COURT OF APPEAL FOR YUKON

Citation: *Faro (Town) v. Knapp*

Citation number: 2012 YKCA 13
No.: 11-YU681

Town of Faro

v.

Angelika Knapp dba A. Knapp Accounting Services and North Star Adventures, a partnership between Angelika Knapp and Eric Dufresne, Angelika Knapp and Eric Dufresne

JUDGES:	Hinkson J.A.
JUDGMENT GIVEN BY:	Hinkson J.A.
JUDGMENT RELEASED:	December 27, 2012
NUMBER OF PAGES:	15
WRITTEN/ORAL:	Written
APPEALED FROM:	Gower J.

SUMMARY:

Application for orders removing the applicants' appeal from the inactive list, granting the applicants leave to proceed with their appeal, extending the time for filling the applicants' materials, and awarding the applicants special costs or costs on an increased scale for the application. The proposed appeal is from a permanent injunction order preventing the applicants from using and occupying a piece of hinterland-zoned land as a full-time residence.

Held: applications dismissed. The interests of justice do not warrant granting the orders sought by the applicants: the extent of the applicants' delay in prosecuting the appeal was not insignificant; the applicants failed to offer a compelling explanation for the delay; the applicants did not established any ground for their appeal that offers any real likelihood of success; and the applicants' submissions do not otherwise establish that it would be in the interests of justice for the orders to be granted.

COURT OF APPEAL FOR YUKON

Citation: *Faro (Town) v. Knapp*
2012 YKCA 13

Date: 20121227
Docket: 11-YU681

Between:

Town of Faro

Respondent
(Petitioner)

And

Angelika Knapp dba A. Knapp Accounting Services and North Star Adventures, a partnership between Angelika Knapp and Eric Dufresne, Angelika Knapp and Eric Dufresne

Appellants
(Respondents)

Before: The Honourable Mr. Justice Hinkson
(In Chambers)

Counsel for the Appellants:	In person
Counsel for the Respondent:	R.G. Macdonald Q.C.
Place and Date of Hearing:	Whitehorse, Yukon November 8, 2012
Place and Date of Judgment:	Vancouver, British Columbia December 27, 2012

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] Ms. Knapp and Mr. Dufresne, on their own behalves and on behalf of their partnership ("North Star Adventures") seek orders:

1) that their appeal be removed from the inactive list;

2) that leave be granted for them to proceed with their appeal;

3) that the time for filing their appeal book, factum, transcript extract book and their brief of authorities be extended; and

4) for special costs or costs on an increased scale for their application, payable forthwith.

Background

[2] The applicants own a lot in the Town of Faro ("the Town"): Lot 1028, located on Johnson Lake, within the Town boundaries (the "Property"). They lived in a cabin on the Property. The Property was zoned by the Town as 'Hinterland'. Up until 2006 the applicants operated an outdoor tourism business through North Star Adventures, offering canoe rentals, and guided canoe and hiking trips at the Property.

[3] The Town claimed that the use of the Property as a residence conflicted with its zoning. As described by the chambers judge who heard the Town's petition, matters came to a head in 2007 when the Town refused to renew the applicants' business licence "until action is taken by [the applicants] to resolve the issue of the inappropriate residential use of the property in question".

[4] On September 19, 2007, the Town refused to approve a development permit for the construction of a well-house and a shed on the Property "on the basis that the continued residential use of the property was in contravention of the permitted and discretionary uses prescribed in the Hinterland Zone."

[5] The applicants claimed they were treated unfairly and believed they should be allowed to reside and conduct their business on the Property. They sought a

declaration that the zoning of the Property conflicted with the Town's Official Community Plan and orders quashing decisions of the Town's Board of Variance and Business Licensing Appeal Board. They also sought a variety of declarations that the Town's treatment of them was unfair.

[6] The petition was heard by Groberman J., as he then was, who determined that the use of the Property as a full-time residence was not a permitted use under the zoning bylaws. While he found that the residential use of the Property could arguably be permitted as a discretionary use, he noted that the Town Council had never exercised its discretion in this way.

