

Citation: *Jacobsen v. McLeod*, 2013 YKSM 5

Date: 20130715
Docket: 11-S0078
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Chief Judge Cozens

IVAN JACOBSEN

Plaintiff/Defendant by counterclaim

v.

ROSS MCLEOD

Defendant/Plaintiff by counterclaim

Appearances:
Ivan Jacobsen
Ross McLeod

Appearing on own behalf
Appearing on own behalf

REASONS FOR JUDGMENT

[1] Ivan Jacobsen and Ross McLeod entered a business relationship in 2007. Mr. Jacobsen was then a financial advisor and the manager of a Canaccord Capital (“Canaccord”) office located in Whitehorse, and Mr. McLeod was hired to help with the business. Canaccord is a wealth management firm that invests client money and earns its own revenue by taking a commission from the investments. As will be detailed below, the relationship between the parties broke

down in October 2010, following the hiring of Mr. Jacobsen's son into a position with the office, against the wishes of Mr. McLeod. The relationship between the parties appears to have further deteriorated since this time.

[2] Mr. Jacobsen initially claimed against Mr. McLeod for \$2,151.84, which he states was owed him for a computer he agreed to purchase for Mr. McLeod to use, but which was not returned to him when Mr. McLeod ceased working with him.

[3] Mr. McLeod filed a Counterclaim seeking \$25,000.00 in damages for what he states is a breach by Mr. Jacobsen of the contract in relation to the employment/partnership agreement between them.

[4] Mr. Jacobsen subsequently filed a Reply and further Counterclaim seeking \$25,000.00 in damages from Mr. McLeod for monies he stated that he overpaid Mr. McLeod and for monies due and owing by Mr. McLeod for office expenses.

Evidence of the Parties

Ivan Jacobsen

[5] Mr. Jacobsen testified that Mr. McLeod began to work with him in 2007. He testified that, as Mr. McLeod had no credit rating and wanted to create his own client base, he agreed to contract with Dell to purchase a computer and printer for Mr. McLeod to use.

[6] A copy of the purchase contract was filed which shows Canaccord Capital as the Buyer with Mr. Jacobsen as the contact person. The contract is dated

August 9 and 10, 2009. The amount of the purchase, including interest, was \$2,151.84. Payments were to be \$44.83 monthly over a 48-month period. At the first trial date of December 12, 2011, Mr. Jacobsen stated that he had been making payments for two years and two years remained for which his account was still being debited. He believes that Mr. McLeod still has the computer. He is unable to point to the date that the first payment was made. He testified that he will be paying until August 2013.

[7] Mr. Jacobsen testified that he has not received any reimbursement from Mr. McLeod of any kind, although Mr. McLeod had agreed to repay him. Mr. Jacobsen stated that they had not, however, had any discussion regarding the specific manner in which repayment was to be made or reached any agreement on this point.

[8] With respect to the allegations contained in his counterclaim, Mr. Jacobsen testified that he and Mr. McLeod had a verbal agreement that Mr. McLeod would receive a 20% commission to start and 5% increases each year afterwards until Mr. McLeod reached 50%. He stated that, in fact, he increased Mr. McLeod's commission to 50% in the second year. He said that he did so because Mr. McLeod was working as much as he was and sharing the load, and thus it was only fair to do so.

[9] Mr. Jacobsen testified that he decided in early 2010 to bring his son, Keith Jacobsen, into the arrangement on a temporary basis only, in order to help him out with some financial problems he was experiencing. He does not recall

discussing this with Mr. McLeod. He stated, however, that Mr. McLeod never said anything about Keith joining the business arrangement until October 2010. In cross-examination he stated that he could not recall Mr. McLeod arguing with him about Keith joining them. He further stated that bringing his son into the business arrangement did not change the contract between himself and Mr. McLeod. He felt that bringing in Keith would result in an increase in commissions, notwithstanding that they would all be serving the same clients, because Keith Jacobsen would speak to the client base. He agreed in cross-examination that the client base did not increase after Keith Jacobsen was brought in, although potentially the private placements could have increased.

