COURT OF APPEAL OF YUKON

Citation: *Angerer v. Cuthbert*,
2018 YKCA 1

Date: 20180124
Docket: 17-YU815

Between:

Stefan Kudwik Angerer
Ursula Angerer
Leopold Selinger
Edeltraud Selinger
Gerry McGraw
Stevan Landfried

Respondents
(Plaintiffs)

And

Shelley R. Cuthbert

Appellant
(Defendant)

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

On appeal from: an order of the Supreme Court of Yukon, dated October 11, 2017 (*Angerer v. Cuthbert*, 2017 YKSC 54, Whitehorse Registry No.16-A0132)

Oral Reasons for Judgment

Appellant appearing In Person via video conference:	S. Cuthbert
Counsel for the Respondents via video conference:	G. Lang
Place and Date of Hearing:	Whitehorse, Yukon January 22, 2018
Place and Date of Judgment:	Whitehorse, Yukon January 24, 2018

Summary:

The appellant Ms. Cuthbert has filed an appeal from a judgment for nuisance made against her. The trial judge concluded that the noise from the appellant's dogs interfered with her neighbours' enjoyment of their respective properties. The respondents seek security for costs of the appeal. Ms. Cuthbert seeks a stay pending appeal of the trial order requiring her to reduce the number of dogs on her property. Held: Application for security for appeal costs adjourned; application for a stay allowed in part. The security for costs application is adjourned to permit the respondents to review the question whether a single judge sitting in chambers has jurisdiction to grant security for appeal costs. The stay application is allowed in part and the trial order is stayed on conditions pending appeal.

[1] **HUNTER J.A.**: On October 11, 2017, the trial judge in this matter found the appellant liable to several of her neighbours in nuisance. He held that the noise from dogs barking on the appellant's property was a substantial and non-trivial interference with their enjoyment of their respective properties which was unreasonable in all the circumstances. The trial judge's reasons are indexed at 2017 YKSC 54.

[2] The evidence at the trial was that Ms. Cuthbert, who operates a dog rescue business, had between 60 and 80 dogs on her property during the relevant period. After a four day trial, the trial judge concluded as follows:

> [130] I am satisfied on a balance of probabilities, meaning that it is more likely than not, that the plaintiffs have suffered a substantial interference with their enjoyment of their respective properties as a result of Ms. Cuthbert's dogs barking. All of the plaintiff witnesses residing near Ms. Cuthbert's property, as well as Ms. Middler, testified to their sleep being disturbed by the barking dogs and a general loss of enjoyment of outside activities such as barbecuing, gardening and entertaining.

[3] The trial judge concluded that the interference was unreasonable, and imposed an injunction on Ms. Cuthbert to address the noise coming from her property. The terms of the injunction prevented Ms. Cuthbert from keeping more than two dogs on her property at any time, with such dogs to be "reasonably kept inside between the hours of 10 p.m. and 7 a.m." To give Ms. Cuthbert time to adjust to these changed circumstances, the trial judge suspended the effect of the order until February 11, 2018.

[4] Ms. Cuthbert has appealed the trial judgment. Two interlocutory applications have been brought before me, as a single judge of this Court sitting in chambers. The respondents seek an order that Ms. Cuthbert post security for appeal costs. Ms. Cuthbert seeks a stay of the trial judgment limiting the number of dogs she is entitled to have on her property pending determination of her appeal.

Security for Appeal Costs

[5] The trial judgment was pronounced on October 11, 2017. Ms. Cuthbert filed a notice of appeal on November 6, 2017. Three days later, the respondents filed an application returnable December 13, 2017 for an order that Ms. Cuthbert post security for costs of this appeal. The application was to be made "to the presiding justice", in the usual manner of an interlocutory chambers application.

[6] On November 22, 2017, Ms. Cuthbert filed an application for an order to adjourn the December 13 court date. In support of her application, Ms. Cuthbert filed an affidavit stating that she was "in the process of retaining legal counsel".

