adaptation were unexpected.

The Agency's case

23. The Agency says that the error about the number of allowances required was entirely of CHC's own making. It could and should have resolved software errors sufficiently in advance of the surrender date. In any event, at the material time CHC knew the true position in terms of the tonnage of verified emissions, and therefore knew how many allowances it required to surrender. It did not matter that CHC could not access its AOHA; it knew from Vertis how many allowances it required.

24. The Agency added that the terms of the Letter of Appointment are inconsistent with it being incumbent upon the Agency to inform CHC that there was a significant shortfall so that CHC could purchase further allowances.

My conclusions on force majeure

25. I accept that CHC acted sensibly and prudently in respect of commissioning software and applying it to the different circumstances of offshore helicopters. It is plain the evolution of the software took a considerable period of time, and I accept Mr Trapp's

point that by February 2013 it was simply too late to change from the software back to the former method: "back to pencil and paper", as he put it.

26. I also accept that CHC made reasonable efforts in respect of opening an AOHA but that these were stymied by the delay in receiving the CRB checks. I would therefore reject any suggestion that CHC had showed any lack of care prior to the opening of the AOHA on 23 April 2013. In any event, as I shall explain, the "late" opening of the account is irrelevant to the reason why insufficient allowances were in the account on 30 April.

27. The critical question for purposes of the *force majeure* principle, on the present facts, is whether the error in calculating the number of allowances necessary was as a result of an "external cause" rendering it objectively impossible for CHC to surrender the correct number of allowances.

28. On the facts, this is not made out. There was no external cause operating in the last week of April 2013, when additional allowances could have been transferred into the open AOHA. Virtually all of the shortfall at issue resulted not from the past software problems and the complexities of the emissions calculations, but from a decision taken by CHC on or about 26 April that Vertis should transfer 36,167 rather than 40,225 allowances into the AOHA. On or before 26 April, CHC knew that its verified emissions were (at least) 44,456; "at least", because, according to the recently disclosed email, the Agency had raised, that day, the possibility of the figure being greater (45,830 tonnes). CHC had also been told by Vertis on 24 April that the shortfall was 40,225 allowances (before consideration of the free 4,220).

29. Hence, the error was made by CHC, and it was not as a result of an external cause. Someone in CHC, and the evidence is not clear whom, decided that fewer allowances should be transferred into the account than Vertis had identified as being necessary.

30. I also reject the contention that it was incumbent upon the Agency to tell CHC that the AOHA contained insufficient allowances. This is inconsistent with the terms of the LOA, and I cannot see as a matter of principle why the Agency should be doing this in circumstances where operators would ordinarily be well aware of how many allowances they had transferred into the account, and how many free allowances would be available.

Ground 2: proportionality

31. This was shortly raised in the notice of appeal, but not in CHC's skeleton argument. It was said that the 100 euro per tonne penalty was widely disproportionate, given that carbon prices were "near the floor" or, as put in argument, were about 5 euros per tonne. It was not pressed vigorously by Mr Bisset for CHC in his oral submissions to me, but was not formally abandoned.

32. The difficulty, as he recognised, was the decision in *Billerud.* The Billerud operators were in a very similar position to CHC. They had allowances available on the surrender date but, as they put it in [19] due to "*internal administrative breakdown*" they did not in fact surrender them. One of the questions put to the CJEU was whether the provisions of Article 16(3) and 16(4) of the Directive, and the mandatory lump sum penalties, could be varied by a national court on the basis of the principle of proportionality: [33]. The CJEU said in terms that it could not: [38].

33. In my view there can be no distinction between this case and the present. It matters not that in *Billerud* the penalty was the 40 euros per tonne applicable to the early years of the EU-ETS scheme via Article 16(4), whereas the current mandatory penalty is 100 euros per tonne laid down by Article 16(3). Both penalties were considered by the Court in *Billerud,* as one can see from the CJEU's answer at [42].

Ground 3: discretion/fairness

34. CHC also contended in its notice of appeal (but not in its skeleton argument) that, even though the Agency may have no discretion due to regulation 32 of the 2010 Regulations, the appellate body did have a discretion which might be exercised in CHC's favour. It also complained about the fairness of the civil penalty process

though, save in the case of delay (addressed briefly below), it did not specify which elements were unfair.

35. I reject these arguments. I have to determine this appeal by reference to the same regulations under which the Agency operated, and I see nothing unfair about the procedures which it adopted. It served a notice of intent to impose a civil penalty prior to the penalty notice itself, thus giving CHC the opportunity to respond, if it wished.

36. I considered a similar argument in the first *Jet* appeal to the effect that the Agency might have some sort of discretion. I said this: "*Finally, Jet refers to the need to apply fair and equitable justice in the present case. If I am right in my interpretation of the directive, and that it is unaffected by the ICAO resolutions relied upon by Jet, then there is no room for the operation of these doctrines. The EA is expressly stated by regulation 22 of the 2010 Regulations to be under a duty to determine emissions in the present circumstances, and I can see no grounds in any event for saying that in the particular circumstances the EA was wrong to determine emissions as they did*."

37. I therefore reject these grounds.

Ground 4: delay

38. CHC argued that over 2 years had passed between the expiry of the surrender deadline on 30 April 2013 and the service of the notice of intent on 9 July 2015. This had caused unfairness, particularly as there had been a change of personnel since April 2013.

39. The Agency says that the time period in this case is "not remotely of such duration as to cause concern on the grounds of fairness."

40. I agree. I accept that in extreme circumstances involving massive delay a party to administrative proceedings might be able to assert some resultant public law unfairness, but this is not made out on the facts of this case.

Ground 5: errors in the 2012 data

41. CHC does not maintain this ground of appeal.

My determination

42. For all these reasons I dismiss CHC's appeal. The EA's civil penalty notice of 30 September 2015 therefore stands.

DAVID HART Q.C.

24 July 2016