



# Civil Resolution Tribunal

Date Issued: May 12, 2023

File: ST-2022-004407

Type: Strata

Civil Resolution Tribunal

Indexed as: *Schmidt v. The Owners, Strata Plan LMS 2454*, 2023 BCCRT 391

**B E T W E E N :**

JAKE SCHMIDT

**APPLICANT**

**A N D :**

The Owners, Strata Plan LMS 2454

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Micah Carmody

## **INTRODUCTION**

1. Jake Schmidt owns strata lot 47 (unit 902) in the respondent strata corporation, The Owners, Strata Plan LMS 2454 (strata).

2. Mr. Schmidt says he is experiencing ongoing noise from the strata residents above him in unit 1002. The noise started in 2001 when unit 1002's previous owner changed the flooring. Mr. Schmidt wants the strata to require unit 1002's owners to remove the hard-surface flooring and install underlay and carpet. Alternatively, they want carpet and underlay installed in the bedrooms and to "have the children stop running and jumping in all areas". Mr. Schmidt, who is a strata council member, represents himself.
3. The strata says the claim should be dismissed. It says the flooring in unit 1002 has an underlay that exceeds the strata's flooring bylaw requirements. The strata says it investigated Mr. Schmidt's noise complaints but it found no bylaw contravention. The strata is represented by a strata council member.

## **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)*. 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.
5. 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.
6. 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.

7. 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**

8. The issues in this dispute are:
  - a. Did the strata reasonably investigate Mr. Schmidt's noise complaints and enforce its flooring and noise bylaws?
  - b. If not, what remedy is appropriate?

## **EVIDENCE AND ANALYSIS**

9. As the applicant in this civil proceeding, Mr. Schmidt 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.

### ***Background and noise complaints***

10. The strata was created in 1996 and includes 129 strata lots in a single tower. Mr. Schmidt and his spouse have lived in unit 902 on the ninth floor since November 2011. Unit 902 is directly below unit 1002.
11. The strata filed bylaws in 2013 that are in addition to the schedule of standard bylaws under the SPA. Bylaw 4(a) says, in part, that a resident or visitor must not use a strata lot in a way that (i) causes a nuisance to another person, (ii) causes unreasonable noise, or (iii) unreasonably interferes with another person's right to use and enjoy their strata lot. In the context of this dispute, I find bylaw 4(a) means that the unit 1002 residents and their visitors cannot make noise that an ordinary person would find intolerable in unit 902. The strata also has a flooring bylaw, which I discuss below.

12. In early 2021, a new owner, SH, purchased unit 1002. The strata gave SH permission to remove all carpet and install laminate flooring with an underlay of "IIC-STC-70", meaning an impact insulation class and a sound transmission class rating of 70 or higher. In June 2021, Mr. Schmidt complained about furniture dragging at "all hours of the night" and asked strata manager if the new flooring complied with the strata's bylaws. The strata manger confirmed that the strata's records indicated that it did comply. Renovations were completed by September 2021.
13. Mr. Schmidt made the following noise complaints by email to the strata manager:
  - September 20, 2021 – Mr. Schmidt said since the flooring change in unit 1002, he had heard what sounded like someone walking with shoes, and moving furniture, at all hours of the day and night. There was also construction noise during the day.
  - October 14, 2021 – Mr. Schmidt said he heard furniture being dragged across floor between 12 am and 6 am.
  - January 9, 2022 – Mr. Schmidt complained music or TV noise from 9 pm to 2 am for several weeks. The furniture dragging noise was also ongoing.
  - February 16, 2022 – Mr. Schmidt said there had been no improvement.
14. On March 24, 2022, SH moved out of unit 1002. On March 28, a family of 4 moved in. Mr. Schmidt says the noise worsened. On May 2, 2022, he complained to the strata manager. He said he heard noise from the time the family awoke (as early as 5 am) until the time they went to bed, but particularly between 8 and 10 pm. The noise was mostly children running, jumping, screaming, and crying. There was also door-slamming, furniture-dragging and item-dropping noise. He said the noise caused things in unit 902 to rattle. He also heard music or TV noise in the primary bedroom on weekend evenings.
15. On July 3, 2022, Mr. Schmidt submitted his application for dispute resolution with the CRT.

