

Docket: 2008-134(IT)I

BETWEEN:

KELLY CLANCY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on common evidence with the appeal of *Brent Jackson*  
(2008-141(IT)I), on August 27, 2008, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant: Dan White (for August 27, 2008 only)  
(no appearance for oral judgment, August  
29, 2008)

Counsel for the Respondent: Alexandra Humphrey  
Amit Ummat

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**JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2003  
and 2004 taxation years is dismissed.

Signed at Ottawa, Canada, this 15<sup>th</sup> day of September 2008.

"Patrick Boyle"

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Boyle, J.

Docket: 2008-141(IT)I

BETWEEN:

BRENT JACKSON,

Appellant,

and

HER MAJESTY THE QUEEN,

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Boyle, J.

Citation: 2008 TCC 518  
Date: 20080915  
Dockets: 2008-134(IT)I  
2008-141(IT)I

BETWEEN:

KELLY CLANCY,  
BRENT JACKSON,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

(Delivered orally from the bench on August 29, 2008, at Toronto, Ontario  
and modified for clarity and accuracy.)

#### **Boyle, J.**

[1] Mr. Jackson's band is named after a male organ. He has played in the band for a number of years. Prior to 2003, Mr. Jackson's band occasionally played local gigs for which bar owners paid each of the four members \$50 to \$100. This was at that time strictly a hobby or pastime for Mr. Jackson. He was and remains a well-employed aerospace worker.

[2] Another personal pursuit of Mr. Jackson's prior to 2003 was that he was taking flying lessons with a view to getting a pilot's licence. He knew someone who did aerial photography. Mr. Jackson did not have any previous experience running a business of any sort. He did not have any background in the travel business or in photography, greeting cards, therapy, dog kennels or landscaping.

[3] In 2003 and 2004, Ms. Clancy worked for a major Canadian bank in Toronto. Before 2003, she did not have any previous experience running a business of any sort. During her school years, she had worked part-time at an aquarium store.

[4] Before 2003, Ms. Clancy did not have any background in the travel business, nor did she have any personal or business interest in photography, greeting cards, therapy, landscaping or dog kennels. Ms. Clancy said she only ever started dabbling in photography in 2003.

[5] In 2003, these two taxpayers bought into the World Network Business Club.

[6] The informal income tax appeals of Mr. Jackson and Ms. Clancy in respect of their 2003 and 2004 taxation years were heard together in Toronto. The taxpayers are spouses of one another.

[7] The taxpayers were represented by Mr. Dan White in these appeals. Mr. White described himself as the principal of WNBC and also the author of a book entitled, "How to Pay Zero Taxes and Keep the Tax Department Happy!"

[8] While there was little evidence regarding WNBC or the WNBC plan or formula, Mr. White described WNBC as a provider of educational tax reduction strategies, encouraging clients to turn their hobbies or interests into businesses, track their expenses and enjoy the tax write-off of start-up losses.

[9] Following the WNBC plan or formula, Mr. Jackson and Ms. Clancy claimed to have started at least six businesses in 2003 and 2004. It is the Crown's primary position that none of their activities constituted a business. There are, thus, no business losses that they could have deducted from their employment income.

[10] When filing their returns, these businesses were reported as being undertaken by one or the other taxpayer. The taxpayers now argue that all of the businesses were actually in partnership. It was not entirely clear whether they now believed each business was a separate partnership or if there was a single partnership carrying on all of the businesses or, as argued by Mr. White, a single partnership carrying on a single business with music management, travel agency, tour guide, aerial photographer, saltwater aquarium consulting therapy, portrait photography and greeting card divisions or departments, much like a Walmart is structured.

[11] In deciding the initial and fundamental issues of whether any of Mr. Jackson's and Ms. Clancy's activities constituted a business, nothing turns on the legal distinctions between partnerships and sole proprietorships, since a partnership by definition involves persons carrying on a business together.

