



Civil Resolution Tribunal

Date Issued: March 9, 2023

File: ST-2021-007564

Type: Strata

Civil Resolution Tribunal

Indexed as: *Morgan v. The Owners, Strata Plan VR 305, 2023 BCCRT 197*

B E T W E E N :

PAUL MORGAN

APPLICANT

A N D :

The Owners, Strata Plan VR 305

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Leah Volkers

INTRODUCTION

1. This dispute is about patio noise.
2. The applicant, Paul Morgan, owns a strata lot (SL28) in the respondent strata corporation, The Owners, Strata Plan VR 305 (strata). Part of SL28 is located directly

below a common property patio. Mr. Morgan alleges that patio noise due to a lack of soundproofing causes significant and intolerable noise.

3. Mr. Morgan says he has complained about the patio noise since 2007, but the strata has refused to investigate his complaints, enforce its bylaws, or maintain the common property patio as required by the *Strata Property Act* (SPA). Mr. Morgan initially asked for orders that the strata:
 - a. Pay \$5,000 in damages for “failure to enforce its bylaws”,
 - b. Hire a professional acoustic engineer or consultant to inspect SL28, the patio, and test the noise levels in SL28 when the patio is in use,
 - c. Install noise reduction material below the patio to prevent unreasonable noise interference in SL28.
4. The strata hired an acoustic engineer since Mr. Morgan started this Civil Resolution Tribunal (CRT) dispute, so I find that this requested remedy is resolved.
5. The strata disputes Mr. Morgan’s claims and says it has made best efforts to comply with its obligations under the SPA and its bylaws.
6. Mr. Morgan is self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

7. These are the CRT’s formal written reasons. 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 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.

Additional requested remedies

11. In submissions, Mr. Morgan requested orders that the strata perform follow up testing after soundproofing to ensure it meets current standards, and an order that the strata immediately pass a rule preventing the use of the patio until "a proper repair" can be completed. Mr. Morgan also asked for compensation for loss of enjoyment likely to occur in the future. Mr. Morgan did not include these requested remedies in his application for dispute resolution. I find it would be procedurally unfair for me to address them in this dispute because I find the strata did not have the opportunity to address them during the CRT facilitation or decision process.

ISSUES

12. The issues in this dispute are:
 - a. Are any of Mr. Morgan's claims out of time?
 - b. Did the strata treat Mr. Morgan significantly unfairly in how it responded to Mr. Morgan's noise complaints and enforced the bylaws?
 - c. Has the strata failed to reasonably repair and maintain common property?

d. What remedies are appropriate, if any?

BACKGROUND AND EVIDENCE

13. In a civil proceeding such as this one, as the applicant Mr. Morgan must prove his claims on a balance of probabilities (meaning more likely than not). I have reviewed all the parties' submissions and evidence, but I only refer to what I find relevant to provide context for my decision.
14. The strata was created in 1976 under the *Condominium Act* and is now governed by the SPA. It consists of 43 strata lots in one apartment-style building. Mr. Morgan's strata lot, SL28, is located on the 4th floor. The 5th floor area located directly above SL28 is partially covered by strata lot 39 (SL39), and partly by a patio. The patio is undisputedly located directly above SL28's living room.
15. It is undisputed that the patio is only accessible from SL39 and is used exclusively by SL39's owners and occupants. However, the patio is designated as common property on the strata plan, and the evidence does not show that it was ever designated as limited common property. Therefore, I find the patio is common property.
16. The strata repealed and replaced its bylaws in the Land Title Office in 2003. There have been several subsequent bylaw amendments since that time. I will address the relevant bylaws below.

Chronology

2007 to 2014

17. The evidence shows that Mr. Morgan complained of patio noise several times between 2007 and 2014. As part of the 2014 complaint, he asked the strata to hire an engineer to find a solution to the noise. The strata undisputedly refused. Then, there are no further complaints and no correspondence between Mr. Morgan and the strata about patio noise until 2021.

2021

18. On April 16, 2021, Mr. Morgan's lawyer wrote to the strata. They said Mr. Morgan had made repeated complaints about unreasonable noise caused by the resident of the strata lot immediately above his strata lot using the patio, included pounding, hammering and thumping while the resident was walking on the patio, thunderous sounds while dragging furniture, and the sound of a television and sound system. I find that the repeated complaints the lawyer referred to were the complaints Mr. Morgan made between 2007 and 2014.
19. May 20, 2021 strata council meeting minutes indicated that the strata would investigate costs of retaining a lawyer to review Mr. Morgan's complaint and letter from his lawyer.
20. On June 2, 2021, the strata manager sent a letter to Mr. Morgan advising that the strata had reviewed the documents and structural drawings and determined that the noises emanating from the patio were "regular daily living and structural noises that are not unusual nor amplified noises for a wood-frame, multi-residential building". The letter also confirmed no alterations were done to the patio and said there were no grounds to further investigate into this matter.
21. Mr. Morgan made two further noise complaints in June 2021. In one complaint, Mr. Morgan said when people walk or move items around his decibel meter jumped sharply to 60, 70, or 80 decibels. In the other complaint, Mr. Morgan said he tried to go to sleep at 9 p.m. but was unable to.
22. On June 24, 2021, Mr. Morgan requested a hearing with the strata to discuss his noise complaints.
23. On July 6, 2021, Mr. Morgan emailed the strata manager complaining of heavy footsteps and "the typical creaking of the roof", and heavy jarring and pounding when people walked with heavy feet. He said his decibel reader jumped from 30 to 70 decibels when everyone walked. He said he could not talk on the phone, watch TV or read a book, and all he was doing was waiting for the next step.

24. The strata held a council hearing about the patio noise issues with Mr. Morgan on July 14, 2021.
25. On August 23, 2021, the strata sent a letter advising Mr. Morgan that following the hearing, the strata decided to arrange a patio inspection to identify and repair any structural defects. The strata also asked Mr. Morgan to log noise occurrences going forward, including the date and time, so that the strata could issue bylaw contravention letters or fines, if applicable.
26. On August 24, 2021, an SSL Enterprises Inc. (SSL) employee and strata council members attended Morgan's strata lot to investigate the patio noise issues. SSL emailed its findings to the strata manager. SSL said that the deck platform was in excellent condition, but recommended re-aligning a section of the floating deck that had shifted against the patio door frame squeaked intermittently when walked on. SSL's employee said they spoke with Mr. Morgan and the neighbouring strata lot owner on the same floor, who referred to general noise from the upper strata lot when walking on the patio, bedroom and kitchen floor, including doors being shut and people talking. SSL noted the building did not have concrete slab floors, and said it was inevitable that a certain amount of noise would transfer through the floor-ceiling assembly.
27. On August 25, 2021, Mr. Morgan emailed the strata manager complaining of heavy foot traffic from the patio when furniture was being delivered. Mr. Morgan asked for a "total moratorium" on any patio usage until the noise issue was fixed.
28. On September 1, 2021, SSL lifted part of the deck and inspected for defects, and re-aligned a few rubber cushion pads. SSL screwed down a loose roof drain panel, lifted out the squeaking deck panel that had slid against the patio door, and installed additional "2x4 sleepers" and rubber pads. SSL also trimmed any uneven and protruding deck boards. Mr. Morgan does not dispute this, and it is confirmed by SSL's invoice and email.
29. On September 9, 2021, Mr. Morgan emailed the strata manager complaining of noise from several people on patio, and said it was preventing him from going to sleep.

30. On September 20, 2021, the strata wrote to Mr. Morgan and advised that the repairs were completed. The strata said it had done its duty to investigate the noise and completed repairs.
31. On October 1, 2021, Mr. Morgan submitted his application for dispute resolution to the CRT.

After this dispute started

32. On February 16, 2022, the strata contacted BAP Acoustics Ltd. (BAP) to conduct structural noise testing between SL39 and the patio and SL28. BAP provided a June 14, 2022 report (BAP report) that indicated that sound transmission testing was conducted on June 9, 2022. Both the strata and Mr. Morgan rely on the BAP report authored by Mark Gaudet, and I find it complies with the CRT rules for expert evidence.
33. In the BAP report, Mark Gaudet said that the testing procedures used were normally used to measure airborne and impact sound insulation between two enclosed rooms. In the absence of any other procedure to assess the sound transmission between the patio and SL28, Mark Gaudet's opinion was that this method of assessment was warranted even though the patio was not enclosed. There is no other expert evidence to contradict this, so I accept Mr. Gaudet's opinion about the appropriate assessment method.
34. The BAP report noted that the apparent sound transmission class rating between the patio and SL28 was 40, which was not compliant with the Building Code requirement that was in force at the time the building was constructed (STC 45). It also noted the apparent impact insulation class (AIIC) rating was 39, but said the Building Code at the time the building was constructed did not require any minimum AIIC rating.
35. The BAP report included two recommendations to improve both the airborne and impact sound insulation between the patio and SL28. First, it recommended lifting the deck, installing an impact reducing underlay and then reinstalling the deck. Second,

it recommended removing the ceiling from SL28 and reinstalling a heaving ceiling with two or more layers of gypsum board.

36. Emails in evidence show that the strata council considered the BAP recommendations and sought quotes from various contractors in July and August 2022.
37. An August 5, 2022 email from JP, an estimator at RooFix Services Inc., said that they could not provide a viable solution because the existing patio was already installed over “rubber pedestals which already provide vibration/noise reduction”. They said the deck height would be “over the sill which would create a waterfall at the door frame” if they added an additional layer of insulation and reinstalled the deck.
38. An October 4, 2022 statement from LM, a strata council member, indicated that the strata council had made efforts carry out the BAP report recommendations, but had difficulty identifying and retaining a contractor to do so. Emails from various contractors in evidence confirm this difficulty. LM said despite this, the strata is continuing with its remediation efforts.

ANALYSIS

Are any of Mr. Morgan’s claims out of time?

39. Mr. Morgan says his noise complaints have been ongoing since 2007. The strata says that Mr. Morgan's complaints between 2007 and 2014 are barred by the passing of the 2-year limitation period under the *Limitation Act*. A limitation period is a time period in which a person may pursue a claim. If that time period expires, the right to bring a claim disappears.
40. Mr. Morgan says he only claims a remedy against the strata from October 1, 2019, which is 2 years before the date Mr. Morgan filed his application for dispute resolution.
41. Mr. Morgan’s claim rests on his allegation that the patio noise is an ongoing nuisance, and says he is entitled to damages from October 1, 2019 on that basis. Therefore, the only possible basis for Mr. Morgan’s claim for damages from October 2019 is the

alleged ongoing nuisance based on his 2007 to 2014 noise complaints. Although Mr. Morgan says the alleged noise was ongoing, he undisputedly did not make any further complaints until 2021. I find the evidence does not establish an ongoing nuisance, given the absence of any complaints for 7 years. Therefore, I find Mr. Morgan's claim for damages based on the alleged nuisance between 2007 and 2014 are out of time.

42. I find Mr. Morgan's claims that the strata failed to enforce its bylaws, investigate his noise complaints and maintain the patio following his 2021 complaints are not out of time under the *Limitation Act*, and I have considered Mr. Morgan's 2007 to 2014 noise complaints in that context.

Was the strata significantly unfair in how it responded to Mr. Morgan's noise complaints and enforced the bylaws?

43. Mr. Morgan says the strata has failed to investigate his complaints or take any action to enforce the bylaws and address the alleged patio noise, and says the strata's failure to do so was significantly unfair.
44. The CRT has authority to make orders preventing or remedying a significantly unfair act or decision by a strata corporation under section 123(2) of the CRTA. This provision contains similar language to section 164 of the SPA, which allows the BC Supreme Court to make similar orders. The court recently confirmed that the legal test for significant unfairness is the same for CRT disputes and court actions. See *Dolnik v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113.
45. The most recent BC Court of Appeal case about significant unfairness is *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173. In paragraphs 75 to 97, the court confirmed the following legal test. Significantly unfair actions are those that are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust, or inequitable. In applying this test, the owner or tenant's reasonable expectations are a relevant factor, but are not determinative. The use of the word "significant" means that the impugned conduct must go beyond mere prejudice or trifling unfairness.

46. I find Mr. Morgan had an objectively reasonable expectation that the strata would reasonably investigate his complaints and enforce its bylaws.

Alleged failure to enforce bylaws

47. Bylaw 3(1)(b) says that an owner, tenant, occupant, or visitor must not use a strata lot, common property or common assets in a way that causes unreasonable noise. Bylaw 3(1)(a) says a strata lot, common property or common assets must not be used in a way that causes a nuisance or hazard to another person.

48. Mr. Morgan says there is a lack of noise reduction material between SL28 and the patio. He says that as a result, **any** use of the patio causes significant and intolerable noise. Despite this submission, based on the Dispute Notice and Mr. Morgan's overall submissions and the evidence, I find that this dispute is not about SL39's owners' behaviour or conduct in using the patio such that the strata has failed to enforce bylaw 3(1)(b) against SL39's owners. Rather, I find Mr. Morgan's claim is about alleged noise that he says is caused by inadequate soundproofing between the patio's floor and SL28, and that the strata has allegedly failed to address.

49. Further, the only enforcement options available to the strata under SPA section 135 are to impose a fine, require a person to pay the cost of remedying a contravention, or deny a person the use of a recreational facility. None of these enforcement options would assist in resolving the patio noise as it is alleged by Mr. Morgan, and he does not suggest that the strata should have used any of these enforcement options against SL39's owners.

50. I note that the bylaw against unreasonable noise does not apply to the strata itself, but only to people using common property.

51. Given the above, I find Mr. Morgan has not identified any failure on the strata's part to enforce the bylaws. Therefore, I also find the strata was not significantly unfair in enforcing its bylaws. So, I dismiss this aspect of his claims.

Strata's response to the noise complaints

52. The evidence shows that after receiving Mr. Morgan's April 16, 2021 complaint, the strata advised Mr. Morgan that it had reviewed documents and structural drawings and determined the noise complained of was "regular daily living and structural noises that are not unusual nor amplified noises for a wood-frame, multi-residential building".
53. After further complaints and following a July 2021 hearing, the strata took steps to investigate the patio noise, including hiring SSL to inspect the patio for structural repairs. SSL recommended repairs, which were completed on September 6, 2021. The repairs included installing additional "2x4 sleepers" and rubber pads under the patio surface, among other repairs to the patio surface. After the repairs, Mr. Morgan made another noise complaint on September 9, 2021.
54. On September 20, 2021 the strata sent a letter to Mr. Morgan explaining its investigation and advising the repairs were completed. I find this letter shows the strata relied on advice from BC Building Science in determining that the noise was not unreasonable in the context of a 1970s wood-frame building, and from SSL in determining the SSL patio repairs were adequate. Mr. Morgan filed his application for dispute resolution shortly after receiving this letter from the strata.
55. Mr. Morgan acknowledges that the strata investigated whether the patio itself required repairs following a hearing in July 2021. However, he says the strata did not investigate whether there was appropriate noise reduction material between the patio's floor and SL28, and says the strata has failed to "address the problem".
56. I find Mr. Morgan expected that the strata would immediately take further steps to investigate and repair the patio, including the area between the patio's floor and SL28, after his September 9, 2021 noise complaint. However, given that the strata had just completed some patio repairs, as recommended by a professional, I find this expectation was not objectively reasonable.
57. Further, In February 2022, the strata retained BAP to perform sound testing between the patio and SL28, among other locations. Mr. Morgan says the strata should "not get credit" for obtaining the BAP report after he started this dispute. However, strata

corporations are not held to a standard of perfection. The law recognizes that strata councils are made of people volunteering their time for the good of the strata community. See *Mitchell v. The Owners, Strata Plan KAS 1202*, 2015 BCSC 2153. I do not find the strata's delay in retaining BAP to be an undue delay in the circumstances, in particular because the strata had just attempted a repair. While the strata's investigation may have been imperfect, I find the strata's response to Mr. Morgan's 2021 complaints has not been wrongful, has not lacked in probity or fair dealing, and there is no evidence of bad faith or deception on the strata's part.

58. I find overall the strata reasonably investigated Mr. Morgan's complaints based on the evidence before me. I find the strata was not significantly unfair in how it responded to Mr. Morgan's noise complaints.
59. As noted, Mr. Morgan asks for an order that the strata pay him \$5,000 in damages for "failure to enforce its bylaws". In submissions, Mr. Morgan says this requested remedy for is the strata's failure to enforce its bylaws and significant unfairness. However, I have found that the strata has not failed to enforce its bylaws and did not treat Mr. Morgan significantly unfairly when investigating his complaints. So, I dismiss Mr. Morgan's claim for damages.

Has the strata failed to reasonably repair and maintain common property?

60. Mr. Morgan argues the strata is responsible for ensuring the common property is constructed so as to prevent unreasonable noise transfer. Under SPA section 72, the strata must repair and maintain common property. It is well established that the standard the strata is held to in the exercise of this duty is reasonableness. See *The Owners of Strata Plan NWS 254 v. Hall*, 2016 BCSC 2363. Specifically, the strata must make repair and maintenance decisions that reasonably balance competing interests between owners. See *Weir v. Owners, Strata Plan NW 17*, 2010 BCSC 784.
61. What is reasonable in the circumstances depends on the likelihood of the need to repair, the cost of further investigation, and the gravity of the harm sought to be avoided or mitigated by investigating and remedying any discovered problems. See *Guenther v. Owners, Strata Plan KAS431*, 2011 BCSC 119 at paragraph 40. So, I

agree that a strata's duty to repair and maintain common property includes an obligation to take reasonable steps to prevent intolerable noise transfer from common property, although I have not made any finding about the alleged patio noise Mr. Morgan complained of.

62. When faced with a range of possible solutions to solve a problem, the fact that a strata chooses a good solution instead of the best solution does not render its approach unreasonable. See *Weir* at paragraph 28. Further, a strata corporation does not have a duty to repair or maintain common property in accordance with the requirements of a specific owner. See *Swan v. The Owners, Strata Plan LMS 410*, 2018 BCCRT 241 at paragraph 51.
63. Although it is reasonable for Mr. Morgan to expect the strata to maintain and repair common property as required by the SPA, Mr. Morgan is not entitled to dictate how the strata does so. As discussed above, the strata investigated the patio noise and completed patio repairs before this dispute was started. The strata relied on professionals in doing so. The courts have found that a strata corporation is entitled to rely on and be guided by the advice of professionals. See *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at paragraph 56. Further, there is no evidence that Mr. Morgan himself took any steps to investigate the soundproofing or attempt any repairs within SL28, which was an option open to him as SL28's owner. Based on *Leclerc*, I find the steps taken by the strata to investigate the patio noise and repair the patio, as detailed above, were reasonable.
64. Further, the strata says it is trying to address the alleged patio noise issue based on the BAP report recommendations, but is facing difficulties in securing materials and retaining qualified contractors to carry out same. The evidence supports the strata's submissions on this issue and show that the strata is making efforts to carry out the BAP report recommendations, including contacting contractors to complete the work. An affidavit from one strata council member also confirms that the strata council is continuing its efforts.

65. As noted, Mr. Morgan asks for an order that the strata install noise reduction material below the patio to prevent unreasonable noise in SL28. Mr. Morgan says he is concerned that if the CRT does not make an order with a deadline to complete repairs, the strata will return to ignoring its obligations. However, the evidence as a whole does not support this submission, in particular given that the strata completed other patio repairs before Mr. Morgan started this dispute. The strata's prompt attention to SSL's recommendations, before the parties were involved in litigation, strongly suggests that the strata takes the issue seriously and is acting in good faith. Further, I have found that the strata did not act unreasonably or treat Mr. Morgan significantly unfairly in the manner it investigated his patio noise complaints and approached the previous repairs.
66. At this stage, there is no evidence to suggest the strata will not continue to work towards completing the repairs recommended in the BAP report. Given all the above, I find Mr. Morgan has not proved the strata has failed to reasonably repair and maintain common property. Therefore, I dismiss Mr. Morgan's claim for the strata to complete further repairs. Nothing in this dispute prevents Mr. Morgan from bringing a fresh CRT dispute if he believes that any subsequent strata actions are unreasonable or significantly unfair.

CRT FEES AND EXPENSES

67. Under CRTA section 49, 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. As Mr. Morgan was unsuccessful in this dispute, I dismiss his fee claim.
68. Mr. Morgan also requested reimbursement of \$7,581.51 in legal fees. CRT rule 9.5(1) says the CRT will usually order an unsuccessful party to reimburse a successful party for dispute-related expenses. Mr. Morgan was not successful in any of his claims, so I order no reimbursement.

69. The strata did not pay any CRT fees or claim any dispute-related expenses, so I award none.

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

ORDER

71. I dismiss Mr. Morgan's claims and this dispute.

Leah Volkers, Tribunal Member