[7] The application came on for hearing on November 28 before Justice Frankel sitting as a single judge in chambers. The adjournment was granted and Frankel J.A. ordered an interim stay of the appeal pending the hearing of the security for costs application. The application then came before me, sitting as a single judge in chambers, on January 22, 2018.

[8] The security for costs application is said to be made pursuant to s. 1 of the *Court of Appeal Act*, R.S.Y. 2002, c. 47. As a preliminary matter, I raised the question whether I had jurisdiction as a single judge of the Court to make an order for security for appeal costs.

[9] The *Court of Appeal Act*, which I will refer to as the *Yukon Act*, does not contain any reference to security for costs of an appeal. The powers of the Court are set out in s. 1 of the *Yukon Act* as follows:

> There shall be a Court of Appeal in the Yukon called the Court of Appeal which shall be a superior court of record and shall have the same powers, jurisdiction and authority in relation to matters arising in the Yukon possessed

> immediately before January 1, 1971 by the Court of Appeal for British Columbia in relation to matters arising in British Columbia in the exercise of its ordinary jurisdiction and, without restricting the generality of the foregoing, the Court of Appeal has jurisdiction and power to hear and determine
>
> > (a) all appeals or motions in the nature of appeals respecting judgments, orders or decisions of the Supreme Court or a judge thereof; and
> >
> > (b) all other petitions, motions, matters or things whatever that might lawfully be brought in England before a Divisional Court of the High Court of Justice or before the Court of Appeal on January 1, 1971.

[10] The powers, jurisdiction and authority "possessed immediately before January 1, 1971 by the Court of Appeal for British Columbia in relation to matters arising in British Columbia in the exercise of its ordinary jurisdiction" are to be found in the *Court of Appeal Act* in force in British Columbia as of December 31, 1970. I will refer to that Act as the *1970 British Columbia Act*. I note in passing that British Columbia's current *Court of Appeal Act*, R.S.B.C. 1996, c. 77, has been overhauled in a way that deals with the problem I am about to identify, but because of the statutory language of s. 1 of the *Yukon Act*, I must take my authority, at least initially, from the now repealed *1970 British Columbia Act.*

[11] The *1970 British Columbia Act* does not contain any authority for the Court of Appeal for British Columbia to order security for costs. Under the *1970 British Columbia Act*, security for costs was set by a judge of the court appealed from, up to a maximum of $200 (s. 31(1)). Thus, under the *1970 British Columbia Act*, I am satisfied that I do not have jurisdiction to make the order sought.

[12] Mr. Lang for the respondents points out, however, that the authority of this Court is also to be found in the jurisdiction of the Divisional Court of the High Court of Justice in England or the English Court of Appeal on January 1, 1971. Mr. Lang argues, and I think he is right, that the English Court of Appeal had the authority to order security for costs in 1970, pursuant to Order 59, Rule 10 of the English *Rules of the Supreme Court*. Therefore, it appears that this Court does have the authority to make such orders.

[13] That is not, however, the end of the jurisdictional tangle. This Court exercises its jurisdiction in divisions of three. Section 8 of the *Yukon Act* states that:

> 8 Three judges of the Court of Appeal constitute a quorum and may lawfully hold court.

[14] As a single judge of this Court, I do not have the jurisdiction of the Court. I have whatever jurisdiction is conferred upon me by statute. For example, s. 13 of the *Yukon Act* confers on me as a judge of the Court the authority to stay execution of the judgment appealed from. Similarly, s. 12.1(5) specifically authorizes a judge of the Court to make vexatious litigant orders. British Columbia's current *Court of Appeal Act* specifically sets out the powers of a single judge (see s. 10 and, in respect of security for costs, s. 24). The *Yukon Act* does not. Nor for that matter, do the Yukon *Court of Appeal Rules, 2005*.

[15] When I raised this issue with counsel, Mr. Lang requested an adjournment in order to consider the specific question of the jurisdiction of a single judge of this Court to order security for costs. Ms. Cuthbert was in agreement and I adjourned the application generally on January 22, 2018.

[16] After the hearing on this matter, Mr. Lang filed with this Court an excerpt from the *Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 Geo. 5), c. 49, and specifically s. 69, which states in relation to the English Court of Appeal that "any direction incidental thereto not involving the decision of the appeal may be given by a single judge of that court".

