

An appeal

- by -

Merlin Software Technologies Inc. and Merlin Software Technologies International,
Inc. (Associated pursuant to section 95 of the B.C. Employment Standards Act)
("Merlin International")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2002/576

DATE OF DECISION: March 11, 2003

DECISION

INTRODUCTION

By way of a determination issued on October 30th, 2002 a delegate of the Director of Employment Standards (the “delegate”) determined that Merlin Software Technologies Inc. (“Merlin Software”) and Merlin Software Technologies International, Inc. (“Merlin International”) were “associated corporations” as defined by section 95 of the *Employment Standards Act* (the “Act”). Accordingly, the two firms were determined to be one person for purposes of the *Act* and were thus jointly and separately (severally) liable for unpaid wages and section 88 interest in the total amount of \$493,287.03. This latter figure represents unpaid wages and interest owed to some 40 former employees of one or both of the two Merlin firms.

According to the information set out in the Determination, Merlin Software and Merlin International jointly operated a software development firm that is no longer in business. Merlin Software is a wholly-owned subsidiary of Merlin International. The material before me discloses that both Merlin Software and Merlin International filed assignments into bankruptcy under section 49 of the federal *Bankruptcy and Insolvency Act* (the “BIA”) on November 22nd, 2002. Mr. John Bottom was appointed as the bankruptcy trustee for both Merlin Software and Merlin International.

By way of a letter dated February 7th, 2003 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

Prior to considering the merits of the appeal, there are some preliminary matters that must be addressed.

PRELIMINARY ISSUES

I have before me a document headed “Appeal”--appended to a Tribunal appeal form--dated November 22nd, 2002 (filed November 25th) that purports to represent an appeal of the Determination filed pursuant to section 112 of the *Act* by legal counsel on behalf of the following parties:

- Merlin Software Technologies Inc.
- Merlin Software Technologies Inc. [sic]
- Robert Heller
- Trevor McConnell
- Curt Alexander
- Hank Barber
- Webb Green
- John Hectus
- William Johnson

The first two corporate appellants are, as noted above, the same party although I presume that the second named appellant was intended to be Merlin Software Technologies *International*, Inc.--that intention seems clear from a perusal of all of the appeal documents. Accordingly, I intend to proceed on that basis. The individual appellants are, so I understand, current or former directors and/or officers of one or both of Merlin Software or Merlin International.

The Status of the Corporate Appellants

Pursuant to section 71(2) of the *BIA*, once an assignment into bankruptcy is filed with an official receiver, the “bankrupt ceases to have any capacity to dispose of or otherwise deal with his property”; that latter authority to deal with the bankrupt’s property is, subject to the rights of secured creditors, vested in the trustee. Pursuant to section 30(1)(d) of the *BIA*, the trustee may “bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt” and may retain legal counsel for that purpose [section 30(1)(e)].

By way of a letter dated December 3rd, 2002, the trustee for both Merlin Software and Merlin International consented to the appeal of the Determination going forward on behalf of those two firms.

Accordingly, I am of the view that the appeal filed by Merlin Software and Merlin International is properly before the Tribunal and can be adjudicated. The status of the individual appellants is, however, another matter.

The Status of the Individual Appellants

It should be noted that the Determination does *not* impose a personal liability on any director or officer under section 96 of the *Act*. I am not aware of any determinations that have been issued against one or more of the individual appellants pursuant to section 96 of the *Act*, and in any event, no such determination(s) is(are) before me in these proceedings.

Accordingly, and to the extent that the instant appeal documents purport to constitute an appeal by any of the individual appellants in their personal capacity, the appeal is not properly before the Tribunal. While the appeal documents raise issues regarding the appropriateness of finding certain directors personally liable, those arguments are not relevant in the context of an appeal of a Determination that does not impose any section 96 liability on any former or present director or officer of either corporate appellant.

In light of the foregoing, and pursuant to subsections 114(1)(b) and (c) of the *Act*, this appeal is dismissed as it relates to each of Robert Heller, Trevor McConnell, Curt Alexander, Hank Barber, Webb Green, John Hectus and William Johnson.

REASONS FOR APPEAL

Legal counsel for Merlin Software and Merlin International raises several grounds of appeal that are properly before the Tribunal and which may be summarized as follows:

- the delegate incorrectly determined the total amount of the employees’ unpaid wage claims; counsel asserts that the total unpaid wage claims ought to have been determined at \$54,518.18 rather than \$493,287.03 as found by the delegate.
- further to the above, counsel submits that two of the employees, namely, Susan Heller (\$937.85) and Robert Murray (\$58,459.09), ought not to have been awarded any compensation since they were not “employees” as defined in section 1 of the *Act* but, rather, independent contractors;
- in addition, counsel submits that two of the employees, namely, William J. Johnson (\$113,713.87) and Robert Heller (\$79,198.48), “were corporate directors...[and] agreed to amend their contracts of employment and defer their salaries until Merlin could obtain further financing”;

- finally, counsel submits that “vacation pay has been overstated in the Determination by approximately \$18,822.01 for a number of employees, namely: Robert Heller, Barry Hagglund, Allison Ishida, William Johnson, Kris Philley, Ivan Prielcel, Dragan Sipka, Wei Wang and Bo Yang.”

I should perhaps note that counsel has not appealed the delegate’s decision to treat Merlin Software and Merlin International as “associated corporations” pursuant to section 95 of the *Act*. During the delegate’s investigation, it was essentially conceded by the president of Merlin Software, Robert Heller, that the two firms operated a single business enterprise. As recorded in the Determination (at p. 2), Mr. Heller advised the delegate: “To all intents and purposes, they [Merlin Software and Merlin International] are the same company”.

Although not specifically discussed in counsel’s original appeal documents, counsel asserts, in a submission to the Tribunal dated December 5th, 2002, that “Mr. [Trevor] McConnell has advised me that he has received all funds owing to him”. Since counsel also represents Mr. McConnell, I take this latter assertion to be, in effect, a request to vary the Determination by deleting Mr. McConnell’s claim. In light of counsel’s declaration, I will vary the Determination by deleting Mr. McConnell’s claim--I note that the delegate advised the Tribunal that she does not oppose such a variance.

I shall now address each of the above reasons for appeal in turn.

FINDINGS AND ANALYSIS

Susan Heller and Robert Murray: Employees or Independent Contractors?

As noted above, counsel for Merlin Software and Merlin International says that Ms. Hiller’s and Mr. Murray’s claims ought not to have been included in the determination since neither was an “employee” as defined in section 1 of the *Act*.

A person who is a true “independent contractor” does not have a claim for unpaid “wages” if they not paid for their services by the other contracting party. Accordingly, unpaid independent contractors must sue in the civil courts rather than file a complaint under the *Act*.

The question of whether Ms. Heller or Mr. Murray was an independent contractor or an employee was not specifically addressed in the Determination. As noted in the Determination, the delegate relied on payroll information provided to her by the Merlin firms which included the “names of all employees and a summary of all wages owed” (Determination, p. 2). Thus, at least during the initial stages of the delegate’s investigation, both firms presumably believed that Ms. Heller and Mr. Murray were employed by one or both of the Merlin firms.

I have reviewed the material that has been filed by counsel for the two Merlin firms on this issue. It is asserted that Ms. Heller and Mr. Murray were “independent contractors” rather than employees--this assertion appears in the appeal document prepared by legal counsel and in the supporting affidavit sworn by Mr. Trevor McConnell, a former officer and director of Merlin Software. However, there virtually no evidence before me to corroborate that assertion (for example, evidence about the nature of the services provided; who owned the equipment they utilized in carrying out their duties?; who underwrote the costs of providing their services?; etc.). Counsel for Merlin submitted an October 24th, 2002 invoice from Mr. Murray to “Merlin Technologies” for fees for “consultancy services” and “unreimbursed expenses” but

this document, in my view, does not speak to the substance (as compared to the form) of the parties' relationship and thus has limited, if any, probative value.

Notwithstanding the dearth of evidence, the delegate's January 10th, 2003 submission to the Tribunal indicates that she obtained a letter from Mr. Murray in which he acknowledged that he was "an independent contractor with a number of accounts in addition to Merlin" (this letter, dated November 13th, 2002, is also before me) and that she did not object to having the Determination varied to delete his claim. In light of these circumstances, I think it appropriate to vary the Determination by cancelling the award made in favour of Mr. Murray. It should be reiterated, however, that this order is being made strictly on the basis of Mr. Murray's concession (accepted by the delegate) that he was not an "employee" of either of the Merlin firms but rather rendered services as an "independent contractor".

