

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0111
)	
KEVIN A. SUYDAM,)	DECISION
Appellant)	
_____)	September 11, 1996

STATEMENT OF THE CASE

Appellant Kevin Suydam appeals an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] of the National Marine Fisheries Service [NMFS], dated May 3, 1995. The IAD revoked the quota share [QS] awarded to Mr. Suydam under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because of a written vessel lease agreement which showed that the F/V THREE SONS, for which he had been issued QS, had been leased during the relevant period of time to another person, Mr. Glen Burkhart. Because of the revocation Mr. Suydam no longer qualifies for QS. Mr. Suydam's appeal was timely filed, and he has adequately shown that his interest is directly and adversely affected by the IAD. Because the record contains sufficient information on which to reach a final decision and there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered. 50 C.F.R. § 679.43(g).¹

ISSUE

1. Whether a valid lease for the F/V THREE SONS existed between LeClercq Marine Construction, Inc. [LeClercq] and Mr. Glen Burkhart, which precluded Mr. Suydam from receiving QS based upon his ownership interest in the vessel.
2. Whether Mr. Suydam's due process rights were violated when his QS was revoked.

BACKGROUND

Mr. Suydam filed a Request for Application [RFA] for QS on July 12, 1994. While he did not claim ownership of the F/V THREE SONS on his RFA, he later did so when he signed his Application for QS, which showed that he had qualified for QS based on the ownership of the vessel between March 27, 1984, and December 31, 1988. On January 5, 1995, Mr. Suydam was awarded QS based upon

¹Formerly 50 C.F.R. § 676.25(g).

his vessel ownership claim and landings from the F/V THREE SONS during the qualifying period.

Mr. Glen Burkhart submitted an RFA on April 7, 1994. Mr. Burkhart claimed in his RFA that he had owned the F/V THREE SONS since April 1, 1988. On August 2, 1994, in his Application for QS, Mr. Burkhart amended his claim and asserted that he had leased the vessel from LeClercq from March 29, 1988, until September 1, 1990, and owned it thereafter. A copy of a purported written bareboat charter agreement [charter] for the F/V THREE SONS was filed with Mr. Burkhart's Application for QS. The charter was signed on March 29, 1988, by Samuel LeClercq, President of LeClercq, and Glen Burkhart. The stated period of the charter was April 1, 1988, through October 31, 1990.

The Division determined that Mr. Burkhart's charter constituted conclusive evidence of the existence of a vessel lease. On January 12, 1995, the Division awarded QS to Mr. Burkhart, based on the landings² made from the F/V THREE SONS during the stated period of the charter. On May 3, 1995, after determining that a conflict existed between Mr. Burkhart's lease and Mr. Suydam's claimed ownership of the same vessel, the Division revoked Mr. Suydam's QS, and suspended the transferability of that portion of Mr. Burkhart's QS that resulted from his charter of the F/V THREE SONS, pending the exhaustion of Mr. Suydam's rights on appeal.³

On July 3, 1995, Mr. Suydam appealed the revocation of his QS. Mr. Suydam claims that he, not Mr. Burkhart, should have been credited with the landings made from the F/V THREE SONS. Mr. Suydam argues that the agreement between LeClercq and Mr. Burkhart is legally invalid and not binding on him because LeClercq did not hold an ownership interest in the vessel at the time the agreement was executed, and because he never signed it, knew about it, or authorized it. Mr. Suydam further argues that the Division's summary revocation of his QS deprived him of a property right in violation of the Due Process Clause of the United States Constitution.⁴

²Halibut landings were made from the vessel during the stated period of the charter on May 25, 1988; June 22, 1988; September 9, 1988; and May 4, 1990; sablefish landings were made on May 27, 1988. As this decision will discuss later, the May 4, 1990 landing occurred after the lease was terminated, but when Mr. Burkhart owned the vessel.

³According to the Division's records, Mr. Burkhart had already transferred the QS on March 31, 1995. Thus, the suspension of transferability had no effect. Mr. Burkhart was not joined as a party to this appeal because he no longer holds the QS and, therefore, he does not have an interest at stake. As a matter of policy, the Division does not revoke QS transferred in good faith by an initial issuee, nor does it seek compensation from the initial issuee or the transferee where no fraud has been shown. Rather, the Division issues additional QS to prevailing appellants who are shown to be the appropriate qualified person.

