

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	
)	
TONGA PARTNERSHIP,)	Appeal No. 95-0047
Appellant)	
)	
and)	DECISION
)	
KEVIN HOGAN,)	
Respondent)	December 19, 1996
_____)	

STATEMENT OF THE CASE

Appellant Tonga Partnership and Respondent Kevin Hogan filed conflicting applications for Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program for the period of May 1988 through December 1988. Kevin Hogan applied as the owner of the F/V TONGA; Tonga Partnership applied as the lessee of the vessel. On December 16, 1994, the Restricted Access Management Division [Division] issued QS to Mr. Hogan for halibut landings made from the F/V TONGA between March 15, 1984, and December 31, 1990. The Division denied Tonga Partnership's application of QS in an initial administrative determination [IAD], issued March 20, 1995, on grounds that Tonga Partnership did not lease the vessel during the period in question. Tonga Partnership filed a timely appeal of the IAD. Mr. Hogan was thereafter joined as a party to the appeal. An oral hearing was held before Appeals Officer James C. Hornaday on August 28, 1995. The partners of Tonga Partnership, Martin P. Cummings and David D. Smith, appeared in person. Mr. Hogan participated by telephone. The parties were given additional time to supplement their records. Mr. Hogan's Request for a Supplemental Oral Hearing was denied.

ISSUE

Whether Tonga Partnership leased the F/V TONGA from Mr. Hogan during the period May through October 1988.¹

SUMMARY

There was no vessel lease between the parties during May 1988, and Mr. Hogan should receive credit

¹While both parties claim a conflicting proprietary interest in the F/V TONGA for the period May through December, 1988, the landings in question occurred from May through October, 1988.

for the halibut landing made from the F/V TONGA at that time. A vessel lease did exist between the parties for the period June through October 1988, and halibut landings during that period should be credited to the Tonga Partnership. Mr. Hogan acknowledged that there was a lease during the June - October 1988 period, but argued that after June it did not cover halibut fishing. The lessee gets IFQ credit for any halibut landings made during the period of the lease, even if halibut fishing would have constituted a breach of the lease agreement. A breach does not retroactively invalidate a lease agreement. A breach can be evidence that a lease terminated early if the breach fundamentally changed the nature of the relationship between the parties or evidenced a clear intent to terminate the agreement, but that is not the case here. An administrative appeal is not the appropriate forum in which to seek a remedy for the breach alleged in this case.

BACKGROUND

Tonga Partnership claims QS credit for the following landings of 8,651 qualifying pounds of halibut, as a lessee of the F/V TONGA during the period of May through October 1988:

- | | | |
|-----|--------------------|------------|
| (1) | May 24, 1988, | 3,662 lbs. |
| (2) | June 21, 1988, | 2,768 lbs. |
| (3) | September 8, 1988, | 1,195 lbs. |
| (4) | October 4, 1988, | 1,026 lbs. |

The partners of Tonga Partnership, Martin Cummings and David Smith, testified that they formed a partnership to fish the F/V TONGA during 1988 for halibut and Dungeness crab after Mr. Hogan told Mr. Cummings that he could use the vessel for the 1988 halibut season. Mr. Hogan had purchased another vessel, and Mr. Cummings had worked previously for Mr. Hogan on the F/V TONGA.

Mr. Hogan and Mr. Cummings testified that they had an oral lease/purchase agreement for the F/V TONGA that was in effect for the June 1988 halibut opener. Under the agreement:

- (1) Mr. Cummings would pay Mr. Hogan 30 percent of the gross revenue to lease the vessel;
- (2) Mr. Cummings would pay a down payment of \$6,500 prior to July 15, 1988;
- (3) Mr. Cummings would pay all vessel expenses, including hull and liability insurance coverage; and
- (4) Mr. Cummings would obtain financing, and pay Mr. Hogan the remaining balance for the purchase of the vessel by the end of 1988.

Mr. Hogan had planned to lease the vessel to Mr. Cummings earlier, but his other vessel was seized by U.S. Customs and, therefore, was unavailable. The parties agree that Mr. Hogan skippered and directed the fishing operations of the F/V TONGA for the May 1988 halibut opening, using Mr. Cummings and Mr. Smith as crew, and assuming responsibility for the vessel's operations.

