Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Rodgers v. The Owners, Strata Plan VR 1322*, 2020 BCCRT 368

B E T W E E N :

Lola Tham Rodgers

APPLICANT

A N D :

The Owners, Strata Plan VR 1322

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. The applicant, Lola Tham Rodgers (owner), owns strata lot 36 (SL36) in the respondent strata corporation, The Owners, Strata Plan VR 1322 (strata).

2. According to the owner's amended application for dispute resolution (amended Dispute Notice) the owner says she is "seeking fairness & equity for negligence and

nuisance including harassment against strata VR1322". The owner asks for the following remedies, which I have paraphrased:

a. The strata remove, relocate or resolve an air-conditioning system that is allegedly detrimental to the owner's health, peace and enjoyment of her strata lot.

b. The strata restore the owner's "original HVAU" by removing and replacing the makeup air unit (MAU) with a new one.

c. The strata pay the owner $10,000 for trauma, "US medical bill" and travel costs due to 2 days when SL36 had no electricity.

d. The strata restore the owner's storage space size and reorganize the furniture, filing cabinets, and books in storage.

e. The strata "remedy pollution and noises, and notify [the owner] of any activities affecting the ground level including but not limited to noises from slamming doors, fire alarms, pollution from the engine running (garbage area), smoke, burnt..".

f. The strata more regularly clean, maintain, and repair the inside and outside of the strata building from debris, fleece, urine and drug needles.

g. The strata have better security for the back of the strata building because of the number of break-ins.

3. The strata denies the applicant is entitled to the above remedies and says it complied with all obligations under the *Strata Property Act* (SPA). I address the strata's further response arguments in the sections below.

4. The strata says the owner commenced a small claims proceeding in the BC Provincial Court against its contractor, Keith Plumbing & Heating Co. Ltd., now known as Modern Niagara Plumbing (Keith Plumbing) over the MAU. It says the tribunal should limit the owner's damages, if awarded, by any recovery from the

parallel court action. I understand the court proceeding is presently adjourned and awaiting trial.

5. The owner is 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 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.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. I find I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always necessary when credibility is in issue. Further, bearing in mind the tribunal's mandate of proportional and speedy dispute resolution, I decided I can fairly hear this dispute through written submissions.

8. 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.

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

10. 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.

Preliminary Issues

Concurrent BC Provincial Court Action

11. Prior to this hearing, the tribunal's case manager had referred the matter to the tribunal for a preliminary decision on whether the tribunal should refuse to resolve the dispute due to the owner's concurrent Provincial Court proceeding. Section 11(1)(a)(i) of the CRTA says the tribunal may refuse to resolve a claim or dispute within its jurisdiction if it considers that the claim or the dispute would be more appropriate for another legally binding process or dispute resolution process. The tribunal's vice chair found it was not appropriate to refuse to resolve the dispute. The vice chair's preliminary decision is not binding on me, but I agree with it.

12. While the owner's claim against the strata relates to the same MAU installation as her Provincial Court action against Keith Plumbing, the strata was not named in the Provincial Court action. I find the proceedings are entirely separate and I have considered the owner's claims to the extent set out below.

Claims not included in the amended Dispute Notice

13. I find the owner made additional claims by submissions related to various issues not specifically set out in the amended Dispute Notice. These additional claims include, but are not limited to, the distribution of funds from a parking lot sale, a building fire in September 2019, a water incident in January 2020, and allegations that certain strata council members were in a conflict of interest.

14. The strata says it was not possible to address every issue raised in the owner's submissions because of their length. The strata objects to the owner raising new issues by submission. I found the owner's submissions expansive, spanning her many years of discontent with the strata. The owner also submitted several pieces of evidence that were actually new argument and not evidence.

15. The purpose of a Dispute Notice is to define the issues and provide fair notice to the respondent. Procedural fairness requires that a party be notified of claims against it and have a fair opportunity to respond. The CRTA and the tribunal's rules would have allowed the applicant to request a further amendment to the Dispute Notice to add additional claims, but this did not occur. I find it would be unfair to the strata to decide claims that the owner did not identify in the amended Dispute Notice.

16. As for the conflict of interest allegation, the owner did not name individual strata council members and CRTA section 122(1) specifically excludes the tribunal from jurisdiction over remedies for conflict of interest, which all arise under section 33 of the SPA (see *Dockside Brewing Company Ltd. v. The Owners, Strata Plan LMS 38371,* 2007 BCCA 183).

