

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD

CASE NO. AB0023

Between

LEUNG YAU KAN (梁有根)

Appellant

And

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Dates of Hearing: 9 March 2016

Date of Decision and Reasons for Decision: 17 June 2016

DECISION AND REASONS FOR DECISION

1. This is an appeal by the Appellant Mr. Leung Yau-kan of Case No. AB0023 against the decision of the Inter-departmental Working Group (“**IWG**”) dated 21 December 2012 to issue to him an amount of HK\$4,473,224.00 in respect of the ex-gratia allowance (“**EGA**”) provided by the government (“**the Appeal**”).
2. The Appeal was heard on 9 March 2016 whereby the Appellant had appeared in person together with his son, Mr. Leung Yiu-tak. The IWG was represented by Ms. Louise Li, Dr. So Chi Ming and Ms. Teresa Yuen.
3. The Board now gives its decision and reasons for the decision.

Pertinent facts and the IWG's decision

4. On 13 October 2010 (“**the Cut-off Date**”), the Chief Executive announced that the Government would implement a basket of 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 Trawl Ban took effect on 31 December 2012.
5. In light of the Trawl Ban, an assistance package was approved by the Legislative Council Finance Committee in June 2011. This was a *“One-off assistance package to trawler vessel owners, local deckhands and fish collector owners affected by the trawl ban and other related measures”*. This led to the setting-up of the IWG which was responsible for handling all matters relating to applications received under the assistance scheme. The Appellant was one such applicant.
6. In assessing EGA applications, the IWG would assess the type of the subject vessel and consider whether it fell into the category of a larger trawler that generally did not operate in Hong Kong waters or inshore trawler. If it were the former, a lump sum EGA of HK\$150,000 would be paid to the applicant. If it were the latter, the IWG would further assess and categorize the subject vessel into specific tiers in terms of its dependence on Hong Kong waters and other special cases. This meant that subject to the category of the subject vessel and the applicable apportionment criteria, an applicant could be eligible to apportion a total amount of the HK\$1,190 million of EGA with other eligible inshore trawler owners.
7. According to the IWG's records, the Appellant's fishing vessel (license no. CM65526A) (“**the Vessel**”) had 1 engine and measured 21.90 metres in length, with propulsion engine power coming up to 186.50 kilowatts, whereas the fuel tank capacity was 13.88 cubic metres.
8. On 3 October 2012, the IWG made the preliminary decision that the Vessel

fell into the category of an inshore trawler, and in observing that the time claimed to be spent fishing in inshore waters (100%) was higher than that spent by trawlers of comparable type and length (according to statistical data collected by the Agriculture, Fisheries and Conservation Department (“AFCD”)), the Appellant was requested to provide more evidence/documents to substantiate his claims.

9. By way of reply dated 9 October 2012, the Appellant provided the following explanation and supporting documents:

(1) The Vessel’s daily catch was sold daily by himself and although he had no new evidence to provide, this was what he had orally expressed during previous meetings with the IWG and the utter truth; and

(2) Fuel purchase receipts between 2009 to 2012.

10. Subsequently, the IWG wrote back to the Appellant on 21 December 2012 to inform him that all relevant materials and evidence had been considered and that their assessment of his application was completed. In accepting that the Appellant was an inshore trawler owner who was affected by the Trawl Ban, the IWG made the following decision:

Type of Vessel:	Prawn trawler
Length of Vessel (in metres):	21.90
Category of dependency on Hong Kong waters:	Highly dependent on Hong Kong waters for trawling operations
Amount of EGA payable:	\$4,473,224.00

11. By the same letter, the IWG also informed the Appellant that around 30% of the EGA payable to all eligible inshore trawler owners had been reserved and would be distributed by apportionment after the Board had determined all successful appeals.

