

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NO. AB0012

Between

KWOK TIM (郭添)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 13 March 2015

Date of Decision and Reasons for Decision: 9 December 2015

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Miss Hui Mei-sheung, Tennessy, Member Mr. Chau How-chen, Member Miss Kung Ching-yee, Athena, Member Mr. Lee Ka-chung, William and Member Miss Barbara Wong):-

Introduction

1. Case number AB0012 is an appeal by Mr. KWOK Tim (“Mr. Kwok”) against the decision of the Inter-departmental Working Group (“IWG”) dated 27 December 2012 (“**the Decision**”¹) determining that Mr. Kwok’s fishing vessel (with Certificate of Ownership Number CM63270A) (“**the Vessel**”) was a “pair-trawler” (雙拖) that was “mainly reliant on Hong Kong waters” and awarding Mr. Kwok an *ex gratia* payment of \$4,299,848 under the one-off assistance scheme in respect of the Vessel.

¹ Hearing Bundle p 284

The Trawl Ban and the EGA

2. According to Paragraph 3 of Food and Health Bureau Paper dated 29 January 2013 ("**FHB Paper**"), the Chief Executive announced in his 2010-11 Policy Address that the Government would implement a basket of fisheries management measures including banning trawling in Hong Kong waters ("**the Trawl Ban**") through legislation in order to restore our seabed and marine resources as early as possible. The legislation for the Trawl Ban was passed by the Legislative Council ("**LegCo**") in May 2011 and came into effect on 31 December 2012.
3. The Finance Committee ("**FC**") of LegCo also approved in June 2011 a one-off assistance package to trawler owners affected by the Trawl Ban, which included making ex-gratia allowance ("**EGA**") to affected trawler owners for permanent loss of fishing grounds arising from the Trawl Ban ("**EGA Package**").

The Policy and Eligibility Criteria

4. According to paragraph 7 of the FHB Paper, the policy and guiding principles underlying the EGA Package are set out in FC Paper FCR(2011-12)22 ("**FC Paper**")².
5. The eligibility criteria for application of EGA ("**the Eligibility Criteria**") are set out in Part (A) of Enclosure 1 to the FC Paper³ :

"(A) EGA

The eligibility criteria are to be determined by an inter-departmental working group (IWG) established before the commencement of the registration for applying for EGA. Only applicants who can meet the criteria are eligible for the EGA. The criteria should include, inter alia, the following:

- (a) the applicant must be the owner of a trawler vessel which is used for fishing only and not engaged in other commercial activities as at 13 October 2010, and at the time of application is still the owner of that trawler;
- (b) the applicant must be the holder of a valid certificate of ownership and operating licence of a Class III vessel issued by the Marine

² Hearing Bundle p 166

³ Hearing Bundle p 175

Department ("MD") under the Merchant Shipping (Local Vessels) (Certification and Licensing) Regulation (Cap. 548D) in respect of the trawler vessel on or before 13 October 2010; or has obtained an approval-in-principle letter for construction of a Class III vessel issued by the MD on or before 13 October 2010, and submit a document proving that the vessel under construction is a trawler vessel;

- (c) where the application is in respect of an inshore trawler, the trawler vessel in the application must wholly or partly fish within Hong Kong waters.

The Appeal Grounds

6. In this appeal, Mr. Kwok contends that although the Vessel was a pair-trawler, operating in a pair with another pair-trawler (Certificate of Ownership Number CM63307A) owned by his younger brother, Mr. Kwok Fook-sum (郭福森), and both owners were awarded *ex gratia* payments under the scheme, the awards were significantly different in that Mr. Kwok's award⁴ was \$4,299,848 whereas his younger brother's⁵ was \$4,747,658.
7. This Board notes that the younger brother has not filed any appeal in respect of his award.

The Appeal Hearing

8. At the hearing, ("the Appeal Hearing"):
- (1) Mr. Kwok conducted the appeal in person; and
 - (2) IWG conducted the appeal through their representatives, Ms. Louise Li ("Ms. Li") and Dr. So Chi-ming ("Dr. So").
9. At the end of the hearing, this Board gave leave to the parties to file additional evidence and written submissions. During the deliberation of this Board, the additional documentary evidence and submissions filed pursuant to such leave were considered as well.

