

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD

CASE NO. CP0002

Between

LEE FU-HING (李富興), LEE KAU-KAN (李九根)

Appellant

And

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Dates of Hearing: 15 April 2016

Date of Decision and Reasons for Decision: 8 July 2016

DECISION AND REASONS FOR DECISION

1. This is an appeal by the Appellants, Mr. Lee Fu-hing and Mr. Lee Kau-kan of Case No. CP0002 against the decision of the Inter-departmental Working Group (“**IWG**”) dated 21 December 2012 to issue to them the amount of HK\$5,713,010.00 in respect of the ex-gratia allowance (“**EGA**”) provided by the government (“**the Appeal**”).
2. The Appeal was heard on 15 April 2016 whereby Mr. Lee Fu-hing had entered notice on 24 March 2016 that he would not appear for the hearing. Mr. Lee Kau-kan (“Mr. Lee”) was present with a representative, namely a Ms. Lee Wai-kuen (transliteration). The IWG was represented by Ms. Louise Li, Dr. So Chi Ming and Ms. Teresa Yuen.

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 Appellants were such applicants.
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 that generally did not operate in Hong Kong waters 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 Appellants' fishing vessel (license no. CM641183A) (“**the Vessel**”) had 3 engines and measured 28.00 metres in length, with propulsion engine power coming up to 559.48 kilowatts, whereas the fuel tank capacity was 8.82 cubic metres.

8. On 3 October 2012, the IWG made the preliminary decision that the Vessel fell into the category of an inshore trawler, and in observing that the time claimed to be spent fishing in inshore waters (90%) was higher than that spent by trawlers of comparable type and length (according to statistical data collected by the Agriculture, Fisheries and Conservation Department (“AFCD”)), the Appellant was requested to provide more evidence/documents to substantiate his claims.
9. By way of reply dated 11 October 2012, the Appellants provided the following explanation and supporting documents:
- (1) The Vessel was a hang trawler which fished within Hong Kong waters, frequently around Lantau Island, Aberdeen and Sha Chau. Whilst the majority of his fishing catch would be sent to the Castle Peak Wholesale Fish Market for sale, he would take a small portion to the market for sale.
- (2) Fish sales receipts, fuel purchase receipts, ice purchase receipts, a copy each of the Fishing Permit under the Marine Parks and Marine Reserves Regulation and Marine Fish Transportation Permit that have been issued under Mr. Lee Kau-kan’s name.
10. Subsequently, the IWG wrote back to the Appellants on 21 December 2012 to inform him that all relevant materials and evidence had been considered and that their assessment of his application was completed. In accepting that the Appellants were inshore trawler owners who had been affected by the Trawl Ban, the IWG made the following decision:

Type of Vessel:	Hang trawler
Length of Vessel (in metres):	28.00
Category of dependency on Hong Kong waters:	Highly dependent on Hong Kong waters for trawling operations and holder of a Fishing Permit that would allow hang trawling by the Vessel at the Sha Chau and Lung Kwu Chau

	Marine Park.
Amount of EGA payable:	\$5,713,010.00

11. By the same letter, the IWG also informed the Appellant that around 30% of the EGA payable to all eligible inshore trawler owners had been reserved and will be distributed by apportionment after the Board had determined all successful appeals.

Grounds of Appeal

12. Subsequently, the Appellants sought to appeal the IWG’s decision, and by letter dated 2 February 2013, stated that since the Trawl Ban was implemented, they were unable to make a living to the extent that they could not earn enough to pay for fuel and labour costs.

13. In the Notice of Appeal dated 6 February 2014, the Appellant:

(1) As regards the IWG’s assessment that the Vessel’s dependency on Hong Kong waters was low, repeated the matters stated in paragraph 9(1) above;

(2) As regards their dissatisfaction as regards the amount of EGA awarded, stated that the Vessel’s catch between January 2009 to August 2012 as sent to the Castle Peak Wholesale Fish Market for sale had reached the total value of HK\$8,315,403.09, but the EGA award only amounted to HK\$5,713,1010. As such they requested for an appeal.

14. In the written submissions submitted for this Appeal dated 11 March 2016, the Appellant has repeated the substance of what was mentioned in his earlier submissions to the Board, and added that the Vessel had already been sold in October 2013.

Matters considered by the Board

15. In their written submissions to the Board, the IWG explained how their decision as to the amount of EGA payable to the Appellant was determined. Although the IWG tended to adopt a very similar format in their analysis of the applicable criteria, the Board accepts that the IWG had appropriately addressed their mind to the particular circumstances of the Appellant and had taken into account the materials that were available to them, including information about the Vessel's type, length, material and design (which amongst other things, affected the distance which the Vessel could travel and therefore its dependency on Hong Kong versus outer waters), statistical data from the AFCD concerning homeport and inshore sightings of the Vessel, the employment profile of the crew, fishing permits held by the Appellants, and also the explanations/evidence submitted by the Appellants. We are satisfied that the Vessel is an eligible inshore trawler as assessed by the IWG.

