

An appeal

- by -

Top Gun Entertainment Ltd., Tregunter Holdings Ltd., Top Gun Lounge Ltd., Top Gun Bowling Investments Ltd., T.G. 223 Ventures Ltd., Granville Sushi Ltd., Richmond Japanese Sushi Ltd., Top Gun Restaurant Holdings Ltd. operating as Top Gun Chinese Seafood, 589934 B.C. Ltd. operating as Garden City Hotpot, T.B.W. Investments Ltd. operating as Top Gun Broadway Chinese Seafood and MB Techno Management Ltd. operating as Top Gun Surrey (Corporations associated with Top Win Café Ltd. under section 95 of the Employment Standards Act)

(“the Appellants”)

- 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: Lorne D. Collingwood

FILE No.: 2001/613

DATE OF DECISION: December 4, 2001

DECISION

OVERVIEW

The appeal is by Top Gun Entertainment Ltd., Tregunter Holdings Ltd., Top Gun Lounge Ltd., Top Gun Bowling Investments Ltd., T.G. 223 Ventures Ltd., Granville Sushi Ltd., Richmond Japanese Sushi Ltd., Top Gun Restaurant Holdings Ltd. operating as Top Gun Chinese Seafood, 589934 B.C. Ltd. operating as Garden City Hotpot, T.B.W. Investments Ltd. operating as Top Gun Broadway Chinese Seafood, and MB Techno Management Ltd. operating as Top Gun Surrey (“the Appellants”) and pursuant to section 112 of the *Employment Standards Act* (“the Act”). The Appellants appeal a Determination issued on July 31, 2001 by a delegate of the Director of Employment Standards (“the Director”). The Determination is pursuant to section 95 of the *Employment Standards Act*. The decision is that the Appellants and Top Win Café Ltd. (“Top Win”) are associated companies, which is to say, one person and the employer for purposes of the *Act*.

Top Win, through a Determination dated March 29, 2001 (“the Corporate Determination”), has been ordered to pay length of service compensation to Carol Chan, Ho Lung Chan, Ka-Lam Chan, Sing Yung Chau, Wan Yee Cheng, Dak Wah Fan, Yan Qun He, John Hwa Kin Hsu, Chi Keng Kwok, Don Yuen Po Lai, Norman Shun Lam, Dennis Leung Lee, Cheuk Kwan Tse, Amy Shui Yi Tsui, Yuet-Chun Yam, Pak Tim Yeung and Kam Hay Yuen (“the employees”). The decision was appealed. It fell to me to decide the appeal and in *Top Win Café Ltd.*, BCEST No. D629/01, I upheld the decision of the Director.

In this case, the Appellants voice several complaints. I have found that, while the appeal is largely immaterial, it does raise one issue which is of substance and that is the matter of whether it has or has not been shown that Top Win and the Appellants are subject to common control and direction.

This case has been decided on the basis of written submissions. The Determination has been confirmed in part with other parts being referred back to the Director.

ISSUES TO BE DECIDED

The appeal goes to fairness as the Appellants claim that they did not have an opportunity to respond to the investigation.

It is said that the Determination should be cancelled because it stems from complaints that are out of time and it is contrary to section 82 of the *Act*.

According to the Appellants, the Director should not be issuing both corporate determinations and section 95 determinations. The Appellants also say that the decision to associate companies must form part of, or be issued along with, the Corporate Determination.

The Appellants argue that if the Determination is not cancelled for reason of the above that it should at least be varied now that a number of employees say that they want to withdraw their complaints.

The issue is whether Top Win and the Appellants may or may not be associated under section 95 of the *Act* as if they were one person and the employer.

FACTS

Top Win is part of what the Appellants call “the Top Gun Group”. That is short for “Top Gun Bowling and Restaurant Group”.

Tregunter Holdings Ltd. is a member of the Top Gun Bowling and Restaurant Group. That is shown by business cards and its corporate letterhead.

The delegate had the records of the Registrar of Companies searched and he found all of the Appellants had at least one director/officer who was also a director/officer of another of the Appellants. Indeed, he found that the directors/officers of some of the Appellants are exactly the same. His findings are presented in a table in the Determination.

In explaining the decision to associate the Appellants and Top Win, the delegate indicates that, in addition to the shared directors/officers, he considered the following:

- The fact that major directors/officers of the Appellants are related by blood or marriage;
- the fact that Tregunter Holdings Ltd. (“Tregunter”) acted for Top Win, Top Gun Bowling Investments Ltd. (“Top Gun”) and also Top Gun Entertainment Ltd. (“Entertainment”) in dealings with the Employment Standards Branch;
- the fact that one office provided administrative services to, and did the payroll for, all of the other Appellants.

He then went on to conclude that “the corporations are obviously under common control and management of the same group of people”.

The Appellants are represented by Top Win on appeal. They say that T.B.W. Investments Ltd. operating as Top Gun Broadway Chinese Seafood (“TBW”) and MB Techno Management Ltd. (“Techno”) are no longer in business. That may be but the Appellants do not submit evidence to confirm it.

The Appellants say that they do not have the same controlling shareholders and directors. Again, the Appellants fail to produce evidence to show that. As matters are presented to me, the owners are unknown and the Appellants fail to say who are the controlling directors.

The Appellants say that the directors and officers of the Appellants are not exactly as set out in the Determination. The following is alleged:

- That Thomas C. Leung is not the President and Secretary of Techno;
- that Stephen Leung is not the President, Albert Leung is not the Secretary, and Alan Leung is not a director/officer of Tregunter;
- that Julisa Too, Wing Lit Fong, Angela Leung, Clara Law and Chung Wo Mak are not directors/officers of Richmond Japanese Sushi Ltd.;
- that Stephen Leung is not a director/officer of 589934 B.C. Ltd.; and
- that Edward Leung and Raymond Leung are not directors/officers of T.G. 223 Ventures Ltd. (“Ventures”).

It is open to interpretation whether the Appellants refer to the present situation or the period of particular interest, that being the months of June and July in the year 2000. While they clearly have a complaint with the Determination, their comments are in the present tense. Whatever the allegation, however, it too is devoid of support. The Appellants have only submitted evidence to show that Thomas Leung resigned as a director of Techno in March of 2000 and the directors of Techno as of April 28, 2000. That is not on point. They fail to submit clear evidence that the delegate’s list of directors and officers is in error.

No evidence to the contrary, I accept that the directors and officers of the Appellants in the period of interest are shown by the records of the Registrar of Companies and set out in the Determination. I note that seven of the Appellants, namely, Top Win, Top Gun, Entertainment, Ventures, Top Gun Lounge Ltd. (“Lounge”), Top Gun Restaurant Holdings Ltd. operating as Top Gun Chinese Seafood (“Restaurant”), and T.B.W. Investments Ltd. operating as Top Gun Broadway Chinese Seafood (“TBW”) are listed as having the same President, Edward Leung. Hin Cheung Leung and Raymond Leung are the only other officers/directors of Top Win, Top Gun, Entertainment, Lounge and Restaurant. Ventures has only one officer/director outside of Edward Leung and that person is Raymond Leung.

Top Win points out a clerical error. The delegate, in setting out the employees’ position in the Determination (what is called the “Complainant’s Position” in the Determination), states that it was Top Gun that did the hiring, not Top Win, and he goes on to say that the employees were paid by Entertainment, Ventures, and Entertainment. (I am not making an error here. Entertainment is repeated.) Top Win, on appeal, claims that it is the employer and that the employees were paid by no company outside of itself. The delegate not arguing the point, I accept Top Win on both points.

ARGUMENT AND ANALYSIS

The Appellants speak of unfairness but no unfairness is shown. The Appellants claim that they were somehow denied the right to be heard but the Appellants also make it clear, in the first of their two appeal submissions, that they were asked to respond to the investigation of whether the companies were under common control and direction and that they responded by saying that they were not.

- “12. During the meeting of 12 December 2000, the Officer was informed that there was no other company associated with the employer. The Officer obviously indicated that he agreed not to proceed with the determination against the employer’s associated corporations under section 95 of the Employment Standards Act. This is the reason why in the first determination, only Top Win Café Ltd. was required to pay for the termination. The Officer subsequently changed his mind under unknown reason and issued the second Determination to the “associated corporations” after 6 months of the meeting without any prior notice to the related parties. It is unfair to the defendants.”...

I fail to see how it can be said that the Appellants were not given an opportunity to respond to the investigation. The delegate’s investigation is consistent with the requirement that the Director make a reasonable effort to give companies under investigation an opportunity to respond, and the need for efficiency. The latter is a purpose of the *Act*.

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

2 The purposes of this Act are as follows:

...

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

The Appellants mistakenly believe that the Determination is based on complaints by employees which were outside of a time limit and contrary to section 82 of the *Act*. In issuing the Determination, the Director has done nothing more than act on her own motion as she may do under sections 76 and 79 of the *Act*.

76 (3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.

79 (1) On completing an investigation, the director may make a determination under this section.

The Appellants are mistaken in thinking that the decision to associate companies must be made at the time the Corporate Determination is issued and that it must form part of the Corporate Determination. The *Act* does not require anything of the sort.