[7] Groberman J. quashed the decision of the Licensing Appeal Board that denied the applicants a business licence on the basis that the Property was being occupied for residential purposes. He held that the decision was improper as there was no connection between that unlawful use and the proper considerations for the Town in deciding whether or not to issue a business licence. He further held that the Town was not entitled to use the business licence application as "an opportunity to exact penance on the [applicants] or to place pressure on them to cease unlawful uses on their land."

[8] Groberman J. also quashed the decision of the Board of Variance denying the applicants a development permit. He found that it was not clear that the proposed developments were contrary to the zoning bylaw, as they may have been accessory buildings connected with use of the land for outdoor recreation pursuits. He found as well that there was a breach of procedural fairness by the Board of Variance in both rendering its decision without hearing from the applicants and in taking into account submissions that were not provided to the applicants.

[9] Groberman J. remitted both the matter of the business licence and the development permit to the relevant bodies for fresh determination. He then considered the applicants' various arguments about their unfair treatment by the Town, and dismissed all of their applications for the declarations sought. The reasons for judgment of Groberman J. are indexed at 2009 YKSC 34.

[10] The applicants appealed the decision of Groberman J. to this Court. The central issue for determination was whether he had erred in refusing to make any of the declarations sought. The appeal was dismissed, the Court finding that Groberman J.'s decision not to grant the declarations was within his discretion and that he was entirely correct in his analysis as to whether the zoning bylaw permitted full-time residential use. The Court concluded that in the absence of an application for permission to use the Property as a full-time residence, the Town was not acting improperly in seeking to limit residential occupancy. The reasons for judgment in the appeal are indexed at 2010 YKCA 7.

[11] The Town subsequently petitioned to the Yukon Supreme Court for a permanent injunction to prevent the applicants from using and occupying the Property as a full-time residence. The applicants filed a cross-application asking that the petition filed by the Town be dismissed.

[12] The chambers judge described the applicants' "technical grounds" for opposing the petition as follows (at para. 7):

> 1. The Town is "estopped" from seeking the injunction (presumably, the [applicants] mean a type of equitable estoppel or estoppel by representation arising from the history of dealings between the parties);
>
> 2. Groberman J.'s reasons for judgment and the order arising therefrom are "moot";
>
> 3. The petition is not valid under Rule 10 of the Rules of Court;
>
> 4. The petition is not valid under Rule 51(6); and
>
> 5. There is no evidence of any breach of the Zoning Bylaw before this Court. (I interpret this last ground as a submission that there is no evidence of the continuance of any "wrongful act" in order to justify the application of Rule 51(6)).

[13] The chambers judge found that the first ground failed because the applicants had not made out a case of estoppel against the Town, and rejected their second ground that Groberman J.'s reasons for judgment or his order were moot.

[14] The chambers judge addressed the applicants' third technical ground at para. 51. He agreed with the Town that the provisions in ss. 338-344 of the *Municipal Act*, R.S.Y. 2002, c. 154, respecting the enforcement of bylaws by prosecution under the

Summary Convictions Act, R.S.Y. 2002, c. 210, are very heavy-handed and can result in massive financial penalties. He also agreed that there is nothing in those provisions or elsewhere in the *Municipal Act* which limits the Town to proceeding by way of prosecution. The chambers judge accepted that the Town had a choice of proceeding civilly or by way of prosecution because s. 345 of the *Municipal Act* states "Conviction of an offence under this Act or a bylaw does not exonerate a person from civil liability".

[15] With respect to their fourth technical ground, the applicants contended that Rule 51(6) applies only to temporary injunctions, and that the petition must be invalid because the Town pleaded its reliance on Rule 51(6) in support of its application for a permanent injunction. The chambers judge disagreed and held that the wording of Rule 51(6) is broad enough to include applications for permanent injunctions. He observed (at para. 52):

> Indeed, [Rule 51(6)] presupposes that a party may apply for an injunction after obtaining a judgment to prevent the continuance of a wrongful act established by a judgment. Rule 51(6) states:
>
> > "In a proceeding in which an injunction has been or might have been claimed, a party may apply by petition after judgment to restrain another party from the repetition or continuance of the wrongful act or breach of contract established by the judgment or from the commission of any act or breach of a like kind."

