Civil Resolution Tribunal

Date Issued: March 28, 2019

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Civil Resolution Tribunal

Indexed as: *Torok v. Amstutz et al,* 2019 BCCRT 386

B E T W E E N :

Patrice Torok

APPLICANT

A N D :

Bryan Amstutz and The Owners, Strata Plan NW 1997

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Kate Campbell

INTRODUCTION

1. The applicant, Patrice Torok (owner) owns strata lot 20 (SL20) in the respondent strata corporation, The Owners, Strata Plan NW 1997 (strata). The other respondent, Bryan Amstutz, owns strata lot 38 (SL38) in the strata, which is directly above the owner's strata lot.

2. The owner says the new laminate flooring installed in Mr. Amstutz's strata lot makes the sound of the neighbours walking in her strata lot very loud. She says this is a nuisance and unreasonably interferes with her use and enjoyment of her strata lot. The owner says the noise is contrary to the strata's bylaws, but the strata failed to sufficiently investigate the noise or enforce the bylaws. The owner seeks the following remedies:

    a. An order that the respondents pay for a floor assessment by an unbiased expert.

    b. An order that the floors be repaired.

    c. Compensation of $300 per month for pain, suffering, and loss of peaceful enjoyment.

    d. Compensation of $5,000 for the strata council's delays, failure to follow the *Strata Property Act* (SPA), and failure to perform its duties.

3. The strata says it has met its duties under the SPA. The strata says its investigation was sufficient, the laminate floor installation met minimum noise standards, and the owner has not allowed an unbiased party to confirm the noise level.

4. Mr. Amstutz says the noise the owner complains of is not due to his laminate flooring. He says the new flooring was installed by the previous owner of SL38 in 2016, and the noise complaint was not raised until August 2017, nearly a year after the floor was installed, so the change in flooring did not cause the noise problem. Mr. Amstutz denies violating any bylaws, and says he has taken steps to reduce potential noise such as using rugs and foam kitchen mats. Mr. Amstutz also says the requested floor repairs are unreasonable, as this is a large, expensive project with no guarantee of solving the owner's noise concerns. Also, Mr. Amstutz says that he is not personally liable, as the strata approved the floors and they were installed before he bought the strata lot.

5. The owner and Mr. Amstutz are self-represented. The strata is represented by a strata council member.

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.

ISSUES

10. The issues in this dispute are:

    a. Did the strata sufficiently investigate the owners' noise complaint?

    b. Is the laminate flooring in SL38 causing unreasonable noise in the owner's strata lot, and if so, what remedies are appropriate?

EVIDENCE, FINDINGS AND ANALYSIS

11. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding such as this, the applicant owner must prove their claims on a balance of probabilities.

12. The strata says the previous owner of SL38 installed the laminate flooring in September 2016. It did not provide specific evidence to confirm the installation date, but I accept that it was shortly after September 1, 2016, as that was when the previous owners signed an "Assumption of Liability Agreement" (Liability Agreement) related to the laminate flooring.

13. Mr. Amstutz bought SL38 effective January 20, 2017. The owner says she first noticed the noise in approximately Spring 2017. She says she did not complain immediately, as she was uncertain if it would be ongoing. The owner sent the first email to the strata council setting out her noise complaint on August 18, 2017.

14. The owner says that when one person in SL38 walks, the noise is intolerable, and it is crushing when 2 people walk, she is "overloaded". The owner says she cannot sleep, relax, or watch television without being disturbed by the noise, and she cannot entertain friends or relatives in her home. She says the negative impact of the noise on her daily life is enormous, and has affected her health.

15. The owner says the noise must be caused by the laminate flooring installed in 2016, as there was no noise problem before that.

Relevant Bylaws

16. The current bylaws are those filed with the Land Title Office on February 17, 2016. Bylaw 3(l) states, in part, that an owner, tenant, occupant or visitor must not use a strata lot, the common property, or common assets in a way that

    a. causes a nuisance or hazard to another person,

    b. causes unreasonable noise,

c. unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot

Did the strata sufficiently investigate the owners' noise complaint?

17. Under section 26 of the SPA, the strata council has a duty to exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules. When carrying under these duties, such as bylaw enforcement, the strata council must act reasonably. This includes a duty to investigate alleged bylaw violations, such as noise complaints.

