Civil Resolution Tribunal

Date Issued: March 25, 2022

File: ST-2020-007242

Type: Strata

Civil Resolution Tribunal

Indexed as: *Wilkins v. The Owners, Strata Plan LMS1946*, 2022 BCCRT 336

B E T W E E N :

MARVIN WILKINS and MARKETTA WILKINS

APPLICANTS

A N D :

The Owners, Strata Plan LMS1946

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. The applicants, Mr. Marvin Wilkins and Ms. Marketta Wilkins, used to co-own strata lot 59 (SL59) in the respondent strata corporation, The Owners, Strata Plan LMS1946 (strata). This dispute is about noise. For several years, the applicants complained about noise coming from strata lot 82 (SL82), which is directly above SL59. They say that the strata failed to adequately investigate their complaints and failed to enforce

its bylaws that prohibit unreasonable noise. They ask for an order that the strata enforce its bylaws, including by requiring SL82's owners to replace its flooring. They also ask for $7,800 in compensation for the loss of quiet enjoyment of their strata lot.

2. The strata says that it investigated the applicants' noise complaints and determined that the flooring in SL82 complied with its bylaws. The strata says that the applicants have also never provided objective evidence to prove that the noise was unreasonable. The strata asks that I dismiss the applicants' claims.

3. Mr. Wilkins represents both applicants. A strata council member represents the strata.

JURISDICTION AND PROCEDURE

4. 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.

5. 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.

6. 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.

7. 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.

How does the applicants' sale of SL59 affect this dispute?

8. As a preliminary issue, I will deal with the applicant's sale of SL59, which happened after they started this CRT dispute. The first issue this raises is whether the applicants have standing, or the legal right, to continue this CRT dispute. On this point, I agree with the previous CRT decision *Gill v. The Owners, Strata Plan EPS 4403*, 2020 BCCRT 725, at paragraphs 19 to 24, that former owners have standing to bring or continue CRT disputes.

9. The second issue is whether any of the applicants' claims are now moot. A claim is "moot" when there is no longer a live controversy between the parties. While the CRT will generally dismiss a moot claim, the CRT has discretion to decide the dispute if doing so will have a practical impact and potentially help avoid future disputes. See *Binnersley v. BCSPCA*, 2016 BCCA 259.

10. As mentioned above, the applicants ask for an order that the strata enforce its bylaws against the residents of SL82. Since the applicants no longer live there, I find that there is no ongoing dispute between the parties about future enforcement of the strata's bylaws. I see no reason why ordering the strata to enforce its bylaws would help the parties in any way. I note that the parties did not explicitly raise this issue, but I find it implicit in the applicants' submissions that they no longer want this order. I therefore dismiss this claim as moot.

11. However, I find that the applicants' claim for damages is not moot, because it arises from their alleged loss of use and enjoyment while they lived in SL59.

ISSUES

12. The remaining issues in this dispute are:

    a. Did the residents in SL82 make unreasonable noise?

b. Did the strata act significantly unfairly by failing to reasonably investigate the applicants' noise complaints?

c. What remedy, if any, is appropriate?

BACKGROUND

13. In a civil claim such as this, the applicants must prove their case on a balance of probabilities, which means "more likely than not". While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

14. The strata consists of 167 residential strata lots in 2 4-storey buildings. SL59 is on the third floor. As mentioned above, SL82 is directly above it.

15. The strata filed a complete set of bylaws in the Land Title Office on April 22, 2002. The relevant parts of the bylaws are as follows. Bylaw 4.1(a) says that a resident must not cause a nuisance. Bylaw 4.1(b) says that a resident must not cause unreasonable noise. Bylaw 4.1(c) says that a resident must not unreasonably interfere with the rights of other people to enjoy their strata lots. In the context of noise complaints, I find that these 3 bylaws all amount to the same thing. The strata filed later bylaw amendments about mitigating noise impacts of floor replacements, but I find that these bylaws are not relevant to the applicants' damages claim.

EVIDENCE

16. The applicants moved into SL59 in the summer of 2015. They say that, in general, they had no significant issues with noise until June 2016, when a new owner of SL82, IX, installed new laminate flooring. The applicants first complained to the strata's property manager about this new level of noise on June 28, 2016.

17. IX lived in SL82 from June 2016 to August 2017. The applicants complained several times about noise, both directly to IX and to the property manager. IX also complained to the strata that the applicants' expectations for quiet were unrealistic.

18. The strata took some steps to address the applicants' complaints about IX. On July 5, 2016, the property manager told the applicants that IX had agreed to lay down foam where their toddler played and carpets in high traffic areas.

19. On January 13, 2017, the strata wrote to IX to notify them of "noise disturbances" from their unit, namely "hard thumping noises, baths in the middle of the night and sounds of a child crying in the middle of the night". IX responded that they are a "normal family" making the sounds of "normal everyday life". However, IX agreed to address some of the applicants' concerns, like late night baths.

20. On June 6, 2017, the property manager told the applicants they would bring the ongoing complaints with strata council at its next meeting. In the meantime, the property manager obtained receipts from IX that verified the underlay surpassed the strata's requirements. On June 20, 2017, the strata asked IX to put down more floor coverings, carpet, and mats.

21. According to the June 14, 2017 strata council meeting minutes, the strata adopted a new process for noise complaints, which were apparently becoming a common problem. First, the complainant must try to address it directly with the other resident. Then, the complainant must prepare a 7-day noise journal and give it to the property manager. Then, property manager would notify the other resident and given them an opportunity to respond to the allegations. At that point, the strata would determine next steps, which could include bylaw enforcement like fines.

22. New residents moved into SL82 around August 30, 2017. The applicants say that the noise got even worse after this.

23. On February 27, 2018, the applicants provided the property manager with a noise log for February 17 to 25. By then, the applicants said they had talked to the SL82 owners twice and wrote them a letter, to no effect. The log said that there was "constant thumping" that lasted for most of the day until between 11:00pm and 1:00 am most days. On March 10, 2018, the applicants said that the noise had not abated since providing the noise log. There is no evidence that the strata responded to either email or took any action.

24. The applicants say that similar noise continued for the rest of 2018 and 2019. There is no evidence they complained to the strata during this time.

25. On August 9, 2019, the property manager told the applicants that the SL82 residents wanted the applicants to stop “harassing” them about noise. The property manager said that noise is inevitable in a wood-framed building, and that the SL82 residents were not doing anything out of the ordinary.

26. The applicants emailed the property manager on December 9, 2019, that they intended to start a CRT dispute about the noise. The property manager responded suggesting they give the strata a reasonable opportunity to investigate the complaints first. There is no evidence that the strata did any investigation after this email. The applicants did not start this CRT dispute until September 19, 2020.

27. The applicants wrote to the strata asking for a hearing on May 27, 2020. They say that they hand delivered it to the strata’s vice president, which the strata does not deny so I accept that they did. In any event, the applicants followed up by email on June 18, 2020, asking when the hearing would be held. The followed up again on January 8, 2021. The strata never responded to this hearing request.

28. The applicants provided several noise logs from between November 2019 and November 2020. The noise logs all describe similar noise. In general, the complaints were of loud voices and heavy stomping. Often the complaints said that the noise went all day, and sometimes well into the night. There is no suggestion that the applicants ever sent these noise logs to the strata.

29. The applicants initially obtained a default judgment against the strata on November 17, 2020, which the CRT later cancelled. They said that things were generally quiet after they got default judgment.

ANALYSIS

Did the residents in SL82 make unreasonable noise?

30. In previous decisions, the CRT has applied the common law of nuisance to noise complaints between strata lots. See *Chan v. The Owners, Strata Plan BCS2583*, 2021 BCCRT 456. I will adopt that approach here.

31. In the strata context, a nuisance is an unreasonable interference with an owner's use and enjoyment of their property: *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502. Whether noise is unreasonable depends on several factors, such as its nature, severity, duration, and frequency. The interference must also be substantial, meaning it is intolerable to an ordinary person, viewed objectively. See *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64. This generally means that a resident's subjective noise complaints will not be enough to prove that noise is unreasonable. Rather, I find that the applicants must provide objective evidence that the noise is unreasonable to an ordinary person. This could include observations from neutral parties, decibel readings, or professional reports.

32. The focus of this analysis is on the noise itself, not the noise's cause. Several CRT decisions have concluded that "everyday living" noises can be unreasonable. So, the fact that the applicants' complaints appear to mostly be the result of normal activities does not necessarily mean that the noise was reasonable. See, for example, *Lucas v. The Owners, Strata Plan 200*, 2020 BCCRT 238.

33. The evidence is clear that the noise from SL82 bothered the applicants considerably. I do not doubt that this is true. The strata's primary argument is that the applicants have failed to prove that the noise was objectively unreasonable. The applicants did not provide any decibel readings or professional reports.

34. The only objective evidence is 2 witness statements. The first is from RK, who housesat for the applicants for about a month in May and June 2019. RK said they could hear a child and adult walking very loudly and running. They said it was "very loud" and that they also heard "walking, doors closing, things being dropped". RK said that they did not "know how [the applicants] both put up with so much disturbance".

35. The second is from one of Mr. Wilkins's colleagues, EC, who went to SL59 on November 14, 2019, at 6:30 am to help fix a kitchen faucet. EC provided a statement in this dispute. They said that they heard noises that were "not at all pleasant". They said it "sounded like someone was chopping bones with a cleaver".

36. While observations from neutral parties can be helpful evidence in determining whether noise is unreasonable, I find that these statements are not enough prove that the noise was intolerable to an ordinary person. EC was only in SL59 for a brief period, which I find largely unhelpful. RK's evidence is more compelling because they lived in SL59 for nearly a month. However, RK's statement is very brief and I find it lacks detail. For example, it says nothing about the noise's frequency or duration. I also note that RK's statement mentions visiting SL59 at other times, which suggests that RK was a friend. Therefore, they are not entirely objective.

37. On balance, I find that the applicants have not proven that the noise was unreasonable.

Did the strata reasonably investigate the applicants' noise complaints?

38. The applicants also challenge the adequacy of the strata's response to its complaints. I find that this is a separate issue from whether the noise itself was unreasonable.

39. Section 26 of the SPA requires the strata council to perform the duties of the strata, which includes enforcing bylaws. The strata must act reasonably in response to complaints about bylaw infractions, and I find that this includes a duty to reasonably investigate noise complaints.

40. The SPA does not set out any specific procedures for addressing bylaw complaints. In *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148, the BC Supreme Court said that the SPA gives the strata discretion about how to respond to bylaw complaints, as long as it complies with principles of procedural fairness and does not act in a significantly unfair way to any person, including the person making the complaint. With that, while the applicants do not use this language, I find that their claim is that the strata acted significantly unfairly by failing to reasonably investigate their bylaw

complaints. The CRT can make orders to remedy significantly unfair actions or decisions by a strata under section 123(2) of the CRTA.

41. In *Reid v. Strata Plan LMS 2503,* 2003 BCCA 126, the BC Court of Appeal interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable. In *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342, the BC Court of Appeal confirmed that the reasonable expectations of an owner may also be relevant to determining whether the strata's actions were significantly unfair. I find that the applicants' reasonable expectations are relevant in this dispute, consistent with previous CRT decisions about how a strata corporation enforces its bylaws. See, for example, *Tran v. The Owners, Strata Plan VIS 6828*, 2021 BCCRT 28. The test for assessing an owner's reasonable expectations is from *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44:

    a. What was the applicants' expectation?

    b. Was that expectation objectively reasonable?

    c. Did the strata violate that expectation with a significantly unfair action or decision?

42. On balance, I find that the strata's initial response to the applicants' complaints was reasonable. As the strata says, it raised the issue multiple times with IX in 2016 and 2017. However, after IX moved out in August 2017, I find that the strata did almost nothing to address the applicants' ongoing complaints.

43. First, I do not accept the strata's submission that it responded to all of the applicants' correspondence. For example, the strata never responded to the applicants' February 2018 noise log, or March 2018 follow up email. It is unclear whether the strata contacted the SL82 residents. However, I do not consider this failure to respond, by itself, to have been significantly unfair.

44. However, I find that the strata's failure to take any steps to investigate the applicants' complaints after December 2019 was significantly unfair. I find that the strata's

request for time to investigate shows that it knew it had an obligation to do so. However, it did nothing after this email to investigate the noise. Based on the property manager's August 2019 email, I find that the strata had already decided that the noise level was reasonable, despite the lack of investigation. In this context, I find that the applicants had a reasonable expectation that the strata would investigate their complaints.

45. I also find that the applicants had a reasonable expectation that the strata would hold a hearing within 4 weeks of its May 27, 2020 letter. Section 34.1 of the SPA says that the strata must hold a hearing within 4 weeks of a request. This provision is mandatory. The strata does not explain why it failed to hold this required hearing, even after the applicants followed up twice.

46. I find that the strata breached both of these reasonable expectations in a way that was burdensome and unjust. It was burdensome because it left the applicants in limbo. It was unjust because the strata failed to follow through on its clear legal obligations.

47. I recognize the strata's submission that it was troubled by the applicants' behaviour towards the SL82 residents. I acknowledge those residents' emails to the property manager expressing discomfort with the applicants' tone when the applicants complained in person about noise. I also agree with the strata that it was inappropriate for the applicants to write handwritten notes to the SL82 residents that implied the letter was from the strata. The applicants were clearly frustrated. However, I find that this behaviour did not absolve the strata of its obligation to investigate their complaints or hold a hearing.

48. I note that the applicants also argue that the strata was "negligent" for failing to inform them of IX's renovation plans. I find that nothing in the SPA or bylaws required the strata to do so. Even if they had, the bylaws gave the strata authority to approve alterations to strata lots. The applicants did not have a right to veto any proposed alterations, as they seem to suggest. So, I reject this argument.

What remedy is appropriate?

49. As mentioned above, the only remedy left to consider is the applicants' claim for damages. Generally speaking, in successful noise complaint claims, the CRT has awarded damages to compensate for the nuisance. Here, I have found that the applicants have not proven unreasonable noise, so I find that they are not entitled to damages on the same basis.

50. However, I find that damages may be a remedy for significant unfairness even if the owner or tenant has not proven a nuisance. The CRT has awarded damages several times where the significantly unfair action did not directly impact the owners' use and enjoyment of their strata lot or common property. In *Lozjanin v. The Owners, The Owners, Strata Plan BCS 3577*, 2019 BCCRT 481, the CRT awarded $1,000 in damages after the strata corporation repeatedly refused to hold a hearing. In *Der v. The Owners, Strata Plan EPS2809*, 2022 BCCRT 182, the CRT awarded $1,000 in damages when the strata corporation wrongly reneged on its agreement to cancel a chargeback. In *Choi v. The Owners, Strata Plan VR 315*, 2021 BCCRT 664, the CRT awarded $100 when the strata corporation unjustifiably ejected the applicant from a meeting. I find that these disputes reflect that in some circumstances, monetary damages are the only way to remedy significantly unfair actions or decisions.

51. Here, it is possible that an investigation would have confirmed the strata's belief that the noise was reasonable. However, I find that the failure to investigate their complaints or hold a hearing likely exacerbated the applicants' frustration with their living situation independently of the noise itself. I find that the strata's failure to act deprived the applicants of the possibility of closure. Instead, the dispute lingered, and the resulting bad feelings festered. I find that this entitles the applicants to damages.

52. I turn then to the amount. The applicants claimed $7,800. I find it clear from the applicants' evidence and submissions that the noise was a more significant issue for them than the strata's response to it. I find that the strata's behaviour was somewhat worse than that in *Lozjanin*. In that dispute, the applicant complained about the impact of necessary building repairs on her ability to use her patio. With that background in mind, the requested hearing would probably have had no practical effect because the

nuisance at issue was inevitable. Here, while it is impossible to know for sure, the applicants' lives may have been different if the strata had fulfilled its obligations. With that in mind, I award the applicants $1,500.

FEES, EXPENSES, AND INTEREST

53. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. The applicants were partially successful, so I find they are entitled to reimbursement of half of their $250 in CRT fees, which includes $25 for the default order. This equals $125. Since the strata was also partially successful, I find that it is entitled to reimbursement of half of the $50 CRT fee it paid to cancel the default decision, which is $25. The net result is that the strata must pay the applicants $100 for CRT fees. Neither party claimed any dispute-related expenses.

54. The *Court Order Interest Act* (COIA) applies to the CRT. I find that the applicants are entitled to pre-judgment interest from December 9, 2019, the day of the property manager's email, to the date of this decision. This equals $28.04.

DECISION AND ORDERS

55. Within 30 days of this order, I order the strata to pay the applicants a total of $1,628.04, broken down as follows:

    a. $1,500 in damages,

    b. $28.04 in pre-judgment interest under the COIA, and

    c. $100 for CRT fees.

56. I dismiss the applicants' remaining claims.

57. The applicants are also entitled to post judgement interest as applicable.

58. 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