Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Battersby v. The Owners, Strata Plan NW 1868*, 2020 BCCRT 257

B E T W E E N :

MARCEL BATTERSBY and ARLENE BATTERSBY

APPLICANTS

A N D :

The Owners, Strata Plan NW 1868 and Ole Frantzen

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This dispute is about floor noise. The applicants, Marcel Battersby and Arlene Battersby, own a strata lot in the respondent strata corporation, The Owners, Strata Plan NW 1868 (strata). They say that there are excessive creaking noises coming from the subfloor and joist structure above their strata lot, as well as knocking

noises coming from the hardwood flooring in the strata lot above theirs. The respondent, Ole Frantzen, is an owner of that strata lot. The applicants' position is that the strata is not enforcing its bylaws, and ask for orders that the strata address the floor issues. They also ask for an order that Mr. Frantzen replace his hardwood floor with carpeting, and repair the subfloor. In addition, the applicants seek reimbursement for $11,706.46 in expenses, including $2,887.50 for acoustic testing, $396.72 for hotel expenses related to the acoustic testing, $6,322.24 in legal fees, and $2,100,00 for a report on the possible acoustic impact of repairs.

2. The respondents say that the applicants' claims are limitation barred and they are not responsible for any of the expenses or remedies claimed by the applicants. According to the respondents, the applicants' noise complaints are not related to the hardwood floors in Mr. Frantzen's strata lot, but rather to the construction of the building.

3. The applicants are represented by Mr. Battersby. The strata is represented by a member of the strata council. Mr. Frantzen is self-represented.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.

5. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

7. Under section 123 of the CRTA 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.

ISSUES

8. The issues in this dispute are:

   a. whether the applicants' claims are barred by the *Limitation Act*,

   b. whether the strata has failed to enforce its bylaws,

   c. whether the strata is responsible for repairs to the floor structure,

   d. whether Mr. Frantzen must remove the hardwood flooring from his strata lot, and

   e. whether the applicants should be reimbursed for $11,706.46 in expenses, including $2,887.50 for acoustic testing, $396.72 for hotel expenses related to the acoustic testing, $6,322.24 in legal fees, and $2,100,00 for an acoustic opinion.

EVIDENCE AND ANALYSIS

9. The parties provided evidence in support of their positions. While I have considered all of this information, I will refer to only what is necessary to provide context to my decision.

10. The applicants own strata lot 43, which is also known as suite 212. Mr. Frantzen owns the strata lot immediately above the applicants'.

11. The strata repealed its previous bylaws and filed new bylaws at the Land Title Office in 2002. Bylaw 3 states that an owner must repair and maintain the strata lot, except

for repair and maintenance that is the responsibility of the strata corporation. According to bylaw 11, the strata has the responsibility to repair and maintain the structure of a building that is part of a strata lot.

12. The strata was built in the early 1980s using wood-frame construction. The strata lots were finished with wall-to-wall carpeting in most areas.

13. At some point, noise transmission became a problem between strata lots on the first and second floors. The owners of those strata lots conducted repairs that mitigated the issues. It appears that the strata was not involved with these repairs, which were funded by the owners themselves.

14. In 2008, the strata signed an alteration agreement that allowed a previous owner of suite 312 to remove the wall-to-wall carpet and install hardwood floors in portions of the strata lot. The July 10, 2008 alteration agreement stated that, if noise complaints were received, the strata retained the right to require the installation of additional soundproofing material, area carpets, wall-to-wall carpets, or the removal of the flooring.

15. Mr. Frantzen purchased suite 312 in early 2011. At some point later that year, the applicants began to complain to the tenants in suite 312 about noise. After those tenants departed, the applicants made similar complaints about the new occupants.

16. As a result of the complaints, the strata's property manager and the president of the strata council attended the applicants' strata lot in October of 2011 to conduct informal noise testing. In an October 19, 2011 letter summarizing the visit, the property manager stated that "it did seem that the sounds and creaking were louder than should be expected". The letter detailed the arrangements the parties had made to try to mitigate the noise and concerns about the tenants.

17. In early 2012, Pomeroy Construction & Maintenance (Pomeroy) reviewed the noise transmission and construction materials in suites 212 and 312. Pomeroy's opinion was that the hardwood flooring in suite 312 was installed "by a skilled installer" and no significant deficiencies were noted. Pomeroy viewed the structure of the building

through 2 access points in the ceiling of suite 212, and noted no insulation between the suites. According to Pomeroy's report, the building was framed with shiplap floor sheathing, which was common for the age of the building. Pomeroy found significant sound transmission between the suites, even in rooms that had carpet installed, and stated that "much of the wood floor vibration is being transferred through to the structural sheathing". Pomeroy recommended replacement of the hardwood with carpeting in suite 312 (although it said this would result in only a marginal improvement in sound abatement) and the installation of a number of products above suite 212. It does not appear that the parties acted on any of these recommendations at the time.

18. The strata amended its bylaws in early 2012 to, among other things, add bylaw 7.5 to address issues around hard flooring in strata lots. This amendment restricted the use of hard flooring to products with a minimum impact insulation class rating of 71 decibels (dB) and sound transmission class rating of 73 dB. Bylaw 7.5(g) states that, if noise complaints are received about any hard floor materials, the strata has the right to require additional sound proofing materials, area carpets covering up to 60% of the hard floor surfaces, wall-to-wall carpets, or the removal of the flooring.

19. There was a change in tenants in February of 2012. Mr. Frantzen says he did not receive any noise complaints from the applicants for approximately 5 years, but they began again in early 2017 when he was preparing the strata lot for new tenants. The applicants documented numerous instances of disturbance from noise they attributed to suite 312 throughout 2017, and they provided those details to the strata council and property manager in early 2018.

20. According to their submissions, the applicants found the noise and the perceived lack of action on the part of the strata to be increasingly upsetting. The applicants sent a large volume of correspondence to the strata council and the property manager on the issue.

21. The strata conducted some sound testing in the summer of 2018 by dropping items on the floor of suite 312 and observing the sound in suite 212. The property

manager began searching for a structural engineer and then an acoustic specialist to assess the situation. The applicants decided to retain their own expert for acoustic testing. It took several months to arrange the schedules of the experts and the tenant in suite 312 to provide access to both strata lots.

22. The applicants paid BKL Consultants Ltd. (BKL) to conduct testing in the strata lots on November 23, 2018. According to BKL, the hardwood installed in the living room of suite 312 had an apparent impact isolation class rating of 43, which is lower than the 71 required by the amended bylaws. BKL also performed testing of mock footfall noise and determined that the measured noise levels in suite 212 were "constantly above 45 dB". BKL stated that, if an occupant of suite 312 were to walk in the suite during the night, it would expect sleep disturbance to the occupants of suite 212.

23. The strata arranged for BAP Acoustics (BAP) to conduct testing in the strata lots between November 24 and November 27, 2018. BAP communicated the results of the testing in 3 separate reports.

24. BAP's November 29, 2018 report measured airborne sound, and found that the floor-ceiling assembly was compliant with the building code. In a second report dated November 29, 2018, BAP reported that the impact sound insulation performance of the floor-ceiling assembly did not meet the recommended minimum for an uncarpeted floor.

25. In a December 11, 2018 report, BAP documented the results of its testing of the noise produced by the floor-ceiling assembly above strata lot 212. The testing revealed several hundred noise events in excess of the accepted limit of 30 dB as set out in British standard guidelines (which BAP considered as there are no municipal, provincial or federal guidelines for assessing impulsive noise events). BAP's opinion was that these events were the result of the creaking of the floor-ceiling assembly and that they "would expect significant noise disturbance to the occupiers of Unit 212".

26. The strata council considered the results of BAP's testing and determined that it showed significant noise disturbance in suite 212. The strata, through the property

manager, wrote to Mr. Frantzen on January 29, 2019 to advise him of the results. The strata proposed 2 options for consideration: to upgrade the insulation under the current hardwood floors or remove the hardwood floor and replace it with wall-to-wall carpet with acceptable underlay. The strata acknowledged that these options might have no significant improvement on the noise from the floor structure. The strata asked Mr. Frantzen to advise them within 14 days about which course of action he would be taking.

27. Mr. Frantzen has declined to proceed with either of these options until this dispute is decided by the tribunal. In a June 25, 2019 letter, the strata advised Mr. Frantzen of its decision to assess a $200 fine for failing to respond to its correspondence on the matter.