16. In this regard, the Appellants appeared to be under some misapprehension about the category which the Vessel was assessed. As such, the IWG explained that because the IWG was not in a position to determine the exact amount of time that any vessel spent trawling in Hong Kong waters, the categorization of tiers based on the degree of such dependency did not get any more specific than either highly dependent (higher tier) or not mainly dependent on Hong Kong waters for trawling operations (lower tier). The IWG then also clarified that they had, according to the principles previously approved by the Finance Committee of the Legislative Council, already considered all of the materials before them and in having assessed that the Vessel belonged to the higher tier, already apportioned to the Appellants the highest amount of EGA payable to inshore hang trawlers of comparable size as the Vessel.

17. The Board also heard the submissions of Ms. Teresa Yuen of the IWG concerning how the EGA amount payable to the Appellant (denoted as "*E_i*" in the IWG's calculations at page 21 of the bundle) was arrived at. Put simply,

this involved the application of an apportionment ratio (denoted as “*Pi*” in the calculations) to the total amount of EGA available for distribution to the total sum of HK\$828,870,000 that was assessed to be available for distribution among eligible inshore trawlers. By reference to the data contained at page 288 of the bundle, the apportionment ratio that was assessed to be applicable in the present case was taken to be 0.006497079, on the basis that the Vessel was 28m in length and possessed a permit for fishing in the Sha Chau and Lung Kwu Chau Marine Park. Therefore:

$$E_i = \text{HK\$}828,870,000 \times 0.00649707900 + \text{HK\$}327,777 = \text{HK\$}5,713,010$$

(rounded to the nearest dollar)

18. During the hearing, the Board was given to understand by Mr. Lee Kau-kan that he in fact took greatest issue with the fact that the EGA award had to be split between himself and his father, Mr. Lee Fu-hing (he went so far as to say that had it not been for the need to split the \$5+ million EGA award, he would not have appealed). To this end, the Board heard how the Vessel was initially purchased by the senior Mr. Lee, who after having transferred ownership to Mr. Lee Kau-kan, insisted that his name be added back to the ownership documents. We are also given to understand that the senior Mr. Lee is now in his nineties and is living in a retirement home. When asked about the net income of made by the Vessel’s catch, the Board was told that after deduction of expenses, it made a bit more than HK\$10,000 per month.
19. In response to Mr. Lee Kau-kan’s complaint, Dr. So of the IWG explained that whereas the EGA award was concerned about productive capacity and catch value, they possessed no information about whether the increase in the number of owners necessarily meant production capacity went up, and doubted whether there was such correlation.
20. In response to the Appellant’s complaints that funds were running low and that it took too long for the 30% reserved EGA to be distributed to the affected owners, the IWG took pains to emphasize the following:

(1) It needed to be borne in mind that the EGA was set up for the specific purpose of ameliorating the negative impact that the Trawl Ban might have on the livelihood of the fishermen who were affected. The owners in receipt of the EGA could choose to refurbish their vessels so as to be able to conduct for fishing operations in Hong Kong which did not involve the use of trawling methods, or venture further into offshore (non-Hong Kong) waters for trawling; and

(2) The reservation of roughly 30% of the EGA was a measure applied across the board to all eligible inshore trawler owners. It was a necessary step because a reserve fund needed to be maintained to meet further grants of EGA following successful appeals to the Board and in the aftermath of all appeals having been heard and determined, the entirety of such remaining sum shall be apportioned to all eligible inshore trawler owners.

The Board's Decision

21. The Board has heard how the criteria adopted by the IWG had been applied towards their determination of the EGA payable to the Appellant, and take the view that the IWG's representatives have provided satisfactory explanations to the questions raised by the Board members, and have also adequately responded to the Appellant's submissions.

22. Having carefully scrutinized all of the evidence, the Board takes the view that the Appellants have not demonstrated any extraordinary circumstances that would lead to the conclusion that the IWG's decision should be departed from. As mentioned above, the IWG has awarded to the Appellants the highest amount of EGA for inshore prawn trawlers of comparable size, and in particular, the Board also note that on the basis of the net income figure provided by Mr. Lee Kau-kan, his own share of the EGA grant amounts to no less than 20 years' net income of the Vessel.

23. In the premises, the Appellant has failed to discharge his burden to show that the Decisions are wrong. The Appeals are therefore dismissed.

Case No. CP0002

Date of hearing : 15 April 2016
Heard at : Room 1818, 18th Floor, East Wing Central
Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(signed) _____

Mrs. CHEUNG Po-yee, Peggy
Chairman

(signed) _____

Mr. CHAN Wai-chung
Member

(signed) _____

Ms. LAM Po-ling, Pearl
Member

(signed) _____

Dr. TYEN Kan-hee, Anthony
Member

(signed) _____

Mr. SOO Kwok-leung
Member

The Appellants, Mr. Lee Fu-hing (in absentia), Mr. Lee Kau-kan.

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

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

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

Ms. Abigail Wong, Legal Advisor of the Board.