

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NO. AB0210

Between

CHOW TAK (周德)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 30 December 2015

Date of Decision and Reasons for Decision: 1 March 2016

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mr. Yeung Ming-tai, Member Mr. Kong Tze-wing, James, Member Dr. Chan Yin-nin, Sammy, Member Mr. Law Chi-yuen and Member Prof. Chu Ka-hou):-

Introduction

1. Case number AB0210 is an appeal by Mr. Chow Tak (“**Mr. Chow**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 30 November 2012 (“**the Decision**”¹) determining that Mr. Chow’s fishing vessel (with Certificate of Ownership Number CM90088V) (“**the Vessel**”) was an eligible trawler that was not ordinarily operating in Hong Kong waters (一艘一般不在香港水域作業的合資格拖網漁船) and awarding Mr. Chow an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the Vessel.

¹ Hearing Bundle p 93

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**”).
5. The eligibility criteria for application of EGA (“**the Eligibility Criteria**”) are set out in Part (A) of Enclosure 1 to the FC Paper :

“(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 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. Chow contends that at the material time, the Vessel was operating 25-30% of its time in Hong Kong waters²; in particular, during the winter (i.e. the 9th to 1st months of the lunar year) when winds were high and seas were rough. Sometimes, he would operate the Vessel in Hong Kong waters because of the fishing season (漁汛)³.
- 7. Mr. Chow lodged a witness statement dated 10 November 2015 for the purpose of the appeal hearing⁴. In essence, he states that fishermen do not tend to keep large quantities of documentation or complete accounting records. According to him, this has led to an unfair situation where those who are truly affected by the Trawl Ban cannot adduce evidence in support of their claims for compensation over and above the general category.

The Appeal Hearing

- 8. At the hearing, (**“the Appeal Hearing”**):

- (1) Mr. Chow conducted the appeal in person; and

² Hearing Bundle p 3

³ Hearing Bundle p 4

⁴ Hearing Bundle p 270

- (2) IWG conducted the appeal through their representatives, Dr Albert Leung, Dr William Siu and Dr So Chi-ming.
9. Apart from relying on the documentary evidence already submitted to the Board prior to the hearing, Mr. Chow gave oral evidence, made oral submissions and raised questions with the IWG representatives.
10. At the hearing, Mr. Chow elaborated on the time spent and operation of the Vessel in Hong Kong waters. According to his oral evidence, depending on the sea conditions, i.e. wind strengths and wave heights, the actual amount of time he operated in Hong Kong waters during the 9th to 1st months of the lunar year could vary from 15% to 25%. Usually, stormy weather would only last for a few days at a time. When the sea became calmer, he would depart again and sail outside of Hong Kong waters. However, it would be uneconomical to trawl too near the coast of Mainland China, as there would be a penalty of RMB50,000 should large vessels such as the Vessel be found fishing within 20-30 nautical miles from the China coast. His *modus operandi* was to fish close to Hong Kong waters so that he could retreat to Hong Kong to avoid troubles from Mainland patrols.
11. On being questioned by the Board (Member Mr. James Kong) about the number of days on average Mr. Chow would consider stormy, Mr. Chow replied by saying it varied and all depended on the year: for 2015, less than 1% of the days were stormy. He made the point that during stormy days, it would be unsafe for workers sailing in the Vessel.
12. On being questioned by another Board member (Mr. Law Chi-yuen) about the amount of time spent operating in Area "17" within Hong Kong waters⁵, Mr. Chow replied by saying at least 10% of the time was spent fishing in Area "17".
13. Mr. Chow gave a historical account of his ownership of the Vessel. In 2005, he bought the Vessel and became its owner⁶. However, the "operating licence" had already expired at that time and it was not until 2009 when he had the Vessel properly licensed to operate as a fishing vessel once

⁵ Hearing Bundle pp 40, 46

⁶ Hearing Bundle p 48

again so that he could enter Hong Kong waters to fish. He used to operate the Vessel as a “pair trawler” in tandem with his partner, Mr. Chow Loy (周來), but they parted company after 2010. In terms of fish sale receipts, Mr. Chow was able to produce some 89 pages of copies of all his receipts, mostly sold to a wholesaler called “成興仔” via collection boats. Mr. Chow was unable to tell to whom “成興仔” eventually sold.

