NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 98-0001
	)	
THOMAS W. MITTENEN,	)	
Appellant	)	DECISION ON RECONSIDERATION
	)	
and	)	
	)	May 23, 2000
LEROY COSSETTE,	)	
Respondent	)	
_____	)	

STATEMENT OF THE CASE

We issued the Decision in this case on March 22, 2000. In the Decision, we found that Mr. Mittenen and Mr. Cossette both assumed the financial risks of their fishing venture, that both treated the venture as their business, and that neither of them characterized their business arrangement as a "vessel lease" during the relevant period. In light of those findings, we concluded that Mr. Mittenen did not lease the vessel, even though the parties stipulated that Mr. Mittenen was responsible for the vessel, fishing, and crew, and even though we found that the parties' arrangement was based on a set or guaranteed term.

Mr. Mittenen died on February 4, 2000, 47 days before the the Decision in this case was issued. Mr. Mittenen's attorney, John Gissberg, filed a motion for reconsideration on April 10, 2000, on behalf of the Estate of Mr. Mittenen. In this Decision on Reconsideration, for the sake of convenience, we will refer to the estate as "Mr. Mittenen." Mr. Cossette's attorney, Shane Carew, filed a motion in opposition to reconsideration on May 5, 2000. Both parties' lawyers had requested additional time to file their motions, and we accepted both as timely filed.

The standard for reconsideration is whether the requesting party has raised a material matter of fact or law that the Appeals Officer overlooked or misunderstood. Having reviewed the motions and the record, we concluded that there were a few errors, but not substantial enough to change the result of the Decision. Nonetheless, we granted Mr. Mittenen's Motion for Reconsideration in order to address the more than three dozen objections raised and to clarify certain matters regarding our analysis of lease claims.

ISSUE

On reconsideration, the central issue remains whether Mr. Mittenen leased the F/V ESKIMO PRINCESS from Mr. Cossette in 1986. In the course of reviewing that issue, we will address each of the objections raised in Mr. Mittenen's motion.

DISCUSSION

A. Claims of Material Legal Oversights

Objection 1. The use of "Charter Agreement," "oral charter," and "Charter hire" by Mr. Cossette's lawyer to describe the arrangement of the parties represents the "very best evidence of the legal nature of the agreement" and "should control the legal characterization of the arrangement."

Mr. Mittenen does not cite any IFQ decision or legal authority to support his position. We have never held in any case that the characterization of an arrangement by a party's lawyer is the "very best evidence" of the nature of an agreement.

Objection 2. The "OAA decision fails to address why the parties' failure to use the words "employment" or hire" ... discredit[s] the conclusion that the arrangement could be construed a partnership, joint venture, or some kind of for hire employment contract."

This criticism is misleading and is not legally relevant. We did not conclude that the parties had a partnership, joint venture, or for-hire arrangement. We only concluded that the parties did not have a lease. The issue in this case is not what the arrangement was between the parties, but whether the arrangement was a lease. We have never held in any IFQ case that the absence of words to describe something other than a lease, is relevant to show the existence of a lease.

Objection 3. The decision overlooked Smee v. Echo Belle, which recognizes that a crew member's wage claim against a vessel operator is evidence of a lease.

We did not discuss the relevance of Paul Linden's wage complaint against Mr. Mittenen because the parties stipulated that Mr. Mittenen assumed responsibility for the hiring, firing, and payment of the crew. But even so, Mr. Mittenen's use of Smee is misleading. We did not hold in Smee that a wage claim against a vessel operator is evidence of a lease. In Smee, we stated that a wage claim against a vessel operator is not legally controlling, because payment of crew wages by a vessel operator is typical in *both* an employment arrangement and a lease arrangement.

Objection 4. The decision overlooks O'Rourke v. Riddle, which holds that a lease exists if the claimed lessee had authority to maintain complete control of the vessel during a set or guaranteed term.

We did not say in O'Rourke, or in any IFQ decision, that complete control of a vessel for a set or guaranteed term is conclusive evidence of a lease. A vessel operator's complete control of a vessel for a set or guaranteed term represents only two of the seven factors used by an appeals officer to determine the existence of a vessel lease for purposes of IFQ.

B. Claims of Factual Oversights

Objection 5. The decision overlooks F/V Determined Partnership v. Big Blue, Inc., which found that the vessel operator's "plea for financial relief" to the owner was inconsistent with a lease.

Mr. Mittenen's assumption that Big Blue, Inc. is relevant is not based on evidence in the record. The record does not show that Mr. Cossette went to see Mr. Mittenen to obtain "financial relief." Mr. Cossette met with Mr. Mittenen to tell him that he wanted 50% of the vessel's salmon tendering proceeds, which was not part of the parties' original agreement for halibut fishing.

Objection 6. "Both parties agreed that they instructed Ursin Seafoods that the owner would not be responsible for "any charges on the vessel."

Mr. Mittenen takes this quote out of context. The evidence in the record clearly shows that the parties instructed Ursin that Mr. Cossette would not be responsible for trip expenses (ice, fuel, bait, groceries, crew share) charged by Mr. Mittenen. [*See* the parties' and Ursin's testimony at tape 3, side b; tape 5, side a; tape 5, side b; tape 6, side a]

Objection 7. "... [T]he cases noted in the decision and cited herein give no credit whatsoever to a lease where an owner himself (and corroborating third party testimony) had washed his hands of any responsibility or involvement with the vessel. Maritime law would call it a "bareboat charter; OAA should have called it a lease or explained why the parties' joint and unanimous disclaimers were somehow not applicable."

Mr. Cossette did not wash his hands of responsibility or involvement with the vessel. While he was not at risk or responsible for trip expenses, he was responsible for the insurance, repairs, maintenance, and fishing gear.

We discussed the "disclaimers" in the Decision under factor 5, which relates to who is responsible for the vessel's operating expenses. We did not give the disclaimers a great deal of weight because they related only to trip expenses, which were marginal at best, and which are shared with the crew in typical non-lease arrangements.

This Office has developed its analysis of vessel lease claims in a series of decisions, beginning with O'Rourke v. Riddle,[1] and extending through Treinen v. Scudder,[2] Kristovich v. Dell,[3] Smee

[1]Appeal No. 95-0018, May 18, 1995.

[2]Appeal No. 95-0104, October 11, 1995.

[3]Appeal No. 95-0010, March 20, 1996.

v. Echo Bell, Inc.,[4] Harper v. West,[5] and Thomassen v. M.S.I.[6] In our earliest lease cases, we attempted to determine what the North Pacific Fishery Management Council had in mind when it provided that a vessel lessee would receive IFQ credit for landings made while the vessel was leased, and that the lessee would qualify for Quota Shares in place of the vessel owner. We reviewed the regulatory history of the IFQ program and, finding no conclusive answers there, we also researched maritime law. We found that the maritime term closest to a vessel lease was a "bareboat charter" or "demise." We noted that the Council at one time considered using the term "bareboat charter," but ultimately abandoned it in favor of the term "vessel lease."

In O'Rourke v Riddle, we stated that "a bareboat charter would definitely constitute a vessel lease" and that "a business arrangement between the parties need not rise to the level of a bareboat charter in order to qualify as a vessel lease under the IFQ program." Unfortunately, these statements have been quoted in appeals decisions ever since. When we made those statements, we were under the false impression that a bareboat charter was a particular type of vessel lease, and one that was more difficult to prove than the type of "vessel lease" the Council may have had in mind.

In West v. Harper, et al., Case No. A97-358-CV(JWS), the United States District Court for the District of Alaska, pointed out that a bareboat charter requires only that "the vessel owner has completely and exclusively relinquished possession, command, and navigation of the vessel." We never intended to reduce the test of a vessel lease for IFQ purposes to such a simple rule. As we stated in several decisions, including O'Rourke v. Riddle (at 13):

> Having considered all of the above-mentioned views on what constitutes or demonstrates a vessel lease, 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.[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." The RAM Division, too, appears to have envisioned a lessee as one who was an entrepreneur with respect to the fishing operations.

We try to determine, as we believe the Council wanted us to do, which party, as between the vessel owner and a claimed lessee, was engaged in the fishing venture as the entrepreneur. This overall view has guided our decisions, and has helped us evolve our lease analysis on a case-by-

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[4]Appeal No. 95-0076, August 1, 1996.

[5]Appeal No. 95-0105, July 17, 1997.

[6]Appeal No. 95-0088, July 29, 1998.

[7]WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988)

case basis. Our reading of maritime cases involving bareboat charters indicates that in virtually every instance the courts are looking at whether a vessel owner should be relieved of liability for death or injury to crew members, or damage to other property, and whether the charterer should entirely take the place of the owner for purposes of imposing liability.

Unlike those court cases, we do not try to determine which party — the vessel owner or the claimed vessel lessee — would be liable for damages. Our inquiry is through different glasses, and for a different purpose — not to fix liability, but to determine which party is worthy of the rewards granted by the IFQ program. In this context, we have developed our own standards and tests. Although our analysis may have been influenced initially by our reading of maritime law, we do not require that a person claiming to have been a vessel lessee prove that a bareboat charter existed. In fact, we view the question of whether a bareboat charter existed as irrelevant. We therefore take this opportunity to clarify our view, and to reject any consideration of bareboat charters and related maritime law cases in our decisions involving vessel leases under the IFQ program. To the extent that any of our previous vessel lease decisions have appeared to rely on maritime law and bareboat charters, those cases are hereby overruled to that extent. The IFQ regulations and the analysis we have developed in IFQ decisions govern the existence of a vessel lease under the IFQ program, not maritime law or bareboat charters.

Objection 8. "The owner avoided any entrepreneurial risk ... by refusing to have his vessel encumbered by liens for the Appellant's pre-season activities."

This statement assumes facts not in evidence. The evidence in the record does not show that Mr. Cossette refused to have his vessel encumbered by Mr. Mittenen's pre-season activities, but by Mr. Mittenen's trip expenses. Under the parties' arrangement, Mr. Mittenen would provide the labor, and Mr. Cossette would pay the costs, to prepare the F/V ESKIMO PRINCESS for fishing. [*See, e.g.*, Mr. Mittenen's testimony at tape 2, side a].

Objection 9. "... [T]he Ursin representative further stated that Respondent's only connection with the operation thereafter was to pick up his share from Appellant's deliveries. ... As a result, ... the entire risk of the operation was assumed by Appellant... . In Thomassen, ... the OAA recognized an owner's deliberate intention to forego a lien and to look solely to the operator's personal credit as evidence of a lease."

Mr. Cossette's connection with Ursin was more than just collecting his share of the vessel's halibut proceeds. The evidence in the record shows that Mr. Cossette paid Ursin for repairs and maintenance expenses charged on his account for the operation of the F/V ESKIMO PRINCESS. As we stated in the Decision, the risk of the vessel's operation was assumed not only by Mr. Mittenen, but also by Mr. Cossette.

Thomassen is not applicable because the parties in this case did not agree to "look solely to the operator's personal credit." Mr. Cossette paid several bills relating to charges made on his personal account by Mr. Mittenen at various businesses for the repair and maintenance of the F/V ESKIMO PRINCESS.

Objection 10. "... [I]f the owner was not to be responsible for the $15,000 of expenses for bait, fuel, ice, groceries, etc. reflected on the Ursin statement, the OAA should have concluded that this risk fell on Appellant if the vessel had returned in the "hole" as in Bradley v. Padon."

Mr. Mittenen assumes facts not in evidence. Bradley v. Padon is also not applicable. There is no evidence in the record that anyone assumed financial responsibility for $15,000 worth of trip expenses. Nor does Ursin's statement show that trip expenses were deducted from anyone's account. In Bradley v. Padon, we found that the owner paid for the vessel's trip expenses, and that he would have been financially responsible in the event of a "hole" operation. We did not mistake the evidence in the record, which shows that Mr. Mittenen was at minimal risk for trip expenses.

Objection 11. The OAA decision notes that the parties "did not discuss the basis of their arrangement" when they met on the dock in April 1986. "The OAA decision makes the gigantic leap of faith that somehow Respondent turned his entire vessel over to a hired skipper without once discussing the terms of their arrangement."

In the Decision, we found that the "evidence does not show that the parties discussed the lease of the vessel face to face." What we meant to say is that the evidence does not show that the parties characterized their arrangement as a "lease" when they met face-to-face. Mr. Cossette testified that they did not. [tape 4, side b] Mr. Mittenen testified that they did and that the arrangement was made via a third party, Mr. Gallaher. [tape 4, side b]. Even though the evidence did not show exactly when the parties agreed to the terms of their arrangement, it is evident that they made an agreement before Mr. Cossette turned the vessel over to Mr. Mittenen. Neither party claimed or testified otherwise. Whether Mr. Gallaher merely introduced the parties to one another, or knew the terms of the arrangement, is not particularly important. The parties do not dispute the basic terms of their arrangement. [*See* Mr. Mittenen's testimony at tape 1, side b, and Mr. Cossette's testimony at tape 4, side b] But they do dispute how they characterized their arrangement. Mr. Mittenen wants Mr. Gallaher's first affidavit to be included show that he brokered a lease for the parties. We found, however, that the affidavit was not credible.

To clarify the Decision, I find that the parties did not characterize their arrangement as a lease when they met face-to-face in April 1986, before the start of the 1986 halibut fishing season.

Objection 12. Mr. Mittenen claims that we ignored the testimony (of both parties and the Ursin representative) that Mr. Cossette was not responsible for trip expenses or any operating expenses made against the vessel.

Mr. Mittenen misreads the Decision. We stated several times in the decision that Mr. Mittenen was responsible for trip expenses (fuel, bait, food, ice, crew shares, and replacement gear), [*See* Decision, at 3, 11, 13, 16, 18], but that it was "unclear from the record to what extent, if any, Mr. Mittenen personally paid, or was at risk for the trip expenses. [*See* Decision at 12] The testimony did not show that Mr. Cossette was not responsible for the other operating expenses or

that the vessel could not be encumbered for those expenses (if incurred by Mr. Cossette).

Objection 13. "... [T]he Respondent failed to be able to produce certain essential 1986 records (e.g. Ursin's statements) even though he was able 'miraculously to produce a box of receipts including tax return copies that somehow did not include the Ursin and other statements he claimed he had. Curiously, he is not discredited for the absence of this evidence that would otherwise seem to be consistent with the evidence box he produced at the last minute. This differential credit and discredit accorded the parties in the decision and the apparent credit given to the receipts in the mystery box that do not even appear to apply to the 1986 halibut fishery should be examined and evaluated by OAA in light of prior decisions ..."

These statements are unsupported and misleading. Mr. Mittenen does not offer evidence to show that Mr. Cossette "failed" to produce "essential 1986 records," or that Mr. Cossette was given "differential credit." The evidence in the record shows that Mr. Cossette produced the documents that he had, and that the documents were consistent with the testimony of the parties.

Objection 14. "... [T]he decision 'penalizes' Mr. Mittenen for not having his old 1986 receipts and tax returns to corroborate his otherwise unrebutted testimony."

We did not "penalize" Mr. Mittenen for not producing receipts and his 1986 tax return. Actually, we credited Mr. Mittenen for the responsibilities that he said he agreed to assume under his agreement with Mr. Cossette. Mr. Mittenen's problem is that he did not produce sufficient evidence of a lease. The record is void of evidence showing that during the relevant period (1) he controlled the proceeds of the entire venture; (2) he assumed financial risk and responsibility for the entire operating expenses of the venture; (3) he paid Mr. Cossette a lease fee for the use of the vessel; and (4) he treated the entire operations of the vessel as solely his own business.

Objection 15. "... [P]revious OAA decisions have discounted owner expenses such as gear and vessel maintenance to invalidate a lease because they were owner expenses even under a lease agreement. ... However, in this case, the same expenses are credited to owner as evidence to disprove Appellant's claim of a lease. The conclusion is contrary to prior OAA decisions ... and general maritime law."

We have never said in any IFQ decision that payment of fishing gear and vessel maintenance expenses are not important indicators of a vessel lease. In O'Rourke we stated that while it is not necessary for a claimed lessee to have paid for vessel repairs, it was highly advisable. [12] In that case, the owner spent considerable sums of money in the vessel's enterprise, but by his own admission, he considered them as "loans" to the vessel operator. The claimed lessee also paid for moorage and gear, which we found to be prima facie evidence of the existence of a lease. In Smee, we also held that an important consideration in determining the existence of a lease is whether the claimed lessee paid for the vessel's fishing gear, insurance, and general repairs during the period of the claimed lease [at 17]. The owner's assumption of those

responsibilities during the operation of the vessel was a contributing reason why we did not conclude that a lease existed in that case.

Objection 16. The OAA decision incorrectly credits Mr. Cossette for moorage instead of grid use at the Kodiak city dock.

The evidence does not substantiate Mr. Mittenen's claim. Mr. Cossette's check registers shows that he paid $15 to the City of Kodiak for one day's moorage of the F/V ESKIMO PRINCESS at the city dock in July 1986. But even if the expense was for grid use, it would not be a material oversight and would not affect the outcome of this case. If anything, Mr. Cossette's payment would tend to show the non-existence of a lease because the "grid use" occurred not during the claimed lease period.

Objection 17. The OAA decision mistakenly credits the owner with payment of lube expenses.

Mr. Mittenen is mistaken. We never said in the Decision that Mr. Cossette paid for lube expenses. Both parties acknowledged that Mr. Mittenen was responsible for it, and that he likely paid for it.

Objection 18. The Decision mistakenly found that Mr. Cossette incurred "entrepreneurial risk" when he paid for the vessel's first fueling.

The Decision does not specifically state that Mr. Cossette assumed financial or entrepreneurial risk with regard to the vessel's first fueling, even though the evidence shows that he did. The Decision only states that Mr. Cossette assumed financial responsibility for the vessel's first fueling. Both parties acknowledged in their testimony that Mr. Cossette was responsible for it [*See* tape 1, side a, and tape 4, side b], and Mr. Cossette's check register shows that Mr. Cossette paid for the vessel's first fueling on Mr. Cossette's account with Petro Marine. Mr. Cossette's payment of the vessel's first fueling is inconsistent with a claimed lease.

Objection 19. The Decision mistakenly found that Mr. Cossette paid the crew.

Mr. Mittenen is wrong. The decision clearly provides that Mr. Mittenen paid crew expenses. [*See* the Decision at 13, 18]

Objection 20. Mr. Cossette is not believable because he testified that he paid for the vessel's lube oil and King Cove moorage in 1985.

We did not discuss lube oil or King Cove moorage expenses, or either party's credibility, in the Decision. The expenses were not particularly relevant or material and the credibility of the parties was not at issue with regard to the basic elements of the case. The parties do not dispute the material facts, but only the legal characterization of those facts. In the end, the Decision did not turn on Mr. Cossette's credibility, but on the sufficiency of evidence to support a lease claim.

Objection 21. "Though the insurance the owner had purchased earlier in the year continued to cover the vessel when Appellant arrived in Kodiak in April, the owner's coverage is not inconsistent with a lease. See e.g. Smee, above: "hull insurance and general vessel repairs would normally be borne by any owner regardless of whether there was a lease of the vessel." The OAA further errs in crediting the full amount of any annual policy to the generally reduced rated for summer fisheries of a vessel used for crab fisheries in the winter."

Mr. Mittenen misstates the facts. Mr. Cossette paid for the vessel's insurance, not only before, but *during* the period of the claimed lease. [*See* the checks to Griffin MacLean on 7/29 and 8/25 in Mr. Cossette's check register.] Mr. Mittenen also misapplies Smee. In Smee, we held that the payment of vessel insurance by a vessel owner for the operation of a vessel during the period of the claimed lease, is indicative of a non-lease arrangement. [*See* Smee at 19]

Mr. Mittenen is correct that the Decision credits Mr. Cossette for insurance coverage outside the claimed lease period. The Decision should have credited Mr. Cossette only for the claimed lease period. Those insurance payments were quite substantial, and do not change the basic findings of fact and conclusions in the Decision. Mr. Mittenen did not pay, and was not responsible for, the insurance of the vessel. The payment and assumption of responsibility for insurance by a vessel owner is evidence inconsistent with a vessel lease. One of Mr. Mittenen's basic problems is that both he and Mr. Cossette paid for and bore financial risk with regard to the operating expenses of the F/V ESKIMO PRINCESS. Mr. Cossette's responsibilities included insurance, repairs, and halibut gear.

Objection 22. The Decision mistakenly credits Mr. Cossette for a 1985 King Cove moorage expense.

We did not credit Mr. Cossette for an 1985 King Cove moorage expense. It was not mentioned in the Decision, nor is the expense relevant because it occurred before the relevant period.

Objection 23. Mr. Cossette's payment for damages to a dock ladder is not applicable in this case.

Mr. Mittenen claims that the Decision never found that the dock ladder was damaged during his operation of the F/V ESKIMO PRINCESS. Mr. Mittenen is correct. We now find that the dock ladder was damaged during Mr. Mittenen's operation of the vessel. The cannery (Ursin) deducted the damage expense from Mr. Cossette's account on June 12, 1986, during the period of Mr. Mittenen's operation of the vessel. If the damage had occurred before the period of the claimed lease (before early April 1986), it is likely that the cannery would have deducted the expense from proceeds of the vessel's first halibut landings made at the cannery in May 1986. This circumstantial evidence is consistent with Mr. Cossette's declaration, in which he states that Mr. Mittenen damaged the dock ladder. [*See* Mr. Cossette's declaration, at 6] Mr. Mittenen never denied the declaration, nor does Mr. Mittenen deny that Mr. Mittenen damaged the dock ladder in the request for reconsideration. In light of this, we reaffirm that the ladder expense is

applicable evidence of the existence of a non-lease arrangement between the parties in this case.

