APPEAL OF TWO AIR (BERMUDA) LIMITED

UNDER THE AVIATION GREENHOUSE GAS EMISSIONS TRADING SCHEME REGULATIONS 2010

1. I have been appointed by the Secretary of State for Business, Energy and Industrial Strategy to determine this appeal by TWO Air (Bermuda) Limited ("TWO"). The appeal concerns a civil penalty notice served by the Environment Agency on 21 July 2016 in respect of the failure by TWO to surrender the requisite number of allowances in respect of aviation emissions in the 2012 Scheme year. The deadline for surrender for that year 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, which I shall call the EU ETS Directive.

3. TWO's verified emissions required it to surrender 315 allowances (for 315 tonnes), and the surrender was not effective until after the deadline of 30 April 2013.

4. The civil penalty notice is in the sum of £26,704.13, the sterling equivalent of 315 x €100.

5. TWO requested that the appeal be determined on the papers, and the Agency agreed with this.

6. The representations I have been sent are

(i) TWO's notice of appeal and attachments, of 10 August 2016, including their letter of 1 August 2016;

(ii) the Agency's response of 3 October 2016, with attachments;

(iii) TWO's responses of 13 October, 16 November, and 2 December 2016, with attachments;

(iv) the Agency's response of 14 December 2016;

(v) TWO's response of 26 December 2016;

(vi) the Agency's response of 18 January 2017, and

(vii) TWO's final reply of 26 January 2017.

The grounds of appeal

7. TWO's initial grounds of appeal relied upon a number of practical problems facing a small operator when dealing with a complex and bureaucratic application procedure. They also rely on the efforts which they took to open an Aircraft Operator Holding Account (AOHA) prior to the surrender deadline of 30 April 2013. No specific defence was advanced other than the implicit one that TWO had done its reasonable best to comply with the surrender deadline obligation.

8. However, TWO's appeal has evolved over time, not least because of the contents of the Agency's initial response of 3 October 2016. In the course of explaining why TWO had not done its reasonable best, it said that TWO would have been offered an option for the Agency to open its account for it (on return of a Letter of Authority or LOA) "*at some point in the second or third week of April 2013",* and it produced a spreadsheet at Annex 1.8 which it said supported the making of this offer. The Agency could not state the precise date of the offer of this option, because it had not retained the email making the offer.

9. This initial response from the Agency also stated, correctly, the emissions penalty laid down by the Directive was a mandatory one and neither the Agency nor the Appeal Body could vary it. It also said, helpfully, that it was assuming the appeal was a *force*

majeure defence, and responded as to why it said this was inapplicable, and I have approached this appeal on this basis.

10. The assertion about TWO being offered a LOA option prior to the deadline was very swiftly refuted by TWO, via an email sent the very same day as the Agency's initial response, i.e. 3 October. Mr Schuch of TWO said that TWO had received no such email.

11. On 13 October, the Agency responded to this email. It said that TWO were on a "*list of operators who were identified as eligible to be offered the LOA option…*" The Agency attached an email which it said had been "*sent to aircraft operators on this list on 18 April 2013.*"

12. TWO chased a copy of any email showing that TWO was the recipient of the offer, which drew the holding response (21 October 2016) that the Agency was still going through its records. The Agency gave a full response on 14 December. It said that at the time of these events it had had a policy of automatically deleting emails after 6 months, but asserted that the spreadsheet listed those who had been offered the LOA option. It was not, as per its email of 13 October, now specifying a day (18 April) when this email was sent; and indeed the spreadsheet shows that there had been some "account approved" applications on 15 April, requiring that the offer had been made some days before 18 April.

13. I return to the issue as to whether such an email was sent and received below.

14. TWO's substantive response came on 2 December 2016. Mr Schuch says he would have accepted the offer had it been made to TWO prior to the deadline on 30 April 2013. They should be in no worse position than those to whom an offer was in fact made. As is made explicit in its response of 26 December 2016, the failure to make

the LOA offer was said to amount to *force majeure*. This case is then amplified in their reply of 26 January 2017.

