Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Cheung v. The Owners, Strata Plan LMS 2970*, 2023 BCCRT 351

B E T W E E N :

DING WONG CHEUNG

APPLICANT

A N D :

The Owners, Strata Plan LMS 2970

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This dispute is about elevator noise in a strata building.

2. The applicant, Ding Wong Cheung, co-owns strata lots 170 and 171 in the respondent strata corporation, The Owners, Strata Plan LMS 2970 (strata). The 2 strata lots

together form unit 1701, the only penthouse unit in Mr. Cheung's building. The building's elevator room is located above unit 1701. Mr. Cheung says the elevator noise is unreasonable and excessive.

3. Mr. Cheung says the strata has not reasonably responded to his elevator noise complaints, has refused to pursue repairs, and has obstructed his attempts to investigate elevator noise with a professional. Mr. Cheung wants orders that the strata conduct professional repairs to reduce noise from the elevator, pay $945 for a noise report he obtained, and pay $20,000 in damages for stress and discomfort he says was made worse by the strata's delay in investigating and addressing the issue. Mr. Cheung represents himself.

4. The strata says its elevators are well maintained and that some noise is unavoidable. It says it has investigated Mr. Cheung's complaints and followed the advice of its elevator contractor. The strata says the elevator noise is reasonable and it would be nearly impossible to reduce the elevator noise to Mr. Cheung's desired level. The strata is represented by a council member.

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. Based on the evidence and submissions provided, I am satisfied that I can fairly decide this dispute without an oral hearing.

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 the parties and witnesses questions of 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.

ISSUES

9. The issues in this dispute are:

    a. Is the elevator noise a nuisance?

    b. Should I order the strata to repair the elevators?

    c. Is Mr. Cheung entitled to damages or reimbursement of the cost of his noise assessment report?

EVIDENCE AND ANALYSIS

Background

10. As the applicant in this civil proceeding, Mr. Cheung must prove his claims on a balance of probabilities, meaning more likely than not. While I have considered all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

11. The strata was created in 1997. It includes 2 towers that the parties refer to as Tower A and Tower B. As noted, Mr. Cheung co-owns both 17th floor strata lots, which the parties refer to as Tower B's penthouse, unit 1701. There are no other strata lots on the 17th floor. The strata plan shows that the 17th floor has common property stairs, 2 elevators, and a lobby. The elevator machine room is located on the roof level, above the 17th-floor lobby and part of unit 1701.

12. The strata repealed its previous bylaws and filed new bylaws at the Land Title Office in February 2015. I find these are the bylaws applicable to this dispute. Bylaw 3.1 says the strata must repair and maintain common property with limited exceptions that do not apply here. It is undisputed that the elevators are common property that the strata must repair and maintain. I discuss the strata's noise bylaw below.

13. Mr. Cheung and his spouse purchased unit 1701 in October 2018 and moved in on November 5, 2018. Two years later, Mr. Cheung made his first written complaint about elevator noise. He says the strata did not respond to his previous verbal complaints, but he does not say when he first raised the issue. In November 2020, the strata had its elevator service contractor, Richmond Elevator, attend and make some minor modifications to reduce noise. Mr. Cheung says those modifications had no effect on the noise.

14. In 2021, Mr. Cheung continued to complain about elevator noise. In response, the strata asked Richmond Elevator to perform more thorough investigation to identify opportunities for noise reduction. I discuss Richmond Elevator's August 2021 report below. Following that report, the strata decided the elevator noise in unit 1701 was reasonable and repairs were not immediately necessary.

15. Mr. Cheung did not agree with that decision and the strata held a council hearing with him. After the hearing, council allowed him to attend the elevator machine room with a council member and take photographs.

16. Mr. Cheung then hired Raincloud Noise & Vibration (Raincloud) to conduct sound testing. The strata refused to grant Mr. Cheung and Raincloud access to the elevator machine room, but Raincloud conducted noise testing in unit 1701 in June 2022. I discuss Raincloud's test results and access below.

17. On July 7, 2022, Mr. Cheung filed his CRT application for dispute resolution.

Is the elevator noise a nuisance?

