

**DECISION AND REASONS FOR DECISION**

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)  
CASE NOS. SW0141 & SW0142  
(HEARD TOGETHER)

Between

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LEE CHI SING (李志成)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

And between

LI CHI HUNG (李志雄) & LI CHI CHUEN (李志泉)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

\_\_\_\_\_  
Date of Hearing: 23 November 2016

Date of Decision and Reasons for Decision: 25 January 2017

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**DECISION AND REASONS FOR DECISION**  
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**JUDGMENT** (Chairman Mr. FEE Chung-ming, Johnny, Member Mr. CHAN Wai-chung, Member Ms. LAM Po-ling Pearl, Member Ms. WONG Pie-yue Cleresa and Member Dr. TYEN Kan-hee, Anthony):-

**Introduction**

1. Case number SW0141 is an appeal by Mr. LEE Chi-sing (李志成) (“**Mr. CS Lee**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 14 December 2012 (“**the SW0141 Decision**<sup>1</sup>”) determining

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<sup>1</sup> Hearing Bundle p 90 of SW0141

that Mr. CS Lee's fishing vessel (with Certificate of Ownership Number CM63642A) ("**the SW0141 Vessel**") was an eligible trawler that generally did not operate in Hong Kong waters (一艘一般不在香港水域作業的合資格拖網漁船) and awarding him an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the SW0141 Vessel.

2. Case number SW0142, on the other hand, is an appeal by Mr. LI Chi-hung (李志雄) & LI Chi-chuen (李志泉) ("**Messrs. Li**") against the decision of the Inter-departmental Working Group ("**IWG**") dated 14 December 2012 ("**the SW0142 Decision**"<sup>2</sup>) determining that Messrs. Li's fishing vessel (with Certificate of Ownership Number CM63698A) ("**the SW0142 Vessel**") was also an eligible trawler that generally did not operate in Hong Kong waters (一艘一般不在香港水域作業的合資格拖網漁船) and awarding him an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the SW0142 Vessel.
3. Mr. CS Lee and Messrs. Li are jointly referred to as ("the Appellants"). The appeals of Mr. CS Lee and Messrs. Li were with the Appellants' consent<sup>3</sup> heard together on 23 November 2016 for the reason that the 2 vessels in questions had, according to the Appellants, at the material time before the Trawl Ban (as defined hereinbelow) been operating in tandem as "pair trawlers" (雙拖).

### **The Trawl Ban and the EGA**

4. According to Paragraph 3 of 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 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.
5. 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**").

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<sup>2</sup> Hearing Bundle p 94 of SW0142

<sup>3</sup> Hearing Bundle p 172 of SW0141

## **The Policy and Guiding Principle**

6. According to paragraph 7 of the FHB Paper, the policy and guiding principles underlying the EGA Package are set out in FC Paper FCR(2011-12)22 (“**FC Paper**”).
7. According to Paragraph 12 of the FC Paper, the guiding principle is that the EGA apportioned to different groups of claimants should be proportional to the impact on them caused by the Trawl Ban.
8. Owners of inshore trawlers which operated wholly or partly in Hong Kong waters were expected to be most affected when the Trawl Ban took effect as they would lose their fishing grounds in Hong Kong waters. They would receive a greater amount of EGA than owners of larger trawlers<sup>4</sup>.
9. Owners of larger trawlers which generally did not operate in Hong Kong waters were also affected by the Trawl Ban since they would lose the option to trawl in Hong Kong waters in the future. However, as the impact of the Trawl Ban on them was far much less when compared with owners of inshore trawlers, an owner of a larger trawler is only granted a lump sum EGA of HK\$150,000<sup>5</sup>.

## **The Appeal Grounds**

10. In both their appeals, the Appellants contend that:
  - (1) their dependency on Hong Kong waters for their trawling operations amounted to 40%. And 40% of their catch came from Hong Kong waters;
  - (2) their vessels were made of wood and had been in service for some 27 years;
  - (3) they had gradually moved towards operating near Hong Kong waters.