15. The central question on this appeal is whether *force majeure* is made out.

16. The Agency is correct in its contention that the other matters relied on in TWO's letter of 1 August 2016 are not capable to amounting to a defence to the civil penalty notice. I readily accept that the procedure posed its challenges, particularly to the smaller operators, but this does not amount to a defence. I also rely on my findings on the Gulfstream appeal which are set out in section 4 of the Agency's response on this appeal.

The facts

17. The Agency sent out a standard form enquiry to operators by email on 15 October 2012. On 17 October 2012, Mr Schuch responded with a query, and on 20 October 2012, TWO had made its online application for an AOHA, albeit without the supporting documentation (in line with Agency indications that they should do this). Mr Schuch and Mr Parsons were named as Authorised Representatives. On 6 December 2012 the Agency appears to have "*chased docs*", as it did on 1 February 2013: see the Agency tracking log.

18. On 23 March 2013, TWO duly submitted their annual emissions report.

19. On 26 March 2013 the Agency warned TWO of the deadline, and said that the AOHA application "*should be ready for us to open by Friday 12th April 2013."* If the operator did not think that it would be able to provide all the necessary information by that date, the operator should telephone the Agency. Mr Schuch says he immediately rang the Agency Helpdesk in response, and said that they were not certain that they could provide all the necessary information by 12 April, with the problem, as often, being with the obtaining of criminal record checks from third parties (the FBI in this case)

rather than the other company documentation which TWO had now obtained. I accept that Mr Schuch made a call along these lines, though it is not clear that the company documents were necessarily in the form required by the Agency (because of what happened when they were in fact submitted at the end of May 2013). Mr Schuch says that he was advised to forward all documents immediately on receipt; I also accept this.

20. On 15 April 2013, Mr Hartley of Universal Weather and Aviation Inc. (whom TWO had contacted in March 2011) sent out a mailshot to all their customers reminding them of the various things which needed doing before they could surrender allowances. This included advice on opening accounts with carbon brokers, CF Partners. On 17 April, UWA informed TWO of reduced steps now required by CFP. Mr Schuch says he spoke to Mr Hartley that same day about the practicalities of obtaining allowances from CFP, and that he was advised to use his personal credit card to avoid bank delays; the only thing which stood in his way was the lack of an AOHA. I accept this evidence.

21. It follows that by the middle of April 2013 TWO, and Mr Schuch in particular, was (a) aware of the impending deadline; (b) knew that they were missing the CRB checks necessary for opening the AOHA; (c) aware that allowances could be purchased swiftly via brokers.

22. It is in that context that I have to decide whether as a matter of fact the Agency sent TWO the LOA option.

23. The Agency's case depends essentially upon 2 documents, what it describes as the template email of 18 April, and the spreadsheet. It say (though this is not how it was put in the Registry's email of 13 October 2016) that as and when a member of the Registry team *"despatched an email offering the LOA option, he or she would update the spreadsheet with the name of the Aircraft Operator and any other relevant*

details". I also take into account the material before me on the LEA appeal, in which the Agency was telling me that it had reached a decision to offer some people this option, because they were struggling, whereas others (such LEA, who complained about not being offered the option) did not need this. So the Agency was saying that there was a sorting of potential candidates for the option before offers were forthcoming.

24. The spreadsheet is redacted of all identifying information other than that of TWO. In terms of TWO, it gives a reference number (EM04123), its name (as TW Air) and leaves all the other columns blank, including that headed "Active Ars," *(sic)* except an evidently later completed column "*Docs received just need on-line app*". As this shows, the rest of the spreadsheet has evidently been filled in over time, because the "docs" referred to in this entry were not received by the Agency until May 2013. As of the end of April 2013, the spreadsheet relating to TWO was in effect blank apart from its identifiers. Given that TWO had nominated its ARs, as the handwritten Agency log confirms, it is not clear why the Active ARs column was left blank.