18. Mr. Cheung says the elevator noise contravenes standard bylaws 3(1)(a) and (b) under the *Strata Property Act* (SPA). The strata has its own noise bylaws that apply

instead, but they say essentially the same thing. The strata's bylaws 2.3(1)(a) and (b) prohibit an owner, tenant, occupant, employee, or visitor from using a strata lot, the common property or common assets in a way that causes a nuisance, disturbance, or unreasonable noise. The strata does not address whether these bylaws apply to noise generated by the common property elevators. The noise bylaws are directed at people and their use of property, and Mr. Cheung does not suggest that people are using the elevator inappropriately or that the strata should fine elevator users.

19. As the elevators are common property, I find the strata's responsibility for noise arising from the elevators arises from its obligation to manage, repair and maintain common property under SPA sections 3 and 72. Specifically, I find the strata has an obligation to ensure its common property does not cause a nuisance to residents (see the non-binding but persuasive reasoning in *Tran v. The Owners, Strata Plan NW468*, 2022 BCCRT 575, paragraphs 75-82).

20. Mr. Cheung says the elevator noise in unit 1701 is excessive and unreasonable. The strata says there will always be some noise in the penthouse from the machine room, but the noise in unit 1701 is reasonable.

21. In the strata context, a nuisance is a substantial and unreasonable interference with an owner's use and enjoyment of their property (see *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502). The test for nuisance depends on several factors, such as its nature, severity, duration, and frequency (see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64). The test is objective and is measured with reference to a reasonable person occupying the premises (see *Sauve v. McKeage et al*., 2006 BCSC 781). The objective requirement guards against those with abnormal sensitivity or unreasonable expectations (see *Sutherland v. Canada (Attorney General)*, 2001 BCSC 1024).

22. I turn to the objective evidence. Mr. Cheung relies on the observations in Raincloud's June 22, 2022 "Noise & Vibration Assessment". The Raincloud report's author is Tony Adamson. Tony Adamson's qualifications were not provided in evidence, other than the title of "Sr Technologist" and "AScT" which I infer stands for Applied Science

Technologist. However, because the strata did not challenge Tony Adamson's expertise, or the content of the Raincloud reports, I accept it as expert evidence about the noise in unit 1701.

23. Raincloud recorded noise in unit 1701 on June 22, 2022, between 10 am and 12 pm. Raincloud found that elevator A was somewhat louder than elevator B and therefore formed the basis for noise tests. The elevator noise in unit 1701's primary bedroom was 32.3 to 34.2 dBA (A-weighted decibels adjusted for human hearing). The elevator noise in the living room was 42.2 to 45.4 dBA. Ambient noise in the living room was 33.3 dBA. I accept these measurements as accurate, which the strata did not dispute.

24. The Raincloud report and Mr. Cheung both refer to noise guidelines put out by the World Health Organization (WHO) and the Canada Mortgage and Housing Corporation (CMHC). Mr. Cheung provided an excerpt of the WHO's Guidelines for Community Noise and an excerpt from a webpage referring to CMHC guidelines. I accept that these are objective indicators of whether a sound level will be tolerated by a reasonable person, which the strata does not dispute. However, I find Mr. Cheung's characterization of the elevator noise as exceeding these standards is incorrect.

25. As noted in the Raincloud report, the WHO recommends noise no more than 30 dBA in bedrooms over the 8 night-time hours. However, as stated in the WHO guidelines, 30 dBA is the recommended limit for continuous background noise, whereas individual noise events to be avoided are those exceeding 45 dBA. I find the elevators did not make continuous noise. They made individual noise events when in operation, and those noise events peaked at 34.2 dBA in the primary bedroom, well below the threshold for individual noise events that should be avoided.

26. As for living rooms, the WHO guidelines do not provide an upper limit for individual noise events in living areas during the day. The Raincloud report says CMHC's maximum recommended noise level for living rooms is 40 dBA. It says the elevator noise of up to 45.5 dBA is "very noticeable" because the daytime ambient noise in

the room is only 33 dBA. The Raincloud report says CMHC recommends that maximum noise should not exceed the interior background noise by more than 5 dBA.

