Civil Resolution Tribunal

Date Issued: March 10, 2021

File: ST-2020-003959

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NES3135 v. T.R.F. Enterprises Ltd.*, 2021 BCCRT 271

B E T W E E N :

The Owners, Strata Plan NES3135

APPLICANT

A N D :

T.R.F. ENTERPRISES LTD. and MOOK THAI CUISINE INC.

RESPONDENTS

A N D :

The Owners, Strata Plan NES3135

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. The applicant (and respondent by counterclaim), The Owners, Strata Plan NES3135 (strata), is a mixed-use strata development.

2. The respondent (and applicant by counterclaim), T.R.F. Enterprises Ltd. (TRF), owns strata lots 1 and 2 in the strata. The respondent (and applicant by counterclaim), Mook Thai Cuisine Inc. (Mook Thai), operates a restaurant in these strata lots as TRF's tenant. There are 3 residential strata lots in the 2 floors above the restaurant.

3. It appears that the original source of the tension between the parties was the residents' complaints about the level of noise coming from Mook Thai. This disagreement ballooned to encompass many other issues.

4. The strata asks for orders that Mook Thai:

    - stop breaching the strata's bylaws and rules by causing unreasonable noise,
    - remove items from the common property basement or pay a monthly fee for storage,
    - remove a lock from a fire door in the basement,
    - replace a common property exterior door or pay the strata to do so,
    - repair its kitchen exhaust fan to stop it from dripping grease onto common property,
    - ensure that its kitchen exhaust fan does not vent smells into any other strata lots or common property,
    - remove a patio from its business and liquor licences, and refrain from operating a patio,
    - stop intimidating other owners or occupants of the strata, and
    - stop dumping garbage onto the doorsteps of other strata lots.

5. The strata also asks for orders against both respondents for the payment of a total of $600 in bylaw fines for 3 separate infractions. Two of the alleged infractions are for causing unreasonable noise. The third is for storing items in the basement.

6. The respondents ask for orders that the strata:

    - remove all fines from their strata lot accounts,
    - stop interfering with their hot water tank, music and fire door,
    - permit Mook Thai to keep the fire door locked,
    - hold a hearing under section 34.1 of the *Strata Property Act* (SPA),
    - disclose documents under sections 35 and 36 of the SPA.
    - permit Mook Thai to keep the recycling and garbage bins on common property, and
    - be prohibited from accessing the commercial strata lots.

7. The respondents also ask for orders that the bylaws filed in the Land Title Office on July 31, 2017 (2017 bylaws), and the "quiet time" rule that the strata adopted on September 12, 2019, are invalid.

8. I note that in their counterclaims, the respondents request the same remedies. Also, except where specifically noted, their submissions are the same.

9. The strata is represented by a strata council member. TRF and Mook Thai are each is represented by an employee or director.

JURISDICTION AND PROCEDURE

10. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly

and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

11. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both sides to this dispute call into question the credibility, or truthfulness, of the other. However, in the circumstances of this dispute, I find that it is not necessary for me to resolve the credibility issues that the parties raised. I therefore decided to hear this dispute through written submissions.

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

13. Under section 123 of the CRTA and the CRT 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 CRT considers appropriate.

14. The respondents both provided late evidence. The strata objected to me considering this late evidence. I find that the late evidence consists of documents that the strata would already have in its possession, either because it was duplicate evidence or correspondence with the strata. Also, the strata had the opportunity to respond to the late evidence. So, I find that there is no prejudice to the strata and I have considered the respondents' late evidence.

15. Also, during the evidence collection phase of the CRT dispute, TRF uploaded a document into the CRT's online portal that I was not able to open. Through the CRT's staff, I asked TRF to provide another copy, which it did.

16. Typically, in these circumstances, I would give the other parties an opportunity to provide submissions as a matter of procedural fairness. However, the document in question is a duplicate of a document already in evidence. So, I find that there is no

need to delay a final decision by giving the other parties an opportunity to make submissions about the new document.

ISSUES

17. As mentioned above, the respondents initially asked for an order that the strata provide copies of certain documents under sections 35 and 36 of the SPA. The parties agree that the strata has now disclosed these documents. So, I consider this issue resolved.

