

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NO. AB0236

Between

LEE YAT LOONG (李日龍)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 11 May 2016

Date of Decision and Reasons for Decision: 26 May 2016

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mr. FEE Chung-ming, Johnny, Member Ms. AU Sin-lun, Catherine, Member Ms. WONG Pie-yue, Cleresa, Member Mr. CHAN Weng-Yew, Andrew and Member Mr. KONG Tze-wing, James):-

Introduction

1. Case number AB0236 is an appeal by Mr. LEE Yat Loong (李日龍) (“**Mr. Lee**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 30 November 2012 (“**the Decision**”¹) determining that Mr. Lee’s fishing vessel (with Certificate of Ownership Number C139153) (“**the Vessel**”) was an eligible trawler that generally did not operate 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 him an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the Vessel.
2. According to Mr. Lee, at the material time before the Trawl Ban (as defined

¹ Hearing Bundle p 93

hereinbelow), the Vessel had been operating as a “pair trawler” (雙拖) and his partnering pair trawler (with Certificate of Ownership Number CM63614A) was owned by one Mr. HO Yung Choi (何容財)² (“**Mr. Ho**”).

3. According to the IWG, Mr. Ho’s said vessel was also determined by the IWG as an eligible trawler that generally did not operate in Hong Kong waters. Mr. Ho was likewise awarded an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of his pair trawler. However, Mr. Ho has not lodged an appeal against the *ex gratia* payment decision.

The Trawl Ban and the EGA

4. 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 statutory notice for the Trawl Ban was published in the Government Gazette in March 2011 and came into effect on 31 December 2012.
5. The Finance Committee (“**FC**”) of the Legislative Council 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 Guiding Principle

6. 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**”).
7. According to Paragraph 12 of the FC Paper, the guiding principle is that the EGA apportioned to different groups of claimants should be proportional to the impact on them caused by the Trawl Ban.
8. Owners of inshore trawlers which operated wholly or partly in Hong Kong waters were expected to be most affected when the Trawl Ban took effect as they would lose their fishing grounds in Hong Kong waters. They would

² Hearing Bundle p 43 para.16

receive a greater amount of EGA than owners of larger trawlers³.

9. Owners of larger trawlers which generally did not operate in Hong Kong waters were also affected by the Trawl Ban since they would lose the option to trawl in Hong Kong waters in the future. However, as the impact of the Trawl Ban on them was far much less when compared with owners of inshore trawlers, an owner of larger trawler is only granted a lump sum EGA of HK\$150,000⁴.

The Appeal Grounds

10. In the present appeal, Mr. Lee contends that:
 - (1) the Vessel had been operated as an inshore trawler (近岸拖網漁船) with 25% – 30% dependence on Hong Kong waters in its operations⁵;
 - (2) the Vessel should not have been categorized in the “larger trawler” category by the IWG⁶;
 - (3) his mode of operations at the material time was that he would first trawl in Hong Kong waters and switch to the outer waters if there were poor catches within Hong Kong waters. After trawling in the outer waters, he would return to Hong Kong waters to trawl⁷;
 - (4) he as a vessel owner had been compensated for marine operations to the seabed (sand dredging and mud disposal) (挖沙倒泥工程賠償) and that proved that the Vessel had indeed been operating in Hong Kong waters⁸;
 - (5) as he becomes gradually older, he will not be able to withstand the rough seas in the outer waters and will eventually have to move back to inshore waters for his fishing operations – and as such should receive fair compensation as a result of the trawl ban⁹;
11. Mr. Lee lodged a witness statement dated 27 October 2015 for the purpose of the appeal hearing¹⁰. In essence, he argues in his statement that:
 - (1) traditional fishermen do not keep large quantities of documentation or complete accounting records. Accordingly, this has led to an unfair situation where those who are truly affected by the Trawl

³ Paras. 5 to 10 of FC Paper

⁴ Paras. 9 and 10 of FC Paper

⁵ Hearing Bundle pp 3, 4

⁶ Hearing Bundle p 4

⁷ Hearing Bundle p 4

⁸ Hearing Bundle p 4

⁹ Hearing Bundle p 9

¹⁰ Hearing Bundle p 270

Ban are not in a position to adduce evidence in support of their claims for compensation over and above the general category¹¹;

- (2) there has been a case where a fishing vessel had been idling inside a typhoon shelter for extensive periods of time and by reason of IWG's shelter visit sightings, the vessel was categorized as a highly Hong Kong waters dependent trawler¹².

