Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Chen v. The Owners, Strata Plan NW 2265*, 2017 BCCRT 113

B E T W E E N :

Miao Fen Chen

APPLICANT

A N D :

The Owners, Strata Plan NW 2265

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. The applicant Miao Fen Chen (owner) owns strata lot 135, also known as unit 104, in the respondent strata corporation The Owners, Strata Plan NW 2265 (strata). This dispute is about two common property hot tub pumps (collectively, the

Pumps) that the owner alleges is causing excessive noise in unit 104. The owner is self-represented and the strata is represented by a council member.

JURISDICTION AND PROCEDURE

2. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness. The tribunal also recognizes any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

3. The tribunal 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 tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I heard this dispute through written submissions because I find there are no significant credibility issues or other reasons that might require an oral hearing.

5. Under section 48.1 of the Act, in resolving this dispute the tribunal may make one or more of the following orders:

   a) order a party to do something;

   b) order a party to refrain from doing something;

   c) order a party to pay money.

6. Section 48.1(2) of the Act is substantially similar to section 164 of the *Strata Property Act* (SPA) and addresses remedies for significant unfairness in strata property disputes. Section 48.1(2) provides that the tribunal has discretion to make an order directed at the strata, the council or a person who holds 50% or more of

the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.

ISSUES

7. These are the issues in this dispute:

   a. Has the strata conducted an appropriate investigation of the owner's noise complaints about the Pumps?

   b. Should there be an order that the strata stop the Pumps from causing unreasonable noise from entering the owner's strata lot?

   c. Should the strata pay the owner $10,000, or some other sum, for her loss of enjoyment of her strata lot over a number of years?

   d. Should the owner be reimbursed $225 she paid in tribunal fees?

POSITION OF THE PARTIES

8. The owner says she has regularly complained about the hot tub noise since she bought unit 104 in October 2012. The owner says the strata's initial April 2014 engineering report from BAP Acoustics Ltd. (BAP) concluded the noise in unit 104 was not suitable for residential dwelling, but that the strata delayed further investigations only to then unreasonably rely upon an April 2016 report of BKL Consultants (BKL) to conclude it need not take any further action. The owner says BKL failed to consider the tonal differences that were found significant by BAP. The owner says that the strata's position is significantly unfair to her as she still suffers from unreasonable noise from the Pumps, which has severely impacted her sleep and overall health.

9. The strata says it has spent over $12,000.00 trying to accommodate the owner's noise concerns. The hot tub is maintained regularly. The strata says the owner knowingly purchased unit 104 located over the hot tub mechanical room, and prior occupants of unit 104 had not complained about noise. The strata says it has met

its repair and maintenance obligations and that given BKL finds the sounds are within acceptable limits, the owner's subjective noise complaints cannot require the strata to spend further money to accommodate her.

EVIDENCE & FINDINGS

10. While I have read all of the material provided, I have only commented below on the evidence and submissions necessary for this decision. That said, given the owner's claim for $10,000.00 in damages, I have addressed in greater detail the owner's numerous complaints and the strata's responses to them.

11. The strata has 238 strata lots. It is undisputed that upon purchase of unit 104 the owner quickly brought to the strata's attention there was a noise issue related to the Pumps. The noise is caused by 2 pumps: the circulation pump and the jet pump which are both located in the mechanical room directly below unit 104. The owner describes the Pumps' noise as like a refrigerator, except louder. The owner says the circulation Pump is a constant noise all day and night. The jet Pump activates when someone is using the hot tub, which therefore occurs off and on during the day during the hot tub's operation hours of 7 a.m. to 10 p.m.

12. In November 2012, Ashton Mechanical Ltd. (Ashton) wrote the strata about the owner's noise complaint and said the hot tub required a pipe work alteration and the addition of flexible pipe couplers to stop the noise from resonating through the concrete. The quote was just under $2,000.00. In advising the owner of Ashton's quote, the strata said that "noise complaints are subjective", that strata living is not "sound-proof" and it would be expected that some noise transference is normal. The owner requested a permanent solution, noting that the noise had seriously disrupted her sleep schedule and other daily activities.