[16] The chambers judge addressed the applicants' fifth technical ground for opposing the Town's petition (at para. 53), that Rule 51(6) should be interpreted to mean that the Town should have applied for the permanent injunction under the "proceeding" before Groberman J. (S.C. No. 08-A0125). He concluded that, while the Town could have applied for a permanent injunction within the proceeding before Groberman J., the Town was correct to contend that there is nothing in Rule 51(6) preventing it from commencing a fresh application by petition. He also accepted that since the Town could have cross-applied for an injunction, the proceeding before Groberman J. was a proceeding in which an injunction might have been claimed, and therefore the condition precedent in Rule 51(6) was met. He reasoned that the Town could thus apply by petition after the judgment of Groberman J. to restrain the

applicants from continuing the wrongful act of occupying the Property as a residence.

[17] In the alternative, the chambers judge ruled that Rules 2(1) and 2(2) were broad enough to protect the validity of the petition, in the event that it somehow contravenes either Rule 10 or 51(6) (at para. 54).

[18] The chambers judge allowed the Town's injunction application, concluding at para. 62:

> ... that the [applicants] shall immediately discontinue their use and occupation of the property as a residence. Should the [applicants] wish to continue to reside on the property, either part-time or permanently, they will have to make an application to the Town for permission to do so as a discretionary accessory use under the Bylaw. In the absence of such an application and the Town's permission being granted, and in the absence of a change to the zoning in which the property is located, the [applicants] are prohibited from residing on the property.

[19] Finally, the chambers judge dealt with costs, and at para. 78 concluded that:

> ... while special costs are clearly justifiable here, I am going to exercise my discretion against such an award, as it would likely have a disproportionately punitive effect upon the [applicants]. On the other hand, the Town does deserve their costs as the successful party, and they also deserve a certain end to this proceeding. Therefore, as I have the authority under Rule 60(14) to fix a lump sum as the costs of the proceedings, I do so in the amount of the $3,000, to be paid within six months of the date of the order arising from these reasons.

The reasons for judgment of the chambers judge are indexed at 2011 YKSC 43.

[20] The order arising from the hearing and from which the applicants have filed their notice of appeal was entered May 16, 2011, the date when it was faxed to their attention.

[21] A notice of appeal on behalf of the applicants was filed on June 14, 2011. Ms. Knapp deposes that the transcripts were filed on June 24, 2011, and the appeal record was filed on August 16, 2011. Ms. Knapp further deposes that her appeal books were not ready for filing within the required time and that counsel for the Town

advised her in January 2012 that if her appeal books were not filed by February 15, 2012, he would apply to dismiss the appeal.

[22] Ms. Knapp deposes that the appeal books were finally ready for filing on June 14, 2012, but the Court Registry refused to accept them for filing without a consent order signed by counsel for the Town, who declined to sign such an order.

[23] On June 20, 2012, the Deputy Registrar of the Court wrote to the parties advising that the appeal had been placed on the inactive list.

Discussion

[24] As I have indicated above, the applicants have already filed their notice of appeal, transcripts, and appeal record, so they do not require leave to perfect those filings. Rule 46 of the *Yukon Court of Appeal Rules, 2005*, (authorized by s. 38 of the *Judicature Act,* R.S.Y. 2002, c. 128) provides:

> 46(1) Immediately after an appeal or an application for leave to appeal is settled or abandoned, the appellant must
>
> (a) file a Notice of Settlement or Abandonment in Form 22; and
>
> (b) serve one filed copy of the Notice of Settlement or Abandonment on each of the other parties.
>
> (2) If a certificate of readiness is not filed in accordance with the rules within one year after the filing of the applicable notice of appeal or notice of application for leave to appeal, the registrar must
>
> (a) place the appeal or application for leave to appeal on the inactive appeal list maintained in the registry; and
>
> (b) mail notice of the action taken by the registrar under paragraph (a) to the following persons at their respective addresses for delivery:
>
> (i) each counsel of record;
>
> (ii) each unrepresented appellant or respondent who has provided the registry with an address for delivery.
>
> (3) An appeal or application for leave to appeal referred to in subsection (2) must be removed from the inactive appeal list when a justice grants leave to the appellant or the applicant to proceed with the appeal or application for leave to appeal.
>
> (4) A justice may, in an order under subsection (3), impose terms and conditions and give directions that the justice considers appropriate.