The Appeal Hearing

12. At the hearing, ("**the Appeal Hearing**"):

- (1) Mr. Lee conducted the appeal in person; and
- (2) IWG conducted the appeal through their representatives, Ms. Louise Li, Dr William Siu and Ms Teresa Yuen.

13. Apart from relying on the documentary evidence already submitted to the Board prior to the hearing, Mr. Lee gave oral evidence, made oral submissions and raised questions with the IWG representatives.

14. Mr. Lee renewed his complaint that he received no compensation for the Trawl Ban. However, he admitted that when he received compensation for marine operations to the seabed (sand dredging and mud disposal) (挖沙倒泥工程賠償), which was many years ago, much before the 2012 ban, he had been operating another vessel¹³, not *the Vessel*. He only became the owner of the *Vessel* sometime in 2009¹⁴. He did not dispute that the marine operations compensation had been as long ago as 1994.

15. Mr. Lee told the Board that he did not know whether or not his trawling partner, Mr. Ho, had lodged an appeal or not. He suggested that Mr. Ho might be well off and whether or not Mr. Ho lodged an appeal was none of his business.

16. Mr. Lee confirmed that his operations continued to be in the outer waters and it had not come to the point where he had to resort to coming back to Hong Kong waters to make a living. Mr. Lee told the Board that the Trawl Ban stopped him from doing so.

¹¹ Hearing Bundle p 270

¹² Hearing Bundle p 270

¹³ which he has since disposed of

¹⁴ Hearing Bundle p 52

17. On the issue of workers, Mr. Lee informed the Board that he operated the Vessel by engaging 7 workers from the Mainland, none of whom had permission to enter Hong Kong and work under the Mainland Fishermen Deckhand Scheme (內地過港漁工計劃). He picked up the workers from Lingding Island and, after his fishing operations, dropped them off back in Lingding Island. According to him in his oral evidence, he dropped them off in Lingding Island if there was no fish in Hong Kong waters to trawl.
18. On the issue of dependency on Hong Kong waters, Mr. Lee admitted that he could not calculate how much his operations depended on Hong Kong waters with any degree of accuracy. In this connection, the Board notes that in his appeal application in February 2014, Mr. Lee had stated his dependency on Hong Kong waters to be 25% to 30%; whereas in his earlier questionnaire answers¹⁵ back in January 2012, he had stated the dependency to be just 15%.
19. Towards the end of the hearing, Mr. Lee pointed out that just because a vessel was large in size should not preclude it from operating in Hong Kong waters. He stated there were some 30 or more large trawlers which were categorized by the IWG as inshore trawlers and their owners received substantial compensation amounts due to the Trawl Ban. He singled out “hang trawlers” as a category of trawlers which appeared to have been viewed by the IWG as operating “inshore” despite their large sizes or sizes comparable to the Vessel.
20. Mr. Lee expressed his grievance that even though he had been a fisherman for a number of decades, he was only given \$150,000 to compensate him as a result of the Trawl Ban. He saw unfairness in IWG’s decisions.

Decision & Reasoning

21. Having considered all the evidence and submissions from the parties, this Board has regrettably decided to dismiss Mr. Lee’s appeal.
22. The burden is on the appellant to show that the decision of the IWG in respect of his case is incorrect. The standard of proof is on the balance of probabilities. In our view, Mr. Lee has not been able to show or convince this Board that he had at the material time been operating the Vessel with a Hong Kong waters dependency of 15% as claimed, or 25% to 30% as also

¹⁵ Hearing Bundle p 43

claimed. In fact, on the evidence presented before us, Mr. Lee has not established dependency of 10% or more - 10% or more being the threshold for a vessel to be categorized as “inshore”.