13. In December 2012, the strata advised the owner that it would not be proceeding with Ashton's quote because there was "no guarantee of success" and that alterations and maintenance had been performed to ensure the hot tub was

running properly. The strata reiterated that the owner's noise concerns were subjective. The owner requested that a noise engineer measure the noise.

14. In February 2013, the strata received a quote from Knights Insulation Ltd. for building modifications. The strata concluded alterations were not feasible as they would compromise service lines within the building, such as sprinkler and electrical lines.

15. The owner requested a council hearing and on June 12, 2013 the strata wrote she would be given 5 minutes at the start of a July 2, 2013 meeting, and that before the meeting a council member would inspect unit 104. It is unclear what, if anything, came from the strata's inspection.

16. On July 2, 2013, a representative for the owner again complained of ongoing "24/7" "low intensity noise" and provided the strata with reports about the associated harms of such noise, obtained from the public library. The letter noted the owner's doctor had advised her to eliminate the noise and that she had been prescribed sleeping pills.

17. On July 4, 2013, the strata wrote the owner noting that her flooring was not part of the building's original construction, and that the strata would not consider any other noise mitigating alterations until the owner had restored unit 104 to its original condition, which had included carpet.

18. On August 31, 2013, the owner disputed her responsibility for restoring the flooring to an original condition with carpet. On September 10, 2013, the strata reiterated its position. However, on September 17, 2013, the owner wrote the strata asking about certain measures to limit the Pumps' noise, to inquire further about the flooring issue and whether the noise would continue in the tiled areas even if she did install carpeting.

19. In October 2013, the strata requested a legal opinion about its obligations to address the owner's noise complaints. A later-referenced November 8, 2013 legal opinion is not before me.

20. On November 28, 2013, the strata did emergency repairs on the hot tub and its Pumps were turned off. The owner advised the strata that during that period, there was no noise and she had never had such a good sleep since she moved into unit 104.

21. On December 16, 2013, the owner wrote the strata asking if they would consider moving the Pump motors, noting that the hot tub was now noisier than it was before the emergency repairs.

22. I turn now to the heart of the dispute, namely the noise engineering assessments.

23. In January 2014, the strata hired BAP to measure the noise levels in the owner's unit, and I pause to note it is not entirely clear to me which bedroom is used by the owner, but nothing turns on this as there is no suggestion the owner should not be entitled to have both bedrooms functional. In BAP's April 7, 2014 report, they wrote (my bold emphasis added):

    a. Measurements were taken with circulation Pump on and jet Pump off, both Pumps on, and all Pumps off.

        i. In the living room: all Pumps off the dBA was 24 but was 31 with both Pumps on and 29 with the circulation Pump on and jet Pump off.

        ii. In "bedroom 1": all Pumps off the dBA was 24, but was 33 with both Pumps on and 30 with the circulation Pump on and jet Pump off.

        iii. In "bedroom 2: all Pumps off the dBA was 27, but was 29 with both Pumps on and 27 with the circulation Pump on and jet Pump off.

    b. The results showed a "significant decrease (up to 7dBA)" in the sound level when the Pumps are off. This demonstrated that the noise from the Pumps was a "significant contributor" to the ambient noise in unit 104.

c. **Based on a graph in the report, the noise increased by 2 to 3 dBA when the jet Pump was turned on in addition to the circulation Pump** (3 dBA difference in “bedroom 1”).

d. Noise containing “strong tonal components”, such as that measured in unit 104, is often perceived as more annoying than non-tonal noise such as road traffic noise. The spectral analysis of the **tonal noise showed that a 350Hz tone exceeded the ambient noise environment and the “human threshold of hearing by 24dB**”. Based on the graph in the report, the problematic 350Hz tone was at about 33dBA.

e. **The level of noise in unit 104 resulting from the Pumps “is unsuited for a residential dwelling**”.

24. On June 11, 2014, BAP sent the strata a report after a 2nd noise assessment in unit 104 on June 2, 2014. The purpose of this report was to address BAP’s findings after its June 2, 2014 attendance in the hot tub mechanical room to identify the primary source paths from the hot tub circulation Pump to unit 104. At this time, BAP mistakenly thought that the jet Pump had been taken out of use, rather than continuing to operate on user command. In this June 11, 2014 report, BAP wrote:

a. Vibration noise from the circulation Pump travels to unit 104 via the cold and hot water supply lines as well through the concrete floor and walls, with the cold water line being the primary source.

b. Replacement of the water lines with flexible braided hoses “would significantly reduce the level of the 350Hz tone” but “may not necessarily guarantee its inaudibility”. This option is a cost-effective solution and may prove sufficient enough to alleviate the noise problem.

c. Additional mitigation work would involve the vibration isolation of pipes within unit 104 from supporting walls or the floor, but due to the associated high costs

BAP recommended re-measuring the noise after the flexible hoses replaced the existing water lines.

25. In September 2014, the strata gave the owner a "Work Order" from Ashton following the inspection of the noise in her unit. Ashton identified 2 separate noises and causes: the "24/7" circulation Pump noise, and, the jet Pump noise when the hot tub spa turned on.

26. In its September 2014 Work Order, Ashton wrote that the options "to repair" were:

    a. to move the Pump to a "totally different location", which would be "quite expensive",

    b. shut down the pool and hot tub and close off the area, which was not recommended due to the widespread use of the facilities,

    c. replace both Pumps, but this might not fix the issue as all pumps make noise,

    d. try to soundproof unit 104, but this might not fix the issue,

    e. ask the owner to sleep with earplugs,

    f. ask the owner to play background noise to drown out the Pumps' noise, and

    g. soundproof the room holding the Pumps, which still might not fix the issue.

27. I do not place any weight on Ashton's recommended options beyond those related to plumbing and the Pumps. It is also unclear why Ashton was offering these various recommendations, given BAP had already provided recommendations.

28. Thereafter, the owner continued to regularly write to the strata about the ongoing noise from the Pumps. On September 23, 2014, she wrote that recent work by Ashton (what that exactly was is not readily apparent to me) did not resolve the problem, as while some vibrations may have reduced, the noise did not. She asked that the Pumps be moved outside of the pump room, "up against the wall facing the pool".

29. In an October 30, 2014 legal opinion, the strata's counsel referenced their earlier November 8, 2013 letter that counsel noted had set out the strata's general duties as to repair and maintenance, noting that nothing had changed. The counsel wrote that a 2014 decision from Alberta had emphasized the strata's obligation to investigate potential deficiencies. The counsel wrote that shutting down the hot tub would require approval of the owners by a ¾ vote under section 71 of the SPA. The counsel also wrote that the strata should undertake the acoustical testing recommended by BAP in its June 2014 report. The counsel wrote that the owner was entitled to not be subjected to "intolerable" noise, but she was also not entitled to complete silence, noting that it must be recognized that she bought unit 104 knowing it was adjacent to the hot tub. The counsel wrote the strata's obligation to repair and maintain is one of acting reasonably. If the noise level was not, on an objective basis, intolerable, then the strata has arguably met its duty.

30. I agree that the strata's counsel's October 30, 2014 assessment is generally the appropriate analysis. The question here remains whether the evidence indicates the noise levels in unit 104 were objectively unreasonable. This in turn requires a critical assessment of the various expert reports before me, as discussed further below.

31. In a November 27, 2014 report following a November 12, 2014 re-assessment of noise in unit 104, BAP wrote (my bold emphasis added):

    a. BAP's June 2014 report had focused only on the circulation Pump, as it has failed to understand that the jet Pump was in fact still in use upon user command.

    b. The cold water supply hoses had since been replaced with the flexible braided hoses as per its recommendation, and the resulting vibration in the circulation Pump was attenuated significantly.

c. **Repeat noise measurements were taken, with the circulation Pump noise having reduced by 8dB at 350Hz**. The resulting noise "would be perceived as being nearly half as loud" as before the introduction of the flexible hoses.

d. During the most recent site visit, **noise measurements were also taken during the operation of the jet Pump, which were unchanged since its original April 2, 2014 survey**.

e. Under "Phase 2 Recommendation", to further mitigate noise BAP recommended mounting the Pumps on boards and neoprene (pads) and to install flexible PVC coupling at certain identified locations.

32. The owner followed up again about the Pumps' noise in December 2014 and the strata relayed BAP's findings.

33. On December 16, 2014, the strata received a further legal opinion. The counsel noted that while BAP had found the circulation Pump noise had reduced significantly, the jet Pump noise was unchanged. The counsel wrote that "Presumably the statement that the noise level is unsuitable holds true in relation to not only the circulation pump but also the operation of the jet pump." Thus, the counsel concluded that the strata remained obligated to address the unacceptable level of noise created by the jet Pump. For the same reasons, I agree. The counsel wrote that in BAP's most recent letter (the November 27, 2014 report) it had set out a relatively cost efficient solution, which the counsel recommended. **The counsel wrote that if the strata received further complaints from the owner, then it may need to assess the noise yet again as to whether or not it has been brought within acceptable standards** (my bold emphasis added).

34. On January 5, 2015, the strata sent the owner BAP's reports dated June 11, 2014 and November 27, 2014. The strata stated that one recommendation was done by Ashton in August 2014 (the flexible hoses). The "Phase 2 Recommendations" in the November 2014 report "are in progress".

35. In February 2015, the strata installed “pads” to minimize the noise from the Pumps, as per BAP’s recommendation in November 2014. It is not clear from the evidence before me whether the strata installed the flexible couplings also recommended by BAP.

36. On April 26, 2015, the owner’s son wrote that the owner was still out of the country, but that he wanted to advise that the circulation Pump noise had “gone down significantly”, but was still “somewhat noticeable”. However, the jet Pump noise had not changed at all and was still as loud as previously. The owner’s son asked what could be done to bring the jet Pump noise down to the current level of the circulation Pump.

37. Thus, by February 2015 the circulation Pump noise may have been addressed, but there was no noise testing done to re-assess. Further, there was the ongoing issue of the jet Pump noise and whether it was unreasonable.

38. On May 8, 2015, the strata wrote the owner and summarized the efforts it had made to date to mitigate the noise coming from the Pumps since her initial complaint, totaling $10,239.39. The strata wrote that the owner must have known her unit 104 was adjacent to the hot tub when she bought it, and the strata felt its efforts detailed below had met the strata’s obligations, noting again the removal of the carpet may have contributed to the noise problem. The strata listed its noise mitigation efforts, and asked the owner to provide a list of her own efforts within unit 104, before the strata would make any further expenditure.

39. On June 2, 2015, the owner wrote the strata that a previous owner had removed the carpet and that in any event experts had advised her that carpet only reduces noise from above to below, not from below to above. The owner asked the strata to reduce the sound of the jet Pump, and that she was willing to pay “the repair fees”. While I find the owner had no such obligation to pay those repair fees, I find the fact that she made the offer is some evidence of the impact the ongoing noise was having upon her.

40. On July 27, 2015, the strata wrote the owner reiterating the list of its efforts, adding the BAP inspections, and noted that the jet Pump noise was limited to 7 a.m. to 10 p.m. and thus the strata would not be proceeding with any further alterations. The strata has not provided an explanation as to why it apparently ignored the December 16, 2014 advice of its legal counsel.

41. On August 22, 2015, the owner wrote the strata that she had decided to install carpeting in unit 104, at her own expense, and asked for specifications. In this letter, the owner proposed a variety of solutions that would cost less than $1,000.00, namely completing BAP's recommendations and repairing or replacing the bearings, motors and pumps. If those actions failed to solve the noise problem, the owner wrote the strata should consider moving the Pumps outside the pump room, or, taking the hot tub permanently out of service.

42. In October 2015, the strata received a further legal opinion in response to a September 14, 2015 email from the strata. The counsel noted that the installation of the pads, as recommended by BAP, had according to the owner made no difference to the jet Pump noise. The counsel also noted the owner complained that the circulation Pump noise had returned, as loud as ever. It is not clear to me what exactly caused the circulation Pump noise to return after February 2015, but the hot tub did undergo alterations in March and April 2015. The counsel wrote that in order to determine whether the strata was required to do anything further, it must conduct a further acoustical test. In short, if BAP advised the noise levels were reasonable for a residential dwelling, then the strata will have met its obligations. However, counsel wrote that **if BAP's further testing concluded that the noise levels remained unsuitable then the strata would need to assess what further steps can and should be taken**. I agree, for the same reasons, as discussed below. I also note the counsel warned the strata it ran the risk of an order that the hot tub could be shut down if the noise continued at unreasonable levels.

43. On January 13, 2016, the strata responded to the owner's queries about carpet, and requested a sample of her underlay to be tested for acoustic rating.

44. On February 17, 2016, the owner wrote the strata that she was still out of the country, and noted that her son had advised that the Pumps' noises were getting louder every day.

45. On March 3, 2016, the strata wrote the owner that the noise levels should be re-measured before the carpet was installed. On March 13, 2016, the owner wrote the strata that while the hot tub had been out of order the past week, she had enjoyed a reprieve from the noise, but that it had returned after the hot tub was fixed. The owner added that with this repair, the noise had gone down "a little bit" and she hoped there would be a permanent solution soon.

46. In an April 25, 2016 report, BKL set out its factual premise and conclusions about the noise from the circulation Pump and the jet Pump (my bold emphasis added):

    a. The circulation Pump operates "24/7" and the jet Pump operates only when activated by a hot tub user.

    b. There is no legislative criteria applicable, but BKL regularly uses the design guidelines established by the American Society of Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE) in its handbook for HVAC applications, to rate the significance of noise inside residences.

    c. The ASHRAE guideline defines limits for noise inside habitable spaces using the Noise Criteria (NC) and other methods. The limits depend on the type of room and "represent general limits of acceptability for typical building occupancies".

    d. Continuous noise from plumbing systems with circulating fluids should meet the same noise criteria as HVAC systems.

    e. For kitchens and bathrooms, the threshold NC is 35, and for living areas it is 30.

f. BKL measured 4 rooms in unit 104, based on the owner's description of where noise was perceived to be the loudest: dining room, ensuite bathroom, southeast bedroom, and northeast bedroom. Measurements were taken with all Pumps off, with only the circulation Pump on, and with both the circulation Pump and jet Pump on.

g. The results were NC25 in the two bedrooms, NC21 in the ensuite bathroom, and NC30 in the dining room. In all cases, the NC criteria was not exceeded.

i. There are no dB equivalent measurements provided in the body of the report. However, in an included graph it shows that **at the 350Hz frequency, there were the following approximate dB noise levels with both Pumps on: 38 (dining room), 33 ("SE bedroom"), and 33 ("NE bedroom").**

h. In conclusion, BKL noted that the intrusiveness and potential disturbance caused by noise is subjective and depends on other factors such as present background noise, **the character of the sound**, and the time of day.

47. I pause to note that, as I understand it, "dB" refers to decibel and "dBA" refers to how the decibel level is perceived. That BAP's report refers primarily to dBA and BKL's report references NC and dB is one of the challenges in comparing the reports.

48. On May 18, 2016, the strata sent the owner the BKL report and noted that it concluded the measured noise levels "did not exceed the criteria chosen for the project". The strata stated that at its May 16, 2016 council meeting the council unanimously voted that "the issue would not be addressed further".

49. At my request, the facilitator asked the strata why it retained BKL rather than BAP again. The strata's response is set out below, and I note the owner did not provide a reply, despite being given an opportunity to do so:

> BKL was likely engaged to provide a second opinion and to gather more information. There might have also been a cost factor in this as well.

ANALYSIS

50. The strata operates through its strata council (section 4 of the SPA). Each council member must act honestly and in good faith with a view to the best interests of the strata, and exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances (section 31 of the SPA). While I have questioned some of the strata's approaches to dealing with the owner, I find that the evidence does not go so far as to establish the strata ever acted dishonestly or in bad faith. To the extent the owner may be making such allegations, I do not accept those submissions.

51. However, I do not agree with the strata's submission that it is:

> …not responsible for the location of the hot tub and the pumps, nor for the way it operates.

52. Unlike the weather or third party actions in cases cited by the strata, the strata is responsible for the hot tub and its Pumps, including their location and the way the hot tub operates. The strata owns the hot tub and its Pumps as common assets and they are all located on common property.

53. The strata cites a number of other cases in support of its position that the hot tub is in good working order for a hot tub, given its reliance upon the later BKL report. The strata says that as such, it has met its obligations under section 72 of the SPA to "repair and maintain". In focusing upon whether the hot tub is in fact operating as intended, I find the strata has missed the material point. As discussed below, the issue is not simply whether the hot tub is functioning as intended.

54. The owner's claim against the strata is a nuisance claim, and I find the strata's responsibility for the nuisance stems from the strata's obligation to "manage and maintain" the hot tub and its Pumps under section 3 of the SPA. Relatedly, the owner says the strata has acted significantly unfairly towards her in its handling of her noise concerns. While the bulk of the case law to date discusses remedies

under section 164 of the SPA, as noted above I am empowered under section 48.1(2) of the Act to make orders related to findings of significant unfairness.

55. The tort of nuisance in a strata setting is an unreasonable continuing or repeated interference with a person's enjoyment and use of their strata lot, and a remedy should be made without undue delay once the respondent is aware of the nuisance (see *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462). In Ng, the court found that the owner brought to the strata's attention facts that required investigation, and failure to conduct that investigation amounted to an omission to use reasonable care to discover the facts. As discussed further below, I find the strata has failed to properly investigate and remedy the nuisance caused by the Pumps' noise, which was significantly unfair to the owner.

56. The strata also submits that the hot tub noise must remain within objectively reasonable limits, and the strata is not required to eliminate all noise. In particular, the strata says the Pumps' noise is no longer a nuisance, if it ever was, given the BKL findings. The strata is correct in that a current nuisance is only established if there is ongoing unreasonable noise. However, contrary to the strata's submission, I do not accept the BKL report finally resolves that question.

57. I find that in comparing the dB levels in the BKL report graph and those contained in the BAP reports, the noise levels with both Pumps on were substantially similar. Thus, based on the BAP report that included an analysis about the challenges of the 350Hz frequency, I find the same level of unreasonable noise continued, at least with respect to the jet Pump if not both Pumps. Using BAP's methodology, there has to date been no re-assessment confirming the noise has been reduced to a reasonable level.

58. I also agree with the owner that BAP's opinion is more complete, as it considers the nature and tone of the noise and BKL's opinion does not, although notably BKL appears to comment at the end of its report that this could be a factor. Overall, I prefer BAP's reporting method. I have not relied upon the internet articles provided by the owner, to which I note the strata objects.

59. I also note that it is not clear that the strata has implemented BAP's second recommendation to install flexible couplings, in addition to the installation of "pads". From my review of the evidence, the couplings are essentially joints and are something different than the flexible hoses.

60. The strata's response as to why it hired BKL is somewhat vague, stating that the strata "likely" wanted a second opinion and that cost "may" have been a factor as well. I find this suggests that the strata sought out BKL in an effort to avoid any expensive repairs that might arise from a further BAP report. Certainly, there is nothing in the strata's stated rationale for hiring BKL that would cause me to prefer BKL's opinion over BAP's.

61. Overall, I find the ongoing noise from the Pumps constitute a nuisance for which the strata is responsible, given the hot tub and Pumps are together a common asset the strata is obliged to manage and maintain. I also find that the strata has failed to conduct an appropriately complete investigation of the owner's noise concerns about the Pumps.

62. I turn then to whether the strata's actions have been significantly unfair to the owner, including whether the strata unreasonably delayed its remedial investigations and repairs, and what remedies should be ordered.

63. The phrase "significantly unfair" has been interpreted to be simply a plain language version of earlier terms "oppressive or unfairly prejudicial" (see *Chow v. Strata Plan LMS 1277*, 2006 BCSC 335). As noted in Chow, oppressive conduct includes conduct that is "burdensome, harsh, wrongful, lacking in probity or fair dealing".

64. In the recent decision in *The Owners, Strata Plan BCS 1721 v. Watson,* 2017 BCSC 763, the court restated the test for determining significant unfairness as set out in *Dollan v. Strata Plan BCS 1589,* 2012 BCCA 44. While that test was considered under section 164 of the SPA, as referenced above I find it would equally apply to an analysis under section 48.1(2) of the Act. In particular, in Watson the court stated (my bold emphasis added):

> The test under s. 164 of the [SPA] also involves **objective assessment**. [The Dollan decision] requires several questions to be answered in that regard:
>
> 1) What is or was the expectation of the affected owner or tenant?
>
> 2) Was that expectation on the part of the owner or tenant objectively reasonable?
>
> 3) If so, was that expectation violated by an action that was significantly unfair?

65. The facts in *Bond v. The Owners, Strata Plan VR2538*, 1996 CanLII 3317 (BCSC) are very similar to those before me, and I note the strata's counsel cited this decision in an opinion to the strata. In Bond, the court found that the noise created by the hot tub exceeded the criteria in excess of background noise. The court also concluded that the petitioner's complaints had not been successfully addressed by the remedial measures taken by the strata. In Bond, which considered the SPA's predecessor statute the *Condominium Act,* the court stated that the strata's obligation to control, manage and administer the common facilities for the benefit of all owners does not give a license to the strata to permit one part of its common assets to be operated in a way that unreasonably interferes with the enjoyment of one owner's separate property. The court in Bond expressly stated that it emphasized "unreasonably" and that the evidence established that the interference was beyond what an individual owner should be required to accept. In that case, the court found it had no ability to order directions for further soundproofing and in the result the court's decision was to order the strata to stop operating the hot tub.

66. Here, my decision rests on the strata's obligation to manage and maintain the hot tub and its Pumps. As in Bond, I find this extends to ensuring it does not cause unreasonable noise. Applying the test set out in Watson, I find the owner reasonably expected that she not have to endure unreasonable noise from the hot tub Pumps. The strata failed to meet that reasonable expectation, which in the circumstances I find was significantly unfair to the owner. I say this because I accept the ongoing noise from the Pumps has been harsh and oppressive, bearing

in mind that I accept the BAP opinion and have extrapolated that its findings continue to this day, at least with respect to the jet Pump. The amount of funds spent by the strata to date is not determinative, and here I note the hot tub is a recreational rather than essential facility and the owner's health has been impacted.

67. I find the strata must stop the operation of the hot tub, unless and until it reduces the Pumps' noise to a reasonable level, save for any limited operation of the Pumps that is reasonably required by a qualified professional to conduct testing. As to what is a reasonable level of noise, I find the strata must obtain an engineering report from a suitably qualified professional, such as BAP, and the report must address not only the noise level but also the nature and tone of the noise, as BAP had done in its reports. I leave it to the strata to determine whether it must install the flexible couplings BAP recommended as part of getting the noise to a reasonable level. Given that I do not know if or when the strata might be able to obtain such a report, which presumably may first require further adjustments and testing, I find that this is the most reasonable order.

68. I turn then to the owner's request for $10,000 in damages, which she seeks because she has been prevented from using and enjoying her strata lot "for a very long time".

69. In support of this claim, the owner cites *Suzuki v. Munroe*, 2009 BCSC 1403, in which case the court granted a total of $6,000.00 in damages for nuisance when a neighbour caused undue noise (with an air conditioner) that prevented the petitioners from using their house. The owner submits that the extent of the noise for her is much worse than it was for the Suzukis. I note that the court in Suzuki made this award in conjunction with an injunction, which is effectively what I have done above in ordering the strata to stop the operation of the hot tub until its noise is reduced to a reasonable level.

70. In Suzuki, the court cited the World Health Organization guidelines for community noise, noting that at 30 dBA there would be sleep disturbance in a bedroom and at

35 dBA speech intelligibility inside. While in this case I primarily rely upon the measurements taken by BAP, the findings in Suzuki provide useful guidance. There, the stated threshold for outdoor noise was 55dBA, and the court ordered that the air conditioner not exceed that limit. In that case, Mrs. Suzuki was found to have suffered more, and the court awarded her $4,000 and $2,000 to her husband who had suffered less for the 3-year period at issue there.

71. The strata relies upon *Chiang v. Yang* [1999], B.C.J. No. 966 (BCPC), partly as support for their position that no more than $3,000 in damages should be awarded, to the extent any are awarded at all. Notably, Chiang is an older case.

72. Here, the period of time stretches to 5 years. The strata submits that it "is to be forgiven for its initial assertion throughout 2013 that the flooring" in unit 104 should be addressed first. I agree that strata councils comprised of lay people are entitled to some latitude. However, I will say that the tone of the strata's correspondence, including the offer of only 5 minutes to be heard at the July 2, 2013 council meeting suggests the council did not take the owner's complaints seriously. Nonetheless, the strata had the benefit of a legal opinion as of November 2013 and the strata's investigation efforts began in January 2014 when it hired BAP.

73. As for the strata's allegation that the owner "moved to the nuisance", I find I do not need to enter into a detailed analysis of the case law on this issue. I say this because I accept the owner's evidence that she did not appreciate at the time of purchase that there was a significant noise issue related to the hot tub. Moreover, contrary to the strata's allegation, I accept the owner knows she is not entitled to silence. I do accept that she reasonably expects to live in her home without unreasonably loud mechanical noise. I agree with the owner that Ashton's suggestion the owner wear ear plugs was not a reasonable solution, to the extent the strata may have considered that option.

74. Overall, while the investigations and repairs unfortunately took time, as did the strata obtaining follow-up legal opinions, I cannot find that the strata unreasonably delayed its remedial investigations during the 2012 to May 2015 period. Thus, to

the extent the *Limitation Act* would not otherwise bar them, I would not order any damages payable for that period.

75. However, I find the strata did not act reasonably in May and July 2015 when it refused to take further efforts to resolve the noise until the owner provided her own list of efforts. The owner had no such obligation with respect to the noise emanating from the hot tub, a common asset. Moreover, the strata no longer benefits from the latitude given to lay people, as at this point the strata had the benefit of the legal counsel's December 2014 opinion and chose to ignore it.

76. The strata then obtained a further legal opinion in October 2015 that advised further noise testing was required. Yet, the strata did not obtain the BKL report until April 2016, some 6 months later. In all of the circumstances, I also find that delay to be unreasonable.

77. Overall, I find the strata is responsible for the owner's experience of unreasonable noise for a period of roughly 2.5 years, since May 2015.

78. As noted by the strata, the owner also has not provided any medical evidence nor has she established any inability to work. However, given the evidence before me, I accept the owner's evidence that her sleep has been severely disrupted in the years since she has bought her unit, save for the periods the hot tub was undergoing maintenance or when the owner was away. I note the evidence is not entirely clear about the amount of time the owner benefitted from a reprieve from the noise, but it would appear to total at least a few months. I also acknowledge that the owner has not claimed an inability to work, in that she has not claimed any wage loss associated with the noise.

79. In Suzuki, Mrs. Suzuki was diagnosed with chronic stress disorder manifested by depression and anxiety, which was caused by both the noise pollution and the intractable personal conflict with the respondent neighbours. I find the evidence in the case before me does not rise to that level. I also recognize that the Suzuki decision was written in 2009, some 8 years ago.

80. Overall, I find the owner is also entitled to $4,000 in damages for loss of enjoyment of her strata lot. I make this order on the basis that the strata has acted significantly unfairly towards the owner in its failure to reasonably address the established nuisance, namely the unreasonable noise from the Pumps.

81. The owner was substantially successful in this dispute. Under section 49 of the Act, and the tribunal's rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable expenses related to the dispute resolution process. I see no reason to deviate from that general rule. The owner did not claim any dispute-related expenses.

DECISION & ORDER

82. I order the strata to do all of the following:

    a. Immediately stop the operation of the hot tub, unless and until the strata obtains a written report from a properly qualified acoustical engineer, such as BAP, that the Pumps' noise entering unit 104 is reasonable. Such a report must address not only the decibel level of the noise but also the character of the noise, as BAP did in its earlier reports. The exception is any reasonable testing of the Pumps by a qualified professional that requires the limited operation of the Pumps for that purpose.

    b. Within 30 days of this decision, pay the owner $4,000 in damages related to the unreasonable noise from the Pumps.

    c. Within 30 days of this decision, pay the owner $225 as reimbursement for her tribunal fees.

83. Under section 167 of the SPA, an owner who brings a tribunal claim against the strata corporation is not required to contribute to the expenses of defending that claim. I order the strata to ensure that no part of the strata's expenses with respect to defending this claim are allocated to the owner. Under section 169 of the SPA,

the owner is also not liable to share in the cost of payments I have ordered the strata to make to the owner, and I so order.

84. The owner is entitled to post-judgment interest under the *Court Order Interest Act*.

85. Under section 57 of the Act, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

86. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently $35,000). Under section 58 of the Act, the Applicant can enforce this final decision by filing in the Provincial Court of British Columbia a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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Shelley Lopez, Tribunal Vice Chair