18. Based on the parties' requested orders, I must answer the following questions:
    a. Did the strata impose the 2 fines for noise complaints in compliance with section 130 of the SPA?
    b. Did Mook Thai cause unreasonable noise?
    c. Did the strata impose the fine for storing items on common property in compliance with section 130 of the SPA?
    d. Would it be significantly unfair for the strata to require the respondents to remove their items from the basement maintenance rooms?
    e. Would it be significantly unfair for the strata to require the respondents to remove the lock from the fire door or give the strata a copy of the key?
    f. Do the respondents have to replace the exterior door they removed?
    g. Is Mook Thai's kitchen exhaust fan causing a nuisance?
    h. Could Mook Thai operate a patio on common property without strata approval?
    i. Did the strata breach section 34.1 of the SPA by failing to hold a hearing?
    j. Did the strata pass the 2017 bylaws in compliance with section 128 of the SPA?
    k. Is the "quiet time" rule valid?

l. Would it be significantly unfair for the strata to require Mook Thai to remove its garbage and recycling bins from common property?

m. Should I make any orders about Mook Thai's allegedly intimidating or harassing behaviour?

n. Should I make an order restricting the strata's access to the commercial strata lots?

o. What remedies, if any, are appropriate?

BACKGROUND AND EVIDENCE

19. In a civil claim such as this, the strata as the applicant must prove its claims on a balance of probabilities. The respondents must prove their counterclaims to the same standard. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

20. The strata consists of 5 strata lots in a 3-storey building. The building is a heritage brick firehall from 1906 that was converted into its current form in 2006. As mentioned above, TRF owns strata lots 1 and 2, which are the only commercial strata lots in the strata. The commercial strata lots take up most of the ground floor. TRF purchased these strata lots on December 21, 2018, from the strata's owner developer, and leased the space to Mook Thai. Before this, the owner developer had operated a café and wine bar there since 2006. The other 3 strata lots are residential strata lots.

21. Section 120 of the SPA says that the Schedule of Standard Bylaws are a strata corporation's bylaws except to the extent that different bylaws are filed in the LTO. The 2017 bylaws are the only bylaw amendments that the strata has filed in the LTO, and they are not a complete set of bylaws. So, the Standard Bylaws apply except to the extent that the 2017 bylaws are different, subject to my findings about the validity of the 2017 bylaws.

ANALYSIS

The Noise Complaints

22. The strata says that Mook Thai plays music at an unreasonably high volume, and at unreasonable times. The strata has imposed 2 fines on TRF for the noise, and wants Mook Thai to stop causing unreasonable noise.

23. The strata relies on bylaws 3(1)(a), which prohibits causing a nuisance or hazard to another person, 3(1)(b), which prohibits unreasonable noise, and 3(1)(c), which prohibits the unreasonable interference with the rights of other persons to use and enjoy common property. Regardless of which bylaw applies, I find that this claim is about whether Mook Thai caused unreasonable noise.

24. The residents above Mook Thai made several complaints about loud music in 2019 and 2020. While there are no complaints before me from before 2019, the parties agree that noise was an issue before TRF bought the commercial strata lots and before Mook Thai operated there.

25. The respondents deny that Mook Thai causes unreasonable noise. They also say that the strata did not follow the SPA's requirements before imposing the fines.

Did the strata impose the 2 fines for noise complaints in compliance with section 130 of the SPA?

26. A residential owner, KF, complained to the property manager at 10:30pm on September 27, 2019, that the music from Mook Thai was "super loud". On October 4, 2019, the property manager wrote to TRF about the noise complaint. The property manager said that TRF had the right to respond, including a hearing if requested, and warned of fines. TRF did not respond, and on December 18, 2019, the strata imposed a $200 fine on TRF.

27. A tenant, EL, complained several times in 2019 and 2020 about noise from Mook Thai. After a complaint on January 22, 2020 about loud noise at 10:00pm, the property manager wrote to TRF warning of more fines. Again, TRF did not respond and on February 19, 2020, the strata imposed another $200 fine.

28. TRF says that the strata did not comply with section 130 of the SPA. Section 130 says that the strata may fine an owner if the owner breaches a bylaw and may fine a tenant if the tenant breaches a bylaw. Section 131 of the SPA says that if a tenant is fined, the strata can collect the fine from the owner.

29. However, the CRT has consistently held that the combined effect of sections 130 and 131 means that the strata cannot fine an owner directly for a tenant's bylaw breach. This is because doing so would deprive the tenant of the procedural protections found in section 135 of the SPA, such as the right to a hearing. See *Clark v. The Owners, Strata Plan BCS 2785*, 2017 BCCRT 49.

30. It appears that the property manager copied a representative of Mook Thai, MQ, on its letters to TRF. I find that this does not change the fact that the property manager's letter was addressed to TRF and gave only TRF the procedural rights under section 135 of the SPA. Also, the strata fined TRF for Mook Thai's alleged bylaw breaches. Because the strata did not comply with section 130 of the SPA, I find that the 2 fines are invalid. I order the strata to remove these fines from TRF's account.

Did Mook Thai cause unreasonable noise?

31. The strata also wants an order that Mook Thai stop causing unreasonable noise, while the respondents want an order that the strata stop interfering with Mook Thai's music. I take this to mean that the respondents want the strata to stop complaining about the noise and enforcing the noise bylaw for the music. The strata says that it has never asked Mook Thai to stop playing music, just to play it at a reasonable level.