17. Section 10(1) of the *Civil Resolution Tribunal Act* says the tribunal must refuse to resolve a claim that it considers not within its jurisdiction. For the reasons above, I refuse to resolve the owner's additional claims and requested remedies not included in the June 10, 2019 amended Dispute Notice.

Limitation Act

18. The owner says that in 2007 the strata reduced her storage unit by half and installed a transformer inside it. The owner submits that she has an "equitable right" to the original storage size and asks that it be restored and reorganized. The strata says the owner cannot bring an action more than 10 years after it reduced the storage size. The owner did not make submissions about the limitation period.

19. The *Limitation Act* applies to the tribunal. It sets out a specific time period within which a person can pursue a claim. If that time period expires, the right to bring a claim disappears. The current version of the *Limitation Act* came into force on June 1, 2013. Section 30 of the new *Limitation Act* says the former act applies to claims that pre-existed June 1, 2013. Under the former *Limitation Act,* a person generally has 6 years to file a claim regarding strata property issues, except for damages in respect to injury to person or property, which had a 2 year limitation period.

20. The owner first applied for dispute resolution with the tribunal on July 24, 2018 and the tribunal issued its Dispute Notice on July 31, 2018 (amended on June 10, 2019). The owner's claim over the storage was included in the July 31, 2018 Dispute Notice. Under the former CRTA, the time period stopped running on the date the tribunal issued the Dispute Notice. I find the owner's claim over the storage unit brought about 11 years later is out of time under the *Limitation Act*. I dismiss the owner's claim over the storage unit.

Request to "Seal" Records

21. The owner asks that the tribunal "SEAL" the records in this dispute and is particularly concerned about her medical records. The owner says the documents are private, confidential and it is necessary to seal them to prevent discrimination, unlawful, and "unforeseen" matters.

22. I find no reason not to allow the owner's request in the circumstances. Under section 61 of the CRTA, the tribunal may make any direction in relation to a tribunal proceeding. I direct the tribunal to seal the records in this dispute. Where possible in my reasons below, I have also omitted the owner's private details that were unnecessary to explain my decision.

Access to Late Evidence

23. The owner submitted late new evidence with her reply submissions, most of which was additional or repeated argument or was related to claims that are not before me.

24. The strata says the owner's late evidence should not be considered by the tribunal. It says it could not access some of the owner's late evidence from the tribunal's portal. In response to this submission, the owner stated that she "likewise" could not open "many evidence-documents" provided by the strata. The owner does not say whether she means the new documents the strata had just submitted in response to the owner's late evidence. The owner did not raise this as an issue in her initial submissions or reply submissions both made after the parties would have submitted

their evidence (that was not late). I had no difficulty opening the strata's documents uploaded to the tribunal's online portal. On balance, I find it is more likely than not that the owner had access to the evidence that was not late.

25. Considering the tribunal's mandate of proportionality, speed, and timely dispute resolution, I decided not to go back to the parties for a further evidence exchange on the late evidence. Instead, I decided not to consider the disputed late evidence submitted by either party. I am unsure if they could both access it and I found it was either completely unrelated to the claims or not relevant to the issues I had to decide.

ISSUES

26. I find the remaining issues before me are:

    a. Has the strata failed to repair or maintain the common property? If so, what is the appropriate remedy?

    b. Must the strata restore the owner's "original HVAU" by removing and replacing the MAU with a new one?

    c. To what extent if any, must the strata pay the owner $10,000 in damages and expenses for a 2-day power outage in 2017?

    d. Has the strata caused a nuisance by allowing excessive heat, water leaks, pollution, poor air quality or noise in SL36?

    e. Was the strata's conduct towards the owner significantly unfair? If so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

27. In a civil claim such as this the applicant owner bears the burden to prove her claims on a balance of probabilities. I refer only to evidence I find relevant and that provides context for my decision.

28. In its submissions, the strata provided the following background information about the strata building that is not in dispute. The strata's building was built in 1906, originally as a warehouse. It is located in a busy Vancouver east side commercial location and situated at the edge of an escarpment. Due to the escarpment, the building has 2 floors below the main public street level facing a lane that was once a railway spur line. The owner's SL36 is in the basement level of the building facing the lane.

