Determination of Sea Fishing Boat Licensing Appeal under section 16 of the Fisheries Amendment Act 2003.

Appellant: Pauric Mulkerrins

Fishing Vessel: MFV St. Bridget; Transfer of Capacity 3.48 gross tonne and 10.06 kilowatts

Law: Operation of Policy Directive 2 of 2003

Oral Hearing was held on 20 October 2023 in Rosaveel Harbour Offices, Co. Galway Those present were Roni Hawe, Registrar General of the Respondent, Cathal Mulkerrins (the son of the Appellant) and the Appellant.

Decision of Appeals Officer: The Appeal is allowed.

Policy Directive 2 of 2003 of the Fisheries Amendment Act 2003

Policy Directive 2 of 2003 made under the Fisheries Amendment Act 2003 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.

Facts

The Appellant lives in Mynish, Carna, Connemara, Co. Galway. Mynish is an island – connected by bridge - off the Connemara coastline. The Appellant has always worked as a full-time farmer and a part-time seasonal fisherman. He fished with his father when he was young and later on, with his own family. He fished on unregistered family fishing boat, MFV St. Bridget, before the industry became regulated in the period 2000-2003. After years of rare-use following the death of his father the family boat was left untended and fell into disrepair.

The capacity of the MFV St. Bridget was removed from the Fishing Register on 25 November 2013.
This capacity was not brought back onto the register before it expired on 25 November 2013 and it was lost.
The Respondent states that two letters were sent to the Appellant advising him of (a) that off-register capacity is required to be brought back on register within two years, or otherwise it will be lost which was set out in a letter dated 17 September 2013 and (b) a subsequent letter dated 25 November 2013 advising the Appellant again of the existence of the two-year rule but specifically advising him that his off-register capacity was required to be brought back on register by 25 November 2015 or otherwise it would be lost.

It is the Appellant's case that he did not receive either of these letters and given that in 2013, there were five different Pauric Mulkerrins living in Mynish, Carna, Co. Galway, it is likely that these letters were delivered to a different Pauric Mulkerrins and never reached him. The Appellant contends that the Respondent were on notice of this (because letters that were previously sent to the Appellants were returned marked "undelivered" by An Post) but despite this, they continued to use the same unreliable postal address. Given this fore-knowledge the Appellant contends that the Respondent should have taken greater effort, particularly with regard to the 25 November 2013 letter, to ensure that the letter was sent and was likely not to be mislaid.

The Appellant's Position

The Appellant's appeal relies essentially on an assertion that he was never advised by the Respondent of the existence of Policy Directive 2/2003 (the two-year rule) and that he did not receive two letters that the Respondent contends were sent to him, within which he was advised on the two-year rule and advised of the date that his off-register capacity would expire.

The Appellant's position is that he received neither the 17 September 2013 or the 25 November 2013 letters. He gave evidence that in 2013 there were 5 different Pauric

Mulkerrins living at Mynish, Carna, Co. Galway. He contends that because he didn't receive these letters, it is probable that these letters were mislaid/ sent to the wrong Pauric Mulkerrins and never reached him. He contends that the Respondent was aware of this problem because a letter of theirs to the Appellant dated 25 October 2013 was returned to the Respondent marked undelivered by An Post on 29 October 2013 and on the envelope the An Post postman wrote that there are two persons of this address with this name.

It is the Appellant's case that given the importance of these letters, particularly the one dated 25 November 2013, sent three weeks after the Respondent became aware of the address' unreliability, the Respondent should have taken additional steps to ensure that the Appellant received their next letter of 25 November 2013, rather than again send it by ordinary post to an address that they knew to be unreliable.

Given that no proof of postage has been provided by the Respondent (and that no assumption can be made that it was posted) but moreover given that the Respondent was aware of the risk that this letter was likely not be delivered to the Appellant is the very one that they seek to rely on, and given the Appellant's evidence that he did not receive it, on the balance of probabilities it is more likely than less likely that the letter of 25 November 2013 was never received by the Appellant.

The Appellant contends also that these were not the only letters that were apparently set by the Respondent but were not delivered to the Appellant, a contention that the Respondent accepts.