18. Section 135 of the SPA sets out a procedure for investigating a complaint, which includes providing the subject owner or tenant the opportunity to be heard, before any fine is levied. This protection is for the benefit of the owner or tenant that is the subject of the complaint, not the person making the complaint. Notably, there is otherwise no particular complaint procedure set out in the SPA and a strata council is permitted to deal with complaints of bylaw violations as the council sees fit, so long as it complies with the principles of procedural fairness and is not "significantly unfair" to any person who appears before the council (*Chorney v. Strata Plan VIS 770*, 2016 BCSC 148 (CanLII)).

19. I am empowered under section 123(2) of the Act to make orders related to findings of significant unfairness. As discussed further below, I find the strata's approach has not been significantly unfair to the owner.

20. In *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763 (CanLII), the court restated the test for determining significant unfairness as set out in *Dollan v. Strata Plan BCS 1589*, 2012 BCCA 44 (CanLII). 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 123(2) of the Act. In particular, in Watson the court stated:

> The test under s. 164 of the [SPA] also involves objective assessment. [The *Dollan* decision] requires several questions to be answered in that regard:
>
> a. What is or was the expectation of the affected owner or tenant?

b. Was that expectation on the part of the owner or tenant objectively reasonable?

c. If so, was that expectation violated by an action that was significantly unfair?

21. In *Dollan*, the court further stated as follows:

> There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. …

22. I find the owner had a reasonable expectation that the strata would investigate her noise complaint, and that any bylaw violation related to noise would be addressed.

23. I find the strata did not meet that expectation, and acted in a manner that was significantly unfair to the owner.

24. First, when the owner first sent her written noise complaint to the strata property manager on August 18, 2017, the property manager failed to take any action, and gave her incorrect information that was inconsistent with the SPA and the strata's bylaws.

25. The owner write that she had lived in SL20 for 20 years, but something had changed with the flooring upstairs as she could hear every step and the floor was creaking incredibly loudly. She asked if the residents upstairs had recently changed their flooring, and said it was interfering with her quality of life and waking her up. She asked the property manager to assist with the issue.

26. The property manager said there were new owners upstairs and they had installed laminate flooring, which he said were "conditions beyond our control". He wrote, "We cannot do anything as they are within their rights". The property manager suggested that the owner discuss the matter with the owners upstairs.

27. The owner and the property manager exchanged a few more emails, and then the owner asked for suggestions on what, if anything, could be done to limit the floor noise. The property manager replied as follows:

> No suggestions. If it was not for Human Rights this would not be allowed in an apartment. But we are forced to accept it and there is no protection for the person below having to endure as it is considered normal living.

28. This information from the property manager, upon which the owner relied for several months, was incorrect. Bylaw 3(I) places limits on unreasonable noise, which, as stated above, the strata has a duty to enforce. This includes a requirement to investigate complaints, such as that set out in the owner's August 2017 emails. There is no indication that human rights legislation, such as the *British Columbia Human Rights Code,* was engaged in this circumstance, as suggested by the property manager. Also, the bylaws provide protection for owners subjected to unreasonable noise.

29. In defending itself in this dispute, the strata relies on the fact that the owner did not raise the noise issue again until January 2018. However, the emails above make it clear that the owner let the matter lie based on the incorrect information from the property manager that she had no recourse. For that reason, I find that any delay was the strata's fault, rather than the owner's.

30. The strata says it did not have an opportunity to investigate the noise complaint, and that the owner would not allow a strata council member to visit her strata lot to assess the noise level. I find that the evidence before me does not support these assertions, and that instead, the strata failed to conduct a reasonable investigation.

31. As previously stated, the strata should have investigated the noise complaint after it was raised in August 2017, but did not. The owner raised the noise problem again in mid-January 2018, and asked to speak directly to the strata council about the matter. Council member D contacted her about the matter. In a January 24, 2018 email, D offered to come to the owner's strata lot to listen to the noise, if the owner

agreed, and then next steps would be discussed with the property manager and strata council.

32. The strata says the owner refused D's offer. I disagree. The owner requested clarification about why D would come listen if she had no authority as a member of council to assist with the resolution. D said that the next step for council was to further investigate the complaint, so D would attend the owner's strata lot "as an impartial third party and take back any findings to council", and council could then determine a course of action.

33. In a January 27, 2018 email to D, the owner said she was agreeable to having D come to her strata lot to investigate the noise, but the visit must be coordinated with the upstairs residents, as they would need to be home and walking for the noise to be heard, and another strata council member must attend upstairs to ensure the residents were walking in a normal fashion. The owner wrote that once this arrangement was confirmed, she could provide some available times and dates. The owner also wrote that she was a bit concerned that the investigation would be based on one person's subjective opinion, but she guessed that could be dealt with later.

34. I find that email was not a refusal, but was in fact an acceptance of D's offer to investigate. I find the owner's conditions were reasonable, as it would not be possible to hear the alleged noise if the upstairs owners were not home and walking normally. It would have been simple to arrange, and would have cost nothing. However, the strata council did not proceed with the investigation, and instead took no further steps until after the owner filed this dispute with the tribunal.

35. On January 29, 2018, the owner emailed D and formally requested a hearing before the strata council and a decision about her noise complaint. In its Dispute Response Form, the strata says the strata council and property manager did not receive this request. I disagree, since the strata's evidence shows that D forwarded this email to the property manager and the council members on January 30, 2018.

36. Section 34.1 of the SPA says if an owner or tenant makes a written request for a hearing at a strata council meeting, the council must hold the hearing within 4 weeks. Section 34.1(3) says that if the purpose of the requested hearing is to seek a decision of the council, the decision must be provided in writing within 1 week after the hearing.

37. I find the strata failed to meet either of these requirements, as it did not offer the owner a hearing within 4 weeks, and never made a formal decision about her noise complaint, as requested. While the strata says it offered to let the owner attend a strata council meeting in March 2018, this was outside the 4 week deadline, and there is no correspondence in evidence confirming that invitation.

38. For all of these reasons, I find the strata failed to reasonably investigate or address the owner's noise complaint, and treated her in a significantly unfair manner.

39. I address the remedies for this breach later in this decision.

Is the laminate flooring in SL38 causing unreasonable noise in the owner's strata lot, and if so, what remedies are appropriate?

40. The owner filed this dispute with the tribunal on March 12, 2018. On August 25, 2018, the property manager conducted sound testing in the owner's strata lot. He used a decibel recorder while the Mr. Amstutz and the strata council president walked in an agreed-upon pattern upstairs. The property manager's August 27, 2018 report includes the following findings:

    a. The decibel readings ranged from 34.6 decibels to 67.4 decibels, with an average of 38.0 decibels.

    b. While these decibel levels were within the acceptable range adopted by the City of Vancouver noise manual and the Canada Mortgage and Housing Corporation (CMHC) guidelines, it was "clear that there was a problem".

    c. The noise level was not the issue, but rather the "annoying squeaking/creaking".

d. The actual footsteps above were not responsible for the noise, and scatter carpets did not affect it. The issue was squeaking/creaking which clearly followed the path of the walker and remained constant with their movement.

e. The noise was an annoying mid-volume sound, as opposed to sudden high levels expected from impact noise.

f. The squeaking sound is “well known with laminate flooring, and is caused by the movement of the individual boards that rub together along the joints.

g. The property manager expected to hear the same squeaking noise inside SL38 upstairs, but he did not hear it. However, movement was noticeable underfoot.

41. The property manager concluded that the owner had a legitimate complaint about the squeaking/creaking noise, and the occupants of SL38 were not previously aware of it. He said covering the laminate flooring would not stop the noise. He recommended lubricating the laminate joints, and as a last resort, removing the laminate, levelling the subfloor, and re-installing the laminate.

42. The property manager performed further sound testing in the owner’s strata lot on September 15, 2018. Mr. Amstutz agreed to remove all the laminate flooring from his master bedroom, in order to determine if the sub-floor contributed to the squeaking. The property manager reported as follows:

a. The squeaking was not as extensive as it was on August 25, likely due to a change in weather.

b. The sub-floor in the master bedroom was level and professionally installed.

c. With the sub-floor removed, he could hear a sub-floor squeak in 3 areas.

43. The property manager recommended removing the ceiling drywall in the owner’s strata lot, and fastening wood alongside the floor joists where squeaking is found, until all squeaking is eliminated. The property manager said the strata would schedule the work with contractors as fast as possible in the master bedroom, and if

successful other areas could be revisited. He said it was unclear who should bear the final cost, but he recommended that the strata pay the contractor and "let the lawyers decide who is responsible".