Grounds of Appeal

12. Subsequently, the Appellant sought to appeal the IWG's decision, and by letter dated 9 January 2013, stated the following grounds of appeal:

(1) The Vessel, which was less than 9 years old, was comparatively newer as compared with other inshore trawlers. Originally, the Vessel could have operated inshore for another 10 to 20 years, but he was shocked by the fact that the compensation granted was about equivalent to that obtained by owners of vessels which were 20 to 30 years old;

(2) Due to the smaller size of the Vessel and the fact that it only had one engine, it was difficult to venture to the outer seas for fishing and as such the income from fishing using the Vessel could no longer maintain the family's livelihood;

(3) The Vessel did not employ foreign labour and fishing operations thereon was operated by his family members and himself;

13. In the Notice of Appeal dated 9 February 2014, the Appellant repeated the above 3 grounds of appeal and also stated that since the Trawl Ban came into force, the Vessel had halted operations for a year and he had not been trawling on the sly in Hong Kong waters.

Matters argued before the Board

14. In their written submissions to the Board, the IWG explained how their decision as to the amount of EGA payable to the Appellant was determined. Although the IWG tended to adopt a very similar format in their analysis of the applicable criteria as between different cases, the Board accepts that the IWG had appropriately addressed their mind to the particular circumstances of the Appellant. In particular, they had taken into account the materials

that were available to them, including information about the Vessel's type, length, material and design (which amongst other things, led to their conclusion that the Vessel only had limited capacity to travel far into offshore waters for fishing), statistical data from the AFCD concerning homeport and inshore sightings of the Vessel, the employment profile of the crew, fishing permits held by the Appellant, and also the explanations/evidence submitted by the Appellant. We are satisfied that the Vessel is an eligible inshore trawler as assessed by the IWG (not that there is any dispute over this).

15. Moreover, the IWG had prepared a presentation to explain the rationale behind the apportionment formula and the categorization of vessels. Explanation was also given concerning how the EGA amount payable to the Appellant (denoted as "*E_i*" in the IWG's calculations at page 22 of the bundle) was arrived at. Put simply, this involved the application of an apportionment ratio (denoted as "*P_i*" in the calculations) to the total amount of EGA available for distribution to the total sum of HK\$828,870,000 that was assessed to be available for distribution among eligible inshore trawlers. By reference to the data contained at page 280 of the bundle, the apportionment ratio that was assessed to be applicable in the present case was taken to be 0.005396775, on the basis that the Vessel was 22m in length. Therefore:

$$E_i = \text{HK\$}828,870,000 \times 0.005396775 = \$4,473,224 \text{ (rounded to the nearest dollar)}$$

16. The Board was given to understand from the Appellant that in order to acquire the Vessel in the first place, he had had to sell his old vessel so that he could have the funds to build a new one. The Vessel itself was commissioned and built at the cost of HK\$1 million, whereby the building process took 1-2 months and involved his entire family. It then served for 8 years before the Trawl Ban was implemented. Although he had initially mentioned that the Trawl Ban meant the Vessel was good for nothing more

than scrap, he later admitted, in response to the Board's questioning, that he did in fact sell the Vessel many years ago and got around HK\$1+ million for it. According to the Appellant, it would cost much more, around HK\$3 million to build such a vessel, and that he would not have gone through the cost and trouble of the investment had he known about the Trawl Ban earlier.

17. It was evident from the Appellant's submissions at the hearing that he took great issue with the age of the Vessel being newer than those owned by some other EGA applicants who were awarded with the same amount as he was, or more. As such he doubted whether that the IWG knew/took into account the age of the Vessel, and launched the appeal. The fact that he was only in his forties and could have fished for another 30 years was raised in conjunction, whereby the Appellant expressed sore dismay over the fact that the Trawl Ban had taken away from him his only means of livelihood, and stated that although he had the permit to fish in Mainland waters, he did not have the relevant know-how.

18. In response to the Appellant's grievances as well as questioning from the members of the Board, the IWG explained that:

(1) They could gather information about the age of the Vessel from documentary records pertaining thereto, and as such this data was something known to them. However the IWG would not factor in the age of trawlers when determining the actual amount of EGA to be awarded, and the Finance Committee of the Legislative Council did not take into account the age of vessels either, when they approved the apportionment formula.

(2) The Appellant's argument that because the Vessel was newer, he suffered greater loss and should therefore be awarded with a greater sum of EGA would be countered by those who would argue that because their vessels were older, their capacity to venture further offshore to fish was weaker and hence their loss was greater. Plus, one also had to contend with the

view that for those who chose to sell their vessels (like the Appellant), its relative newness and better condition gave him an edge in terms of the greater price he could demand in the Mainland China market. Given these variables, it can be seen that the age/loss correlation argument is certainly not a simple one and that the newer age of the Vessel does not necessarily correlate with greater loss. In this light, it should be understandable why the age of trawlers was not factored into the apportionment formula. For the purposes of practicability and fairness, only the more obvious, objective and measurable factors such as type and length of the vessel could be taken into account.

