

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of)
)
OCEAN CREST FISHERIES, INC.,)
Appellant,)
)
and)
)
BARRY L. MCKEE,)
Respondent)
_____)
)

Appeal No. 95-0101

DECISION

October 13, 1995

STATEMENT OF THE CASE

On June 9, 1995, Ocean Crest Fisheries, Inc., filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on April 10, 1995. The IAD found that Barry L. McKee demonstrated conclusively that he held a lease of the F/V CREST during the period February 1, 1990, through October 15, 1990. The IAD allocated qualifying pounds of halibut and sablefish landed from the vessel during that period to Mr. McKee. The IAD also denied the same qualifying pounds to Ocean Crest Fisheries, Inc., the vessel's owner. An order joining Mr. McKee as a party Respondent was issued on July 12, 1995.

The entirety of the administrative record, including all appeal documents, has been reviewed by the Appeals Officer prior to the issuance of this decision. Those documents having particular relevance are specifically referred to in the decision. The record was closed in an order issued on August 31, 1995.

ISSUES

1. Is an oral or written hearing either necessary or advisable?
2. Was there a valid vessel lease in effect between the parties?
3. If so, when was it in effect?

BACKGROUND

On January 9, 1990, a detailed agreement [Exhibit #1] was executed by Christos Isahouris for Ocean Crest Fisheries, Inc., of Boston, Massachusetts, as "owner," and Barry McKee, as "charterer/captain." The document is captioned "Bare Boat Charter." The main body of the document consists of five typed pages. There are another five pages of typed annexes, denominated as "Notice" or "Exhibits." Each page is dated and initialed. The signatures of both parties are notarized. The document provides, in

part, that:

- # the term is from February 1, 1990, to October 15, 1990
- # rent shall consist of 40% of the gross commercial fishing proceeds
- # the owner shall provide hull and P & I insurance
- # the owner assumes liability for all claims within the insurance deductible
- # the charterer/captain shall personally serve as master and that no other master shall be assigned without notice to owner and agreement by insurance carrier
- # the owner shall be responsible for costs for repairs over \$5,000
- # the owner retains no control, possession or command whatsoever of the vessel during the duration of the charter
- # the charterer/captain shall have exclusive possession, control and command of the vessel but that it will be used only for the taking and transportation of fish and will not carry passengers or cargo for hire
- # the charterer/captain shall indemnify owner against all claims, actions, proceedings, damages, and liabilities, including attorney's fees, arising from or connected with his possession, use and return of the vessel
- # the charter is a charter of the bare vessel, and Charterer/Captain shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature, pay for all fuel, fresh water, etc. etc.
- # the charterer/captain shall not incur maritime liens or encumbrances on the vessel and agrees to maintain in a conspicuous place in the pilot house of the vessel a notice stating that the vessel is under bare boat charter to Mr. McKee and that he has no authority to incur any liens on the vessel or to purchase any materials or services upon the credit of the F/V Crest or Ocean Crest Fisheries, Inc.
- # the fish will be delivered to Faros Seafoods in Kodiak and to no other port or processor without the consent of the owner
- # the processor will issue a check for 40% [of the gross catch] to the owner
- # the owner has the right to [have] one of his representatives on board as a crew member
- # if the boat sat in port for over 15 days without any reason (repairs or something similar), the owners had the right to cancel the contract
- # the owners were working with Exxon to hire the vessel for oil spill work and that if such happened within four months from the date mentioned in the contract [presumably February 1, 1990] the charter would terminate and a new charter party would be entered with Exxon
- # expenses and responsibilities of Barry McKee included fuel, bait, gear, 50% of the expense of the "Mustad man" and 50% of the observer expense.
- # expenses and liabilities of the owner included maintenance and repair of specified items, a Coast Guard approved twelve man life raft, and 50% of the observer coverage cost

It also contained a disclosure clause that the agreement had been drafted by the law firm of Jamin, Ebell, Bolger & Gentry, which represented the charterer/captain exclusively and that the owner was advised to seek independent assistance of counsel.

In its appeal, Ocean Crest argues that: (1) the true relationship between the parties was not that of a lessor/lessee; and (2) the agreement between the parties was invalidated by Mr. McKee's breaches. In his response, dated August 15, 1995, the Respondent argues that the written lease (bare boat charter) was conclusive evidence pursuant to the applicable IFQ Regulations, and that, in any event, a lease would be found to exist if the actual arrangements were considered.

DISCUSSION

Under the IFQ program, as implemented by the Division, an applicant for an initial issuance of QS may receive credit only for legal landings of Pacific halibut or sablefish that were made from a vessel owned or leased by the applicant at the time of the landings. See 50 C.F.R. § 676.20. Under § 676.20(a)(1)(iii), a written vessel lease is conclusive evidence of the existence of a vessel lease between the parties. To be conclusive evidence, a written lease must identify the leased vessel, the name of the lease holder, and the period of time during which the lease was in effect. Where, as in this case, an applicant has submitted a written document said to be a vessel lease, the appropriate inquiry on appeal is whether that document on its face actually constitutes a vessel lease for purposes of the IFQ program.

The inquiry begins with an examination of the provisions in the document itself, rather than with other evidence concerning the intent or actual conduct of the parties. In the absence of evidence challenging the validity of the agreement, a document that contains provisions consistent with a vessel lease is conclusive evidence of the existence of a vessel lease between the parties, and the inquiry on that question need go no further. However, evidence that the agreement was invalid (void) *ab initio*, such as evidence of fraud, duress, coercion, or incapacity, is always relevant and should be considered.¹ If the Appeals Officer determines that a valid vessel lease existed, then the next question is to determine when the lease was in effect. In examining that question, the Appeals Officer will presume that the lease was in effect for the term stated in the lease, unless contrary evidence is presented.

The IFQ regulations do not define "vessel lease," nor do they prescribe the minimum requirements for, or essential elements of, a vessel lease. Recognizing that commercial fishermen and vessel owners enter into a considerable variety of business arrangements relating to fishing operations, this office has chosen not to establish a single, narrow definition of a vessel lease. Rather, we have identified a number of factors that should be considered in deciding whether a vessel lease existed.

¹If the Appeals Officer finds that a written document does not constitute conclusive evidence of a vessel lease, but does constitute a valid agreement between the parties, the document may still be considered as relevant evidence of the relationship between the parties, along with other evidence of the parties' actual conduct and intent.

In two published decisions involving claimed oral vessel leases,² we reviewed the regulatory history of the vessel lease provisions and concluded that the North Pacific Fishery Management Council intended to allocate Quota Shares to those who "acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question."³ We pointed to five factors that should be considered, but stated that this was not intended to be an exclusive or exhaustive list. These factors are:

- (1) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;
- (2) whether the claimed lessee directed fishing operations of the vessel;
- (3) whether the claimed lessee had the right to hire, fire, and pay the crew;
- (4) whether the claimed lessee was responsible for the operating expenses of the vessel; and
- (5) 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.

Since issuing O'Rourke and Seater, we have reviewed several other appeals involving conflicting claims about the existence of a vessel lease. As a result, it has become clear that some of the factors, which are appropriate to consider in an oral lease situation, might not be relevant in a written lease situation. For example, while it might be useful when reviewing a claimed oral lease to consider how the parties treated the fishing operations for tax purposes, one would not expect a written lease to address this question. Thus, a flexible approach is needed. Therefore, each claimed lease, whether written or oral, must be reviewed on its own merits. Whatever factors are relevant in a particular case will be considered and given appropriate weight.

1. Is an oral or written hearing either necessary or advisable?

The Appellant requested a hearing on the issue of whether the Respondent held a valid lease of the F/V CREST. The Appellant requested an additional 30 days to supplement its appeal with documentary evidence, including affidavits of former crewmembers of the vessel, in order to show that the "true relationship" between the parties constituted a "hired skipper" arrangement or a joint venture, and not a

²O'Rourke v. Riddle, Appeal No. 95-0018, May 18, 1995, affirmed May 23, 1995; Seater v. Seater & Seater, Appeal No. 94-0010 [consolidated with Appeal No. 95-0006], June 6, 1995, affirmed June 9, 1995.

³O'Rourke at 13.

bareboat charter, despite the title of their written agreement. The Appellant also wanted to demonstrate that the agreement had been invalidated by certain alleged breaches by the Respondent. The Appellant never submitted any such evidence. The Respondent did not request a hearing.

The determination whether to order a requested hearing is governed by 50 C.F.R. § 676.25(g)(3), which provides:

- (3) Order that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following:
 - (i) There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law;
 - (ii) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be ordered on the basis of mere allegations or denials or general descriptions of positions and contentions;
 - (iii) The evidence described in the request for hearing, if established at hearing, would be adequate to justify resolution of the factual issue in the way sought by the applicant. A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate; and
 - (iv) Resolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.

The above criteria must all be met before a requested hearing may be ordered. A request for a hearing will be denied if any of the criteria are not met.

The Appellant's first argument -- that the written agreement between the parties does not constitute a bareboat charter -- seeks to go behind the face of the agreement and is based on proposed evidence concerning the actual conduct of the parties, irrespective of the terms of the agreement. The question whether the written agreement constitutes a vessel lease under the IFQ program is a legal question, not a factual question. It is based on an examination of the provisions in the document. Only if the document is found not to constitute conclusive evidence of a vessel lease will the Appeals Officer consider the actual conduct of the parties in deciding whether nonetheless a lease existed. The Appellant does not allege that the agreement was invalid due to fraud, coercion, or incapacity. Nor does the Appellant dispute the language in the document. Since there is no genuine issue of adjudicative fact with respect to the provisions of the document, a hearing on this question is precluded under § 676.25(g)(3)(i).

