

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD

CASE NO. AB0361

Between

LAI SIU KAN

Appellant

And

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 27 February 2015

Date of Decision and Reasons for Decision: 15 September 2015

DECISION AND REASONS FOR DECISION

1. This is an appeal by the Appellant Mr. Lai Siu Kan of Case No. AB0361 against the decision of the Inter-departmental Working Group ("IWG") dated 17 December 2012 that the Appellant was considered ineligible for the ex-gratia allowance ("EGA") provided by the Government ("the Appeal").
2. The Appeal was heard on 27 February 2015 whereby the Appellant was absent at the hearing, having previously appointed Mr. Lai Chi Chung ("Mr. Lai") as his representative to attend and make oral/written submissions on his behalf. The IWG was represented by Mr. So Chi Ming and Ms. Louisa Li.
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 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 was a fiberglass shrimp trawler (license no. CM60785C) (“the Vessel”) that had 1 engine and measured 12.80 metres in length in total. Its propulsion engine power came up to 79.40 kilowatts, and the fuel tank capacity was 0.75 cubic metres.

8. The IWG made the preliminary decision that the Vessel was ineligible for EGA, on the basis of various pieces of evidence that suggested that the Vessel had not been operating as a trawler on or before the Cut-off Date. This was communicated to the Appellant by letter dated 25 September 2012 whereupon the Appellant was invited to make further submissions (which he did, by way of reply dated 5 October 2012). By letter dated 17 December 2012, the IWG informed the Appellant that they were maintaining their decision, and cited the same grounds they relied upon when making the preliminary decision. The Appellant felt aggrieved and lodged the present appeal.

9. In their submissions to the Board, the IWG explained that having considered various aspects, including the Appellant's said further submissions, they had reached the formal decision that the Vessel had not been designed and equipped for the purposes of trawling. These were the various matters considered:
 - (1) When the Vessel was inspected on 22 February 2012 (on the day the Appellant registered his claim for EGA), it was found to be carrying newly- installed trawling equipment and tools;

 - (2) According to the records kept by the Agriculture, Fisheries and Conservation Department ("AFCD") for field validation surveys which took place between November 2010 to October 2011, the Vessel did not have the requisite equipment for shrimp trawling;

 - (3) According to the records kept by the AFCD, the Appellant had made applications under the Mainland Fishermen Deckhand Scheme ("**the Deckhand Scheme**") in May 2009, May 2010 and June 2011 in respect of the Vessel, but had not declared the Vessel as a trawler;

 - (4) According to records obtained by the IWG from other governmental departments, the Appellant had registered the Vessel for an ex-gratia

payment scheme for fishermen affected by Marine Works in the vicinity of Lamma Island waters (“the Marine Works EGA”). According to records of inspection of the Vessel at the time, it was not a trawler.

Grounds of Appeal

10. In the said further submissions of the Appellant dated 5 October 2012 that were made in response to the IWG’s preliminary decision, the Appellant argued that:

(1) He had been fishing for 38 years and generations of his family had used multiple fishing methods which necessitated changes or acquisition of equipment as required;

(2) His application under the Mainland Fishermen Deckhand Scheme in 2009 recorded the Vessel to have been a gill netter. This category encompassed many types of fishing methods and nets, including amongst others, shrimp netting; and

(3) Fishermen now face many limitations imposed by the AFCD, e.g. restricted fishing areas, which infringe on their right to fish. After all, Hong Kong is a world-renowned fishing harbor. Now that the government has made available conservation-related subsidies, he hopes the AFCD will accept his appeal against the decision to reject his application.

11. Thereafter, in the Notice of Appeal dated (28 January 2014) (“the Appeal Notice”), the Appellant argued that his ancestors had, for many generations, made a living out of multiple methods of fishing and asked why he was considered ineligible for the EGA. Although the IWG had reached their decision as stated above and did not appear to have ever classified the Vessel as a larger trawler or made any conclusion as to its percentage of

dependence on Hong Kong waters, the Appellant nevertheless purported to appeal such matters, and declared that the Vessel was a small-sized shrimp trawler which was 90% dependent on Hong Kong waters. The Appellant further declared that he would continue to fish for a living in Hong Kong even if he were not granted the EGA.

12. By written submissions attached to the Appeal Notice, the Appellant (amongst other things) also argued that:

(1) The IWG's finding that the Vessel's equipment had been subject to modifications was a misunderstanding. Replacement and repairs were none out of the ordinary given that fishing equipment tended to become worn and damaged. The relevant trawling equipment had been replaced before he applied for registration for such reason. This did not demonstrate that he was trying to make a false claim;

(2) The record of AFCD's field validation surveys between November 2010 to October 2011 were inaccurate or misconceived. During that period of time, the Vessel had not been in frequent operation and as such all tools and equipment were stowed away until it fished again;

(3) In relation to the records of the Appellant's applications under Mainland Fishermen Deckhand Scheme in May 2009, May 2010 and June 2011 in respect of the Vessel, deckhands were only there to assist with transportation and as such the Vessel's type would not be stated in the records of the deckhands from the Mainland; and

(4) The Vessel was registered as a gill netter during the inspection on 6 January 2009 because this was how such vessels were characterized in the Mainland. In Hong Kong however, there was no such categorization and local vessels may take part in any type of fishing.

