Civil Resolution Tribunal

Date Issued: May 12, 2023

Files: SC-2022-005212 and SC-CC-2022-008369

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Knowlan v. Zenuk*, 2023 BCCRT 395

B E T W E E N :

PATRICK EDWARD KNOWLAN and SHAN HE

APPLICANTS

A N D :

ALAN ZENUK

RESPONDENT

A N D :

PATRICK EDWARD KNOWLAN and SHAN HE

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. These 2 linked small claims disputes are about alleged noise nuisance. I find they are a claim and a counterclaim, so I have issued a single decision for both disputes.

2. The applicants (and counterclaim respondents), Patrick Edward Knowlan and Shan He, live in unit 102 in a building that is part of a strata corporation (strata). The respondent (and counterclaim applicant), Alan Zenuk, lives in unit 203 above the applicants.

3. The applicants say the respondent has been making unreasonable noise in unit 203 since November 2021. They claim $5,000 in damages for the loss of quiet enjoyment of their home and for the respondent's refusal to cooperate with the strata's investigation. Mr. Knowlan represents the applicants.

4. The respondent denies making the noise. He counterclaims $5,000 for stress and anxiety he says resulted from the applicants' wrongful accusations. The respondent represents himself.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination

of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

7. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

9. Both parties submitted evidence after the CRT's deadline. Both had the opportunity to respond to the other's late evidence. Bearing in mind the CRT's flexible mandate, I admit the late evidence and have considered it in this decision.

ISSUES

10. The issues in this dispute are:

    a. Is the respondent liable in nuisance for alleged noise from unit 203?

    b. If so, what remedy is appropriate?

    c. Are the applicants liable for a "wrongful accusation" against the respondent, and if so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

11. As the applicants in this civil proceeding, Mr. Knowlan and Ms. He must prove their claims on a balance of probabilities, meaning more likely than not. Mr. Zenuk must

prove his counterclaims to the same standard. While I have considered all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

12. The parties live in a 24-unit, 4-storey building with "concrete post and beam" construction. The parties own their respective strata lots. The respondent and his spouse have lived above the applicants since early 2010. The units have the same floor plan, and the applicants' unit 102 is directly below the respondent's unit 203. The primary bedrooms in both units are in the southeast corners. Unit 203's floors are polished concrete. None of this is disputed.

13. The applicants say that in November 2021, they began hearing noise coming from above them at night. They describe the noise as a "series of intermittent taps with what sounds like a glass or steel ball or disc dropped a few cm" onto unit 203's bare concrete floor, or alternatively like a hard object hitting and bouncing on the floor, or a "wobbling, spinning, coin-like disk."

14. By January 2022 the noise had become more frequent. By March, the applicants were convinced the noise was coming through their bedroom ceiling from unit 203. On March 29, Mr. Knowlan emailed the respondent indicating that he had pinpointed the noise within 3 feet and was certain it was coming from some hard object contacting the floor in the respondent's bedroom. He asked the respondent to figure out what was causing the noise, and to stop it. The respondent was "mystified" as to what could be causing the noise and asked Mr. Knowlan to stop the accusations. The respondent said he was starting to feel harassed.

15. In the weeks the followed, the applicants made noise complaints to the strata. The strata's bylaws prohibit residents from causing a nuisance, causing unreasonable noise, or unreasonably interfering with a person's right to use and enjoy their strata lot. The applicants provided dozens of noise recordings to the strata council. The strata council attempted to investigate. The applicants say the respondent has refused to cooperate with the strata's investigation or provide access to his strata lot. I return to this issue below.

16. At the same time, the respondent complained to the strata that Mr. Knowlan was bullying him, harassing him, and invading his privacy. Mr. Knowlan admits he banged on the ceiling once, in response to hearing noise from his ceiling.

17. The applicants logged the number of "strikes" sounding out from above and say that they doubled in September 2022, then doubled again in October 2022. They say they documented 38,621 strikes in the last 3 months of 2022, an average of 316 strikes per day. They describe the noise in late 2022 as long sequences of Morse-code-like tapping.

