Civil Resolution Tribunal

Date Issued: June 7, 2019

File: ST-2018-008611

Type: Strata

Civil Resolution Tribunal

Indexed as: *Bruusgaard v. The Owners, Strata Plan LMS 2599,* 2019 BCCRT 693

B E T W E E N :

Tom Bruusgaard

APPLICANT

A N D :

The Owners, Strata Plan LMS 2599

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kate Campbell

INTRODUCTION

1. This dispute is about hot tub noise.

2. The applicant, Tom Bruusgaard (owner) is the co-owner of strata lot 31, also known as unit 107, in the respondent strata corporation, The Owners, Strata Plan LMS

2599 (strata). There is a hot tub on the limited common property (LCP) patio of a neighbouring strata lot (unit 106). The owner says this hot tub transmits noise and vibration into his strata lot, which constitutes a nuisance, contrary to the strata's bylaws. The owner says the strata has failed to enforce its bylaws. He asks that the tribunal order the strata to reduce the noise within a normal range for multi-unit housing. He also seeks reimbursement of $3,000 for an engineering report.

3. The strata says the limitation period for the owner's claims has expired. The strata says it properly investigated the owner's noise complaint, and found no bylaw contravention. The strata also says it met the terms of an earlier agreement settling the owner's previous CRT dispute about the hot tub noise, and the owner is not entitled to any further remedy.

4. The owner is self-represented. The strata is represented by a strata council member. The owner of unit 106 (and the hot tub) is not a party to this dispute.

JURISDICTION AND PROCEDURE

5. 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.

6. 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.

7. 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.

8. 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

9. The issues in this dispute are:

    a. Are the owner's claims barred because they are out of time under the *Limitation Act*?

    b. Are the parties bound by the terms of the August 2018 agreement?

    c. If not,

        i. does the hot tub noise or vibration violate strata bylaws, and if so, must the strata take steps to reduce the hot tub noise or vibration?

        ii. is the owner entitled to reimbursement of $3,000 for the April 2018 engineer's report?

EVIDENCE, FINDINGS AND ANALYSIS

10. 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 his claims on a balance of probabilities.

11. I find that the bylaws relevant to this dispute are those filed with the Land Title Office on April 29, 2010. In particular, bylaw 4.1 says in part that a resident or visitor must not use a strata lot, common property, or common assets in a way that causes a nuisance or hazard to another person, causes unreasonable noise, or unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets, or another strata lot.

Are the owner's claims barred under the Limitation Act?

12. The owner says he first noticed the hot tub noise in September 2016, when he moved into his strata lot. The strata says that since the owner did not file this dispute with the tribunal until November 21, 2018, the owner therefore missed the 2-year limitation period set out in the *Limitation Act.*

13. For disputes filed before January 1, 2019, like this one, the limitation period stopped when the Dispute Notice was issued, which in this dispute was on November 28, 2018.

14. As stated in section 13 of the Act, the *Limitation Act* applies to tribunal disputes. A limitation period is a specific time period within which a person may pursue a claim. If the time period expires, the right to bring the claim disappears. Section 6(1) of the *Limitation Act* states that a proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

15. I find that the owner's claims are not statute-barred. His claims involve disturbances due to noise and vibration, and I accept his evidence that these are ongoing.

16. In *K&L Land Partnership v. Canada (Attorney General*), 2014 BCSC 1701, the BC Supreme Court held that a nuisance continues so long as the activity causing the nuisance is ongoing. While *K&L* dealt with a previous version of the *Limitation Act,* I find that the same reasoning applies to the current version, and therefore to this dispute. Also, although not binding on me, I accept the reasoning in *The Owners, Strata Plan VR 133 v. Zelman et al*, 2018 BCCRT 538, in which a tribunal member relied on *K&L,* and found that a noise disturbance dispute involving a strata's bylaws was not barred by the *Limitation Act,* even though the applicant had first complained of the noise more than 2 years before the tribunal dispute was filed (see paragraph 34).

17. Following the reasoning in *K&L* and *Zelman,* and because the owner's complaint is about ongoing noise and vibrations, I find his claims are not barred under the *Limitation Act.*

Are the parties bound by the terms of the August 2018 agreement?

18. In April 2018, after extensive communications with the strata about the hot tub noise and vibration, the owner hired an engineering firm, BKL Consultants Ltd. (BKL) to test and report on the residual noise transmission from the hot tub pump located on the unit 106 patio into the owner's strata lot. BKL's April 16, 2018 report says noise testing was conducted using a calibrated, hand-held sound level meter. The report says the hot tub noise was clearly audible in the master bedroom, due to the high sound levels from the hot tub pump. The reported noise level in the master bedroom was NC (noise criterion) 37, which exceeded the noise guidelines established by the American Society of Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE) for bedrooms, living rooms, and dens by 7 points. The report says that the ASHRAE guidelines or HVAC-related background sound is NC 30 for bedrooms, living rooms and dens, NC 35 for less sensitive spaces such as kitchens and bathrooms, and a maximum of NC 40 for common spaces such as corridors, and lobbies.

19. The BKL report concluded that the noise transmission from the hot tub pump to the owner's master bedroom was "structure-borne", and there should be a simple way to minimize vibration transfer to the building structure. The engineer made the following recommendations:

> Due to the existing conditions with the hot tub sitting on a shared suspended concrete slab, we recommend that a resilient floor mount solution is installed under the hot tub and/or pump of the residential unit #106 in order to reduce the structure-borne noise transmission and the potential for complaints from the adjacent residences. Product such as the GenieMat FF25 or Mason Super W (see attached cut-sheets) should be considered and further investigation is required.

20. The owner gave the BKL report to the strata, and requested a hearing before strata council, which occurred on May 16, 2018.

21. The matter was not resolved. On June 13, 2018 the owner filed a dispute with the tribunal seeking that the strata enforce its noise bylaws, and seeking reimbursement for the April 2018 engineer's report. This is a previous dispute, and not the dispute that is the subject of this decision, which was filed in November 2018. However, I find that both of these disputes have the same subject matter, and the same parties.

22. During the tribunal facilitation process for the June 2018 dispute, the parties agreed to a settlement. The terms of their agreement were set out in an August 7, 2018 email from the case manager. The case manager noted that both parties had agreed to the terms, and to the withdrawal of the claim. He wrote that the CRT dispute was now closed. The terms of the agreement, entitled "Agreement & claim withdrawal", can be summarized as follows:

    a. The strata would direct the unit 106 owners to install a sound-dampening product, either the GenieMat FF25 or the Mason Super W, under their hot tub pump, as recommended in the April 2018 engineer's report.

    b. The strata would ensure this work was completed as quickly as possible.

    c. The agreement also said the owner would bear the cost of the April 2018 engineer's report, and the strata was responsible for the cost, or cost recovery, of the sound-dampening product installation.

    d. The strata would inform the unit 106 owner that "should he receive information from the installer that may further remediate the sound issue noted in this claim, that he may request to make the additional changes to the [strata]."

23. Based on the correspondence provided in evidence, I accept that both parties agreed to these terms, including to the withdrawal of the June 2018 dispute.

24. Further correspondence provided by the owner shows that the sound-dampening pad was installed under the hot tub pump on September 28, 2018. On October 1, 2018, the owner emailed the property manager and said the anti-vibration mat had not resolved the hot tub noise issue. The owner said he had discussed the issue

with “other experts”, and the consensus was that the hot tub was “located too close to the common building membrane envelope.” The owner asked whether the strata intended to take any further action to remediate the excessive hot tub noise.

25. In a subsequent email, the owner wrote that the anti-vibration pad should have been installed under the hot tub, as well as under the pump, and there should have been a professional assessment of the noise issue or the proper application of the anti-vibration mat or other technologies to remediate the vibration. The owner then requested another hearing before the strata council, which was held on November 19, 2018. In a November 20, 2018 letter setting out the strata council’s decision following the hearing, the property manager wrote that the strata council found that all parts of the August 2018 agreement had been fully satisfied.

26. The owner then filed this dispute with the tribunal on November 21, 2018. He submits that the strata “followed the letter of the agreement, as opposed to the intent.” The owner says the minimum amount of work was completed, and it did not resolve the noise problem. He says he filed this dispute when it became clear that the August 2018 agreement failed to resolve the noise issue, and the other parties (meaning the strata and the unit 106 owner) were unwilling to continue remediation efforts.

27. I find that the parties are bound by the terms of the August 2018 agreement. Those terms were set out in writing, and both parties freely consented to them. I find the terms of the agreement are clear and unambiguous.

28. However, the agreement contained no provision regarding future disputes or claims on the hot tub noise issue. It did not say the claims were fully resolved, or that the owner could not file future disputes. Also, there was no provision that the claims were dismissed. Rather, the parties agreed that the owner’s dispute would be withdrawn (as it was). If a claim is dismissed, either by a tribunal member’s order or by consent of the parties, the identical matter cannot be raised again in a subsequent dispute. However, when a claim is withdrawn, there is no prohibition on raising that claim in a future proceeding.

29. I have considered whether the owner's claims are *res judicata* (already decided by the tribunal or a court) and I find they are not. The tribunal chair set out the tests for deciding whether a claim is *res judicata* in *Wong v. The Owners, Strata Plan LMS 2461*, 2017 BCCRT 55. One of the key parts of those tests is that there must have been a final decision by a court or tribunal deciding the issue. The tribunal has never decided the issue of the hot tub noise nuisance raised by the owner. Thus, I conclude that this issue is not *res judicata.*

30. For this reason, and because the June 2018 dispute was withdrawn rather than dismissed, I find the owner's noise nuisance claim in this dispute is not barred due to the August 2018 agreement. In making this finding, I also rely on 2 relevant factors. First, part of the tribunal's mandate, as set out in section 2(1) of the Act, is to provide accessible, speedy, economical, informal and flexible, dispute resolution, in a manner that recognizes relationships between parties that will likely continue after the tribunal proceeding is concluded. This is fundamentally a dispute within a community of close neighbours who must necessarily have an ongoing relationship. Second, the strata has a duty under section 26 of the SPA to enforce its bylaws on a continuing basis.

31. For these reasons, I find that the August 2018 agreement does not preclude the owner from pursuing his noise nuisance claim in this dispute.

Ongoing Hot Tub Noise

32. After the sound-dampening mat was installed under the hot tub pump in September 2018, the owner reported that the noise was unchanged. He continued to report ongoing noise, which he says was excessive and a violation of bylaw 4.1.

33. In response to the owner's renewed complaint, the strata said there was no new or compelling information to support the complaint, and that the August 2018 was fully satisfied.

34. I find that this response from the strata did not meet its duty to enforce its bylaws. I find that the April 2018 BKL report raised significant, documented concerns about

above-average levels of noise in the owner's master bedroom. Bylaw 4.1 says a resident or visitor must not use a strata lot in a way that causes a nuisance to another person, causes unreasonable noise, or unreasonably interferes with the rights of other persons to use and enjoy another strata lot.

35. While the strata takes issue with parts of the BKL report, it has not conducted its own sound or vibration testing to establish different findings, and has not investigated whether the installation of the mat under the hot tub pump in September 2018 reduced the noise documented in the BKL report. As explained in *Torok v. Amstutz et al,* 2019 BCCRT 386, a strata has a duty to investigate alleged bylaw violations, including neighbour-to-neighbour noise complaints.

36. It was open to the strata to provide its own sound testing report as evidence in this dispute, but it did not. As there is no contrary report before me, I accept the findings of the BKL report, and conclude that the unit 106 hot tub transmits audible vibration-related noise into the owner's strata lot, which constitutes an unreasonable interference with his use and enjoyment, contrary to bylaw 4.1.

37. In view of the ongoing relationship between the parties, I find the most appropriate remedy in this dispute is to order the following:

    a. The owner and the strata must agree on a professional hot tub installer to make recommendations and perform work. The strata may consult the unit 106 owner in this process.

    b. The strata must hire that hot tub installer to recommend how to maximally eliminate noise and vibration from the unit 106 hot tub. This may involve installing additional equipment, replacing the pump, moving the hot tub and/or pump, or other options suggested by the installer.

    c. The strata will then hire the installer, or a technician recommended by the installer, to perform the recommended modifications.

    d. The owner (Tom Bruusgaard) shall not bear the costs of this work.

e. The strata must direct the unit 106 owner to comply by providing access.

f. Until the modifications are complete, the strata must direct the unit 106 owner to keep the hot tub pump turned off at all times.

Reimbursement for Engineer's Report

38. The owner seeks reimbursement for the April 2018 BKL report, and provided an invoice in the amount of $2,730. I find the owner is not entitled to this reimbursement.

39. The August 2018 agreement between the parties specifically states that the owner would bear the cost of the April 2018 BKL report, and in exchange the strata would bear or recover the cost of the sound-dampening mat under the hot tub pump. There has been no new engineering report then. As previously explained, the mat was installed under the hot tub pump as agreed. I see no reason why the strata would now have to pay for the engineer's report, when the parties specifically agreed otherwise in August 2018.

40. For these reasons, I do not order reimbursement for the BKL report.

Tribunal Fees and Dispute-Related Expenses

41. 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 dispute-related. As the owner was partially successful in this dispute, I find he is entitled to reimbursement of half his tribunal fees, which equal $112.50. While the owner claimed $50 for dispute-related expenses, I do not order reimbursement for this amount in any event, as he provided no receipts or particulars to support the claim.

42. 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

43. I order that within 30 days of this decision, the strata pay the owner a total of $112.50 for tribunal fees.

44. The owner is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

45. I also order the following:

    a. The owner and the strata must agree on a professional hot tub installer to make recommendations and perform work. The strata may consult the unit 106 owner in this process.

    b. The strata must hire that hot tub installer to recommend how to maximally eliminate noise and vibration from the unit 106 hot tub. This may involve installing additional equipment, replacing the pump, moving the hot tub and/or pump, or other options suggested by the installer.

    c. The strata will then hire the installer, or a technician recommended by the installer, to perform the recommended modifications.

    d. The owner (Tom Bruusgaard) shall not bear the costs of this work.

    e. The strata must direct the unit 106 owner to comply by providing access.

    f. Until the modifications are complete, the strata must direct the unit 106 owner to keep the hot tub pump turned off at all times.

46. The owner's remaining claims are dismissed.

47. 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 123.1 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.

48. 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 123.1 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