

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

**In relation to off-register capacity from fishing vessel MFV “MVF Felucca”**

Polar Fish Co. Ltd. Appellant

and

The Licensing Authority in Relation to Sea Fishing Boats Respondent

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**Hearing:** Oral Appeal, 6 October 2023, Mill Park Hotel, Mullins, Co. Donegal

**Appeals Officer:** Emile Daly B.L.

**Date of Determination:** 10 October 2023

**Appeal Outcome:** This appeal succeeds

**Determination**

**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, which states:

*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 Fisheries Amendment Act 2003 states (at paragraph E) that capacity taken off the Fishing Register must be reintroduced onto the Sea Fishing Boat Register within two years of its removal from the fleet, otherwise the entitlement will be lost to its owner.*

This appeal concerns, the loss of capacity under the two-year (“use it or lose it”) rule pursuant to Policy Directive 2/2003, under section 3 of the Fisheries Amendment Act 2003.

### **Capacity**

On 7 October 2020 the Appellant removed capacity of 56 GT from the Fishing Boat Register, capacity that had attached to the fishing vessel MFV “Felucca.” On this date this capacity became “off-register” capacity. The Appellant’s plan was to bring the capacity back on register within two years before the capacity expired. The date to reintroduce the capacity onto the register was on or before 7 October 2022.

### **Agreed Facts**

On 7 October 2022 the Respondent received a completed deregistration form and a licence application for the MFV “Lelia.”

In response and on the same day, namely 7 October 2022 the Respondent sent a letter of licence offer to the Appellant in respect of the MFV “Lelia” in which the Appellant was advised that in order for the vessel to be licenced two interrelated conditions were required to be met.

The first condition was that the capacity, which had been removed from the MFV “Felucca” needed to be brought back on register on that day, 7 October 2020 and the second was that a Certificate of Compliance issued by the Marine Survey Office (MSO) certifying that the host vessel, MFV “Lelia” complied with EU safety requirements. In the absence of this certificate of compliance, the vessel could not accept the capacity and therefore the capacity could not be brought back on register.

On receipt of this licence offer on 7 October 2022 the Appellant contacted the Respondent office to advise them that the certificate of compliance would be issued forthwith.

On Monday 10 October 2022 the Respondent received the MSO certificate of compliance however at that point the capacity had already expired the previous Friday.

The Appellant contacted the Respondent again on Monday 10 October 2022 to explain that the MSO had been asked to complete the survey the previous June 2022 and that despite a number of reminders the MSO had not issued the certificate in time. The Appellant contended that it could not be held responsible for delays by the MSO, particularly given that the certificate was only late by one working day.

The Respondent contacted the MSO. The MSO confirmed to the Respondent (email on Tuesday 11 October) that the Appellant was correct in stating that its application for a certificate of compliance *had* been made in advance of the expiry date and the MSE confirmed that there was no reason why the Certificate of Compliance could not have been issued on the date of expiry (i.e., on 7 October 2022) because the host vessel had passed the survey.

However, this presented the Respondent with a difficulty because the certificate was not presented to them on 7 October, to enable the capacity to be reintroduced on that date, and consequently the capacity was lost on that date. The Respondent informed the Appellant, by email dated 12 October 2022, that it had no discretion to extend the two-year rule and that because on 7 October 2022 they were not in receipt of a safety certificate for the MFV “Lelia” they were left with no option. As on 7 October 2022 they were not provided with a certified assurance that the host boat complied with the safety requirements to put the vessel at sea, the capacity could not be transferred on that date and the certification could not be applied retrospectively. The Appellant was offered a right of appeal.

The Appellant issued a notice of appeal on the 28 October 2022

### **Points of Appeal.**

The Appellant submits the following points:

1. The MSO received the Appellant’s application for a Certificate of Compliance in June 2022. The Appellant should not lose its capacity because of MSO delayed in issuing the Certificate of Compliance.
2. The Appellant had no control over the time that the MSO took to issue the certificate.
3. If the MSO had certified that the boat was safe, one working day before it had, the capacity would have transferred on 7 October 2022 and the asset would not have been lost.
4. The MSO confirmed on 11 October 2022 that the surveys were complete and that the certificate could have issued on 7 October 2022. This constituted a

confirmation, albeit retrospectively, that the boat was safety-compliant on 7 October 2022.

### **Defence to Appeal**

1. Fishing capacity is a private asset that is up to the owner to manage.
2. It was a matter solely for the Appellant alone to ensure that the capacity was brought back onto the Register on or before 7 October 2022. The Appellant failed to do that.
3. The Appellant was aware that the transfer of capacity could only take place once a host vessel had a Certificate of Compliance, and the off-register capacity could not transfer in the absence of that certification.
4. The Respondent is bound by the statute and Policy Directive 2/2003 within which no discretion is permitted. It must be strictly applied.

### **Appeal Process**

The Appeal Notice was received by the Appeals Officer and forwarded to the Respondent on 17 November 2022.

The appeal bundles were received by the Appeals Officer on 16 June 2023 and a copy was forwarded to the Appellant, which included the Respondent's written submissions. The Appellant's written submission was received by the Appeals Officer on 14 July 2023

An oral hearing was arranged for 6 October 2023 in the Mill Park Hotel in Donegal Town.

### **Determination**

As Appeals Officer, under the 2003 Fisheries Amendment Act, my powers are circumscribed. My jurisdiction is set out in Section 6 of the 2003 Act and my powers are subject to Ministerial policy directives, including Policy Directive 2/2003.

Paragraph E of Policy Directive 2/2003 provides a sea-fishing licence applicant with two years, from the removal of capacity from the fleet register, to reintroduce that off-register capacity back onto the register.

I accept that the wording of paragraph E of Policy Directive 2/2003 is strictly worded and does not give the Respondent any discretion other than to apply a time limit of two year from date of removal from the register. I accept the Respondent's submission that the capacity is a private asset, which is up to the owner alone to manage.

However given that an application for the safety survey was made by the Appellant to the MSO in June 2022, well in advance of the capacity expiry date of the 7 October 2022 and given also that the MSO confirmed on 11 October 2022 that the vessel had been surveyed and complied with the safety requirements and the certificate of compliance could have issued on 7 October 2022, I am satisfied that the only reason that the certificate did not issue on 7 October 2022 is because of a delay in issuing the certificate by the MSO.

Given that the MSO was tasked with the responsibility of conducting the survey in June 2022 and the delay that occurred thereafter was not a matter either party in this appeal had any control over, I am satisfied, particularly as the MSO confirmed on 11 October 2022 that the vessel was compliant on the 7 October that the delay from 7-10 October (when the certificate of compliance was furnished to the Respondent) is a delay that should not prejudice the Appellant.

## **Conclusion**

The fact that the host vessel complied with the EU safety rules was not communicated to the Respondent until 10 October 2022 does not alter the fact that the vessel was certifiably compliant on 7 October 2022. This is an unusual appeal in this regard in that even though the two conditions could have been met by the Appellant on 7 October, because the found compliance was not communicated to the Respondent until after 7 October, the capacity expired.

Applying section 16 (4) (a) (ii) of the 2003 Act while I accept that the Respondent had no option other than to determine that the capacity had expired, I am now satisfied that the conditions in the licence offer made to the Appellant on 7 October 2022 were met on 7 October 2022, albeit not communicated, and in these circumstances the capacity should be treated as having been returned to the register on that date.

An emanation of the State cannot by its inaction reduce the entitlement that a licence holder has, of two years to bring capacity back onto the register, to a time period (even by one working day) of anything less than two full years.

I find that the off-register capacity of 56 GT from the MFV “Felucca” should be treated as if it was reintroduced to the register (onto the MFV “Lelia”) on 7 October 2022.

**Emile Daly B.L.**  
**Appeals Officer**