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

Appellant: Antarctic Fishing Co. Ltd

Fishing Vessel: MFV "Antarctic"

Law: Operation of Policy Directive 2 of 2003

Oral Appeal: 21 July 2020, Central Hotel, Donegal Town.

Representatives:
Mr. Shane Murphy SC and Mr. Brian Gageby B.L. instructed by Ms. Mairin McCartney of Gallagher McCartney Solicitors (for the Appellant)

Mr. Brendan Foley (Legal Advisor to the Respondent)

Decision of Appeals Officer: The Appeal is allowed.

Reason for the Decision

I am satisfied that the Appellant complied with Policy Directive 2 of 2003, made pursuant to the Fisheries Amendment Act 2003, which 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.

The Appellant's case

The Appellant is a company with limited liability and is a family-run fishing business. EMcH and GMcH are brothers. Together they own two companies (the Appellant being one, the surplus capacity of which being the subject matter of this appeal) and a second, another company which owns two smaller fishing vessels. In respect of the

Appellant company, GMcH is the skipper of the vessel “MVF Antarctic” and EMcH runs the shore-based office in Killybegs, Co. Donegal.

Evidence of GMcH

At the oral hearing GMcH gave evidence that on 15 May 2019 he was asked by his brother, EMcH to retrieve “the laminates” from the “MVF Antarctic” (by this he meant the licence and certificate of registration) and bring them into the office, which he did. He copied the documentation and brought copies back to keep on board. He understood the purpose of this was so that EMcH could apply to the Respondent for a capacity swap, which had occurred several times previously. He understood that his brother was to post the originals to the Respondent later that day, which he understood occurred but was not present when it occurred.

Evidence of EMcH

EMcH gave the following evidence:

The Appellant is a family run company. It originally owned a larger fishing vessel also called MFV “Antarctic”, which had a greater fishing capacity than the currently owned vessel of the same name. Due to rising fuel prices, the operation of the larger vessel became inefficient and the vessel was sold in 2008. Arising from this sale the Appellant purchased a smaller vessel (which possessed a smaller capacity) and which is currently held by the Appellant. As a result of the 2008 sale, the Appellant possessed surplus capacity. To manage this and to ensure the capacity was not lost, the Appellant sold 201 GT to a third party which left a remaining surplus capacity of 289 GT. It is this capacity that is the subject matter of this appeal which has a commercial value of in excess of €1,700,000.

EmcH was always fully aware of Policy Directive 2/2003 and the necessity to maintain surplus off register capacity by applying to put it back on the register every two years (the two-year “use or lose” rule.) The first expiry date to put the capacity back on register was March 2014 and the Appellant complied with this time limit in February 2014. However, EMcH found that compliance that year was uncomfortably tight time-wise and also it occurred at an inopportune time for the business (because

the vessel missed out on valuable spring fishing time by having to return to port in February/ March 2014.) So while the Appellant was able to meet the March 2014 deadline, from that point onward he decided that the application to sign the capacity on and off register (otherwise known as “swapping” capacity or colloquially referred to as “flipping”) would be done less close to the expiry date.

The second application to put the capacity on and off register had an expiry date of February 2016. In order to ensure that it was done within time, this application was completed in late 2015, which gave rise to a new expiry date of 29 December 2017.

The third application was completed in November 2017, which gave rise to a new expiry date of 22 November 2019.

At the start of 2019, again concerned to ensure that the on/off registration be done in good advance of the expiry date, EMcH made contact with the Licensing Authority. An additional reason for applying for an early capacity swap that year was to facilitate a business plan that involved preparing the vessel for sale in order to finance the building of a new vessel. With this in mind, the brothers planned to spend the 2019 summer repairing the vessel to prepare it for sale and to otherwise arrange finance the new build.

On 14 May 2019 at 15.42 EMcH emailed AH of the Respondent (who had been his point of contact with all previous capacity swaps.) This email stated as follows:

“Hi A, I think the Antarctic’s GTs are requiring swapping at the end of this year. As they are tied up at the moment, I think I will do the swap now. Is that okay with you?”

The reply received from AH by EMcH was:

“E, That is fine. The 289GT off-register has an expiry date of 20 November 2019. Relevant forms attached. Kind Regards, AH”

EMcH was already familiar with the forms that were required by the Licensing Authority to swap capacity so rather than using the forms attached to AH's email, he used precedent forms that he had kept on the office computer for previous swaps.

