

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NO. SW0073

Between

CHAN KAM LUN (陳錦綸)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 23 October 2015

Date of Decision and Reasons for Decision: 22 March 2016

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mrs. Peggy Cheung, Miss AU Sin-lun, Catherine, Member Mr. CHAN Wai-chung, Member Miss KUNG Ching-ye, Athena and Member Dr. SHIN Kam-shing, Paul):-

Introduction

1. Case number SW0073 is an appeal by Mr. CHAN Kam Lun (“**Mr. Chan**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 17 December 2012 (“**the Decision**”¹) determining that Mr. Kwok’s fishing vessel (with Certificate of Ownership Number CM63584A) (“**the Vessel**”) was not an vessel eligible for compensation under the one-off assistance scheme. The reasons for the determination were set out in the Decision itself.

The Trawl Ban and the EGA

2. According to Paragraph 3 of the 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

¹ Hearing Bundle p 102

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.

3. 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 Eligibility Criteria

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

“(A) EGA

The eligibility criteria are to be determined by an inter-departmental working group (IWG) established before the commencement of registration of application for EGA. Only applicants who can meet the criteria are eligible for the EGA. The criteria should include, inter alia, 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 vessel in the application must wholly or partly fish within Hong Kong waters.

The Appeal Grounds

6. In this appeal, Mr. Chan contends that the Vessel, which is a stern trawler (單拖), had a complete set of tools for trawling², albeit a little old from wear and tear over the years. The length of the Vessel was merely 22m and the engine power was just 160kW³. It was spending about 70% of its time operating in Hong Kong waters⁴ and was not capable of operating further away⁵.

The Appeal Hearing

7. The appeal hearing was originally scheduled to be held on 25 March 2015. However, due to unforeseen circumstances⁶, neither Mr. Chan nor his representative was able to attend on 25 March 2015. The appeal was then refixed to be heard on 23 October 2015 instead.
8. At the hearing, (**“the Appeal Hearing”**):
- (1) Mr. Chan conducted the appeal through his cousin and authorised representative, Mr. Cheung chun-wai; Mr. Chan himself was absent; and
- (2) IWG conducted the appeal through their representatives, Dr. William Siu Ho-lim and Dr. So Chi-ming.
9. IWG representatives presented their case first. Dr. So highlighted Mr. Chan’s assertions during the EGA application that the Vessel had been operated on average 200 days per year, of which 80% was in Hong Kong waters. During the inspection of the Vessel by the IWG, it was found that the otter boards (龜板) on board the Vessel were made of wood, instead of

² Hearing Bundle p 4

³ Records show vessel length of 22.8m and aggregate engine power of 161.14kW: see Hearing Bundle p 14

⁴ Hearing Bundle p 3, see also Hearing Bundle p 41 where he states 80% instead of 70%

⁵ Hearing Bundle p 4

⁶ This Board was informed that the appellant’s vessel had a leak in its hull and needed to be fixed in Zhuhai. He sought an adjournment of his appeal hearing, as both himself and his representative were still in Zhuhai and could not attend on 25 March 2015 as scheduled.

steel (which was the norm in the industry). Furthermore, there were unexpectedly few floaters and no sinker found on board. The pulleys installed on the Vessel appeared highly rusted or eroded, suggesting that they had not been in use for a long time. Similarly, the “A-frames” of the Vessel were severely rusted. All in all, the Vessel gave the distinct impression to the inspectors that it had not been in use for trawling for a very long time.

10. Furthermore, it was pointed out by Dr. So that the Vessel was not sighted in any of the typhoon shelter visits, sea surveys or patrols at all. It was suggested by Dr. So that as such, it was not likely that the Vessel had indeed been operating in Hong Kong waters during 80% of the time as claimed.
11. Dr. So further pointed out that the fuel tank onboard the Vessel had a disproportionate size when compared with the engine power and nature of the Vessel. If the fuel tanks in aggregate were filled to their maximum capacity, the Vessel should be able to operate for some 6 months without having to refuel.
12. It was further pointed out that there was unusually little space on the Vessel for storing fishing equipment; and in any case, the fishing equipment observed on board was very old and rusted. Such equipment did not appear to the IWG as suitable for efficient operation of a trawling business.
13. The IWG thus concluded that the Vessel was not an eligible one under the scheme.
14. Mr. Cheung on behalf of the Appellant gave an account of how the Vessel had been used. According to him, the Vessel had not been in use for about 1 year prior to the IWG inspection. The Vessel had been disused because it was not making any profit for the owner. It originally had a steel otter board but that had hit a rock and gone missing. They therefore replaced it with a wooden one. That was no good either. So they did not operate the Vessel any more. It had spent more time floating around than operating. Sometimes, it was left in Mainland China for 2 to 3 months (e.g. in Zhuhai); sometimes, it stayed in Shaukeiwan. There was no regular spot for the Vessel. He himself last worked on the Vessel some 4 to 5 years ago.
15. Mr. Cheung informed the Board that Mr. Chan had not been a fisherman before acquiring the Vessel in 2009. According to Mr. Cheung, Mr. Chan had bought the Vessel on others’ recommendations. That investment

turned out to be an unprofitable one. Mr. Chan soon lost interest in operating that business. 2 years ago, he sold the Vessel.

16. When questioned by Member Miss Kung, Mr. Cheung said that as far as he knew, the Vessel had been operating 50% of its time in Hong Kong waters and 50% in Mainland waters, around outer Po Toi.

Decision & Reasoning

17. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss Mr. Chan's appeal.
18. We are not persuaded that the Vessel had been operating as a trawler at the material time. On Mr. Cheung's admission on behalf of the Appellant, the Vessel had been left floating around for an extended period of time. It had been disused as a trawler. The condition of the Vessel and its equipment was more consistent with it having been abandoned rather than operating. There is simply nothing to suggest that the Vessel was operating as a trawler 70% or 80% of its time in Hong Kong waters out of 200 operating days in a year, a case that Mr. Chan is putting forward in this EGA application. In fact, Mr. Cheung told this Board during the hearing that as far as he was aware, the Vessel could have been operating 50% of its time in Hong Kong and 50% in Mainland China. The business turned out to be unprofitable and Mr. Chan soon lost interest.
19. This is a case where the Appellant has plainly failed to discharge his burden to prove his case on a balance of probabilities. He has failed to show that the IWG was wrong in concluding that the Vessel was not an eligible one under the compensation scheme.

Conclusion

20. In the circumstances, this appeal is dismissed.

Date of hearing : 23 October 2015
Heard at : Conference Room 2, Ground Floor,
Central Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(signed)
Mrs. Peggy Cheung
Chairman

(signed)
Miss AU Sin-lun, Catherine
Member

(signed)
Mr. CHAN Wai-chung
Member

(signed)
Miss KUNG Ching-yee, Athena
Member

(signed)
Dr. SHIN Kam-shing, Paul, MH
Member

The Appellant, Mr. CHAN Kam-lun, absent, but represented by Mr. CHEUNG Chun-wai
Dr SO Chi-ming, Fisheries Officer (Sustainable Fisheries) 1, 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