[10] Mr. Jacobsen points to a number of invoices from November 23, 2009 to February 9, 2010 in which Mr. McLeod has claimed a finder's fee from various clients. The total amount of these fees is \$38,956.25. Mr. Jacobsen states that he did not receive any monies in respect of these fees. He states that he is entitled to 50% of these fees, and therefore to \$19,478.12.

[11] Mr. Jacobsen also testified that he is entitled to a share of the monies Mr. McLeod received as set out in the Stockwatch document dated August 24, 2010. This document shows Mr. McLeod receiving a \$1,040.00 finder's fee. Mr. Jacobsen stated that he did not receive any monies for this transaction and he is entitled to 50% of it.

[12] Mr. Jacobsen stated that Canaccord paid the office rent until April 1, 2010. After this date Canaccord no longer paid the rent as he and Mr. McLeod were

operating independently from Canaccord. The monthly rent was \$5,500.00 which was split equally between himself, Mr. McLeod and Keith Jacobsen.

[13] The rent was deducted from the commissions. Mr. Jacobsen further testified that Mr. McLeod failed to pay any portion of his share of the rent for the seven months from November, 2010 to May, 2011. As Mr. McLeod received no share of commission from Mr. Jacobsen after October, the rent could not be automatically deducted as it had been previously.

[14] Mr. Jacobsen provided invoices from May 7, 2010 until November 5, 2010, showing monthly payments from himself to Mr. McLeod in the total amount of \$46,955.96.

[15] Mr. McLeod sent Mr. Jacobsen e-mail correspondence dated October 5, 2010 in which he made it clear that he was not interested in working on a three-way split of commission and that each party would keep 100% of the commissions they earned and would each pay their own expenses. I note from a filed copy of this letter that the following handwritten annotations are at the bottom of the e-mail:

Agreed

Jacobsen

Oct/10

[16] Mr. Jacobsen stated that Mr. McLeod also advised him at this time that he wanted to work out of his home. Mr. Jacobsen said that he did not try to talk Mr.

McLeod into staying in the agreement as he was not satisfied with his work. He nonetheless set up an office in the back for Mr. McLeod, on the basis that Canaccord required Mr. McLeod to be in the office 80% of the time. He agreed in cross-examination that Mr. McLeod was never informed of this 80% requirement in October 2010. Mr. Jacobsen felt, however, that Mr. McLeod was still responsible for paying his one-third share of the monthly office rent.

[17] Mr. Jacobsen pointed out several instances of what he called “sloppy practice” on the part of Mr. McLeod, some of which required remedial action.

[18] Mr. Jacobsen stated that he ultimately dissolved the relationship with Mr. McLeod because of an e-mail sent by Mr. McLeod to George Karkoulis at Canaccord.

[19] Mr. Jacobsen denied that he had ever agreed with Mr. McLeod in August 2008 or 2009 to bring him in as a full partner. It was put to Mr. Jacobsen in cross-examination that, as there was no agreement in place, Mr. Jacobsen therefore felt that he could govern the arrangement by his whim. Mr. Jacobsen agreed with this assessment. He stated that he could make the rules as it was his office and his client list.

Ross McLeod

[20] Mr. McLeod testified that he met Mr. Jacobsen’s daughter in the few months prior to August 2007. She told him that her father needed help as her brother was not working out as a business partner. Mr. McLeod had an interview with Mr. Jacobsen and agreed to work for him in August, 2007. It was agreed

that he would start at 20% commission and increase each year at the rate of 5% per year until he reached 100% [In light of the entirety of the evidence, I interpret this as being 100% of Mr. McLeod's expected ceiling which was 50% of the total amount available for division].

[21] There were exceptions, such as in September, 2007 when Mr. McLeod received a 40% commission, as Mr. Jacobsen was gone the entire month. Mr. McLeod stated that, as he wasn't licensed at this time, he should not have been doing 90% of what he did. He stated that he received his first raise to 25% on August 15, 2008. He actually earned 37% that month because Mr. Jacobsen was away.