The next day, on 15 May 2019, EMcH asked his brother, GMcH, to retrieve the Sea Fishing Boat Licence and the Certificate of Registry from the vessel. Photocopies were arranged along with a photograph of the vessel which he got stamped by an official in the Sea Fisheries Protection Authority. He also completed an Acceptance of Terms form because, having done this process several times before, he knew that this form would be required by the Licensing Authority at a later stage in the process so, for efficiency sake, he decided to include it with the application.

Having collated all the necessary forms and supporting documentation EMcH photocopied them and put hard copies on the Appellant's file. The documentation completed was as follows:

- a completed Sea Fishing Boat Licence Application Form
- a completed Application to remove a vessel from the Sea-Fishing Boat Register
- two completed capacity assignment notes
- the original Sea Fishing Licence
- the original Certificate of Registry
- Stamped photographs of the vessel
- A completed acceptance of terms form

EMcH put these documents into an A4 envelope and on 15 May 2019 he posted them in a post box opposite the Ulster Bank in Killybegs, Co. Donegal.

Because AH had confirmed in an email to him that day before that doing the swap was "fine" and as he was seven months ahead of the time limit, once EMcH posted the application package, he was satisfied that he had completed everything that he needed to do to effect the swap.

He was away from Killybegs over the summer months that summer attending to family obligations.

He accepted that he did not receive an acknowledgement from the Licencing Authority, as had occurred following previous swaps, in the form of an offer of licence. However he was satisfied that having posted the application to AH, that his task was complete and assumed that that the licence offer letter was sent to their office when he was away, although he accepts that he did not check that.

In any event, having posted the package he believed that the capacity was safe until sometime in May 2021. As AH was on notice of the Appellant's intention to swap capacity and that the application to do so had been posted the following day, had there been any problem with processing the swap, he expected that AH would have made contact with him. He did not know that AH was due to retire soon thereafter.

On 9 December 2019 EMcH emailed AH to asking confirmation of "*the dates that my off-register GTs are up for swapping*." The reason he sought clarification at that stage was because the bank (which was financing the building of the new vessel) required the information. He received a bounce-back reply indicating that AH had retired and was no longer working for the Respondent. EMcH re-sent his query to the recipient suggested in the bounce back email, namely from PO'R.

PO'R replied to EMcH by email stating that "*the off-register capacity of 289 GT from the MFV "Antarctic" expired on 20 November 2019*" (it is accepted by the Respondent that this date should have read 22 November 2019).

EMcH was taken aback by this as he had thought the swap had been performed the previous May. The next day EMcH re-sent copies of the completed application and supporting documentation that he had previously posted to AH on 15 May 2019 along with a request that the Licensing Authority search of their office to ensure that the documentation had not been received in May.

On 13 December 2019 PO'R emailed EMcH to say that there was no record of the application or documentation having been received.

EMcH then made contact with a Licensing Consultant to act on his behalf with the licensing authority, however despite a representation being raised by this Consultant the response of the Respondent was that the 289GT capacity expired on 22 November 2019 and under Policy Directive 2/2003 the capacity had been lost.

The Appellants then instituted this appeal and instructed solicitors to represent them.

Essentially the appeal has two points

1. That the application to swap capacity was posted in May 2019 and that the application was made within time.

2. That the Appellant had a legitimate expectation that the Respondent would be contact them prior to the expiration of the time limit, in the three fold circumstances which prevailed: (a) the Respondents were made aware by email on 14 May 2019 of the Appellant's intention to apply for a swap (b) the Appellant had a history of swapping capacity well in advance of the expiry date and immediately following an authorisation to proceed.

Also both in the guidance document entitled "Overview of Sea-Fishing Boat Licensing and Registration and in the letter of licence offer, both of which were issued by the Respondent, the following representation is made:

Following the customary written notification issued on de-registration of a vessel and on the purchase of sale of capacity, the Licensing Authority will not issue reminders of off-register capacity held and its expiry date(s) other than where contact concerning the off-register capacity is initiated by its owner (s)

The Appellant submits that this representation allowed the Appellant believe that, in circumstances that they, as owners initiated contact with the Licensing Authority concerning the capacity swap, which they did by email on 14 May 2019 the Licensing Authority should have issued a reminder of the expiry date at some point between 14 May 2019 and 22 November 2019.

In relation to the first prong of the appeal EMcH gave evidence of the events that led up to the email correspondence with the Respondent on 14 May 2019. He described how he prepared the application forms and the accompanying documentation and how he posted them in a post box on 15 May 2019 in Killybegs, Co. Donegal. At the appeal hearing he furnished screen shots of his office computer which corroborated his evidence that he had completed the application forms on his office computer on 15 May 2019.

The Respondent's case

In defending this appeal the Respondent sets out the Policy Directive 2/2003 and explains its purpose as to maintain Ireland capacity ceiling in order to comply with EU Regulation 1380/2013 to ensure that the fishing capacity of its fleet achieves a stable and enduring balance.

As the wording of the Policy Directive is non-discretionary, no extension of time is permitted.

The Respondent denies that the Appellant has proven that the letter dated 15 May 2019 was posted.

In support of this position the following submissions were made:

(a) In every capacity swap application made prior to this, the Appellant has used email communication to lodge the appropriate application. No explanation has been provided as to why the application would for no reason change to hard copies being posted 7 months before the expiry date elapsed.
(b) The first time that the Respondent saw these documents that the Appellant alleges were posted on 15th May 2019 was after the appeal had been lodged.
(c) In previous applications the Appellant did not lodge all the papers (including an Acceptance of Terms letter.) This is at variance with the course of dealing until this point.

(d) There is no requirement for the Appellant to surrender “the laminates” at the time of applying for a capacity swap. Indeed to be without them on board is a criminal offence.

(e) There is no evidence that an official from the Sea Fisheries Protection Authority stamped and dated a photograph of the vessel despite such evidence being provided in all other earlier capacity swap applications.

(f) The Respondents office system of logging and tracking correspondence received did not include any record of correspondence being received from the Appellant in or around 15 May 2019

(g) The query received by the Respondent on 9 December 2019 does not refer to the earlier application having been made by the Appellant, as one might expect if this had in fact occurred. Instead “*the dates my off register GTs are up for swapping*” implies that the Appellant knew that the swap had not taken place.

(h) It is not credible, given that no offer of licence issued (as always occurs following a swap) that the Appellant could reasonably believe that the swap had occurred. It is when the licence offer issues that the capacity swap is confirmed and until receipt of this the Appellant was under an obligation to follow up their application.

(i) While postage is an accepted mode of application for a capacity swap it must be proven and a mere unsworn assertion of postage, in the absence of further corroboration is not adequate proof of return

(j) The onus lies on the Appellant to bring the off register back on register within a two year period. This he failed to do and the version of events as described by the Appellant is not credible.

(k) The William Fitzpatrick decision and the John O’Brien decision on posted correspondence are in conflict. The Respondent submits that the William Fitzpatrick decision should be followed.

Decision

This appeal concerns the operation of Policy Directive 2/2003 and whether an application to bring off-register capacity back on register was validly brought.

To date previous appeals, involving Policy Directive 2/2003, have not concerned whether an application was validly made within time. Rather, they have involved circumstances where, on its face, the application is out of time but that the time limit should not be applied for various reasons; for example that the Appellant was not properly on notice of the expiry date; that an error prevented the application being brought within time; that due to a representation made by the Respondent the Appellant believed time would not run or that the effluxion of time past the expiry date was not of his/her making.

In the present appeal, the Appellant claims that the application was brought within time but the Respondent says that it was never received. Therefore if, on balance of probabilities, the Appellant can prove that the application was made on the date claimed, in accordance with Policy Directive 2/2003, the appeal must succeed. If not, it must fail.

Application by Post

The first point to state is that both parties agree that an application by post is a valid form of applying for a capacity swap.

However the Respondent contends that in order to be valid, postage by the Appellant must be proven as having occurred (by corroborative evidence) as opposed to the Appellant making a mere averment that it occurred OR the Applicant must prove receipt of the application by the Respondent. They say that this is so because the asset of the capacity is one that is up to the Applicant alone to maintain and the Respondent has no role in ensuring that the application is received in time. Once received, if valid and within time, the swap will be effected, but the onus to ensure the application was received by the Respondent, lies with the Applicant.

The Appellant contends that in the absence of a specific requirement or direction that the posted application be in a recorded format that ordinary post suffices and that if an individual gives evidence that s/he posted the application her/himself, this is proof

that it was posted and the requirement to return the application to the Respondent is therefore met.

In their submissions both parties refer to the “postal rule” which is a term that arises more properly in contract law and does not accurately pertain to statutory applications.

The question to be determined in this appeal is as follows:

In circumstances where a capacity swap application has been sent by ordinary post and where there is no additional corroborative proof of actual postage or where there is no proof that the Respondent received the application, has the obligation to apply within time been met by the Appellant?