## ***The law of significant unfairness***

16. The CRT has authority to make orders remedying a strata corporation's significantly unfair act or decision under CRTA section 123(2). That provision contains similar language to SPA section 164, which allows the BC Supreme Court to make orders remedying significantly unfair acts or decisions. 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).
17. In *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173, the court confirmed the legal test for significant unfairness. 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 objectively 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.
18. Although Mr. Schmidt does not specifically say the strata has treated him unfairly, he says the strata's investigation of his noise complaints was inadequate. I find Mr. Schmidt expected that the strata would adequately investigate his noise bylaw complaints. I find that his expectation was objectively reasonable. I say this, in part, because SPA section 26 requires the strata to enforce its bylaws. Several CRT decisions have concluded that it is significantly unfair for a strata corporation to fail to reasonably investigate bylaw complaints and enforce its bylaws (see, for example, *Chan v. The Owners, Strata Plan LMS 1946*, 2021 BCCRT 456, and *Dhanani v. The Owners, Strata Plan NW 2265*, 2021 BCCRT 282). While previous CRT decisions are not binding on me, I agree that a failure to investigate noise complaints and enforce bylaws may be significantly unfair, depending on the impact on the owner or tenant.
19. The SPA does not set out any procedural requirements for addressing bylaw complaints. In *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148, the BC Supreme Court said that the SPA gives strata corporations discretion about how to respond to bylaw complaints, as long as they comply with principles of procedural fairness and do not act in a significantly unfair way. In *Leclerc v. The Owners, Strata Plan LMS*

614, 2012 BCSC 74, the court said that strata corporations are not held to a standard of perfection when responding to bylaw complaints, but instead must take “reasonable action” and have “fair regard for the interests of all concerned.”

***Did the strata fail to enforce its flooring bylaw?***

20. In 2019, the strata passed bylaw 11(d)(i), which said owners had to “ensure minimum requirement underlay IIC-STC-70 is used.” Confusingly, bylaw 11 is about alterations to common property, not strata lots, which are covered in bylaw 7. Nonetheless, bylaw 11(d)(iii) says owners require the strata’s permission to install hard surface flooring in a strata lot, and must provide the strata with a description of the type of flooring, type of underlay, installation method and areas flooring will be installed.
21. Mr. Schmidt says there must be a problem with the floor in unit 1002 because he had no noise complaints until SH changed the flooring. I reject this argument. Noise transmission and the degree of disturbance from noise depends on more than flooring and underlay. It also depends on the activities and habits of the strata lot occupants, background noise levels, and other factors. As noted, ownership of unit 1002 changed shortly before the floor was changed. As well, it may be possible to comply with the flooring bylaw but still breach the noise bylaw by making intolerable noise.
22. The evidence includes the strata’s May 20, 2021 approval for SH to renovate their strata lot by removing carpet and replacing it with laminate flooring, among other changes. SH provided the strata with specifications for the flooring and underlay. The copy of these specifications in evidence is not entirely legible but it appears to have an IIC rating of 75 and an STC rating of 72.
23. Mr. Schmidt says as far as he is aware, nobody confirmed that SH actually installed the underlay specified in their renovation request. I find the strata was entitled to accept SH’s application and information as correct. I find the strata did not have to supervise every step of the renovation. The bylaws and the SPA do not require it, and to expect a strata corporation to do so would impose an unreasonable burden. There was no reason for the strata to suspect SH provided false information, and there is no evidence that SH did so here. I note that when the strata later advised SH of the

noise complaint, SH expressed dismay because they had installed “higher rated acoustical underlay.” I find Mr. Schmidt has not proven that unit 1002’s flooring does not meet the requirements in bylaw 11(d), or that the strata failed to enforce bylaw 11(d) against SH.

24. It may be that further investigation, which the strata was planning at the time of submissions, will provide a reason to suspect the flooring underlay was not installed to bylaw 11(d)’s specifications. As that evidence is not before me, I make no comment about what steps the strata may then be required to take.

***Did the strata fail to enforce its noise bylaws?***

25. As I explain below, I find that the strata took reasonable steps to investigate Mr. Schmidt’s complaints, with appropriate sensitivity to his concerns and those of the unit 1002 residents and neighbours.
26. The strata manager advised SH of Mr. Schmidt’s initial noise complaints by email in October 2021. The strata manager reminded SH about the noise bylaws and asked SH, if 1002 was up for sale, to ask viewers to take their shoes off at the door. SH denied walking with shoes on or moving furniture. SH suggested that someone in a different strata lot could be making the noise.
27. Although the strata did not take significant additional investigation or enforcement steps before SH moved out in March 2022, there were unique circumstances. First, the strata was aware that SH was selling unit 1002. If SH was the source of the noise, Mr. Schmidt’s noise concerns could resolve when SH moved out. Second, Mr. Schmidt’s complaints were not frequent – one in October 2021, one in January 2022 and one in February 2022. Generally, a strata corporation is entitled to assume that a warning was effective until there are further complaints. Third, council meeting minutes from February 2022 showed that council was about to take further enforcement steps in response to Mr. Schmidt’s noise complaints when they resumed in 2022. Then SH moved out. After SH moved out, there were no complaints until May 2022.

28. I find the strata took Mr. Schmidt's complaints seriously, particularly when the complaints continued with new unit 1002 residents. Upon receiving Mr. Schmidt's May 2, 2022 complaint, council discussed the complaint at the next council meeting. The strata manager reached out to the unit 1002 family and explained the complaint. The strata manager asked them what steps they could take to reduce noise. Shortly thereafter, two council members met with the unit 1002 family and investigated unit 1002 to try to determine where the noise was coming from. The strata's investigation included questions and observations about the children's play activities, the family's footwear in the home, furniture padding, television location, and the presence of rugs and speakers. The strata council members concluded that the noise must be coming from somewhere else.
29. Mr. Schmidt was not satisfied, and the strata continued to investigate. Between August 5 and 17, 2022, strata council members attended nearby units 901, 903, 1001, 1003 and 1006, along with 1002 again. The evidence includes detailed notes taken by the council members who visited each unit. I find the strata's investigation was thorough and a genuine attempt to determine the source of Mr. Schmidt's noise complaints while balancing other residents' rights to use and enjoy their strata lots. Ultimately, the strata's August investigations did not reveal any likely noise source.
30. The strata says council members also attended unit 902 several times to hear the noise about which Mr. Schmidt complains. It says it has been unable to verify or corroborate Mr. Schmidt's noise complaints. Mr. Schmidt says council members acknowledged they heard "murmuring" but said it was not unreasonable noise. Although I accept that the noise bothers Mr. Schmidt, I do not agree with him that he should never be able to hear a voice that originates outside his strata lot "no matter how loud or quiet." Living in a strata building involves some degree of give and take among neighbours when it comes to noise and other potential nuisances (see *Sauve v. McKeage et al.*, 2006 BCSC 781).
31. I agree with the strata that Mr. Schmidt has not proven that the noise was objectively intolerable in unit 902. I note Mr. Schmidt provided the strata with recordings and noise logs only after the CRT dispute began. Those recordings, as I hear them, do



not establish intolerable noise. Moreover, Mr. Schmidt has not provided any objective sound level measurements to document the sounds' intensity. Nor has he provided statements from witnesses who heard the noise.

32. In any event, the strata is still investigating. It says it has sought proposals from noise professionals to objectively measure noise in unit 902. As of submissions, the strata was reviewing those proposals. Nothing in this decision prevents Mr. Schmidt from making future noise complaints. The strata's duty to investigate noise complaints is ongoing.
33. I find the strata's investigation of Mr. Schmidt's noise complaints, while perhaps slow to get started, has been reasonably thorough. As noted above, council members are volunteers and the standard the strata is held to in bylaw complaint investigations is reasonableness. I find the strata has reasonably investigated Mr. Schmidt's complaints and enforced its bylaws, and therefore has not been significantly unfair to Mr. Schmidt. For these reasons, I dismiss Mr. Schmidt's claim.

## **CRT FEES AND EXPENSES**

34. 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. The strata was successful but did not pay CRT fees. I dismiss Mr. Schmidt's claim for CRT fees.
35. The strata claimed \$5,580 for legal expenses. Rule 9.5(3) says that the CRT will not order one party to pay another party's legal fees in a strata property dispute unless there are extraordinary circumstances. The strata does not point to any extraordinary circumstances, and I find the circumstances of this dispute are not extraordinary. So, I dismiss the strata's claim for legal expenses.
36. The strata must comply with SPA section 189.4, which includes not charging dispute-related expenses against Mr. Schmidt.

## **ORDER**

37. I dismiss Mr. Schmidt's claims, the strata's claim for dispute-related expenses, and this dispute.

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Micah Carmody, Tribunal Member