44. The owner refused the property manager's proposal. She said that removing the laminate in the SL38 master bedroom did not resolve the noise, and that the property manager's proposal to remove her ceiling and install wood was not a viable option because they did not know the true issue or cause of the noise. She said she had no noise problem for 20 years, and her ceiling was not the problem.

45. As an alternative, the owner said the matter should be assessed by a flooring professional to determine the cause of the noise. She suggested hiring a particular flooring inspection service. That assessment did not occur, as Mr. Amstutz refused consent.

46. I find that the evidence before me proves that the owner's noise complaint is justified. I place significant weight on the property manager's August 25, 2018 report, which says the squeaking/creaking noise coming from upstairs was a clear problem and "annoying". The fact that the property manager found the noise is annoying substantiates the owner's claim that it interfered with daily activities in her strata lot, such as entertaining, watching television, and sleeping. The property manager also confirmed that it was a "mid-volume" sound, rather than a slight or quiet noise. I also place some weight on the witness statements provided by the owner, which confirm her reports of annoying and distracting noise from above. I note that the there is no contrary evidence before me stating that there is no noise, or that the noise is minor and reasonable in the circumstances. Mr. Amstutz's submission that such noise is to be expected in a wood-frame building is not supported by any expert evidence, such as a contractor's report, so I am not persuaded by it. I also note that according to the property manager's reports, the noise was not really audible in Mr. Amstutz's strata lot.

47. For these reasons, I find the squeaking/creaking noise documented in the property manager's August 25, 2018 report constitutes a nuisance and a violation of bylaw

3(I)(a) and (b). There is no requirement that noise reach a certain decibel range in order to be considered unreasonable or a nuisance. Rather, it is an objective determination, which must be made based on a standard of reasonableness, and in consideration of all the relevant facts.

48. 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. Similarly, I find the owner in this dispute was entitled to live in her strata lot without frequent exposures to "annoying" noise, as described in the property manager's report.

Remedies

49. I find the property manager's proposed solution of opening up the owner's ceiling to add wood to the existing joists, is not reasonable in the circumstances. While I accept that the property manager has some expertise in the area of home warranties, as set out in his report, he is not a licenced contractor or engineer. I find his proposal to be speculative, and not based on a thorough examination of the building's structure and components. He also did not address the fact that the owner had no noise problem prior to the installation of the laminate floor in September 2016. I also find it was unreasonable for the property manager to suggest proceeding with the work and letting "the lawyers" dispute the question of payment later. In the circumstances, I find the owner was justified in refusing this proposal.

50. The Liability Agreement signed by the previous owners of SL38 says those owners, and any successor owners of SL38, indemnify and save harmless the strata corporation and any other owners of property within the strata corporation from an and all costs and damages, loss or liability, which may occur by reason of carrying

out related to the installation of the laminate flooring, or the installation of the laminate flooring once in place. I find that this means Mr. Amstutz is liable to pay for any noise remediation necessary, that is related to the laminate flooring currently in SL38.

51. However, I find the evidence before me does not sufficiently identify the nature and source of the noise problem in the owner's strata lot. As previously explained, the property manager is not an expert in construction or engineering, and I do not accept his opinion as sufficient to establish Mr. Amstutz's liability for the noise.

52. For this reason, and in order to remedy the strata's failure to properly investigate the owner's noise complaint, I find the strata must hire and pay for a structural engineer to investigate the source of the noise in the owner's strata lot, and to identify the best way to eliminate or maximally reduce the noise. This may involve replacing or reinstalling the laminate flooring in SL38, adding additional underlay components, or bolstering the floor joists as suggested by the property manager.

53. It is solely up to the strata to select the structural engineer, who must be a licenced professional engineer. The engineer's findings must be set out in a written report, which the strata must provide to the owners of SL20 and SL38 within 1 week of receiving it.

54. The owners of SL20 and SL 38 must allow reasonable access to their strata lots for this assessment, which may involve some cutting open of floor or ceiling components for viewing. I find that a structural engineer is a more appropriate expert in the circumstances than the flooring specialist identified by the owner, as it is possible the noise originates in the subfloor or joists rather than in the flooring itself.