25. The spreadsheet does not purport to say when offer emails were despatched, though it does tell one when the Agency approved the opening of an account. From cross-referring to my decisions on previous appeals, I see that the first operator listed (presumably in alphabetical order) must be AJW, with a total of 475 tonnes of emissions; according to the evidence there, the offer of the LOA option was made on 17 April. The approval date on the spreadsheet is given as 23 April, which accords with paragraph 9 of my AJW decision to the effect that the AOHA was opened on that date. There are two steps which need to happen after despatch of any offer email, namely (i) the operator returning the LOA form to the Agency and (ii) the Agency approving the application as then made.

26. It is said by the Agency that an email in the form of the template of 18 April would have been despatched to both Mr Schuch and Mr Parsons, as the registered ARs, sometime in April. Neither AR say they received it.

27. Before determining this question, I should complete the narrative. On 26 April, the Friday, Mr Schuch emailed, offering to send all documents to the Agency except for the CRB documents, if that would help. On 29 April, the Monday, the Registry responded saying that this would confer no advantage, and making the point that it was in any event most unlikely that the AOHA would be open in time for the deadline the next day. This elicited a very swift response from Mr Schuch asking about the implications of not meeting the deadline: *"Please be aware that though we apparently underestimated the time required, we are now moving as aggressively as we can."* The Agency places some reliance upon this response as some sort of admission by TWO. But it has to be read in the context of the rest of the emails, from which one can infer that TWO it is acknowledging no more than that it underestimated the time it would take to get CRB information from third parties.

28. There are then various emails sent after the expiry of the deadline evidencing the belated steps TWO took to surrender allowances, but none of these bear on the critical issues.

29. Taking the evidence as a whole, I consider that on balance it is unlikely that the Agency sent TWO the offer of the LOA option when it says it did. It seems to me highly unlikely that TWO received it. I note the very prompt responses by Mr Schuch (as I have found) to correspondence from the Agency (17 October re Agency of 15 October, telephone call re Agency email of 26 March), and indeed to the Agency's initial representations on 3 October.

30. Had Mr Schuch received the offer, it was inconceivable that he would not have responded to it, and would not have accepted the Agency's offer. This would have overcome the only remaining thing standing in the way of opening an AOHA for TWO. Mr Schuch may not have appreciated precisely the downside of failing to comply with the deadline, but it is plain he had been taking a number of steps to avoid

that outcome. He had been discussing the practicalities of acquiring allowances with Mr Hartley at just about the time when the Agency would have sent the email, so it is not as if the whole AOHA/surrender problem had fallen off TWO's radar. I also note that Mr Schuch has been able to find various threads of emails on the same subject at about the same time from his email archives, so it would be surprising if he (and Mr Parsons) had permanently deleted one from the Agency.

31. The spreadsheet is good evidence that TWO was regarded at one stage as being *eligible* for the option (as per part of the Agency's email of 13 October 2016) and I infer that it was created and supplemented as and when the Agency formed this view about particular operators. I also infer that the Agency concluded that TWO would be eligible because of what Mr Schuch had said during his call of 26 March, and further that the deadline of 12 April in its letter of 26 March was designed to elicit responses from operators, so that the Agency could decide to whom they should make the LOA offer.

32. But the spreadsheet is not strong evidence that an offer was made to a particular operator, or indeed during the two week period in April relied upon by the Agency, unless it also records Agency approval in the document. There seems to have been a rolling programme of sending out such emails to operators, and I can only think that for reasons unexplained these were sent to most operators on the list but not to TWO. It may be that this was something to do with the spreadsheet not identifying that there were active ARs, but this can only be speculation.

33. This conclusion that an email was not sent is far more probable than the rival one that both Mr Schuch and Mr Parsons ignored an email which happened to provide TWO with the way out of a current and pressing problem which faced them.

The factual consequences

34. I have already concluded that TWO would have wanted to accept such an offer had an offer been made to it. One cannot say for sure when any offer would and should have been sent out from the spreadsheet, but it seems probable that most of the offers

which were sent went out between on or before 15 April (the earliest date in the spreadsheet) and 23 April. Equally, on a balance of probability, and having regard to the approval dates listed on the spreadsheet, it seems likely that the account would have been opened by the Agency some days before 26 April.