> (5) The registrar must return the appeal or application for leave to appeal to the inactive appeal list and must mail notice of that action in accordance with subsection (2)(b) if
>
> > (a) a justice makes an order under subsection (3) that requires terms, conditions or directions to be complied with by a specified date and the appellant or applicant fails to comply with those terms, conditions or directions by that date; or
> >
> > (b) in any other case, a certificate of readiness is not filed in accordance with the rules within 180 days after the making of an order under subsection (3) in respect of the appeal or application for leave to appeal.
>
> (6) If an appeal or application for leave to appeal has remained on the inactive appeal list for 180 consecutive days it shall on the 181st day, stand dismissed as abandoned.
>
> (7) An appeal or application for leave to appeal that stands dismissed as abandoned under subsection (6) must not be reinstated unless a justice otherwise orders.

[25] Section 25 of the British Columbia *Court of Appeal Act*, R.S.B.C. 1996, c. 77 contains effectively the same wording as Rule 46(2)-(7) of the *Yukon Court of Appeal Rules*. That section of the British Columbia legislation was considered by Chief Justice Finch, in chambers, in *Murphy v. Wynne*, 2008 BCCA 26, where at paras. 19–20 he commented:

> [19] Section 25 of the *Court of Appeal Act* governs inactive appeals. There is no rigid test on an application to reinstate. The overriding issue has been said to be whether it is in the interests of justice to grant the application: *Kar Recovery Ltd. v. KDA*, 2004 BCCA 503. Factors which have been considered by the Court in removing a case from the inactive list are the extent of the delay, any explanation for the delay, the existence of prejudice arising from the delay, and the likelihood of success on appeal.
>
> [20] The applicant bears the onus of establishing a good reason for reactivating the appeal under s. 25(2): see *Galiano Conservancy Association v. British Columbia (Ministry of Transportation and Highways)* (1997), 40 B.C.L.R. (3d) 171 (C.A.) at 176.

[26] As no certificate of readiness was or could have been filed by June 14, 2012, the applicants bear the onus of establishing a good reason for the reactivation of their appeal. The applicants contend that they satisfy the factors referred to by Madam Justice Ryan in *Kar Recovery Ltd.* I will examine these factors and the applicants' contentions with respect to each of those factors.

a) The Extent of the Delay

[27] Although initially complying with the requirements of the *Rules*, the applicants effectively took no steps to prosecute their appeal after filing their appeal record on August 16, 2011. It is apparent from the affidavit of Ms. Knapp that counsel for the Town was prepared to accept the filing of the applicants' appeal books as late as February 15th of this year.

[28] As the applicants' notice of motion is dated November 5, 2012, the period of delay in the prosecution of the appeal from the date that the Town was prepared to tolerate for the filing of the appeal books may be as little as eight and a half months. That does not take into account the time that will be needed for the applicants to prepare and file a factum, and no estimate has been provided for the preparation and filing of their factum. This factor is a reason, but, in my view, not a strong reason to refuse the application.

b) The Explanation for the Delay

[29] The applicants contend that the appeal books were not ready for filing until June 14th of this year. Ms. Knapp has deposed to health and financial challenges over the past 13 years, but I am unable to find that they were so overwhelming as to preclude her from prosecuting her appeal more expeditiously than she has.

[30] As a partner in North Star Adventures and in his personal capacity, Mr. Dufresne is expected to protect his interests in the proceedings or to explain why he has failed to do so. Other than his extended absences from the Whitehorse area for work commitments of four to six months at a time, Mr. Dufresne offers no evidence of any impediment on his part that explains his failure to prosecute the appeal more expeditiously. It is apparent from his affidavit that he was in Yukon for some period of time after March 2010, from September of 2011 until February of 2012, and from July of this year.

[31] I reject as untenable the applicants' submission that the Town's litigation strategy distracted them from focussing on the appeal. Far too much time expired

without any activity to justify that explanation. Moreover, it is inconsistent with their alternate submission that the Town's failure to file and serve an appearance within the time required by the Rules led them to believe that their appeal was unopposed, an explanation which I also reject as untenable.