Ms. Heller's claim stands on a different footing; she does not concede that she was an independent contractor and there is no evidence before me to indicate that she was not an employee. Accordingly, the Determination is confirmed with respect to Ms. Heller's unpaid wage claim.

The claims of William J. Johnson and Robert Heller

Messrs. Johnson and Heller were formerly directors and officers of Merlin Software.

I have before me a letter dated November 13th, 2002 signed by Mr. Heller and addressed to the delegate. In this letter, Mr. Heller acknowledges that he agreed to provide services "at no cost to the Company by way of direct salary" and that he entered into, it would appear, some form of barter arrangement whereby he purchased company products which, in turn, were paid for by way of an offset against salary otherwise payable. In general, this latter sort of arrangement is not permissible since, under the *Act*, wages must be paid in the form of money, a bill of exchange or direct deposit (section 20) and section 4 of the *Act* prohibits any "contracting out" of the *Act's* requirements.

Mr. Johnson's letter to the delegate, dated November 12th, 2002, similarly indicates that he agreed to forgo any salary during what he termed a "restructuring period" so that the company might be able to right its precarious financial position.

Both Mr. Johnson and Mr. Heller appear to be a sophisticated businessmen who were also principals of the Merlin firms. The delegate's January 10th submission indicates that she spoke with both men and that they each consented to the deletion of their claims from the Determination. The Director does not oppose such a variance and, in those circumstances, I do not think it inappropriate to agree to vary the Determination as requested. Accordingly, the Determination will be varied to delete the unpaid wage claims of Messrs. Johnson and Heller.

The vacation pay claims for Robert Heller, Barry Hagglund, Allison Ishida, William Johnson, Kris Philley, Ivan Priece, Dragan Sipka, Wei Wang and Bo Yang

I have already held that the Determination should be varied by deleting the unpaid wage claims of Messrs. Heller and Johnson.

Mr. Hagglund, for his part, also advised the delegate--by way of a letter dated November 20th, 2002--that he (along with other principals) agreed to forgo any wages during a "restructuring period" in an effort to assist the company and, ultimately, to secure his "future employment". The delegate's January 10th submission confirms that Mr. Hagglund wishes to have the Determination varied by deleting his claim.

In such circumstances, and consistent with the approach I have taken regarding the claims of the other principals, I will order such a variance.

With respect to the remaining vacation pay claims--namely, those of Allison Ishida, Kris Philley, Ivan Prielcel, Dragan Sipka, Wei Wang and Bo Yang--the appellants' entire case amounts to the simple assertion that the vacation pay entitlement for these employees has been incorrectly calculated. I cannot reach that conclusion based on the material before me (more correctly, based on the dearth of material). If the amounts set out in the Determination are incorrect, I would have expected the trustee to provide evidence of error to his legal counsel. However, I have no such evidence before me and thus I cannot see any reason to vary the Determination with respect to the vacation pay claims of these particular employees.

Summary of Orders

By way of summary, I have varied the Determination as follows:

- the appeal is dismissed as it relates to each of Robert Heller, Trevor McConnell, Curt Alexander, Hank Barber, Webb Green, John Hectus and William Johnson; and
- the Determination is varied by deleting the unpaid wage claims of Barry Hagglund, Robert Heller, William J. Johnson, Trevor McConnell and Robert Murray.

ORDER

Pursuant to subsections 114(1)(b) and (c) of the *Act*, the appeal is dismissed as it relates to each of the appellants Robert Heller, Trevor McConnell, Curt Alexander, Hank Barber, Webb Green, John Hectus and William Johnson.

Pursuant to section 115(1)(a) of the *Act*, the Determination is varied by deleting the unpaid wage claims of each of the respondents Barry Hagglund (\$62,523.09), Robert Heller (\$79,198.48), William J. Johnson (\$113,713.87), Trevor McConnell (\$11,028.64) and Robert Murray (\$58,459.09).

In all other respects the Determination is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal