



# Civil Resolution Tribunal

Date Issued: April 30, 2019

File: ST-2018-007358

Type: Strata

Civil Resolution Tribunal

Indexed as: *De Mark v. The Owners, Strata Plan BCS 3240*, 2019 BCCRT 512

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

Pamela De Mark

**APPLICANT**

**A N D :**

The Owners, Strata Plan BCS 3240

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Amy J. Peck

### **INTRODUCTION**

1. The applicant (owner) owns strata lot 17, also known as unit 211, in the respondent strata corporation, The Owners, Strata Plan BCS 3240 (strata). This dispute is about the strata's alleged failure to enforce its noise bylaws with respect to the owner's complaints about noise coming from the unit above, unit 311. 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 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.
3. 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.
4. 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.
5. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
6. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.
7. Section 123(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. It provides, among other things, that the tribunal has discretion to make an order directed at the strata or the council if the order is necessary to prevent or remedy a significantly unfair action or decision. The tribunal has jurisdiction to remedy significant unfairness on the part of a strata corporation (see *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164 at para. 119).

## **ISSUES**

8. The issues in this dispute are:
  - a. Has there been any contravention of the strata's noise bylaws by the occupants of unit 311?
  - b. Should there be an order that the strata enforce its noise bylaws in order to prevent or remedy a significantly unfair action or decision?
  - c. Should the owner be reimbursed for her tribunal fees?

## **BACKGROUND AND EVIDENCE**

9. I have reviewed all of the material submitted by the parties but I will only refer in these reasons to what is directly relevant to my decision.
10. The owner and the owner of unit 311 have both lived in their respective strata units for approximately 10 years. Unit 311 is directly above unit 211. The owner is currently the secretary on the strata council.
11. The strata is a heritage building with exposed concrete floors. There are 57 residential units and 2 commercial units in the strata.
12. The owner made 6 noise complaints against unit 311, on each of December 5, 2017, and January 3, February 23, May 6, May 24, and July 16, 2018, all for noise occurring between 8:30 p.m. and 1 a.m. She described the noises as banging, dragging and thumping, walking in hard-soled shoes, and, most often, scraping of furniture.
13. The strata bylaws changed on June 25, 2018. However, the bylaw related to noise – bylaw 3(1)(b) – was the same at all relevant times, and says that an owner must not make undue noise in or about a residential strata lot.
14. The strata, through its property manager, sent letters to the owner of unit 311 on each of December 12, 2017, January 8, 2018 (though that letter is incorrectly dated

December 12, 2017) and February 28, 2018 advising the owner of the December 5, January 3 and February 23 noise complaints, respectively, and inviting the owner of unit 311 to respond to the allegations. It is not clear why no letters were sent to the owner of unit 311 on behalf of the strata about the May 6, May 24 and July 2018 noise complaints.

15. The owner of unit 311 responded to each of the three bylaw violation letters stating that the noise complained of was regular living noise and, later, that the complaints constituted bullying and harassment. He also detailed the steps taken to minimize floor noise, such as using felt and rubber pads on furniture, installing rugs, and the purchase of soft dog toys.
16. The owner had previously made a noise complaint against unit 311 in July 2010 related to dropping and dragging items and walking in hard-soled shoes. The strata's then-property manager issued a warning letter to the owner of unit 311 related to noise at that time but imposed no fine. There is no evidence that the owner made any additional noise complaints until December 2017.
17. Both the owner and the owner of unit 311 requested hearings before council related to the noise complaints.
18. The owner appeared before the strata council on May 25, 2018, and on May 31, 2018, the strata's property manager issued a letter to the owner of 311 levying a fine of \$200.
19. The strata subsequently granted the owner of unit 311 a council hearing on June 25, 2018. Although issuing a fine prior to hearing the owner of unit 311 may have been a breach of section 135 of the SPA, that issue is not before me. After the June 25 hearing, the strata decided to schedule a walkthrough of unit 311 to investigate the potential cause of the noise. Two council members attended unit 311 on July 11, 2018 and found that furniture pads were securely fastened to the couch, dining chairs, and bar stools, that a kitchen ladder had rubber padded feet, that the dog toys in the home were soft, and that no other furniture pieces required additional noise control measures.

20. After the July 11, 2018 walkthrough, the strata decided to reverse the fine issued against unit 311, and they sent the owner of unit 311 a letter to that effect, via the property manager, on July 26, 2018.
21. Despite having decided that the owner of unit 311 had taken appropriate steps to mitigate noise, because the owner had made ongoing complaints, including one after the July 11, 2018 walkthrough, the strata decided to further investigate the source and nature of the noise. Four council members attended both units 211 and 311 on September 25, 2018 to hear first-hand the noises that could be heard in unit 211 from activity in unit 311.
22. The strata presented an affidavit from each of the 4 council members who participated in the September 25 investigation. The content of those affidavits is all substantially similar and confirms that the council members each attended both unit 211 and unit 311, and detailed the movements they made in unit 311 and noises they heard in unit 211. They all said that the owner, who was present during the investigation, confirmed that the nature of the noises heard in the investigation were the same as the noises that formed the basis of her complaints. They also all said that they have heard similar noises in their units or elsewhere in the building, and that they considered the noise to be related to day-to-day activities and not to be unreasonable.
23. The strata's property manager sent a letter dated October 2, 2018 on behalf of the strata to each of the owner and the owner of unit 311 stating council's conclusion that the noises that formed the basis of the owner's complaints were reasonable day-to-day noises and that the owner of unit 311 had done everything necessary to minimize any noise transfer. The letter confirmed no further action was required from unit 311 on any prior related noise complaints.
24. Despite having already made a determination that no further action was required, a council member contacted a professional sound monitoring company in November 2017 to inquire about the possibility of monitoring the sound coming from unit 311. The company representative advised the council member that the monitoring

services they provide is directed to industrial noise, and that they would not recommend professional sound monitoring in this case due to significant expense and the fact that there is no accepted standard as to what constitutes "reasonable" residential noise to measure against.

## **POSITION OF THE PARTIES**

25. The owner argues that:

- a. She is more negatively impacted by the strata's alleged failure to enforce the noise bylaw than the owner of unit 311 would be if strata did enforce the bylaw because the noise is impacting her health whereas issuing a fine against unit 311 is simply a monetary penalty.
- b. The owners of 311 have a motive to deny the complaint in order to avoid the potential financial penalty. She has no reason to pursue complaints if they were not true.

26. The owner requests that I order the strata to enforce the noise bylaw and to present all noise complaint letters, though it is not clear to whom she wants the letters presented.

27. The strata argues that:

- a. They have properly investigated the complaints.
- b. They have concluded that the complaints are unfounded.

28. The strata requests that I dismiss the owner's claim.

## ANALYSIS

### ***Has there been any contravention of the noise bylaw by the occupants of unit 311?***

29. Once a bylaw contravention has occurred, council does not have the discretion to choose not to enforce a bylaw. Rather, enforcement of bylaws is mandatory, as set out in section 26 of the SPA. Therefore, the first question to be answered in a dispute such as this is whether the bylaw has been breached, which involves asking whether the strata did enough to determine whether or not a breach occurred.
30. Section 135 of the SPA addresses the strata's investigation of a complaint. It requires that the subject owner be given the opportunity to be heard before any fine is levied. This protection is for the benefit of the owner that is the subject of the complaint, not the owner making the complaint. Other than this requirement, a strata 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 at para. 52).
31. The test for whether the tribunal should intervene in a strata's bylaw enforcement decision on the basis of significant unfairness is an objective one, meaning what is relevant is what is reasonable in the circumstances and not necessarily what the individual(s) in question actually believed or expected. In particular, there are three questions to be answered:
- a. What is or was the expectation of the affected owner?
  - b. Was that expectation on the part of the owner objectively reasonable?
  - c. If so, was that expectation violated by an action that was significantly unfair?

*(The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 763 at para. 28)

32. What is "significantly unfair" in this context has been defined as conduct that is "burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith" (*Chow v. Strata Plan LMS 1277*, 2006 BCSC 335 at para. 75). This is a

high bar and the owner bears the burden of proving this type of conduct has occurred.

33. The strata's evidence, which I accept, is that the owner acknowledged that the sounds heard at the September 25, 2018 investigation were of the same nature as those she was complaining about. The owner also acknowledged that some of the same sounds were made in the daytime and that they did not bother her at that time because they did not disrupt her sleep. The strata concluded, on the reports of all 4 council members who attended the September 25 investigation, that those noises were a reasonable part of day-to-day living and were similar to other living noises heard regularly in the building. While the strata did not say so directly in the letter of October 2, 2018, the implication is that the strata concluded that there had been no breach of the noise bylaw on any of the 6 occasions reported.
34. As was the case in *A.P. v. The Owners, Strata Plan ABC*, 2017 BCCRT 94 (A.P.), the owner never invited a council member to observe the noises that formed the basis of any complaint at the time they were occurring. While that would have been challenging for some of the complaints late at night, some complaints were for activities earlier in the evening where it is possible a council member could have been available. The owner is the only person who could have invited a council member to observe the noises that formed the basis of her complaints. She never did so, so council had little choice other than to try to recreate the noises at other times to evaluate the noise complaints.
35. As was also the case in A.P., I believe that the owner finds the noises coming from unit 311 to be unreasonable. However, the owner's expectation must be evaluated objectively, taking all of the circumstances into account. Here, the owner of unit 311 has taken many steps to reduce the noises from walking, moving furniture, and his dog coming through the floor, and there appears to have been a long period between 2010 and 2017 where the noise was manageable for the owner. The owner also acknowledges that the strata is a heritage building with concrete floors, and noises tend to travel through those buildings more so than in other types of construction. To the extent that she expects that these types of noises will be any



quieter later in the evening or will stop altogether, that expectation is not reasonable.

36. The way the strata proceeded to address and investigate the noise complaints may have delayed the process and caused some confusion, as decisions were made and then reversed. However, despite the awkward process, I find that the strata did not act in a way that qualifies as "significantly unfair" by investigating the noise complaints in the way that they did and ultimately concluding that no breach of the bylaws had occurred. I find that there is no need for me to address the remaining issues, and I dismiss the owner's dispute.

## **TRIBUNAL FEES AND EXPENSES**

37. 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 dispute-related expenses. However, the strata is the successful party in this dispute and the strata did not claim any fees or dispute-related expenses. Therefore, I make no order about fees or expenses.
38. The strata must also comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

## **ORDER**

39. I order that the owner's dispute is dismissed.

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Amy J. Peck, Tribunal Member