18. In the next section I consider whether the noise the applicants have experienced constitutes a nuisance. Then, I consider whether the noise comes from unit 203.

Is the noise a nuisance?

19. In the strata context, a nuisance is a substantial and unreasonable interference with an owner's use and enjoyment of their property (see *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502). The test for nuisance depends on several factors, such as its nature, severity, duration, and frequency (see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64). The test is objective and is measured with reference to a reasonable person occupying the premises (see *Sauve v. McKeage et al*., 2006 BCSC 781). The objective requirement guards against those with abnormal sensitivity or unreasonable expectations (see *Sutherland v. Canada (Attorney General)*, 2001 BCSC 1024).

20. The noise heard in unit 102 is documented by the applicants' daily noise logs, time-stamped noise recordings submitted to strata council, emailed complaints to strata council, the strata council's investigative findings, the applicants' noise level measurements, and witness statements.

21. The applicants provided 5 signed witness statements. Three of the witnesses are current or former strata council members who attended unit 102 to hear the noise. In general, the witnesses consistently heard loud rapping or banging coming from unit 102's bedroom ceiling. Many witnesses said they could pinpoint the noise to a specific

area of the ceiling, within a few feet. They generally said it lasted for a few minutes and was repetitive but irregular or inconsistent.

22. The applicants recorded noise levels using an iphone app developed by the National Institute for Occupational Safety & Health. The respondent does not challenge the applicants' noise measurements, and I accept them. The average peak impulse noise level recorded in more than 110 noise samples was 58.2 dBA (decibels weighted for human hearing). Although the noise only persists for several seconds, it often recurs several times over the next few minutes.

23. The applicants say the noise they experience is about 30 dBA higher than the background noise level in their primary bedroom. They say the noise exceeds the recommendations in the "Guidelines for Community Noise" published by the World Health Organization (WHO). In *Suzuki v. Munroe*, 2009 BCSC 1403, the court referred to those same guidelines as evidence of objective standards. The guidelines say that for good sleep, individual noise events should not exceed 45 dBA in a bedroom. The applicants' noise logs document noise events exceeding 45 dBA on most nights at least once between 10 pm and 1 am. I find noise at that volume and time of night would likely disturb an ordinary person's sleep. The applicants report that their habitual 10 pm bedtime was either delayed, or they were awakened, on 63% of the nights in the last 9 months of 2022. Mr. Knowlan says it wakes him even though he wears industrial earplugs to bed.

24. As noted, the frequency of the disturbances has increased over time, and the applicants recently documented an average of 316 strikes per day. I find the strikes are loud and disruptive. The noise is loudest in the applicants' bedroom, which makes them particularly disruptive given their timing and their inconsistent nature. I find a reasonable person living in unit 102 would find this degree of noise disturbance intolerable.

25. In summary, I find the noise the applicants experienced was sufficiently frequent, intense, and disruptive that it was a substantial and unreasonable interference in their enjoyment of their strata lot.

Is the respondent responsible for the noise nuisance?

26. As noted, the respondent says he is not doing anything to cause the noise. He says it must be coming from somewhere outside his strata lot. He suggests the noise comes from building mechanical equipment.

27. The strata council tested the mechanical equipment hypothesis by shutting down the building's heat, cooling and hot water circulation systems for 10 nights in June 2022. The applicants' noise logs show that noise continued with roughly the same frequency as before the shut down. The respondent says the applicants' complaints "dropped off almost entirely" but the records indicate the applicants made 3 complaints in that period and 7 complaints in May 2022, so I find the frequency of complaints was about the same.

28. The respondent submitted an email from Gordon Anderson, a "recording engineer" of 40 years with "personal experience with radiant heating and concrete buildings." Gordon Anderson listened to a recording of the noise, presumably made by the applicants because the respondent cannot hear the noise in unit 203. Gordon Anderson said their opinion is that the noise originates with a circulation pump with a loose pipe or broken support backet. They said the "strange nature" of sound transmission in concrete buildings makes it difficult to determine a sound's location or direction.

