

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

Appellant: William Deasy, Woodview Pier Road, Union Hall, Co. Cork

Fishing Vessel: MFV "Horizon" S 329

Law: Operation of Policy Directive 2 of 2003

Decision of Appeals Officer: The Appeal is refused.

Reason for the Decision

Policy Directive 2 of 2003, made pursuant to 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. The Appellant was on notice of the expiry dates of the capacity and did not reintroduce it onto the Register before that date.

The Appellant's case

The Appellant is a full time fisherman with a large family. Until 2012 the Appellant's late wife managed the administration of the Appellants fishing business. Following her death in 2012, that role was taken over by the Appellant's daughter in law.

In 2008 the Appellant brought an appeal in relation to lost capacity due of the operation of Policy Directive 2/2003. That appeal was unsuccessful and the Appellant lost the capacity. The Appellant, in this appeal, does not raise any contention that he was not aware of the operation of the two year rule.

In 2004 the Appellant's fishing vessel, the MFV "Emerald Isle," sank. The capacity attached to the MFV "Emerald Isle" was then not used for a period of ten years. In 2014 the Respondent contacted the Appellant and informed him that the capacity of the sunken vessel could not be allowed to lie unused, as otherwise it would be lost. The Appellant then set about transferring the capacity of the MFV "Emerald Isle" onto and off a vessel, the MFV "Horizon" which belonged to his friends. Once the Appellant had assigned this capacity on and off register he did not know, nor was he told that the two year rule started to commence. He understood rather that the risk of loss of the capacity had been avoided by the once off assignment of capacity.

On the assignment note dated 21 December 2015 the Appellant applied to transfer the capacity from the MFV "Horizon" back onto the MFV "Emerald Isle" and no query was raised by the Respondent about this. If, as the Respondent now contends, the capacity could not transfer back onto a sunken vessel, why was the Appellant not told this at the time? The Appellant submits that the failure to so advise, allowed the Appellant to believe that the capacity was being reassigned back onto the sunken vessel which gave them no indication that the two year rule would start running. They believed, that a special rule applied for capacity on sunken vessels which was not

subject to Policy 2/2003. This belief, supported by the evidence of the Respondent at the appeal hearing - that the capacity of sunken vessels is treated differently to the more usual, off register, capacity - meant that the Appellant had no notice and was not afforded any such notice that the two year rule had started to run against him.

The capacity, when it was assigned to his friends' vessel in January 2016, was split into two assignments. 50 GT/187KW and a smaller assignment of 14.45 KW. Both assignment notices were sent to the Respondent on 6 January 2016. Around this time the Appellants daughter in law spoke on the telephone with an agent for the Respondent who confirmed that the capacities had been assigned on and off register. There was no discussion during this telephone conversation that this capacity from then on would be subject to the two year rule.

The Appellant denies that he was advised that the two year rule applied to this capacity. Moreover because he was not advised and because of the capacity of the MFV "Emerald Isle" was allowed sit unused for ten years and because the Respondent had not raised any issue with the assignment of this capacity back onto a sunken vessel, he had no basis to believe that a failure to re-introduce the capacity would mean that he was risking its loss.

The Respondent's actions created an expectation in the Appellant's mind, that the risk of loss of capacity had been stopped when he arranged the transfer of capacity onto a third party vessel, which he regarded as a once-off rescue event.

He contends he did not receive letters dated 6 January 2016 which set out the expiry dates of the two different capacities. He accepts that these letters are on the Respondent's file, he accepts that the address used is the same as was used for other correspondence that he did receive, but he contends that he did not receive them.

He accepts that he received a letter from the Respondents dated 3 June 2017, in relation to an application to licence a small fishing vessel, intended for his grandson, to which it was intended that a small part of the off-register capacity of the MFV "Horizon" would be used. The Appellant accepts that in this letter there is reference to an expiry date of the MFV "Horizon capacity", however he did not take account of the significance of this as it pertained to the MFV "Horizon" as opposed to the MFV "Emerald Isle" which is where he believed the capacity had transferred. The expiry date was in the middle of the letter (which ran to several pages) and he was not alerted to its significance because he had not received the earlier January 6 2016 letters.

The evidence of the Appellant on this point and his daughter in law differ in one respect. Her evidence was that the reason that the licence offer letter of 3 June 2017 was not read thoroughly was because by the time it arrived they had already decided not to pursue the licence application for the small fishing vessel for the grandson for costs reasons. The Appellant instead said that that decision came later and he could not explain why the letter was not read thoroughly at the time.

In any event, the next material event was that some capacity was sold by the Appellant in 2017, through an agent, to young fishermen in Donegal. In return the

Appellant was given back alternative capacity at a later date. In this respect the capacity being transferred to Donegal rescued it from being entirely lost. He denies getting any letters from the Respondent in relation to these assignments either.

