DETERMINATION BY THE SECRETARY OF STATE OF THE APPEAL OF ROCCO FORTE AND FAMILY LTD

And

THE ENVIRONMENT AGENCY

Under the CRC ENERGY EFFICIENCY SCHEME ORDER 2010

Introduction

- 1. This is a determination by the Secretary of State for Energy and Climate Change ("the Secretary of State") of an appeal under article 111 of the CRC Energy Efficiency Scheme Order 2010 ("the 2010 Order"). The appeal was made by Rocco Forte and Family Ltd ("Rocco") against two civil penalty notices served on the appellant by the Environment Agency ("the EA") on 27 March 2012 for:
 - (1) failing to provide a footprint report to the CRC Registry by 29 July 2011, contrary to article 39(1) and (2) of the 2010 Order;
 - (2) failing to provide an annual report to the CRC Registry by 29 July 2011, contrary to article 47(1) and (2) of the 2010 Order.
- 2. The Secretary of State appointed David Hart Q.C. under paragraph 14 of Schedule 10 to the 2010 Order, to consider the appeal and to make recommendations or reasons for being unable to make recommendations to the Secretary of State.
- 3. After receiving written submissions, Mr Hart delivered his report, including recommendations, to the Secretary of State on 2 October 2012 ("the Report").

Conclusions of the Report

4. On hearing the arguments for both sides Mr Hart concluded:

"Ground 1: Financial penalty is severe "in its own right"

- 28. I do not consider that the total penalty of £10,000 is severe, given the history set out above, and given the nature of the scheme, which is to lay down default penalties and then to allow Rocco to establish that those penalties should not apply in the particular circumstances of the case.
- 29. Whilst I accept that Rocco engaged a consultant to submit material for it, I have been provided with no information as to when and in what circumstances

the consultant was so instructed. As the EA points out, the duty still remains on Rocco to submit the material on time, and I would have expected at very least Rocco to chase the consultant if he or she was not performing their job as the deadline approached. The EA flagged up the lack of evidence on this topic in [40] of its statement, and Rocco did not produce any documentation to me in response. This was unhelpful given that the onus was and is on Rocco to establish the circumstances in which the defaults had occurred, and hence why in its submission the default amounts should be varied.

30. In summary, Rocco has produced nothing justifying its contention that the penalty was generally too severe. The EA applied a discount to the daily default penalties under the 2010, and in my view, and on the very limited information put before the EA, and indeed put before me, I do not consider that the EA was obliged to discount the lump sum penalty of £5,000 per infringement as well.

Ground 2: Financial penalty is severe "with reference to inconsequential losses" suffered by the Agency

32. I agree with the EA's submission that this ground has no merit. There is no support in either the Order or the statutory guidance that the EA must suffer losses, substantial or otherwise, before civil penalties can be levied. The purpose of a financial penalty is to provide a sanction for non-compliance and to act as a deterrent against future failures. The Order has set a starting point for the assessment of such penalties, which starting point may then be adjusted on the facts of the specific case in hand.

Ground 3: Late submission of reports has not negatively affected the performance of the Agency's duties

33. See my response to Ground 2. The EA is not required to show that it has been inconvenienced by the failures in question. In any event, the practical consequence of a participant failing to submit an annual report on time is that it may preclude the Agency from proceeding as expeditiously as possible to publish the performance table. Contrary to the suggestion in Rocco's letter of 31 August 2012, it is not incumbent on the EA to show that it was in fact prejudiced by Rocco's failures.

Ground 4: The Appellant is not in a position of financial strength

- 34. Rocco, in its response to the EA's statement, refers to it having made losses of £25m and £12m for the financial years ending April 2010 and 2011, and suggests there, and in its May letter, that it was incumbent upon the EA to elicit this information before issuing or confirming its penalties, or before responding to this appeal.
- 35. This misunderstands the position, both at the stage when the EA is considering penalties, and at the stage of this appeal. It is for Rocco to establish why it says the penalties are too severe, and that if it wishes to show that civil penalties of £10,000 should be abated on the grounds of Rocco's financial position, to explain why.

36. In its July statement, the EA threw down the gauntlet to Rocco to produce cogent evidence on this score, as follows:

"Without further and better evidence that the Appellant would have genuine difficulty paying a total penalty of £10,000, there is no basis upon which to disturb the Agency's judgment that this is an appropriate level of penalty. It would be most surprising if the Appellant, an international luxury hotel brand, would face insurmountable obstacles paying this penalty. It is a solvent company and there is no suggestion that it is unable to meet its debts."

As Mr Clark, the Group Finance Director of Rocco, and writer of Rocco's letter of 31 August 2012, will be all too aware, overall solvency or insolvency in October 2012 is not established by looking at 2 particular years' losses ending in April 2011, substantial though they may be, without carrying out a more general review of the company's financial position and its prospects for the future. Nothing I have seen meets the EA's points in the passage quoted above, and in particular the contention that Rocco is a solvent company. I am certainly not convinced that Rocco would sustain financial hardship as a result of being compelled to pay the £10,000 required by these two notices."

5. Mr Hart's recommendation is:

I therefore recommend that the Secretary of State dismiss Rocco Forte and Family Ltd's appeal against the penalty notice dated 27th March 2012.

- 6. The Secretary of State agrees with and adopts the conclusions set out in the Report.
- 7. In determining the appeal the Secretary of State has the power, under paragraph 12 of Schedule 10 to the 2010 Order, to cancel or to affirm the civil penalty and, where the civil penalty is affirmed, the Secretary of State may do so in its original form, or with such modifications as he sees fit.

Determination

The Secretary of State therefore determines that:

- (i) The appeal by Rocco Forte and Family Ltd, against the penalty notices dated 27th March 2012, is dismissed on the grounds set out above and in the Report.
- (ii) The penalty notices are affirmed in their original form.

Signed by:

NR Partye

Niall Mackenzie Dated January 2013

Head, Industrial Energy Efficiency Programme, Department of Energy and Climate Change