- (1) He admitted he did not know how to establish his claim of 15% dependency through calculations;
- (2) He has submitted conflicting figures of dependency, ranging from 15% to 30%;
- (3) He has not submitted any documentary evidence to suggest a dependency as claimed or one that is 10% or more;
- (4) On the other hand, we accept IWG’s analysis¹⁶ of the average Hong Kong waters dependency of pair trawler operators. According to their analysis, which was based on 2 surveys conducted over extensive periods of time, with sampling rates of 7% and 38% respectively¹⁷ in respect of each type of trawlers in question, the average dependency of pair trawlers of sizes similar to the Vessel was about 0.68% only. For small pair trawlers, for example, those of 26m in length or shorter, their dependency would on average be greater than 10%. Here, Mr. Lee has not adduced any evidence to challenge IWG’s analysis. Nor has he put forward any evidence to bring his case up to a level of 10%, or greater, dependency.
- (5) We do not see any fault in IWG’s analysis of Mr. Lee’s application. The IWG has taken into account¹⁸ a wide and pertinent range of factors before arriving at the conclusion that the Vessel was not being generally operated within Hong Kong waters. Those factors included factors set out in the FHB Paper¹⁹ dated 29 January 2013. We find the basis of IWG’s decision to be reliable and sound.
- (6) Despite his suggestion that he might need to move back to Hong Kong waters to fish in his older years, Mr. Lee has not in fact done so.
- (7) Mr. Ho, being Mr. Lee’s pairing partner, is not appealing against IWG’s decision in respect of his case. The Board accepts that the absence of an appeal by Mr. Ho can have a number of explanations. Without any evidence from Mr. Ho, the Board is not in a position to

¹⁶ Hearing Bundle p 233

¹⁷ Hearing Bundle pp 226, 228

¹⁸ Hearing Bundle pp 14 - 16

¹⁹ Hearing Bundle p 180

second-guess his reason and abstains from doing so here.

- (8) IWG's sea survey records show a complete lack of sighting of the Vessel
 - (9) The 7 Mainland workers engaged by Mr. Lee on the Vessel could not legitimately have worked in Hong Kong waters. They were picked up from Lingding Island, which is outside Hong Kong waters, and returned to Lingding Island at the end of each fishing trip. There is no evidence to suggest that these workers helped Mr. Lee to trawl in Hong Kong waters at all, let alone for 10% or more of the time spent. There is insufficient evidence to show that the Vessel could have been operated by just the remaining crew of 2 as an operating trawler.
23. Mr. Lee's point about there being unfairness in his receiving \$150,000 (despite his having been in the industry for decades) as compared with some others who were given millions in compensation is not a valid ground in the circumstances of this case. The burden is on him to persuade this Board to accept his case and he has failed to do so here. Furthermore, the FC had already considered the need to cater for owners of large trawlers and made provisions to compensate them for the adverse effects of the Trawl Ban on the owners, both immediately and in the long term²⁰. Therefore, Mr. Lee's point that he would lose the option to trawl in Hong Kong waters as a result of the Trawl Ban cannot be a valid ground of appeal in any case.
24. In respect of Mr. Lee's contention that there was proof of his vessel having been operated in Hong Kong waters, which proof was provided by the fact that he had received compensation money for marine operations such as sand dredging and mud disposal, we do not put weight on such allegation. Firstly, no evidence was put forward to support that allegation. More importantly, Mr. Lee admitted during the hearing that the vessel in question when he received such compensation in 1994 was a vessel different from the Vessel. For the purpose of this appeal, we are to focus on the Vessel and on the period closer to the announcement of the Trawl Ban policy. Evidence of operating in Hong Kong waters more than 15 years earlier and in respect of another vessel would have little probative value to this appeal, if any.
25. Finally, to address the complaint in Mr. Lee's witness statement about

²⁰ Hearing Bundle p 158, 159

perceived unfairness in IWG granting substantial compensations to owners of trawlers said to be idling in typhoon shelters for extensive periods of time, this Board is unable to take the matter further because no particulars were provided by Mr. Lee despite opportunities having been given to him. In any event, the Board's duty is to hear Mr. Lee's case, his evidence and submissions about his case (as well as IWG's evidence and submissions) and to determine whether or not Mr. Lee's appeal should be allowed. Whether or not there were indeed idling trawlers whose owners received more compensation than they deserved is not a matter that this Board is tasked to decide in this appeal.

Conclusion

26. In the circumstances, this appeal is dismissed.

Date of hearing : 11 May 2016

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

(signed)

Mr. FEE Chung-ming, Johnny, JP
Chairman

(signed)

Ms. AU Sin-lun, Catherine
Member

(signed)

Ms. WONG Pie-yue, Cleresa
Member

(signed)

Mr. CHAN Weng-Yew, Andrew
Member

(signed)

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

The Appellant, LEE Yat Loong appearing in person

Ms. LI Wai-hung, Louise, Senior Fisheries Officer, AFCD, representative on behalf of the IWG

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

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

Mr Paul LEUNG, Legal Advisor to the Board