DETERMINATION BY THE SECRETARY OF STATE OF THE APPEAL OF CRITERION CAPITAL 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 made under article 111 of the CRC Energy Efficiency Scheme Order 2010 ("the 2010 Order"). The appeal was made by Criterion Capital Ltd ("Criterion") 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 23 January 2013 ("the Report").

Conclusions of the Report

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

"***Ground 1: The EA revised the "due date" for the reports from 29 July 2011 to 27 September 2011 and so there was no failure to submit the reports within 40 working days***

36. I have read all the correspondence from the EA carefully. There is no evidence at all that the EA ever changed its view that the due date was 29

July 2011; indeed, it had no possible basis for doing so. It made it clear that the last possible date for submission (albeit amounting to late submission) of the reports was 27 September, and that penalties would be increased thereafter, but that the EA retained the right to levy a civil penalty for late submission up to that point.

37. In addition, I see no evidence that Criterion thought that the deadline had been revised. Mr Shaw's promise on 7 September to submit within the week is not readily reconcilable with a belief that Criterion to submit until 27 September without penalty.

38. I therefore reject this ground.

Ground 2: Criterion did not fail to submit the footprint and annual reports as it submitted them on 1 November 2011

39. The problem with this contention is that, as the EA point out, reports submitted on 1 November were submitted well after the point at which the CRC Registry ceased accepting reports for the year. If the reports had been sufficient (an issue which I find it unnecessary to determine as the EA did not rely upon it in its determination), they still would not have prevented the EA from levying the penalties they did for the breaches already committed prior to 1 November.

40. Therefore the ground does not assist Criterion in respect of its appeal.

Ground 3: The EA was "incorrect" to impose the "maximum fixed financial penalty of £40,000 under Articles 96(2)(b)(ii) and 97(2)(b)(ii)

41. The default fixed penalty under articles 96(2)(b)(ii) and 97(2)(b)(ii) is £40,000: it is not therefore, as the ground contends, a "maximum "fixed penalty (leaving aside the emissions-based element).

42. The real issue, however, is whether the EA was right to retain the fixed financial penalty in both notices, once it had concluded, as it did, that it had discretion to waive the emissions-based element. The reasons relied upon for the latter decision (namely that Criterion had taken reasonable steps to rectify the failure once it came to its attention) were equally applicable under the statutory guidance to reducing the fixed penalties of £45,000. The EA did not address the latter question in terms, namely why it did not reduce the fixed penalties as well, given those findings.

43. In the administrator's statement, it is said that such a decision to retain the fixed penalties was well within the scope of its discretion, though it did not give any reasons for such a view at the time of the notice.

[…].

48. My recommendation is that a penalty, and a significant one, is required over and above the £5,000 per report for failing to comply with the deadline of 29 July. I consider that the appropriate penalty for failing to comply with the 27 September deadline is £20,000 per report, in addition to the £5,000 per report in respect of the July deadline, making a total of £25,000 per notice or £50,000 in all. I consider that in all the circumstances the default penalty of £45,000 in each notice should be varied to that extent.

49. Hence, I accept an element of the criticism made in Ground 3, though I stress that I have been provided with rather more information than was before the EA when it served the notices.

Ground 4: Criterion's failure to comply was due to the advice it was given by the EA to submit accurate data rather than estimated data and/or the EA failed to give due weight to the time taken to produce accurate data

50. As set out above, I do not accept that the EA gave inaccurate advice or was to blame for this. The fact that, for whatever reason, Mr Khan did not have in his mind this possibility is however a relevant factor which I take into account.

51. As the EA points out, had Criterion wished to use estimated data as part of its submission, paragraphs 26 and 27 of Schedule 1 to the CRC Order do allow such data to be relied upon (i) for electricity and gas where the amount of supply is estimated by the supplier for at least half the year; and (ii) for other fuels where the consumer has estimated supply.

52. Dealing with the second element of the ground, to some extent, the EA did bear in mind the time it could reasonably take to prepare the necessary material, so I do not accept that criticism.

Ground 5: The EA failed to recognize that Criterion took all reasonable steps (i) to comply with the CRC Order; and (ii) to rectify the failures as soon as they came to its notice

53. I agree with the EA that the factual premise of this ground is wrong. In its letter accompanying the notices, the EA did consider that Criterion

(i) had taken reasonable steps to comply with its reporting obligations by instructing an agent;

(ii) had sought to rectify its failures by taking steps "to obtain the relevant data" and "subsequently instructed another agent to complete the task" when it was let down by its original agent.

I have taken into account these facts in my recommendation that the penalties should be reduced.

Ground 6: The EA failed to give due weight to the fact that the Appellant's failures to comply with the CRC Order were attributable to its agent, RPS

54. This was expressly taken into account by the EA. It is plainly an important factor in the story.

Ground 7: The EA failed to consider several factors when deciding on an appropriate modification of the penalty

55. In its decision letter, the EA referred to "intent, foreseeability, deterrent effect, length of participation in the scheme and nature of breach" as the "most relevant" of those listed in the Guidance. Taking each in turn:

(1) *"Attitude of the person in breach"***:** It is said that the EA ought to have acknowledged that Criterion "communicated directly" with it "as soon as a possible breach was identified". This is putting it too high. I agree with the EA that Criterion's communication was "relatively poor": it failed to respond to any of the EA's communications throughout August 2011 and only responded to the notices of intent issued on 7 September 2011. Though it promised the reports within a week of that date, I am not sure it fully realised the extent of the work then involved.

(2) *"Deterrent effect"*: Plainly, £90,000 has deterrent effect. So, in my view, does the £50,000 recommended in this report.

(3) *"Personal circumstances"*: Criterion refers to the difficulties which Criterion faced during the London riots making significant demands on management. I accept the point, though it does not totally excuse the delays which occurred here. The EA does not say in terms that it accepted this point in reaching its decision.

(4) *"Financial implications"*: Criterion say that "*the very people within the Company championing the CRC scheme may not be involved in that role any longer should such a large fine be imposed on the Company*". I do not

find this a convincing reason why not to make a large fine, if otherwise justified by all the circumstances.

Ground 8: The total penalty imposed is in any event excessive

56. I have accepted this point in reaching my recommendation, though I hold to the view that significant penalties are warranted for failing to meet the 27 September deadline.

Ground 9: The EA has failed to take into account and/or give due weight to the time pressures under which Criterion was placed following the default by its agent RPS

57. The EA did to some extent take this into account, though the additional detail provided in the course of the appeal process assists me to understand how this delayed matters in practice.

Ground 10: the EA has failed to taken into account and/or give due weight to Criterion's general approach to carbon reduction commitment

58. I note the points being made by Criterion at page 9 of its September response. I do not accept that the imposition of a penalty will or indeed should have the de-motivating effect alleged on Criterion as a Scheme member. On the contrary, it will remind Criterion to ensure that at all stages its agents are sufficiently briefed to comply with the requirements of the Scheme.

5. Mr Hart's recommendation is:

I recommend to the Secretary of State that criterion's appeal of 22 May 2012 be allowed and the civil penalty notices of 27 March 2012 be varied so that the sum of £45,000 in each notice be reduced to £25,000.

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 Criterion Capital Ltd, against the two penalty notices of 27th March 2012 is allowed on the grounds set out above and in the Report.

(ii) The civil penalty notices are now varied from their original form, so that civil penalty of £45,000 in each notice be reduced to £25,000.

Signed by:

Niall Mackenzie Dated 21st March 2013

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