

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NOS. AB0337 & AB0338
(HEARD TOGETHER)

Between

LO YEE KAU (盧二狗)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

And between

LO SAU SANG (盧壽生)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 4 March 2016

Date of Decision and Reasons for Decision: 24 March 2017

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mr. TO Wai-keung, Vincent, Member Ms. AU Sin-lun, Catherine, Member Miss Nancy CHAN, Member Mr. AU Pak-ching, Romeo and Member Mr. KONG Tze-wing, James):-

Introduction

1. Case number AB0337 is an appeal by Mr. LO Yee-kau (盧二狗) ("Mr. YK Lo") against the decision of the Inter-departmental Working Group ("IWG") dated 30 November 2012 ("the AB0337 Decision"¹) determining that Mr. YK Lo's fishing

¹ Hearing Bundle p 88 of AB0337

vessel (with Certificate of Ownership Number CM90083V) (“**the AB0337 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 AB0337 Vessel.

2. Case number AB0338, on the other hand, is an appeal by Mr. LO Sau-sang (盧壽生) (“**Mr. SS Lo**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 30 November 2012 (“**the AB0338**”) determining that Mr. SS Lo’s fishing vessel (with Certificate of Ownership Number CM90082V) (“**the AB0338 Vessel**”) was also 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 AB0338 Vessel.
3. The appeals of Mr. YK Lo and Mr. SS Lo were with the Appellants’ express consent³ heard together on 4 March 2016 for the reason that the 2 vessels in questions had, according to the Appellants, at the material time before the Trawl Ban (as defined hereinbelow) been operating in tandem as “pair trawlers” (雙拖).

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 legislation for the Trawl Ban was passed by the Legislative Council (“**LegCo**”) in May 2011 and came into effect on 31 December 2012.
5. 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 Guiding Principle

6. According to paragraph 7 of the FHB Paper, the policy and guiding principles

² Hearing Bundle p 88 of AB0338

³ Hearing Bundle p 311 of AB0337 and Hearing Bundle p 312 of AB0338

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 receive a greater amount of EGA than owners of larger trawlers⁴.
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\$150,000⁵.

The Appeal Grounds

10. In both their appeals, the Appellants contend⁶ that
 - (1) their dependency on Hong Kong waters for their trawling operations amounted to 20-30% (in the case of AB0338) and 30% (in the case of AB0337);
 - (2) they operated near Cheung Chau (長洲), Po Toi (蒲台島) and Ninepin Group (果洲群島) when the weather was bad or just before and after a typhoon;
 - (3) the EGA sum of \$150,000 was too little and unfair, as they actually spent 20 to 30% (in the case of AB0038) and 30% (in the case of AB0337) operating in Hong Kong waters.
11. In a statement dated 6 February 2013⁷, apparently signed by Mr. YK Lo with his seal in Chinese and a simple cross (十字), Mr. YK Lo contended that from 2009 through 2011 until 2013, the AB0337 Vessel did in fact spend “a part” of the time operating in Hong Kong waters predominantly near North Waglan Island (橫瀾頭) and Po Toi. He did not specify in the statement the proportion of time

⁴ Paras. 5 to 10 of FC Paper

⁵ Paras. 9 and 10 of FC Paper

⁶ Hearing Bundle p 3 of AB0337 and p 3 of AB0338

⁷ Hearing Bundle p 269 of AB0337

spent operating there. He further contended that the quantities of fish that could be caught near Hong Kong waters had, in recent times, dwindled. As a result, he had no alternative but to spend most of his time operating outside Hong Kong waters. Now that he was getting old, he would eventually move back inshore. A fair compensation should thus be paid by the Government to compensate him for the loss of fishing grounds resulting from the trawl ban. An identical statement, apparently signed by Mr. SS Lo, is also in evidence⁸ for AB0338.

12. In a statement dated 21 September 2015⁹, Mr. SS Lo stated that he could not adduce any evidence to prove his claim that he was operating in Hong Kong waters for 20 to 30% of his time, but his claim reflected the truth. He contended that he operated in Hong Kong waters when typhoons were approaching or leaving, or at times when the winds were high. He challenged the accuracy of the statistics relied on by the IWG. He further contended that he chose to employ Mainland workers who did not have permits to enter or work in Hong Kong waters. He stated that his vessel was mostly moored at Mainland fishing ports such as Ling Ding Island (伶仃島) and Guishan Island (桂山島) even when he was operating in Hong Kong waters. Because of lack of entry permits for his workers to enter Hong Kong, he avoided mooring in typhoon shelters in Hong Kong.