[17] While this provision solves the problem for judges of the English Court of Appeal, I am doubtful that it can confer powers on a judge of this Court. The reference to English practice in s. 1 of the *Yukon Act* confers jurisdiction on this Court, not the individual judges of this Court.

[18] As I have adjourned the respondents' application, I do not propose to make any further order in respect of this matter save one. On November 28, 2017, Frankel J.A. issued an interim stay of the appeal until the security for costs application was

heard. I would lift the stay so that Ms. Cuthbert can proceed to file the appeal materials, including her factum. If the security for costs application is set down again, and security for costs is ordered, it will be open to the respondents to apply for a further stay of the appeal until the security is posted. In all the circumstances of this case, I would encourage the parties to get on with the appeal so that it can heard at the May sitting of the Court in Whitehorse.

Stay of the Trial Order

[19] The second application before me is Ms. Cuthbert's application for a stay of the trial order requiring her to reduce the number of dogs on her property to two by February 11, 2018. That application I do have jurisdiction to hear, pursuant to s. 13 of the *Yukon Act*.

[20] The current situation is that the trial judge's order is scheduled to take effect February 11, 2018, four months after the trial judgment. On that date, absent a stay, Ms. Cuthbert will be in breach of the order if she has not reduced the number of dogs on her property to two. As of last week, more than three months after the trial judgment, she had reduced the number of dogs on her property to 55. On the present trajectory it seems clear that she will not be compliant with the trial order by February 11, 2018.

[21] In *Ross River Dena Council v. The Attorney General of Canada et al.,* 2009 YKCA 2, Justice Gower summarized the test to be applied in determining whether a stay should be issued pending appeal:

> [4] The test for a stay of execution of an order pending appeal is the three part test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, which was adopted by the Yukon Court of Appeal in *Gonder v. Velder Estate,* 2001 YKCA 4. Specifically, the onus is on the appellant to show:
>
> > 1. That there is some merit to the appeal, in the sense that there is a serious question to be determined;
> >
> > 2. That irreparable harm would be suffered by the applicant if the stay is refused; and

> 3. On balance, the inconvenience to the applicant if the stay is refused would be greater than the inconvenience to the respondent if the stay is granted.
>
> [5] Other general principles applicable to an application for a stay pending appeal include the following:
>
> 1. An order for a stay is discretionary: *Miller v. Loughead Ventures Ltd*. (1990), 70 D.L.R. 4th 160 (B.C.C.A.).
>
> 2. A successful plaintiff is entitled the fruits of its judgment and should not be deprived of them unless the interests of justice require that they be withheld: *Coburn v. Nagra*, 2001 BCCA 607, para. 12.
>
> 3. A stay order should only be granted where it is necessary to preserve the subject matter of the litigation, or to prevent irremediable damage, or where there are other special circumstances: *Peter Kiewit Sons Co. v. Perry*, 2006 BCCA 259, para. 12.
>
> 4. The judgment below is assumed to be correct and protection of the successful plaintiff is a precondition to granting a stay: *Gill v. Darbar*, 2003 BCCA 3.
>
> 5. The onus lies on the applicant to establish the right to a stay: *Re: Taylor* (1986), 4 B.C.L.R. (2d) 15 (C.A.), at para. 2.

[22] In addressing this test, Ms. Cuthbert has emphasized the low threshold for determining whether an appeal has merit, and the irreparable harm that would occur if some of the dogs must be euthanized. For the latter point, she relies upon the judgment of Justice Bennett in *Ulmer v. British Columbia Society for the Prevention of Cruelty to Animals*, 2010 BCCA 98. In *Ulmer*, Bennett J.A. did state that the prospect of a number of cats being euthanized met the irreparable harm test, and the respondents in this appeal do not disagree. However, notwithstanding that conclusion, Bennett J.A. denied the stay in *Ulmer* on the basis that the appeal did not meet the threshold test for merit. That is the hurdle Ms. Cuthbert must meet on this application.