## **The Appeal Hearing**

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<sup>4</sup> Paras. 5 to 10 of FC Paper

<sup>5</sup> Paras. 9 and 10 of FC Paper

11. At the hearing, (“**the Appeal Hearing**”):
  - (1) Mr. CS Lee conducted his appeal in person; Mr. CS Lee further represented Messrs. Li in the conduct of their appeal; and
  - (2) IWG conducted the appeal through their representatives, Dr. William Siu and Ms. Teresa Yuen.
12. No documentary evidence of fish sale, fuel expense or payment for ice has been submitted by the Appellants. None of the Appellants lodged any witness statement for the purpose of the appeal hearing.
13. Mr. CS Lee gave oral evidence, made oral submissions and raised questions with the IWG representatives. On the other hand, Messrs. Li were both absent at the hearing.
14. Mr. CS Lee’s oral evidence can be summarized as follows:
  - (1) They always refueled their vessels to the full capacity of the fuel tanks, i.e. about 150 barrels of fuel for SW0141 Vessel. The amount of fuel could usually last them about 1 month of operation.
  - (2) In the 1970s, they started hiring workers from the Mainland to assist their operations.
  - (3) In the late 1980s, each fishing expedition lasted about 7 to 8 days. On average, they would return to Hong Kong about 4 times each month.
  - (4) Later on, their mode of operations changed because Hong Kong waters had less fish to catch. They tended to stay outside Hong Kong for longer time spans for each trip. They returned to Hong Kong less frequently as a result.
  - (5) They went trawling wherever there was fish to catch. News of where fish could be caught would be communicated via walkie-talkies. In the period from 2009 to 2011, typically they would travel to the south of Hong Kong, to the south of Shanwei (汕尾) and to Hainan Island (海南島) to trawl fish. A return trip to Hainan and back would take more than 10 days.
  - (6) They sold primarily to Hong Kong. Typical types of fish included 大眼雞, 魷魚, 紅衫魚. Those fishes that could not be sold in Hong

Kong would be sold to Mainland fish-traders operating from fish collecting boats. Typically, those sold to Mainland traders were lower value types of fish. The sale to the Mainland fish-traders was usually done in Hong Kong waters. Those traders would then carry the load back to the Mainland for sale.

- (7) During the fishing moratorium periods, they could not operate. The PRC authorities prohibited them from fishing and if caught, they would be fined.
- (8) They required Mainland workers to assist them in operating their vessels. Because the Mainland workers needed to work in Hong Kong waters, they needed permits to enter Hong Kong and work on board. Thus throughout the years, the Appellants would apply for permits for those workers under the Mainland Fishermen Deckhands Scheme in order for the workers to work legally in Hong Kong waters.
- (9) The Mainland workers' tasks on the vessels when in Hong Kong waters were refueling, off-loading fish, replenishing ice and cooking.
- (10) They no longer kept the receipts for fish sales, fuel payments and ice payments.

### **Decision & Reasoning**

15. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
16. It is not in dispute that both vessels were pair trawlers of 31.00m / 31.60m in length, of wood construction, each having 794.49kW aggregate engine power and a fuel tank of 42.42 sq. m. / 50.00 sq. m. We accept IWG's submission and analysis that such vessels would be capable of operating well beyond Hong Kong waters. On the Appellants' own admission at the hearing, they typically operated the vessels in places well beyond Hong Kong's borders, going as far as Hainan and Shantou. These 2 places are about 1 to 1.5 hours by plane from Hong Kong.
17. The admission that during the fishing moratorium periods (休漁期), the Appellants would not operate in case they could be caught by the Mainland authorities and fined is another clear indication that the Appellants did not generally operate in Hong Kong waters. This admission is in line with

typhoon shelter surveys<sup>6</sup> conducted in 2011, where each of the vessels was spotted at Shau Kei Wan typhoon shelter on 10 occasions during the fishing moratorium period from mid-May to end of July. It is also in line with the two sea patrol survey records for the survey on fishing in Hong Kong waters and for the survey in connection with the enforcement of Fisheries Protection Ordinance - there was no sighting at sea recorded at all for the 2 vessels<sup>7</sup> during the periods between November 2010 and November 2011 and between October 2009 and November 2011 respectively.

