

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 97-0016  
)  
BRUCE A. LEWIS, )  
Appellant ) DECISION  
)  
\_\_\_\_\_ ) March 27, 2000

STATEMENT OF THE CASE

Appellant Bruce Lewis filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management [RAM] program on July 30, 1997. The IAD denied Mr. Lewis's request for additional units of halibut and sablefish quota share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish. RAM denied the additional QS because Mr. Lewis did not produce timely and sufficient evidence of the lease of two fishing vessels: the F/V CLIPPER ENDEAVOR and the F/V KAELA C.<sup>1</sup> A hearing was not held because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution. 50 C.F.R. § 679.43.<sup>2</sup>

In this Decision, I conclude that Mr. Lewis did not lease the F/V CLIPPER ENDEAVOR, but that he did lease the F/V KAELA C between March 15, 1990, and May 8, 1990. As a result, the IAD relating to the F/V KAELA C is vacated, and Mr. Lewis is entitled to all qualifying QS resulting from the lease of the vessel.

ISSUES

1. Did Mr. Lewis lease the F/V CLIPPER ENDEAVOR?
2. Did Mr. Lewis lease the F/V KAELA C?

DISCUSSION

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<sup>1</sup>The IAD also denied Mr. Lewis's claim that he leased the F/V STARRIGAVAN. Mr. Lewis does not seek reversal of the IAD as to that claim. [Appeal, at 2]

<sup>2</sup>Formerly, 50 C.F.R. § 676.25(g)(2) and (3). All IFQ regulations were renumbered, effective July 1, 1996. See, 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

A former shareholder of a dissolved corporation who would otherwise qualify as a person may apply for QS in proportion to the former shareholder's interest in the dissolved corporation. 50 C.F.R. § 679.40(a)(2)(iii). To qualify for QS under the regulations of the IFQ program, a person must have owned or leased a fishing vessel that made legal landings of halibut or sablefish during a QS qualifying year (1988, 1989, or 1990). 50 C.F.R. § 679.40(a)(2). Evidence of vessel ownership is limited to the following documents, in order of priority: a U.S. Coast Guard abstract of title, when required; a certificate of registration that is determinative of vessel ownership; and a bill of sale. 50 C.F.R. § 679.40(a)(3)(ii).

A written vessel lease agreement, or notarized statement from the vessel owner and leaseholder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years, is conclusive evidence of a vessel lease. Conclusive evidence of a vessel lease must identify the leased vessel, the name of the leaseholder and the period of time during which the lease was in effect. 50 C.F.R. § 679.40(a)(3)(iii). Other evidence, which may not be conclusive, but which tends to support the existence of a vessel lease, may also be submitted. *Id.* In the absence of conclusive evidence of a vessel lease, the Appeals Officer seeks to determine from a review of all the evidence in the record whether the overall arrangement between the parties constituted a vessel lease. See Thomassen v. Mechanics Service, Inc., Appeal No. 95-0088, July 29, 1998, at 9.

Neither the IFQ regulations nor the regulatory history define "vessel lease." In a series of decisions,<sup>3</sup> this Office identified seven factors to assist Appeals Officers in deciding whether a valid oral vessel lease existed. The factors are:

- (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 the navigation of the vessel;
- (3) whether the claimed lessee directed the fishing operations of the vessel;
- (4) whether the claimed lessee had the right to hire, fire, and pay the crew of the vessel;
- (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 business for federal income tax and other purposes; and

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<sup>3</sup>See, e.g., O'Rourke v. Riddle, Appeal No. 95-0018, May 18, 1995; F/V Determined Partnership v. Big Blue, Inc., Appeal No. 95-0049, October 22, 1996; Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996; Kristovich v. Dell, Appeal No. 95-0010, March 20, 1996.

(7) whether the claimed lease had a set or guaranteed term.

We developed these factors after reviewing the regulatory history of the IFQ program, maritime law, and other legal principles relating to leases. We discovered that the North Pacific Fishery Management Council intended to award QS to vessel lessees because, like vessel owners, lessees "supply the means to harvest fish, suffer the financial and liability risks to do so, and direct the fishing operations."<sup>4</sup> In our first decision involving a vessel lease issue,<sup>5</sup> we said:

it appears that the Council intended to allocate Quota Share 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.<sup>6</sup> 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." The RAM Division, too, appears to have envisioned a lessee as one who was an entrepreneur with respect to the fishing operations.

The factors were designed to help identify which party, as between a vessel owner and a claimed vessel lessee, was the "true" fishing entrepreneur. Owners and operators of fishing vessels enter into a variety of business arrangements, with varying degrees of formality. In many ways, owners and operators share in the risks, responsibilities, and rewards of a commercial fishing enterprise. For example, whether an owner leases his vessel to another or not, the owner typically is compensated with a share of the fishing proceeds and, therefore, always has a stake in the success of the enterprise. Whether the operator leases the vessel or works as a hired skipper, partner, or joint venturer of the owner, the operator accepts personal and financial risks by taking the vessel and crew out to sea, and by relying on their catch for a livelihood. And because hired skippers and crew almost always work as independent contractors, rather than as employees, everyone involved in a commercial fishing enterprise could be considered, in a sense, an entrepreneur.

Nonetheless, the Council chose to award Quota Shares only to qualified vessel owners or vessel lessees. The Council preferred to reward vessel owners and those who (as lessees) acted like vessel owners, rather than those who worked with, for, or as agents of, vessel owners. A non-owner vessel operator must have had a lease to qualify for an initial issuance of QS; any other relationship results in

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<sup>4</sup>58 Fed. Reg. 59,375, at 59,378 (November 9, 1993).

<sup>5</sup>O'Rourke v. Riddle, Appeal No. 95-0018, at 13, May 18, 1995, *aff'd* May 23, 1996.

<sup>6</sup>WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988)

the QS going to the vessel owner. Therefore, to find for a claimed lessee, the Appeals Officer must reach a legal conclusion that the parties entered into a legally valid vessel lease that was in effect when the qualifying landings in question were made.

Unlike our analysis of purported written vessel leases, which focuses almost exclusively on the four corners of the document, our analysis of oral vessel leases considers the parties' words, conduct, and documents. Regardless of whether the parties' agreement was written or oral, we must answer the same questions: (1) What were the terms of the agreement? (2) Did the agreement constitute a legally valid vessel lease? and (3) If so, when was it in effect?

In applying the oral lease factors, we have found it necessary to use a flexible case-by-case analysis. The factors are analytical tools or guideposts, rather than elements of a vessel lease. The factors are not exclusive; an Appeals Officer has discretion to consider additional factors in particular cases if they help in determining whether a lease existed between the parties.

### **1. Did Mr. Lewis lease the F/V CLIPPER ENDEAVOR?**

RAM issued halibut QS and sablefish QS to Clipper Seafoods, Ltd., based on the company's ownership of the F/V CLIPPER ENDEAVOR in 1988. The U.S. Coast Guard abstract of title shows that Clipper Seafoods, Ltd. owned the vessel during that year.

Mr. Lewis claims that he leased the F/V CLIPPER ENDEAVOR from Clipper Seafoods, Ltd., as president and owner of Douglas Cold Storage, Inc., between June and December 1988. In a letter to RAM, he alleges that: (1) a written lease existed for the vessel, but his copy of the written lease was stolen from his house in Seattle, Washington, following his arrest on April 27, 1992; (2) Mr. Paul Gilliland signed the written lease on behalf of Clipper Seafoods, Ltd., as vice-president of the company; and (4) Douglas Cold Storage, Inc. paid Mr. Lewis \$30,000 to captain the vessel. The fishing records of the State of Alaska Commercial Fisheries Entry Commission [CFEC] show that Mr. Lewis landed halibut and sablefish on his fishing permit from the F/V CLIPPER ENDEAVOR on September 30, 1988, and October 24, 1988.

Mr. Lewis did not produce for the record any documents that show he leased the F/V CLIPPER ENDEAVOR. Notably absent from the record are settlement statements, bank records, fish cannery statements, corporate business records, federal income tax returns, checks, receipts, accountant or bookkeeper records, W-2 forms, etc. that would show (1) the terms of an agreement between the parties; (2) who was responsible for the navigation, the fishing, the marketing of the fish, and the crew, of the F/V CLIPPER ENDEAVOR during the relevant period; and (3) who received and controlled the fishing income from the vessel's operations, made the capital investments, and paid for and assumed the financial and liability risks, with regard to the vessel's operating expenses. Also, notably absent from the record is a letter or affidavit from Mr. Paul Gilliland, or someone else on behalf of Clipper

Seafoods Ltd., attesting to the existence of a written lease. At best, the evidence in the record shows only that Mr. Lewis was aboard the F/V CLIPPER ENDEAVOR for the harvests of the halibut and sablefish landings on September 30, 1988, and October 24, 1988.

Due to the absence of evidence, I conclude that Mr. Lewis (or Douglas Cold Storage, Inc.) did not lease the F/V CLIPPER ENDEAVOR. Therefore, Mr. Lewis is not eligible for the QS resulting from the landings of the vessel in 1988.

## **2. Did Mr. Lewis lease the F/V KAELA C?**

The U.S. Coast Guard abstract of title shows that Cal Kaela, Inc. owned the F/V KAELA C in 1990. RAM initially assigned the QS for the vessel's 1990 landings to Larry Kinley, but later revoked the QS. Mr. Kinley did not challenge the revocation. RAM's records show that Cal Kaela, Inc. never applied for QS, and that RAM has not issued the QS to anyone for the F/V KAELA C.

Mr. Lewis originally claimed on his Request for Application [RFA] that he leased the F/V KAELA C between March and June 1989. Because the vessel made no halibut or sablefish landings in 1989, and because Mr. Lewis operated the vessel in 1990, it is likely that Mr. Lewis meant to claim on his RFA that he leased the vessel in 1990, and not in 1989. Thus, for purposes of this appeal, I shall consider Mr. Lewis' claim of the lease of the F/V CLIPPER ENDEAVOR in 1989 to be for the period between March and June 1990.

To prove that he leased the vessel, Mr. Lewis produced a typed document purported to be a bareboat charter for the F/V KAELA C, signed by Mr. Lewis, as president of Douglas Cold Storage, Inc., and by Mr. Scott Bergren, as president of Cal Kaela, Inc., on March 15, 1990. The typed document does not have a stated term, and contains handwriting on the document that modifies various provisions of the charter. The word "DRAFT" is handwritten above the heading of the document, which is entitled "BAREBOAT CHARTER." Because the document appears to be a draft, I conclude that the document, by itself, cannot be considered conclusive evidence of the lease of the F/V KAELA C. Nevertheless, the document can be used as evidence of the existence of an oral lease of the vessel.

In addition to the draft "bareboat charter" document, Mr. Lewis produced (1) Alaska state fish tickets for landings made by Mr. Lewis from the F/V KAELA C on April 9, April 13, April 23, and May 4, 1990; (2) cod scale sheets for landings made by the F/V KAELA C at Pelican Seafoods, Inc., in April 1990, which show Mr. Lewis as the master of the vessel; (3) CFEC fishing records for landings made from the F/V KAELA C on Mr. Lewis's fishing permit on April 9, April 13, April 23, and May 4, and June 8, 1990; and (4) a fax from Mr. Scott Bergren, president of Cal Kaela, Inc., to Mr. Lewis, terminating the "charter" of the F/V KAELA C on May 8, 1990.

On August 5, 1999, I called Mr. Scott Bergren<sup>7</sup> who confirmed that he and Mr. Lewis had signed a bareboat charter for the KAELA C on March 15, 1990, and that Mr. Bergren terminated the charter via fax on May 8, 1990. The biennial report for Douglas Cold Storage, Inc., and a certificate of involuntary dissolution issued by the state of Alaska, show that Douglas Cold Storage, Inc. is a dissolved corporation, and that Mr. Lewis was the president and sole shareholder of the corporation at the time of dissolution.

Based on the weight of the evidence in the record, I find that (1) Cal Kaela, Inc., owned the F/V KAELA C in 1990; (2) Mr. Bergren and Mr. Lewis signed a draft bareboat charter agreement on March 15, 1990, for the charter of the F/V KAELA C by Douglas Cold Storage, Inc.; (3) Mr. Bergren terminated Mr. Lewis' charter of the F/V KAELA C on May 8, 1990; (4) Mr. Scott Bergren had the authority to sign the draft charter and to terminate the charter of the F/V KAELA C, as president of Cal Kaela, Inc.; (5) halibut and sablefish landings were recorded on Mr. Lewis' fishing permit from the F/V KAELA C between March 15, 1990, and May 8, 1990; (6) Mr. Bergren chartered the F/V KAELA C to Mr. Lewis on March 15, 1990, and terminated the charter on May 8, 1990; and (7) Douglas Cold Storage, Inc., is currently dissolved, and Mr. Lewis was the president and sole shareholder of the corporation at time of dissolution.

In light of this evidence, I conclude that Douglas Cold Storage, Inc. leased the F/V KAELA C from Cal Kaela, Inc., between March 15, 1990 and May 8, 1990, and that Mr. Lewis is entitled to the QS resulting from the landings made from the F/V KAELA C during that period.

#### FINDINGS OF FACT

1. Clipper Seafoods, Ltd., owned the F/V CLIPPER ENDEAVOR in 1988.
2. Cal Kaela, Inc., owned the F/V KAELA C in 1990.
3. Halibut and sablefish landings were recorded on Mr. Lewis's fishing permit from the F/V KAELA C between March 15, 1990 and May 8, 1990.
4. Mr. Scott Bergren had authority to sign and terminate the charter of the F/V KAELA C, as president of Cal Kaela, Inc.
5. Mr. Bergren terminated Mr. Lewis's charter of the F/V KAELA on May 8, 1990.
6. Cal Kaela, Inc., never applied for QS, including the QS for the landings made from the F/V

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<sup>7</sup>Mr. Bergren is currently the president of California Calamari Corporation in Walnut Creek, California.

KAELA C in 1990.

7. Douglas Cold Storage, Inc., was involuntarily dissolved by the state of Alaska.
8. Mr. Lewis was the president and sole shareholder of the corporation at the time of dissolution.

#### CONCLUSIONS OF LAW

1. Mr. Lewis did not lease the F/V CLIPPER ENDEAVOR in 1988.
2. Mr. Lewis cannot be issued QS, based on the lease of the F/V CLIPPER ENDEAVOR in 1988.
3. Douglas Cold Storage, Inc., leased the F/V KAELA C from Cal Kaela, Inc., between March 15, 1990, and May 8, 1990.
4. Mr. Lewis is entitled to the QS resulting from the landings made from the F/V KAELA C between March 15, 1990, and May 8, 1990.

#### DISPOSITION AND ORDER

The IAD that is the subject of this appeal is **AFFIRMED** insofar as it denied issuance of QS to Mr. Lewis for the lease of the F/V CLIPPER ENDEAVOR and the F/V STARRIGAVAN. The IAD is **VACATED** to the extent that it denied QS to Mr. Lewis for the lease of the F/V KAELA C between March 15, 1990, and May 8, 1990. RAM is **ORDERED** to issue to Mr. Lewis the QS resulting from all qualifying halibut and sablefish landings made from the F/V KAELA C during that period. This Decision takes effect April 26, 2000, unless by that date the Regional Administrator orders review of the decision.

Any party, including RAM, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m., Alaska Time, on April 6, 2000, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must specify one or more 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.

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Randall J. Moen  
Appeals Officer