[12] In filing her 2003 and 2004 returns, Ms. Clancy did not report any revenue whatsoever from any of her reported businesses, of therapy, photography, travel

agent or greeting cards. Her reported losses from these businesses were in the \$20,000 range. All of these pursuits, except photography, have since been discontinued without ever having generated any revenue whatsoever.

[13] In filing his 2003 and 2004 returns, Mr. Jackson reported gross revenues of less than \$6,000 in total, from his reported business of entertainment and aviation services. His reported losses from these businesses were in the \$43,000 range.

[14] The aerial photography pursuits have since been discontinued without ever having generated any revenue. Mr. Jackson's band continues. Mr. Jackson acknowledged that the majority of the reported revenues were in fact his WNBC commissions and not from his music or other business.

[15] In circumstances such as these, I must first decide whether any or all of these activities constitute a business pursued for profit in a commercial manner, or whether they were personal endeavours, such as hobbies or the like. This approach is mandated by the Supreme Court's 2002 decision in *Stewart*. In *Stewart*, the Supreme Court highlights some of the criteria, indicia of commerciality and badges of trade that should be considered.

[16] A related legal question in circumstances such as these is at what time do a person's pursuits with a view to starting up a business give rise to the existence of a business? The approach to determining that question is guided by the approach taken by this Court in such earlier cases as its 1994 *Gartry* decision and its 1998 *Kaye* decision, both decided by our former Chief Justice.

[17] The Band: Mr. Jackson had been a band member for some time before 2003. The four members equally shared the \$200 to \$400 received each gig. The estimated number of gigs each year could be described as very light.

[18] In addition to word of mouth and reputation, the band is promoted by direct approaches to local bars and by a vanity licence plate on his car and a licence plate cover showing the band's website address. The band's website turns out to still be under construction and "coming soon."

[19] Mr. Jackson entered a business card in evidence, together with e-mail and other correspondence, with bars and fans in the years in question.

[20] Little changed in the functioning of the band in 2003, when Mr. Jackson claims his hobby became a business, apart from the extensive recording of expenses allegedly associated with it. Mr. Jackson described the band's activities through 2003

and 2004 and to date. The evidence did not suggest it played more gigs, pursued more gigs or pursued gigs more diligently or in a more businesslike fashion beginning in 2003.

[21] The listing of expenses to which I will return does not suggest more diligent and businesslike steps were being taken.

[22] In the e-mail to the band's fan club for the summer of 2003, two performances were announced. The first was the Clancy family farmhouse pig roast. The second was that several of the band members would be performing with another musician under a different band's name.

[23] Clearly, even if I were to fully accept all of the evidence of these taxpayers, the band has remained a hobby throughout.

[24] Aerial Photography: Mr. Jackson had begun flying lessons prior to 2003 as a personal interest. He said he found the costs very high. After his involvement with WNBC, he decided an aerial photography business would help him address the high costs. He never made a sale or even took a sample aerial photograph before discontinuing his alleged business venture, which he did before even obtaining his pilot's licence.

[25] This activity was never a business. Obtaining his pilot's licence was never more than a personal pursuit. I am far from satisfied that Mr. Jackson ever genuinely intended to develop an aerial photography business.

[26] Dog Kennels: The itemized expenses and the taxpayers' testimony claimed that the establishing of a dog kennel was a legitimate part of the plans for their business activities. This never went further than discussions among the spouses at meetings at restaurants of the possibility of getting into the dog kennel business. They expensed those restaurant meals.

[27] There was no evidence that the taxpayers ever even owned a dog. There were no steps taken towards entering a dog kennel business beyond enjoying meals together at numerous restaurants. There was no such business. Any claim to the contrary is a serious misrepresentation.

[28] These same comments apply to the landscaping business referred to in the evidence.

[29] Aquarium Consulting and Therapy: The only evidence of activity in this area is Ms. Clancy's part-time job while at school, a saltwater aquarium in their home and Ms. Clancy's statement that her only promotional efforts were that she had talked to some aquarium stores about the availability of her services.

[30] She acknowledged it was really just a concept for a business. There was no evidence to support the therapy aspect of aquaria beyond her assertion that saltwater aquaria can be used in therapy settings.

[31] Ms. Clancy's aquarium at home did not appear to even constitute a hobby. It was more in the nature of something she had in her home. This was certainly not a business.

[32] Further, I do not believe that it was ever genuinely intended to be developed into a business. There was not sufficient evidence, activity or investment to even regard as plausible window dressing for trying to start up an aquarium consulting or therapy business.

[33] Greeting Cards: Ms. Clancy's greeting card venture was supported by a filed photo album filled with four-by-six photographs printed at retail photo shops. None of these cards was in a conventional folding-card format, although a few had sayings written on the face of the print. Almost all of the pictures of babies, expectant mothers, the CN Tower, Lake Louise and the family cat looked like they came from a typical family photo album.

[34] Ms. Clancy said on several occasions that, contrary to what was set out in her Notice of Appeal, her promotion of this business was only to try to develop word-of-mouth interest by circulating her cards to friends and family. In cross-examination, she acknowledged that she circulated them to friends and family by sending handmade cards to her friends and family.

[35] Again, this does not even approach being able to be considered to be a business. Indeed, the totality of the taxpayers' evidence, such as it was, leads me to the conclusion that this was never honestly intended to be developed into a business either.

[36] Travel Agent and Tour Guide: The taxpayers took a week-long family trip to Ireland in 2004 and a similar trip to London in another year. In Ireland, Ms. Clancy led her family and friends on a day-long Dublin tour she developed. She claims this was in effect the test launch of the travel agent and tour guide business. The taxpayers also claim these trips aided the development of the photography business

by branching out into travel photography, and the music business and Mr. Jackson's band, since he discovered the bhodran while in Ireland, and has since incorporated it into his band's performances.

[37] The taxpayers filed photo albums of these trips as well. Again, these look like the family holiday photo albums and souvenir scrapbooks found in any family's home. There was no evidence that Ms. Clancy spoke with hotel operators, checked out the existing commercial tours or did similar things while in Dublin or in London.

[38] The only thing she did in this area beyond what appears to be taking typical family holidays is that, following her Ireland trip, she paid for a travel agent ID card from an IATA-registered travel-agency franchise business. This entitled her to a commission on any travel she booked in her capacity as travel agent. She did not in fact sell any travel and did not earn any commissions. There was little or no evidence of trying to sell travel trips or tours to anyone at all. She did not renew the card beyond its expiry. There was no travel agency or tour guide business, nor am I satisfied there were *bona fide* intentions to start one. The travel agent card obtained upon payment of a fee appears to have been mere window dressing.

[39] Photography: If Ms. Clancy is to be believed at her word, her photography pursuits have proved successful and profitable and she has continued to carry them on. In 2003 and 2004, she had no revenues from it. In her own words, she only began dabbling in photography in 2003. There was no mention of studio space in the home or elsewhere and no mention of lugging equipment to customers. There was no mention of professional quality cameras or photographic equipment. Indeed, there was very little evidence, if any at all, of efforts to obtain customers.

[40] The photo albums already mentioned filled with snapshots of family and family travel were said to be evidence of the existence of her photographer business as well. None of these resembled a traditional photographer's portfolio.

[41] Ms. Clancy testified that her photography business is now both successful and profitable but, when asked about current years' numbers, could not even estimate her revenues or profit. She did mention having done three weddings, but did not say whether they were for family or friends or whether she was paid anything at all for them.

[42] The evidence presented does not suggest that Ms. Clancy's photographic pursuits went beyond being a personal interest or hobby in the years in question.



[43] World Network Business Club: Mr. Jackson's involvement with World Network Business Club was not described as a business activity in his tax returns and reporting documentation. The \$5,000 fee paid to WNBC was recorded as an expense of his business. However, in his evidence, Mr. Jackson described his role, as a WNBC Satellite Champion for Oakville, as one of his business activities. Apparently, he held meetings locally to recruit other members to WNBC. For that, he received commissions from WNBC.

[44] The commissions he received from WNBC were significantly less than the fees he paid to WNBC. They also comprised the majority of his gross business revenues.