28. The strata arranged for an assessment by a structural engineer. In a July 15, 2019 report from Kunimoto Engineering (1995) Limited (Kunimoto), a structural engineer considered whether the floor-ceiling assembly contained structural elements. According to the engineer, the floor sheathing and floor joists formed the structural portion of the assembly, while the floor finish and concrete topping on the top of the floor sheathing, the insulation between the joists, and the ceiling drywall on the underside of the joists formed the architectural portion of the assembly.

29. The evidence suggests that the strata considered further investigation by structural and acoustic engineers in the fall of 2019. It is not clear if any additional investigations occurred.

30. The applicants asked BKL to consider whether the method used to repair the floors on the first and second floor strata lots would mitigate the noise in their own strata lot. In a September 16, 2019 report, BKL summarized the results of its testing on a similar floor assembly in February of 2019. According to BKL, the process of lifting the flooring, removing the cement screed and subfloor, tightening the joists, reinstalling the subfloor and cement layer with mesh, and installing a new floor surface would mitigate the impact of the popping and cracking noises from the joists. BKL also said that the installation of absorptive material in the joist cavity

would likely provide no improvement to the popping and cracking. BKL also noted that the popping and cracking noises were not necessarily attributable to the replacement of the floor finish.

31. The applicants say the noise in their strata lot is unbearable, causes them stress and anxiety, and interferes with their sleep and daily activities. They say that immediate action is required to address the issue. The strata and Mr. Frantzen say that he has taken steps to reduce sound transmission between the strata lots, including carefully selecting tenants without pets, advising them of the noise issue, and installing underpad and area rugs in high traffic areas. The respondents question whether the applicants have taken any steps in their own strata lot to mitigate the effects of the noise.

Limitation Period

32. The respondents submit that, since the applicants became bothered by floor-related noises more than 2 years before commencing their dispute, they missed the limitation period set out in the *Limitation Act*. A limitation period is a time period in which a person may pursue a claim. If that time period expires, the right to bring a claim disappears.

33. I do not agree that the applicants' claims are stature-barred. Their claims involve ongoing floor-related noises.

34. In *K&L Land Partnership v. Canada (Attorney General)*, 2014 BCSC 1701, the British Columbia Supreme Court found that a nuisance continues for so long as the state of things causing the nuisance is suffered and said, at paragraph 58, the associated claims were not barred by the limitation period. Although not binding upon me, other tribunal decisions have determined that a noise dispute involving a strata's bylaws was not barred by the *Limitation Act*, despite the fact that the applicant first complained about the noise more than 2 years before filing a dispute (see, for example, *The Owners, Strata Plan VR 133 v Zelman et al*, 2018 BCCRT 538 and *Bruusgaard v. The Owners, Strata Plan LMS 2599*, 2019 BCCRT 693).

Applying this reasoning, and the Court's decision in *K&L*, I find that the applicants' complaints about ongoing noise are not barred by the *Limitation Act*.

Enforcement of Bylaws

35. The applicants' view is that the strata has taken "far too long" to address their concerns and, in doing so, has failed to enforce its bylaws. The strata denies this.

36. The evidence before me shows that the property manager and strata council initially viewed the matter as a dispute between owners as opposed to a strata matter, but later took active steps to investigate the source of the problem and possible solutions. The evidence also shows that the strata fined Mr. Frantzen.

37. The evidence also shows that the applicants' messages to the property manager (who was the assigned point of contact) did not always receive prompt responses. However, this appears to flow from the fact that some of the messages were directed to an email account that was intended for outgoing messages only, and were sent as replies to messages that contained a direction not to reply to them. I do not find any indication that the delayed responses from the property manager were the result of any action (or inaction) on the part of the strata.

38. I find that the evidence does not establish that the strata has failed to enforce its bylaws.

Strata's Responsibility for Repairs

39. When living in a multi-family environment, there likely will be some noise transmission between homes. I acknowledge that people have differing levels of tolerance for noise, and what is acceptable for 1 person may be disturbing to another. In these circumstances, I find that the Pomeroy report and the BAP sound testing confirms that there is an unreasonable level of noise transmission between suites 312 and 212 that is interfering with the applicants' use and enjoyment of their strata lot. Based on BAP's December 11, 2018 report, I find that most, but not all, of the noise is coming from the floor assembly. Given BKL's statement that absorptive

material or replacement of the floor finishing is unlikely to improve the popping and cracking sounds, I also find that repairs are required in order to mitigate the noise transmission to a reasonable level.