29. The applicants challenge Gordon Anderson's qualifications and overall evidence. The say recording engineers work in recording studios and are not qualified to provide opinions about noise in concrete buildings. I agree that it is not clear that Gordon Anderson's experience as a recording engineer qualifies him to give an opinion about sound transmission in a concrete building. I also agree that Gordon Anderson's personal, in other words non-professional, experience with concrete buildings, without further details, does not qualify them to give an expert opinion about the source of a noise in a concrete building. Further, they do not explain how they reached their conclusion about the noise's source. For these reasons, I give Gordon Anderson's evidence little weight.

30. The strata's building maintenance contractor, RPH Services Inc., has done quarterly maintenance checks since 2010. A March 2, 2023 email from RPH indicates that it tested pumps, brackets, and anything that could cause noise throughout the building. RPH said the pumps operate normally and there are no loose "fixings or brackets that could cause noise when the pumps start up and stop." RPH said the mechanical system in general has some issues but is not likely to produce disruptive noise. I give this evidence significant weight because RPH is familiar with the strata's mechanical systems. I also agree that if the noise came from building mechanical equipment, others in the building would likely hear it, which is undisputedly not the case.

31. Given the multiple witnesses who were able to pinpoint the noise as coming from unit 102's bedroom ceiling, the absence of any evidence of anything mechanical that could be making noise between unit 102's ceiling and unit 203's floor, and the evidence ruling out mechanical system causes, I find it more likely than not that the noise originates in unit 203.

32. I acknowledge that the respondent insists he is not making the noise. He submitted travel records showing he and his spouse were out of the country from October 3 to 11, 2022. The applicants still documented noise during that time, at only slightly lower frequency. The respondent says this is conclusive evidence that he is not the source of the noise. However, the respondent does not say his strata lot was unoccupied at the time. More importantly, the applicants' claim is that there is an unreasonable noise coming from unit 203, not that the respondent himself is making the noise. Even if I accept that the respondent is not intentionally making noise and does not know the noise's source, that is not determinative. The law holds that if a person does not create a nuisance, ignorance of the facts constituting the nuisance is not an excuse if they ought to have discovered the facts by use of reasonable care. Moreover, once a person is made aware of a nuisance, they must take all reasonable steps to stop the nuisance (see *Wayen Diners Ltd. v. Hong Yick Tong Ltd*., 1987 CanLII 2700 (BC SC).

33. The respondent has, without explanation, refused to cooperate with the strata's attempts to determine the source of the noise. This is clear from the strata's December 29, 2022 letter to the respondent. The letter indicates that the respondent prevented strata council from entering unit 203 to investigate the noise complaint, arguing it is "impractical and invasive." I find a reasonable person in the respondent's situation would have allowed the strata corporation to investigate, including by having council members attend unit 203 when the noise was happening to try to pinpoint the noise's source. I find the respondent has obstructed the strata's investigation attempts. I also find he refused to take reasonable steps to work with the applicants to identify the noise's source since being made aware of it on March 29, 2022.

34. I acknowledge the respondent's submission that his spouse allowed the strata's mechanical contractor into unit 203 three times. However, he does not say when these visits happened or for whether the purpose was to identify the noise's source. I find this assertion, without more details, insufficient to show that the respondent took reasonable steps to determine the noise's source. This means that the respondent cannot rely on ignorance of the noise's source as an excuse. The respondent's continuing ignorance was due to his omission to use reasonable care to discover the facts (see *The Owners, Strata Plan LMS 3529 v. Ng*, 2016 BCSC 2462). I therefore find the respondent is liable for the noise nuisance.

What remedy is appropriate?

35. In the Dispute Notice, the applicants said they were seeking $5,000 in damages for chronic sleep disturbance, loss of peace, privacy and enjoyment of their property, and for the respondent's non-cooperation with the strata's investigation. In submissions, the applicants say they seek $4,500 in nuisance damages and $500 in punitive damages for the respondent's failure to cooperate with the strata's investigation.

36. The applicants say they can no longer retire at their customary 10 pm bedtime because it is impossible to sleep anticipating the "near-nightly barrage" of noise. I accept that the applicants have suffered and continue to suffer a significant loss of quiet enjoyment of their strata lot as a direct result of the nuisance. That said, the

noise is most frequent between 10 pm and midnight, and "almost never" occurs between 1 am and 7 am, so the applicants are at least able to have 6 hours of uninterrupted sleep.

37. In *Suzuki*, the court awarded $6,000 in damages for air conditioning noise in the summer months over 3 years. The court said damages would have been "significantly higher" if it were not also granting an injunction against using the air conditioner at certain times. The CRT does not have authority to grant injunctions in its small claims jurisdiction, and the applicants have not asked for one. That suggests the damages award should be higher, because the noise will likely continue unless an injunctive order is sought and obtained by the applicants or the strata.

38. That said, in *Suzuki*, the Munroes provided medical evidence of a resulting chronic stress disorder. There is no medical evidence here and limited evidence about physiological or psychological impacts. The applicants say they have suspended or modified some of their hobbies and daily activities. I find the impact is less significant than the impact in *Suzuki*, but is year-round. The respondent was made aware of the noise no later than March 29, 2022 and the noise has continued through submissions in February 2023, increasing in frequency. I put particular weight on the applicants' evidence, supported by noise logs, that noise disturbed their sleep on 63% of the nights in that period. Taking into account all the above, I award the applicants $4,500 in nuisance damages.

39. As for punitive damages, the applicants say the respondent has cruelly refused to give up a few hours of privacy and knowingly allowed them to suffer nearly a year of nuisance. The Supreme Court of Canada has said the purpose of punitive damages is to punish extreme conduct worthy of condemnation, and can only be awarded to punish harsh, vindictive, reprehensible and malicious behaviour (see *Vorvis v. ICBC*, [1989] 1 SCR 1085). I find the respondent's conduct, while unneighbourly, did not rise to the level of reprehensible or malicious. I decline to award punitive damages.

Counterclaim

40. In the counterclaim, the respondent seeks $5,000 for the "wrongful accusation of noise," causing him stress and anxiety. I find he likely intends to rely on the tort of intentional infliction of mental suffering. This would require him to prove that the applicants engaged in flagrant or outrageous conduct that was calculated to produce harm, and that he suffered in a visible or provable way (see *Mission Group Homes Ltd. v Braam,* 2017 BCSC 1281).

41. I find the applicants did not engage in flagrant or outrageous conduct. I find the steps they took were measured and justified given the increasing noise disturbance. Contacting the respondent by email and making complaints to the strata council were reasonable steps and not calculated to produce harm.

42. As for provable suffering, the respondent relies on a short note from Dr. Tabassi, his physician for the last 5 years. Dr. Tabassi said the respondent is dealing with mental health problems and receiving treatment. The symptoms have worsened in the last year, and the respondent believes this to be for unstated "external reasons." I find this is insufficient to establish any causal connection between the respondent's anxiety and the applicants' conduct.

43. For all these reasons, I dismiss the respondent's counterclaim.

Interest, CRT fees and expenses

44. The *Court Order Interest Act* applies to the CRT. It says interest must be added to a from the date the cause of action arose. In the circumstances, I find the applicants are entitled to pre-judgment interest on the $4,500 damages from August 1, 2022, the date they applied to the CRT, to the date of this decision. This equals $103.94.

45. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. The applicants were generally successful, so I find they are entitled to reimbursement of $175 in paid CRT fees. The applicants did not claim any dispute-related expenses.

Because he was unsuccessful, I dismiss the respondent's claim for reimbursement of $125 in CRT fees and $50.66 for the doctor's letter.

ORDERS

46. Within 30 days of the date of this order, I order the respondent to pay the applicants a total of $4,778.94, broken down as follows:

    d. $4,500.00 in damages,

    e. $103.94 in pre-judgment interest under the *Court Order Interest Act*, and

    f. $175.00 in CRT fees.

47. The applicants are entitled to post-judgment interest, as applicable.

48. I dismiss the respondent's counterclaims.

49. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Micah Carmody, Tribunal Member