[23] Ms. Cuthbert represented herself on this application, which made it more difficult to determine whether this appeal had any merit. The trial judgment is largely dependent on findings of fact made by the trial judge, and it has not been suggested that there was no evidence to support these findings.

[24] Ms. Cuthbert wishes to argue that the proceedings were unfair because the trial judge did not ensure that she understood the proceedings initiated against her

and did not invite her to make submissions on the proper remedy to be granted. She also argues that there are "serious problems with the trial judge's treatment of the evidence", without further elaboration. Finally, she wishes to argue that the remedy was "completely out of proportion to what is necessary to ensure that the nuisance is abated."

[25] It may be that by the time this appeal is perfected, one of these arguments will be seen to have some merit, although without the assistance of counsel I consider that most unlikely. At the present time, however, I can see no merit in this appeal as it relates to the finding of nuisance and the remedy of an injunction. The merits threshold is a low one, but as in *Ulmer*, I am of the view that the appeal does not meet this low threshold. Accordingly, I am not prepared to stay the trial judgment pending appeal, at least not in its entirety.

[26] Having said that, I do not consider it to be in the interests of justice to dismiss the stay application completely. During argument, Mr. Lang advised that his clients would not oppose a partial stay if it were based on a real effort by Ms. Cuthbert to respond to the nuisance finding and begin in a serious way to reduce the number of dogs on the property and thereby reduce the volume of barking that has interfered with the respondents' enjoyment of their properties (and their sleep).

[27] The respondents have provided evidence that the Yukon Government operates a Voluntary Dog Surrender program whereby dogs can be surrendered to the Animal Health Unit free of charge for adoption through registered humane societies. If the animals are deemed unsafe, they will be euthanized. The Animal Health Unit can only take up to 10 animals at one time. The respondents propose that as a condition of any stay, Ms. Cuthbert be required to transfer up to ten dogs per month to the Animal Health Unit, until the appeal has been heard or the remaining animals have been reduced to ten in number.

[28] In this interim period, the respondents also ask that the remaining dogs on the property be housed indoors at night to mitigate the effect of barking dogs on their sleep. Finally, they ask that Ms. Cuthbert stop accepting new dogs until the appeal

has been heard. Ms. Cuthbert has been adding dogs to her shelter since the trial judgment pursuant to arrangements she has with the local Carcross and Tagish First Nations.

[29] Ms. Cuthbert has advised that she would be willing to transfer her dogs to the Animal Health Unit provided that they were returned to her rather than be euthanized. She has advised that seven of the dogs cannot be housed indoors at night because of issues particular to them. She also advised that she has commitments with the Carcross and Tagish First Nations to catch and retain stray dogs.

[30] In my view, the proposal by the respondents is reasonable in the circumstances. I appreciate that it is not acceptable to Ms. Cuthbert in all its aspects, but it is the only basis on which I am prepared to order a stay of the trial judgment. In the absence of a stay, it seems certain that Ms. Cuthbert will be in breach of the court order on February 11, 2018.

[31] Accordingly, I am prepared to grant a partial stay of the trial judgment pending appeal on the following conditions:

> (i) Commencing February 1, 2018, the appellant shall surrender ten dogs to the Yukon Government's Animal Health Unit on or by the 15th day of each month, including February, until such time that the number of dogs on the property is reduced to ten dogs;
>
> (ii) The number of dogs surrendered is subject to variance as dictated by the Yukon Government's Animal Health Unit in a given month;
>
> (iii) In the event that the Yukon Government's Animal Health Unit ceases to accept surrendered dogs, either party may apply to vary this order;
>
> (iv) The appellant shall, as of February 15, 2018, keep all dogs reasonably inside between the hours of 10:00 p.m. and 7:00 a.m.; and

(v) The appellant shall cease to accept dogs until such time that she has fewer than ten dogs on the property, and thereafter is only permitted to keep a maximum of ten dogs on the property.

[32] If Ms. Cuthbert does not abide by these terms, the respondents have liberty to apply to rescind the stay.

"The Honourable Mr. Justice Hunter"