- (3) It was also important to bear in mind that the EGA's actual purpose was to compensate fishermen for the loss of their fishing grounds, and not to compensate them for the value of their vessels. In particular, the EGA was intended to assist trawler owners to switch to other methods of fishing in Hong Kong, or to refurbish their existing vessels/purchase a new one so that they might venture to the seas in the Mainland where trawling is not prohibited.
- (4) Indeed, the circumstances of each individual varied and there was no knowing whether a particular owner would prefer to refurbish his vessel or sell it altogether. So as to assist owners who, in light of their own circumstances, preferred to sell, there was a voluntary buy-out scheme providing them with the option to surrender their vessels to Government as an alternative to having to make their own arrangements to sell their vessels in the market.
- (5) It was not feasible for the IWG to factor in various aspects of the owner's particular circumstances because the profitability of fishing operations depended on far too many variables. Besides, such data was often not documented and therefore the IWG had no such information at hand. The IWG could only rely on statistical data, and did, insofar as those data/statistics were available to them, take into account the usual costs

of fishing operations such as those for the purchase of fuel, ice, tools, and employment of labour. The IWG also made it a point that they were obliged to adhere to the apportionment formula approved by the Finance Committee of the Legislative Council.

(6) The IWG also drew attention to the fact that deckhands working aboard affected inshore trawlers were also entitled to a one-off grant of HK\$34,000 per person. In practice, such deckhands would include family members of the trawler's owner who also worked onboard.

(7) The IWG emphasized that they had, according to the principles previously approved by the Finance Committee of the Legislative Council, already considered all of the materials before them and had apportioned to the Appellant the highest amount of EGA payable to inshore prawn trawlers of comparable size as the Vessel.

The Board's Decision

19. The Board has heard how the criteria adopted by the IWG had been applied towards their determination of the EGA payable to the Appellant, and take the view that the IWG's representatives have provided satisfactory explanations to the questions raised by the Board members, and have also adequately responded to the Appellant's submissions. Although we do hear the Appellant's grievances, we also see much force in the IWG submissions as regards why the age of individual trawlers cannot be regarded as having a necessary correlation to loss.

20. Moreover, in line with the policy of the EGA, the Board is also obliged to look at the overall picture in order to seek out a practicable way forward that is also fair to all of the EGA applicants. The Board agrees that it is important to have regard to the purpose of the EGA scheme which is not to compensate those affected, but to assist them in the face of change.

21. Having carefully examined the evidence and submissions of both the Appellant and the IWG, the Board notes that no compelling evidence has been presented to support the Appellant's argument that his unique circumstances merit an award of a greater sum of EGA. As such, we find no reason to disturb the findings made by the IWG, who as mentioned above, has awarded to the Appellant the highest amount of EGA for inshore prawn trawlers of comparable size. The Appeal is dismissed.

Case No. AB0023

Date of hearing : 9 March 2016
Heard at : Room 1801, 18th Floor, East Wing Central
Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

signed

HUI Mei Sheung, Tennessy, JP

Chairman

signed

Mr. CHAN Wai Chung
Member

signed

Mr. LO Wai Kei, Wilkie
Member

signed

Miss WONG Pie Yue, Cleresa
Member

signed

Mr SOO Kwok Leung
Member

The Appellant, Mr. Leung Yau-Kan and an appointed representative, Mr. Leung Yiu-tak.

Ms. Louise Li, Senior Fisheries Officer (Sustainable Fisheries), AFCD, representative on behalf of the IWG.

Dr. So Chi-ming, Fisheries Officer (Sustainable Fisheries)¹, AFCD, representative on behalf of the IWG.

Ms. Yuen Wing-sum Teresa, Fisheries Officer (Sustainable Fisheries) ⁴, AFCD, representative on behalf of the IWG.

Ms. Abigail Wong, Legal Advisor of the Board