29. The strata plan shows that the strata was created in November 1983 and the warehouse building was developed into 36 strata lots. The building is mixed commercial residential use with 5 commercial and 31 residential strata lots. The strata building is professionally managed by a property management company.

30. The owner refers to her SL36 as both a commercial and a residential strata lot. The strata says it is a commercial strata lot. Based on the strata plan, I find SL36 is a commercial strata lot. At any rate, I find nothing in this dispute particularly turns on its use. I find the owner was using SL36 as her residence and living in it.

Has the strata failed to repair or maintain the common property?

31. The owner alleges that the strata is not doing enough to maintain the common property and does not provide enough security to the building. The owner points to the building's history of breaks-ins and vandalism, and a recent fire. The owner's position is that the strata is not doing enough to secure the building, prevent vandalism, and clean the "debris, fleece, urine and drug needles" left by vandals and trespassers. The owner says the strata has breached its duty causing her mental health to deteriorate.

32. The strata agrees that its building has issues with break-ins, vandalism and people using it as a washroom. The strata says it has taken reasonable action to try to improve the building's security and is working "diligently" to address the cleanliness and vandalism issues. The strata says it cannot prevent third parties from leaving their garbage, including used needles. It says it has worked with the owners, including the applicant, to come up with "creative solutions" to these problems.

33. Under section 3 of the SPA, the strata has a duty to manage and maintain the common property and common assets of the strata corporation for the benefit of the owners. Section 72 of the SPA requires the strata to repair and maintain the common property.

34. In *Wright v. Strata Plan #205,* 1006 CanLII 2460 (*Wright*), the BC Supreme Court said that in performing its section 72 obligations, the strata corporation must act reasonably in the circumstances. The standard is not one of perfection.

35. I have reviewed the parties' correspondence in evidence going back over many years. I find the emails show the strata consistently and reasonably responded to the owner's concerns about common property repair, maintenance, cleaning and security issues through its property management company.

36. I accept that the strata is faced with unique challenges beyond its control, being situated in Vancouver's downtown east side in a mixed residential-commercial area. The strata summarized a list of steps it has taken to address the security and cleanliness of the building that were either not disputed or if they were, I find there was sufficient corroborating evidence to support it. I accept on balance that the strata has taken the following remedial steps:

    a. Hired full-time janitorial assistance.

    b. Participates in "block watch" to help inspect the property to locate and report issues and created a building security and safety committee.

    c. Coordinates with a neighbouring building to engage a company to clean the public alley 3 times per week, with current discussions to increase this amount.

    d. Worked to improve the doors and locks.

    e. Installed a gate and plexiglass around the owner's access door off the alley (the plexiglass was burnt during a recent vandalism in 2019 and repairs are ongoing).

f. Installed motion detector lights and a security camera.

37. The BC Supreme Court in *Weir v. The Owners, Strata Plan NW 17,* 2010 BCSC 784 (*Weir*), at para 28 said that there can be “good, better or best” solutions available and choosing a “good” rather than “best” solution does not render the choice unreasonable. In *Weir* the court said the starting point should be deference to the decision made by the strata council as approved by the owners. I find this same principle applies to the tribunal. In deciding how to address the various problems arising from its location in Vancouver’s downtown east side, I find the strata should be given deference. Based on the preceding list, I am satisfied that strata is reasonably carrying out its duties under the SPA with respect to repairs and maintenance of common property and building security. I find no reason in the circumstances for the tribunal to intervene.

38. I dismiss the owner’s claims about common property maintenance and repairs.

Must the strata restore the owner’s “original HVAU” by removing and replacing the MAU with a new one?

39. A MAU (make-up air unit) is part of a building’s heating, ventilation and air conditioning system. There were 3 gas MAUs installed side-by-side on a wall in a common property room on the ground level of the strata building. One of the 3 MAUs was the strata’s common asset. The strata’s MAU supplied the building’s common property with air and ventilation. One of the other 3 MAUs belonged to the owner. These facts are not disputed.

40. The strata had a depreciation report prepared by consulting engineers that assessed all 3 MUAs. The March 2014 depreciation report in evidence states that the 3 MAUs were over their 30-year expected service life and in poor condition. The depreciation report recommended their replacement.

