



# Civil Resolution Tribunal

Date Issued: December 11, 2017

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Fox v. The Owners, Strata Plan KAS 1911*, 2017 BCCRT 137

**B E T W E E N :**

Steven Fox

**APPLICANT**

**A N D :**

The Owners, Strata Plan KAS 1911

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Jamie Bleay

## **INTRODUCTION**

1. The applicant, Steven Fox (owner) owns unit 409, also known as strata lot 44 (SL 44) in the respondent strata corporation, The Owners, Strata Plan KAS 1911 (strata). The owner says the strata has failed to enforce its bylaws in response to repeated complaints of excessive and unreasonable noise in SL 44 caused by an

exhaust fan operated by the occupant of a ground floor commercial strata lot (ground floor strata lot) that includes the operation of a restaurant.

2. The owner is self-represented and the strata is represented by a council member.

## **JURISDICTION AND PROCEDURE**

3. 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, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
5. 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.
6. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
7. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

8. Subsequent to the tribunal issuing its dispute notice the fan unit was replaced on or about November 22, 2107.
9. The issues in this dispute are:
  - a. Did the strata conduct an appropriate investigation into the owner's noise complaints about the fan unit;
  - b. Has there been a contravention of the strata's bylaws in connection with the noise complaints;
  - c. Should the strata be ordered to enforce its bylaws to remedy the bylaw contraventions;
  - d. Should the strata pay the owner punitive and general damages of \$50,000.00, or some other amount, for the interference to the owner's use and enjoyment of SL 44;
  - e. Should the owner be reimbursed \$225.00 he paid in tribunal fees?

## **BACKGROUND AND EVIDENCE**

10. While I have reviewed all of the evidence and submissions provided, I have only referred to the evidence and submissions necessary for the purpose of my decision.
11. The strata is a 4 storey mixed-used building, without sections, with 53 residential strata lots on the second through fourth floors and a commercial strata lot on the ground floor.
12. SL 44 is on the top floor. The owner took ownership of SL 44 in early August, 2017. Almost immediately he heard loud noises coming from the roof above SL 44.

13. Upon going onto to the roof to investigate the owner discovered an exhaust port with a fan (fan unit) on the roof above SL 44.
14. The fan unit was making what the owner described as fairly loud sounds and the fan unit was shaking and vibrating. Photographs and videos confirm the location of the fan unit on the roof and confirm that when in operation the fan unit does make noise and does shake and vibrate.
15. The fan unit services the kitchen stoves located in the ground floor unit that houses a senior's centre and a restaurant that operates as the Oasis Café. The exhaust fan runs from the kitchen in the ground floor unit through a closed-in area next to the bedroom closets in units 209, 309 and SL 44 and exhausts on the roof above SL 44.
16. At the time of the complaint the evidence indicates the fan unit was operating 24 hours a day, 7 days a week.
17. As early as August 3, 2017 the owner began sending e-mails to the strata and to its strata manager complaining about the loud noises coming from the fan unit and asking that the strata investigate and address the loud noises, including enforcing the strata's bylaws.
18. The strata's relevant bylaws are:
  - a. standard bylaw 3(1) - A resident or visitor must not use a strata lot, the common property or common assets in a way that (b) causes unreasonable noise, (c) unreasonably interferes with the rights of persons to use and enjoy the common property, common assets or another strata lot;
  - b. filed bylaw 2004-6 - Strata Lot 54 – The ground floor strata lot, will be fully responsible for: d) Maintenance and repairs to rooftop chillers and kitchen fans exclusively servicing Strata Lot 54.
19. E-mail correspondence between the owner, the strata manager and members of the strata council confirms that the strata did, upon being made aware of the noise

complaints, contact the owner of the ground floor unit to advise the owner of the ground floor unit of the complaint and to address the noise complaints and the fan unit as required by the strata's bylaws.

20. The owner of the ground floor unit advised the strata that the fan unit was serviced annually and had recently been cleaned.
21. On or about August 8, 2017 the strata's property manager called in Care Systems, an HVAC company, to inspect the fan unit. Care Systems confirmed that the fan unit was the source of the noise problem. The contractor used by the owner of the ground floor unit to service and repair the fan unit reviewed the problem on or about August 9<sup>th</sup> and confirmed that the necessary parts had been ordered to address the problem.
22. On or about August 11, 2017 the ground floor unit owner's contractor attended at the building and performed certain repairs to the fan unit. It is not completely clear on the evidence what repairs were completed but in an e-mail from the property manager to members of the strata council and the owner dated August 11, 2017 the property manager stated she had been informed by a representative of the ground floor unit that the "repairs to the rooftop exhaust fan are underway and should be completed by the end of the day".
23. Repairs to the fan unit, which included replacement of worn out bearings, were completed on August 11, 2017 by the ground floor owner's contractor; a further visit by the contractor on August 14, 2017 resulted in some further adjustments to the fan unit.
24. The repairs, which included the replacement of worn out bearings, did not seem to alleviate the noise from the fan unit. The owner sent an e-mail to the property manager and the strata council on August 13, 2017 complaining that the noise from the fan unit was more prevalent and was making a louder banging sound.
25. A decision was then made by the strata in consultation with a representative of the ground floor unit to undertake a complete inspection of the fan unit.

26. On or about August 22, 2017 Care Systems performed a complete inspection of the fan unit and reported to the strata council that there were three possible avenues to help alleviate the noise to some degree; further cleaning of the fan wheel, replacement of the fan wheel or replacement of the entire fan unit assembly.
27. On or about August 25, 2017 the owner of the ground floor unit had its contractor do some minor cleaning and adjustments to the fan unit who apparently confirmed that installation of a new fan unit did not seem feasible or necessary at that time.
28. A representative of the ground floor unit sent an e-mail dated August 25, 2017 to members of the strata council confirming the work its contractor had recently completed and asked if a member of the strata council could visit the owner in SL 44, observe the degree to which the annoying vibration had been reduced and to ascertain if the noise and vibration was now acceptable to the owner.
29. The evidence submitted by the owner confirms that the vibration and noise problems continued. E-mails from the owner during the period August 17<sup>th</sup> to August 29<sup>th</sup> to the strata council confirmed that the noise from the fan unit was ongoing, that he and his partner were not able to sleep despite wearing ear plugs and that the noise was negatively affecting his health.
30. In an e-mail dated August 26, 2017 he sent an e-mail to a council member in which he confirmed that he and his partner were leaving SL 44 for the weekend because they could not take the noise anymore.
31. On August 29, 2017 the property manager sent an e-mail to the owner and several council members stating that she believed the strata council will need to now demand the exhaust fan be replaced as in its current state it unreasonably interferes with the rights of other persons to use and enjoy their strata lot and is considered unreasonable noise. She also stated she had placed a call into a representative of the ground floor unit to talk to him but that a formal letter demanding that the fan unit be repaired or replaced to a level where it is not causing disrupt to another owner.

32. There is no evidence that a formal letter was in fact sent to the owner of the ground floor unit demanding that the fan unit either be repaired or replaced. The strata's property manager did send an e-mail to the owner on September 11, 2017 stating that she was waiting to hear back from the owner of the ground floor unit to see where they were with obtaining quotes to replace the fan unit.
33. In an e-mail dated September 20, 2017 a representative of the ground floor unit advised the strata that it was in the process of obtaining quotes for replacement of the fan unit and that all contractors are extremely busy and they have to wait their turn.
34. Meanwhile the noise problems experienced by the owner continued to the point where, on September 29, 2017 he sent an e-mail to the property manager stating "for legal purposes please consider this e-mail another formal complaint in regards to the ongoing issue with this exhaust fan".
35. In an e-mail dated October 12, 2017 the strata was advised by a representative of the ground floor unit that Steve from Inland Tech had called to advise they were coming to the building to take measurements and check air flow so that the contractors who were asked for quotes could finalize their quotes.
36. On October 12, 2017 a council member sent an e-mail to the owner stating that the owner of the ground floor unit had advised they would replace the fan unit, that it would take a minimum of six weeks as the replacement was being shipped from the United States. The ground floor unit owner had also requested approval to install a vent to the outside of the building from the kitchen area to allow for an auxiliary fan to be installed in the kitchen to vent any possible gas build up in the kitchen which would allow the fan unit to be shut off when the stove in the kitchen was not in use. The e-mail also stated that the strata council did not discuss applying fines for a possible bylaw infraction as the owner of the ground floor unit had limited funds and levying a fine seemed counterproductive to resolving the issue.

37. Apparently the strata approved the request to install the vent to the outside of the building based on an e-mail to the strata from a representative of the ground floor unit dated October 17, 2017 which stated the fan to be installed had been ordered and that they hoped it would be installed that week if all went well. The e-mail also stated that the owner of the ground floor unit has received a quote for the replacement fan unit and that they would be ordering it the next day.
38. The auxiliary exhaust fan was installed in the kitchen on October 23, 2017.
39. The strata has confirmed that it did not “enforce the bylaw and fine the Society” as it felt the ongoing efforts by both the society and the strata were resolving the issue and further, the Senior’s Centre is a non-profit society and adding additional costs to the issue would be counterproductive. The strata also confirmed that it has never over the years issued fines.
40. The fan unit was installed on or about November 22, 2017. The applicant has advised that shortly after the new fan unit was installed he began hearing noise again. The original loud noise complained of is gone.
41. The applicant advises that his partner has now moved out of SL 44 and that he too has now moved out as he can no longer take the stress caused by the noise.
42. The strata after the new fan unit was installed with final torqueing completed the technician found the new fan unit running quietly and that any noises heard by the applicant were either the cooling tower motor turning on from time to time or the sound of air flowing through the duct work.

## **POSITION OF THE PARTIES**

43. The applicant argues that the strata should be ordered to enforce its bylaws and fine the owner of the ground floor unit for breaching its bylaws.
44. The applicant also wants an order that the strata pay him \$50,000.00 for punitive and general damages and that the strata reimburse him for his tribunal filing fees.



45. The strata says that the issues have been resolved and no orders need to be made.

## **ANALYSIS**

46. The owner has complained that the strata did not enforce its bylaws in connection with the noise from the fan unit and the unreasonable interference with his rights to use and enjoy SL 44.
47. Standard bylaw 3(1) states, in part, that a resident or visitor must not use a strata lot, the common property or common assets in a way that (b) causes unreasonable noise, (c) unreasonably interferes with the rights of persons to use and enjoy the common property, common assets or another strata lot.
48. Filed bylaw 2004-6 - Strata Lot 54/ The Seniors Community Centre (SCC) states that the ground floor unit will be fully responsible for: d) Maintenance and repairs to rooftop chillers and kitchen fans exclusively servicing Strata Lot 54.
49. The evidence confirms that as early as August 3, 2017 the owner complained to the strata of excessive and unreasonable noise coming from the fan unit. The evidence that has been submitted by the parties confirms in my view that the fan unit was the source of the excessive and unreasonable noise.
50. Whether identified as a breach of bylaw 3(1)(b) or (c) or a breach of bylaw 2004-6 by the strata I find that the noise experienced by the owner emanating from the fan unit was excessive in breach of the bylaws. The noise from the fan unit caused unreasonable noise to the owner and his partner over a period of several months and on a significant number of occasions caused unreasonable interference with the owner's right to use and enjoy SL 44.
51. Pursuant to section 26 of the *Strata Property Act* (SPA) the strata has an obligation to enforce its bylaws, which implicitly requires it to take steps to investigate complaints of a bylaw contravention.

52. Upon receiving the initial noise complaint the strata contacted the owner of the ground floor unit, who acknowledged that it is responsible for the fan unit, advised the owner of the complaint and advised the owner to address the noise complaints and the fan unit as required by the strata's bylaws.
53. In this case I find that the strata did, in addition to notifying the owner of the ground floor unit of the noise complaints, take steps to investigate the noise complaint by having Care Systems inspect the fan unit and identify any problems with the fan unit.
54. I find that the owner of the ground floor unit also took steps, albeit far too slowly from the owner's perspective, to investigate the noise complaints. Those investigations were carried out by contractors engaged by the owner of the ground floor unit who provided recommendations and advice to the owner of the ground floor unit on necessary repairs.
55. It is unfortunate that the recommended repairs, which including servicing and cleaning of the fan unit on top of regular servicing and maintenance, and replacement of worn out bearings, did not put an end to the owner's complaints of excessive and unreasonable noise caused by the fan unit.
56. Despite evidence of clear written demands made by the strata to the owner of the ground floor unit to identify bylaw contraventions and evidence from the strata that it did not enforce its bylaws and fine the owner of the ground floor unit for the bylaw contraventions I find that in the circumstances, the strata did take appropriate steps to address the noise complaints.
57. The strata engaged a contractor to investigate the noise complaints and advised the owner of the ground floor unit of the complaints, which resulted in the owner of the ground floor unit engaging its own contractor to investigate the noise complaints.
58. The strata relied on the advice of the contractor it engaged to investigate the fan unit and recommend necessary repairs. The owner of the ground floor unit placed

similar reliance on the contractors it engaged to investigate the noise complaints and to make repairs to the fan unit to stop the noise from the fan unit.