⁴*See*, letter of August 22, 1996, from Mr. Suydam's attorney, Bruce Weyhrauch.

DISCUSSION

1. Whether a valid lease for the F/V THREE SONS existed between LeClercq and Mr. Glen Burkhart, which precluded Mr. Suydam from receiving QS based upon his ownership of the vessel.

To qualify for QS under the IFQ program, a person must have owned or leased a 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).⁵ As the program has been implemented by the Division, an applicant for initial issuance of QS may receive credit only for those landings made from the vessel while the person owned or leased the vessel. The IFQ regulations limit proof of ownership of a vessel to the following documents, in order of priority: a U.S. Coast Guard abstract of title (for vessels required to be documented under the laws of the United States); a certificate of registration that is determinative as to vessel ownership; and a bill of sale. 50 C.F.R. § 679.40(a)(3)(ii).⁶

Mr. Suydam claims that he was the sole owner of the F/V THREE SONS from the time it was built in 1982 until he sold it to LeClercq on June 22, 1989. The Division's records, which were based on the vessel registration (license) records of the Alaska Commercial Fisheries Entry Commission, showed Mr. Suydam as the vessel's registered owner for the period March 27, 1984, through December 31, 1988.⁷ With his appeal, Mr. Suydam submitted a U.S. Coast Guard Certificate of Documentation, issued May 13, 1988, showing that he and LeClercq each held a 50 percent interest in the vessel at that time. The U.S. Coast Guard Abstract of Title for the F/V THREE SONS shows that Mr. Suydam was the sole owner of the vessel until March 28, 1988, when he transferred a 50 percent interest to LeClercq by bill of sale. The abstract also shows that Mr. Suydam transferred the remaining 50 percent interest to LeClercq by bill of sale on June 22, 1989. Further, the abstract shows that LeClercq was thereafter the sole owner of the vessel until it was sold to Mr. Burkhart on September 26, 1989.

Mr. Suydam claims that LeClercq's 50 percent interest in the vessel did not begin until May 13, 1988,

⁵Formerly 50 C.F.R. § 676.20(a)(1). 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.

⁶Formerly 50 C.F.R. § 676.20(a)(1)(ii).

⁷The Division concerned itself only with CFEC vessel registration information for the years 1984 through 1990, the qualifying and base years under the program.

the date the certificate of documentation was issued. Under IFQ regulations, however, a Coast Guard abstract of title that is not shown to be erroneous or fraudulent is superior evidence of vessel ownership.⁸ The abstract shows that LeClercq's ownership interest in the vessel began March 28, 1988. This fact was not recorded on the abstract until May 12, 1988. It is apparent that the co-owners did not report the change in ownership to the Coast Guard until May 12, 1988, at which time the abstract of title was changed and a certificate of documentation was issued and dated the following day. The delay in recording the change of ownership does not affect the effective date of the change. Therefore, I find that Mr. Suydam and LeClercq co-owned the F/V THREE SONS as tenants in common between March 28, 1988, and June 22, 1989. Thereafter, LeClercq solely owned the vessel until September 26, 1989, when it was sold to Mr. Burkhart.

Mr. Burkhart claims that he leased the F/V THREE SONS during the entire period of time for which Mr. Suydam claimed eligibility for QS. Mr. Burkhart produced a purported written bareboat charter of the vessel as proof of his claim. Under the regulations of the IFQ program, one who owns a vessel that has been leased to another cannot be a qualified person on the basis of the ownership of the vessel for the time period that the vessel was leased to another. 50 C.F.R. § 679.40(a)(2).⁹ Consequently, if Mr. Burkhart's bareboat charter is a valid vessel lease, Mr. Suydam's claim of QS, based on the ownership of the F/V THREE SONS, must be denied.

Under 50 C.F.R. § 679.40(a)(3)(iii)¹⁰, 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 into whether a document constitutes a valid vessel lease 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 written 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

⁸50 C.F.R. § 679.40(a)(3)(ii) [formerly, 50 C.F.R. § 676.20(a)(1)(ii)]. *See also, Weber v. Kochuten*, Appeal No. 95-0122, June 18, 1996, at 4.

⁹Formerly 50 C.F.R. § 676.20(a)(1).

¹⁰Formerly 50 C.F.R. § 676.20(a)(1)(iii).

always relevant and should be considered.¹¹ 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.

Mr. Burkhart presented a document to the Division entitled "Bareboat Charter Agreement with Purchase Option," which was executed by him and Samuel LeClercq, on behalf of LeClercq Marine Construction, Inc., on March 29, 1988. The terms of the agreement provide that Mr. Burkhart would charter the F/V THREE SONS for the 31-month period running from April 1, 1988, through October 31, 1990. Among other provisions, the document uses the terminology of a bareboat charter; it contains a set or guaranteed term; it provides for a "charter fee" of 35 percent of the vessel's gross proceeds; and the lessee (Burkhart) is responsible for vessel insurance, the repair and maintenance of the vessel (ordinary wear and tear excepted), all trip expenses, the hiring and payment of the crew, gear replacement and damages, and the operation and navigation of vessel, including fishing operations. The document on its face is consistent with and possesses the characteristics of a vessel lease.¹²

Mr. Suydam does not argue that the document is inconsistent with, or lacks the characteristics of, a vessel lease. Rather, he asserts that LeClercq did not hold an ownership interest in the vessel at the time the lease was executed, and therefore had no legal authority to enter into the lease. He bases this assertion on a U.S. Coast Guard Certificate of Documentation [certificate] for the vessel, which he says establishes that LeClercq's ownership interest in the vessel did not begin until May 13, 1988, nearly two months after the charter's inception. As I have already found, however, LeClercq's interest in the vessel began on March 28, 1988 -- one day before the bareboat charter agreement was executed. Therefore, Mr. Suydam's claim that LeClercq did not hold an ownership interest in the vessel at the time the lease was executed is without merit.

Mr. Suydam argues in the alternative that even if LeClercq was a co-owner of the vessel when the

¹¹If 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.

¹²Although neither the IFQ regulations nor our decisions have defined the elements of a vessel lease, several appeals decisions have discussed factors that should be considered in deciding whether an arrangement should be considered a vessel lease. *See, e.g., Smee v. Echo Belle, Inc.*, Appeal No. 95-0076, August 1, 1996, *aff'd* August 20, 1996; *Kristovich v. Dell*, Appeal No. 95-0010, March 20, 1996, *aff'd* March 27, 1996; and *O'Rourke v. Riddle*, Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995 [all oral agreements]. *See also, Ocean Crest Fisheries, Inc. v. McKee*, Appeal No. 95-0101, October 13, 1995, *aff'd* October 19, 1995; and *Dietrick v. Weikal*, Appeal No. 95-0109, February 27, 1996, *aff'd* March 4, 1996 [written agreements].

lease was executed, the lease was never legally valid because Mr. Suydam, the other co-owner, was not a party to it, nor did he authorize Mr. LeClercq to enter into the lease on his behalf. The law, however, is otherwise. As a tenant in common, LeClercq had the legal authority to lease the vessel to a third party without the knowledge or authorization of the other co-owner, Mr. Suydam.¹³ The fact that Mr. Suydam was not a party to the vessel lease agreement does not, in itself, invalidate the agreement. Mr. Suydam may have had a right to void the lease on the grounds that it deprived him of possession and use of the vessel, but there is no evidence in the record that he ever took any action to do so. Also, Mr. Suydam may have had a right to a share of the proceeds from the lease. Neither of these possible rights can be decided in this forum, however, and neither of them make the vessel lease void *ab initio*. Therefore, I conclude that the charter between LeClercq and Mr. Burkhart was a legally valid vessel lease. Because the lease agreement contains the three elements required under 50 C.F.R. § 679.40(a)(3)(iii), I conclude that the agreement constitutes conclusive evidence of the existence of a vessel lease.