32. As mentioned above, noise has been an ongoing issue since the strata was created in 2006. The parties agree that this is due, in part, to the fact that the strata building is a heritage conversion with imperfect soundproofing. I also note that some of Mook Thai's speakers are mounted on the ceiling. TRF says that the sound system was included in its purchase of the commercial strata lots.

33. In 2017, the strata received a report from an acoustics engineer, BAP Acoustics (BAP). BAP determined that the floor and ceiling assembly did not comply with the

BC Building Code requirements for sound transmission. BAP recommended a suspended ceiling and other improvements, which it expected would reduce sound transmission by at least 10 decibels. The strata and the respondents both say that implementing BAP's recommendations is the other's responsibility.

34. Under section 68 of the SPA, the boundary between 2 strata lots is the halfway point in the ceiling and floor that separates them. With that, it appears that most of BAP's recommendations are for physical changes within the commercial strata lots, although the report is not entirely clear on this point. In any event, the BAP report suggests that the construction of the floor and ceiling is at least partly to blame for the level of noise in the residential strata lots.

35. The respondents say that there is no "concrete evidence" about the sound levels in the residential strata lots. I take this to mean that there are no decibel readings or recordings, which is true. Based on the complaints in evidence, I accept that EL and KF could regularly hear the music from Mook Thai late at night. Some of these complaints are about noise after Mook Thai closed for the evening, which EL knew because she saw that there were no guests left in the restaurant. Mook Thai did not specifically dispute this point, so I accept EL's evidence. I find that BAP's report corroborates the complaints. I find that the noise is loud enough in at least 2 of the residential strata lots to bother the residents above.

36. Mook Thai says that the music is pre-set to a reasonable level. Mook Thai says that it has told employees not to increase the volume. Mook Thai says that it has verified that the music is not audible from outside, although neither respondent has had a representative visit a residential strata lot to observe the noise.

37. Mook Thai says that it has measured the sound levels at different parts of the restaurant. It says that the loudest, near the speakers, is 38 decibels. I infer that Mook Thai was measuring the ambient noise in the restaurant while it was empty, and not the sound from the music system, because 38 decibels is quieter than a public library (see *Suzuki v. Munroe*, 2009 BCSC 1403, at paragraph 63). I therefore do not find this evidence helpful.

38. The respondents say that the noise complaints must take into account the surrounding context, including the nature of the community. The respondents say that the ground floor has been a café and lounge since it was built in 2006, and that any complaints of noise or nuisance must recognize this fact. I agree that what is reasonable may be different for a strata lot above a restaurant compared to a strata lot in a purely residential context. I find that it would be unreasonable to move into a strata lot above an existing restaurant and lounge and expect perfect silence in the evening. However, just because the space has always been a restaurant and lounge does not mean that Mook Thai is exempt from the strata's noise and nuisance bylaws. Mook Thai and the residents must all accept that living or operating in a strata context requires a certain amount of "give and take". See *Sauve v. McKeage et al.*, 2006 BCSC 781.

39. With all that said, I find that Mook Thai likely caused unreasonable noise on several occasions in 2019 and 2020, in breach of the bylaws. I rely particularly on the fact that Mook Thai continued to play music even after it has closed, late at night, presumably only for its employees' entertainment. Given that Mook Thai knew that its music bothered the residents above the restaurant, I find that it was unreasonable to continue playing music after hours.

40. It may also be that the amount of noise coming from Mook Thai while it is open is also unreasonable. I find that there is not enough objective evidence, such as sound readings from a professional, for me to reach this conclusion. It is open to the strata to further investigate the amount of noise transfer and take further action, if warranted. Ultimately, if the music at its current level causes unreasonable noise in the residences above, it is Mook Thai's responsibility to comply with the noise bylaw, whether by turning the music down or off at certain times or improving the soundproofing in the restaurant.

41. I decline to order Mook Thai to comply with the noise bylaw because Mook Thai must do so whether I order it to or not. I also decline to order the strata to "stop interfering" with Mook Thai's music. The residents are entitled to complain about noise if they

think it is unreasonable, and section 26 of the SPA requires the strata to investigate those complaints and enforce the bylaws.

The Basement

42. The strata's basement includes storage areas for each of the residential strata lots, which are part of those strata lots. The residential owners access the basement directly from outside. Mook Thai can access the basement via an internal staircase from the restaurant. At the bottom of the internal staircase, there is a landing with a door to the left and a door to the right. The door to the right leads to 3 maintenance rooms (West maintenance rooms). The door to the left is a fire door that leads to the other 2 maintenance rooms (East maintenance rooms) and a hallway that connects to the residential owners' entrance. The fire door has a padlock on it, and only the respondents have a key. No part of the basement is part of the commercial strata lots or designated as limited common property for their exclusive use.

43. The respondents admittedly use some of the maintenance rooms for storage. The photos in evidence show chairs and other items in a maintenance room. There also appears to be restaurant equipment in a hallway. At a strata council meeting on July 25, 2019, TRF agreed to clean up the chairs and some kitchen items. It is unclear what remains in the maintenance rooms. It is also unclear whether Mook Thai and TRF both store items in the maintenance rooms. The strata says that the respondents' use of common property for storage violates bylaws 3(1)(a) and (c).

44. On January 17, 2020, the imposed a $200 fine, following the same procedure as the noise bylaw fines. In other words, the strata addressed its bylaw enforcement letter to TRF and fined TRF for Mook Thai's alleged bylaw breach. For the same reasons as above, I find that the strata did not comply with section 130 of the SPA and order this fine reversed.

Would it be significantly unfair for the strata to require the respondents to remove their items from the basement maintenance rooms?

45. The strata initially asked for an order that Mook Thai remove all items in the basement, including a hot water tank, or pay a monthly rental fee. In submissions, the strata abandoned its claim that the hot water tank must be removed.

46. The strata relies on section 66 of the SPA, which says that all strata lot owners are also owners of common property as tenants in common. On that basis, the strata says that all owners have an equal right to access, use and enjoy the maintenance rooms. The strata therefore says that Mook Thai should not be allowed to store items there because doing so necessarily takes up space that the other owners could theoretically use. I also note that section 3 of the SPA says that the strata must manage common property for the benefit of the owners.

47. The respondents say that the owner developer used the basement for storage. They say that they have no other space to use for storage. Although they have not framed it this way, I find that the respondents argue that it would be significantly unfair for the strata to force it to remove the items from the maintenance rooms. The CRT has the authority to remedy or prevent significantly unfair actions under section 123(2) of the CRTA.

48. In *Reid v. Strata Plan LMS 2503,* 2003 BCCA 126, the court interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith. In *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342, the court confirmed that where a strata corporation exercises discretionary authority, an owner or tenant's reasonable expectations form part of the significant unfairness inquiry. I find the strata's decisions about the use of common property are discretionary. So, I find the appropriate test, taken from *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, is:

    a. What is or was the respondents' expectation?

    b. Was that expectation objectively reasonable?

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

49. According to TRF, when it purchased the commercial strata lots, the owner developer included items that were already stored in the basement. I also accept that there is no other on-site storage available for the respondents to use. On that basis, I find that the respondents have a reasonable expectation that they would be allowed to continue using the storage rooms.

50. I find that it would be significantly unfair for the strata to force the respondents to remove its items from the West maintenance rooms. The strata has not identified how the storage of any particular item is a nuisance. There is no evidence that the strata has been unable to perform its repair and maintenance obligations because the respondents' items are in the way. There is no evidence that any owner wants to access or use the West maintenance rooms. This is unsurprising given that they already each have their own storage room. I also find that it would be impractical for the residents to access the West maintenance rooms from the outdoors. They are much more easily accessed through the internal staircase in the restaurant.

51. I find that the strata's obligation to manage common property for the benefit of the owners does not mean that it can arbitrarily refuse to allow an owner to make reasonable use of common property. Based on the arrangement of the basement, I find that Mook Thai is the only occupant who could realistically benefit from using the West maintenance rooms. So, I find that depriving Mook Thai of the continued use of the West maintenance rooms would be burdensome and harsh. I also note that it does not appear that the strata took issue with Mook Thai's use of the maintenance rooms until after it became frustrated by Mook Thai's response to the noise complaints. I find that the strata was motivated, at least in part, by improper motives in demanding that Mook Thai remove the items, which is lacking in probity. I find that the strata must permit the respondents reasonable use of the West maintenance rooms for storage. In particular, I find that it is reasonable for the respondents to use the West maintenance rooms for storage as long as it does not interfere with the strata's obligation to repair and maintain common property.

52. I find that I am supported in my decision by *Poole v. Owners, Strata Plan VR 2506*, 2004 BCSC. In a somewhat different context, the court in *Poole* ordered a strata corporation to allow an owner to exclusively use common property because the owner was the only person who could access it. The court said that allowing the strata to prohibit the owner's use would mean that the "area will not be used or enjoyed by anyone". Even though it is possible for the other owners to access the West maintenance rooms, it is so impractical that I find that a similar principle applies here.

53. I do not reach the same conclusion about the East maintenance rooms, which are accessible from the hallway that the residential owners have access to. Because of the layout of the basement, I find that if the respondents expected to exclusively use the East maintenance rooms, that expectation was not reasonable. I also cannot conclude that the strata has no legitimate interest in using the East maintenance rooms. Finally, given my conclusion that the respondents should have exclusive use of the West maintenance rooms, I find that it would not be harsh or burdensome to have them vacate the East maintenance rooms. So, to the extent that the respondents want an order permitting them to exclusively use the East maintenance rooms, I dismiss it. I order the respondents to remove any items in the East maintenance rooms unless they receives permission from the strata to continue using them.

Would it be significantly unfair for the strata to require the respondents to remove the lock from the fire door or give the strata a copy of the key?

54. The strata asks for an order that Mook Thai remove the lock on the basement door or give the other residents each a key.

55. The respondents say that this is a fire door that must be closed and asks for an order that the strata stop interfering with the fire door. They also ask for a similar order that the respondents be allowed to keep the fire door locked at all times to protect their belongings.

56. The respondents say that they do not want the strata to have a key to the fire door for 2 reasons.

57. First, the respondents say that the fire door must remain locked, according to an email from the Regional Fire Chief. However, the Regional Fire Chief says in their email that the door must remain closed. They say nothing about the door being locked. I therefore find that the Regional Fire Chief's email does not assist the respondents.

58. Second, the respondents say that the fire door provides access to the internal staircase, which in turn leads into the restaurant. So, if the door were unlocked or other residents could unlock it, they would have unfettered access into the restaurant. The respondents say that they are concerned about food contamination and theft of liquor. They also note that the owner developer installed the lock and gave TRF the keys as part of its purchase.

59. I find that the respondents have a reasonable expectation that the fire door will remain locked. I find that it is reasonable to expect that the other owners would not have free access to the restaurant, including when it is closed.

60. The strata again relies on the fact that the owners each own the common property on the other side of the fire door, and therefore have a right to access it if they wish. Again, the only areas beyond the fire door from the hallway that the residential owners have access to is the staircase up to the restaurant, and the West maintenance rooms. I do not agree that just because an owner owns a share of common property means that they are entitled to access it at any time, for any reason. I find that the strata's obligation to manage common property for the benefit of the owners could include restricting access to common property. Again, the strata has identified no reason why the other owners or tenants should be able to freely enter the restaurant at any time through the basement. The strata has identified no reason why other owners or tenants would need access to the West maintenance rooms.

61. So, I find that it would be significantly unfair to require the respondents to provide free access to the other residents through the fire door. I find that it would be burdensome, harsh, and lacking in probity.

62. What about the strata itself having reasonable access to common property? Under section 77 of the SPA, the respondents must provide reasonable access to the

common property beyond the fire door so that the strata can exercise its powers and perform its duties. That said, given that the reason for keeping the fire door locked is to prevent the residential owners from having free access to the restaurant, I find that it would be counterproductive to order the respondents to give the strata a key. While the respondents might consider giving the strata's property manager a key as a safeguard, I will not order them to do so.

63. I dismiss the strata's claim that the respondents remove the on the fire door or give the strata a key.

64. My decision means that the respondents will effectively have exclusive use of the common property on their side of the fire door. I agree with the strata that if the respondents are going to have exclusive use of common property, they should pay for it. I note that the outcome in *Poole* was an order requiring the strata corporation to enter into a lease with the owner for the exclusive use of the common property in question. The court had evidence about the common property's market value.

65. The strata claimed rent for the use of the maintenance rooms, but neither party provided any evidence or submissions about their market value. On a judgment basis, and to provide finality to the parties, I find that $50 is a reasonable monthly rent for the use of the West maintenance rooms.

66. I note that section 76 of the SPA gives the strata the power to give an owner or tenant permission to exclusively use common property for a maximum term of 1 year. Given the high level of tension among the owners, I am concerned that if the respondents only have permission to exclusively use the West maintenance rooms for 1 year, the parties' dispute will fester and flare up annually. As mentioned above, section 123(2) of the CRTA gives me the authority to make orders to prevent a significantly unfair action. I find that this broad authority allows me to order the strata to give the respondents permission to use common property for longer than 1 year. I find that making an order that is effective for longer than 1 year will allow tensions to cool, and prevent a significantly unfair action.

67. That said, I find that a permanent or indefinite order would not be appropriate. I find that the purpose of the 1-year time limit in section 76 of the SPA is to safeguard the strata's ongoing authority over the use of common property. I must balance this authority with the risk of the strata acting significantly unfairly.

68. I order the strata to permit the respondents to continue to use the internal staircase, landing and West maintenance rooms until at least March 31, 2026, at which point the permission will expire subject to a renewal under section 76 of the SPA. I order the respondents to ensure that its use of this common property does not interfere with the strata's obligation to repair and maintain common property. I order the respondents to pay $50 per month for the use of this common property.

69. If the parties want a permanent solution, I note that section 74 of the SPA allows the strata to designate common property as limited common property with a ¾ vote at an annual general meeting (AGM) or special general meeting (SGM). This would grant the respondents, and any subsequent owner and tenant, permanent exclusive use of the areas in question.

Do the respondents have to replace the exterior door they removed?

70. The strata says that Mook Thai removed a common property exterior door without the strata's permission, replacing it with a false door. While it is not entirely clear from the strata plan whether the door is common property, the respondents did not dispute this point, so I find that the door was common property. The strata wants an order that the respondents install a functioning door.

71. The respondents say that they removed this exterior door during renovations in December 2018 and January 2019. The respondents say that Mook Thai stored the door in the basement near the fire door. They say that someone disposed of the door without their knowledge or consent, and that they installed a very similar-looking false door instead.

72. TRF says that it was through inadvertence that they did not inform the strata in advance of the renovations. TRF says that no one from the strata ever said anything

about the renovations while they were going on. TRF also says that it has asked the strata for the paint colour to blend the door with the rest of the building but have not been told what the paint colour is.

73. In response, the strata says that aesthetics are not the only issue. The strata says that the door must be a working door because that is what was there before.

74. Bylaw 6 says that an owner must obtain written approval from the strata before making an alteration to common property. I find that bylaw 6 gives the strata wide discretion to approve or disapprove of alterations to common property, subject only to its obligation not to act significantly unfairly. There is no suggestion that requiring the door to be functional is significantly unfair, and I find that it is not. If the respondents expected that they could replace the door with a false door without strata approval, that expectation was not objectively reasonable. So, I find that the strata is entitled to insist that the door remain functional.

75. I order the respondents to replace the current false door with a working door similar in style and colour to the door that they removed. The respondents will have 120 days to complete this work.

Is Mook Thai's kitchen exhaust fan causing a nuisance?

76. The strata says that Mook Thai's kitchen exhaust fan drips grease onto common property and causes food smell to permeate other strata lots and common property. They ask for an order that Mook Thai remediate or repair the exhaust fan so that it does not do this.

77. Mook Thai admits that the exhaust fan was dripping grease. There are photos showing what appears to be congealed fat on the sidewalk underneath the exhaust fan. Mook Thai says that it has had 2 HVAC experts inspect the fan. One of them recommended installing a catch at the end of the fan lip, which Mook Thai did. Mook Thai says that it has hired someone to drain this catch to prevent any overflow, so the problem has been solved.

78. The strata says that Mook Thai's solution has been ineffective and that grease still spills or drips onto the common property sidewalk.

79. There is no evidence of what other option may be available to Mook Thai, or of the professional advice they supposedly received. There is also not clear evidence before me showing whether or not Mook Thai's current solution has been completely effective.

80. I find that grease dripping onto the common property causes a nuisance contrary to bylaw 3(1)(a). I order Mook Thai to ensure that no grease drips, leaks or spills onto the common property sidewalk below the kitchen exhaust fan. Given the lack of clear evidence before me, I make no order about how Mook Thai specifically must achieve this. To be clear, my order does not necessarily mean that Mook Thai must do anything other than continue to empty the grease catch before it overflows onto the sidewalk if that solution is actually working.

81. As for smells, there is no evidence about the nature, frequency or strength of any smells from the restaurant. I make no order about abating smells.

Could Mook Thai operate a patio on common property without strata approval?

82. It is undisputed that Mook Thai has never operated a patio on common property. The strata's concern is that Mook Thai has both a liquor licence and a business licence that include a patio on common property. The strata wants Mook Thai to change its licences to remove the patio.

83. Mook Thai says that it could operate a patio but has so far decided not to. TRF says that the owner developer operated a patio, which TRF "bought". The fact that Mook Thai obtained liquor and business licences that include patio space suggests that it believes it could operate a patio without strata approval.

84. First, I find that there is no reason to order Mook Thai to make changes to its liquor or business licence. These licences allow Mook Thai to operate a patio in compliance with municipal bylaws and liquor regulations, but they do not bind the strata.

85. According to the strata plan, all of the outdoor space is common property. So, I find that TRF did not "buy" an area where it or its tenant could operate a patio.

86. As mentioned above, the respondents cannot alter common property without the strata's approval. Comparing the schematic on the liquor licence with photos of the building, I find that the area that would be a patio is currently used as parking. I find converting common property from parking to a patio would be an alteration that would require strata approval. Depending on the nature of the alteration, it may also require owner approval under section 71 of the SPA.

87. With that, I order Mook Thai not to operate a patio on common property without strata approval. I dismiss the strata's remaining claims on this issue.

Did the strata breach section 34.1 of the SPA by failing to hold a hearing?

88. The respondents say that the strata failed to hold a hearing as required under section 34.1 of the SPA. In their Dispute Notices, they both asked for an order that the strata hold the requested hearing. TRF appears to have abandoned this claim, but Mook Thai did not.

89. It is undisputed that the strata held a hearing on September 10, 2019, about a noise complaint, the grease dripping from the kitchen fan, and the garbage and recycling bins. Mook Thai says that the strata council did not have "quorum" for this hearing but does not explain this submission further.

90. The respondents' lawyer requested another hearing on April 24, 2020. The issues that the lawyer raised are all included in this dispute, except that they also made allegations about conflicts of interest and the strata council members' duty of good faith. The strata says that it decided to proceed with a CRT dispute instead of holding another hearing, since the previous hearing had been unsuccessful in resolving the parties' concerns.

91. Section 34.1 of the SPA says that an owner or tenant may request a strata council and the strata council must grant it on the timelines set out. I find that the strata does not get to decide whether holding a hearing would be worthwhile, or whether a CRT

dispute would be a better avenue to resolve a dispute. So, I find that the strata breached section 34.1 by failing to hold the requested hearing.

92. It is unclear whether Mook Thai still wants a hearing to address allegations of bad faith or conflict of interest. I find that there would be no point in ordering a hearing on that single issue in the absence of clear evidence that Mook Thai still wants one. So, I dismiss this claim. That said, Mook Thai may request a hearing about this potential outstanding issue.

Did the strata pass the 2017 bylaws in compliance with section 128 of the SPA?

93. The respondents say that the 2017 bylaws are invalid because the strata did not comply with section 128 of the SPA. They want an order to that effect. Section 128(1) of the SPA says that where a strata has both residential and non-residential strata lots, bylaw amendments must pass a ¾ vote by both types of strata lot.

94. The strata first proposed the 2017 bylaw amendments for an AGM on May 11, 2017. All 3 residential owners were present in person or by proxy but TRF did not attend. The bylaw amendments therefore did not pass.

95. The strata held an SGM on July 13, 2017. The minutes are somewhat contradictory about who attended. At the top of the first page, the minutes say that there were 2 owners present and 1 present by proxy. However, the remainder of the minutes refers to all 5 strata lots being present. There are several references to the owner of strata lot 1, which is TRF, participating in the meeting. According to the minutes, the bylaw amendments initially proposed at the 2017 AGM passed unanimously with 5 votes in favour.

96. The respondents do not say how the requirements of section 128 were not met. They do not dispute the accuracy of the minutes or say that TRF did not attend the SGM. They do not dispute that TRF voted in favour of the 2017 bylaws. I find that the reference to only 3 strata lots attending was a typo and that all 5 strata lots were present.

97. Technically, section 128 of the SPA requires separate votes of the residential and non-residential strata lots. It is unclear from the minutes whether this happened. If there were not separate votes, I would still find that the 2017 bylaws are enforceable because all the owners had the opportunity to vote and did so unanimously. See *Yang v. Re/Max Commercial Realty Associates (482258 BC Ltd.)*, 2016 BCSC 2147, at paragraph 147. I dismiss the respondents' claim about the 2017 bylaws.

Is the "quiet time" rule valid?

98. The strata adopted a "quiet time" rule on September 12, 2019, which required quiet between 9am and 9pm. The respondents say that the rule is invalid because it relates to behaviour on strata lots, not common property and common assets.

99. Under section 125(6) of the SPA, a rule must be approved at the first AGM or SGM after it is made. At the 2020 AGM, the owners did not approve the quiet time rule. So, it is of no effect. I find that this issue is therefore moot, and dismiss the respondents' claim about the quiet time rule.

Would it be significantly unfair for the strata to require Mook Thai to remove its garbage and recycling bins from common property?

100. Mook Thai stores its garbage and recycling bins on common property behind the building. The strata says that it wants the bins off common property because they create "tensions" within the strata and attract animals.

101. Mook Thai says that it has no choice but to store the bins on common property. The respondents say that the municipality requires them to store their bins outside. The respondents say that the strata should build a structure for all the occupants' garbage and recycling. They ask for an order permitting them to keep the bins where they are.

102. This claim also raises the issue of significant unfairness.

103. First, I find that since Mook Thai is a restaurant, it is objectively reasonable to expect that it would be able to store garbage and recycling bins on common property.

I accept that they cannot be left inside, nor is it practical for them to be located off-site. The strata does not say where else the garbage and recycling bins could go.

104. I accept that the bins may attract animals and may invite illegal dumping. I find that the bins' negative impacts do not outweigh the fact that the strata has not identified a workable solution for Mook Thai if the bins were moved off common property. I therefore find that requiring Mook Thai to remove the bins would be burdensome, harsh and unfair.

105. I therefore dismiss the strata's claim and order that Mook Thai may continue to store its garbage and recycling bins on common property. Unlike with the basement common property, I see no reason to put a time limit on this order. I find that an indefinite order is appropriate to prevent significant unfairness.

106. This decision does not prevent the strata from enforcing its bylaws against Mook Thai if the bins are attracting wildlife or otherwise creating a nuisance. To be clear, even though the bins are on common property, it is Mook Thai's responsibility under the bylaws to make sure that they do not cause a nuisance. In enforcing the bylaws, the strata may remedy the contravention and charge the costs to Mook Thai. The parties may wish to proactively determine how to mitigate any negative impacts of the bins.

Should I make any orders about Mook Thai's allegedly intimidating or harassing behaviour?

107. The strata says that Mook Thai has engaged in intimidating and bullying tactics that have negatively affected the well-being of other occupants. The strata says that Mook Thai has taken video and photos of female occupants. The strata also says that Mook Thai dumped garbage at residents' doorsteps. The strata wants an order that Mook Thai stop this behaviour.

108. The respondents admit that Mook Thai took photos of the cars parked around the strata once. Mook Thai says that it did this to determine which of the residential strata lot residents were around because someone had been dumping in Mook Thai's bins. There is a photo in evidence of MQ photographing a resident early in the morning,

but it appears to be on public property. Of course, the fact that this photo exists means that the resident was also photographing MQ at the same time.

109. Mook Thai says that once, it attempted to "return" garbage to a resident who had dumped it. A resident took a video of this incident, which shows a person, who I understand was a Mook Thai employee, throwing a bag of garbage onto the stoop of a residential strata lot. Mook Thai provides no evidence to prove that this garbage came from a residential strata lot, although it is somewhat suspicious that the resident happened to be videotaping from what appears to be the inside of their garage. I find that the evidence is inconclusive about who was the first party to dump garbage on the other's property.

110. Ultimately, it appears that Mook Thai and some of the residents allowed the high tensions in the strata to get the better of them, leading to a series of "tit for tat" actions. The number of claims in this dispute is evidence of this. However, I find that the evidence falls short of proving that Mook Thai engaged in the type of behaviour that would constitute a bylaw breach. I therefore dismiss this claim.

Should I make an order restricting the strata's access to the commercial strata lots?

111. The respondents also ask for an order preventing the strata from accessing the commercial strata lots. Bylaw 7 says that the respondents must allow a person authorized by the strata to access the commercial strata lots in an emergency or on 48 hours' notice for certain purposes. The respondents do not say why these provisions should not to apply to them.

112. It appears that what the respondents really want is an order that the other owners and residents not access the commercial strata lots. If this is the case, I decline to consider it because none of the other owners or tenants is a party to this dispute. I cannot make orders against non-parties.

113. I dismiss this claim.

TRIBUNAL FEES AND EXPENSES

114. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. All the parties had mixed success, so I decline to order any reimbursement of any CRT fees or dispute-related expenses.

115. The strata must comply with the provisions in section 189.4 of the SPA, which includes not charging dispute-related expenses against the respondents.

DECISION AND ORDERS

116. As mentioned in the introduction, all the strata's claims except for the payment of fines are against just Mook Thai. However, both respondents responded to all the claims and made counterclaims related to several of those claims. Given that the respondents' materials were nearly identical, I find that it is appropriate for some of the orders to bind both respondents to ensure that they are effective at resolving the parties' dispute.

117. I order that the strata must:

a. immediately reverse the fines it imposed on TRF on December 18, 2019, January 17, 2020, and February 19, 2020,

b. permit the respondents to continue to exclusively use the common property internal staircase, landing, and West maintenance rooms until at least March 31, 2026, at which point the permission will expire subject to a renewal under section 76 of the SPA, and

c. permit Mook Thai to keep its garbage and recycling bins on the common property behind the strata's building.

118. I order that the respondents must:

a. ensure that their use of the common property internal staircase, landing, and West maintenance rooms does not interfere with the strata's obligation to repair and maintain common property,

b. pay the strata $50 per month for their ongoing use of the common property internal staircase, landing, and West maintenance rooms, and

c. immediately remove any items from the East maintenance rooms unless they receives permission from the strata to continue using them.

119. I order that Mook Thai must:

a. within 120 days of the date of this decision, replace the existing false door with a working door similar in style and colour to the door that the respondents removed,

b. ensure that no grease drips, leaks or spills onto the common property sidewalk from its kitchen exhaust fan, and

c. refrain from operating a patio on common property without strata approval.

120. I dismiss all the parties' remaining claims.

121. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Eric Regehr, Tribunal Member