To answer this, one must consider what constitutes a valid application by post and at what point in time, if posted, is an application deemed to have been made.

Proof that the application was posted

The procedure setting out how a valid capacity swap application may be effected is not specified in any representation or publication relied on by the Respondent.

Policy Directive 2/2003 does not specify how an application is made but rather deals with the substantive obligation that “capacity taken off the Fishing Boat register must be re-introduced onto the Sea Fishing Register within 2 years of its removal…”

So how is it envisaged that such capacity would be reintroduced onto the Register?

Guidelines in a document entitled “Overview of Sea Fishing Boat Licensing and Registration” deals with off–register capacity, but it does not deal with the mode of application.

The sea fishing licence form (a required form in a capacity swap application) contains guidance notes on completion but does not specify the mode of application. The

guidelines state that the form is to be *completed and returned* to the Respondent, the address of which is then cited, which anticipates that a return may be by post to the Respondent's address but no proof of post or receipt is required.

In the capacity assignment form (another required form) no mode of return is specified but the return address of the Respondent is stated, so again return by post is clearly envisaged, but no proof of post or receipt is required.

In letters relating to earlier capacity swaps, while the Respondent informed the Appellant that the surplus capacity was required to be brought back on register before an expiry date, otherwise it will be deemed as expired, no direction is given as to how this application is to be made and no reference is made to recorded post or the fact that the proof of the application lies with the Appellant.

No other representation has been evidenced by the Respondent to show that the Appellant was on notice that proof that an application had been made was required.

So while the Respondent seeks to contend that an obligation lies on the Appellant to prove (by corroborative evidence) that the postage occurred, more than merely asserting that it did, or alternatively proving that the application was received by the Respondent, such requirements are not set out in any directive, form or guidance material.

In other statutory applications where time limits apply, the mode of application is usually particularised and the onus of proof expressly placed on an applicant to prove that the application or appeal has been made. The validity of an Agriculture Appeal for example requires proof of postage. In appeals under the Sea Fisheries (Amendment) Act 2003 too, the appeal must be in writing and served by registered post. In both instances (while they involve enactments and appeals as opposed to an application to retain a licence) proof that an appeal is within time, is expressly placed in the hands of the would-be appellant/applicant. This puts the applicant/appellant on notice that lack of proof that an appeal has been brought, could result in a loss of the right to appeal.

Other time-limited statutory provisions usually state either that proof of application is a matter solely for an Applicant or that if an acknowledgement of receipt is not received within 5 days, the Applicant should contact the statutory authority or simply that an application must be by email or registered post. There are various ways in which proof that an application has been brought, can be made the sole responsibility of an Applicant.

However none of these were required of the Appellant. The only requirement (as set out in the sea licence application form and capacity assignment notes) is that the application be *completed and returned* by the Appellant before the expiry date.

EMCH gave direct evidence that he completed the forms on his computer in his office on 15th May 2019. This was supported by screen shots which showed that the work was completed by him on his office computer on 15 May 2019. His direct evidence was that that he put the application documents in an A4 envelope and returned the application by posting it in Killybegs, in a post box opposite the Ulster Bank, on 15 May 2019.

The Respondent submits that this evidence is insufficient because the Appellant's "unsworn assertion of postage" is not independently corroborated. The Respondent argues that this is an easy assertion to make and an impossible one to rebut and for this reason a higher standard of proof than mere assertion is necessary.

The procedure of oral appeal hearings are governed by Part 3 of the 2003 Fisheries (Amendment Act,) in particular section 8. The Act does not envisage that evidence be given under oath, therefore all oral evidence in these appeals is unsworn. In terms of its capacity to be rebutted, it could be rebutted if a mandatory mode of application were specified and the Respondent showed that the mode was not complied with. So I do not accept the Respondent's contention that an insuperable administrative burden is being placed on the Respondent by putting the Appellant on notice of the fact that the proof of application is her/his to prove. This would be relatively straightforward for the Respondent to put in place.

The Respondent relies on a previous appeal decision of W.F v. The Licensing Authority[1] which relates to letters posted by the Respondent advising the Appellant of the expiry date of capacity. However in W.F., unlike in the present case, there was there was no evidence tendered by the person who physically posted the letter, whereas in the present case, there was.

I found EMcH to be a credible witness. I also think that it is unlikely, especially given his history of preparedness and early applications in previous years that he would have prepared the application on 14th and 15th May and then failed to post it on 15th May. On the balance of probabilities and without evidence to the contrary, I find that the Appellant posted the application on 15 May 2019.

I do not accept the Respondent's submission that the Appellant's evidence is fatally undermined by inconsistencies in the Appellant's evidence. The fact that all previous applications of the Appellant were completed online (ie this was the first time the application was made by post) or the fact that the SFPA official's signature was not evidenced. Whilst such inconsistencies on their face, do not assist the Appellant's case, adequate explanations for same was provided by EMcH at the hearing and whilst they are valid points for the Respondent to raise, they do not fatally undermine the direct evidence of the Appellant, which I found to be credible.

Proof that the application was received

The Respondent contends that they did not receive the posted document, However, is this a requirement for the Appellant to so prove? If the Respondents did not receive it and I accept this might well have been the case, does it mean that the Appellant did not return it? What does "return" mean, if indeed the inclusion of this word on the forms, constitutes a requirement?

The ordinary meaning of "return" is that it is given back to the sender, but if post is an authorised and acceptable mode of effecting such a return (which the Respondent accepts) and neither a proven return is required nor proof of receipt requested, then

[1] 2017

in my view, it was reasonable for the Appellant to believe that in posting the letter, that he was returning it.

The Respondents assert that if this is the case, they are placed in an invidious position where they are being required to prove a negative, that they did not receive the post. However I do not accept this and it would not be so if the Respondent could show that the Applicant failed to follow a prescribed mode of application.

Section 25 of the Interpretation Act 2005 states:

> Where an enactment *authorises* or requires a document to be served by post, by using the word "serve," "give," "deliver," "send," or any other word or expression, the service of the document may be effected by properly addressing, pre-paying (where required) and posting a letter containing the document, and in that case the service of the document is deemed, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

This appeal relates to the operation of a policy directive and not an interpretation of an enactment however it is of useful assistance because it applies where the service of documents in an enactment, is not particularised.

In circumstances where the Respondent accepts that the application may be returned by post, were the requirement "to return" documents to be found in statute, the posting of a letter by ordinary pre-paid post would meet this requirement, in which case, the service would become effective at the time at which the letter would be delivered in the ordinary course of post, on 16 or 17 May 2019, as opposed to when it is actually received[2] i.e. before the expiry date of 22 November 2020.

As the application for a capacity-swap is the point in time at which the owner of off-register capacity takes action to keep his/her asset alive so to speak, I think that unless the Applicant is on notice that without a higher proof of postage or proof of receipt by the Respondent, that s/he risks losing the asset, it is reasonable for

[2] [Molloy v. Reid 2014 IEHC 4].

her/him to believe that the act of posting, constitutes an action which will preserve the asset.

Given the significance that this loss of capacity would mean to an applicant, it would be in breach of fair procedures to impose an obligation where the Appellant has not been put on notice of. The Appellant cannot be prejudiced by a condition that is silent.

The Respondents ask why the Appellant was not alerted when no letter of licence offer issued within a week of the application being made, as happened on previous occasions. However the issue is not what happened after the 15 May but whether on 15 May he discharged his obligation to return the application, which, for reasons already outlined, I am satisfied that he did.

As I find that the Applicant complied with Policy Directive 2/2003 on 15 May 2019, it is unnecessary to decide on the second limb of the appeal. Although, for future guidance on this point, while I find that while the words “initiated” or “contact” (contained in the licence offer and the guidance document) to be vague and open to interpretation, I find that the Respondent did advise the Appellant of the expiry date when AH emailed EMcH on 14 May 2019. Thereafter, if further contact had been initiated by the Appellant, the Respondent would have then been under a fresh duty to remind them of the applicable expiry date, but as the Respondent did not receive any further contact, it did not so advise. I am not convinced by the Appellant’s contention that once the Respondent has advised the Appellant of the expiry date once, that they had an ongoing obligation, to so advise, if (as occurred) no further contact were made by the Appellant, although I limit this observation to the facts of this case.

Conclusion

The Applicant was required to complete and return the application. As an application by post was an acceptable mode of return and as the Appellant was not on notice that the Respondent required recorded proof of postage, in the absence of evidence to counter the direct evidence of the Appellant, which I found to be credible, I find on

the balance of probabilities that the Appellant posted the application to the Respondent on 15 May 2019 and that in doing so he discharged his obligation to return the application within time permitted by Policy Directive 2/2003.

Emile Daly
Appeals Officer
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