59. It is evident that one of the owner's concerns was the lack of any fines imposed by the strata for the bylaw violations.
60. Section 129 of the SPA gives the strata several bylaw enforcement options; fines may be imposed, the strata can remedy a contravention pursuant to section 133 of the SPA or it could deny access to a recreational facility if the contravention involves a recreation facility, which here, it does not. I find the options available to the strata are discretionary given the use of the word "may" in section 129.
61. The strata chose not to impose fines and supported its decision by saying it felt the ongoing efforts by both the owner of the ground floor unit and the strata were resolving the issue and further, the Senior's Centre is a non-profit society and adding additional costs to the issue would be counterproductive. The strata also confirmed that it has never over the years issued fines.
62. Section 129 of the SPA also states that before enforcing a bylaw the strata may give a person a warning or may give a person time to comply with a bylaw or rule.
63. The strata's approach was not to impose fines but to give the owner of the ground floor unit time to fix the noise problem with the fan unit. I find that the strata's use of the enforcement options in section 129 of the SPA was reasonable in the circumstances.
64. Perhaps it could have done more and utilized section 133 of the SPA and taken control of the replacement of the fan unit and charge the costs back to the owner of the ground floor unit. However there is no basis for me to second guess the strata's decision not to do this in light of the evidence that both the strata and the owner of the ground floor unit had engaged contractors to investigate the noise and repair the noise problem. When that did not work the strata permitted the owner of the ground floor unit to install an auxiliary exhaust fan in the kitchen so

that it could shut the fan unit off when the kitchen was not in operation. At the same time the owner took steps to replace the fan unit.

65. It is unfortunate that it took as long as it did for the owner of the ground floor unit to identify the replacement of the fan unit as the best way to address the noise problem and to then replace the fan unit. However the fan unit has now been replaced and according to the strata's technician the new fan unit is running quietly. The applicant does not agree or least says that shortly after the new fan unit was installed it began making noise again although the original very loud noise is gone.
66. In the circumstances I find that the strata acted reasonably in dealing with the noise complaints and I would dismiss the owner's request that I order the strata to enforce its bylaws in connection with the applicant's original complaint.
67. However, the owner says that the new fan unit is making noise again. The strata's technician says that the new fan unit is operating quietly but there may be noise from the cooling tower when it turns on or it may be air flowing through the duct work.
68. While I have dismissed the owner's request that I order the strata to enforce its bylaws in connection with the applicant's original complaint I find it necessary to order the strata to investigate the applicant's new noise complaints and enforce its bylaws if it is determined that there is merit to the applicant's new noise complaints.
69. Turning next to the owner's claim for punitive and general damages, the sum of \$50,000.00 that has been claimed is based on the following:
  - a) Hotel costs of \$150.00 per night for one hundred nights if the owner had been put up in a hotel;
  - b) Pain and suffering of \$150.00 per day x 100 days for constant headaches, migraines, stress and emotional breakdowns;

- c) Loss of use and enjoyment of \$100.00 per day x 100 days while the owner and his partner were stripped of any peace and quiet; and
  - d) Punitive damages of \$100.00 per day x 100 days.
70. There is no evidence that the owner did in fact stay in a hotel and there is no medical evidence of the impact of the noise problems on the owner's health. I am prepared to accept that the ongoing noise was stressful and would have somewhat of a negative impact on the owner's use and enjoyment of SL 44.
71. In the circumstances there is no basis to award the owner for hotel costs or pain and suffering.
72. With respect to the owner's claim for loss of use and enjoyment in a tribunal dispute cited as *Chen v. The Owners, Strata Plan NW 2265*, 2017 BCCRT 113 an owner was awarded the sum of \$4,000.00 in damages for loss of enjoyment of her strata lot after finding that the strata corporation was responsible for the owner's experience for a period of roughly 2.5 years. In *Chen* it was determined that the strata corporation delayed for a significant period of time in dealing with further noise testing. Though not binding on me, I accept the conclusion the tribunal reached in *Chen* and apply it here.
73. In this case in a period of approximately 100 days the fan unit was replaced and the noise problems resolved. Compared to *Chen* this is a relatively short period of time. However I find that it is not a sufficient enough delay to attract damages for loss of use and enjoyment.
74. With respect to the claim for punitive damages I have found that there is no basis to order the strata to enforce its bylaws. The strata took steps to investigate the complaint and worked with the owner of the ground floor unit to ultimately resolve the noise problems caused by the fan unit. The owner was understandably upset with the time it took to completely resolve the noise problems. However the noise problems have been resolved rather than being ignored or passed off as insignificant or unreasonable.

75. There is no evidence before me that would support a claim for punitive damages. The strata's conduct did not amount to "malicious, oppressive or high handed" conduct or deserving of "rebuke, punishment and deterrence" as cited in *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130.
76. I therefore dismiss the owner's claim for punitive and general damages.

## **DECISION AND ORDERS**

77. I order that the applicant's dispute is dismissed.
78. I order the strata to investigate the applicant's new noise complaints and enforce its bylaws if it finds there is merit to the new noise complaints.
79. Under section 49 of the Act, and the tribunal 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. Here, the strata is the successful party. However the strata is not claiming for reimbursement of any fees or disbursements. I therefore make no order with respect to any fees or disbursements of the strata.
80. 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.

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Jamie Bleay, Tribunal Member