

**DETERMINATION OF SEA-FISHING BOAT LICENSING APPEAL
UNDER SECTION 16 OF THE FISHERIES (AMENDMENT) ACT 2003**

**In relation to vessel MFV “Shazleah” Licence Application 10/20
and expired capacity 29 kW of MFV “Keith Og”**

MLM Fisheries Ltd

Appellant

and

The Licensing Authority in Relation to Sea Fishing Boats

Respondent

Decision: This appeal succeeds for the reasons set out below

Jurisdiction

This appeal is limited to the jurisdiction granted to an Appeals Officer under section 6 (3) and (4) of the Fisheries Amendment Act 2003.

Section 6 (3)

An Appeals Officer shall be independent in the exercise of his or her functions under this Act subject to—

- (a) the law for the time being in force in relation to sea-fishing boat licensing, including, in particular, the legal obligations of the State arising under any law of an institution of the European Communities or other international agreement which is binding on the State, and*
- (b) such policy directives in relation to sea-fishing boat licensing as the Minister may give in writing from time to time.*

Section 6 (4)

A policy directive given under subsection 3(b) may require certain prohibitions or conditions to be imposed in relation to sea-fishing for the purposes of protecting, conserving or allowing the sustainable exploitation of living marine aquatic species.

Policy Directive 2 of 2003 was issued under the Fisheries Amendment Act 2003. It provides that *capacity taken off the Fishing Register must be reintroduced to the Register within two years of its removal from the fleet otherwise the entitlement will be lost to its owner.* Policy Directive 2/2003 was applied in this case.

Facts

This appeal is against the decision of the Respondent to refuse to allow the capacity of MFV “Keith Og” (29 kW) to be used as partial replacement capacity for MFV Shazleah (13.7 GT and 132 kW) because the capacity of the MFV “Keith Og” lapsed on 18 May 2020 by reason of the failure to bring the capacity back on register within 2 years.

Appeal

The basis of this appeal is that the reason why the replacement capacity could not be brought back on register before its expiry on 18 May 2020 was due to a delay by the Marine Survey Office in conducting a survey of MFV “Shazleah” because of government restrictions that were in place during the period March and August 2020 due to the Covid pandemic.

The Respondents issued a licence offer to the Appellant dated 17 January 2020 in respect of the MFV “Shazleah.” The offer was subject to a number of conditions, one of which, condition iv, required the vessel to be surveyed by a marine surveyor appointed by the Marine Survey Office and a declaration of compliance with the Code of Practice (confirming the safety of vessel) being issued.

The intended process at that time was that following the declaration, providing that all other conditions in the licence offer were met, the off register replacement capacity from MFV “Keith Og” would be used alongside replacement capacity from MFV “Endeavour A” (which is still extant and is not subject to this appeal) to make up the capacity required for MFV “Shazleah.”

The Appellant had until 18 May 2020 to reintroduce the capacity from MFV “Keith Og” to the sea fishing register in order to be used as capacity for MFV “Shazleah.”

Building of the MFV “Shazleah” was due to be complete in April 2020. The survey was to take place immediately following its completion and because the vessel was a new-build, there was no expectation that the survey would be problematic, in which case the Code of Practice declaration could issue (meeting the licence conditions) in advance of the 18 May 2020 dead-line and the licence would issue.

However due to the builder’s boatyard having to close unexpectedly in March 2020, due to Covid restrictions, and due to the closure of the marine survey company premises (and agent of the MSO) in late March 2020 until 18 May 2020, condition iv of the licence offer could not be complied with and the replacement capacity expired.

The Appellant contends that had the Covid pandemic not resulted in the closure of the boat yard and the marine survey company, the vessel would have been built and the survey conducted within the necessary time frame. He says that the other conditions in the January 2020 licence offer were fully complied with.

He contends that statutory deadlines that pertained to other statutory processes (for example planning permission deadlines) were extended due to Covid restrictions, however no extension was permitted in respect of the expiry of replacement capacity. He contends that this is unfair because it is clear that if the pandemic had not occurred and if the Covid restrictions were not in place, at this very salient time (ie from mid March 2020 onwards), as all of the other conditions in the licence offer were in place, the COP declaration would have issued and the vessel would have received its licence before the capacity of MFV “Keith Og” had expired. He points to the fact that when the marine survey company re-opened, the vessel received its COP survey without any complication or delay.

Decision

This determination is issued on the basis of a consideration of the contents of the Licensing Authority file, as no oral hearing was requested. In accordance with section 10 (2) of the 2003 Act, no submissions having been furnished I am precluded from considering any other material other than that contained in the Appeal file.

The standard position of the Respondent when replacement capacity has lapsed due to time, is that no decision has been taken by them but rather the licence has been allowed to lapse due to time expiry as set out in Policy Directive 2 of 2003, which permits no discretion.

I am not persuaded by this approach. As has been found in other appeals, where the Licensing Authority has contributed to the delay or where it has occurred “on its watch” so to speak, whether it is liable for this or not, appellants have been granted the capacity. The reason for this is because time limits under the policy directive are apply strictly and therefore, if a delay has been caused either by actions the Respondent or, as in this case, another State body (an agent of the Marine Survey Office) not through its action but during its watch, this should not be used to deprive an Appellant of a right which he should have ordinarily had. In other words “two years” in Policy Directive 2/2003 should not be interpreted as being less than two years. In doing so I follow the reasoning of the Appeal decision of **MFV “Ard Beara” dated 8 May 2017 and MFV “Briseanua” C126 dated 29 November 2019**. I am also persuaded by the decisions of other Appeals Officers in this regard.

Therefore when an period of time runs against a licence applicant due to the operation of the Marine Survey Office, a State body, or an agent thereof, due to that office being closed due to government restrictions in place due to a pandemic, I am not persuaded that this should be used to deny the Appellant of capacity, when the evidence is that, in the absence of the Covid delay, the replacement capacity would not have been lost.

There is no assertion by this Appellant, as has pertained in some other Policy Directive 2/2003 appeals, that he was unaware of the time constraint of two years. The Appellant was at all times fully aware of the time limit when he applied for the survey. He fully expected the boat build and the subsequent survey to be complete within the time period. The fact that the survey was not completed until after the time had lapsed was outside his control.

I am of the view that the reason that the failure to reintroduce the capacity onto the register on or before 18 May 2020 was solely due to the Covid restrictions that were in place at this time.

I accept that the wording of the policy directive does not permit the Respondent a discretion other than to apply the terms of the directive strictly and I am not suggesting that the Respondent depart from wording of the policy directive but I also find that the phrase “two years” in the directive must be interpreted as being two full years within which the licence conditions could be complied with. Given the extraordinary circumstances that prevailed at this time I suggest that a stay on the time period set out in the directive be applied from mid-March 2020 (when Covid restrictions were introduced) until such time as the conditions set out in the licence offer *could* have been complied which in this case was by end August 2020.

This decision is not to be considered as an automatic extension of the expiry date as contended by the Appellant in his appeal application. Nor is it an amendment to the terms of Policy Directive 2/2000, because to do so would be to step outside the powers of an Appeals Officer set out in the 2003 Fisheries Act. However confined to the facts of this case, where all the licence conditions were complied with bar those that fell outside the control of the Appellant due to the pandemic and in circumstances where the public office whose responsibility it was to conduct the marine survey was closed due to the necessary Covid restrictions in place and this closure lasted until the expiry date of the replacement capacity had passed, in my view it would be manifestly unfair if this was the reason that the Appellant was not permitted to use this capacity to licence his vessel. There was no more that the Appellant could have done in the circumstances.

I do not find fault with Policy Directive 2/2003, nor it being applied. I find however that the delay in the survey being conducted specifically from mid-March 2020 onwards occurred at the most pertinent time for the Appellant and it would not have occurred but for the Covid restrictions that were in place. This led to the MSO being unable to complete its statutory obligations to survey the Appellant’s vessel within the necessary time period. I note from that the Marine Survey Office agent’s correspondence that it was only permitted to recommence survey work on 18 May 2020, from which point they had a back log of several (unspecified) number of weeks. I suggest that this period should not have counted as time running against the Appellant and that the operative expiry date, taking account of the stay period, should have been the end of August 2020.

For this reason I find this appeal to be well founded and should succeed.

Emile Daly B.L.
Sea Fisheries Appeal Officer

20 February 2021