[22] Mr. McLeod stated that Canaccord kept 50% of the commissions and paid all of the office expenses, with some exceptions. Mr. McLeod's commission was a percentage of the branch office's gross, after removing Canaccord's percentage.

[23] Mr. McLeod stated that he was receiving 50% commission as an equal partner as of August, 2009. He felt that he and Mr. Jacobsen had a firm contract. He used to live at Mr. Jacobsen's house and discussed the running of the business with him for hours. Mr. McLeod was working under Mr. Jacobsen's license.

[24] He said that he learned in November 2009, that Keith Jacobsen wanted to come back to work with his father. Keith spoke to Mr. McLeod and told him that Mr. Jacobsen had already agreed to this so it would mean a pay cut for him. Mr.

McLeod stated that this was not something that he agreed to or, with respect to a decrease in commission, accepted. It was, in fact, not until February of 2010 that he was actually officially informed that Keith Jacobsen was coming to work with Mr. Jacobsen and Mr. McLeod.

[25] Mr. McLeod testified that as of April 1, 2010, he and Mr. Jacobsen operated as independent contractors. Canaccord took only 15% commission and paid no office expenses. He said that this change in the relationship with Canaccord was made entirely by Mr. Jacobsen without consultation and resulted in Mr. McLeod becoming an agent for Mr. Jacobsen. In furtherance of this arrangement, Canaccord accepted his resignation, although he had never actually submitted a resignation.

[26] By February 2010 Mr. McLeod had obtained his own license and block of clients, some of whom had switched over from Mr. Jacobsen. The incident that resulted in his October 5, 2010 e-mail to Mr. Jacobsen was his receiving only 50% of a commission of \$20,000.00 that he had generated entirely on his own. Mr. Jacobsen had insisted that this commission be split three ways. After that, Mr. McLeod stopped working in the office and managed all his own business from his house. He was out of the territory for medical treatment from November 2010 until February 2011. When he returned to the office he found that Mr. Jacobsen had him placed in a back office that was very small and filled with boxes. He considered this office to be unsuitable for working.

[27] Mr. McLeod contested some of the invoices filed by Mr. Jacobsen. He

stated that the invoice in Exhibit #3 for \$4,740.00 was voided as it was a duplicate of the transaction for \$5,340.00. He also testified that Mr. Jacobsen received the Stockwatch monies that he had testified to as not having received. Mr. McLeod also disputed some of the incidents that Mr. Jacobsen had referred to as being indicative of “sloppy practice”.

[28] Mr. McLeod testified that there were improprieties in how certain transactions were conducted. I will not go into the specifics of these, but note Mr. McLeod’s testimony that he ended up providing evidence under oath in an IIROC investigation (IIROC, the Investment Industry Regulatory Organization of Canada, is the regulating body for this industry). He advised Canaccord of this investigation and the evidence that he intended to give. As a result of this information, Canaccord accepted Mr. Jacobsen’s resignation, officially dismissed Mr. McLeod, and closed the Whitehorse office.

[29] Mr. McLeod has since moved onto another securities firm and opened his own sub-branch in Whitehorse.

[30] With respect to the computer, Mr. McLeod stated that he thought that he had already paid for it. His understanding was that Mr. Jacobsen had been deducting the amounts from his monthly paycheques. He believes that 28 deductions were made from 2009 through 2011. He stated that he did not recall specifically what the payment arrangements had been but testified that he still has the computer.

[31] Mr. McLeod believes that Mr. Jacobsen brought the claim against him for the computer in an attempt to sabotage Mr. McLeod's business, which was taking clients away from Mr. Jacobsen.

[32] Mr. McLeod feels that he was treated fairly until April 2010, when Mr. Jacobsen unilaterally altered the working arrangement by changing the relationship with Canaccord and bringing Keith Jacobsen into the business.

