

An appeal

- by -

Shauneen Martens [a.k.a. Shauneen Anne Hodson],
a Director or Officer of Paragon Custom Developments Ltd.

- 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: Ib S. Petersen

FILE No.: 2001/537

DATE OF HEARING: October 2, 2001

DATE OF DECISION: November 14, 2001

DECISION

APPEARANCES:

Mr. Murray Morrison	on behalf of Shauneen Martens
Mr. Dave MacKinnon	on behalf of the Director

OVERVIEW

This is an appeal by Shauneen Martens (“Martens”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards issued on June 28, 2001, which determined that she was liable as a corporate director or officer for two months wages to former employees of the Employer, Paragon Custom Developments Ltd. (“Paragon”), for a total of \$34,014.84. The Director’s Delegate found that Martens was an officer based on the records of the Registrar of Companies and rejected her assertion that she was not.

ISSUES

Martens’ appeals the conclusion in the Determination that she was an officer of Paragon. While there is no dispute that the records filed with the Registrar of Companies indicates that she held the office of secretary, she says that she was not aware of that and that she never consented to such an appointment. As well, she never carried out the functions of a corporate secretary.

The Delegate argues that it would be improper for the Tribunal to consider the documents submitted in support of the appeal, at this stage, because of Martens’ failure to participate in the investigation. He argues, in any event, that the factual circumstances are such that the Determination was correct.

FACTS

Martens, her husband, Lance Martens, the president of Paragon, and Sylvia Mcleod, the accountant who maintained Paragon’s minute book, testified at the hearing. I say at the outset that I found the testimony of these witnesses believable and credible. In my view, they testified in a forthright manner.

According to the records of the registrar of Companies, Martens held the office of secretary of Paragon. Paragon was incorporated in 1995. Lance Martens was and remained the sole director and shareholder. When the time came for the filing of the annual report for 1996, which on its face stated that “every company must have a president and a secretary,” Lance Martens indicated on the form in his own handwriting that he was the president and his wife was the secretary. He

certified that the annual report was correct. He received the annual report from Sylvia Mcleod. He did not, however, return the form to her but sent it in to the registrar of Companies. The next time the annual report came, he simply signed it and returned it to the Registrar.

ANALYSIS

The appellant, Martens, has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that she succeeds.

Section 96 of the *Act* provides for personal liability for corporate directors and officers. They may be liable for up to two month's unpaid wages for each employee, if they were directors and officers at the time the wages were earned or should have been paid.

I deal first with the Delegate's argument that the Appellant is barred from introducing documents and other evidence to support the argument that she was not an officer at the material time.

In *Oak Forever Furniture Co. Ltd.*, BCEST #D516/01, I noted:

I am cognizant of the principles set out in earlier decisions of the tribunal in such case as *Tri-West Tractor Ltd.* (BCEST #D268/96) and *Kaiser Stables* (BCEST #D058/97). In *Specialty Motor Cars (1970) Ltd.* (BCEST #D570/98), the Adjudicator noted that the

“... Kaiser Stables principle relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigating officer. There may be legitimate reasons why particular evidence was not provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such non-disclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria.”

In the circumstances, in my view, the integrity of the Tribunal's process would not be well served by letting a Determination stand and be enforced against the wrong person, as clearly seems to be the case here. In the result, I am prepared to admit the evidence tendered on behalf of Oak Forever.

In my view, the issue of her status was placed in issue by Martens early on. It cannot seriously be maintained that she was “laying in the weeds.” She took issue with the assertion early on that she was an officer of the Employer. She testified that she did not perform any functions of a corporate secretary or otherwise took part in corporate management. The Determination states

that the Delegate told Martens (in January, 2001) that he would “proceed on the basis that they [Martens and her husband] were both directors or officers subject only to their right to present rebuttal evidence,” and that the Delegate did not receive anything. However, the Delegate did, in fact, attend the offices of Martens’ counsel and, there, reviewed the corporate minute book in early March 2001 (letter from the Delegate to counsel, dated March 8, 2001). The Delegate asked to review the minute book. The letter is far from equivocal as far as the Delegate’s requirements. From the Determination is clear that the Delegate did receive other documents, though the source and the circumstances are not clear to me. Considering all of the circumstances of this case, I am of the opinion that Martens is not precluded from raising the issue that she was not an officer and I accept evidence tendered on her behalf in that regard, principally, evidence from Paragon’s accountant at the time and certain banking documentation.