In April 2018 the Appellant telephoned the Respondent to arrange a transfer of the capacity to a third party fisherman based in Castletownbere. It was during this call that the Appellant was informed that the capacity had been lost in December 2017 and January 2018, as had been previously advised. The Appellant contends that he never received such letters and he lodged this appeal.

The Appellant submits that without proof of postage of the warning letters dated 6 January 2016, he could not be found to have been on notice of the two year rule. In cases of conflict of evidence the onus is on the Respondent to prove that the warning letters of 6 January 2016 were sent. This precedent has been set in other Appeal decisions. The Respondent has not produced such evidence in this Appeal.

The Appellant did not use the capacity on his sunken MFV "Emerald Isle" for ten years and yet he did not lose that. This failure by the Respondent to act consistently in relation to this capacity namely the same capacity after it had been transferred, created an expectation that the expiry of time was not an issue in relation to this capacity.

The Appellant contends that the scheme is confusing and the facts of this case are particularly confusing. Why for example when the capacity was transferred to the Donegal fishermen, was the Appellant not warned of the expiry dates for those transfers? Although the Appellant does not accept that he received them why, in the letters dated 6 January 2016 that the Respondent has on file, did the Respondent provide two different expiry dates for the one block of capacity, even though the applications to transfer the capacity were both made on 6 January 2016?

In such a confused set of facts, the onus is on the Respondent to be very clear if they are operating the two year rule, an onus that they have failed to discharge by the absence of proof of postage of the letters dated 6 January 2016.

The Respondent's case

The Appellant's submission is based in part on a misunderstanding of the scheme and in part on an assertion that he was not on notice of the expiry dates, both of which arguments are rejected.

In relation to the Appellant's argument that there should not have been two different expiry dates for different capacities, each off register capacity has a different expiry date. When capacity is transferred, the new expiry date is determined by the expiry date that preceded it. The reason that there were two different expiry dates is because the capacity that was transferred off and back onto register was made up of two different capacities, as evidenced by the two different assignment notes. Just because capacity is transferred does not create a new expiry date on the date of transferring, because what is transferring has its own individual expiry date. This shows a misunderstanding on the part of either the Appellant or his representatives.

The Respondent submits that the Appellant is a very experienced fisherman who has had many dealings with the Respondent over many years. The supposed lack of familiarity with the operation of Policy 2/2003 is improbable given that in 2008 he brought an appeal to reverse a decision of the Respondent that he lost off register capacity due to the operation of Policy 2/2003. He lost that appeal. To claim that in 2016 that he was unfamiliar with the operation of the scheme as his representative contends is, on the balance of probabilities, not likely.

The letters that are on file dated 6 January 2016 expressly state that the capacity will expire on two dates; 29 December 2017 and 6 January 2018. There is no proof of postage because the letters were sent before the Appeal decision of Fitzpatrick (in which the Appeals Officer held that in the case of a conflict of evidence about whether warning letters have been sent or not, the onus lies on the Respondent to prove that the letters were posted). The 6 January letters were posted to the Appellant, as were all the letters on file. The address used is accepted as being the correct address for the Appellant. It is too coincidental that the only letters that the Appellant did not receive are those letters which put him on notice of operative expiry dates.

Furthermore, unlike the Fitzpatrick case, there is an additional letter dated 3 June 2017 which the Appellant accepts that he received. This letter referred to the operative expiry date of 29 December 2017 and the explanation of the Appellant, that the letter was not read properly, is not an adequate explanation.

It is also not conceded that these letters were the only mention of the two year rule. The telephone conversations with the Appellant's daughter in law, which took place in or around January 2016 could only have been about one thing – namely the transfer of capacity on and off register. Why had this transfer been done at all unless the loss of capacity was at stake? Given his prior experience of loss of capacity due to the two year rule and his appeal in 2008 it is not credible that the Appellant was unaware of what this transfer on and off register in 2016, meant. Transferring on and off register is a device to keep the capacity extant. It is usually done in one transaction on one date and from that same date, the two year time period starts to run.

The legitimate expectation argument (that the treatment of sunken capacity meant thereafter that the two year rule did not apply) as made by the Appellant, does not hold weight. The Respondent advised the Appellant in 2014 that he would need to do something with the sunken capacity otherwise there was a risk that he would lose it. The only solution that is available in those circumstances is to find a temporary host for the capacity and transfer it onto and off register which then saves the capacity from being lost, but only for two years. The capacity did not transfer back onto the MFV "Emerald Isle", because it could not have. Assignment notes are not transfer documents. The Appellant accepts that the Respondent had made contact with him in 2014 in order to advise him of the risk of loss of the Emerald Isle capacity. The letters of 6 January 2016 also confirm this. The reason that the Appellant was advised in the first place was that capacity cannot lie on a sunken vessel. However, once the capacity is rescued by going on/off register, the time limit starts to run and it is not probable that the Appellant was unaware of this.

