



# Civil Resolution Tribunal

Date Issued: June 5, 2020

File: ST-2019-009026

Type: Strata

Civil Resolution Tribunal

Indexed as: *Alavi v. The Owners, Strata Plan BCS1311*, 2020 BCCRT 630

**B E T W E E N :**

FOROUZANDEH ALAVI

**APPLICANT**

**A N D :**

The Owners, Strata Plan BCS1311

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Rama Sood

## **INTRODUCTION**

1. The applicant, Forouzandeh Alavi (owner), owns strata lot 11 (unit 111) in the respondent strata corporation, The Owners, Strata Plan BCS1311 (strata).
2. The owner says the strata has failed to maintain and repair common property, specifically the inner and outer garage gates, which cause an unreasonable level of

noise and vibration in her strata lot when they are opened and closed throughout the day. The owner says this noise interferes with her and her family's quiet enjoyment of the strata lot. The owner seeks an order that the strata maintain or repair the garage gates. In her submissions to the tribunal, she further asked for the garage gates and the operators to either be replaced or removed. She also asked in her submissions for \$8,000 for loss of enjoyment or unreasonable interference with the use of her strata lot.

3. The strata denies the owner's claims. It says it took reasonable steps to maintain the gates and denies the noise creates a nuisance. The strata says there is no guarantee that replacing the gates will eliminate the noise in the owner's strata lot. The strata also says removing the garage gates will compromise the building's security.
4. The owner is self represented. The strata is represented by a strata council member.

## **JURISDICTION AND PROCEDURE**

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims 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.
6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. Though I found that some aspects of the parties' submissions called each other's credibility into question, 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.

7. 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.
8. 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***

9. The owner's requested remedies changed during the course of the tribunal facilitation process. In her dispute application, she requested an order that the strata maintain or repair the garage gate opening mechanism. After facilitation, she instead requested the garage gates be replaced or removed and she also asked for \$8,000 in damages. Although the Dispute Notice was not amended, I find the strata had notice of the changes in requested remedies, and sufficient opportunity to respond when providing evidence and submissions. So, I find no procedural fairness problem in considering the amended remedies raised during facilitation.
10. Likewise, the owner added the issue of privacy in her submissions. She says the strata breached her privacy by informing the strata owners of the details of her noise complaint and Dispute Notice prior to an annual general meeting held in September 2019 (AGM). She also says the strata council members breached her privacy when they requested statements from neighbouring owners about the garage gate noise. However, the owner did not specify a cause of action or remedy. The BC Court of Appeal decided that there is no common law cause of action for breach of privacy (see *Ari v. Insurance Corporation of British Columbia*, 2015 BCCA 468 at paragraph 9). For this reason, I refuse to resolve this issue.

## ISSUES

11. The issues in this dispute are:

- a. Is the noise in unit 111 from the garage gates excessive or unreasonable?
- b. Must the strata repair, replace, or remove the garage gates?
- c. Was the strata significantly unfair in how it dealt with the owner's noise complaints?
- d. Is the owner entitled to \$8,000 in damages for unreasonable interference with the use and enjoyment of her strata lot?

## FACTS AND EVIDENCE

12. The owner and the strata both provided submissions and evidence in this dispute. I have read all of these materials, but I only refer to those I find relevant to provide context for my decision. In a civil proceeding such as this, the applicant owners must prove their claims on a balance of probabilities.
13. As a preliminary matter, I note that the owner's husband, KA, primarily communicated with the strata about the noise complaints on behalf of the owner.
14. The strata was created in 2005, under the *Strata Property Act* (SPA). The strata consists of a 4-storey building with 59 strata lots above a parking garage. Title documents show the owner purchased the strata lot on May 18, 2017. The owner moved into the strata lot either in June or July 2017. The owner's strata lot is located on the first floor. The strata plan shows that it is directly above the garage entrance ramp and the inner garage gate, with strata lots on all sides.
15. The owner says the noise from the garage gates opening and closing interferes with her enjoyment of her strata lot. In a March 2019 email to a strata council member, KA reported increased noise from the garage gates that was non-stop from 4:30 AM to 8:30 AM and again 3:30 PM to 7:30 PM. KA also stated the noise affected their infant's sleep and they played light music in the room to block the gate noise.

