

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)

CASE NO. CM63810A

Between

KWOK KIN-MAN (郭建文)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)

CASE NO. CM64396A

Between

KWOK KIN-MAN (郭建文)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

(Consolidated by Direction of Fishermen Claims Appeal Board (Trawl Ban)
on 24 April 2015)

Date of Hearing: 22 May 2015

Date of Decision and Reasons for Decision: 9 June 2015

DECISION AND REASONS FOR DECISION

Introduction

1. Case number CM63810A is an appeal by Mr. Kwok Kin-man (“**Mr. Kwok**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 7 January 2013¹ in holding that Mr. Kwok was not eligible for ex gratia allowances (“**EGA**”) payable to trawler owners affected by the trawl ban² on the ground (“**the Ineligible Ground**”) that he was not the holder of a valid certificate of ownership of a Class III vessel issued by the Marine Department under the Merchant Shipping (Local Vessels) (Certification and Licensing) Regulation (Cap. 548D) in respect of trawler vessel CM63810A on or before 13 October 2010 (“**the CM63810A Decision**”).
2. Case number CM64396A is similarly an appeal by Mr. Kwok against the decision of the IWG dated 7 January 2013³ in holding that Mr. Kwok was not eligible for EGA on the Ineligible Ground in respect of trawler vessel CM64396A (“**the CM64396A Decision**”).
3. The CM63810A Decision and the CM64396A Decision are hereinafter collectively referred to as “**the Decisions**”).
4. The Fishermen Claims Appeal Board (Trawl Ban) (“**the Board**”) consolidated Mr. Kwok’s above two appeals (collectively “**the Appeals**”) as they involved common questions of law and facts. The parties consented to the consolidation. The Appeals were therefore heard together on 22 May 2015.

The Trawl Ban and the EGA

5. According to Paragraph 3 of Food and Health Bureau Paper dated 20 February 2013 (“**FHB Paper**”) ⁴, 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.

¹ CM63810A Hearing Bundle pp 66.

² As explained below.

³ CM64396A Hearing Bundle pp 67.

⁴ CM63810A Hearing Bundle p 142; and CM64396A Hearing Bundle p 143.

6. 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 EGA to affected trawler owners for permanent loss of fishing grounds arising from the Trawl Ban ("**EGA Package**").

The Policy and Eligibility Criteria

7. According to paragraph 7 of the FHB Paper⁵, the policy and guiding principles underlying the EGA Package are set out in FC Paper FCR(2011-12)22 ("**FC Paper**")⁶.
8. The eligibility criteria for application of EGA ("**the Eligibility Criteria**") are set out in Part (A) of Enclosure 1 to the FC Paper⁷ :

"(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 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

⁵ CM63810A Hearing Bundle p 143; and CM64396A Hearing Bundle p 144.

⁶ CM63810A Hearing Bundle pp 120-132; and CM64396A Hearing Bundle pp121-133.

⁷ CM63810A Hearing Bundle p 129; and CM64396A Hearing Bundle p 130.

vessel in the application must wholly or partly fish within Hong Kong waters;

- (d) the applicant must provide the trawler vessel and fishing gear for inspection during registration;
- (e) the particulars of qualified coxswain and engineer operator of the vessel must be provided for registration; and
- (f) other criteria as determined by the IWG⁸

The Appeal Hearing

9. At the appeal hearing on 22 May 2015 (“**the Appeal Hearing**”):

- (1) Mr. Kwok conducted the appeal in person, through his authorized representative Mr. Fung Wah (馮華) (“**Mr. Fung**”). Mr. Kwok also called Mr. Fung as his witness.
- (2) IWG conducted the appeal through their representatives Dr. So Chi-ming (“**Dr. So**”) and Ms. Louise Li (“**Ms. Li**”).

10. Mr. Kwok either directly or through Mr. Fung, reiterated his grounds of appeal as set out in his Notice of Appeal⁹ and letters to the Board⁹.