[33] Mr. McLeod felt that Mr. Jacobsen's deteriorating health and having his children working in the office negatively changed the working relationship. Mr. Jacobsen's daughter worked in the office for a time as did Mr. Jacobsen's other son as a janitor. Mr. McLeod stated that Mr. Jacobsen's daughter did nothing yet he was required to pay one half of her salary. He testified that Mr. Jacobsen did make some monetary adjustments to address this concern of Mr. McLeod.

Documentation

[34] Documents were filed by Mr. McLeod to show his earnings. There appears, however, to be some discrepancy in the amounts that are indicated on these documents. They appear to show him earning a total of \$14,416.81 (\$10,396.00 – adding actual stub amounts) between August 16 and December 31, 2007. He earned \$54,020.31 (\$51,744.45 – stub amounts) in 2008, \$75,272.31 (same as stub amounts) in 2009, and \$21,271.80 between January and April, 2010 (\$17,329.34 - stub amounts).

[35] According to Canaccord documentation, the commissions it paid out were: between August 2007 and March 2008, \$280,524.00; between April 2008 and

March 2009, \$454,160.00; between April 2009 and March 2010 were \$414,534.00, and between April 2010 and March 2011, \$545,855.00 (\$246,317.00 of this was between April 1 and September 30, 2010).

[36] The affidavit of Mr. Jacobsen shows the following commissions and earnings:

Commissions August to December 2007 = \$177,569.00

Commissions January to December 2008 = \$438,864

Commissions January to December 2009 = \$351,918.00

Commissions January to March 2010 = \$78,625.00

Earnings April to September 2010 = \$246,317 (\$73,119.00 + \$173,198.00)

Earnings between October 2010 and March 2011 = \$299,538.00

Earnings April to June 2011 = \$79,628.00

Issues

[37] The issues to be resolved here are as follows:

1. Does Mr. McLeod owe Mr. Jacobsen any monies for the computer purchase?

[38] Mr. McLeod does not dispute the evidence of Mr. Jacobsen that the Dell computer package was purchased for him to use and that it was his responsibility to repay Mr. Jacobsen for this purchase. I find that the first payment of \$44.83 was made in September 2009, that it was a 48 month term, and that the last payment is to be made in August 2013. Therefore between September 2009 and March 2010, seven payments were made for a total of \$313.81. Between April

2010 and October 2010, an additional seven payments were made in the total amount of \$313.81. Between November 2011 and August 2013, an additional 34 payments will have been made in the total amount of \$1,524.22.

[39] It appears that Mr. Jacobsen was providing Mr. McLeod monthly cheques for commissions earned up to and including October 2010. Therefore he was in a position to deduct the monthly payments between September 2009 and October 2010, a total of 14 months. The burden rests on Mr. Jacobsen to establish that no payments were made by Mr. McLeod. I am not satisfied that he has met that burden for these 14 months. I take into account the evidence of Mr. McLeod that he believed monthly deductions were being made. Therefore, I will credit Mr. McLeod \$627.62 for payments for this time period. I also note the fact that the computer usage by Mr. McLeod was likely to assist him in obtaining commissions which provided a monetary benefit to Mr. Jacobsen.

[40] There is no evidence to contradict Mr. Jacobsen's testimony that he will have, by August 2013, paid an additional \$1,524.22 for the computer package, without any monetary contribution from Mr. McLeod.

2. Does Mr. McLeod owe Mr. Jacobsen any monies for the financial transactions that took place between November 23, 2009 and February 9, 2010?

[41] Mr. Jacobsen bears the burden of proof with respect to this claim. While there was an agreement regarding the apportionment of commissions, there was no evidence before me that a finder's fee was governed by the same agreement

or how a finder's fee was to be apportioned. I am not satisfied that a finder's fee was the same as a commission for the purpose of apportionment as per the agreement regarding commissions. The evidence regarding these transactions also pointed to these transactions being conducted contrary to the rules in order to circumvent Canaccord becoming aware of them. The evidence was very sparse regarding these transactions. In all the circumstances, I am not satisfied that Mr. Jacobsen has discharged his burden and I decline to make an award of damages to him on this point.