41. I find on the email evidence that the owner’s MAU was not in working condition when Keith Plumbing removed and disposed of it. On the owner’s own evidence, the MAU had not been operating for many years and the owner heated SL36 with

portable heaters. According to a technician's October 2013 email from Trotter & Morton Facility Services (Trotter) the owner's MAU was disconnected in 2010 because it had a "compromised heat exchanger", was dangerous to operate, and could not be repaired.

42. In November 2015, the strata hired Keith Plumbing to replace the strata's common asset MAU with a new unit. The work was done in about February or March 2016. The strata says Keith Plumbing mistakenly replaced the owner's MAU with the strata's new unit. The owner's MAU was positioned right next to the strata's MAU on the wall. I understand Keith Plumbing disposed of the owner's MAU before the strata realized the mistake. The correspondence in evidence shows that the strata had not intended to replace the owner's MAU because it was not its asset and the strata was not responsible for its repair or replacement. I find nothing in the evidence suggests the strata should have been responsible for repair or replacement of the owner's MAU, which was her personal asset.

43. The strata's email suggests that it did not realize Keith Plumbing's mistake until several months later, at which point it attempted to resolve it. For some technical or cost related reason, the strata did not simply move the new MAU to a different location on the wall. Instead, the strata decided to swap the duct work. The strata had Keith Plumbing connect the new MAU to the duct work serving the common property and the strata's old MAU to the duct work serving SL36. It seems this work was completed in about December 2016, but there are few records of the actual work.

44. The strata did not notify the owner of the MAU swap or the duct work change until after it swapped out the ducting in December 2016. The emails show that the strata then offered the owner its old MAU for free and also offered to pay to install a thermostat in SL36 to regulate it. The emails suggest the owner never explicitly agreed to accept it as a replacement. However, the strata's old MAU remained connected to the ducting servicing SL36.

45. After the install, on about December 16, 2016, the owner reported carbon monoxide to Fortis BC. Fortis BC immediately investigated the building and found carbon monoxide was present in SL36. The owner notified the strata property manager on about December 17, 2016 and told him she had "already aired" her strata lot. The emails show that by December 17, 2016 the strata had shut down its old MAU which was servicing SL36. The strata also attempted to dispatch a gas technician to inspect SL36 but the owner was either not home or had not picked up the phone. On Monday December 19, 2016 a mechanical contractor assessed the situation and found a "mechanical deficiency (heat exchanger)" problem with the strata's old MAU, and it was permanently shut down.

46. The owner says that on February 1, 2017, a technician from Broadway Refrigeration & Air Conditioning Co. Ltd (Broadway) stated that "anyone with access to mechanical room could turn the Fortis gas valve to emit CO to Rodgers unit again". The tribunal's rules allow evidence that is not normally admissible in a court of law. I accept the owner's hearsay evidence from Broadway's technician. I find it is generally consistent with Broadway technician's work order that says inspected the strata's old MAU and found it "de powered" and the gas valve was turned off." The owner says the problem is not resolved because the defective MAU is still connected to SL36. The strata does not say otherwise, so I infer that it remains connected to SL36's ducting as she alleges.

47. The owner claims that the strata was negligent in dealing with the MAU replacement, causing carbon monoxide to enter SL36, and it should replace her MAU with a new unit.

48. In a negligence claim, the general elements are as follows: the respondent owes a duty of care, the respondent failed to meet a reasonable standard of care, it was reasonably foreseeable that the respondent's failure to meet the standard could cause the applicant's damages, and the failure did cause the claimed damages.

49. There is no dispute that the strata owed the owner a duty of care to not cause harm or loss when it was carrying out its duties under the SPA to replace the common

asset MAU. However, I find the owner has not established that Keith Plumbing swapping out the wrong MAU was a breach of this duty. As stated in the BC Supreme Court decision in *Wright* mentioned above at paragraph 30:

> [Strata corporations] are not insurers. Their business, through the Strata Council, is to do all that can reasonably be done in the way of carrying out their statutory duty: and therein lies the test to be applied to their actions. Should it turn out that those they hire to carry out work fail to do so effectively, the [strata corporation] cannot be held responsible for such as long as they acted reasonably in the circumstances.

50. I find the strata was following its engineer's recommendation in the depreciation report by replacing the MAU. I find the strata acted reasonably in hiring Keith Plumbing, who are professional plumbers, to replace the MAU. I find the strata was entitled to rely on Keith Plumbing that it would carry out the work in a professional and diligent manner. Even though Keith Plumbing made a mistake when swapping the MAUs, the strata is not an insurer and I find its mistake does not make the strata responsible.