This appeal must be determined on the balance on probabilities and it is more probable than not that the Appellant received the letters dated 6 January 2016.

However, what is accepted by the Appellant, is that he received the letter dated 3 June 2017 and once put on notice of the expiry date then, if not before, the Respondent and an Appeals Officer in an appeal, has no discretion other than to uphold the decision that the Appellant was on notice of the operation of the Policy Directive and the capacity was lost due to the capacity not being re-introduced within the stated time limit.

Decision

This is not an easy case to decide. The sinking of the MFV "Emerald Isle" must have been very difficult for the Appellant and the transfer of capacity took place in 2015/16, less than four years after the Appellant's wife passed away and it was she who, until then, had managed the administration of the Appellant's business. So I have no doubt that from 2012 the ability of the Appellant to manage the administration of his fishing business was effected.

The other concern I have is the loss of capacity. I have been informed and it has not been denied that if lost, the fishing capacity (approximately 45 GT) is not just lost to the Appellant but also to the State. Such a loss is neither in the national interest nor clearly the Appellant's.

The last concern I have is that the capacity, as a valuable asset worth approximately €250,000 had been set aside as the inheritance for the Appellant's daughters and if the capacity is lost, they will not benefit from this legacy.

However these reasons are not determinative in themselves, as has been shown in many previous appeals.

The effect of the loss of capacity underlines the need for the owner of such capacity to be a careful custodian of it and to be aware and mindful of the rules that pertain in relation to it. Capacity if not used, risks being lost, through an effluxion of time. This fact, as a generality, could not be unknown to the Appellant, given his previous appeal in 2008.

As I have cited in other appeal decisions, the wording of Policy Directive 2/2003 is mandatory and must be applied even where there are circumstances of grave tragedy (as has pertained in other cases involving sunken vessels) even too if a valuable and hard earned asset is lost to the family, even too if the State loses this capacity, as a result, which benefits no one.

Capacity is a valuable asset and one that is the responsibility of the owner to manage. Unless there is a proven or conceded defect in the operation of the two year rule by the Respondent (such as an Appellant not having charge of time running against him or if he is not put on notice of an expiry date) then the rule must apply. In such cases of defect in administration, it is not that the Policy Directive does not apply, but rather it applies equally against both parties. The operation of Policy Directive 2/2003 requires two full years to pass during which the owner's asset is

protected. If a party is not adequately put on notice of the operation of the policy directive or where the time is interrupted by actions of the Respondent or an emanation of the State, it is only in these case the Appeals Officer may intervene in order to ensure that the 2 full years run and the Appellant is on notice of that. The appeal process exists to ensure the policy directive protects both parties equally.

On the facts of this case I do not accept on the balance of probabilities that the letters were not sent to the Appellant in 6 January 2016. I have not been provided with any evidence that the administration of the Appellant's paperwork was such that these assignments of capacity usually took place without receipt of any documentary confirmation from the Respondent. I do not accept the evidence of the Appellant's daughter in law that the assignments of capacity were confirmed only by telephone.

The case is also distinguishable from the Fitzpatrick case in one important respect, which is that the present Appellant accepts that he received a letter dated 3 June 2017 which contained the expiry date of 29 December 2017.

The relevant paragraph of this letter stated:

“Kindly be aware that following the customary written notification issued on de-registration of a vessel and on the purchase or 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). I note that you are assigning off Register Capacity from the MFV “Horizon” S329; Please note that this capacity must be reintroduced onto the Sea Fishing Boat register by 29 December 2017.”

If this letter had been read with care by the Appellant or his daughter in law they would have been alerted to the impending expiry date, however they accept that this letter was not properly attended to.

The fact that the Appellant was put on notice of the expiry date defeats any contention of legitimate expectation that has been raised by the Appellant.

For these reasons I am satisfied that on the balance of probabilities the Appellant was on notice of the operation of the two year rule under Policy Directive 2/ 2003 and I have no discretion other than to apply it in these circumstances. Regretfully and very conscious of the impact that this decision will have both on the Appellant and his family, as I am bound by the mandatory language of the policy directive, I have no discretion other than to apply it. To do otherwise would be beyond the jurisdiction of this office.

I find this appeal fails and I uphold the decision of the Respondent.

Emile Daly
Appeals Officer
Law Library
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