The Appeal Hearing

13. At the hearing, ("**the Appeal Hearing**"):
 - (1) Mr. SS Lo conducted his appeal in person; Mr. SS Lo further represented Mr. YK Lo in the conduct of Mr. YK Lo's appeal; and
 - (2) IWG conducted the appeal through their representatives, Dr. William Siu and Dr. Albert Leung.
14. No documentary evidence of fish sale, fuel expense or payment for ice has been submitted by the Appellants.
15. Mr. SS Lo gave oral evidence, made oral submissions and raised questions with the IWG representatives. On the other hand, Mr. YK Lo was absent at the hearing.
16. Mr. SS Lo's oral evidence can be summarized as follows:
 - (1) he could not tell what percentage of operations was done in Hong Kong waters;

⁸ Hearing Bundle p 269 of AB0338

⁹ Hearing Bundle p 265 of AB0338

- (2) the 7 Mainland workers¹⁰ on board each of the 2 vessels were not permitted to work in Hong Kong waters;
- (3) the Mainland workers could be dropped off at Mainland ports;
- (4) the 2 pair trawlers could not be operated with just the remaining 2 workers on each vessel who did have the right to work in Hong Kong waters; the trawlers could not operate with a staff of only 2 each; with only 2 workers, only small quantities of fish could be unloaded in Hong Kong.

17. In oral submissions, Mr. SS Lo argued that just because they were never sighted in Hong Kong waters by the IWG during sea patrols or surveys, it did not necessarily mean that the Appellants were not operating in Hong Kong waters 30% of the time. He further argued, likewise, that having large engine power did not necessarily mean the Appellants were operating outside Hong Kong.

Decision & Reasoning

18. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
19. It is not in dispute that¹¹ both vessels were pair trawlers of 38.22m / 38.23m in length, of steel construction, each having 1,193kW aggregate engine power and a fuel tank of 192.24 cubic metres. We accept IWG's submission and analysis that such vessels would be capable of operating well beyond Hong Kong waters.
20. As conceded by Mr. SS Lo during the hearing, each vessel had 7 Mainland workers who did not have permission to work in Hong Kong waters. And without such workers, i.e. with just 2 remaining workers on board, it would be impossible to operate the pair trawlers. It would therefore be reasonable to infer from his evidence that the Appellants were operating their vessels at least predominantly outside Hong Kong waters.
21. The concession by Mr. SS Lo at the start of the hearing that he could not tell how much time, as a percentage, the vessels were operating in Hong Kong waters is a sufficient ground in itself for the Board to dismiss the appeals, since the burden is on the Appellants to establish their case.
22. Further, we have carefully examined IWG's grounds for its decision, in particular,

¹⁰ Hearing Bundle p 39 of AB0337 and p 39 of AB0338

¹¹ Hearing Bundle p 13 of AB0337 and p 13 of AB0338

those set out in the Statement Submitted by the Respondent in the hearing bundles, Parts B, C and D (乙部 丙部 丁部). For example, the Appellants had permits from the Mainland authorities to fish in Mainland waters, the patrol records show no sighting of the Appellants' vessels at sea and very few sightings at typhoon shelters, and the Appellants' staffing arrangements.

23. Having considered all the evidence, the Board has taken the view that the Appellants have not been able to discharge the burden of proof to establish their case that, on a balance of probabilities, their vessels had been spending about 20 to 30%, or 10% which is the required threshold¹², of its time operating in Hong Kong waters. There is no real evidence to support any such case, whether it be 10%, 20%, 30% or anything in between. The burden is on the Appellants to persuade this Board to accept their case and they have failed to do so here. They have also failed to challenge IWG's reasoning as set out in the Statement submitted by the Respondent in the hearing bundles, Parts B, C and D (乙部 丙部 丁部). The contention that no sighting should not equate no fishing in Hong Kong is unsound. It is for the Appellants to positively show they *did* operate in Hong Kong to the extent claimed.
24. Lastly, as a final remark, the Board wishes to state that despite the behavior and attitude exhibited by Mr. SS Lo at the hearing, our decision in these appeals was in no way affected.

Conclusion

25. In the circumstances, these appeals are dismissed. IWG has not asked for costs, and accordingly we make no order as to costs of this Appeal.

¹² The Board is mindful that any percentage of fishing time in Hong Kong waters at or above 10% would satisfy the threshold requirement stipulated in Annex III of the Food and Health Bureau Paper dated 29 January 2013

Date of hearing : 4 March 2016
Heard at : Room 1801, 18/F, East Wing Central Government
Offices, 2 Tim Mei Avenue, Tamar, Hong Kong

(signed)

Mr. TO Wai-keung, Vincent, BBS
Chairman

(signed)

Ms. AU Sin-lun, Catherine
Member

(signed)

Miss Nancy Chan
Member

(signed)

Mr. AU Pak-ching, Romeo, JP
Member

(signed)

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

The Appellants, LO Sau-sang appearing in person in AB0338 and as authorized representative of the appellant in AB0337, that appellant being absent
Dr LEUNG Wai-yin, Albert, Supervisory Fisheries Management 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
Mr Paul LEUNG, Legal Advisor to the Board