The Appellant also states that he did not receive an earlier Respondent's letter dated 28 May 2009 (seeking a Declaration of Compliance with safety standard) in respect of renewing his licence and seeking photographs of the vessel and the Appellant's PPS details. While the Respondent accept that this letter was not replied to by the Appellant, they do not concede that the Appellant's non-reply is evidence that this letter was not received.

The Appellant contends that he also did not receive the Respondent's letter to him dated 17 September 2013 advising him that the licence for the MFV St. Bridget lapsed in June 2009 and that its compulsory removal from the fleet was being considered and attaching an application form to remove the vessel from the register. This is the first letter that the Respondent relies to show that the Appellant was advised about the two-year rule for off register capacity.

The Respondent contends that, while there is no proof of postage of this letter, that it is likely that this letter was received by the Appellant because on 3 October 2013 the Appellant telephoned the Respondent Office to discuss the removal of the MFV St. Bridget from the register because it was no longer sea worthy and they ask, why would he have done this unless he had received the letter of 17 September 2013.

The Appellant maintains that he did not receive the letter of 17 September 2013 and that the reason that he telephoned the Respondent Office on 3 October 2013 was not in response to the letter of 17 September but rather was because he had missed a call from the Respondent office and he returned that call. It was only when he spoke to a clerical officer that he found out about their suggestion that the boat might be compulsorily removed due to lack of sea worthiness, which he agreed with and the forms were sent to him to complete, which he received by letter dated 3 October 2013.

The Appellant further contends that if he *had* received the letter of 17 September 2013 (together with the enclosed application form to remove the boat from the register) there would have been no need for the Respondent's clerical officer to again send this form to the Appellant with their letter dated 3 October 2013.

The Appellant contends that if he did not receive the letters of 17 September 2013 nor the letter of 25 November 2013 then he was not made aware of the two-year rule or the expiry date of the capacity. If he was not informed of the rule or the expiry date of the capacity, he could not have complied with the rule.

The Appellant contends that the more likely explanation for not bringing the capacity back on register is that is that he did not receive the two letters. He contends that this

was further (albeit subsequently) evidenced in September 2020 when another letter from the Respondent (enclosing correspondence that the Appellant contends he never received in 2013) was again delivered to a wrong Pauric Mulkerrins but this was later corrected by the An Post worker, when the wrong Pauric Mulkerrins returned this letter to the post man. At the Appeal hearing the Appellant furnished a witness statement by Paraic Canavan, a postman working in Carna who confirmed that an envelope stamped 22 September 2020 was initially delivered to the wrong Pauric Mulkerrins, Mynish, Carna, Co. Galway but was returned to him some days later, and he then delivered it to the correct Pauric Mulkerrins, namely the Appellant. The An Post worker also confirmed that in 2020 there were three Pauric Mulkerrins resident in Mynish, Carna, Co. Galway.

The Appellant accepts that the introduction of eircodes have rectified all these issues but in 2013 missing and wrongly delivered post to Pauric Mulkerrins in this area was not uncommon and the Respondent knew about this but did nothing about it.

In conclusion the Appellant case is that the balance of probabilities favours a finding that he did not receive either the September 17 2013 letter nor the 25 November 2013 letter and as the Respondent became aware of the postal problem in October 2013, they should have taken additional steps particularly to ensure that the next important letter, namely the one dated 25 November 2013 which advised the Appellant on the two year rule and how it would operate against him, was sent and received by the Appellant.

The Respondent's Position

The Respondent relying on the following grounds:

1. The Appellant is one of the fishermen who prior to 2000 were unregistered. At that point there was an amnesty to allow unregistered fishing boats to be brought onto the register. Policy Directive 2/2003 on foot of the 2003 Fisheries Amendment Act to ensure that off register capacity be brought on the register within two years. When the Appellant took the capacity off

register in 2013 the onus was on him to be aware of the terms and conditions of this facility to ensure that the capacity remained alive.

2. The asset of licensing capacity is a matter for the Appellant alone to manage.
3. There is no legal obligation on the Respondent to inform the Appellant that having taken the capacity off register on 25 November 2013 that he would be required to bring it back on register by 25 November 2015.
4. The Appellant was informed in two letters from the Licensing Authority of the "use it or lose it" policy as per Policy Directive 2/2003. The first on 17 September 2013 and the second on 25 November 2013.
5. These letters are on the Respondent's file as being copies of that which was posted to the Appellant.
6. On the balance of probabilities, it is likely the Appellant received either one or both of these letters. It is unlikely that he received other letters from the Licensing Authority but did not receive the two letters that advised him of the two-year rule.
7. There is no obligation to inform an Appellant of the existence of the two -year rule but even if there was the Respondent has provided ample evidence to prove that the Appellants was informed.

