Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan 1674 v. Graham,* 2019 BCCRT 74

B E T W E E N :

The Owners, Strata Plan 1674

APPLICANT

A N D :

Theresa Graham

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell

INTRODUCTION

1. The applicant, The Owners, Strata Plan 1674 (strata) is a bare land strata corporation existing under the *Strata Property Act* (SPA). The strata corporation consists of 41 detached houses. The respondent, Theresa Graham (owner), is an owner of a strata lot in the strata.

2. The strata says AW, the occupant of a neighbouring strata lot, has made written complaints to the strata council about excessive noise coming from the owner's heat pump. The strata submits that AW's noise complaint is legitimate, and that the strata has been unable to resolve the matter through negotiations with the owner. The strata seeks an order that the owner install a new heat pump, install noise suppressing equipment, or stop using the heat pump. The strata also seeks an order that the owner pay $275 in outstanding bylaw infraction fines.

3. The owner says her heat pump is regularly maintained and works properly, and that sound tests show it operates in a normal decibel range. She says the heat pump was installed before she owned the strata lot in a manner consistent with the strata's bylaws at that time. The owner says that moving or replacing the heat pump is prohibitively expensive, and that heating her home using another heat source is insufficient.

4. The strata is represented by a strata council member. The owner is represented by a lawyer, Justin Hanson.

5. For the reasons set out below, I find that the owner must stop using her existing heat pump immediately, as it causes unreasonable noise and unreasonably interferes with the use and enjoyment of the neighbouring strata lot.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 121 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.

7. 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.

8. 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.

9. Under section 123 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.

10. Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan, VIS 1674. Based on section 2 of the *Strata Property Act* (SPA), the correct legal name of the strata is The Owners, Strata Plan 1674. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.

ISSUE

11. The issue in this dispute is whether the owner's existing heat pump is unreasonably noisy, and if so, what is the appropriate remedy.

POSITIONS OF THE PARTIES

12. The strata says the owner's heat pump, which is located beside her house, is unreasonably noisy. It says the heat pump's changes in volume and pitch as it goes through its cycles are disturbing.

13. The owner submits that the strata's claim is essentially a claim of nuisance, and that the strata has not met the burden of proving that the heat pump noise unreasonably interferes with AW's use and enjoyment of his strata lot.

EVIDENCE, FINDINGS AND ANALYSIS

14. I have read all of the evidence provided but refer only to information I find relevant to provide context for my decision.

15. The parties agree that the respondent is solely responsible for the maintenance and operation of the heat pump, as she owns it and it is located on her bare land strata lot. It is not common property. The heat pump is located beside her house, between her house and the house next door, which is occupied by AW. The owner says the heat pump was installed before she bought her strata lot in 2014. She submits that her heating contractor, Westisle, says the pump was likely installed around 2002 or 2003.

16. The strata's bylaws are the Schedule of Standard Bylaws set out in the SPA, along with some additional bylaws. Bylaw 3(1) of the Standard Bylaws states, in part, that an owner may not use a strata lot in a way that causes unreasonable noise, or in a way that unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot.

17. In May 2006, the strata corporation approved and registered a new bylaw about heat pump noise, bylaw 4(j). This bylaw did not exist before May 2006, and did not replace a previous bylaw. The bylaw is still in force, and states as follows:

> 4(j) Heat Pumps, Air Conditioners, and other equipment which may generate unacceptable levels of noise must be installed at the rear of the Residence. Of primary consideration in such installations is the noise factor. The equipment must be of a design, and of a quality level, to ensure it does not present a problem for, or be a nuisance to, neighbouring residences.

18. The strata says the owner's heat pump noise violates bylaws 3(1) and 4(j), as it is an unreasonable continuing interference with AW's enjoyment of the neighbouring strata lot. The strata discussed AW's noise complaint with the owner in October 2016, and she responded with a written request that the strata obtain a decibel

reading by a qualified professional to determine the heat pump's sound level. This did not happen.

19. The strata council sent the owner a January 6, 2017 letter setting out the alleged bylaw infraction. The letter suggested that the owner replace her heat pump with a new, quieter, model. The letter said bylaw violation fines would be imposed if the owner did not remedy the noise problem within 2 weeks.

20. The owner initially agreed to replace her heat pump, and not operate it at night until it was replaced. On April 6, 2017, the strata council sent her another letter stating that fines would be imposed if she did not remove or replace her old heat pump by May 7, 2017.

21. AW sent further complaints to the strata council about the owner's heat pump noise in November and December 2017. On January 10, 2018, the strata sent the owner a letter stating that she was in contravention of the bylaws by continuing to use her heat pump, and that a $25 per week fine would be imposed starting on February 1, 2018.

Grandfathering

22. The owner says her heat pump was installed before bylaw 4(j) came into force in May 2006. While this is not disputed, I find it does not exempt her from the requirement to comply with bylaw 4(j). In *Field et al v. The Owners, Strata Plan 159*, 2018 BCCRT 15, the vice chair said that unless a bylaw fits within specific categories set out in the SPA, such as bylaws related to pets, age of occupants, or rental restrictions, there is no "grandfathering" or exemptions. The vice chair wrote as follows in paragraphs 59 and 60:

> The SPA provisions that create bylaw exemptions are specific in nature and only apply to very limited types of bylaws. There is no general provision in the SPA regarding circumstances when a bylaw does not apply or an owner is exempt. As discussed earlier, bylaws can be amended by passing a 3/4 vote resolution at a general meeting. Unless

the bylaw itself contains an exemption for certain owners or the SPA exemptions apply, the bylaw is changed and becomes effective when it is filed in the Land Title Office. In other words, the strata is free to change its bylaws by following the requirements of the SPA.

Here, there is no exemption under the SPA to suggest that bylaw 1.3(3)(a) does not apply to the applicants nor is there any such exemption contained in the strata's bylaws. In the result, I find the applicants are not "grandfathered" or otherwise exempt from bylaw 1.3(3)(a).

23. As in *Field,* I find that the owner is not exempted from bylaw 4(j) under the SPA, and there is no express exemption within the bylaws. Thus, she must comply with both bylaw 4(j) and bylaw 3(1). Having said that, I note that the January 6, 2017 letter to the owner, which was signed by the strata council president and vice president, says the strata council was not convinced that moving the heat pump to the rear of the owner's house would solve the noise problem, since there was limited space. For that reason, I find that the owner is not required to move her heat pump to the rear of her house, even though bylaw 4(j) says heat pumps that may generate unacceptable levels of noise must be installed at the rear of the residence.

24. However, I find that the owner must take steps to reduce the noise from her heat pump, as its noise violates bylaw 3(1). For the reasons set out below, I find that the owner's heat pump creates unreasonable noise, which is prohibited in Standard Bylaw 3(1)(b). I also find that noise unreasonably interferes with AW's right to use the neighbouring strata lot, which is prohibited in Standard Bylaw 3(1)(c).

25. It is clear from the evidence that the heat pump emits noise, and that some noise is standard for all heat pumps. The question is whether the noise levels emitted by the owner's heat pump are unreasonable in the circumstances.

26. The strata provided statements from AW and his wife, as well as a frequent visitor to their home. These statements confirm that the owner's heat pump is noisy. AW and his wife say the heat pump's noise, particularly as it changes cycles and enters the "defrost" cycle, constantly wakes them at night. They say this lack of sleep

significantly impacts their quality of life. They say their bedroom is adjacent to the heat pump, about 22 feet away. This is not disputed.

27. AW and his wife also state that earplugs diminish the noise only slightly, and that they often have to vacate their bedroom and try to sleep in the living room. AW says the problem with the heat pump noise is not the decibel level. Rather, he says the clunking, clanging, oscillating, and pitch level changes as the pump moves through its cycles are what interrupt and disturb their sleep.