The Appellant's second argument -- that breaches of the agreement allegedly committed by the Respondent invalidated the agreement -- is misplaced. As discussed later, evidence of a breach by either party is not relevant to the question of whether a written agreement, on its face, constitutes a valid

vessel lease under the IFQ program. Therefore, the suggested evidence would not be admissible on the issue of validity of the agreement and a hearing on the issue is neither necessary nor advisable.

2. Was there a valid vessel lease in effect between the parties?

We have here a detailed document which is identified as a "Bare Boat Charter." There are no allegations of fraud, incapacity or coercion as to its execution, nor is there any such evidence in the record. Therefore, we need look only to the provisions of the document itself to determine whether it constitutes conclusive evidence of a vessel lease.

The title of the document and the terminology used in the document can be relevant evidence of whether the parties intended the document to constitute a vessel lease. In this appeal, the document is entitled "BARE BOAT CHARTER" and the parties are referred to as "owner" and "charterer/captain." The document provides for "rent" or "charter hire" to be paid by the charterer/captain. Such language, while not in itself determinative, is consistent only with a bareboat charter or similar vessel lease and indicates the intent of the parties to create a vessel lease.

The document provides, among other things, that the charterer/captain would have exclusive possession, control and command of the vessel; would be responsible for hiring, feeding, and paying a crew; and would indemnify the owner from any maintenance costs. All of these provisions are consistent with a vessel lease. As required to be conclusive evidence, the document identifies the leased vessel, the name of the lease holder, and the period of time during which the agreement was in effect.

I have given careful consideration to the Appellant's contention that the provisions allowing the owner to select an onboard representative and restrict a change of captain, and requiring that deliveries be made to a processor owned by the Appellant (unless permission were granted otherwise), degrade the document's classification as a lease. However, I do not find this argument persuasive. Though such provisions might arguably detract from the document's classification as a classic bare boat charter, the document, taken as a whole, clearly establishes that the responsibility for the entire fishing operation, including all trip expenses, was the Respondent's.

I have also considered Appellant's argument that alleged breaches by the Respondent retroactively voided the agreement and converted it into something other than a lease. It did not. It may be that the Appellant had a cause of action for breach of the agreement, but that is not for an Appeals Officer to decide. The appropriate question for our purposes is whether the document presented by the Respondent constitutes a vessel lease. A breach of the agreement does not change the nature of the document.

I am persuaded that the document is a valid written vessel lease within the meaning of the IFQ

regulations, and that it therefore constitutes conclusive evidence that a vessel lease existed between the parties.

3. When was the vessel lease in effect?

The Appellant did not specifically address the question of when the lease was in effect. The Appellant did, however, argue that various alleged breaches by the Respondent retroactively invalidated the agreement. As discussed above, breaches of a written agreement do not invalidate the document or its status as conclusive evidence. Evidence of a breach could, however, be relevant to the question of when the lease was in effect and, particularly, when the lease terminated. Such a breach would have to fundamentally change the nature of the relationship between the parties or evidence a clear intent to terminate the agreement. An appropriate question is whether the lessee permanently relinquished possession and control of the vessel and evidenced an intent to cease using the vessel for commercial fishing operations. Examples of the kind of breaches that could constitute termination of a vessel lease include a lessee's abandonment of the vessel or the return of the vessel to the owner.

In this instance, the alleged breaches are not such as would constitute termination of the vessel lease. Even assuming that the Respondent committed the breaches alleged by the Appellant, none of these involved abandoning the vessel or returning the vessel to the Appellant's possession. The evidence in the record is that the Respondent fished the vessel for the entire term stated in the agreement, and the Appellant does not contend otherwise. Therefore, I must conclude that the vessel lease was in effect from February 1, 1990, through October 15, 1990.

FINDINGS OF FACT

1. The parties executed a valid written agreement entitled "BARE BOAT CHARTER" on January 9, 1990.
2. The Respondent operated the vessel for the full term of the agreement.
3. The agreement was in effect from February 1, 1990, through October 15, 1990.

CONCLUSIONS OF LAW

1. The written agreement constitutes a vessel lease for purposes of the Pacific halibut and sablefish IFQ program.
2. The written agreement is conclusive evidence of the existence of a vessel lease between the

parties.

3. The Respondent qualifies as the person to whom qualifying pounds resulting from legal landings of halibut and sablefish made from the F/V CREST during the period February 1, 1990, through October 15, 1990, should be allocated, based on his lease of the vessel from the Appellant during that period.

DISPOSITION

The Division's Initial Administrative Determination, dated April 10, 1995, involving a conflict between the Respondent and the Appellant over the allocation of qualifying pounds of halibut and sablefish landed from the F/V CREST is AFFIRMED. This decision takes effect on November 13, 1995, unless by that date the Regional Director orders review of the decision.

James Cufley
Appeals Officer

I concur in the factual findings of this decision and I 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, Barry L. McKee, still has an opportunity to receive QS and the corresponding IFQ for the 1995 fishing season, I recommend that the Regional Director 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.

Edward H. Hein
Chief Appeals Officer