11. Mr. Kwok, mostly through Mr. Fung, stressed that he had already entered into the two agreements to purchase his two trawlers CM63810A and CM64396A (collectively “**the Two Trawlers**”) on 20 September 2010¹⁰ (collectively “**the Agreements**”), that he had to take time to raise money to pay the balance of the purchase price, that the certificates of ownership of the Two Trawlers were issued on 29 October 2010 which means he was just ten odd days late, that as a result of the Trawl Ban he had to spend a substantial amount of money to upgrade the Two Trawlers for off-shore trawling, that he does not have money to do the upgrading, and that he requested EGA of HK\$600,000 for each of the Two Trawlers.

⁸ CM63810A Hearing Bundle pp 3-5; and CM64396A Hearing Bundle pp3-5.

⁹ They include Mr. Kwok’s letters dated 19 and 21 May 2015 respectively, certificate from Shing Hing Tsai Fish Wholesaler Factory dated 29 January 2013, quotation from Chung Shing Shipyard dated 20 January 2013 and quotation from Tak Ming Engineering & Repair Factory dated 30 January 2013.

¹⁰ CM63810A Hearing Bundle p 57; and CM64396A Hearing Bundle p 37.

12. Dr So and Ms. Li on behalf of IWG stressed that sub-paragraph (b)¹¹ in Part (A) of the Eligibility Criteria clearly provided that an eligible applicant must be the holder of a valid certificate of ownership of his/her trawler issued on or before 13 October 2010 (“the Certificate of Ownership Requirement”). Dr. So also submitted that the Certificate of Ownership Requirement is a mandatory and indispensable requirement which must be fulfilled by an applicant in order to make him/her eligible for EGA in view of the conjunction “and” before the last sub-paragraph (f) in Part (A) of the Eligibility Criteria.

Discussion

13. The Board considers that sub-paragraph (b) in Part (A) of the Eligibility Criteria, and the conjunction “and” before the last sub-paragraph (f) in Part (A) of the Eligibility Criteria do not fetter the Board’s exercise of discretion in determining who are eligible for EGA.

14. In view of the other sub-paragraphs in Part (A) of the Eligibility Criteria, in particular sub-paragraph (a) thereof, the Board considers that the following factors are also relevant in determining whether Mr. Kwok is an eligible applicant for EGA:

- (1) The terms of the Agreements;
- (2) Whether the balance of purchase price was paid on or before 13 October 2010;
- (3) Whether the sale and purchase was completed on or before 13 October 2010;
- (4) Whether there is any term for specific performance;
- (5) Whether risk of the Two Trawlers was passed to Mr. Kwok on or before

¹¹ As set out in paragraph 8 above, sub-paragraph (b) provides that “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”.

13 October 2010;

(6) Whether possession of the Two Trawlers was delivered to Mr. Kwok on or before 13 October 2010;

(7) The consequences for breach of the Agreements by Mr. Kwok.

15. Sub-paragraph (a) of Part (A) of the Eligibility Criteria provides, among other things, that an applicant must be the owner of a trawler as at 13 October 2010.

16. The certificate of ownership of course is a very strong piece of evidence to prove that its holder is the owner of a trawler. However, the Board considers that it is not the only evidence that may prove ownership.

17. In the present case, the fact that the Agreements were entered into and the deposit thereunder paid on 20 September 2010¹² may tend to show that Mr. Kwok became the owner of the Two Trawlers on or before 13 October 2010.

18. However, the following factors which are apparent from the Agreements and/or Mr. Fung's and/or Mr. Kwok's evidence/submissions during the hearing, tend to show that Mr. Kwok was not the owner of the Two Trawlers on or before 13 October 2010:

(1) The balance of purchase price was due after 13 October 2010¹³, i.e. within 45 days from 20 September 2010;

(2) The balance of purchase price was paid after 13 October 2010 on 29 October 2010¹⁴;

(3) The sale and purchase was completed after 13 October 2010 on 29 October 2010¹⁵;

¹² Date of the Agreements and Clause 2 thereof: CM63810A Hearing Bundle p 57; and CM64396A Hearing Bundle p 37. And receipts: CM63810A Hearing Bundle p 58 (Mr. Fung clarified during the hearing that the dates of the receipts should be 20 September 2010 and 29 October 2010 and the reference to "2012" was a clerical mistake); and CM64396A Hearing Bundle p 48.

¹³ Clauses 2 and 3 of the Agreements: CM63810A Hearing Bundle p 57; and CM64396A Hearing Bundle p 37.

¹⁴ Receipts: CM63810A Hearing Bundle p 58; and CM64396A Hearing Bundle p 48.

¹⁵ According to Mr. Fung and Mr. Kwok during the hearing. And Clauses 2 and 3 of the Agreements: CM63810A Hearing Bundle p 57; and CM64396A Hearing Bundle P 37.

- (4) There is no term for specific performance¹⁶;
- (5) Risk of the Two Trawlers was passed to Mr. Kwok after 13 October 2010 on 29 October 2010¹⁷;
- (6) Possession of the Two Trawlers was passed to Mr. Kwok after 13 October 2010 on 29 October 2010¹⁸;
- (7) In case of Mr. Kwok is in breach, his deposits would be forfeited but the Agreements would then be cancelled without further liability on Mr. Kwok's part¹⁹.
- (8) The intention of the parties was that Mr. Kwok would become the owner of the Two Trawlers upon payment of the balance of purchase price²⁰.

19. On balance, there is insufficient evidence to prove that Mr. Kwok was the owner of the Two Trawlers as at 13 October 2010. He was the purchaser but not yet the owner of the Two Trawlers as at 13 October 2010.

20. There is also insufficient evidence to prove exceptional hardship suffered by Mr. Kwok as a result of the Decisions. In any event, exceptional hardship does not seem to be a valid ground that may override the Eligibility Criteria.

21. As the total amount of EGA, which is fixed, would be apportioned amongst successful applicants²¹, it would be unfair to them if for any reason ineligible applicants are treated as eligible applicants.

¹⁶ According to Mr. Fung and Mr. Kwok during the hearing. And Clause 2 of the Agreements: CM63810A Hearing Bundle p 57; and CM64396A Hearing Bundle p 37.

¹⁷ According to Mr. Fung and Mr. Kwok during the hearing, if a fire broke out in the Two Trawlers before 29 October 2010, the vendor Mr. Cheng would have to bear the loss.

¹⁸ According to Mr. Fung and Mr. Kwok during the hearing, the vendor Mr. Cheng retained possession of the Two Trawlers after signing of the Agreements, Mr. Kwok conducted a final inspection one day before the completion of 29 October 2010 whereupon possession was handed to him.

¹⁹ According to Mr. Fung and Mr. Kwok during the hearing. And Clause 2 of the Agreements: CM63810A Hearing Bundle p 57; and CM64396A Hearing Bundle p 37.

²⁰ According to Mr. Fung and Mr. Kwok during the hearing. And the Board reached the same conclusion in view of the factors outlined above.

²¹ Paragraph 8 of FC Paper: CM63810A Hearing Bundle p 123; and CM64396A Hearing Bundle p 124.

Conclusion

22. There is insufficient ground to disturb the Decisions. The Appeals are therefore dismissed with no order as to costs.

Date of hearing : 22 May 2015

Heard at : Conference Room 3, Ground Floor,
Central Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(signed)
FEE Chung-ming, Johnny
Chairman

(signed)
SHIN Kam-shing, Paul
Member

(signed)
TO Kar-wing, Alice
Member

(signed)
TYEN Kan-hee, Anthony
Member

(signed)
YUNG Hoi-yan
Member

The Appellant, Mr. Kwok Kin Man.
Ms. Li Wai-hung, Louise, Senior Fisheries Officer (Sustainable Fisheries) (Ag.),
representative on behalf of the IWG.
Dr. So Chi-ming, Fisheries Officer (Sustainable Fisheries)1, AFCD,
representative on behalf of the IWG.
Mr. Paul Leung, Legal Advisor to the Board.