28. AW sent the strata audio recordings of the heat pump noise, which were provided in evidence. While I accept that these recordings establish that the heat pump is fairly noisy, they do not establish any particular level of noise, as I cannot tell how loud the playback is compared to the original recording.

29. I place more weight on the decibel level reports and audio-video recordings provided by the owner. Because the decibel meter readout is shown in the videos, this evidence from Westisle objectively shows the amount of noise emitted by the heat pump. Thus, I do not have to rely solely on the sound level in the audio playback, which is not fixed. Westile's reports and recordings were created by its technician, who I accept as an expert in heat pump operation under tribunal rule 113.

30. Westisle's reports from 2017 and 2018 confirm that the owner's heat pump was operating normally, with no problems. Westisle's April 6, 2017 report, which was not accompanied by video evidence, says the heat pump generally operates within the range of 60 to 62 decibels while heating, but goes up to 73 decibels for under 2 seconds during start up, and goes up to 79 decibels for under 2 seconds when it enters its defrost cycle. The report said these readings were what was expected of a standard ducted heat pump system.

31. Westisle's November 27, 2017 was accompanied by video recordings. The report and the recordings indicate that the decibel readings, taken about 4 feet away from the heat pump, showed noise up to 60 decibels during the heating cycle, and around 60.5 decibels when the unit's fan started to run. The decibel reading jumped

to 78.1 decibels when the heat pump switched out of the defrost cycle. The report, which was written by Westisle's service manager, says the noise levels were "typical" and no worse "than any other heat pump out there."

32. In *Chen v. The Owners, Strata Plan NW 2265,* 2017 BCCRT 113, the tribunal considered a noise nuisance dispute from a strata lot owner who was disturbed by noise from hot tub pumps located in a common area directly below her home. The vice chair said in paragraph 73 that while the owner was not entitled to silence, she reasonably expected to live in her home without unreasonably loud mechanical noise. Although *Chen* is not a binding precedent, I find its reasoning persuasive, and rely on it in this decision.

33. In *Chen,* the vice chair cited *Suzuki v. Munroe*, 2009 BCSC 1403, a BC Supreme Court decision about a civil claim for nuisance due to a noisy air conditioning unit. In *Suzuki*, the court found that the noise from the air conditioning unit, which was installed outside about 18 feet from the plaintiff's master bedroom window, was a nuisance. The air conditioner's noise was around 40 to 50 decibels, measured at the property line between the 2 houses. In determining whether this noise level was unreasonable, the court relied on World Health Organization (WHO) guidelines for community noise, noting that at 30 dBA (decibels weighted based on human hearing) there would be sleep disturbance in a bedroom. The court also considered bylaws from various municipalities in BC, which required nighttime noise not to exceed 45 dBA.

34. While these municipal bylaws and the WHO guidelines are not in evidence before me in this dispute, I find the reasoning in Suzuki persuasive in determining whether the noise from the owner's heat pump is unreasonable. Based on the evidence provided by the owner, the heat pump routinely operates between 56 and 60 decibels, and occasionally jumps to 78 decibels for brief periods. I find that this noise level, even at the lower end of this range, is unreasonable. I accept that it created a nuisance for AW, and interfered with his use and enjoyment of the neighbouring strata lot.

35. In making this finding, I note that in *Suzuki*, the court found that air conditioner noises of 40 to 50 decibels at the property line constituted a nuisance. In paragraph 82, the judge said the fact that there was a narrow area between the 2 homes made any noise in that area particularly bothersome. I find the same facts, and therefore the same reasoning, apply in this case. Also, the decibel readings provided by the owner are all substantially higher than those in *Suzuki.* For that reason, I find that the heat pump's noise, as measured by Westisle, would unreasonably impact an ordinary member of the community, with normal sensitivity and temperament. While I have considered the evidence from Westisle that the owner's heat pump sound levels were standard for that type of system, I find that does not mean that the noise was reasonable in the circumstances, including the proximity of the heat pump to AW's bedroom.