[32] The applicants' contention that they were relying on counsel for the Town to consent to the time for their required filings is, in my opinion, no explanation for their need for such an accommodation, nor does it address the delay in bringing their application from February 15, 2012 until November 5, 2012.

[33] The failure of any compelling explanation for the delay in the prosecution of this appeal weighs against the application, but I am unable to find that the lack of a compelling explanation is necessarily determinative of the application.

c) The Existence of Prejudice to the Town from the Delay

[34] The Town is unable to point to any prejudice from the delay in the prosecution of the appeal by the applicants, other than the fact that the appeal has now been outstanding for over sixteen months and that little has been done to prosecute the appeal since August 16 of this year. This factor alone is an insufficient basis upon which to refuse the application.

d) The Likelihood of Success on Appeal

[35] The applicants raise a number of issues with respect to the likelihood of success of their appeal, contending that each has merit. The applicants' written submissions were somewhat repetitive. I will discuss the issues that they have raised, as I understand them.

[36] The applicants deny that they are attempting to overturn the decision of Groberman J. or of this Court on the appeal from the decision of the chambers judge, but at the same time contend that one issue on their proposed appeal is whether Groberman J. was correct in his interpretation of the applicable zoning

bylaw. Such an argument is unavailable even if the relief sought is granted, and thus there is no merit in that submission.

[37] The applicants further contend that, because they were acting under a valid business license at the time the permanent injunction was granted, the injunction ought not to have been issued. This contention betrays a misapprehension of the basis for the injunction. The basis for the injunction was that the applicants' business is a "discretionary use" under the zoning bylaw, and any residential accommodation associated with that discretionary use is a "discretionary accessory use", for which the applicants had not applied. The injunction was not issued to affect the operation of the business, but rather the residential occupation of the premises from which the business was conducted. The Town concedes that the injunction itself does not restrain North Star Adventures from carrying on its business activities. In the result, the *Yukon Building Standards Act*, R.S.Y. 2002, c. 19, which is relied upon by the applicants, has no application and I am unable to see any merit with respect to these issues.

[38] The applicants also contend that the Town relied solely upon hearsay evidence and therefore failed to prove a *prima facie* case to support its injunction application. They also contend that the chambers judge disallowed the use of their evidence in reaching his conclusions. I see no merit in these contentions.

[39] The chambers judge relied upon the findings of fact made by Groberman J. in the earlier proceedings between the parties. The applicants contend that he erred in so doing. Not only was the chambers judge entitled to rely on the findings of fact made by Groberman J., he was obliged to do so based upon the principles of *res judicata*, and issue estoppel which he discussed at paras. 20–21 of his reasons for judgment.

[40] In my view the factual findings of Groberman J. precluded the use of much of the further evidence that the applicants proffered. However, the findings of fact by Groberman J., and the applicants' evidence that their home on the Property was used as a "caretaker residence" to secure the buildings and assets on the site year-

round was an ample factual foundation for the order of the chambers judge. I see no merit in this submission.

[41] The applicants' submit that the *Yukon Municipal Act* does not authorize a municipality to initiate civil proceedings to deal with the breach of a bylaw, referring to the decision of Mr. Justice Gower in *Whiskey Flats Investment Corporation v. Council of the City of Whitehorse*, 2010 YKSC 27. I am unable to find any support for this contention in *Whiskey Flats Investment Corporation*. That decision addresses an application under Rule 54 of the *Yukon Rules of Court* for judicial review of a decision of the municipal council for the City of Whitehorse that required the petitioner to remove a free-standing sign on its property. That decision was quashed on the basis that the city Council of Whitehorse incorrectly interpreted s. 8.5.3 of the City's Zoning Bylaw, 2006-01.

[42] The applicants contend that the chambers judge erred by restricting the use and occupation of the land and buildings, despite the fact that North Star Adventures was found to be entitled to use the Property as its place of business. This appears to be just another way of saying that, because they were acting under a valid business license at the time the permanent injunction was granted, the injunction ought not to have issued. For the reasons I have given, I am unable to see any merit with respect to this submission.