51. I do find it was unreasonable for the strata not to inform the owner for several months that its contractor mistakenly removed and disposed of her MAU. I also find it unreasonable for the strata to swap out the duct work that serviced SL36 without notifying the owner first. Also, it was unreasonable to not get her permission to attach the strata's old MAU to SL36. However, to succeed in a claim in negligence the owner must show that she sustained loss and that the loss was related to the strata's breach of the standard of care. I find the owner has not shown any loss, expense, or damage caused by the delay or lack of notice. I find as well, that the owner has not shown she suffered any injury as a result of the carbon monoxide in 2016.

52. Further, the owner's old MAU was not functioning and was past its service life. The owner has not shown that it had any residual value. I find the owner is essentially back in her original position, in that she does not have an operational MAU. The

difference is that Keith Plumbing disposed of her old MAU. However, I find on the emails that at least in 2013, the owner had wanted the strata to shut down and remove her "non functional" MAU. I do not have the full email exchange in evidence, but I understand the strata did not originally agree to pay to remove the MAU because it was not a strata asset. The MAU thus remained in the common property room until Keith Plumbing accidently removed it in 2017.

53. The owner bears the burden of proof in this proceeding. I find she has not established on a balance of probabilities that the strata was negligent due to the MAU swap. I find the owner has not established on the evidence that the strata must provide her with a new MAU or pay her the replacement cost of a new MAU. Since the owner's old MAU was not a common asset, I find the strata was also not required to replace it under section 72 of the SPA.

54. However, I find no reason the strata's old MAU should remain connected to the ducting to the owner's SL36. The owner did not agree to take possession of the old MAU. I find the old MAU is still the strata's common asset and it is responsible for it under the SPA. I also find the strata is responsible for the ducting connecting the MAU to SL36. Section 1 of the SPA defines common property as including ducts and other facilities for the passage or provision of heating and cooling systems, or other similar services if they are located within a floor, wall or ceiling that forms a boundary between a strata lot and the common property. I find the ducting here is for heating and cooling and is between a strata lot and the common property and so, I find the ducting is common property.

55. Considering the strata's old gas-powered MAU has a mechanical deficiency and remains connected to SL36 without the owner's consent and is the strata's common asset, I find the strata must detach the MAU from the ducting serving SL36. I find the strata must perform the work using a certified professional and provide a report to the owner confirming the work once it is complete.

To what extent if any, must the strata pay the owner $10,000 in damages and expenses for a 2-day power outage in 2017?

56. The owner says that in 2017 either Keith Plumbing or the strata's electrician caused a circuit to short in SL36 by adjusting the "electricity connection" and lowering the voltage to her strata lot from 460 to 208. On January 26, 2017 the owner reported to the strata property manager that she had no electricity for 2 days.

57. The owner provided no report from an electrician on the cause of the electrical issues within SL36. While I find that the strata had lowered the voltage as alleged, the owner provided no expert opinion evidence from an electrician or other professional on the impact if any, of the lowered voltage on the SL36 electrical system. Without evidence from someone qualified to provide an opinion, I cannot make a finding about what caused the electrical problem or specifically, the 2-day power loss.

58. I find the owner has not established that the strata is responsible for the 2-day electrical outage. For this reason, I have not discussed the owner's alleged personal injury or $10,000 in alleged expenses for travel, accommodation, and US medical bills. I dismiss the owner's claims on this issue.

Has the strata caused a nuisance by allowing excessive heat, water leaks, pollution, poor air quality or noise in SL36?

59. The owner claims the strata has created both nuisance and trespass by allowing poor air quality, heat intake, harmful gasses, water leaks, and noise pollution into SL36.

60. Although the owner's arguments mention trespass, I find her claims are more properly defined as claims in nuisance. Legally, trespass is the direct and physical intrusion onto a person's property. Trespass does not apply to indirect intrusions of property. I find the gas or water that allegedly entered the owner's strata lot from mechanical units outside her strata lot are indirect intrusions. I find the intrusions are not actionable as claims in trespass (see *Allison v. Radtke,* 2014 BCSC 1834).

Nuisance on the other hand is actionable, though I find it is not proven here as I explain below.