I now turn to the merits of the appeal. In the *Director of Employment Standards*, Bcest # RD047/01, reconsideration of Bcest # D056/00, the Tribunal explored the question of corporate officers and directors and noted:

“In our view, in summary, the case law reviewed ... stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation’s registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

In *Black’s Law Dictionary* (St. Paul, Minn.: West, 1979), “presumption” is defined as “a rule of law ... by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted.”

Martens' husband and MacLeod explained how Martens' name originally came to be on the corporate records. Paragon was incorporated in 1995. MacLeod incorporated the company. Lance Martens was the sole shareholder and director. When time came to file the annual return in 1996, he received the form from MacLeod, but, rather than returning it to her, sent it directly to the Registrar of Companies. Because the form stated "every company must have a president and a secretary," he put down his own name as the president and his wife as the secretary. He was inexperienced in business matters and thought, since his wife helped him with secretarial work, helping with typing etc., that it was appropriate to put her name down as corporate secretary. He did not appreciate the distinction. In subsequent years, when the time came to file the annual return, he simply signed the form indicating that his wife was the corporate secretary. Lance Martens testified under oath or affirmation that his wife did not know or consent to this. In fact, as Martens herself testified that the first time she was told that she was the corporate secretary was when told by the Delegate in January 2001. In other words, it is clear to me on the evidence that Martens did not know that she was recorded as a corporate officer.

The Delegate relied on certain banking documents in his Determination. I am not convinced that these documents, in the circumstances of the facts of this case, establish that Martens was an officer of the company. Among others, Martens--the owner of the family home, purchased before the marriage with funds from her mother--signed as guarantor for a line of credit for Paragon. She explained that she simply signed what was put before her to ensure that her husband could get the loan. She did not have signing authority on Paragon's accounts and while bank documents indicated that Lance Martens was the president, there was nothing to indicate that Martens was an officer. It is not uncommon for banks and lending institutions to require a spouse to sign a loan agreement as a guarantor. Martens' counsel introduced a few letters from financial institutions suggesting that she only signed the loan agreements as guarantor. I do not place much weight on these documents. In any event, there is nothing, on its own, in the signing of these documents that would make Martens an officer of Paragon.

At the hearing, both Martens and her husband agreed that she was paid money from time to time by Paragon. She agreed with the suggestion by the Delegate that she may have been paid some \$1,000 or 1,200 per month. She did perform some secretarial work for the company. She explained that she was paid for her work. In any event, I found it telling that Martens explained that she did not work in the office and, in fact, was only there on one occasion. There was nothing before me to indicate that she performed any of the functions usually or normally performed by corporate officers. By itself, the fact that she received money from the Employer, in my view, would not make her an officer.

In any event, even if I am wrong, *i.e.*, that the evidence of Macleod and the various banking documents ought not to be admitted, having heard Martens testify under oath or affirmation, I accept her testimony that she did not know that her husband had put her name down as the corporate secretary. If she did not know, it is difficult to understand how she could consent to such an appointment. I found Martens to be a credible and forthright witness and, as noted, accept her testimony. In the circumstances, it appears to me that this case meets one of the

exceptions set out in the Tribunal's decision in the *Director of Employment Standards, above*, namely that the person was not properly appointed. In that case, there was no issue that the person "had become an officer in any involuntary manner or had not consented to the appointment." In the instant case, that is the issue.

In the circumstances, my decision is to cancel the Determination.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination dated June 28, 2001 be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal