Civil Resolution Tribunal

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Civil Resolution Tribunal

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B E T W E E N :

ERNAN ABANILLA

APPLICANT

A N D :

The Owners, Strata Plan LMS 739

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This strata property dispute is about alleged noise and strata lot alteration bylaw contraventions.

2. The applicant, Ernan Abanilla, owns a strata lot (SL121) in the respondent strata corporation, The Owners, Strata Plan LMS 739 (strata). The strata consists of apartment-style and townhouse style strata lots, of which SL121 is an apartment-style strata lot.

3. Mr. Abanilla says that noise created by the residents in strata lot 133 (SL133), located directly above SL121, is unreasonable and contrary to the strata's noise bylaw. He also says the flooring in SL133 has been altered without the strata's approval, contrary to the strata's alteration bylaw. He says the strata has not enforced either the noise or the alteration bylaws and seeks orders that the strata do so. Mr. Abanilla also seeks an order that the strata pay him damages of $5,000 for "unfair treatment and loss of enjoyment".

4. The strata denies all allegations. It says Mr. Abanilla has failed to prove the SL133 residents have acted contrary to the strata's bylaws and that the strata has failed to enforce its bylaws. The strata asks that Mr. Abanilla's claims be dismissed and seeks reimbursement of its legal costs.

5. Mr. Abanilla is self-represented. The strata is represented by a strata council member.

6. For the reasons that follow, I find the strata has not sufficiently investigated Mr. Abanilla's noise complaints, including investigating the flooring in SL133 as it agreed to do. I order the strata to investigate the noise and flooring issues, but I dismiss Mr. Abanilla's claim for damages. I also dismiss the strata's claim for legal fees.

JURISDICTION AND PROCEDURE

7. 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). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize

any relationships between the dispute's parties that will likely continue after the CRT process has ended.

8. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.

9. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

10. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT 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.

Preliminary Issue – Strata as the sole Respondent

11. In September 2016, the strata filed bylaw amendments that created separate sections within the strata, the Apartment Section and the Townhouse Section. SL121 is located in the Apartment Section. I have considered if the proper respondents have been named, particularly if the Apartment Section should be added as a respondent. As explained below, I find there is no need to add the Apartment Section as a respondent.

12. Some of the correspondence in evidence is signed by a property manager "on behalf of" the strata. In the body of the same correspondence, it states the property manager is "writing on (sic) the direction of the Section executive". Other correspondence from the same property manager is signed "on behalf of the Owners, LMS 739 Apt", but states in the body of the correspondence that the property manager is writing at the direction of "the Strata Council for Strata Corporation LMS 739."

13. Most of Mr. Abanilla's correspondence is via email either addressed to the strata, its president, or to the strata's property manager, whom I refer is the same individual for the strata and Apartment Section. Email correspondence from the property manager simply notes the writer's tile of "Strata Manager". The claim for legal fee reimbursement includes correspondence from a law firm naming the strata as its client and does not mention the Apartment Section, even though some of the meeting minutes in evidence refer to the Apartment Section executive or council.

14. Bearing all this in mind, it is unclear if the strata or the Apartment Section was responding to Mr. Abanilla. Based on my review of the bylaws, I am satisfied the bylaws relevant to this dispute are strata corporation bylaws, rather than bylaws of the Apartment Section. I find the overall evidence leads me to conclude the strata must enforce the bylaws at issue, and I find there is no reason to add the Apartment Section as a respondent.

ISSUES

15. The issues in this dispute are:

    a. Did the strata sufficiently investigate Mr. Abanilla's noise complaint and if not, what is an appropriate remedy?

    b. Is Mr. Abanilla entitled to $5,000 in damages, or some other amount?

    c. Is Mr. Abanilla responsible for the strata's legal fees?

BACKGROUND

16. In a civil proceeding such as this, as applicant, Mr. Abanilla must prove his claims on a balance of probabilities. I have read all the submissions and evidence provided by the parties, but refer only to information I find relevant to give context for my decision.

17. The strata is a residential strata corporation consisting of 154 strata lots in 8 3-storey buildings. SL 121 is located on the first or ground level of building "C". The strata was

created in February 1993 under the *Condominium Act* and continues to exist under the *Strata Property Act* (SPA).

18. In 2016, the strata repealed all of its bylaws except for its pet and rental restriction bylaws which continued as they were previously passed. On September 27, 2016, a new consolidated set of bylaws was filed with the Land Title Office (LTO). I find the September 27, 2016 bylaws apply to this dispute. I infer the Schedule of Standard Bylaws under the SPA does not apply. Subsequent bylaw amendments were filed with the LTO, but they are not relevant to this dispute. I find the bylaws set out below apply to this dispute and note Mr. Abanilla's quoted bylaws are numbered differently but contain the same wording. I infer Mr. Abanilla quoted outdated bylaws that were renumbered in the filed September 2016 bylaws. For clarity, I refer to the numbering of the filed bylaws.

19. Bylaw 8.1 headed "Use of property" says, among other things, a resident must not use a strata lot in way that:

    a. Causes a nuisance or hazard to another person,

    b. Causes unreasonable noise, or

    c. Unreasonably interferes with the rights of other persons to use and enjoy another strata lot.

20. Bylaw 8.6 reads:

    > No owner who owns a second or third floor strata lot in any of the Strata Corporation's apartment buildings is allowed to install ceramic tiles, hardwood floors or any other non-carpeted surface to their suites, excluding kitchen, bathroom and suite entrances.

21. Bylaw 11.1 requires an owner to obtain approval of the strata and applicable separate section prior to making alterations to their strata lot that includes "parts of the strata lot that the strata must insure under [SPA section 149]". Section 149 says the strata

must insure fixtures, defined under section 9.1 of the *Strata Property Regulation* (regulations) to include floor coverings, built or installed on a strata lot, if the original fixture was built or installed by the owner developer.

22. Bylaw 51.2 and 51.3 makes residents responsible for the conduct and supervision of children residing in their strata lot, "including ensuring noise is kept to a level that, in the sole determination of a majority of the council, are kept to levels that will not disturb the quiet enjoyment of others".

23. I summarize the following basic facts, which are not disputed.

24. New residents occupied SL133 in about May 2019. On July 24, 2019, Mr. Abanilla emailed the strata manager complaining about loud noises coming from SL133, stating the noises were "not loud voices but [activities] such as running, footsteps and shuffling of [furniture, especially] in the balcony and kitchen area". The email contained 8 logged entries detailing specific occurrences mostly related to children and stated the actions were contrary to bylaws 8.1 and 51.2.

25. Mr. Abanilla sent another email on August 8, 2019 complaining of noise from the balcony of SL133. The strata property manager responded on August 27, 2019 stating that the residents had assured him they would try and reduce the noise noting the residents are allowed to "live normally". Mr. Abanilla responded the same day advising of additional noise complaints and requested a copy of the strata's approval of the hardwood floor installation in SL133. On August 28, 2019, Mr. Abanilla asked the strata property manager in an email if they were aware that the front entrance of SL133 and parts of the hallway had laminate or hardwood flooring. The following day, the property manager stated the bylaw excludes kitchens, bathrooms and suite entrances. They also confirmed receipt of information and a sketch plan of which rooms in SL133 had laminate flooring, noting they would "send it to the strata council for their discussion and decision". It is unclear who provided the information and sketch plan of SL133 to the property manager, but I infer it was Mr. Abanilla, since the property manager said he would get a decision from the strata.

26. On November 13, 2019, Mr. Abanilla wrote to the property manager to file another complaint against SL133 under bylaw 8.1. He provided readings from a decibel meter for most days between September 29 and November 2, 2019 and a noise level table from HealthLink BC showing several sample noise levels for different things. For example, the table showed “normal conversation, background music” averaged 60 decibels and “heavy traffic, window air conditioner, noisy restaurant, power lawn mower” averaged 80-89 decibels. The table also identified that sounds above 85 decibels are considered harmful. As for the readings provided by Mr. Abanilla, most of the daily maximum readings exceeded 85 decibels. The minimum and average levels were less than 50 decibels. In his emails, Mr. Abanilla explained that the decibel meter he was using, SNDWAY SW-252B, collects data 24 hours per day at 2 second intervals noting the maximum is the highest sound measured throughout the day, the minimum is the minimum sound it measured in a day, and average is the average of the daily measurements.

27. A hearing was held on January 6, 2020. On January 12, 2020, the property manager advised both Mr. Abanilla and the residents of SL133 that trades would be sent to investigate the source of the noise in SL133, and the strata would order the flooring changed if it did not comply with the bylaws.

28. There is no further correspondence between the parties in evidence until March 29, 2020. On that date, after recognizing the COVID-19 pandemic was causing people to isolate in their homes, Mr. Abanilla emailed another complaint to the property manager about “loud running sounds” from SL133 contrary to bylaw 8.1. He reproduced the HealthLink table and 3 days of decibel readings stating the readings were indicative of recent unacceptable noise activity from the child in SL133.

29. On April 14, 2020 Mr. Abanilla emailed the property manager asking: “could you please advise if there is anything being done about my complaints?” On April 28, 2020 Mr. Abilla’s lawyer wrote to the strata outlining Mr. Abanilla’s noise complaints.

30. On May 15, 2020, the property manager emailed Mr. Abanilla stating the strata was trying to determine what flooring exists SL133 and that, based on the strata’s

caretaker's review, some strata lots had laminate flooring in the dining areas. The email also stated the strata is "trying to figure out how to address this". On May 19, 2020, the property manager provided photographs of several rugs placed on the laminate flooring in different areas of SL133, which they say was done at the request of Mr. Abanilla. The photographs show laminate flooring in the hallway of SL 133.

31. On June 2, 2020 Mr. Abanilla's lawyer wrote to the strata advising the noise levels were reduced. The letter stated Mr. Abanilla was hopeful the reduced noise levels would continue, but that he would continue monitoring them.

32. On June 30, 2020, Mr. Abanilla emailed the property manager about a loud noise from SL133 that occurred on June 27th experienced by his sister when he was out of town. He provided graphs and printouts of decibel readings that showed above 65 decibels on 3 occasions between 7:00 and 8:30 pm.

33. July 3, 2020 council meeting minutes acknowledge the noise complaint and that the strata would "look at hiring a sound engineer when the pandemic has passed". A July 21, 2020 letter from the strata notes involvement of a sound engineer would need ¾ vote approval for the estimated $5,000 expense. The letter also states "If and when COVID-19 subsides, then the Strata Council can try and deal with your issue".

34. Mr. Abanilla made further complaints to the property manager on July 8, July 13 and September 2, 2020. Some of the complaints included similar attachments of graphs and decibel readings.

35. From the evidence, it appears the strata council held another hearing with Mr. Abanilla and the residents of SL133 on January 6, 2021. On January 7, 2021, Mr. Abanilla provided the new property manager with decibel recordings of past incidents dated March and May 2020, which the property manger acknowledged and said would be considered by the strata council.

36. Mr. Abanilla emailed further complaints to the property manager on February 10, May 18 and June 14, 2021. No responses from the strata are in evidence.

37. The Dispute Notice for this dispute was issued on June 11, 2021.

38. In May 2021, Mr. Abanilla emailed the property manager to enquire about the sound testing. He made further inquiries of the strata council president in late July 2021, and to the property manager on August 9, 2021.

39. On August 10, 2021, Mr. Abanilla enquired of the strata property manager if the flooring installed in SL133 had been verified by the strata as it stated it would do in its January 12, 2020 letter.

EVIDENCE AND ANALYSIS

Did the strata sufficiently investigate Mr. Abanilla's noise complaint?

40. As noted, bylaw 8.1 says an owner must not use a strata lot in a 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.

41. Bylaw 8.6 prohibits owners of suites above the first floor to have non-carpeted flooring in their suites, excluding the kitchen, bathroom and suite entrance.

42. SPA section 26 requires the strata council to exercise the powers and perform the duties of the strata, which include enforcing bylaws. The strata council is required to act reasonably when carrying out these duties, and this includes a duty to investigate alleged bylaw violations, such as noise complaints.

43. The SPA does not set out any procedures for assessing bylaw complaints. In *Chorney v. Strata Plan VIS 770,* 2016 BCSC 148, the British Columbia Supreme Court stated that the SPA allows strata corporations to deal with matters of complaints for bylaw violations as it sees fit, as long as it complies with the principles of procedural fairness and its actions are not significantly unfair to any person who appears before it (paragraph 52). In other words, the strata must be reasonable in how it assesses bylaw complaints.

44. The strata's investigation must also be objective, as established in *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502 at paragraph 33. In *Triple P*, the court found that nuisance in the strata context is an unreasonable interference, such as noise, with an owner's use and enjoyment of their property. Whether an interference is unreasonable depends on several factors, such as its nature, severity, duration and frequency. The interference must also be substantial such that it is intolerable to an ordinary person. (See *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.).

45. The CRT has jurisdiction to determine claims of significant unfairness. See *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119.

46. The courts and the CRT have considered the meaning of "significant unfairness" in many contexts and have equated it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, the 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 and/or unjust or inequitable. See also *Kunzler v. The Owners, Strata Plan EPS 1433,* 2021 BCCA 173.

47. In *Kunzler*, the Court of Appeal confirmed that an owner's expectations could be considered a relevant factor in assessing significant unfairness. In considering an owner's reasonable expectations, the following test from *Watson* applies:

    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?

48. In this case, I find Mr. Abanilla reasonably expected that the strata would investigate the flooring in SL133 to determine if it was contrary to bylaw 8.6. I also find Mr. Abanilla reasonably expected the strata to investigate his noise complaint and any noise bylaw violations. Although the strata stated it would investigate the SL133 flooring in January 2020 and complete sound testing in July 2020, subject to the

COVID-19 pandemic, it appears to have done neither. Nor has the strata put the cost of an engineers' sound transmission report to the owners by way of a ¾ vote, as it stated was necessary.

49. Based on the correspondence in evidence, I accept the noise from SL133 was unacceptable to Mr. Abanilla, but that is not the test. Rather, as I have mentioned, the test is whether the noise was objectively unreasonable. I put little weight on Mr. Abanilla's decibel readings and graphs because he has not established he has the expertise to conduct noise tests. Further, he has not established the testing equipment he used was properly calibrated. Finally, it is the strata's responsibility to objectively investigate noise complaints, not Mr. Abanilla's.

50. I agree with the CRT's finding in *Chau v. The Owners, Strata Plan NW 155*, 2020 BCCRT 1161 that the "reasonableness of the strata's delay in investigating... noise complaints must be considered in the context of the COVID-19 pandemic". However, as noted below, I also agree with *Chau* that an indefinite delay would be unreasonable.

51. The Provincial Health officer declared a public health emergency on March 17, 2020. Therefore, I find the strata's decision not to pursue investigations by demanding entry into strata lots for noise bylaw enforcement reasonable, given what little was known about COVID-19 transmission in early 2020.

52. However, as noted in *Chau*, this does not mean that the strata can avoid its bylaw enforcement duties until "COVID-19 subsides", as the strata suggested in the property manager's July 2020 email to Mr. Abanilla. COVID-19 concerns will likely exist for the foreseeable future. There are safety measures that can be taken to minimize the risk of transmission, including physical distancing, mask-wearing, and following other guidance from the Provincial Health Officer.

53. I find it is also significant that Mr. Abanilla accepted the noise issue had subsided in June 2020 as stated in his lawyer's letter to the strata. However, I do not find the noise issue ever stopped. I agree the noises might have subsided on occasion, but

there is evidence Mr. Abanilla's noise complaints continued even after he filed his application for dispute resolution with the CRT.

54. While the strata may have taken its time to address Mr. Abanilla's complaints, and taken a more cautious approach than necessary about fulfilling it duties and responsibilities during the COVID-19 pandemic, I do not find the strata acted in manner that was burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable. Therefore, I find the strata did not treat Mr. Abanilla in a significantly unfair manner by delaying the investigation into his noise complaints.

55. Further, I do not agree with the strata that Mr. Abanilla has refused to give access to SL121. This is evident from his July 25, 2021 email to the strata council president. Given the strata agreed to complete investigations into the floor coverings of SL133 and conduct an objective sound transmission test between SL133 and SL121, I find it appropriate to order the strata to do so within the 90 days of this decision. The strata must retain a professional engineer familiar with sound transmission to conduct the test. The strata must also give as much advance notice as possible to Mr. Abanilla for access to SL121, including details of how the testing will be completed in SL121. The strata must immediately provide Mr. Abanilla with the results of its SL133 flooring investigation, and a copy of the engineer's sound test report immediately upon receiving it. Finally, the strata must take appropriate action based on the results of its investigations.

Is Mr. Abanilla entitled to $5,000 in damages, or some other amount?

56. As earlier noted, Mr. Abanilla seeks an order that the strata pay him damages of $5,000 for "unfair treatment and loss of enjoyment". From his submissions, he bases this amount on other CRT decisions involving noise complaints. However, given my finding that the strata did not treat him significantly unfairly, I dismiss this claim.

57. Even if my conclusion about significant unfairness was different, I would not have awarded damages because Mr. Abanilla did not provide proof that he suffered any

loss. I accept that he felt stressed and may have consulted professionals about his alleged suffering, but he did not provide supporting letters from those professionals to support his claim.

Is Mr. Abanilla responsible for the strata's legal fees?

58. CRT rule 9.5(3) that says the CRT will not order reimbursement of lawyer's fees in a strata dispute unless there are extraordinary circumstances. CRT rule 9.5(4) says the CRT may consider the complexity of the dispute, the degree of the lawyer's involvement, whether the conduct of a party or their representative has caused unnecessary delay or expense, and any other factors the CRT finds appropriate.

59. Neither party was represented by legal counsel but based on the strata's submissions for legal expenses it is clear the strata had legal assistance. I find the issues in this dispute were not overly complex as the fundamental issue is the investigation of a noise complaint. I find Mr. Abanilla did not cause unnecessary delay or expense during the proceedings and there is no indication his conduct was reprehensible during the course of this dispute. Overall, I find the rule 9.5(4) factors, and the lack of extraordinary circumstances, weigh against ordering reimbursement of the strata's legal fees as a dispute-related expense.

60. Finally, I note the strata's reliance in part on *Kotowska et al v. The Owners, Strata Plan BCS 2742,* 2018 BCCRT 802, where I found the owner-applicant was responsible for land title search fees and charges of $233.10 the strata paid to its lawyer. I find *Kotowska* can be distinguished from this dispute because in *Kotowska,* the applicant was unsuccessful.

61. For these reasons, I dismiss the strata's claim for legal fees, including disbursements paid to its lawyer.

CRT FEES AND EXPENSES

62. 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. Mr. Abanilla is the successful party in this dispute and paid $225.00 in CRT fees, so I order the strata to reimburse him that amount. Other than legal fees claimed by the strata discussed above, neither party claims dispute-related fees so I make no order for that.

63. The strata must comply with SPA section 189.4, which includes not charging dispute-related expenses against Mr. Abanilla.

ORDERS

64. I order that the strata must:

    a. Within 30 days of this decision, reimburse Mr. Abanilla $225.00 for CRT fees.

    b. Within 90 days of the date of this decision:

        i. Investigate the floor coverings in SL133 to determine if they comply with bylaw 8.6 and enforce the bylaw if the floor coverings are found to contravene bylaw 8.6. The strata must convey it's findings of the flooring status to Mr. Abanilla immediately upon making its decision, and

        ii. Arrange for a professional engineer familiar with sound transmission to conduct an objective sound transmission test between SL133 and SL121. The strata must give Mr. Abanilla details of what work will be required in SL121 and as much advance notice of the testing date as possible. The strata must provide Mr. Abanilla with a copy of the engineer's report upon receiving it and take appropriate action based on the engineer's report.

65. I dismiss Mr. Abanilla's remaining claims and the strata's claim for legal fees and disbursements.

66. Mr. Abanilla is entitled to post judgement interest under the *Court Order Interest Act*, for CRT fees.

67. 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.

J. Garth Cambrey, Vice Chair