Mr. Hogan testified that he cancelled the lease/purchase arrangement after June 1988 (apparently when the financing for the vessel fell through), but that he agreed to lease the vessel to Tonga Partnership for the duration of the 1988 fishing season, solely for Dungeness crab, subject to the sale of the vessel. Mr. Hogan contends that he specifically told Mr. Cummings that he could not use the vessel for halibut fishing due to concerns of insurance and weather. Mr. Smith denied that Mr. Hogan had ever told him or his partner [Tonga Partnership] that the vessel was restricted to crab, and testified that Tonga Partnership had a lease for halibut and crab during that period of time. The parties agree that Tonga Partnership had possession and command of the vessel, and directed the vessel's fishing activities, from June through October 1988. Mr. Hogan contends that he did not know that the vessel was being used for fishing halibut in September and October 1988. He nonetheless admitted that he received a percentage of the halibut catch during that period as payment for the use of the vessel, though he claims he was unaware of the payments at the time.

Mr. Cummings and Mr. Smith testified that they were the only crew of the vessel from June through October 1988. This was not disputed by Mr. Hogan, who admitted that he was not aboard the vessel during that time period. Receipts and the cannery's statement show that Tonga Partnership paid the following vessel operating expenses during that period of time: harbor fees, moorage, bait, ice, fuel, crane usage,² paint, fiberglass, matting, hull insurance, halibut supplies, and rent [30 percent of gross revenues]. Mr. Hogan admitted that Tonga Partnership was responsible for those expenses. Mr. Hogan had expected Tonga Partnership to pay for liability insurance. Mr. Cummings admitted that he [Tonga Partnership] never did pay for the insurance. Mr. Cummings and Mr. Smith testified that they [and Tonga Partnership] did not have tax returns showing that they had claimed a business deduction for lease of a vessel in 1988. Mr. Hogan testified that he claimed business expenses and income for the use of the F/V TONGA in May 1988 on his 1988 tax return. Mr. Cummings testified that Mr. Hogan was paid 30 percent for every landing from the F/V TONGA from June through October 1988. Mr. Hogan did not dispute this.

DISCUSSION

The Division has administratively established a presumption that a vessel owner, as opposed to a claimed lessee, is entitled to the QS that results from verified legal landings made from the vessel. During the application phase, the Division initially places the burden of proof on the applicant who claimed a lease. On appeal, however, factual issues are reviewed *de novo*, with the burden of proof equally shared between Appellant and Respondent.³ The Appeals Officer will review the evidence that

²Appellant picked up halibut gear at Respondent's house and Appellant paid crane rental to the City of Homer to load the halibut longline on the F/V TONGA. They returned the halibut gear to Respondent at his residence.

³Smee v. Echo Belle, Appeal No. 95-0076, August 1, 1996, at 5, *aff'd*, August 20, 1996.

the Division considered in reaching the IAD, as well as any additional evidence submitted during the appeal.

Federal regulation 50 C.F.R. § 679.40(a)(2)⁴ provides in relevant part that QS may be awarded to a person:

...that owned a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year. A person is a qualified person also if (s)he leased a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year. A person who owns a vessel cannot be a qualified person based on the legal fixed gear landings of halibut or sablefish made by a person who leased the vessel for the duration of the lease.

Tonga Partnership claims QS based on an oral lease of the F/V TONGA. The IFQ regulations provide that evidence of an oral lease may be used to establish the existence of a lease for purposes of QS.⁵ The regulations, however, do not define what constitutes a "lease." Nevertheless, certain factors have been identified by this office as a way of determining the existence of an oral vessel lease.⁶ The factors are not exclusive, and Appeals Officers have discretion to consider other factors that, in their judgment, help in determining whether a lease existed between the parties. The North Pacific Fishery Management Council intended to allocate QS to those who acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question. An entrepreneur is one who organizes, operates, and assumes the risk in a business venture in expectation of gaining the profit.⁷ This is the kind of person the Council seems to have had in mind when it decided that vessel lessees, as well as vessel owners, could be "qualified persons."

In deciding whether a vessel lease existed between the parties, an Appeals Officer should, therefore,

⁴Formerly 50 C.F.R. § 676.20(a)(1). Effective July 1, 1996, 50 C.F.R. Part 676 was removed and the regulations thereunder were renumbered. However, there have not been any changes material to the issues in this appeal.

⁵See 50 C.F.R. § 679.40(a)(3)(iii), which reads in part: Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted.

⁶See the following cases for a discussion, and development, of the factors: O'Rourke v. Riddle, Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995; Kristovich v. Dell, Appeal No. 95-0020, March 20, 1996, at 10, *aff'd* March 27, 1996; and Smee v. Echo Belle, Appeal No. 95-0076, at 5-7, *aff'd* August 20, 1996.

⁷ Webster's II New Riverside University Dictionary 436 (1988).

consider a variety of factors. These include, but are not limited to:

- (1) how the parties characterized their business arrangement at the relevant times;
- (2) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;
- (3) whether the claimed lessee directed fishing operations of the vessel;
- (4) whether the claimed lessee had the right to hire, fire, and pay the crew;
- (5) whether the claimed lessee was responsible for the operating expenses of the vessel;
- (6) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her own business for federal income tax and other purposes; and
- (7) whether the claimed lease had a set or guaranteed term.

1. The parties' characterization of the arrangement.

The parties agree that Mr. Hogan controlled the vessel, crew, and fishing operations for the May, 1988 opening, and that there was a lease/purchase agreement between the parties that was in effect for the June halibut opener. The parties disagree as to some of the details of their arrangement thereafter. Mr. Hogan contends that he orally cancelled the lease/purchase arrangement after June 1988, and that he agreed to lease the vessel to Tonga Partnership for 1988 fishing season, but only for Dungeness crab and subject to the vessel's possible sale to a third party. Mr. Hogan stated that he specifically denied Mr. Cummings' request to fish for halibut, and was unaware of Tonga Partnership's continued halibut fishing. Tonga Partnership denies that the halibut portion of the lease was cancelled or that Mr. Hogan denied its request to fish for halibut. Given that Mr. Hogan admits that the vessel continued to be leased for Dungeness crab for the 1988 season, I find that the parties at all times characterized their arrangement for the months of June through October 1988 as a vessel lease, be it for halibut, Dungeness crab, or both. Since the parties agree that Mr. Hogan was in charge of the vessel in May 1988 and used Mr. Cummings and Mr. Smith as crew for that period, I further find that the parties did not characterize their use of the vessel in May 1988 as a lease arrangement.

2. - 4. Possession and command, and control of navigation, of the vessel; direction of the fishing operations; and the right to hire, fire, and pay the crew.

The parties agree that Tonga Partnership possessed, commanded, and controlled the navigation of the vessel, directed the fishing operations, and had the right to hire, fire, and pay the crew for the June,

September, and October 1988 halibut openings. Mr. Cummings and Mr. Smith were the only persons aboard the vessel during that period, and handled the day-to-day operations of the vessel, and all of the landings of halibut that occurred during that period were made on Mr. Cummings' gear card. While the parties disagree as to what could be fished under their arrangement after June 1988, Tonga Partnership, as the sole entity aboard the vessel, determined at all times where, when, and how to catch and market the fish. Given the evidence, I find that Tonga Partnership possessed, commanded, and controlled the navigation of the vessel, directed the fishing activities, and was in charge of the vessel's crew from June through October 1988.

5. Responsibility for the operating expenses of the vessel.

The parties agree that Tonga Partnership was responsible for and paid the operating expenses of the F/V TONGA during the period of June through October 1988. Cannery records and receipts show that Tonga Partnership paid for harbor fees, moorage, crane usage, bait, ice, fuel, paint, fiberglass, matting, a portion of hull insurance, and halibut supplies during that period of time. The fact that the partnership may not have paid for all of the insurance did not relieve it of the responsibility to do so. Although Mr. Hogan provided the gear, I find that the weight of evidence shows that Tonga Partnership was responsible for the primary expenses of the vessel.

6. Treatment of the fishing operations for tax and other purposes.

Neither Mr. Cummings nor Mr. Smith claimed to have tax returns showing that they had treated the operation of the F/V TONGA as a business in 1988. Mr. Hogan's 1988 tax returns show F/V TONGA as a business enterprise with fishing boat proceeds paid to Mr. Cummings and Mr. Smith, and Mr. Hogan paying for bait and other vessel expenses. Mr. Hogan admits that the expenses, however, were for the May 1988 halibut opener. I find that the lack of tax returns are not indicative, either way, of whether the vessel was used as a business from June through October 1988. I further find that Mr. Hogan's tax return is persuasive evidence that the F/V TONGA was used as Mr. Hogan's business, at least during a portion of 1988.