3. Does Mr. McLeod owe Mr. Jacobsen any monies for rent between November 1, 2010 and May 31, 2011?

[42] Mr. McLeod and Mr. Jacobsen agreed in October 2010 that the working relationship, as it stood, would be substantially altered. Mr. McLeod stated at the time that he would be responsible for his own expenses. It appears that Mr. Jacobsen agreed to this, as indicated by his endorsement on the October 5, 2010 e-mail. It is clear that it was not until February, 2011 that Mr. McLeod was advised that Canaccord required him to maintain an office presence. There is also no indication that it was communicated to Mr. McLeod that, notwithstanding his October 5 e-mail, he would continue to be responsible for one-third of the office expense. It is clear from the photographs and the evidence that the office space Mr. Jacobsen provided for Mr. McLeod was sub-standard, almost as though it were an afterthought. I am not satisfied that Mr. Jacobsen has discharged his burden to show that Mr. McLeod was responsible to share in the office expenses, including rent, and I deny his claim on this point.

4. Does Mr. Jacobsen owe Mr. McLeod any monies for commissions between April 1, 2010 and October 5, 2010?

[43] I am satisfied on the evidence that, between August 2009 and March 2010, Mr. Jacobsen and Mr. McLeod were operating under an agreement in which they shared equally in the commissions they received. I am also satisfied that Mr. Jacobsen, without Mr. McLeod's agreement, unilaterally altered the agreement to allow for the commissions to be divided equally between himself, Mr. McLeod and Keith Jacobsen. I find that this was a breach of the agreement between himself and Mr. McLeod.

[44] The commissions that were paid out by Canaccord between April 2010 and October, 2010 totalled \$311,066.00. I have included October as it appears from Exhibit 4 that in November Mr. Jacobsen paid a share of the commission to Mr. McLeod for October. After Canaccord deducted its 15%, that leaves a total of \$264,406.10. From this amount, \$38,500.00 is deducted for rent, leaving a balance of \$225,906.10 to be divided. Therefore, it appears that Mr. McLeod was entitled to receive \$112,903.55. It appears that he received \$46,955.96. I have some trouble with this figure, however. Even if the commission was split three ways, Mr. McLeod should have received \$75,302.03. While there may be a reasonable explanation for the discrepancies in the figures I have, no explanation was offered at trial and I will not speculate. The same is true for most of the documents and figures filed. They do not correlate well with one another and I have found it essentially impossible to reconcile the numbers presented by each of the parties.

[45] As such, although I am satisfied that Mr. McLeod suffered some monetary loss from Mr. Jacobsen's decision to unilaterally change the working relationship between them, I am not satisfied that I am well-enough informed as to be able to calculate the amount of the loss. Mr. McLeod bears the burden in this respect.

Conclusion

[46] This case was a difficult one that required several pre-trial and trial dates before the trial was finally concluded. The evidence from both parties has left me in doubt with respect to how the evidence supports their claim, in particular with respect to monies that should have been paid out for commissions and finder's fees.

[47] I recognize that Mr. McLeod has continued to have possession and use of the computer and that Mr. Jacobsen has continued to pay for it. Certainly the computer was used to earn commissions that would, in all likelihood,

[48] . have provided a monetary benefit to Mr. Jacobsen, Keith Jacobsen and Mr. McLeod. It is also interesting that the issue of any payment contribution from Mr. McLeod was not a factor that was discussed until the Claim was filed. I would have expected some clearer expression of payment requirements from Mr. McLeod to have been set out by Mr. Jacobsen. I am also unclear as to how the indication on the purchase agreement with Dell that Cannacord was the purchaser would potentially impact on the issue.

[49] While I am satisfied that Mr. McLeod would have suffered monetary loss when Keith Jacobsen was brought into the business and shared in the

commissions, I am not able to quantify such loss.

[50] In all the circumstances, I believe that the appropriate way to resolve this matter is to deny the Claim and both Counterclaims. I order that each party bear its own costs.

COZENS C.J.T.C.