Decision: This appeal succeeds.

Reasons

The Licensing Authority are correct to say that they have no discretion but to apply Policy Directive 2/2003.

However they are incorrect, in my view, to say that they have no obligation to inform an effected party of the operation of the 2 year rule. If an asset is held by an individual through a licence and a rule is introduced that through non-use the State will remove this asset after a set period of time has passed, I am of the view that the State – through its emanations, in this case, the Licensing Authority – has a duty to

inform the effected party of the existence of this rule and that they will lose their capacity unless they bring the off-register capacity back onto the register within two years. There are a number of fishery appeal decisions which support this duty to inform.

No proof has been provided by the Respondent that the letters dated 17 September 2013 and 25 November 2013 were posted. There is proof that there copies of the letters are on the Respondent file but no proof that they were posted and all written communications between the Respondent and Appellant was by post. However even if I were to assume for the purposes of this case that these letters *were* posted by the Respondent, the presumption of receipt of these letters cannot arise in circumstances where in October 2013 the Respondent became aware that their post to the Appellant was not being delivered because An Post told them this was so.

From that point (October 2013) onward I find that an onus lay on the Respondent to ensure that the Appellant was receiving their post. Knowing, as the Respondent did in October 2013 that the Appellants postal address was unreliable should have made them take additional steps to ensure that their pivotal letter of 25 November 2013 should have either been sent by registered post or the Respondent should have contacted the Appellant by some other means to confirm that this letter was received. Continuing to use an unreliable postal address did not discharge the Respondent's obligation to inform the Appellant of the two year rule.

The fact that there were multiple Pauric Mulkerrins of the same address alone would not be sufficient to allow this appeal to succeed, because if that is all that it was, it would have been the responsibility of the Appellant to inform the Respondent of this problem so that the postal address could be changed to something more accurate. The reasons that this appeal succeeds are unique, these are:

(a) I find on the balance of probabilities that the letter of 17 September 2013 was not delivered/ received by the Appellant. I find his evidence that the Respondent's employee sent him out the application form following their telephone conversation on 3 October 2013 was because he hadn't received

the form that was enclosed with the 17 September 2013 letter to be credible. I accept that the reason that he telephoned the Respondent on 3 October was because he had missed a call from them not because he received their letter.

(b) I am satisfied that the most significant letter that the Respondent seeks to rely is the one dated 25 November 2013 because it is the only letter that identifies the off-capacity expiry date.

(c) I am satisfied that in October 2013 the Respondent was put on notice by An Post that there were a number of Pauric Mulkerrins at this address but nonetheless their next letter (being the 25 November 2013) was sent to the same address by ordinary post and no confirmation of receipt was sought.

(d) Had An Post not put the Respondent on notice the outcome of this appeal would most likely be other than it is.

(e) The fact that letters were delivered to the wrong Pauric Mulkerrins subsequently in 2020 is not relevant other than to observe that the mislaying of post still remained a problem in 2020 and at that stage there were only three and not five Pauric Mulkerrins living in Mynish, Carna, Co. Galway.

(f) The facts of this appeal would not arise now given that correspondence is more usually conducted on-line than by post and given that eircodes allow for more accurate delivery. But in 2013 the correspondence between the Appellant and Respondent was only by post and eircodes had not yet been introduced.

(g) In conclusion I am satisfied that the onus was on the Respondent to prove that the Appellant was on notice of the two-year rule and how it operated against him. And I find that even if proof of postage of the Respondent letters are accepted, given that the Respondent were then put on notice by An Post that the Appellants post was at risk of not being delivered, it was reasonable to expect that they would not have kept posting letters to him to the same unreliable address, as if they were not aware of the risk, particularly given that registered post or other ways of confirming receipt of post were open to them and at a minimal cost.

For reasons stated above I find that this Appeal succeeds.

Emile Daly
Appeals Officer
Law Library
Four Courts
Dublin 7

6 November 2023