18. The admission, on the other hand, is not in line with the Appellants' "claim" that they were operating in Hong Kong waters during 40% of their time or that they were relying on Hong Kong waters to the extent of 40% of their operations.
19. In any event, the figure of 40% given at the time of the lodging of the appeal differs markedly from the figure given when the questionnaire was completed back in February 2012. In the questionnaire for SW0141<sup>8</sup>, it was declared by Mr. CS Lee that only 10% of his time was spent operating in Hong Kong waters. In the questionnaire for SW0142<sup>9</sup>, it was declared by Messrs. Li that 30% of their time was spent operating in Hong Kong waters. No satisfactory explanation was given by the Appellants for these discrepancies.
20. In the evidence<sup>10</sup>, the 2 vessels were spotted on 21 occasions at Shau Kei Wan typhoon shelter during 2011, of which 10 occasions were during the moratorium and 1 occasion was during the Chinese New Year period. In other words, the vessels were spotted on 10 occasions outside the moratorium and Chinese New Year periods. According to the evidence of Dr. Siu, the IWG would not consider 10 such occasions as high. In their view, 4 to 16 sightings (outside the moratorium and Chinese New Year periods) would not be considered as frequent. The Appellants did not challenge such view of the IWG during the hearing. There is no reason or basis for the Board to doubt IWG's view in this regard.
21. As regards the oral evidence given by Mr. CS Lee regarding the mode of sale of the Appellants' catch, it is totally inconsistent with the answers given in the 2 questionnaires<sup>11</sup>. In the questionnaires, the Appellants declared that

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<sup>6</sup> Hearing Bundle p 109 of SW0141 and p 111 of SW0142

<sup>7</sup> Hearing Bundle pp 111, 113 of SW0141 and pp 113, 115 of SW0142

<sup>8</sup> Hearing Bundle p 45 of SW0141

<sup>9</sup> Hearing Bundle p 40 of SW0142

<sup>10</sup> Hearing Bundle p 109 of SW0141 and p 111 of SW0142

<sup>11</sup> Hearing Bundle p 46 of SW0141 and p 41 of SW0142

they sold their catch to Mainland fish traders on boats (大陸收魚艇). By deleting the words “次要” in Paragraph 21(b) of the questionnaire, the Appellants were effectively declaring that *all* their fish catch was sold to Mainland fish traders on boats in the year leading up to 13 October 2010. No satisfactory explanation was given by the Appellants for this inconsistency between what was declared in the questionnaire and what Mr. CS Lee was telling the Board at the hearing. We take the view that Mr. CS Lee’s oral description of the Appellants’ mode of sale unconvincing. We find the answers given at Paragraph 21 of the questionnaires to more accurately reflect the true situation. Such a mode of sale is more consistent with a case where the pair trawlers were not generally operating in Hong Kong waters.

22. The Appellants declared in the questionnaires<sup>12</sup> that they each employed 6 Mainland workers under the Mainland Fishermen Deckhands Scheme in the year leading up to 13 October 2010. Mr. CS Lee’s oral elaboration on what tasks these workers regularly took on *in Hong Kong waters* was illuminating. These workers were said to have been engaged in refueling, cooking, off-loading fish and preparing ice (打冰). He made no mention of the workers being engaged in catching fish or trawling activities in Hong Kong waters. Thus, the fact that these workers had entry and work permits in Hong Kong under the scheme does not help the Appellants discharge the burden of proving that they were operating 40% of their time in Hong Kong waters or that they were relying on Hong Kong waters for their trawling business to the extent of 40%. There is no evidence to suggest that these workers actually trawled for the Appellants in Hong Kong waters. On the other hand, there is evidence to suggest that the Appellants were predominantly operating a long way away from Hong Kong waters with the assistance of these workers on board, and for convenience more than anything else, permits to enter and work in Hong Kong were obtained for them so that they could help out in re-fueling, cooking, off-loading and preparing ice whilst they were in Hong Kong waters.
23. In the hearing bundles is a copy of a letter<sup>13</sup> from the Hong Kong Fishing Vessel Owners Association Ltd to the Board dated 7.1.2013. In the letter, mention was made of certain compensations made to vessels owners of the association for dredging operations (挖沙) in the 1990s. It is not in dispute that those compensations were paid to all fishing vessel owners and not only to those who were operating or predominantly operating in Hong Kong waters. As such, the fact of having been paid such

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<sup>12</sup> Hearing Bundle p 44 of SW0141 and p 39 of SW0142

<sup>13</sup> Hearing Bundle p 8 of SW0141

compensation in the 1990s would not help the Appellants prove their case in the present appeals.

24. In coming to our decision to dismiss the appeals, we have also taken into account of the fact that although the Appellants asserted that they could produce documentary evidence to show their fuel usage, none in fact was produced in the end.
25. For the sake of completeness, the Board has also considered the reliability of Table M-2 at Hearing Bundle p. A120 and Table S-3 at Hearing Bundle p. A154, despite no challenge having been specifically mounted by the Appellants in this regard. Having heard explanations from Dr. Siu on the sampling rates and sampling sizes<sup>14</sup> in the surveys referred to in Appendices J and K<sup>15</sup>, the Board is satisfied with the reliability of IWG's analysis of the correlation between vessel lengths and operational dependency on Hong Kong waters.
26. Having considered all the evidence, the Board has taken the view that the Appellants have not been able to discharge the burden of proof to establish their case that, on a balance of probabilities, their vessels had been spending about 40%, or 10% which is the required threshold<sup>16</sup>, of its time operating in Hong Kong waters. There is no real evidence to support any such case, whether it be 10%, 40% or anything in between. The burden is on the Appellants to persuade this Board to accept their case and they have failed to do so here. They have also failed to challenge IWG's reasoning as set out in the Statement Submitted by the Respondent in the hearing bundles, Parts B, C and D (乙部 丙部 丁部).

## **Conclusion**

27. In the circumstances, these appeals are dismissed.

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<sup>14</sup> sampling rate of 38% for Appendix J statistics and 7% for Appendix K statistics

<sup>15</sup> Hearing Bundle pp A112 and A114

<sup>16</sup> The Board is mindful that any percentage of fishing time in Hong Kong waters at or above 10% would satisfy the threshold requirement stipulated in Annex III of the Food and Health Bureau Paper dated 29 January 2013



**Case Nos. SW0141 & SW0142**

Date of hearing : 23 November 2016  
Heard at : 9/F, Rumsey Street Multi-storey Carpark Building, 2  
Rumsey Street, Sheung Wan, Hong Kong

(signed) \_\_\_\_\_  
Mr. FEE Chung-ming, Johnny, JP  
Chairman

(signed) \_\_\_\_\_  
Mr. CHAN Wai-chung, MH  
Member

(signed) \_\_\_\_\_  
Ms. LAM Po-ling, Pearl  
Member

(signed) \_\_\_\_\_  
Ms. WONG Pie-yue, Cleresa  
Member

(signed) \_\_\_\_\_  
Dr. TYEN Kan-hee, Anthony  
Member

The Appellants, LEE Chi-sing appearing in person in SW0141 and as authorized representative of the appellants in SW0142, those appellants being absent  
Dr SIU Ho-lim, William, Fisheries Officer (Sustainable Fisheries) 3, AFCD, representative on behalf of the IWG  
Ms. YUEN Wing-sum Teresa, Fisheries Officer (Sustainable Fisheries) 4, AFCD, representative on behalf of the IWG  
Mr Paul LEUNG, Legal Advisor to the Board