27. However, the Raincloud report later says that the CMHC guidelines are for "time-average sound levels over 24 hours and are not intended to highlight the issues surrounding intermittent or tonal noises[.]" Similarly, the webpage Mr. Cheung provides in evidence referring to CHMC recommendations says living room noise should not exceed the "24-hour equivalent" sound level of 40 dBA. There is no evidence that the noise in unit 1701's living room exceeded a 24-hour equivalent sound level of 40 dBA. I find these limitations constrain the conclusions that can be drawn about whether the elevator noise is a nuisance. There is also no evidence about how many times per day the elevator noise can be heard and at what hours. Without that information, I find it unproven that the elevator noise in unit 1701's living room is objectively unreasonable.

28. In summary, the evidence before me does not show that the elevator noise caused a substantial and unreasonable interference with Mr. Cheung's use and enjoyment of unit 1701. He has not proven that the elevator noise was a nuisance.

Should I order the strata to repair the elevators?

29. As noted above, it is undisputed that the strata has a duty under the SPA and its bylaws to repair and maintain the common property elevators. 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).

30. What is reasonable in the circumstances depends on the likelihood of the need to repair, the cost of 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). I find that the strata's duty to repair and maintain the elevators includes an obligation to take reasonable steps to minimize noise.

31. As outlined above, the strata investigated the elevator noise in late 2020 and completed repairs following Richmond Elevator's advice. When Mr. Cheung's noise concerns continued, the strata engaged Richmond Elevator for a more comprehensive investigation and options. I find these were reasonable and appropriate steps.

32. The August 13, 2021 Richmond Elevator report was prepared by Tomas Lichy, "modernization adviser" for Richmond Elevator. Tomas Lichy's qualifications were not provided but Mr. Cheung did not challenge them. I accept their evidence as expert evidence about the state of the strata's elevators. The elevator inspection occurred with Tomas Lichy, Mr. Cheung, the strata president, the strata manager, and 3 Richmond Elevator technicians. The report's findings that I find most relevant are as follows:

    a. The machines have standard (original) vibration isolation and thicker vibration isolation under the "sheave" where most the force is applied, per industry standard.

    b. Elevator A was somewhat louder than Elevator B but operated "very well and was kept in excellent running order." Both machines have "appropriate vibration isolation."

    c. There are certain limitations to the amount of vibration isolation that can be provided. Too much soft rubber can make the machine float and become unstable, which is unsafe.

    d. The current rubber under the "geared traction machine" was much thicker than would likely be allowed if work was done on the machine, due to modern safety requirements.

    e. Certain small changes could be made, such as replacing solid pipe components with flexible ones, and re-doing certain existing vibration isolation, but those components did not seem to be making noise detectable in unit 1701. The price for those modifications was $21,330 and $35,580 respectively. Such

changes could “possibly improve the noise levels” but would not eliminate noise.

f. The elevators are 26 years old and have a life expectancy of 25-30 years. Full elevator modernization would replace the geared traction machines with quieter gearless traction machines that generate significantly less vibration and noise. The estimated cost was $500,000.

33. The strata says any decision to modify the elevator will involve costs that require ownership approval at a general meeting. The strata says Mr. Cheung is free to put his request on the next AGM agenda. However, SPA section 36 says the strata council, not individual owners, determine the agenda at a general meeting. Persons holding 20% of the strata’s votes may demand, in writing, that a resolution be placed on the agenda. So, I find that by telling Mr. Cheung that it is up to him to put the matter on the agenda at the next general meeting, council has effectively decided that it will not proceed with any elevator work at this time.

34. Was that decision reasonable? I find that it was, for the following reasons. First, as I found above, the noise does not rise to nuisance level. I find that a strata corporation’s response should be commensurate with the degree of disturbance, so here, reasonable expectations are lower. Second, I find the strata took reasonable steps to investigate the noise issue by engaging Richmond Elevator at least twice and seeking options. Third, there is no evidence that the strata has neglected its elevator repair and maintenance obligations. The Richmond Elevator report found the elevators in excellent running order, with appropriate vibration isolation in place. There is no evidence that the elevator noise has worsened over time. Fourth, the Richmond Elevator report does not recommend undertaking any particular work given the uncertainty that there will be any further noise reduction. Richmond Elevator’s advice in subsequent emails suggests waiting until the elevators need to be replaced entirely within the next few years as they approach the end of their expected lifespan. The strata is entitled to rely on and be guided by the advice of professionals like Richmond Elevator (see *Leclerc v. The Owners, Strata Plan LMS 614*, 2012 BCSC 74 at paragraph 56).

35. As well, it is not clear that Mr. Cheung has explored all options to reduce noise and vibration within his strata lot, such as by adding material in his ceiling. While Mr. Cheung says the developers installed sound-dampening materials, he provides no documentary evidence in support. Even if there are sound-dampening materials in his ceiling, there is no evidence about the condition or quality of those materials.

36. Although it is reasonable for Mr. Cheung to expect the strata to maintain and repair common property as required by the SPA, he is not entitled to dictate the process. A strata corporation does not have a duty to repair or maintain common property in accordance with the requirements of a specific owner. 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).

37. For all these reasons, I decline to make Mr. Cheung's requested order that that the strata do further elevator work.

Is Mr. Cheung entitled to damages or reimbursement for the Raincloud report?

38. Above, I found that the strata's duty to repair and maintain the elevators includes an obligation to take reasonable steps to minimize noise. I find that this includes taking reasonable steps to investigate Mr. Cheung's complaints about noise arising from the elevators. This is consistent with several CRT decisions about a strata corporation's duty to investigate complaints about potential common property nuisances, such as *Lee v. The Owners, Strata Plan EPS2809*, 2023 BCCRT 338, about odour, and *Morgan v. The Owners, Strata Plan VR 305*, 2023 BCCRT 197, about noise from a common property patio.

39. I acknowledge that Richmond Elevator made some noise measurements for its August 2021 report, but I find they were insufficient to make an objective assessment of the noise. This is supported by Richmond Elevator's May 12, 2022 email acknowledging that its noise measurements were approximate and suggesting the strata engage a professional to determine the exact noise difference and conditions in unit 1701. Raincloud was one of the professionals that Richmond Elevator

recommended. So, I find the strata's failure to follow that advice and retain a noise professional was unreasonable in the circumstances.

40. Given the strata's failure to retain a noise professional, I find it was reasonable for Mr. Cheung to do so himself and seek reimbursement. I find Raincloud's $945 invoice was reasonable for the noise assessment it performed. The strata does not argue otherwise. I order the strata to reimburse Mr. Cheung $945.

41. The Raincloud report and the rest of the evidence before me did not establish that the elevator noise was a nuisance. I also find that the strata did not unreasonably delay investigating Mr. Cheung's noise complaints. For those reasons, I dismiss his claim for $20,000 in damages.

42. I acknowledge the undisputed evidence that the strata did not allow Raincloud access to the elevator machine room as Mr. Cheung requested. However, Richmond Elevator had already investigated the elevator for the purpose of investigating noise-reduction options. I am not persuaded that granting Raincloud access would not simply be duplication of that work. Moreover, Mr. Cheung does not specifically request access for Raincloud as a remedy in this dispute. For those reasons, I make no order about Raincloud's access to the elevator room.

CRT FEES, EXPENSES AND INTEREST

43. 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. Cheung was partially successful, I find he is entitled to reimbursement of $112.50 for half his paid $225 in CRT fees. The strata did not pay CRT fees. Neither party claims dispute-related expenses.

44. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Cheung is entitled to prejudgment interest on the $945 Raincloud payment from June 24, 2022, when he paid the invoice, to the date of this decision. This equals $20.41.

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

ORDERS

46. I order the strata, within 21 days of the date of this order, to pay Mr. Cheung a total of $1,077.91, broken down as follows:

    a. $945 as reimbursement for the Raincloud report,

    b. $20.41 in prejudgment interest under the COIA, and

    c. $112.50 in CRT fees.

47. Mr. Cheung is also entitled to post-judgment interest, as applicable.

48. I dismiss Mr. Cheung's remaining claims.

49. Under CRTA section 57, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under CRTA section 58, 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.

Micah Carmody, Tribunal Member