Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Moojelsky v. The Owners, Strata Plan K 323 et al*, 2019 BCCRT 698

B E T W E E N :

Carrie Moojelsky

**APPLICANT**

A N D :

The Owners, Strata Plan K 323, Lorne White, and Theresa White

**RESPONDENTS**

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**REASONS FOR DECISION**

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Tribunal Member: Sarah Orr

## INTRODUCTION

1. The applicant, Carrie Moojelsky, owns strata lot 20 in the respondent strata corporation The Owners, Strata Plan K 323 (strata). The respondents Lorne White and Theresa White (together, the Whites) own the strata lot directly above Ms. Moojelsky (unit 309).

2. Ms. Moojelsky says the noise emanating from the Whites' strata lot disturbs her daily living and prevents her from enjoying her strata lot. She believes the previous owners of unit 309 installed unapproved flooring which is the source of the problem. She wants the strata to remedy the unapproved flooring, pay her $3,000 for loss of use and quiet enjoyment of her strata lot, and pay her $1,500 in punitive damages.

3. The Whites say they live quietly, are respectful of their neighbours, and do not cause unreasonable noise. The strata says it has no record of a flooring renovation in unit 309, its investigation into Ms. Moojelsky's noise complaint showed the Whites did not make or cause unreasonable noise, and that Ms. Moojelsky must accept some noise as part of living in a condominium.

4. Ms. Moojelsky and the Whites are self-represented, and the strata is represented by Jason Jensen, who I infer is a strata council member.

## 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. Some of the evidence in this dispute amounts to a "she said, they said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanor in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the

documentary evidence and submissions before me. Bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the recent decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.

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. The applicable tribunal rules are those that were in place at the time this dispute was commenced.

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 Ms. Moojelsky's noise complaint, and if not, what is an appropriate remedy?

    b. Is the laminate flooring in the Whites' strata lot causing unreasonable noise in Ms. Moojelsky's strata lot, and if so, what is an appropriate remedy?

## BACKGROUND AND EVIDENCE

11. In a civil proceeding such as this, Ms. Moojelsky must prove her claims on a balance of probabilities.

12. I have reviewed all of the parties' evidence and submissions but refer only to that which I find relevant to explain and give context for my decision.

13. The strata is a low-rise apartment-style complex made up of 33 strata lots, created in 1980. In 2001 the strata filed bylaws with the Land Title Office (LTO) which repealed and replaced all previous bylaws. The strata has filed subsequent bylaw amendments, but none of them are relevant to this dispute.

14. Ms. Moojelsky bought her strata lot (unit 209) in November 2014 and moved into it in October 2016. She says that ever since she moved in there has been excessive noise emanating from the Whites' strata lot (unit 309), including echoing footsteps and children running. She communicated her concerns to the Whites on several occasions but says that nothing changed.

15. In October 2017 Ms. Moojelsky asked her neighbour, C.B., who was the strata council president at the time, to listen to the noise from her strata lot. She submitted a statement from C.B. who said she was surprised how loud the footsteps and running noises were, and she "actually expected a foot to come through the ceiling." C.B. said on another occasion in unit 209 she heard loud thumping footsteps coming from unit 309. She said the noise she experiences in her own unit from the upstairs neighbours is muffled, whereas in unit 209 the noise from unit 309 is amplified, and that she would not be able to live with the noise.

16. On January 11, 2018 Ms. Moojelsky made a formal noise complaint to the strata about the Whites. She said she was disturbed by noise from their daily activities at all hours, including during designated quite hours between 11:00 p.m. and 7:00 a.m. She provided a log of over 30 instances of noise disturbances, primarily from stomping and children running, between November 2017 and January 2018. C.B.'s statement says she told the strata council at that time about what she heard from Ms. Moojelsky's strata lot, and that she suspected the problem was the previous owner of unit 309's unauthorized flooring renovation which likely lacked a proper underlay.

17. On January 23, 2018, the strata manager wrote a letter to the Whites informing them that they had received a noise complaint and that the strata was contemplating different options to address the complaint.

18. On February 15, 2018 the Whites had a hearing before the strata council. Mr. White says that in response to Ms. Moojelsky's complaints he and Ms. White modified their activities, which included wearing slippers and telling their grandchildren to be quiet. Mr. White submitted photographs showing a thick rug on top of carpeting on his living room floor, a rug in a hallway covering approximately half of the floor, and partial carpeting in the bedroom. The Whites submitted a statement from their daughter that said she used to bring her 3 children over to the Whites' unit approximately once per month, usually on Sundays, but that since August 2018 they had visited only once.

19. After the hearing the strata council determined that the noises Ms. Moojelsky complained of were reasonable and did not warrant issuing the Whites a fine. No one from the strata council, except for C.B., entered Ms. Moojelsky's unit to investigate the noise levels.

20. On February 21, 2018 Ms. Moojelsky submitted to council an excerpt from HealthLink BC's website which indicates that sounds above 85 decibels can be harmful. She also submitted 5 decibel readings she took on an app on her phone in February 2018 with peak spikes between 64.4 and 90.2 decibels. Ms. Moojelsky says that on March 24 and 25, 2018 she experienced extended periods of noise disturbance from children running and playing in unit 309. On March 26, 2018 she requested a hearing with the strata council.

21. On March 30, 2018 Ms. Moojelsky wrote a second letter to the strata council in advance of her hearing. She said the noise was infringing on her right to quiet enjoyment of her strata lot and compromising her health by preventing her from sleeping through the night. She said the flooring in the Whites' unit had insufficient soundproofing and suggested that installing soundproofing may resolve the problem.

22. Ms. Moojelsky says the previous owners of unit 309 installed laminate flooring in breach of the bylaws and that these unauthorized renovations are contributing to the noise problems she is experiencing. She submitted a statement from C.B., strata council president, who said the former owners of unit 309 renovated their floors in 2013, and that she saw the new flooring in September 2013. Ms. White says the previous owner of unit 309 replaced carpeting in the foyer, hallway, and dining room with laminate flooring over a ¾ inch plywood base, and that those areas remain uncarpeted.

23. The Whites submitted an affidavit from T.H., the son of the previous owner of unit 309. T.H. said his mother lived in unit 309 from 1991 to 2012, and that she had laminate flooring installed in 2002 or 2003. T.H. lived in the unit from 2005 to 2012. He said his mother played an electric organ in her unit, and sometimes his sisters would sing and play acoustic guitar, and they never received a noise complaint. However, Ms. White said the previous owner of unit 209 was nearly deaf, so I find it is unlikely that owner would have noticed excessive noise emanating from unit 309. It is unclear from the evidence when the Whites bought their strata lot, but it is undisputed that they have not renovated their floors since they bought it.

24. The strata says there is no evidence that the previous owners of unit 309 renovated their floors. It says it does not have knowledge of how past councils handled alteration agreements, but there are no records of an application to alter unit 309.

25. On April 4, 2018 Ms. Moojelsky had a hearing before the strata council. At the hearing she submitted to council additional decibel readings she took in February and March 2018 on her phone with spikes between 66.4 and 99 decibels. C.B.'s statement says the strata manager advised the council to investigate the noise in Ms. Moojelsky's unit in person, but that none of the council members did so.

26. On April 11, 2018 the strata sent a letter to Ms. Moojelsky informing her that the council had voted to obtain an estimate from a professional acoustic company to compare noise levels in her unit to those in the neighboring units. They said once they received the estimate they would determine their next steps.

27. On May 24, 2018 the strata manager informed her that the company they had contacted for an estimate declined to provide one as they said it was outside their expertise and they were not prepared to become involved in what they assumed was guaranteed litigation, but they recommended an audio engineer in Vancouver specialising in sound transference. The strata manager said at that time he had no directions from the council to take any further action. On May 24, 2018 the strata manager sent Ms. Moojelsky another letter notifying her the strata council voted not to contact the recommended audio engineer in Vancouver because of budget constraints.

28. On June 7, 2018, the strata council president, C.B., emailed Ms. Moojelsky to tell her she had asked the council to continue its investigation into her noise complaints. C.B.'s statement says she recommended to council that they pull up the floor in unit 309 to see what was underneath, but that she was ignored.

29. On June 21, 2018, the strata informed the Whites that it would take no further action with respect to Ms. Moojelsky's noise complaints.

30. On July 17, 2018 Ms. Moojelsky asked the strata to continue its investigation into her noise complaints.

31. Ms. Moojelsky submitted to the tribunal 15 audio and video recordings of the noise disturbances in her unit between March 2018 and February 2019. I hear echoing tapping noises in many of these recordings which sound like footsteps from the unit above. Some of the videos appear to show 3 different decibel readers on a cell phone measuring ambient noise at approximately 40, and peak noises between 57.4 and 73.1 decibels. Ms. Moojelsky also submitted a log of noise disturbances from unit 309 from February 2018 to January 2019 with over 70 entries.

32. Ms. Moojelsky says she cannot socialize in her unit because conversations, whether on the phone or in person, are often interrupted by noise disturbances. She says she cannot watch television, listen to music, read, or sit quietly without repeated noise disruptions from unit 309. She says she is repeatedly awakened in the night.

33. Ms. Moojelsky submitted statements from 3 different friends which support her observations about the excessive noise from unit 309. One of the statements says the noise has taken a physical and emotional toll on Ms. Moojelsky.

## ANALYSIS

### *Did the strata sufficiently investigate Ms. Moojelsky's noise complaint?*

34. Bylaw 31 (1) says an owner must not use a strata lot 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 another strata lot.

35. Bylaw 36 (1) says no noise shall be made in or about any strata lot which, in the opinion of the strata council, is a nuisance or unreasonably interferes with the use and enjoyment of any other strata lot by its owner. Quiet hours are to be observed after 11:00 p.m. and before 7:00 a.m., and residents are responsible for their guests.

36. Bylaw 33 (1) says an owner must obtain the written approval of the strata before making an alteration to a strata lot that involves the structure of the building.

37. Section 26 of the *Strata Property Act* (SPA) requires the strata council to exercise the powers and perform the duties of the strata, which include enforcing bylaws. The strata council is required to act reasonably when carrying out these duties, and this includes a duty to investigate alleged bylaw violations, such as noise complaints.

38. Section 135 of the SPA sets out a procedure for the owner or tenant who is the subject of the complaint to have an opportunity to be heard before the strata levies a fine. Aside from this section, there is no specific procedure set out in the SPA for a strata to investigate a complaint. The courts have said a strata may investigate complaints of bylaw violations as its council sees fit, provided it complies with the principles of procedural unfairness and is not significantly unfair to any person

appearing before the council (see *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148).

39. The tribunal has jurisdiction to determine claims of significant unfairness because the language in section 164 of the SPA is similar to the language of section 123(2) of the Act, which gives the tribunal authority to issue orders to remedy significant unfairness. (see *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119.)

40. The courts and the tribunal have considered the meaning of "significant unfairness" in many contexts and have equated it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, the Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

41. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the Court of Appeal established the test for determining significant unfairness which the Supreme Court restated in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763 at paragraph 28 as follows:

    a. What is or was the expectation of the affected owner?

    b. Was the owner's expectation objectively reasonable?

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

42. In *Torok v. Amstutz et al*, 2019 BCCRT 386, the tribunal considered a case with very similar facts to those in this dispute. In that case a previous owner of a strata lot installed laminate flooring and the owner of the strata lot below complained that the sound of walking above their strata lot was loud enough to constitute a nuisance. The tribunal found the strata failed to sufficiently investigate the noise complaint in a manner that was significantly unfair to the applicant, and that the noise constituted a nuisance. While the decision is not binding on me, I find its reasoning persuasive and I rely on it.

43. In this case I find Ms. Moojelsky reasonably expected that the strata would investigate her noise complaint and address any noise bylaw violation. On the evidence before me, I find the strata failed to sufficiently investigate Ms. Moojelsky's noise complaint, which was significantly unfair to her.

44. There is no evidence that any of the strata council members aside from C.B. investigated the noise themselves. C.B.'s investigation seemed to confirm unreasonable noise. It was only after Ms. Moojelsky submitted decibel readings and had an opportunity to be heard that the strata took any action to investigate. That action was to attempt to obtain an estimate from a sound professional, but when the first company they contacted declined to provide an estimate the strata council chose to take no further action, despite its president's urging.

45. All parties except the strata acknowledge that at some point the previous owners of unit 309 installed laminate floors, at least part of which remain uncarpeted. The strata's position is that they have no records of the strata approving such a renovation, and therefore it must not have occurred. However, Ms. Moojelsky specifically alleges that the renovation was unauthorized, and therefore the strata would not have such records. I find that if the strata had investigated Ms. Moojelsky's complaint it would have discovered with certainty what type of floors are installed in unit 309.

46. The strata says that after the Whites' hearing they determined that no abnormal activity was taking place in unit 309 that warranted punitive action. However, Ms. Moojelsky correctly points out that the Supreme Court in *Suzuki v. Munroe,* 2009 BCSC 1403, found that a nuisance can be created even when the activity complained of is otherwise lawful. The strata says that by purchasing a strata lot in an older building Ms. Moojelsky knowingly accepted that sound could travel between units. However, since the strata failed to take any action to investigate Ms. Moojelsky's noise complaint beyond conducting hearings with the affected parties, I do not find this position compelling.

47. I find the strata failed to sufficiently investigate Ms. Moojelsky's noise complaint, which was significantly unfair to her.

### *Is the laminate flooring in the Whites' strata lot causing unreasonable noise in Ms. Moojelsky's strata lot?*

48. The test of whether a noise is unreasonable or a nuisance is objective and based on a standard of reasonableness, after considering all of the surrounding circumstances. There is no requirement that a noise reach a certain decibel range in order to be considered unreasonable (see *Torok*).