The stated term of the lease was April 1, 1988, through October 31, 1990. The lease was terminated early when Mr. Burkhart exercised his option to purchase the vessel on September 26, 1989. Thus, the lease was in effect during the entire time for which Mr. Suydam would otherwise have been eligible for QS. Because of the existence of the lease, Mr. Suydam cannot be a qualified person for the initial issuance of QS based upon his ownership of the F/V THREE SONS.

2. Whether Mr. Suydam's due process rights were violated when his QS was revoked.

The Division did not afford Mr. Suydam notice and an opportunity to be heard prior to revoking his QS. Mr. Suydam claims that this summary revocation of his QS deprived him of a property right in violation of the Due Process Clause of the United States Constitution. IFQ regulation 50 C.F.R. § 679.40(f)¹⁴ provides that QS is not a property right subject to the "takings" provision under the Fifth

¹³See the discussion and cases in 86 C.J.S. *Tenancy-in-Common* § 112-114, where, for example, it reads at p. 518: "Ordinarily, one tenant in common may, by either lease or license, confer on another person the right to occupy and use the property of the tenancy as fully as the lessor or licensor himself might have used or occupied it, if the lease or license had not been granted." See also, the discussion and cases in 20 Am. Jur. 2d *Tenancy-in-Common* § 797-824, where it also reads at p. 803: "Clearly, the owner of an undivided interest has, in most jurisdictions, the capacity and right to execute a valid lease thereon." My analysis of the cases indicates that while a lease by a co-owner may be voidable (in some cases) by the property's co-owners, it is not per se void simply because the lease was made without the authorization of all of the co-owners. It is generally accepted that a co-owner has the legal capacity to lease property, and that the parties to the lease may not object to the lease merely on the basis that it was not signed or authorized by all of the property's co-owners.

¹⁴Formerly, 50 C.F.R. § 676.20(g), which reads: "Quota shares allocated or permits issued pursuant to this part do not represent either an absolute right to the resource or any interest that is subject

Amendment of the U.S. Constitution. Consequently, I find that Mr. Suydam's claim that his QS was an unlawful taking of property is without merit. Nonetheless, to the extent that any applicant may not be afforded full due process by the Division during the IFQ application process, that shortcoming is substantially, if not completely, rectified by the granting of *de novo* review on appeal by this office.

FINDINGS OF FACT

1. Mr. Suydam and LeClercq co-owned the F/V THREE SONS as tenants in common between March 28, 1988, and June 22, 1989. Thereafter, LeClercq solely owned the vessel until September 26, 1989, when it was sold to Mr. Burkhart.
2. LeClercq held a 50-percent ownership interest in the F/V THREE SONS when the bareboat charter agreement was executed with Mr. Burkhart, March 29, 1988.
3. The bareboat charter between LeClercq and Mr. Burkhart was in effect from April 1, 1988, until September 26, 1989.

CONCLUSIONS OF LAW

1. LeClercq, as a tenant in common co-owner of the F/V THREE SONS, had the legal authority to lease the vessel without the authority and knowledge of Mr. Suydam.
2. Mr. Suydam's claim that LeClercq did not hold an ownership interest in the vessel at the time the lease was executed is without merit.
3. The charter between LeClercq and Mr. Burkhart is a valid vessel lease for purposes of the IFQ program.
4. The charter is conclusive evidence of a vessel lease.
5. Because of the existence of the vessel lease, Mr. Suydam cannot be a qualified person for the initial issuance of QS based on his ownership of the F/V THREE SONS.
6. Mr. Suydam's claim of denial of due process, resulting in loss of a property right, is without merit

to the "takings" provision of the Fifth Amendment of the U.S. Constitution. Rather, such quota shares or permits represent only a harvesting privilege that may be revoked or amended subject to the requirements of the Magnuson Fishery Conservation and Management Act and other applicable law."

because QS is not considered a property right for purposes of due process protection under the Fifth Amendment of the U.S. Constitution.

DISPOSITION

The Division's IAD revoking Mr. Suydam's QS, and finding him unqualified for QS, is AFFIRMED. This decision takes effect on October 11, 1996, unless by that date the Regional Director 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 10 days after the date of this decision, September 23, 1996.

Randall J. Moen
Appeals Officer