Objection 24. "The Decision concludes that there was no documentary evidence or receipts showing that Appellant for any replacement gear. ... This is contrary to the testimony presented by both parties. ... It is simply wrong for the OAA decision to justify ... the parties' admission of replacement gear (albeit 'used') by Appellant just because documentary evidence from 1986 is no longer available."

The latter portion of this objection is unintelligible. We said in the Decision that Mr. Mittenen was responsible for gear replacement, but that there was no documentary evidence that he actually paid for it. Mr. Mittenen testified that he paid to replace the gear, but he did not say from where or whom. Mr. Mittenen also testified that he paid to replace the gear out of his personal checking account, but he never identified the check or the amounts in his bank statements that he used to pay for the gear. Both parties testified that Mr. Mittenen replaced the vessel's gear with "used" fishing gear. Mr. Cossette testified that one of Mr. Mittenen's crew told him that the crew had found the used fishing gear on the fishing grounds. [*See* tape 4, side b] Mr. Mittenen did not refute that testimony, but testified that the gear was "damn good gear" that could be used for the next halibut opener. [*See* tape 7, side b] Mr. Cossette claims that Mr. Mittenen left a "small amount of gear on the F/V ESKIMO PRINCESS, which Mr. Mittenen probably called "replacement gear." [*See* the Mr. Cossette's Declaration at 8,9] Mr. Cossette claims that he does not know whether Mr. Mittenen actually purchased replacement gear. [*See* the declaration at 9] In sum, we did not make a mistake in finally concluding that Mr. Mittenen's capital investment in the enterprise of the vessel was "non-existent," and that his financial risk was "at best marginal."

Objection 25. " ... [T]he owner's tax records and testimony indicate no claim for business expenses whatsoever for Appellant's 1986 fishing. ... [T]he OAA decision finds against Appellant under factor no. 6. The conclusion is "contrary to [another] ... OAA decision [F/V Determined] where a missing tax return was not deemed detrimental to a favorable finding" ... of a lease. The conclusion is especially challenging because, though the decision acknowledges the last minute submission of a copy of the 1986 owner's tax return (decision at p. 5), the analysis of lease factor no. 6 fails to discuss the tax return and the fact that even the most cursory review of the owner's schedule C included no deductions for vessel operating expenses during the time the Appellant ran the vessel in 1986. ... [T]he decision is arbitrary and capricious for failing to honor the parties' testimony, and failing to follow or distinguish, prior similar cases."

Mr. Mittenen is incorrect. Mr. Cossette claimed business income and business operating expenses for commercial fishing on his 1986 federal tax return. Schedule C shows that he claimed business expense deductions for insurance ($26,527), repairs ($18,410), supplies ($13,445), gear ($7,455), fuel and oil ($5,178), crew shares ($15,700), etc.; and that he received business income in receipts or sales ($227, 757). The tax return does not specify the extent the expenses were related to the F/V ESKIMO PRINCESS, or the extent the business income was attributable to "lease" payments. That is why we did not consider the tax return relevant

evidence of a vessel lease.

We also could not use Mr. Mittenen's missing tax return to determine the extent to which he used the F/V ESKIMO PRINCESS as his own business in 1986. We did not state in the Decision, nor have we stated in any IFQ decision, including F/V Determined, that an Appellant's missing tax return is conclusive proof of a non-lease vessel arrangement. We found against Mr. Mittenen on factor no. 6, not because he did not have a tax return, but because several pieces of other evidence showed that both he and Mr. Cossette treated the operations of the F/V ESKIMO PRINCESS as their own business during the period of the claimed lease. Mr. Mittenen fails to specify in the request for reconsideration how this finding was contrary to the parties' testimony. In light of all of the above, Mr. Mittenen fails to show how the Decision is arbitrary and capricious.

Objection 26. "The OAA decision on Lease Factor 6 also errs in assuming that Appellant traveled to Kodiak for five months where he for some reason only opened a 'personal' checking account that was inconsistent with a lease of a vessel instead of a business account in the name of the vessel or a business that would be somehow more consistent with the responsibilities of a lessee. Unfortunately, the decision does not delve below the name of on the account to the substance of the account where copies of the bank statements provided by the bank (in the absence of Appellant's personal and business records from 1986) show deposits of $156,790 and withdrawals of $86,322 that are consistent with the Ursin settlement sheets. The statements also reflect payments of three checks cashed on the same day in Kodiak in the amounts of $6,230.89 that are consistent with Appellant's testimony that the checks were for crew shares. In the absence of any contrary evidence, it defies logic to ignore those figures altogether and characterize an account opened with a zero balance and sustained with the deposits reflecting landings and deliveries to Ursin Seafoods as a 'personal' account that will not be considered as documentary evidence of Appellant's lease."

Mr. Mittenen claims that the Decision errs in not assuming that his account at First Federal was used as his business account for the F/V ESKIMO PRINCESS. Mr. Mittenen is incorrect. We examined the bank account, and found that the account *at best* represented only Mr. Mittenen's portion of the business of the vessel. The issue in factor 6 is the extent to which the claimed lessee treated the entire fishing venture as his or her own business. We found that both parties treated the venture as their separate business during the relevant period. Mr. Mittenen never explained the numbers in his bank statements, other than three checks that were used to pay crew shares for salmon tendering. There was only one Ursin statement produced for the record, and it represented Mr. Cossette's account. Mr. Mittenen fails to explain in the request for reconsideration how the numbers in his bank statements relate to the Ursin statement or the operations of the F/V ESKIMO PRINCESS. Mr. Mittenen did not do this at the hearing or at any time for the record.

C. Mr. Mittenen's Summation

Objection 27. "Contrary to the intentions of the IFQ program, the decision in this case gives entrepreneurial credit to a fisherman who never assumed any risk for the failure of the operation of his vessel and who had not acquired the same fishing expertise for halibut that he might claim for crab and salmon."

Mr. Cossette incurred financial risk for the maintenance, repairs, gear, and insurance of the vessel's operation during the period of the claimed lease. The intention of the IFQ program is to award IFQ on the basis of the ownership or lease of the vessel, not fishing expertise.

Objection 28. "The uncontroverted evidence in this case ... portrays an owner who gladly turned over the fiscal responsibility for halibut fishing to a person [Mr. Mittenen] the owner himself acknowledged to be a highliner and who made substantial profits for the owner compared to the owner's previous efforts."

Mr. Cossette "turned over" only a portion of the "fiscal responsibility" to Mr. Mittenen. The evidence in the record does not show whether Mr. Cossette made "substantial profits," but if he did, it is not relevant to the existence of a lease. If anything, it is evidence of a non-lease arrangement.

Objection 29. "In fact, without the proceeds provided by the Appellant's production, the owner would not have equipped the vessel with the initial basic gear (60 additional skates, radar) that would enhance the vessel's operations."

We agree that Mr. Cossette used the proceeds he received from the vessel to "enhance the vessel's operations." Mr. Cossette's financial involvement with the vessel's operations, which includes the purchase of fishing gear, weighs against the existence of a vessel lease.

Objection 30. "All of the owner's expenses inured to the benefit of the vessel in future fisheries or were made so far in the past to be claimed as 1986 expenses."

Mr. Cossette's expenses also benefitted the vessel's operations in 1986.

Objection 31. "Claims of operating expenses that would have been paid by an owner who hired a skipper are all either inapplicable ... or quite contrary to the leases found in similar decisions (which this decision does not distinguish)."

Mr. Cossette's expenses for the vessel's operation during the period of the claimed lease are applicable in this case, as discussed in prior decisions (e.g., Smee).

Objection 32. "... [T]he two day hearing in Seattle revealed considerable conflict in Respondent's testimony. It also produced no evidence or evaluation consistent with any prior OAA decision that invalidated a claim of lease."

This is simply not true. Mr. Cossette's testimony at the hearing was consistent with the basic

terms of the parties' arrangement. In several IFQ decisions, we concluded that a lease did not exist where: (1) both parties bore financial responsibility for the vessel's operating expenses (Smee v. Echo Belle); (2) the parties did not characterize their arrangement as a vessel lease at relevant times (Thomassen v. MSI); and (3) both parties treated the operation of the vessel as their own business (Kristovich v. Dell).

Objection 33. "The failure to mention to crucial evidence in support of a lease (the values on the Ursin statements, the check amounts, and specific receipts) ..."

We evaluated this evidence in the Decision. The Ursin statement, the checks, and the specific receipts show that Mr. Cossette paid operating expenses for the F/V ESKIMO PRINCESS in 1986.

Objection 34. " ... [T]he acceptance at face value of evidence that is either inapplicable to disproving a lease (e.g. grid moorage, 1985 moorage) ..."

If the claimed "grid" moorage expense existed, it is applicable, and the expense favors a lease because it was paid for by the owner during the period of the claimed lease. The 1985 moorage expense was not mentioned in the Decision. The expense is not relevant because it was incurred outside the period of the claimed lease.

Objection 35. " ... the acceptance at face value of evidence ... which has been previously rejected by OAA as disproving [a] lease (insurance, missing tax records, first fuel, etc.) ..."

Mr. Mittenen is incorrect. An Appeals Officer can legally weigh this evidence to determine the existence of a lease.

Objection 36. The Decision ignores IFQ decisions and undisputed testimony (by the parties and the cannery operator) that provide "the owner was not going to be liable for 'any charges' and would not assume the risk of loss for Appellant's fishing operations."

Mr. Mittenen takes "any" charges out of context and misstates the law. The charges that could not be made against Mr. Cossette's vessel were Mr. Mittenen's charges, which the parties and the cannery operator understood to be trip expenses. We clearly concluded in Smee that there was no lease, even though the claimed lessee bore sole financial responsibility for the vessel's trip expenses.

Objection 37. "Even if the Appellant's missing records failed to persuade the OAA of his risk in the enterprise, the Respondent's admissions in this regard should have been given credit."

We gave Mr. Mittenen credit for his risk in the enterprise, but found that it was minimal in relation to the financial risk borne by Mr. Cossette, and that Mr. Mittenen's risk was no greater than that of a partner or hired shipper.

Objection 38. "In the absence of controverting documentary evidence, the absence of Appellant's receipts does not warrant the discounting of his otherwise undisputed (and often corroborated by Respondent) testimony."

We did not discount Mr. Mittenen's undisputed testimony, even in the absence of receipts and documentary evidence. But his testimony was not enough to show that he leased the vessel. Other evidence (the owner's financial risk, the owner's involvement in the business of the vessel, and the parties' lack of characterization of their arrangement as a lease) showed that something other than a "lease" existed in this case.

Objection 39. "No exception is warranted in this case from other OAA decisions such as Padon (where e.g. missing tax records did not prevent validation of lease) and other decisions in light of which the evidence in this case should have been weighed."

Mr. Mittenen's missing federal tax return did not invalidate his lease claim, but the lack of a tax return did not prove its existence. An Appellant cannot prove a lease on the basis of missing evidence. Nor have we said so in any IFQ decision. The missing tax return was only one of several reasons that Mr. Mittenen did not show he treated the fishing venture as his own business during the relevant period.

FINDINGS OF FACT

1. The parties did not characterize their arrangement as a lease when they met face-to-face in April 1986, before the start of the 1986 halibut season.

2. The parties failure to characterize their arrangement as a lease when they met face-to-face in April 1986 is indicative of a non-lease arrangement between the parties.

3. The Appeals Officer did not overlook or misunderstand any material matters of fact or law in the Decision.

CONCLUSIONS OF LAW

1. Mr. Cossette's payment for insurance coverage of the F/V ESKIMO PRINCESS outside the claimed lease period in 1986 is not legally relevant to this case.

2. To the extent that any of our previous vessel lease decisions have appeared to rely on maritime law and bareboat charters, those cases are hereby overruled to that extent.

3. The IFQ regulations and the analysis we have developed in IFQ decisions govern the existence of a vessel lease under the IFQ program, not maritime law or bareboat charters.

4. Mr. Mittenen did not lease the F/V ESKIMO PRINCESS in 1986.

DISPOSITION AND ORDER

The Decision in this Appeal is AFFIRMED. The Decision on Reconsideration incorporates the Decision by reference. RAM is ORDERED to reallocate to Mr. Cossette the qualifying pounds of halibut landed from the vessel in 1986, minus the qualifying pounds of halibut recorded on Mr. Cossette's CFEC permit on May 4 and June 2, 1986; and to issue to Mr. Cossette the resultant QS. The Decision on Reconsideration takes effect June 22, 2000, unless by that date the Regional Administrator orders review of the Decision on Reconsideration.

_____
Randall J. Moen
Appeals Officer

_____
Edward H. Hein
Chief Appeals Officer