The Director is quite able to issue more than one determination against a company, both a Corporate Determination like that against Top Win and a section 95 determination like that which is against the Appellants.

It is immaterial whether employees have withdrawn complaints against Top Win. That has no bearing on the Determination appealed, it being a decision to associate companies.

There is only one issue of any substance and that is the matter of whether the Appellants may or may not be associated under section 95 of the *Act* as if they were one person and the employer.

Section 95 is as follows:

- 95** If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and
 - (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of the amount from any or all of them.

Section 95 of the *Act* allows the Director to look beyond ownership in the strict legal sense, to pierce the corporate veil, so that all parts of a business whole can be held accountable in the event of an insolvency. Ownership and financial control are an important part of assessing common control and direction but common ownership is not necessary for a finding of common control or direction. It is enough to show that businesses, trades and/or undertakings are **in practice** run by a person or group and in that regard, control need not be perfectly overlapping [*Invicta Security Systems Corp.* BCEST No. 349/96]. Even in the absence of a single guiding force in day-to-day operations or actual control of shareholdings, there may be common control or direction through the functional interdependence of businesses [*Wills Enterprises Ltd.*, BCLRB No. 153/84 (1984), 6 CLRBR (NS) 231] [See also *Sangard Electrical Ltd.*, BCLRB No. B101/94]. Yet that being said, it is clear to me that there are limits to the Director's ability to treat different incorporations as one person.

For businesses, trades or undertakings to be associated under section 95 there must be

- more than one corporation, individual, firm, syndicate or association;

- the carrying on of some business, trade or undertaking;
- common control or direction; and
- a statutory purpose for treating the entities as one person and the employer.

It is clear to me that three of the four conditions are met. There are a number corporations in this case. There was the carrying on of a business, that being Top Win's restaurant business. And, there is a statutory purpose to treating Top Win and the Appellants as one person and the employer. There is both the statutory purpose of enforcing the *Act* and also the statutory purpose of seeing to it that employees are paid that which they are entitled to, in this case, length of service compensation. The question is, Is there reason to believe that some or all of the companies are under common control and direction?

According to the delegate, it is obvious that Top Win and the Appellants are all under common control and direction. I am unable to see how that is obviously so. It does not necessarily follow that there is common control and direction just because directors or officers are related; companies use the same accountant or professional manager; and/or they present themselves as the members of a group. That is simply not clear evidence of common control and direction.

It is obvious that five of the Appellants are under common control and direction, the five being Top Win, Top Gun, Entertainment, Lounge, and Restaurant. The evidence is that all five of those companies were controlled and directed by a triumvirate comprised of Edward Leung, Hin Cheung Leung and Raymond Leung. It is not at all clear that the remaining seven Appellants are controlled and directed by a member or members of the triumvirate or that there is a functional interdependence between businesses. And there is no evidence of a person, group or company with overarching control.

The Determination is confirmed only to the extent that it associates Top Win, Top Gun, Entertainment, Lounge, and Restaurant. If the Director wants to hold Tregunter, Ventures, Granville Sushi, Richmond Japanese Sushi, 589934 B.C. Ltd., TBW and/or Techno accountable for the moneys which Top Win must pay, she will have to show how the companies and Top Win are under common control and direction. I am, accordingly, referring that matter back to the Director.

There are two other points to make. The Appellants complain that the Determination provides for a double remedy and that it fails to apportion the amount that is to be paid. The Appellants will find that if Top Win pays the full amount of the Corporate Determination, then the Director will not act to enforce the section 95 Determination. The second matter is not a failing of the Determination. The matter of who is to pay what is addressed by the *Act* itself. As section 95(b) is written, associated companies are "jointly and separately liable" for the entire amount owed. The companies can divide the amount of the Corporate Determination as they wish but should any fail to pay the amount owed, the others must make up the difference.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated July 31, 2001 be confirmed to the extent that it associates, and treats as one person, the following companies:

Top Win Café Ltd.;
Top Gun Bowling Investments Ltd.;
Top Gun Entertainment Ltd.;
Top Gun Lounge Ltd. and
Top Gun Restaurant Holdings Ltd. operating as Top Gun Chinese Seafood.

The matter of whether Top Win Café Ltd., Tregunter Holdings Ltd., T.G. 223 Ventures Ltd., Granville Sushi Ltd., Richmond Japanese Sushi Ltd., 589934 B.C. Ltd. operating as Garden City Hotpot, T.B.W. Investments Ltd. operating as Top Gun Broadway Chinese Seafood and MB Techno Management Ltd. operating as Top Gun Surrey may be associated pursuant to section 95 of the *Act* is hereby referred back to the Director.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal