

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)
CASE NOS. SW0158 & SW0159
(HEARD TOGETHER)

Between

WAN KWAI MUI (溫桂妹)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

And between

CHEUNG SE WAH (張士華)

Appellant

and

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Date of Hearing: 22 June 2016

Date of Decision and Reasons for Decision: 28 February 2017

DECISION AND REASONS FOR DECISION

JUDGMENT (Chairman Mr. TO Wai-keung Vincent, Member Ms. HUI Ming-ming Cindi, Member Mr. CHAN Wai-chung, Member Mr. AU Pak-ching Romeo and Member Mr. CHAN Hiu-fung Nicholas):-

Introduction

1. Case number SW0158 is an appeal by Ms. WAN Kwai-mui (溫桂妹) (“**Ms. Wan**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 21 December 2012 (“**the SW0158 Decision**¹”) determining

¹ Hearing Bundle p 124 of SW0158

that Ms. Wan's fishing vessel (with Certificate of Ownership Number CM69630Y) ("**the SW0158 Vessel**") was an eligible pair trawler (雙拖) that mainly relied on Hong Kong waters for its trawling operations and awarding her an *ex gratia* payment of \$3,413,132 under the one-off assistance scheme in respect of the SW0158 Vessel. The SW0158 Vessel was wooden pair trawler of 21.92m in length.

2. Case number SW0159, on the other hand, is an appeal by Mr. CHEUNG Se-wah (張士華) ("**Mr. Cheung**") against the decision of the Inter-departmental Working Group ("**IWG**") dated 21 December 2012 ("**the SW0159 Decision**")² determining that Mr. Cheung's fishing vessel (with Certificate of Ownership Number CM63264A) ("**the SW0159 Vessel**") was also an eligible pair trawler that mainly relied on Hong Kong waters for its trawling operations and awarding him an *ex gratia* payment of the same amount, i.e. \$3,413,132, under the one-off assistance scheme in respect of the SW0159 Vessel. The SW0159 Vessel was a wooden pair trawler of 21.9m in length.
3. Mr. Cheung and Ms. Wan are husband and wife. With their express consent³, their appeals were heard together on 22 June 2016 for the reason that the 2 vessels in questions had, according to them, at the material time before the Trawl Ban (as defined hereinbelow) been operating in tandem as pair trawlers.

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**").

² Hearing Bundle p 120 of SW0159

³ Hearing Bundle p 313 of SW0158 and Hearing Bundle p 308 of SW0159

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 trawlers⁴.
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 larger trawler is only granted a lump sum EGA of HK\$150,000⁵.

The Appeal Grounds

10. In both their appeals, the Appellants contend⁶ that their awards were at least \$1,000,000 below those granted to some owners of a similar type of vessels and that the Appellants’ awards were not sufficient to cover their loss of income over a period of 11 years. They allege that each year, their total catch amounted to between \$2,800,000 to \$3,000,000⁷.

The Appeal Hearing

11. At the hearing, (“**the Appeal Hearing**”):

(1) Ms. Wan and Wan’s son, Mr. Cheung Ka-chung (張家眾), her authorised representative, conducted the appeal ;

⁴ Paras. 5 to 10 of FC Paper

⁵ Paras. 9 and 10 of FC Paper

⁶ Hearing Bundle pp 4, 8 of SW0158 and Hearing Bundle pp 4, 8 of SW0159

⁷ Hearing Bundle p 8 of SW0158 and Hearing Bundle p 8 of SW0159

- (2) Mr. Cheung was present in person; and
 - (3) IWG conducted the appeal through their representatives, Dr. Albert LEUNG Wai-yin, Dr. William SIU Ho-lim and Dr. SO Chi-ming.
12. Mr. CHEUNG Ka-chung made a number of points at the start of the hearing. He relied on the handwritten submissions of the Appellants⁸ filed on 13 May 2016 and stressed that:
- (1) in making the *ex gratia* awards, the IWG failed to take into account the actual productivity of the Appellants' 2 vessels;
 - (2) the survey data used by the IWG in analyzing the net income generated by pair trawlers of different vessel lengths were neither sufficient nor reliable;
 - (3) when compared with IWG's analysis of stern trawlers' net income, IWG's figures for pair trawlers were too low, given the fact that the size of the nets deployed by pair trawlers were usually much larger than that of stern trawlers;
 - (4) when compared with larger trawlers, smaller trawlers (such as the Appellants' vessels) had the advantage of being able to trawl in more confined waterways (內灣) where there were fewer competitors;
 - (5) there were 6 other pairs of pair trawlers, all larger in length than the Appellants' vessels, whose owners were awarded more than \$4 million in *ex gratia* payments under the present scheme;
 - (6) it is unfair that for pair trawlers of length of 21.5m, their *ex gratia* payments were about 5% less than those for stern trawlers; whereas for longer vessels, the payments for pair trawlers were greater than for stern trawlers;
 - (7) the Appellants had original sale receipts showing income that was greater than IWG's figures or assumed figures – and those receipts did not include the Appellants' other trawling income from the sale of miscellaneous fish such as “貓魚” and “魚肥” which amounted to about \$500,000 each year.
13. Mr. Cheung and his son both raised the so-called “skipper effect” point during the hearing. They were both adamant that they were more productive fishermen than their competitors.

⁸ Hearing Bundle pp 147-155 of SW0158 and Hearing Bundle pp 141-149 of SW0159

Decision & Reasoning

14. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
15. We accept the evidence of Dr. So representing the IWG that the survey data they used in analyzing the net income generated by pair trawlers of different vessel lengths were taken from surveys of trawler owners as described in Appendix J and Appendix K in the Annex 4 (附件 4) of the Hearing Bundles. In particular, we accept Dr. So's evidence that in their survey of 2005 data, an overall sampling rate of 38% was achieved and for pair trawlers, a sampling rate of 46% was achieved. In our view, data obtained from such surveys are reasonably reliable. We have no reason to doubt Dr. So's evidence on these figures. On the other hand, we do not accept Mr. CHEUNG Ka-chung's suggestion that when the government departmental staff was conducting the surveys, they were not being treated seriously by the fishing vessel operators. Mr. CHEUNG Ka-chung even suggested that the surveys took place when the operators were playing mahjong. In our view, the burden was on the Appellants to persuade this Board that the basis of IWG's analysis was faulty. The Appellants have not discharged that burden.
16. In any case, the present *ex gratia* payment scheme was never intended to compensate each and every trawler owner by paying them amounts equivalent to 11 years of their actual annual net income. The criteria for determining these payments were essentially (i) the type of vessels, (ii) the length or size of the vessels and their power, and (iii) the dependency of operations on Hong Kong waters. These broad criteria were set out as the policy and guiding principles underlying the EGA Package, as set out in the FC Paper⁹.
17. The Appellants rely on the numerous receipts issued by 德記鮮魚 presented in the Hearing Bundles to illustrate how much income they had earned trawling in Hong Kong waters. In our view, these receipts are not helpful. First of all, it should be noted that the Appellants are already in the category of "higher tier" inshore trawler owners. For the same or similar vessel lengths, the Appellants are already receiving the highest amounts of *ex gratia* payments for pair trawlers. Secondly, as stated above, the EGA scheme is not intended to pay an allowance based on actual receipts. Thirdly, those receipts are equivocal as a matter of evidence on where the fish was caught: within Hong Kong waters or outside Hong Kong. As there

⁹ Hearing Bundle Annex 4 p A053

is no evidence to prove the additional \$500,000 annual income from the miscellaneous fish types (“貓魚” and “魚肥”), we do not accept the Appellants’ assertion of such income.

18. In respect of the Appellants’ submissions that pair trawlers’ net income should be higher than stern trawlers, we accept Dr. So’s explanations, namely, that although pair trawlers should be able to generate a higher net income in proportion to stern trawlers, pair trawlers tend to operate outside of Hong Kong waters whereas stern trawlers tend to operate within Hong Kong waters. Therefore, when the focus is on the net income of these 2 types of trawlers *in Hong Kong waters*, it should not be surprising that the figures are relatively higher for stern trawlers.
19. We are unable to accept the argument of “skipper effects” advanced by the Appellants. The Appellants have not discharged their burden of proving that they were better skilled than their competitors. No reliable evidence has been placed before us to make such a comparison. There is also nothing to support their assertion that smaller vessels can catch fish more productively in confined waterways.
20. Based on Annex 4 of the Hearing Bundle, p A154, one can indeed observe that there were 12 pair trawlers (i.e. 6 pairs) other than the Appellants’ pair trawlers. Those trawlers were of lengths between 25.01m and 31.00m. Those lengths are significantly greater than that of the Appellants’ vessels (of approx. 21.9m). Their owners were paid significantly higher EGA than the Appellants. Whilst we do understand the Appellants’ grievances, given our rejection of the “skipper effects” argument, we cannot see any valid ground to challenge IWG’s use of vessel lengths as one of the criteria for determining the amounts of EGA.
21. We have carefully considered the handwritten submissions of the Appellants including the mathematical calculations and deductions contained in those submissions. We have also carefully considered the oral submissions made during the hearing in respect of those calculations and deductions. Regrettably, we do not accept the logic behind those calculations. In particular, we do not accept the validity of the use of the “constant” of 65.6406. The fundamental objection of those calculations and deductions is the point stated earlier, namely, the EGA amount is not intended to be equivalent to or based on the actual net income of individual trawler owners. The adoption of the Appellants’ method of calculating EGA would amount to a radical departure from the criteria set out in the FC Paper.

22. All in all, we find that the Appellants have not discharged their burden to show that IWG's method of working out their EGA was erroneous.

Conclusion

23. In the circumstances, these appeals are dismissed. IWG has not asked for costs, and accordingly we make no order as to costs of this Appeal.

Date of hearing : 22 June 2016

Heard at : Room 1801, 18/F, East Wing,
Central Government Offices, 2 Tim Mei Avenue,
Tamar, Hong Kong.

(signed) _____
Mr. TO Wai-keung Vincent, BBS
Chairman

(signed) _____
Ms. HUI Ming-ming Cindi
Member

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

(signed) _____
Mr. AU Pak-ching Romeo, JP
Member

(signed) _____
Mr. CHAN Hiu-fung Nicholas, MH
Member

The Appellants, WAN Kwai-mui appearing in person with her authorized representative, Mr. Cheung Ka-chung; and Cheung Se-wah appearing in person
Dr. LEUNG Wai-yin, Albert, Supervisory Fisheries Management Officer, AFCD, representative on behalf of the IWG
Dr. SIU Ho-lim, William, Fisheries Officer (Sustainable Fisheries), AFCD, representative on behalf of the IWG
Dr. SO Chi-ming, Fisheries Officer (Sustainable Fisheries), AFCD, representative on behalf of the IWG
Paul LEUNG, Legal Advisor to the Board