14. On the issue of refuelling, Mr. Chow gave evidence that he used to refuel once a month or so. The reason he gave was that fuel prices fluctuated: when the price was low, he would buy more. IWG’s representatives’ observations and submissions, on the other hand, were that there was evidence of very large quantities of fuel being purchased⁷, enough for 100 days of use in general; and that if the Vessel had been operated close to Hong Kong shores, it would not need to be refilled to such an extent and tie down so much cash-flow for the business.

Decision & Reasoning

15. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss Mr. Chow’s appeal.
16. Mr. Chow’s evidence, during the course of the appeal, on the amount of time spent operating the Vessel in Hong Kong waters was inconsistent. The percentage figure started out as 25-30%⁸, moved to 15%⁹ in January 2012 and 10-20%¹⁰ in February 2013, and finally to “no average number of days” when he was giving evidence at the hearing. The thrust of his evidence in this regard was that he would operate in Hong Kong waters only when the seas were rough, usually during the winter season of 9th to 1st months of lunar year. In the questionnaire he answered, he stated he operated the Vessel about 250 days during the year ending 13 October 2010¹¹. Therefore, the effect of his evidence would be that there were some 25 to 50 stormy days during those 5 months, and on those days, the Vessel operated in Hong Kong waters. We find that rather unlikely to be the real situation as there could not be so many stormy days during those 5 months. Further, if the sea were really so rough, it would be more likely

⁷ Hearing Bundle p 227

⁸ Hearing Bundle p 3

⁹ Hearing Bundle p 39

¹⁰ Hearing Bundle p 8

¹¹ Hearing Bundle p 39

than not that the Vessel would be berthed, instead of operating.

17. Further, according to Mr. Chow's evidence, the Vessel had as many as 7 direct workers working on board who were from Mainland China¹² and who did not have the permission to work in Hong Kong waters. Although he gave oral evidence that suggested that he used those workers illegally when he was operating the Vessel in Hong Kong waters, we are not persuaded that there would have been sufficient commercial incentives for him to do that when he could legally engage those workers to help him operate the business outside Hong Kong waters. Operating the Vessel illegally in Hong Kong waters only when the seas were rough is perhaps a true account of what had actually taken place. However, as explained in paragraph 16 above, we do not consider it likely that the Vessel was operating 10% or more of its time in Hong Kong waters.

18. We further take into consideration the factors relied on by the IWG in coming to the Decision and the submissions made by them for the purpose of the appeal. In particular, we note that the Vessel was of a steel construction capable of withstanding operating conditions outside of Hong Kong waters. It had large fuel tanks and powerful engines to keep it operating far outside Hong Kong waters. Further, during 2011, officers of the Agriculture, Fisheries and Conservation Department ("AFCD") conducted a regular check of those vessels which berthed in Hong Kong typhoon shelters and found that, apart from Lunar New Year Holidays and Fishing Moratorium (休漁期), there were only two occasions when the Vessel berthed in Hong Kong. Furthermore, in the course of routine checking by the officers of AFCD during the period between 2009 and 2011, the Vessel was not found to be working in Hong Kong waters. All these evidence show it likely that the Vessel was operating outside Hong Kong waters.

19. Having considered all the evidence, the Board has taken the view that Mr. Chow has not been able to discharge the burden of proof to establish his case that, on a balance of probabilities, that the Vessel had been spending more than 10% of its time, be it 10%, 15% or 25%, operating in Hong Kong waters.

¹² Hearing Bundle p 38

Conclusion

20. In the circumstances, this appeal is dismissed.

Date of hearing : 30 December 2015

Heard at : Conference Room 1801, 18th Floor, East Wing
Central Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(signed)

Mr. YEUNG Ming-tai
Chairman

(signed)

Mr. KONG Tze-wing, James, MH, JP
Member

(signed)

Dr. CHAN Yin-nin, Sammy
Member

(signed)

Mr. LAW Chi-yuen
Member

(signed)

Prof. CHU Ka-hou
Member

The Appellant, Mr Chow Tak appearing in person

Dr LEUNG Wai-yin, Albert, Supervisory Fisheries Management Officer, AFCD,
representative on behalf of the IWG

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

Dr SIU Ho-lim, William, Fisheries Officer (Sustainable Fisheries)3, AFCD,
representative on behalf of the IWG

Mr Paul LEUNG, Legal Advisor to the Board