61. In the strata context, nuisance is defined as an unreasonable, continuing or repeated interference with a person's enjoyment and use of their strata lot (see *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462). The strata's bylaw 3 prohibits an owner, tenant, occupant or visitor from using a strata lot in a way that causes a nuisance. Bylaw 3 does not apply to nuisance caused by the strata. However, nuisance caused by the strata's common assets is prohibited under the common law (see for example, *Chen v. The Owners, Strata Plan NW 2265,* 2017 BCCRT 113, which is persuasive though not binding).

62. To prove nuisance, the owner would need to establish that the interference with her use or enjoyment of her strata lot is substantial, (which means non-trivial) and unreasonable in all the circumstances (see the two-part test in *Antrim Truck Centre Ltd. Ontario (Transportation),* 2013 SCC 13 at para 19 (*Antrim*)).

Air conditioning system

63. The strata says that one of the previous commercial owners had installed air conditioning units to help cool down computer servers located within their strata lot.

64. The owner says that these air conditioning units bring "hot air and particles via duct system" into SL36. The owner says they are also leaking water and she is concerned they might be emitting pollution, including harmful gasses, and a bacteria called legionella. My understanding from the parties' arguments and the emails is that the air conditioning units are electric.

65. The owner submitted evidence that the commercial owner's prior air conditioners had leaked some water. Specifically, the June 18, 2019 strata council meeting minutes say the commercial owner replaced the air conditioning units with new ones and installed drip pans to prevent further water issues. However, the minutes do not say the leaks entered SL36 or caused water damage. I find the owner has not proven that the air conditioners leaked water into SL36.

66. The owner provided no objective evidence that the electric air conditioning units are connected to SL36 through a duct system or that they emitted heat, gas, particular matter, bacteria, or other hazardous substances into SL36. Therefore, I find no need to consider whether the strata would be liable in nuisance for the commercial strata lot owner's air conditioning system. The owner also did not explain how the strata would be liable in nuisance for the commercial owner's air conditioning units' emissions and leaks.

67. I find there is also no factual basis to establish that the air conditioning units have caused damage to SL36. Therefore, I have not dealt with the owner's alternative argument that the strata is liable in negligence because of the air conditioning units.

68. I dismiss the owner's request that the strata remove, replace or resolve the air conditioning system.

Other Water Incidents

69. In her submissions, the owner provided a small list of what appear to be isolated water incidents, including incidents dating back to 2007 and 2010. The strata says it is not aware of any ongoing leak in SL36 and I find the owner has not demonstrated that there are any ongoing leaks. The owner's position seems to be that the strata is liable because of the mere existence of water leaks in the strata building. To this extent she is wrong. The standard is not strict liability. I find the strata is not liable simply because there were past incidents of water leaks. I dismiss the owner's nuisance claim over the list of water leaks.

Diesel Generator

70. The owner asserts that the strata's diesel generator located on common property exhausts carbon dioxide or other gasses that are "nauseating and lingers inside the building for the whole day". The strata says the generator vents into the back alley for 20 minutes once every 2 weeks. I find it is plausible that gas fumes vented outside could re-enter the owner's strata lot if her window was open during the test, which is what the owner seems to assert. However, without an air quality test, I

have no objective evidence that the generator impacts SL36 in any substantial way. I find the owner has not established that the generator causes a substantial interference to meet the first branch of the *Antrim* test.

71. I dismiss the owner's nuisance claim over the diesel generator.

Carbon Monoxide from the MAU

72. As for the carbon monoxide from the MAU in 2016, the owner said she was able to air out SL36 and the gas was shut down within a day. As mentioned above, the owner makes no personal injury claim related to the MAU. I find the carbon monoxide likely interfered temporarily with the owner's use or enjoyment of her strata lot but I do not find it was a substantial interference. I dismiss the owner's nuisance claim over the MAU.

Noise Pollution

73. The owner's noise complaints relate to factors both internal and external to the strata building. For example, she says the building's exterior doors make slamming noises, and the neighbour's recording studio, the sound of vehicle traffic on public roads, people lined up for a restaurant outside the strata building, and other environmental noises disturb her.

74. The owner provided no objective measurement of the noise decibel level in SL38 related to any of her noise complaints or evidence from witnesses to the noise. I find the fact that the owner might experience noises as disturbances does not meet the threshold of a "substantial interference". The owner also does not explain why the strata would be responsible for environmental noises outside the strata building caused by others. I find the owner has not proven that the strata is liable in nuisance due to the existence of noise. I dismiss the owner's claims on this issue.

