Civil Resolution Tribunal

Date Issued: May 28, 2020

File: ST-2019-005741

Type: Strata

Civil Resolution Tribunal

Indexed as: *Jamal v. Rushton*, 2020 BCCRT 585

B E T W E E N :

NAGIB JAMAL

APPLICANT

A N D :

MICHAEL RUSHTON, The Owners, Strata Plan NW2153 and LINNEA MANN

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Lynn Scrivener

INTRODUCTION

1. This dispute is about noise complaints in a strata environment. The applicant, Nagib Jamal, owns a strata lot in the respondent strata corporation, The Owners, Strata Plan NW2153 (strata). The applicant's strata lot is located below the strata lot owned by the respondents, Michael Rushton and Linnea Mann (owners). According

to the applicant, the owners replaced their carpet with hardwood floors, which has resulted in daily noise that is a nuisance and impacts his health. He says the owners are not willing to address the noise, and the strata failed to adequately investigate or resolve the issue. The applicant asks for orders that the strata hire an engineer to assess the owners' flooring and, if it is deemed to be inadequate, that the owners restore the noise insulating characteristics of the original carpet flooring. He also asks for an order that the respondents pay him $13,200 for potential loss of rental income and $275,000 in damages for loss of enjoyment of property, loss of property value, mental stress, and losses resulting from compromised productivity.

2. The owners say they replaced their flooring in 2008 and the noise complaints did not start until 2017. They deny that they are unwilling to resolve the matter, or that they are responsible for any of the amounts claimed by the applicant. The strata says that it investigated the applicant's noise complaints and determined that the noise transferred between the strata lots was not excessive or unreasonable. The strata denies that it caused any of the losses described by the applicant.

3. The applicant and the owners are self-represented. The strata is represented by a member of the strata council.

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 applicant's claims are barred by the applicable limitation period under the *Limitation Act,*

    b. whether strata failed to adequately investigate and address the applicant's noise complaints,

    c. whether the noise was a nuisance to the applicant in contravention of the strata's bylaws, and

    d. whether the applicant is entitled to compensation for lost rental income or damages for loss of enjoyment of property, loss of property value, mental stress, and losses resulting from compromised productivity.

BACKGROUND, EVIDENCE AND ANALYSIS

9. In a civil dispute such as this, an applicant bears the burden of proof on a balance of probabilities. The parties provided evidence and submissions in support of their respective positions. While I have considered all of this information, I will refer to

only what is relevant to the issues before me and necessary to provide context to my decision.

10. The strata is a wood frame residential structure that was built around 1984. The applicant has owned and lived in strata lot 16 since 1991. Strata lot 16 is located under part of strata lot 15, which the owners purchased in 1994.

11. The strata's bylaws address the possibility that noise may be disruptive to occupants. Bylaw 3(1) states that an occupant must not use a strata lot in any 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. Bylaw 3(2) contains requirements that there be no undue noise between 10:30 p.m. and 7:00 a.m., and that occupants must not use musical instruments or other devices in a strata lot that interfere with the comfort of any other occupant.

12. The owners obtained the strata's approval to install hard surface flooring in portions of their strata lot in 2008. At that time, the strata's bylaws did not contain specific requirements for impact insulation or sound transmission class ratings, underlay, or installation of hard surface flooring. After they installed their flooring the owners placed rugs in some areas.

13. In late 2016, the respondents bought a small dog and temporarily removed some of their rugs to accommodate the dog's training process. The applicant advised the owners that he could hear some noise from the dog in his own strata lot, and the owners replaced the rugs.

14. In January of 2017, the strata filed a bylaw amendment at the Land Title Office that dealt with changes to flooring surfaces within a strata lot. The new bylaw 4 set out requirements for impact insulation or sound transmission class ratings, underlay, and installation of hard surface flooring. Bylaw 4.6 provides that an occupant with hard surface flooring "must take sufficient measures to minimize noise transference to neighbouring strata units" including, but not limited to, using sound-dampening insultation, area rugs in high-traffic areas, attaching sound-dampening pads to

furniture, and refraining from repeated running, jumping, or walking in hard soled shoes.

15. In early 2017, the applicant noticed noises such as vacuuming, appliance use, running water, furniture movement, dropped objects and walking that he thought were coming from strata lot 15. As the applicant had not experienced noise issues from the that strata lot before, he suspected that the owners had recently modified their floors to result in a loss of sound proofing. He complained to the strata about the noise and his suspicion that the owners had altered their floors without permission. The applicant also suggested that the owners were "doing work" on their floors at that time.

16. In response to the applicant's complaint, the strata's property manager sent a May 3, 2017 bylaw violation letter to the owners. The owners responded on May 24, 2017, and explained that they had installed new floors in 2008 and, since then, had added rugs to about 80% of the floor area, pads under their furniture, and rubber matting under their dog's crate. They also stated that they wear slippers indoors and were not noisy people. No new noise complaints were received, and it does not appear that the strata took action against the owners at that time.

17. In February of 2018, the applicant sent text messages to the owners with new noise complaints. The owners responded that they were being quiet and questioned whether the noise the applicant heard was coming from their strata lot. The owners found the applicant's response to be unsettling and forwarded a copy of the text exchange to the strata. The owners did not interact further with the applicant.

18. The applicant made additional noise complaints to the strata in March of 2018. The strata arranged for informal noise testing in April of 2018. A member of the strata council, LH, walked in various areas of the owners' strata lot (both with and without shoes) while another member, GM, measured the resulting sounds in the applicant's strata lot with a decibel reader. GM reported that there was little change in the decibel levels with the footfalls, and that the exterior traffic noise resulted in the biggest increase in the decibel levels.

19. The owners invited the strata's property manager to view their strata lot and the efforts they had made to prevent noise transmission. They provided the strata with proof of their 2008 alteration approval and a letter from their floor installer, who confirmed that the flooring in the strata lot was the flooring he installed in 2008. The installer also stated that the flooring "was installed with the underlay that was at least the minimum or more of the required specification at the time".

20. The strata council considered this information at its April 30, 2018 meeting. The council noted that no noise complaints were made for 9 years after hard flooring was installed, and found that the owners had made reasonable attempt to limit the transfer of sound to the strata lot below. The strata council determined that "every day noises" were not unreasonable or excessive, and did not amount to a nuisance or a contravention of the bylaws and decided not to take further action.

21. The applicant was not satisfied with this decision and continued to correspond with the strata. As a result of a June 19, 2018 hearing with the applicant, the strata obtained quotes for professional sound testing. However, the strata's ownership did not approve a resolution to pay for noise testing at a December 3, 2018 annual general meeting. It does not appear that any additional noise testing, formal or informal, has been conducted in the strata.

Parties' Positions

22. The applicant says that, as the sudden increase in noise cannot be attributed to an improvement in his hearing, the owners must have made an unauthorized alteration to their flooring. He says the fact that he heard no noise from above until 2017 supports the conclusion that there was a second renovation around that time using a similar-looking floor. The applicant states that he was unable to record the loud sounds coming from the owners' strata lot, but submits that this was due to a problem with the recording equipment. In the applicant's view, the testing proposed by the strata was too expensive and "overkill". The applicant suggests that the strata should have removed a portion of the owners' floor from an inconspicuous place for testing purposes and to confirm its age. The applicant says the owners

should be required to reinstate the acoustic barrier between the strata lots to the original specifications.

23. The applicant says that he has spent a lot of time dealing with the matter, which has taken time away from his social and leisure activities. The applicant also says the noise has impacted a medical condition and compromised his ability to generate investment income. He describes having to go to a coffee shop to escape the noise. He also says that interactions with the strata, owners and other neighbours about this issue have had a negative impact on his health. The applicant says he was forced to evict the tenants from another property he owns so that he could move into it, resulting in a loss of rental income. He also suggests that the sale price of his strata lot will be lower than it would be if not for the noise issue.

24. The strata says the building is not sound proof and occupants will hear every day noises from time to time. The strata says that it properly investigated the applicant's complaints and determined that there had been no nuisance or bylaw breach. The strata denies that it acted in bad faith or in an unfair manner.

25. The owners say they are a retired couple who rarely entertain, go to bed by 10:00 p.m., and have made a point of being quiet. They say the applicant's own evidence shows that there is some noise transfer between strata lots even with carpet, and they point out that they can hear some of the applicant's daily noises. The owners emphasize the applicant's admission that the noise is not recordable. They say they have added rugs and taken other steps to limit noise transmission, but say that they cannot be expected to live "without movement" in their strata lot.

Limitation Period

26. 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. The strata submits that, as the applicant first reported being bothered by noise more than 2 years before commencing his dispute, he missed the limitation period set out in the *Limitation Act*.

27. As discussed above, the applicant complained to the owners about dog-related noise in late 2016 and about what he thought was noise related to the flooring in early 2017. The applicant described the noise as a nuisance in the Dispute Notice he filed on September 12, 2019.

28. 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 applicant's complaints about ongoing noise are not barred by the *Limitation Act.*

The Strata's Response to the Noise Complaints

29. Section 26 of the *Strata Property Act* (SPA) says that a strata corporation must enforce its bylaws, subject to some limited discretion, such as when the effect of the breach is trivial (see *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings Inc.*, 2016 BCSC 32). A strata may investigate bylaw contravention complaints as it 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).

30. The standard of care that applies to a strata council is not perfection, but rather "reasonable action and fair regard for the interests of all concerned" (see *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at paragraph 61). I must determine whether the strata's response to the applicant's noise complaints was reasonable.

31. As noted above, the strata's bylaws state that occupants must not engage in activities that cause nuisance or interfere with the enjoyment of another strata lot. Although bylaw 4.6 allows the strata to require an owner to take steps to minimize noise transference, this is not a situation where the strata's bylaws require the removal of hard surface flooring if it becomes the subject of complaints.

32. In this case, the strata council considered the applicant's complaints and allowed the owners an opportunity to respond, as required by section 135 of the SPA. The strata reviewed the evidence provided by the owners and the results of the informal noise testing before determining that the noise did not amount to a nuisance. The strata council also held hearings at the applicant's request.

33. I find that the applicant's submissions about the strata's handling of his noise complaints amount to an argument that the strata treated him in a significantly unfair manner. Section 123 of the CRTA contains language similar to section 164 of the SPA, which allows a tribunal member to make an order to remedy a significantly unfair act by a strata corporation. A "significantly unfair" act encompasses oppressive conduct and unfairly prejudicial conduct or resolutions. The latter has been interpreted to mean conduct that is unjust and inequitable (see, for example, *Strata Plan VR1767 (Owners) v. Seven Estate Ltd.*, 2002 BCSC 381). In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, the British Columbia 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, unjust or inequitable.

34. The test for significant unfairness was summarized by a tribunal vice chair in *A.P. v. The Owners, Strata Plan ABC*, 2017 BCCRT 94, with reference to *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44: what is or was the expectation of the affected owner or tenant? Was that expectation on the part of the owner or tenant objectively reasonable? If so, was that expectation violated by an action that was significantly unfair?

35. The thrust of the applicant's submission is that the strata's process was unfair because it did not investigate the complaint in the way he wanted. The applicant

does not appear to take issue with the fact that the expenditure for the noise testing proposed by the strata was not approved by the ownership. Instead, he says that the strata should have followed the procedure he recommended and removed a section of the owners' flooring to test its age and have it assessed by an engineer.

36. While the applicant expected that the strata to investigate his complaint, I find that it was not objectively reasonable for him to expect to dictate the process or result of the investigation. As noted, a strata may determine the process of an investigation (see *Chorney* above). Although the result of the investigation was not what the applicant had hoped for, this does not establish that the strata failed to address the matter or take the complaints seriously. I find that the evidence before me does not establish any bad faith, an unfair process, or significant unfairness.

37. Based on the small number of complaints, the efforts the owners made to minimize noise transference, and the results of the informal noise testing, I find that the strata reasonably met its duty to investigate the complaint and enforce its bylaws. I am satisfied that the strata's decision that there was no nuisance or bylaw infraction was reasonable, given the contents of the bylaws and the evidence before it.

38. In summary, I find that the strata did not fail to respond to the applicant's noise complaints or to enforce its bylaws. I also find that the strata did not act in a significantly unfair manner. Accordingly, I dismiss this claim.

Is The Owners' Flooring the Source of a Nuisance?

39. As discussed above, the applicant believes that the owners made a change to their flooring after the 2008 modification that impacted the acoustic barrier and caused an increase in noise transmission between the strata lots. Although the applicant says the owners told him that they installed new flooring after 2008, I find this is not supported by the evidence. Photographs in evidence show some areas of the flooring not covered by rugs have signs of wear including scratches and dents. The owners also provided evidence from the floor installer who confirmed that the floor in their strata lot is what he installed in 2008, as well as a statement from their housecleaner who stated that the floors have not changed.

40. I find that the evidence supports the conclusion that the owners' hard surface flooring is the same flooring that was installed (and authorized by the strata) in 2008. The evidence does not prove that the owners have installed new flooring or modified the existing flooring to alter the acoustic barrier between their strata lot and the applicant's strata lot below.

41. However, this is not the end of the matter. The next consideration is whether the hard surface flooring installed in 2008 is the source of noise that rises to the level of a nuisance. For the purposes of this analysis, I find that it is not necessary for me to determine why the applicant did not notice increased noise transference until approximately 9 years after the hard surface flooring was installed.

42. In *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, at paragraph 77, the Supreme Court of Canada defined a nuisance as an unreasonable interference with the use of land. The Court added that it is of no consequence whether the interference results from intentional, negligent or non-faulty conduct so long as the harm can be characterized as a nuisance. In addition, the British Columbia Supreme Court has held that a nuisance can be created even when the activity complained of is otherwise lawful: *Suzuki v. Munroe*, 2009 BCSC 1403. Another tribunal member summarized the tort of nuisance in a strata setting in *Chen v. The Owners, Strata Plan NW 2265*, 2017 BCCRT 113 at paragraph 55 as being the unreasonable, continuing, or repeated interference with a person's enjoyment and use of their strata lot (with reference to *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462 (*Ng*)).

43. Although not binding upon me, I agree with the reasoning in decisions made by other tribunal members about noise-related nuisance in strata environments. The test for whether noise is unreasonable is objective rather than what the owner experiences: see *A.P. v. The Owners, Strata Plan ABC*, 2017 BCCRT 94, at paragraph 48. It is not necessary that noise reach a particular decibel range in order for it to be considered unreasonable. Instead, the determination is objective and must be made based on a standard of reasonableness and on all of the relevant facts: *see Torok v. Amstutz et al*, 2019 BCCRT 386, at paragraph 47.

44. Although the applicant says there are no issues with noise in other strata lots as the complex is well built, evidence before me suggests otherwise. The applicant admits that there were issues with music and other noises from his strata lot that he resolved with other neighbours. Several other owners provided statements in which they described the types of noises that they can hear from other strata lots. I accept that there is some degree of noise transference between strata lots.

45. As discussed above, the applicant's complaints included noise from a variety of activities, plumbing and appliance use, and "walking noise". Although the applicant says that all of these noises came from the owners' strata lot, the text message exchanges in evidence suggest that some of the noise events may have occurred when the owners were not moving in their strata lot or they were not at home.

46. The strata's informal noise testing involved walking with and without shoes. The recording and decibel readings taken during the testing were not retained. The evidence from the strata council members was that the noise from footfalls was "very quiet", "far from disruptive", and was not as loud as traffic noise entering the strata lot from outside. GM stated that the noise he observed in the applicant's strata lot was at the same level that he experienced in his own strata lot.

47. The applicant disagrees with the characterisation of the noise observed during the testing. It is not clear to me why the excessively loud noises described by the applicant could not be recorded, even if there was a problem with some of the sound equipment he used. I also note that the applicant did not arrange for formal testing or recording of the noise to establish its frequency or intensity.

48. The applicant provided a statement from a friend, JP, who commented on the "racket" she heard from the strata lot above while visiting the applicant. However, given that I have accepted that there is some degree of noise transference, I do not find that JP's statement establishes that the noise was unreasonable.

49. As noted, the burden of proof is on the applicant to establish that the noises he hears in his strata lot are from the owners' strata lot and objectively unreasonable. While I do not doubt that the applicant's report that he heard noise in his strata lot, I

find that he has not proven that the level of noise was unreasonable or that all of the episodes he described came from the owners' strata lot. I find that the circumstances proven by the applicant did not rise to the level of nuisance as contemplated by *Ng*, or a violation of the strata's bylaws. Therefore, I find the applicant is not entitled to compensation for lost rental income or damages for loss of enjoyment of property, loss of property value, mental stress or loss of productivity. Accordingly, I dismiss this claim.

TRIBUNAL FEES AND EXPENSES

50. 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. I see no reason in this case not to follow that general rule. As the applicant was not successful, I dismiss his claim for reimbursement of tribunal fees.

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

ORDERS

52. I dismiss the applicant's claims and this dispute.

Lynn Scrivener, Tribunal Member