[43] The applicants also contend that the chambers judge erred by failing to draw an adverse inference from the Town's alleged failure to disclose what they argued was crucial evidence of a permit issued to previous leaseholders of the Property. What the chambers judge wrote about this contention is found at para. 58 of his reasons:

> The [applicants] submitted that they attended at the Town Office to ask for documents from this registry and were advised that the registry does not exist. While that is unfortunate and may be the basis for a legal remedy in other circumstances, I fail to see how it is relevant to the question of whether there is evidence that the [applicants] are in breach of the Zoning Bylaw.

[44] I see no error on the part of the chambers judge in this ruling, and find no merit in the submission that the ruling offers any likelihood of success on the proposed appeal.

[45] The applicants further contend that, as the petition for the injunction refers to both of them as individuals as well as to their partnership, the injunction prevents not only their residence at the Property, but also the business activities of North Star Adventures. With respect, there is no merit in this contention. The injunction addresses only the residential use of the Property. Its terms are found at para. 62 of the chambers judge's reasons:

> I order that the [applicants] shall immediately discontinue their use and occupation of the property as a residence. Should the [applicants] wish to continue to reside on the property, either part-time or permanently, they will have to make an application to the Town for permission to do so as a discretionary accessory use under the Bylaw. In the absence of such an application and the Town's permission being granted, and in the absence of a change to the zoning in which the property is located, the [applicants] are prohibited from residing on the property.

[46] In the result, I am not persuaded that the applicants have established any ground for their appeal that offers any real likelihood of success.

e) The Interests of Justice

[47] In applications such as those brought by the applicants, the interests of justice are always an overriding factor. The applicants contend that this factor supports the granting of their applications. I am not persuaded that it does.

[48] The applicants contend that the fact that this Court historically sat in Whitehorse only once a year makes it almost impossible for self-represented litigants to comply with strict rules in respect to the form that must be followed in the prosecution of an appeal. The frequency with which the Court sits in Whitehorse has no bearing upon the ability of litigants, self-represented or not, to comply with the Rules. In any event, despite the accommodations that were offered to the applicants, there is, as I have discussed above, no compelling explanation for the delay in the prosecution of this appeal.

[49] The applicants contend that the Yukon *Court of Appeal Act* relies on the B.C. *Court of Appeal Rules* and that this is confusing. This contention is not entirely correct. Section 12 of the Yukon *Court of Appeal Act* only requires resort to the B.C. *Court of Appeal Rules* for matters not otherwise provided for by the Yukon *Act* or the Yukon Civil or Criminal Rules. More importantly, as I have discussed above at paras. 20–21 of these reasons, the applicants were not confused as to what they were obliged to do to prosecute their appeal.

[50] The remaining assertions by the applicants with respect to the interests of justice are that they have limited access to free legal advice, that they should not be held to the same standard as members of the Bar, that they were given insufficient time to prepare their case in the Court below, that Ms. Knapp's health issues warrant greater latitude for her in complying with the Rules, and that the applicants' case would have a greater prospect of success if she were given more time to prepare it.

[51] In my opinion, none of these submissions justify granting the orders sought by the applicants. Free legal advice is not an entitlement to civil litigants, nor is the absence of such advice the reason for the failure of the applicants to prosecute their appeal in any expeditious way.

[52] The applicants have not been held to the same standard as lawyers, either by the Town, or by the Court. There comes a time when the failure to comply with the Rules of Court warrants the placement of an appeal on the inactive list, as this appeal was, and once that occurs, the law expects a litigant whose appeal has been placed on that list to establish a good reason for reactivating the appeal. These applicants have failed to do so.

[53] The remainder of the applicants' assertions have been addressed and rejected above where the explanation for the delay is discussed.

[54] I conclude that the interests of justice do not warrant granting the orders sought by the applicants.

f) Costs

[55] The applicants contend that the chambers judge's order for costs should be set aside. That could only be done, if appropriate, by a division of the Court. To the extent that an appeal from the order for costs might be pursued, I see no merit in such an appeal.

[56] As the applications have failed, the Town is entitled to its costs of the application. The applicants' submission that they should recover special costs or costs on an increased scale for their application is dismissed.

Conclusion

[57] The applications of the applicants are dismissed.

The Honourable Mr. Justice Hinkson