35. The Agency asserts that even if it had opened an AOHA, it would not have been able to effect surrender in time. I reject this argument. I have specific evidence from Mr Schuch, which I accept, that he had worked out how to effect a speedy transfer of allowances on or about 17 April. I see no reason which he would not have been able to arrange for the purchase of allowances in sufficient time, had an AOHA been opened at about this time.

36. Regulation 36(3) of the EU Registries Regulations 1193/2011 imposed a mandatory 26 hour delay on effecting transactions, in an attempt to avoid fraud. There is also a 10.00 to 16.00 transaction window during which brokers with allowances may transfer them, failing which the transaction is initiated the next day. These are the only formal obstacles. I see no reason why allowances would not have been effected by the practical deadline for this year, which the Agency correctly identifies as 15.59 CET on 29 April 2013: 4.3 of its January Representations.

37. It is of course possible that the brokers chosen (CFP) might not have responded as fast as they could have done in response to instructions (as I note occurred in another appeal being determined at the same time as this, YH, in which there was an apparent delay by CFP from 26 until 30 April), but I cannot conclude that this would have probably occurred in this case given the longer timescale which they would have had to initiate the transfer.

38. I therefore consider whether the above facts amounted to *force majeure* so as to confer a defence upon TWO.

Force Majeure: the law

39. The concept of *force majeure* is not expressly set out in either the EU ETS Directive or the 2010 Regulations, but it is a general and long-standing principle of European Union law. It was also 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 in respect of the EU ETS Directive.

40. The Billerud operators had failed to surrender EU-ETS allowances for a stationary installation due to an administrative oversight, despite owning enough allowances 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.

41. 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] – underlining all mine.

42. 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

Due care by TWO?

43. The first question is whether, on the facts as set out above, the late surrender was caused by any lack of due care of TWO within the *force majeure* principle.

44. TWO started the process of applying for an AOHA in October 2012. Mr Schuch was obviously concerned enough to respond quickly by telephone to the Agency's letter of

26 March 2013. It is also plain that all the documents required for exercising the LOA option were available to Mr Schuch in mid April. I am not persuaded by the Agency's contention that TWO were at fault, either prior to or after 26 March.

Extraneous

45. On my conclusions above, TWO would have been able to surrender allowances in time via the Agency, had the Agency made the offer which the Agency intended to make to it. The lack of that offer was a cause "external" to TWO upon which they can rely as *force majeure.*

Abnormal and unforeseeable circumstances

46. On my findings of fact, TWO had no idea that other operators were being offered a way of resolving any remaining documentation problems which they were facing. So the way in which they could have achieved their objective, by accepting the LOA option, was indeed unforeseeable by them.

The LEA case

47. The Agency contends that any reliance on the lack of a LOA option extended to TWO was foreclosed by my conclusions in the LEA case.

48. But the cases are very different. In the LEA case, the Agency had not decided to assist LEA with an LOA option. LEA complained of that, and I decided that it was not under a duty to make such an offer to all operators who had not completed the opening of their accounts by mid-April 2013 – put another way, it was not irrational not to offer the LOA option to all operators in LEA's position. Contrast the present case, in which the Agency had decided to assist TWO (hence being named on the spreadsheet) and those similarly unable to open their AOHA. On my findings of fact, I have concluded that the Agency did so because of TWO's response to its email of 26 March, but then had simply failed to make the offer which it had intended to make.

Conclusion

49. I therefore conclude that the *force majeure* defence does apply in TWO's favour as a defence in respect of this civil penalty notice.

Observations

50. Determination of this and similar appeals (LEA in particular) has been made far more difficult by the Agency's policy of destroying emails and documentation before deciding whether to serve a civil penalty notice. I read with some surprise in this appeal that at one stage that policy was to destroy emails after 6 months. In these particular circumstances, it would or should have been apparent to the Agency from the moment that operators failed to meet the deadline that, at very least, it would have to give careful consideration as to whether a civil penalty notice should be served. I cannot see how it can fairly carry out that exercise without being able to review all communications between the Agency and the operator in the run up to the deadline.

My determination

51. For these reasons, I allow TWO's appeal. The Agency's civil penalty notice of 21 July 2016 is to be set aside.

DAVID HART Q.C.

20 March 2017