[45] The evidence such as it was regarding Mr. Jackson's involvement with WNBC is insufficient to meet the onus on him to satisfy the Court that his involvement with WNBC's business constituted a business carried on by him.

[46] Indeed, the evidence leads one to wonder whether this was a partial circling of cash to create more window dressing of business activities and revenues.

[47] Turning to a review of all of the evidence of the nature of expenses claimed, I need only say that many of the items expensed to the businesses were preposterous and outrageously aggressive. Mr. Jackson and Mr. White acknowledged that a lot were in fact entirely personal.

[48] Some highlights of their reported expenses were: a portion of Ms. Clancy's weekly GO Train passes and subway tokens to get to her place of employment, daily Starbucks meetings with herself, Blockbuster Video rentals for meetings with each other at home, groceries for meetings with family, gifts to family, clothes, hairdressers, flowers for his wife, meetings allegedly held at LCBO outlets, wine purchased by the bottle with no explanations, hygiene products, souvenirs in Ireland, a \$400 Irish wool sweater and a handbag from Harrods.

[49] Three home computers were fully allocated to the business. The Ireland and England trips were fully expensed. A portion of their cars was expensed, although the use of cars was not even indirectly referred to in evidence.

[50] All of the two taxpayers' evidence is tainted by their series of excessive, implausible and unreasonable claims. Mr. Jackson and Ms. Clancy were shamefully aggressive in claiming their expenses and shamefully loose with the facts surrounding their ventures. They were not simply duped by WNBC. They spun and stretched their stories, they rationalized by relating to the possible, and they evaded

answering questions. This level of lack of forthrightness casts doubt on all of their claims as described by this Court in *Voitures Orly Inc.*, *Chrabalowski* and *Zepotoczny*.

[51] The taxpayers rationalized and explained things away by what could have been. The words "could have" kept rolling off Mr. Jackson's lips in evidence and Mr. White's in argument. By way of example, Mr. Jackson explained the florist bill he expensed for sending flowers to his wife by saying they could have been sent as a thank-you for helping in the business. Plausibility is not the threshold test to be met in order to succeed in a tax appeal.

[52] Further, virtually all of the potential clients who were wined and dined or given gifts by Mr. Jackson and Ms. Clancy, were immediate family members or each other. It is true that, in a strict business sense, a potential client is anyone who is not already your client. But, in the absence of any real clients or unrelated potential clients, a reality check and common sense dictate this is unlikely to be persuasive evidence of reasonable business activity.

[53] Similarly, in trying to demonstrate the ability of a start-up venture to become profitable, one is not much helped by the observation that others run businesses in the same area very successfully.

[54] In conclusion, I find neither Mr. Jackson nor Ms. Clancy carried on any business in 2003 or 2004 and their testimony was not very credible.

[55] The World Network Business Club plan or formula as followed by these taxpayers was perhaps sufficiently plausible to avoid tax evasion charges, but certainly involved them making serious misrepresentations and distortions. I am not satisfied there were even good-faith intentions on these taxpayers' parts to convert their pre-existing hobbies and interests into a business.

[56] Mr. White's book and WNBC did not help these taxpayers pay zero tax or keep the tax department happy — quite the contrary. However, Mr. Jackson and Ms. Clancy were not mere simple dupes of WNBC's plan. They were willing and eager informed participants in control of their very thinly veiled attempts to deceive the tax authorities. They made their own decisions. They struck me as smart and educated Canadians who are ultimately the authors of their own misfortunes.

[57] The appeals are dismissed.

Signed at Ottawa, Canada, this 15<sup>th</sup> day of September 2008.

"Patrick Boyle"

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Boyle, J.

CITATION: 2008 TCC 518

COURT FILE NOS.: 2008-134(IT)I, 2008-141(IT)I

STYLE OF CAUSE: KELLY CLANCY v. HER MAJESTY THE  
QUEEN, BRENT JACKSON v. HER  
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 27, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: September 15, 2008

APPEARANCES:

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