

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD

CASE NO. CP0020

Between

LEE FOR-MING (李火明), LEE SHU-SUM (李樹森)

Appellant

And

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 6 May 2016

Date of Decision and Reasons for Decision: 22 September 2017

DECISION AND REASONS FOR DECISION

1. This is an appeal by the Appellants, Mr. Lee For-ming and Mr. Lee Shu-sum of Case No. CP0020 against the decision of the Inter-departmental Working Group (“IWG”) dated 21 December 2012 to issue to them an amount of HK\$6,083,780.00 in respect of the ex-gratia allowance (“EGA”) provided by the government (“**the Appeal**”). Mr. Lee Shu-sum is the father of Mr. Lee For-ming.
2. The Appeal was heard on 6 May 2016 whereby Mr. Lee For-ming of the Appellants appeared with an appointed representative, Mr. Lee For-hing. Mr. Lee Shu-sum was absent. The IWG was represented by Ms. Louise Li, Dr. William Siu and Ms. Teresa Yuen.

3. After considering all materials submitted by the parties, 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' jointly-owned fishing vessel (license no. CM65579A) (“**the Vessel**”) had 3 engines and measured 29.60

metres in length, with propulsion engine power coming up to 612.00 kilowatts, whereas the fuel tank capacity was 38.05 cubic metres.

8. It appears that although initially, the IWG had cause to question Mr. Lee Shu-sum's eligibility for the EGA because there was a period of time when he was not registered as an owner of the Vessel, the IWG later gave way and decided to continue to process the Appellants' application.
9. 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 (80%) 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 Appellants were requested to provide more evidence/documents to substantiate his claims.
10. By way of reply dated 14 October 2012, the Appellants asserted that they wished to revise their position and stated that their dependence on Hong Kong waters was 100% rather than 80%. For such purpose, the following explanation and supporting documents were provided:
 - (1) The Appellants had been dependent on Hong Kong waters for fishing for many years. Other than the lunar new year holidays and festival days, as well as the occasions where there were illnesses, celebrations or sudden occurrences in the family which precluded them from fishing in Hong Kong, the Appellants had carried out their fishing operations within Hong Kong.
 - (2) According to Mr. Lee For-ming, they had met with personnel of the AFCD on 7 December 2011, and were asked where they tended to conduct fishing operations and the time they spent fishing. It was not before they received the IWG's letter on 5 October 2012 that they realized that their dependence on Hong Kong waters for fishing was in fact 100%, and that their previous assertion arose out of a misunderstanding of the question

asked of them.

(3) By way of clarification, the Appellants explained that when they previously stated the figure of 80%, they had taken into account inclement weather, holidays, rest days and illnesses within the family...etc. Otherwise, their dependence on Hong Kong waters for fishing was in fact 100%.

(4) According to Mr. Lee Shu-sum, he had fished by hang trawling for many decades, since his grandparents were still around. He also stated that the second vessel that he owned had successfully obtained compensation for those marine works concerning the Chek Lap Kok Airport, and the third vessel which he owned had also obtained compensation for reclamation works in Penny's Bay. These, and the fact that he had once participated in a television programme produced by Radio Television Hong Kong (broadcasted on 5 February 2012), were evidence that he had spent all his time fishing in Hong Kong waters for years.

(5) Fresh Fish Sales Memo, Fresh Fish Auction Vouchers and Marine Fish Transportation Permit issued by the Fish Marketing Organization, fish sales receipts, ice and fuel purchase receipts, Fishing Permit issued by the Marine Parks Authority and Certificate of Ownership in respect of the Vessel issued by the Marine Department.

11. Subsequently, the IWG wrote back to the Appellant on 21 December 2012 to inform him that all of the relevant materials and evidence had been considered and that their assessment of his application was completed. In accepting that the Appellant was an inshore trawler owner who was affected by the Trawl Ban, the IWG made the following decision:

Type of Vessel:	Hang trawler
Length of Vessel (in metres):	29.60
Category of dependency on Hong	Highly dependent on Hong Kong

Kong waters:	waters for trawling operations (higher tier) and holder of a Fishing Permit issued by the Marine Parks Authority that allows the Vessel to fish at designated areas within Sha Chau and Lung Kwu Chau Marine Park.
Amount of EGA payable:	\$6,083,780.00

12. 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

13. Subsequently, Mr. Lee For-ming sought to appeal the IWG's decision, and by letter dated 9 January 2013, stated the following:

- (1) He had been notified of the result of his application for EGA, but faced with financial difficulties and concerns about the future, he wished to appeal the IWG's decision and hoped that the FCAB would increase the amount of the award;
- (2) The Vessel was built in 2005 and relatively new. At the time it was constructed, he had envisaged that the Vessel could operate for 30 years, i.e. till 2035. Due to the Trawl Ban however, he was forced to give up trawl fishing in Hong Kong waters and had therefore been deprived of 22 years of employment.
- (3) In the past 8 years that he had been fishing, his average yearly income was around \$2.8 million and his average expenses were around \$2.3

million. He had already provided sufficient receipts issued by the Fish Marketing Organization, as well as ice and fuel purchase receipts to justify such figures;

(4) For the next 22 years, the gross profit of the Vessel should reach around \$11 million and he therefore hopes the FCAB would increase the EGA award to \$17 million so as to ensure that he and his family will continue to maintain the same living standard and financial security.

(5) His family had been fishing for generations which, in the wake of the Trawl Ban, he is unable to continue. He has lost his only means of earning an income. His family is anxious about their future and hopes that the FCAB would carefully process his case.

14. In the Notice of Appeal dated 6 February 2014, the Appellants also gave the following reasons for their dissatisfaction concerning the awarded EGA amount:

(1) The Vessel was only a few years old. The Trawl Ban has caused them to lose their employment and their means of earning a living, and as such they questioned whether the amount of EGA which they were apportioned, was fair;

(2) It was questionable whether the EGA formula, which involved multiplying the fish catch by 1.63 (i.e. fish price movement) was reasonable; and

(3) It was questionable whether the EGA which was apportioned in respect of the Fishing Permits issued by the Marine Parks Authority was fair.

15. In the written submissions submitted for this Appeal dated 27 March 2016, the Appellants largely repeated the substance of what was mentioned in his earlier submissions to the Board, and added that the Trawl Ban did not merely affect their family's income for the next 11 years, but had a more

lasting impact. According to Mr. Lee For-ming, the trawl fishing skills that were amassed by his father and himself over the duration of a lifetime could no longer be put to use, and the next generation would not be able to make a living out of such skills.

Matters considered by the Board

16. In their written submissions to the Board, the IWG explained how their decision as to the amount of EGA payable to the Appellants was determined. We note that despite the Appellants' initial submissions about how they were in fact 100% dependent on Hong Kong waters for their fishing operations (rather than 80%), the IWG had in fact already assessed the Vessel as being an eligible inshore trawler that belonged to the higher tier. Nothing therefore, turned on the question of whether the Appellants' extent of dependence was 80% or 100%.

17. At the hearing, the matters which the Appellants took issue with boiled down to the following:

(1) In relation to how the formula for EGA was derived, whether inflation was taken into account, and why the figures of 1.63 (representing fish price movement) and the multiplier of 11 years were adopted.

(2) Whether it was possible, in the future, for the Appellants to be granted permission to conduct fishing operations which do not involve trawling in the vicinity of Marine Parks.

18. The following are submissions made by the IWG in relation to the above issues:

(1) Concerning the figure adopted in relation to the notional value of 11

years' fish catch, the IWG submitted that the adoption of 11 years as the multiplier was in line with the timespan adopted by the Marine Works EGA for the permanent loss of fishing grounds, whose effect is not dissimilar to the effects of the Trawl Ban. Originally, the figure for permanent loss of fishing grounds which was adopted in relation to the Marine Works EGA was 7 years. Taking into account the fact that the area of fishing grounds that were to be permanently lost due to the Trawl Ban was much more extensive, as well as the fact that fishermen will have to travel further afield to fish in the future, this figure was later revised to 11 years. This was how the figure – which also underwent consultation with the trade – was adopted in relation to the EGA formula.

- (2) Although the value of fish catch was based on the 1989/1991 Port Survey, fish price movement was something that the AFCD continually monitored month by month. The figure of 1.63 had already taken into account fish price movements since the 1989/1991 Port Survey till the year 2011 when the Finance Committee approved the EGA formula.
- (3) Likewise, the figure of \$66.3 million as representing the notional fish catch value from trawl fishing methods, was derived from the 1989/1991 Port Survey. Back then, the fish catch value was in fact better because the fish stocks in Hong Kong waters had since been on the decline and in turn the fishing sector itself had shrunk somewhat.
- (4) The Marine Park Permit was a measure introduced by the Marine Parks and Marine Reserves Regulation (Cap. 476A). It was introduced at the time when the Marine Parks were set up, in order to allow certain fishermen – amounting to the operators of 18 hang trawlers – who had always been fishing within the vicinity, to continue their operations (using hang trawling methods only) at the discretion of the Marine Parks Authority. This measure was the only exception to the absolute prohibition of fishing activities within the Marine Park.
- (5) In light of the Trawl Ban which prohibited trawl fishing within the waters

of Hong Kong, it naturally followed that the Marine Park Permits had to be made obsolete. This was achieved by the non-renewal of the Marine Park Permits after they expired on 31 December 2012. Given the change in policy, it can be understood why applications for the renewal of these permits would no longer be considered nowadays. In any event, the question of whether to renew such permits or not was not within the remit of the IWG or the FCAB and fell outside the ambit of the Appeal.

(6) In respect of the Appellants' complaint that the EGA granted to them was insufficient compensation for their future loss of livelihood, the IWG emphasized that 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. It was not to compensate, but to assist with transitioning into a means of earning a livelihood which did not involve fish trawling; and

(7) The owners in receipt of the EGA could choose to conduct 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. Those opting to continue to fish in Hong Kong could apply for a certificate of eligibility for registration from the AFCD that would allow them the option of registering a non-trawler, either by modifying his/her existing trawler, or by acquiring a new vessel, within 7 years.

The Board's Decision

19. The Board has heard how the criteria adopted by the IWG had been applied towards their determination of the EGA payable to the Appellants, 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 Appellants' submissions.

20. The Board accepts that the IWG had appropriately 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.
21. Having carefully scrutinized all of the evidence placed before us, the Board has found no reason to disturb the findings made by the IWG, who has already considered all of the materials before them and had apportioned to the Appellants the highest amount of EGA payable to inshore hang trawlers of comparable size as the Vessel. This is not to mention the fact that, on the basis that the Appellants were holders of a valid Marine Park Permit before the Trawl Ban, the Appellants have already been apportioned an extra amount of \$327,777 that is over and above what other EGA applicants would have gotten.
22. As regards those figures representing the notional fish catch value and the fish price movement index respectively, the Board notes that those are figures that were specifically approved by the Finance Committee of the Legislative Council and therefore, not within our remit to vary. As for the renewal/re-issuance of the Appellants' Marine Park Permit, we agree with the IWG that this is not a matter that is within the ambit of the Appeal, or within the powers of the Board or the IWG to decide.
23. To conclude, the Appellants have failed to discharge their burden to show that the Decisions are wrong. The Appeal is therefore dismissed.

Case No. CP0020

Date of hearing : 6 May 2016
Heard at : Room 1801, 18th Floor, East Wing Central
Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(signed)

Mrs. CHEUNG Po Yee, Peggy, JP

Chairman

(signed)

Mr. CHAN Wai Chung, MH
Member

(signed)

Mr. LAW Chi Yuen
Member

(signed)

Ms. LAM Po Ling, Pearl
Member

(signed)

Dr. TYEN Kan Hee, Anthony
Member

The Appellants, Mr. LEE For-ming and Mr. LEE Shu-sum.

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

Dr. William SIU, Fisheries Officer, AFCD, representative on behalf of the IWG.

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

Ms. Abigail WONG, Legal Advisor of the Board.