49. The Whites and the strata all deny that the Whites' activities have caused unreasonable noise in Ms. Moojelsky's unit. However, there is no evidence that the Whites or anyone on council or their agents, aside from C.B., entered Ms. Moojelsky's unit to investigate the noise levels. C.B.'s evidence is that the noise was excessive and that she would not be able to live with it. Ms. Moojelsky submitted detailed logs recording frequent disturbances, numerous decibel readings showing significant spikes in decibel levels from noises emanating from unit 309, and video evidence which is consistent with her complaints. She also submitted 3 other statements from people who experienced the noise in her unit.

50. In the absence of any evidence from the Whites or the strata about the noise in unit 209, I find the evidence establishes that Ms. Moojelsky's noise complaint is justified. I find the noise from unit 309 of footsteps and children running constitute a nuisance and a violation of bylaw 31 (1) and 36 (1). I address appropriate remedies below.

### *What are appropriate remedies?*

51. Ms. Moojelsky wants the strata to remedy the unapproved flooring by installing sound dampening materials. However, I find there is insufficient evidence of what materials are currently under the flooring in unit 309 and therefore it is premature for me to make such an order. Therefore, I find the strata must hire and pay for a qualified structural engineer of its choosing to investigate the source of the noise in Ms. Moojelsky's strata lot, and to identify the best way to eliminate or reduce the

noise as much as possible. The engineer's findings must be set out in a written report, which the strata must provide to Ms. Moojelsky and the Whites within 1 week of receiving it.

52. Ms. Moojelsky and the Whites must allow reasonable access to their strata lots for the assessment.

53. Once the source of the noise is identified by the structural engineer, the strata has a duty to enforce its noise bylaws by taking steps to eliminate or reduce the noise as much as is reasonably possible in the circumstances.

54. Ms. Moojelsky claims $3,000 in damages for the strata council's delay and failure to sufficiently investigate her noise complaint and enforce the noise bylaws.

55. In *Suzuki*, the court awarded the plaintiff $6,000 in damages for nuisance when their neighbour's air conditioner caused excessive noise that prevented them from enjoying the use of their house. The court determined that the strata was responsible for 2.5 years of unreasonable noise.

56. In *Torok*, the tribunal awarded the applicant $4,000 in damages for nuisance for approximately the same period of time. The tribunal based the amount of this award on the fact that the noise in that case was likely not as loud as in *Suzuki* but was more likely more frequent.

57. In this dispute Ms. Moojelsky first complained to the strata council of excessive noise in January 2018, and the evidence is that the noise has continued since that time. Since I have found the strata failed to sufficiently investigate the noise, I find it is responsible for the nuisance since January 2018. I find the nature of the noise in this case to be similar that that in *Torok*, being sounds of "everyday living" which are likely not as loud as the mechanical air conditioner noise in *Suzuki*, but likely more frequent.

58. Based on the duration of the nuisance and the nature of the noise, I find the strata must pay Ms. Moojelsky $2,500 in damages for loss of enjoyment of her strata lot. I find she is entitled to pre-judgment interest on this amount under the *Court Order*

*Interest Act* (COIA) calculated from January 11, 2018, which is the first date the strata council learned of her noise complaint.

59. Ms. Moojelsky also claims $1,500 in punitive damages. However, punitive damages are an extraordinary remedy to deter high-handed or malicious conduct, and I find there is no evidence the strata conducted itself in such a manner. I dismiss this claim.

## TRIBUNAL FEES AND EXPENSES

60. Under section 49 of the Act, and the tribunal rules, since Ms. Moojelsky was generally successful, I find she is entitled to reimbursement of $225 in tribunal fees. She also claims $34.02 in dispute-related expenses for registered mail to serve the Dispute Notice on the respondents, which I find to be reasonable in the circumstances. Therefore, I find she is also entitled to $34.02 for reimbursement of her dispute-related expenses.

## DECISION AND ORDERS

61. I order that within 60 days of the date of this decision the strata must hire and pay for a qualified structural engineer of its choosing to investigate the source of the noise in Ms. Moojelsk'ys strata lot, and to identify the best way to eliminate or reduce the noise. The engineer's findings must be set out in a written report, which the strata must provide to Ms. Moojelsky and the Whites within 1 week of receiving it.

62. I order Ms. Moojelsky and the Whites to allow reasonable access to their strata lots for the engineer's assessment.

63. I order that within 30 days of this decision, the strata must pay Ms. Moojelsky a total of 2,812.45, broken down as follows:

    a. $2,500 in damages,

    b. $53.43 in prejudgment interest under the COIA, and

c. $259.02 for $225 in tribunal fees and $34.02 in dispute-related expenses.

64. Ms. Moojelsky is also entitled to post judgement interest under the COIA.

65. 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, unless the tribunal orders otherwise.

66. 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.

67. 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.

Sarah Orr, Tribunal Member