Civil Resolution Tribunal

Date Issued: August 18, 2022

File: ST-2021-006582

Type: Strata

Civil Resolution Tribunal

Indexed as: *Penner v. The Owners, Strata Plan BCS1437*, 2022 BCCRT 932

B E T W E E N :

KATHERINE PENNER

APPLICANT

A N D :

The Owners, Strata Plan BCS1437

RESPONDENT

REASONS FOR DECISION

Tribunal Member: David Jiang

INTRODUCTION

1. This dispute is about flooring underlay. The applicant, Katherine Penner, is a tenant in a strata lot (unit 1502) in the respondent strata corporation, The Owners, Strata Plan BCS1437 (strata). Ms. Penner says the strata lot directly above her (unit 1602) uses flooring underlay that potentially breaches the bylaws. She seeks an order for the strata to investigate the underlay and remove and replace it if necessary.

2. The strata disagrees. It says it is the wrong respondent and that the correct respondent is Residential Section of The Owners, Strata Plan BCS1437 (residential section). The strata also says it investigated the underlay in unit 1602 by hiring a contractor to take a sample. The strata says the underlay used is appropriate. It also says Ms. Penner seeks vague or unenforceable orders.

3. Ms. Penner represents herself. A strata council member represents the strata.

4. For the reasons that follow, I dismiss Ms. Penner's claims.

JURISDICTION AND PROCEDURE

5. 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.

6. 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.

7. 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.

8. Under CRTA section 123, 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.

Admissibility of the Expert Report and Settlement Correspondence

9. The strata objects to the admissibility of Ms. Penner's expert report. It is an undated opinion letter from Groupe Finitec about flooring underlay and noise transmission. The strata says Ms. Penner breached CRT rule 8.3(1) by failing to provide the report within 21 days of the case manager notifying the parties that facilitation has ended. It also says the report breaches rule 8.3(2) because its writer is not identified, and their qualifications are not stated. Finally, the strata says the report does not include any of Ms. Penner's correspondence with the expert relating to the requested opinion, as required under rule 8.3(4).

10. I agree with the strata that the report, at a minimum, does not fulfill the requirements of CRT rules 8.3(2) and 8.3(4). I find it is not expert evidence under the CRT rules. However, I have decided to consider it as non-expert evidence, even if it was delivered late under CRT rule 8.3(1). I find it relevant to the issues in this dispute and the strata had the opportunity to respond to it in submissions. I discuss what weight I place on it below.

11. The strata also objects to correspondence Ms. Penner submitted between the parties and the case manager during the facilitation phase of the dispute management process. The strata did not identify these documents, but I infer it refers to the emails she uploaded that include CRT staff as a recipient or sender. These emails are dated January 12, 13, 20, 21, February 6, 7, 10, 11, 14, 15, 16 17, 24, 25, and March 15, 2022. Some emails share the same date.

12. I find CRT rule 1.11 applies to these emails. CRT rule 1.11(1) says that settlement discussions made during the CRT's process are confidential and must not be disclosed to the CRT member. The rule provides some exceptions, such disclosure through the consent of all parties. I find none of these exceptions apply in this dispute. Given this, I place no weight on the above-mentioned emails in making this decision.

ISSUES

13. The issues in this dispute are as follows:

    a. Is the strata the correct respondent in this dispute?

    b. If not, must the strata further investigate or compel unit 1602's owner to remove and replace their underlay?

BACKGROUND, EVIDENCE AND ANALYSIS

14. In a civil proceeding like this one, the applicant Ms. Penner must prove her claims on a balance of probabilities. This means more likely than not. I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

15. The strata's property includes a high-rise tower shown in the strata plan. Units 1502 and 1602 are located in this tower. The strata registered a complete set of bylaws in the Land Title Office (LTO) in December 2006. There are numerous amendments in the LTO. I have reviewed them and find them irrelevant to this dispute.

16. Bylaw 1 created the residential section and commercial section. The residential section consists of strata lots 1 through 526. I find this includes units 1502 and 1602. The commercial section consists of strata lots 527 through 541. Bylaw 1 says both sections are governed by the strata's bylaws. The residential section does not have a separate set of bylaws. Under bylaw 31, owners elect an "executive" for each section, drawn from owners in that section, to conduct the section's affairs in the same manner as a strata council.

17. Bylaw 8 is key to this dispute. Bylaw 8(1) says that an owner must obtain the written approval of the council before making certain alterations to a strata lot. The listed categories do not explicitly include flooring. However, bylaw 8(4) says that hardwood floors and ceramic tiles installed under bylaw 8(1) must be installed under certain conditions. Reading the bylaws as a whole, I find that an owner must obtain the strata's permission in order to install hardwood or ceramic tile flooring.

18. Bylaw 8(4)(g) says that if a strata lot uses a hardwood floor with cork underlay, it must be at least 6 mm thick and possess an STC, or sound transmission class, rating of more than 50.

19. Bylaw 8(4)(h) says that if a "silent step" underlay used, its STC rating must be more than 61 and its IIC, or impact insulation class, rating must be more than 50. Its closed self-foam layer must be at least ¼ inch thick as well.

20. Bylaw 8(4)(i) says the strata council requires proof of purchase and the STC and IIC ratings for the materials in bylaws 8(4)(g) and (h).

21. Bylaw 8(4)(j) says that ceramic tiles on kitchen and bathroom floors must also be installed with sound deadening underlay materials, and the details must be submitted to the strata council.

22. Bylaw 8(4)(k) says that if the strata council receives a verified noise complaint against an owner with hardwood floors, the owner with the hardwood floors must place runners or rugs over areas of the hardwood floors to reduce noise transmission. Otherwise, the strata may assess fines against the strata lot owner.

23. Finally, bylaw 10(1) says, in part, that any alteration to a strata lot that has not received the prior written approval of council must be removed at the owner's expense if the council orders that the alteration be removed.

24. I now turn to the chronology of this dispute. According to an MLS feature sheet, unit 1602's prior owner sold it in March 2014. The strata says, and I accept, that unit 1602's current owner purchased it at this time. According to the sheet, unit 1602 had "bamboo hardwood floors" installed. The strata says neither it nor the residential section has any record of it approving this flooring under bylaw 8 or otherwise.

25. On January 16, 2018, Ms. Penner first sent an email to the strata manager complaining about noise from unit 1602. In a March 21, 2019 email, the strata decided to check on whether there were any changes done to the flooring in unit 1602.

26. The strata initially concluded that the floors were upgraded without the strata's approval. The evidence does not show what the strata based its conclusion on. On June 11, 2019, the strata manager sent a letter to unit 1602's owner on behalf of the residential section executive. The executive alleged that the owner had installed flooring in breach of the bylaws.

27. The owner replied to the June 11, 2019 letter. They said that the previous owner installed the flooring. Based on the MLS feature sheet, the residential section executive agreed and decided unit 1602's owner had not breached the bylaws. However, the owner agreed to put down "thick play mats". I find they did so by January 8, 2020 at the latest, based on the strata manager's email to Ms. Penner about the mats.

28. The residential section executive also held 2 hearings with Ms. Penner, on October 1, 2019 and February 5, 2020. At the February 2020 meeting, Ms. Penner asked the residential section executive to obtain proof that the unit 1602 flooring complied with the bylaws. Some months later, in a January 11, 2021 letter, the residential section advised that it had fined unit 1602 for breaching noise bylaws but would not test the flooring in unit 1602.

29. Ms. Penner applied for dispute resolution in August 2021. After this, emails show the residential section decided to hire GQ Flooring Contracting Ltd. (GQ) in October 2021 to examine the flooring in unit 1602. GQ attended in November and December 2021. It obtained a sample of the flooring and sent the strata manager its corresponding materials specification sheet.

30. The strata manager noted that the sheet lacked any STC or IIC rating. They asked if the materials met or exceeded the strata's bylaw requirements of bylaws 8(4)(i) and (j), which the manager quoted for reference. As noted earlier, these bylaws require, among other things, 1) an STC rating of more than 50 for hardwood with cork underlay and 2) an STC rating of more than 61 and an IIC rating of more than 50 for "silent step" underlay. I infer "silent step" is a brand of underlay.

31. GQ did not directly answer the strata manager's question. It sent another data sheet and replied that the sheets specified the flooring had an FSTC rating of 61 and an FIIC value of 69. The data sheets for the flooring in evidence support GQ's observation. GQ said that FIIC and FSTC ratings were "essentially the same as IIC and STC, the F means the test was done in the field instead of a lab".

32. GQ did not say that the underlay in unit 1602 used cork underlay or "silent step" underlay. The parties agree that the flooring does not fit into either category. Consistent with this, the data sheets indicate the underlay is largely composed of rubber.

Issue #1. Is the strata the correct respondent in this dispute?

33. As noted earlier, the strata says the residential section is the correct respondent for this dispute. However, bylaw 8 says the "council" approves strata lot alterations. I find this refers to the strata council, as it does not explicitly mention a section or the executive of a section. I note that SPA section 197(1) says a strata corporation's bylaws apply to a section unless they are amended by the section, and there is no such amendment in evidence. For all those reasons, I find that the strata is the correct respondent in this dispute.

34. Further, the same individuals were largely involved with both the strata and residential section. For example, the strata manager appeared to act for both legal entities. The strata's representative in this dispute is a member of both the strata council and the residential section executive. This was not a situation where the strata was unaware of the history of this dispute.

35. The strata also says unit 1602's owner should be a party to this dispute. I disagree as Ms. Penner's claim is against the strata to enforce its bylaws. As such, I find it unnecessary for unit 1602's owner to be a party to this dispute.

36. Ultimately, nothing significant turns on this issue because I have dismissed Ms. Penner's claims for the reasons discussed below.

Issue #2. Must the strata further investigate or compel unit 1602's owner to remove and replace their underlay?

37. Under SPA section 26, a strata corporation must enforce its bylaws, subject to some limited discretion, such as when the effect of the breach is trivial. See *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings Inc.*, 2016 BCSC 32. A strata corporation may investigate bylaw contravention complaints as it sees fit, provided it complies with the principles of procedural unfairness and is not significantly unfair to any person appearing before the council. See *Chorney v. Strata Plan VIS 770,* 2016 BCSC 148. The standard of care that applies to a strata council is not perfection, but rather "reasonable action and fair regard for the interests of all concerned". See *Leclerc v. The Owners, Strata Plan LMS 614,* 2012 BCSC 74 at paragraph 61.

38. Here, I find the strata's actions were reasonable. The residential section did not ignore Ms. Penner complaint. It sent the June 2019 bylaw infraction letter to unit 1602's owner. It then learned that that the owner did not make the alteration and the flooring and underlay were pre-existing. It is undisputed that the owner placed mats over the hardwood flooring. I find the strata was aware of these facts as the residential section shared the same strata manager and at least 1 council member.

39. While bylaw 10(1) allows the strata to compel an owner to remove the flooring in a strata lot, it does not require the strata to do so. I find the strata's refusal to do so was reasonable given that unit 1602's owner placed the mats on the floor. I find this substantially complies with bylaw 8(4)(k), though that bylaw refers to rugs rather than mats.

40. More importantly, GQ's investigation shows that unit 1602's floors do not breach the bylaws. This is because, based on the GQ's emails and the data sheets, the rubber underlay in unit 1602 does not fit under either bylaw 8(4)(g) or (h). Those govern cork and "silent step" underlay, respectively. Bylaw 8 is silent on any requirements for rubber-based underlays. Given the wording of the bylaws, I find this means the underlay in this dispute is not prohibited under the bylaws. Further, the data sheets do not make it obvious that the underlay is inappropriate or lacks any reasonable degree of noise-dampening.

41. Ms. Penner says the strata should have obtained a more detailed inspection report. She says it is possible that the flooring or underlay used in unit 1602 is not the same as that identified by GQ. I find this speculative. The emails show that GQ removed a sample of the underlay to identify it and send the correct data sheets. GQ did not express any concerns about the underlay or flooring. It did not say that the underlay was installed incorrectly, was failing, or had been switched.

42. Ms. Penner relies on Group Finitec's report. The report says that underlay with more density, such as a rubber-based one, will mitigate lower frequency ratings. In contrast, more resilient materials, such as non-woven synthetic fiber underlayment, will mitigate higher frequency noises more audible to the human ear. I find that, even if I accept this as true, the report does not comment on the particular underlay in this dispute or whether it is appropriate. So, I put little weight upon the report's conclusions.

43. Ms. Penner also says the strata should conduct acoustic testing to determine the performance of the underlay and flooring. She says that if they do not meet certain performance standards, the strata should compel unit 1602's owner to replace the underly and/or flooring. The strata says this requested order is vague and unenforceable. I agree, as Ms. Penner did not say what performance standards the underlay and flooring should meet. In any event, I find I have no basis to make such an order. There is nothing in the bylaws that requires the strata to take such measures.

44. For all those reasons, I dismiss Ms. Penner's claim.

CRT FEES AND EXPENSES

45. 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. I see no reason in this case not to follow that general rule. I dismiss Ms. Penner's claims for reimbursement. This includes her claims for

reimbursement of CRT fees and the cost of Groupe Finitec's report. The strata did not claim reimbursement for any dispute-related expenses.

46. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Penner.

ORDER

47. I dismiss Ms. Penner's claims and this dispute.

David Jiang, Tribunal Member