40. The question of who is responsible for the repairs to the floor structure must be answered with reference to the classification of the materials and structures located in this area. The fact that other strata lot owners conducted repairs to the floor structure on their own is not determinative of the matter.

41. The space between the ceiling materials of the lower strata lot and the floor materials of the upper strata lot is occupied by joists and otherwise empty space with no insulation. There is no indication that there are pipes, ducts, conduits or other items in this area that would meet the definition of CP as set out in section 1 of the *Strata Property Act* (SPA). The strata plan does not show any CP in the area between ceilings and floors of strata lots.

42. In its submissions, the strata suggests that it does not have any responsibility for the repairs to the ceiling-floor assembly due to the lack of CP. I find that this is not the case. The strata has a responsibility as set out in bylaw 11 to repair and maintain structural elements of strata lots. The fact that repairs may be onerous, expensive or disruptive does not excuse the strata from its responsibilities.

43. Kunimoto's uncontroverted opinion is that the floor sheathing and floor joists are structural. I find that, under bylaw 11, the strata is responsible for the repairs that involve these structural elements. The respective strata lot owners are responsible for areas that the engineer described as architectural, which I find are parts of their strata lots.

44. The evidence before me about the scope of repairs necessary to address the problem refers to the previous work done between strata lots on the first and second floors. BKL's view is that this work will mitigate the cracking and popping noises from the joists. The improvement related to this scope of work appears to be long-lasting. According to a February 20, 2018 email from a strata lot owner involved in the previous repairs, despite the passage of time, "there is no loud

cracking as it was before the fix". Although it is unlikely to eliminate noise transmission between strata lots, I find that the scope of work considered by BKL would reasonably address the excessive noise.

45. The strata must proceed with these repairs within a reasonable time, which I find to be within 6 months of my decision. It is not clear whether the strata's repair work will require the removal of Mr. Frantzen's floor surface to access the structural elements. The parties may find it to be convenient to coordinate the work in order to minimize disruption and expense.

Removal of Hardwood Floors

46. The applicants say the hardwood floors in suite 312 must be replaced because the sound transmission from impacts is causing them significant disturbance. The applicants say the amount of disturbance has varied with different tenants over the years. They deny that they ever told anyone that the sound transmission between the suites was reduced after the previous owner installed the hardwood flooring.

47. Mr. Frantzen says that it has not been proven that replacing his hardwood will result in any improvement in the noise, so he should not be ordered to do it. He also suggests that the applicants waived their rights to bring a claim about the noise issues by not complaining for a period of about 5 years.

48. The applicants have consistently stated that their noise complaints have involved 2 aspects: the creaking from the floor structure and impact noises. The parties agree that the removal of the hardwood floors may not completely eliminate the noise problem. However, based on BAP's testing, I am satisfied that the issue of impact noise is distinct from the noise from the floor structure. The fact that there may be noise from other sources is not relevant to my analysis about the flooring. Given my conclusion below about Mr. Frantzen's responsibilities under the bylaws, I also find that it is not relevant for me to consider whether the applicants have attempted to mitigate the effect of the noise on them.

49. Although Mr. Frantzen says that he checked the strata's minutes for complaints about his strata lot prior to him purchasing it, he did not say whether he was aware of the existence or contents of the alteration agreement. The evidence before me does not contain the Form B information certificate, or any information about it. Section 59(3) of the SPA says must disclose any agreements under which the owner takes responsibility for expenses relating to alterations. Based on the evidence before me, I am unable to conclude that Mr. Frantzen was aware of the alteration agreement and therefore bound by it.

50. Even if the terms of the alteration agreement are not binding on Mr. Franzten, I find that the bylaws are. As noted above, bylaw 7.5 says that the strata may require the installation of additional soundproofing material, area carpets, wall-to-wall carpets, or the removal of the flooring in the event of complaints. The bylaws do not place a limit on the duration of the owners' obligations or the strata's rights in this regard. I find that the requirement to address noise complaints applies whenever they were received. The fact that there was a period of time during which there were no noise complaints from the applicants does not alter my conclusion.

51. The requirement in the bylaws that an owner remediate or remove hard surface flooring in the event of noise complaints is not subject to the consideration of expense or inconvenience. I find that Mr. Frantzen must comply with the bylaws. Images in evidence and the parties' submissions show that Mr. Frantzen placed area rugs over the majority of the hard flooring surface, but this did not address the applicants' concerns. Therefore, he must, at his own cost, either lift the existing flooring and install additional soundproofing material, or install wall-to-wall carpet with the appropriate underpad. If Mr. Frantzen chooses the first option and there are further noise complaints, then he may be required to replace the hardwood flooring with carpet and underpad, also at his own expense.

52. Given that the repairs by the strata may require access to the floor structure from inside suite 312, Mr. Frantzen may wish to coordinate the repairs and his own floor work.

TRIBUNAL FEES, EXPENSES AND INTEREST

53. Under section 49 of the CRTA, 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. As the applicants were largely successful in this dispute, I see no reason not to follow that general rule. I therefore order the respondents to reimburse the applicants for tribunal fees of $225.00. The strata and Mr. Frantzen each are responsible for half of this amount, or $112.50.

54. The applicants also request reimbursement for a number of expenses they attribute to this dispute, including $2,887.50 for acoustic testing. The applicants chose to engage BLK to provide this information due to the amount of time it was taking for the strata to arrange testing. It was open to them to make this choice, but I am not satisfied that the BLK testing was necessary for this dispute. This is particularly so as both sets of testing occurred within days of each other. I dismiss the applicants' claim for reimbursement of these expenses.

55. I have come to a different conclusion about BKL's September 16, 2019 report. BAP's reports and the other reports obtained by the strata did not address the scope of the necessary repairs or their potential to mitigate the noise transmission. I find that it was reasonable for the applicants to obtain a report on this issue, and find that they are entitled to reimbursement from the strata of the $2,100.00 they spent on the report.

56. The applicants also claim $396.72 for hotel expenses related to the acoustic testing. Based on the evidence before me, I find that the applicants were required to be out of their strata lot for the duration of BAP's testing activities, as arranged by the strata. Therefore, I find that they are entitled to reimbursement for this amount, which is supported by a receipt, from the strata.

57. The applicants are entitled to pre-judgment interest under the *Court Order Interest Act*. Calculated from the date of payment to the date of this decision, this equals $9.62 for the hotel costs and $19.41 for the BKL report, for a total of $29.03.

58. The applicants request reimbursement of legal fees in the amount of $6,322.24 in legal fees. Rule 9.4(3) states that the tribunal will not order one party to pay to another party any fees charged by a lawyer or other representative unless there are extraordinary circumstances which would make such an order appropriate. I do not find that the circumstances of this dispute are extraordinary, and I dismiss the applicants' claim for reimbursement of their legal fees.

59. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the applicants.

ORDERS

60. I order that:

    a. the strata is responsible for the maintenance and repair of the structural portions of the floor-ceiling assembly between the strata lots and, within 6 months of this decision, must repair the structural elements between suites 212 and 312, using the scope of work considered by BKL,

    b. Mr. Frantzen must comply with the bylaws and, at his own expense and within 6 months of this decision, either install additional soundproofing material under his existing hardwood flooring or replace it with wall-to-wall carpets and appropriate underpad,

    c. within 30 days of the date of this decision, the strata and Mr. Frantzen must each pay the applicants $112.50 as reimbursement of tribunal fees,

    d. within 30 days of the date of this decision, the strata must pay the applicants $2,525.75 for $2,496.72 in dispute-related expenses and $29.03 in pre-judgment interest under the *Court Order Interest Act*.

61. The remainder of the applicants' claims are dismissed.

62. The applicants are also entitled to post-judgment interest under the *Court Order Interest Act*.

63. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). Once filed, a tribunal order has the same force and effect as an order of the BCSC.

64. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently $35,000). Under section 58 of the CRTA, the applicants can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as an order of the BCPC.

Lynn Scrivener, Tribunal Member