⁴ Hearing Bundle p 284

⁵ Hearing Bundle p 286

Decision & Reasoning

10. Having considered all the evidence and submissions from the parties, this Board has decided to allow Mr. Kwok's appeal.
11. In coming to this decision, we first reminded ourselves of the Terms of Reference of the FCAB (Trawl Ban), namely,
 - (1) to see that the criteria established by the IWG for processing and/or vetting applications for the EGA comply with the government policy, and are fair and reasonable (in the public law sense) to the applicants;
 - (2) to see that the IWG's decisions on eligibility and the amount of the EGA granted comply with the government policy and are fair and reasonable (in the public law sense) to the applicants;
 - (3) to examine any new or additional information/evidence provided by the appellants (or their representatives) who have lodged an appeal against the IWG's decisions or by the relevant departments, and to consider the relevance of and the weight to be given to such information/evidence;
 - (4) to consider whether to uphold the IWG's decision on the appellants' cases or to revise the decisions, and to determine the type and amount of EGA payable to the appellants, as appropriate⁶.
12. The IWG's decision letters issued to Mr. Kwok and his younger brother, respectively, towards the end of December 2012 indicate that the vessel lengths of their trawlers were taken to be different: Mr. Kwok's was taken as 30.2m whereas his younger brother's was taken to be 28.6m.
13. The IWG's calculations of EGA for the Vessel were based on a formula, of which a key variable was the vessel's length⁷ (another key variable being the type of trawler in question). According to the IWG, the relationship or correlation between vessel length and EGA for pair-trawlers is not a linear one. Reference was made by the IWG to "net income" data collected by the IWG, plotted against "vessel length": see Graph P-5 in Appendix P on p 260 of the Hearing Bundle. The plot suggests that according to data collected by the IWG, net income should be highest for pair-trawlers of lengths 27m to

⁶ This FCAB would be able to confirm, revoke, vary in such manner as it thinks fit, or substitute its own decision for the IWG's decision

⁷ Hearing Bundle pp 17, 20

28m⁸; for pair-trawlers of greater vessel lengths, net income should be less than those of 27m to 28m. Thus, for example, a pair-trawler of 28m should yield a net income greater than that of a pair-trawler of, say, 30m.

14. It was the submissions of the IWG's representative at the hearing that their calculations for the Vessel was based on the approved criteria, taking into account the type of vessel and the vessel length; and that in their view there was no ground for matching partnering vessels' EGAs because there could be situations where partners change from time to time. And this Board was told that it would be hard for the department to see for sure who was partnering with whom during patrols. The IWG did not see it appropriate to simply match the EGAs of partners.
15. Mr. Kwok, on the other hand, gave oral evidence that he and his partner, i.e. his younger brother, shared their combined income and expenses equally between themselves and that the trawl ban's impact on the brothers was exactly the same. His evidence was not challenged at the hearing by the representatives of the IWG. In fact, the IWG representative expressly stated during the hearing that he would not doubt Mr. Kwok's case of sharing everything equally with his partnering brother.
16. In our view, there are unique circumstances in the present case. The partners were brothers. They had been in partnership for many years, sharing income and expenses equally. We accept Mr. Kwok's evidence in this regard and consider this a material factor for the purpose of his appeal.
17. Furthermore, there was no evidence or suggestion that either of the brothers had any other business income.
18. The plain fact is that the lengths of the brothers' vessels differed by about 1m only, i.e. about 5 to 6%. We accept Mr. Kwok's submissions that in such circumstances, there is no good reason that his EGA payment should be any different from that of his younger brother. We find that his EGA should match up with his brother's.
19. As the younger brother's EGA is not under appeal, and on the evidence, his EGA amount was determined as \$4,747,658.00, we hold that Mr. Kwok's EGA for the Vessel should also be \$4,747,658.00.

⁸ Hearing Bundle pp 260, 262, 264

Conclusion

20. This Board's decision is to substitute the amount of EGA of \$4,747,658.00 for the decision of the IWG. Insofar as there may be further payments of EGA at the end of all the appeals, the payments to Mr. Kwok in respect of the Vessel should match with his younger brother's vessel (Certificate of Ownership Number CM63307A).

Date of hearing : 13 March 2015

Heard at : Conference Room 7, Ground Floor,
Central Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(Signed)

HUI Mei-sheung, Tennessy, JP
Chairman

(Signed)

CHAU How-chen
Member

(Signed)

LEE Ka-chung, William, JP
Member

(Signed)

KUNG Ching-ye, Athena
Member

(Signed)

WONG Barbara
Member

The Appellant, Mr KWOK Tim appearing in person
Ms LI Wai-hung, Louise, Senior Fisheries Officer (Sustainable Fisheries) (Ag.),
representative on behalf of the IWG
Dr SO Chi-ming, Fisheries Officer (Sustainable Fisheries) 1, representative on
behalf of the IWG
Mr Paul LEUNG, Legal Advisor to the Board