36. I also accept AW's evidence that the changing noises of the heat pump as it shifts through its cycles are particularly bothersome, and interrupt sleep. These changes are audible in the owner's video footage, and are measured at up to 78 decibels. This is extremely loud. In the WHO guidelines cited in *Suzuki,* 70 dBA is listed as potentially causative of hearing impairment with long exposure. While the 78 decibel level was not sustained, I accept that short bursts of such sound would easily disrupt sleep in a bedroom 22 feet away.

37. The owner says that AW ought to have known the heat pump was noisy, as his mother lived in the strata lot before him. She cites *Moore v. The Owners, Strata Plan KAS 353*, 2018 BCCRT 40, which says at paragraph 28 that movement to a known nuisance may be a factor in determining whether a nuisance is actionable. I find that this principle is not determinative, as the prohibition on unreasonable noise set out in Standard Bylaw 3(1)(b) does not require the strata to establish tortious nuisance. Also, the evidence before me does not establish that AW or his wife were aware of nighttime noise levels before they moved in. In *Segal v. Derrick Golf and Winter Club (1977)*, 1977 CanLii 656 (AB QB), even where a person moved in next to a golf course and expected some golf balls in their yard, the court found that 53 balls per year constituted a nuisance. Thus, awareness of a potential nuisance does not mean that no remedy for that nuisance can ever exist. The obligation to abate or

reduce the nuisance is on the person causing the nuisance: *Douglas Lake Cattle Co. v. Mount Paul Golf*, 2001 BCSC 566; *Peace Portal Properties Ltd. v. Surrey (District of)*, 1990 CanLII 853 (BCCA).

Bylaw Infraction Fines

38. The strata seeks an order that the owner pay $275 in bylaw infraction fines. However, strata provided no evidence, such as strata lot account statements, to verify the amount it claims the owner owes, or how it was calculated. The only information on the subject is the January 10, 2018 letter warning that a fine of $25 per week would be imposed starting February 1, 2018 for the owner's ongoing contravention of the noise bylaws. I find the strata's letters of January 10, 2018 and April 6, 2017 set out sufficient particulars of the noise complaint, and that the strata met the requirements set out in section 135 of the SPA before imposing the fine. Since the evidence shows that the owner's violation of bylaws 3(1)(b) and (c) continued for at least 11 weeks after February 1, 2018, which would equal $275, I find the owner must pay the $275 in fines.

39. The strata is entitled to pre-judgment interest on the $275, under the *Court Order Interest Act* (COIA). I find this amount is due from April 1, 2018

Summary

40. For all of these reasons, I find the owner has violated bylaws 3(1)(b) and (c), as her heat pump causes unreasonable noise and unreasonably interferes with the rights of AW and his wife to use and enjoy another strata lot. I therefore order the owner to stop using the heat pump immediately. I leave it to the owner to determine whether to replace the heat pump with a quieter model or heat her home another way.

41. I also order the owner to pay the strata $275 plus prejudgment interest for bylaw violation fines.

42. 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. As the strata

was successful in this dispute, I see no reason to depart from this general rule. I therefore order that within 30 days of this decision, the owner must reimburse the strata $275 for tribunal fees.

DECISION AND ORDERS

43. I order that the owner must immediately stop using her existing heat pump.

44. I order that within 30 days of this decision, the owner pay the strata a total of $503.88, broken down as follows:

    a. $275 for bylaw violation fines,

    b. $3.88 as prejudgment interest under the COIA, and

    c. $225 for tribunal fees.

45. The strata is entitled to post-judgement interest under the COIA, as applicable.

46. 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 Dispute Notice for this dispute was issued on December 6, 2017, before amendments to the Act came into force on January 1, 2019. This means 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.

47. 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.

Kate Campbell, Tribunal Member