55. Once the source of the noise is identified by the engineer, the strata has a duty to enforce its noise bylaw by taking steps to ensure the noise is eliminated or reduced as much as reasonably possible in the circumstances. Under the terms of the Liability Agreement, Mr. Amstutz is liable to pay for those repairs, if the noise is

caused by his laminate floors. As that matter is not in evidence before me, I make no order about it.

Damages

56. The owner claims $5,000 in damages for the strata council's delays and failure to carry out its duty to investigate the noise complaint and enforce the noise bylaw.

57. In *Suzuki v. Munroe*, 2009 BCSC 1403, the BC Supreme Court awarded $6,000 in damages for nuisance when a neighbour's air conditioner caused undue noise that prevented the petitioners from using their house. In *Chen* (cited above), the tribunal awarded a strata lot owner $4,000 in damages for loss of enjoyment of her strata lot. As in this dispute, the vice chair found the strata had acted significantly unfairly towards the owner by failing to reasonably address the noise nuisance from a nearby hot tub pump. In *Chen,* the vice chair found the strata was responsible for 2.5 years of unreasonable noise.

58. In this dispute, the noise was first reported in August 2017, and has continued since. This is a similar time period to *Chen,* and I find the noise was similarly disruptive. Although the evidence indicates that it was not as loud, it was likely more frequent. For these reasons, and following the persuasive but not binding reasoning in *Chen,* I find the strata must pay the owner $4,000 in damages for loss of enjoyment of her strata lot.

59. I find the owner is also entitled to pre-judgment interest on the $4,000, under the *Court Order Interest Act* (COIA). I find this interest is due from September 1, 2017, when the strata ought to have investigated the noise complaint.

Pain and Suffering

60. The owner also claims $300 per month in damages for pain, suffering, and loss of peaceful enjoyment of her home.

61. I accept that the ongoing noise, and the strata's failure to take action, were extremely disruptive, frustrating, and upsetting for the owner. However, I find she is

not entitled to $300 per month as compensation, on top of the $4,000 I have already ordered.

62. The owner relies on the *Residential Tenancies Act* (RTA) for this damages claim, and cites decisions of the Residential Tenancy Branch (RTB). The RTA does not apply to this dispute, as the owner is not a tenant, and the respondents are not her landlords. For that reason, the RTB decisions she cites are not relevant or persuasive.

63. While the owner provided medical records documenting some symptoms and conditions (which I omit for privacy reasons), there is no medical opinion before me stating that these were caused by the noise or by the strata's actions.

64. I therefore dismiss the owner's claim for additional damages for pain and suffering.

Summary

65. The strata must pay a structural engineer to investigate the source of the noise in the owner's strata lot, and to identify the best way to eliminate or maximally reduce the noise. The owners of SL20 and SL38 must allow reasonable access to their strata lots for this assessment.

66. The strata must pay the owner $4,000 in damages for loss of enjoyment of her strata lot, plus prejudgment interest under the COIA.

Fees and Expenses

67. 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 owner was substantially successful in this dispute, I see no reason to depart from this general rule. I therefore order the strata to reimburse the owner $225 for tribunal fees.

68. The strata claims $420 in dispute-related expenses. However, since the strata was not substantially successful in this dispute, I order no reimbursement. Also, I would

not order this reimbursement in any event, as the strata provided no receipts, invoices, or particulars to explain what the expenses were, or to confirm the amount.

69. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

DECISION AND ORDERS

70. I order that within 60 days of this decision, the strata hire and pay for a structural engineer to investigate the source of the noise in the owner's strata lot, and to identify the best way to eliminate or maximally reduce the noise.

71. It is solely up to the strata to select the structural engineer, who must be a licenced professional engineer. The engineer's findings must be set out in a written report, which the strata must provide to the owners of SL20 and SL38 within 1 week of receiving it.

72. The owners of SL20 and SL 38 must allow reasonable access to their strata lots for the engineering assessment.

73. I order that within 30 days of this decision, the strata pay the owner a total of $4,305.27, broken down as follows:

    a. $4,000 in damages,

    b. $80.27 as prejudgment interest under the *COIA*, and

    c. $225 for tribunal fees.

74. The owner is also entitled to post-judgment interest under the COIA.

75. 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.

76. 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