7. Whether the claimed lease had a set or guaranteed term.

I find that two different business arrangements existed between the parties for the use of the F/V TONGA from June through October 1988. The first arrangement was governed by an oral lease/purchase arrangement that took effect in June 1988. The second arrangement commenced some time after June 1988, when the financing of the vessel fell through. Mr. Hogan cancelled the purchase agreement and permitted Tonga Partnership to use the vessel until the end of October, subject to its sale. Although the second arrangement was subject to being terminated early if the vessel had been sold to a third party, that contingency did not occur. The parties agree that Tonga Partnership possessed the vessel at all times from June through October 1988, and was permitted to fish throughout

that period. I, therefore, find that the arrangements had a set term -- June through October 1988.

Summary of the evidence

In reviewing and weighing all the evidence in this case, and applying the factors for claimed oral leases, I find that the weight of the evidence shows that Tonga Partnership did not lease the F/V TONGA from Mr. Hogan in May 1988, given that Tonga Partnership were only employees, not lessees, of Mr. Hogan during that time. I further find that the greater weight of the evidence favors Tonga Partnership's claim that it leased the F/V TONGA from Mr. Hogan for the period of June through October 1988. I reach this latter result for the following reasons: (1) the parties characterized their arrangement for the use of the vessel during the period of June through October 1988 as a vessel lease; (2) Tonga Partnership possessed and controlled the vessel, and directed the vessel's fishing operations, deciding who would crew, and where and how to harvest and market the fish; (3) Tonga Partnership paid for, and assumed the primary financial responsibilities of, the operations of the vessel; and (4) the arrangement had a set term. Thus, the arrangement between the parties from June through October 1988 had characteristics consistent with a vessel lease.

The parties, in fact, never disputed that the vessel was leased for the duration of the June through October 1988 season. Mr. Hogan did not claim that the lease was terminated, only that the lease was breached when the vessel was used for fishing halibut in September and October. But as we have stated in Ocean Crest v. McKee,⁸ a breach does not retroactively invalidate a lease agreement. A breach can be evidence that a lease terminated early if the breach fundamentally changed the nature of the relationship between the parties or evidenced a clear intent to terminate the agreement. But here the partnership had exclusive possession and control of the vessel and operated the vessel for the entire period contemplated by the parties. In addition, Mr. Hogan accepted payment for his share of the halibut proceeds in September and October 1988 under the same terms as he was paid for the halibut proceeds in June 1988. The parties' relationship was not terminated earlier than they had contemplated. The nature of the relationship between the parties was not fundamentally changed by the allegedly unauthorized halibut fishing.

Under the IFQ program, a lessee gets credit for any halibut landings made during the period of the lease, even if halibut fishing would have constituted a breach of the lease agreement. The remedy for such a breach is not to be found in an administrative appeal. If Mr. Hogan wants to seek relief for the alleged breach, he must do so in another forum.

⁸Appeal No. 95-0101, October 13, 1995, *aff'd* October 19, 1995

FINDINGS OF FACT

1. Tonga Partnership and Mr. Hogan had an oral lease of the F/V TONGA for the months of June through October 1988.
2. Tonga Partnership did not lease the F/V TONGA in May 1988.

CONCLUSIONS OF LAW

1. The oral lease agreement between the parties for the period June - October 1988 constitutes a vessel lease for purposes of the Pacific halibut and sablefish IFQ program.
2. Qualifying pounds resulting from legal landings of halibut made from the F/V TONGA during the months of June through October 1988 should be allocated to Tonga Partnership, based on the lease of the vessel from Mr. Hogan during that period.
3. Qualifying pounds resulting from legal landings of halibut made from the F/V TONGA in May 1988 should be allocated to Mr. Hogan, based on his ownership of the vessel during that period.

DISPOSITION AND ORDER

The Division's IAD denying Tonga Partnership's application for QS is VACATED. The Division is ORDERED to amend the NMFS official record to reflect that the Tonga Partnership held a lease of the F/V TONGA during the period June - October 1988, and to allocate qualifying pounds of halibut, and issue any resultant QS and IFQ, to which Tonga Partnership may thereby be entitled. This decision takes effect on January 21, 1997, unless, by that date, the Regional Administrator orders review of the Decision.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, December 30, 1996. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

James C. Hornaday

Appeals Officer

We concur in the factual findings of this Decision and we have reviewed this Decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1997 fishing season, we recommend that the Regional Administrator expedite review of this Decision and, if there is no substantial disagreement with it, promptly affirm the Decision and thereby give it an immediate effective date.

Randall J. Moen
Appeals Officer

Edward H. Hein
Chief Appeals Officer