

APPEAL OF YH AVIATION 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 YH Aviation Limited (“YH”). The appeal concerns a civil penalty notice served by the Environment Agency on 21 July 2016 in respect of the failure by YH 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. YH’s verified emissions required it to surrender 105 allowances (for 105 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 £8,901.38, the sterling equivalent of 105 x 100 euros.
5. YH requested that the appeal be determined on the papers, and the Agency agreed with this.

6. The representations I have been sent are (i) YH's notice of appeal and attachments, of 11 August 2016; (ii) the Agency's response of 3 October 2016, with attachments; (iii) YH's response of 30 November 2016, with attachments; (iv) the Agency's response of 11 January 2017; and (v) YH's further response of 22 February 2017. I confirmed with both parties on receipt of the last that neither wished to make any further submissions to me and that I would then proceed to determine the appeal.

The grounds of appeal

7. YH's grounds of appeal stated that their Aircraft Operator Holding Account (AOHA) was opened by the Registry on 18 April 2013, and that "*the emissions entry was made and verified on 30 April 2013.*" They said that the credits were purchased from CF Partners on the 26 April 2013, but were not applied to the AOHA account until 2 May 2013.
8. They say that the civil penalty "*is excessive, unreasonable and unfair*", and rely upon the fact that there has been no loss or damage caused by the innocent late surrender of the credits.
9. YH's further response of 22 February 2017 makes their case plain. They do not say that they did surrender allowances on or before 30 April. They had entrusted that task to CFP from whom they had bought allowances, and it was CFP's fault that these were not surrendered on their behalf. The failure to surrender was not through any intentional or negligent fault of YH.

The facts

10. With the benefit of the various representations made to me, the facts have become clearer as this appeal has proceeded. I can thus state them shortly.
11. It is plain that the AOHA was opened on 21 April, not 18 April. This was in sufficient time for allowances to be transferred into it before the surrender deadline on 30 April.

12. It is also plain that the emissions were verified by YH on 30 April in sufficient time to allow surrender in time.

13. I also accept evidence from YH that it purchased sufficient allowances from CFP on Friday 26 April (see Mr Daykin's witness statement of 30 November 2016). At that stage, Mr Daykin was told by CFP that it might take 2 to 3 days for the Registry to confirm receipt.

14. On 30 April, the following Tuesday, the Agency had issued an email reminder (at 13.48) about missing allowances to YH on 30 April. Internal emails quickly followed between Mr Bach and Mr Daykin, both of YH, and Mr Daykin had (by 15.32 on 30 April) plainly telephoned CFP to find what had happened to the allowances. I infer that as result of this call CFP transferred the allowances into the AOHA. The EU ETS website (Mr Bach's exhibit 6) shows that CFP initiated the transfer of allowances into the AOHA at 16.10 Middle European Summer Time, on 30 April, so some 38 minutes after Mr Daykin's email to Mr Bach.

15. But 16.10 MEST on 30 April was after the transaction window had closed for that day. So a transfer sought to be made at 16.10 MEST on 30 April was only initiated at 10.00 on 1 May 2013. There was a further problem. 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. This is why the earliest date for the transaction to have taken place was 2 May 2013. The combined effect of the 26 hour delay and the 10.00 to 16.00 transaction window is that CFP would have to have transferred the allowances before 16.00 on 29 April to meet the deadline.

16. Mr Daykin says that he went on line to "release" the credits. I accept the Agency's view that this cannot possibly be correct, and I note that the further response of 22 February 2017 does not contend this. It proceeds on the basis that from the 26 April, things were in the hands of CFP, and (per para.6) "*CFP failed to initiate the transfer*

in time for YH to meet the surrender deadline". As I have noted above, YH did verify the emissions on 30 April, which would have been a further stumbling block to a valid surrender of allowances.

17. I accept YH's factual case that it was not intentionally or negligently at fault in respect of the late surrender. I reject the case which the Agency made in its initial representations to the effect that YH should have opened an AOHA earlier than they did. Nor am I persuaded that earlier opening of an AOHA would have probably made any difference to the outcome. On the evidence before me (and I should say that I have seen nothing directly coming from CFP) I agree with YH that the fault lying behind the late surrender is that of CFP in not transferring allowances on Friday 26 April, or on Monday 29 April before the transaction window closed.

18. YH's submission of 30 November 2016 was that the Agency was partly to blame for what happened. The suggestion appears to be that the Agency's messages on 30 April were unclear and insufficiently helpful, and that this may have played a part in events. I reject this criticism, if (in the light of their rather different submissions of 22 February 2017) it remains part of their case. The Agency say rightly that YH did not understand the process (which was not the Agency's fault); that the initial emails that day came from the EU Registry, not the Agency, and that there was nothing which misled YH in the Agency's reminder on that day to YH that it should urgently surrender allowances. In fact, as I have explained, it was already too late for surrender to have been validly effected within time, so advice received on 30 April can have played no part in the failure to surrender.

19. In my view, the Agency was not to blame for the late surrender, and the case bears no resemblance to the London Executive Aviation case, relied upon by YH, in which I had concluded that the Agency, by mislaying parts of the file, delayed progress in the opening of LEA's AOHA over a critical period during 26 and 29 April, and thus prevented surrender of allowances before the deadline. Those factual findings led to my finding of *force majeure*. There are no comparable findings of fact in this appeal.

The legal effect of those facts as found

20. As YH's further response of 22 February helpfully recognises, there is strict liability for the failure to surrender allowances under the EU-ETS. They will therefore appreciate that my conclusions that they, as a company, were not to blame for the late surrender does not amount to a defence in respect of this civil penalty.
21. The only possible defence in these circumstances is *force majeure*. This was not relied upon in the notice of appeal, though the Agency helpfully set out the terms of this defence in its initial submissions of 3 October 2016. Possibly in response to this, YH picked up the point in their submissions of 30 November. They relied on the combination of two matters as amounting to "a frustration of [their] efforts to comply with the regulations as *force majeure*."
22. The two matters are the Agency conduct, and that of CFP. I have rejected the criticisms of the Agency's conduct on the facts above. I have accepted that CFP were at fault, and I have concluded that there is no reason why, given the date of purchase on 26 April, CFP could not have effected transfer of the allowances prior to the effective deadline at 1600 on 29 April.
23. The question therefore is whether CFP's defaults amounted to *force majeure* so as to confer a defence upon YH.

Force Majeure: the law

24. 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.

25. 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.
26. 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.*
27. 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].
28. *Billerud* also refers 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...*”
29. According to the CJEU, a similar principle disposed of the *force majeure* defence run in *Eurofit*. 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”.

Its application here

30. The question therefore arises whether CFP’s failure to transfer the allowances between Friday 26 April and the close of the trading window at 1600 on Monday 29 April is capable of being an external cause within the meaning of the principle of *force majeure* and/or was not foreseeable as an ordinary commercial risk.

31. Applying this ruling, it is plain that any defaults by CFP in this case, lasting 2 working days at most, 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” by YH, as this term is used in the context of *force majeure*.

My conclusions on force majeure

32. I accept that YH were on target to surrendering sufficient allowances by the deadline but were let down by CFP. I cannot see in the circumstances what more YH itself could or should have done, but European law makes a principal liable for its agent’s defaults in these circumstances.

33. Because I determine that CFP’s actions or inactions do not amount to *force majeure* upon which YH can rely, YH remain liable for this civil penalty.

My determination

34. For all these reasons, I dismiss YH’s appeal. The Agency’s civil penalty notice of 21 July therefore stands.

DAVID HART Q.C.

20 March 2017