16. The strata admits that there were noise complaints from the former owner of strata lot 114 in 2014. The strata says in response, it installed isolators and the noise was reduced and there were no further complaints before the owner's complaint. The strata provided invoices since 2013 that show the garage gates have been regularly serviced and repaired.
17. The strata also provided witness statements from other owners which I summarize below:
- a. KB is a former strata council member and lives in unit 109, which is 2 strata lots to the east of the owner's strata lot and above the garage. He stated that the strata repaired the garage gates after there were noise complaints from previous owners. He also says the garage gates were serviced and brake pads changed after the owner complained in December 2018. Currently, he says he occasionally hears noise from the garage gates but it is not a nuisance.
  - b. LN is the current strata council president. She says since the owner would not allow her access to unit 111, she visited the adjacent strata lot, unit 110, while another strata council member opened and closed the garage gates. She says she stood close to the common wall shared with the owner's strata lot and barely heard any noise. She also says she placed a water bottle on the kitchen counter and living room floor and did not see the water move.
  - c. MP lives in unit 110 which is next door to the owner's strata lot and above the garage gates. She says when she moved into unit 110 in 2008, the inner gate was noisy and caused her counters to vibrate. She says she complained to the strata and the vibrations stopped and the noise decreased after vibration isolators were installed. She did not state when the improvements happened. She says that currently she cannot hear the garage gates at all. She also stated she does not have any hearing problems.
  - d. TJ lives in unit 114 which is above the garage gates. She says she can hear the garage gates in her bedroom if her unit is very quiet, and the sound is

muffled. She also says she occasionally feels vibrations, but it is not a nuisance.

18. The strata also provided a statement from GV who works for VDSL, a company that installs and repairs garage gates. He has serviced and repaired the garage gates for 6 years. He says he went to the owner's strata lot in February 2020 and heard low noise from the gate. He says he installed new noise isolators on both garage gates 1 week later. He did not state whether he checked the noise in the owner's strata lot after he installed the parts.

## **POSITIONS OF THE PARTIES**

19. The owner submits that the strata did not investigate the sound level in her strata lot and did not take adequate steps to remedy the problem. The owner says the strata was negligent because it ignored her complaint.
20. The strata says it has met its duty to maintain the garage gates through regular servicing, and that the garage gates do not cause excessive or unreasonable noise or vibrations. It says owners should expect some noise if their units are near garages or elevators. The strata says it responded to the owner's noise complaints in a timely and appropriate manner and has investigated her complaint while balancing the interests of all owners. The strata relies on the fact that owners of neighbouring strata lots have stated that there is little noise and it did not disturb them. The strata also says the owner may have contributed to the problem because she may have replaced the carpeting in her strata lot with laminate without strata approval.

## **ANALYSIS**

***Is the noise and vibrations in unit 111 from the garage gates excessive or unreasonable?***

21. While I am not bound by it, I agree with this tribunal's decision in *Tollasepp v. The Owners, Strata Plan NW 2225*, 2020 BCCRT 481. According to the decision,

whether noise is unreasonable or a nuisance is an objective determination. It is based on a standard of reasonableness, and on consideration of all the relevant facts, which would include the age and material of the building.

22. Aside from her statements and KA's emails to the strata council members, the owner has not provided any additional evidence about the level of noise in her strata lot from the garage gates. The owner relied on KB's March 2019 email to the strata council members after he visited the owner's strata lot in early 2019. In the email KB stated there was considerable noise and vibrations from the inner garage gates. I give KB's email little weight. I find it is not relevant since further repairs and maintenance have been done on the garage gates since March 2019.
23. The owner suggests that the owners who provided written statements are biased and their statements should be disregarded. She says she has faced negativity from her neighbours since she filed a Dispute Notice. She says a note was placed under her door by one of the neighbours complaining about her child's crying. The owner did not provide a copy of the note. I find there is insufficient evidence to show that the owners are biased or that they have demonstrated negativity towards her, and I give no weight to the owner's objections.
24. The owner also says the witness statements from neighbouring owners are inconsistent with their previous statements about noise from the garage gates. Even if the neighbouring owners previously stated there was noise or vibrations from the garage gates, I find it would be reasonable for their observations to change given the amount of work done on the garage gates in the past 3 years. Hence, aside from KB's statement and emails which I have already addressed, I find there is no basis to find the statements are inconsistent.
25. Hence, I find that the owner has not established that noise from the garage gates is excessive or unreasonable.

***Must the strata repair or replace the garage gates?***

26. There is no dispute that the garage gates are common assets and that the walls above the garage gates are common property. Under section 72 of the *Strata Property Act* (SPA), the strata must repair and maintain common property and common assets. Bylaw 9 of the strata's bylaws also makes the strata responsible for repair and maintenance of common assets and common property.
27. However, I find this issue is moot since the owner has failed to establish that noise or vibration from the garage gates is excessive or unreasonable. Hence, I dismiss the owner's claim.

***Was the strata significantly unfair in how it dealt with the owner's noise complaints?***

28. The owner says she first complained in September 2017 and the strata did not take any steps to investigate the sound level in her unit or to provide an adequate resolution.
29. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the Court of Appeal established the test for determining significant unfairness which the Supreme Court restated in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763 at paragraph 28 as follows:
- a. What is or was the expectation of the affected owner?
  - b. Was the owner's expectation objectively reasonable?
  - c. If so, was that expectation violated by an action that was significantly unfair?
30. In this case I find the owner reasonably expected that the strata would investigate her noise complaint and address any repairs to reduce the noise and vibrations.
31. On the evidence before me, I find the strata adequately investigated the owner's complaints. Emails show that the strata council members took steps to investigate and respond in a timely manner to the owner's complaints. The strata council members also included KA in its emails to keep the owner updated on the progress.



32. In addition, invoices from VDSL show that the garage gates were regularly repaired and serviced in the last 6 years as follows:

- a. In December 2013 it replaced worn brake solenoid, adjusted brake shoes, and tested the left gate which was “very noisy”.
- b. In June 2015 it replaced a broken torsion spring and tested the gate after it was broken into.
- c. In November 2015 it replaced the reversing contactor because the inside gate was not working.
- d. In April 2016 it appeared the inside gate was struck by a car and VDSL replaced the brake solenoid, adjusted the brake shoes, lubricated the hardware, and levelled the gate. In addition, it adjusted the brake, lubricated the hardware, and replaced the exit hose on the outside gate.
- e. In June 2016 it cycled and tested both gates after the inside gate belt broke. It is unclear whether the belt was replaced by I infer that it was.
- f. In December 2016 it repaired a broken contactor wire, replaced a brake solenoid, and adjusted the shoes after the outer gate was stuck open. It also replaced the brake solenoid, replaced a centre idler, lubricated the hardware, tested the safety reverse and safety beams, and checked the clutch setting on the inside gate.
- g. In August 2017 it reset the motor for the electric operator, replaced the brake solenoid, adjusted the shoes, and replaced the v-belt after the gate was stuck open.
- h. In June 2018 it cycled and tested the gates, lubricated the hardware, replaced solenoids and adjusted the shoes, replaced a v-belt, and adjusted the chains.
- i. In November 2018 it noted both gates were noisy, and the pickets were cut. It also serviced the gates, replaced the brake solenoids, brake shoes, and

- brake drum, lubricated, cycle and tested, tested the pneumatic safety reverse, tested the safety beams, and checked the clutch setting.
- j. In November 2019 it cycled and tested the gates after the door was stuck open.
  - k. In March 2020 it preformed scheduled maintenance, lubricated hinges, and cycled and tested the gates after there was a report that gate #2 (which I infer was the inside gate) was noisy.
33. Hence, I find the owner has not established that the strata's response to her complaint was significantly unfair.
34. The owner suggested the strata should have obtained a report from a professional acoustic engineer. Since the owner has not established that the noise was excessive, I find there was no need for the strata to obtain such a report.

***Is the owner entitled to \$8,000 in damages for loss of enjoyment or unreasonable interference with the use of her strata lot?***

35. The owner says the noise and vibrations from the garage gates has interfered with her and her family's enjoyment of her unit and creates a nuisance.
36. The Supreme Court of Canada defined a nuisance in *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, at paragraph 77 as an unreasonable interference with the use of land. The Court also stated that whether the interference resulted from intentional, negligent or non-faulty conduct was irrelevant so long as the harm can be characterized as a nuisance. In addition, the British Columbia Supreme Court has stated that a nuisance can be created even when the activity complained of is otherwise lawful (see *Suzuki v. Munroe*, 2009 BCSC 1403). The tribunal 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 (referring to *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462 (Ng)).

37. Although I am not bound by it, I agree with the tribunal's statement in *A.P. v. The Owners, Strata Plan ABC*, 2017 BCCRT 94, at paragraph 48 that the test for whether noise is unreasonable is objective rather than what the owner experiences. 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*, 2019 BCCRT 386, at paragraph 47).
38. As discussed above, the burden of proof is on the owner in this case to establish that the garage gate noise and vibrations are objectively unreasonable. I do not doubt that the owner hears noise from the garage gates in her strata lot. However, as stated above, I find she has not proved there are vibrations as well or that the noise level was unreasonable. I find the evidence provided by the owner did not reach the level of nuisance contemplated by *Ng*. Based on my reasons, I find the owner is not entitled to compensation for loss of enjoyment and dismiss this claim.

## **TRIBUNAL FEES, EXPENSES AND INTEREST**

39. 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. Since the owner was not successful, I dismiss her claim for reimbursement of tribunal fees.
40. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

## **ORDER**

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