Was the strata's conduct towards the owner significantly unfair?

75. The owner claims that some strata council members, their family members, and the strata property manager have acted improperly or illegally and harassed her over

the years. I have not considered the owner's claims against these individuals themselves. These individuals are not named parties to this dispute.

76. The owner argues that the strata actions towards her were contrary to the *Canadian Charter of Human Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982 (Charter), as well as provincial and federal human rights legislation. The CRTA section 11(1)(b) says the tribunal may refuse to resolve a claim or the dispute where it involves a constitutional question or the application of the BC *Human Rights Code*. However, the owner did not set out the particulars of her human rights claims and did not request any specific remedies related to the Charter or the *Human Rights Code*. I also note that the Charter applies to government, but not to a strata corporation (see for example, *K.M. v. The Owners, Strata Plan ABC XXXX*, 2018 BCCRT 29). Although, Charter values may apply in some circumstances, the owner did not specifically argue how Charter values would apply to her claims.

77. It seems the owner referenced the human rights legislation to support her argument that the strata must treat her fairly and equitably, and that it did not. Therefore, I have considered whether the owner has a remedy against the strata for significant unfairness.

78. Under CRTA section 123(2), the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. This is similar to the BC Supreme Court's power under SPA section 164.

79. The BC Court of Appeal considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated by the BC Supreme Court in *The Owners, Strata Plan LMS 1721 v. Watson,* 2018 BCSC 164 at paragraph 28:

    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?

80. Conduct that is significantly unfair means conduct that is unfairly prejudicial or oppressive and that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith (see *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 and *Chow v. The Owners, Strata Plan LMS 1277*, 2006 BCSC 335).

81. Part of the owner's argument is that the strata's conduct was unfair because it permitted the alleged nuisances and failed to maintain the building. I have dismissed these claims. The owner also agues that the strata treated her unfairly because its council members made unkind and discriminatory remarks about her in an email. I found there are a few emails that included negative personal remarks by the strata's council about their lack of trust in the owner. The comments do not suggest they are motivated by prejudice or discrimination, but due to the strata's experience responding to some of the owner's unsubstantiated complaints. I understand the remarks might have been upsetting for the owner to read, but I do not find they reached the level of burdensome, harsh or oppressive. There are years worth of emails in evidence that generally show the strata council and the property manager had treated the owner with respect and generally took her complaints seriously.

82. The owner says that the strata acted unethically about the condition of the defective common asset MAU. I find the strata did not represent the old common asset MAU as anything other than what it was and it did not sell it to her. The strata attempted to give it to the owner to rectify a mistake.

83. For these reasons, I dismiss the owner's claim of significant unfairness.

TRIBUNAL FEES and EXPENSES

84. 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. Since the owner was mostly unsuccessful in

this dispute. I find she is not entitled to reimbursement of any dispute-related expenses. The tribunal waived the owner's filing fee.

85. I find the strata was not entirely successful in this dispute. I find it is not entitled to reimbursement of the $25 it paid to respond to the dispute by paper filing. The strata also claims $919.22 in legal fees and dispute-related expenses. I note that the tribunal did not approve the strata's request for legal representation for this dispute.

86. Tribunal rule 132 (now rule 9.5(3)) says that except in extraordinary cases, the tribunal will not order one party to pay to another party any fees charged by a lawyer or other representative in the tribunal process. I find the owner's submissions were likely onerous to respond to because of their large volume. However, I find the issues underlying the dispute were not overly complex and I found the owner was successful on one aspect of her claim related to the MAU. On my assessment of the owner's submissions together with her historical emails, I find the owner's other claims were unlikely to succeed but not brought in bad faith. I find that the circumstances of this dispute were not so extraordinary that legal fees should be awarded.

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

ORDERS

88. I order that:

    a. Within 30 days of this order, the strata must detach the MAU from the common property ducting that attaches the MAU to SL36. The strata must perform this work using a certified professional and provide a report to the owner confirming the work once it is complete;

b. The owner’s remaining claims are dismissed; and

c. The strata’s claims for tribunal fees and dispute-related expenses are dismissed.

89. 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). The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA 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 a BCSC order.

90. 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 strata can enforce this final decision by filing a validated copy of the attached order in the BCPC. The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA has expired and leave

91. to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as a BCPC order.

Trisha Apland, Tribunal Member