13. On 16 April 2014, yet further submissions were made by the Appellant:

- (1) The L-shaped outrigger appeared to be new because the old one, which was made of wood, came to be damaged after years of use and became dangerous. As such it was replaced;
- (2) In respect of the field validation surveys, the apparent lack of silver shrimp trawling equipment was attributable to the fact that the L-shaped rigger on the Vessel was dismantled by day when it was not in use. This was in contrast to other silver shrimp trawlers whose equipment was permanently fixed, and whose operators in the times otherwise than during May to October every year, had to go onshore to seek employment. Because the Vessel was engaged in multiple fishing methods, he could operate throughout the year;
- (3) The Vessel was declared a gill netter and hand liner and not a trawler because there was no such distinction made for Hong Kong vessels; and
- (4) All his catch was sold to a certain Mainland seafood wholesaler between the months of May to October between 2009-2011, and the total quantity was 1,500 *dan* (擔).

The Evidence

14. At the hearing, the Board heard and examined evidence tendered by both parties, who were also carefully questioned. At the outset, the Board was given to understand that where it came to trawling, such means of fishing was used by the Appellant for catching silver shrimp.
15. The evidence before the Board therefore included pictures of the Vessel (taken during the said inspection on the date of registration, during one of the said various field surveys and during inspection for the Appellant's applications under the Deckhand Scheme and the Marine Works EGA) as

compared with a conventional trawling vessel. The IWG explained how silver shrimp trawling was generally conducted, and with what equipment. The Board was given to understand that a heavy L-shaped outrigger was necessary for the operation, so that the trawl nets could be attached thereto. There was also the notable absence of a motorized winch on the Vessel which, according to Dr. So who appeared on behalf of the IWG, was indispensable when it came to hauling the catch.

16. On the part of the Appellant, his various submissions as outlined above were reiterated orally.

17. Given areas of sharp disagreement between the parties, the Board at the conclusion of the hearing gave permission to the Respondent for the supplementation of evidence and further written submissions to be filed in respect thereto, and for the Appellant to make his reply by writing (if any):

(1) What was the definition of "gill netting" used by the fishing trade in the Mainland, whether gill nets covered silver shrimp nets or was incompatible with the practice of silver shrimp trawling;

(2) Whether the Respondent was indeed challenging the authenticity of the receipts issued by the seafood wholesaler to the Appellant; and

(3) Evidence in relation to the practice of silver shrimp trawling in Hong Kong waters, including its location, method; whether it was necessary for a winch to be used, and whether trawling in shallow waters or in waters with rocky surfaces had an effect on the practice.

18. It suffices to say that the Board has further considered the further submissions and/or evidence filed thereafter by the parties, as well as their implications. We are satisfied that the areas of disagreement that still remained are either immaterial, or stood to be resolved as a matter of credibility.

The Decision

19. The Board is mindful that in order for the Appellant to qualify for compensation under the scheme, the requisite requirements need to be satisfied. Specifically, clause 23 of the Eligibility Criteria for the EGA provides that applicants must comply with all of the requirements stated therein, amongst which include:

- (a) The applicant must be the owner of a trawler vessel as at the Cut-off Date, and at the time of application is still the owner of that trawler;
- (b) The above-mentioned trawler must:
 - (i) be designed and equipped exclusively for trawling;
 - (ii) be used for trawling only and not engaged in other commercial activities; and
 - (iii) meet the relevant requirements of the Merchant Shipping (Local Vessels) Ordinance (Cap.548) and its subsidiary legislation for its operation in Hong Kong.

20. Having considered all the arguments and materials before us, this Board has arrived at the following findings:

- (1) By the Appellant's own admission, the Vessel was indeed used by him for multiple purposes, amongst which included silver shrimp trawling;
- (2) We rejected the Appellant's claim that the relevant equipment for silver shrimp trawling was replaced because they were old and only renewed just shortly before registration;
- (3) On inspection on the date of registration, it was found that there was an absence of a trawling net as well as a winch. We reject the Appellant's claim that the Vessel was used sometime in the evening for silver shrimp

trawling by installing the L-shaped outrigger, and that by daytime the same was dismantled so that the Vessel could be used for other purposes. This does not sound economical or reasonable;

(4) The absence of the winch is another factor which goes against the Appellant's claim he used manual labour to pull the haul of silver shrimp onto the Vessel. This seems most unusual. This allegation is also rejected.

21. Applying the policy underlying the EGA scheme, all criteria must be complied with, and amongst the requirements, it is stipulated that the Vessel must be used exclusively for trawling purposes. The Appellant's has himself admitted that the trawler was not used solely for such purpose, and as such on this particular piece of evidence alone, the necessary criteria has not been satisfied.
22. In the circumstances, the Board finds as a fact that the Vessel did not at the time of the Cut-off Date, i.e. 13 October 2010, or before, possess the necessary equipment for trawling which the policy was intended to compensate, nor was it used in fact by the Appellant solely for the purposes of trawling. The Vessel was not designed only for the purposes of trawling, although it may well also be used at times for trawling as the Appellant may wish.
23. The policy addresses the release of EGA for those affected by the Trawl Ban. We are however, not satisfied that the Appellant comes within the Scheme, or that he had discharged his burden of proving that he does.
24. In light of the above, the Board upholds the IWG's decision. The Appeal is dismissed.

Date of hearing : 27 February 2015

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

(signed)

Mr TO Wai-keung, Vincent, BBS
Chairman

(signed)

Mr CHAN Wai-chung
Member

(signed)

Mr LEE Ka-chung, William, JP
Member

(signed)

Dr SHIN Kam-shing, Paul
Member

(signed)

Dr TYEN Kan-hee, Anthony
Member

The Appellant, Mr. Lai Siu-kan (Absent).

The Appellant's Authorized Representative, Mr. Lai Siu-chung.

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

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

Ms. Abigail Wong, Legal Advisor of the Board