Civil Resolution Tribunal

Date Issued: September 14, 2023

File: ST-2022-003587 &
ST-2022-004622

Type: Strata

Civil Resolution Tribunal

Indexed as: *Mack v. The Owners, Strata Plan 1736*, 2023 BCCRT 776

B E T W E E N :

JOHN MACK

APPLICANT

A N D :

The Owners, Strata Plan 1736

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about a strata corporation's alleged failure to address an owner's noise complaints, and the enforceability of a bylaw restricting how notice can be given to a strata corporation. It involves 2 linked disputes with the same parties, so I find I can issue a single decision for both disputes.

2. The applicant, John Mack, owns strata lot 8 (SL8) in the respondent strata corporation, The Owners, Strata Plan 1736 (strata). Mr. Mack is self-represented. The strata is represented by a strata council member.

3. In dispute ST-2022-003587, Mr. Mack essentially argues the strata has failed to investigate his noise complaints or enforce its hardwood flooring bylaw. He says unreasonable noise occurs in SL8 as a result of hardwood flooring the strata approved in strata lot 13 (SL13), located immediately above SL8. He specifically says the strata has failed to enforce 2 bylaws. First, he argues the strata has not enforced bylaw 3(1), which requires an owner not to use a strata lot in a way that unreasonably interferes with the use and enjoyment of another strata lot. Second, Mr. Mack argues the strata has failed to enforce bylaw 11(6)(b), which Mr. Mack interprets to mean that an owner who installs hardwood flooring must guarantee the installation meets an Impact Insulation Class (IIC) of 60 or greater. Mr. Mack says the IIC rating is not fact-based because is it measured in a laboratory. He says sound testing of the floor-ceiling assembly between SL13 and SL8 is required to prove bylaw compliance.

4. Mr. Mack seeks orders that the strata:

    a. Enforce bylaw 3(1) about noise from his upstairs neighbours' floor,

    b. Conduct Apparent Impact Insulation Class (AIIC) sound testing between SL8 and SL13,

    c. Endorse the adoption of the strata's lawyer's draft bylaw amendments about hard surface flooring including AIIC ratings, and

    d. Pay him damages of $5,000 as compensation for "disruptive flooring noise" in SL8.

5. The strata disagrees with Mr. Mack's claims. It says he first complained that the hardwood flooring installation in SL13 did not comply with bylaw 11(6), and requested the strata conduct sound testing, even though the strata provided Mr. Mack proof the underlay installed in SL13 was compliant with its flooring bylaw. The strata also says when Mr. Mack complained of unreasonable noise it requested the SL13 owner "mitigate any noise making activities", which the owner has done. The strata also says

Mr. Mack has not proved the noise is unreasonable. Finally, the strata says the Civil Resolution Tribuanal (CRT) does not have jurisdiction to order the strata to adopt a bylaw. The strata asks that Mr. Mack's claims be dismissed.

6. In dispute ST-2022-004622, Mr. Mack argues the strata acted contrary to *Strata Property Act* (SPA) section 63(1)(a) when a strata council member refused to accept a hand-delivered letter from him, and again when he was told at a strata council meeting that he could not hand deliver letters to strata council members. He also says that the strata's newly adopted "Anti-Harassment and Solicitation Bylaw" contravenes SPA section 63(1)(a). He says the bylaw is unenforceable because it does not allow for hand delivery of correspondence to the strata by leaving the correspondence with a strata council member. I will refer to the anti-harassment and solicitation bylaw as bylaw 9(5). Mr. Mack asks for orders that the strata uphold SPA section 63, change, or remove bylaw 9(5), and pay him damages of $1,000 for "stress engenderment caused by the culmination of unorthodox contraventions that willfully disregard [his] legislated right under SPA section 63 (1) (a)."

7. The strata says the incidents referenced by Mr. Mack occurred before bylaw 9(5) was passed, when COVID-19 protocols were in place. The strata also acknowledges the requirements of SPA section 63(1)(a) but suggests that hand delivery is "intended for time-sensitive documents only". The strata asks that I dismiss Mr. Mack's claims.

8. As explained below, I find that strata has not properly investigated Mr. Mack's noise complaints and order it to do so. I also find a portion of bylaw 9(5) contravenes the SPA and order the strata to immediately stop enforcing that part of the bylaw.

JURISDICTION AND PROCEDURE

9. These are the formal written reasons of the 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.

10. 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.

Preliminary Matter

11. The Dispute Notice for ST-2022-003587 was issued on June 6, 2022. Mr. Mack amended it on January 27, 2023 to add 3 new remedies that are included in those mentioned above. The strata provided its only Dispute Response on February 11, 2023, after it had received the amended Dispute Notice. Therefore, I find there are no issues about procedural fairness, given the strata had the opportunity to respond to the amended Dispute Notice and did so.

ISSUES

12. The issues in these disputes are:

    a. Has the strata reasonably investigated Mr. Mack's noise complaints?

    b. Is the strata responsible for conducting AIIC sounding testing?

    c. Must the strata propose bylaw amendments to its owners?

    d. Is Mr. Mack entitled to damages related to the strata's conduct about his noise complaints?

    e. Does bylaw 9(5) contravene SPA section 63(1) and if so, what is an appropriate remedy?

BACKGROUND

13. As applicant in a civil proceeding such as this, Mr. Mack must prove his claims on a balance of probabilities, meaning more likely than not. I have considered all the submissions and evidence provided by the parties but refer only to information I find relevant to explain my decision.

14. The strata plan shows the strata consists of 97 strata lots in 2 low rise buildings.

15. The strata filed a consolidated set of bylaws with the Land Title Office (LTO) on June 21, 2017 which replaced the Standard Bylaws. I find these bylaws applicable to dispute ST-2022-003587 about flooring noise. Bylaw amendments filed in 2021 and 2022 are not relevant to the noise dispute. I address relevant bylaws below, as necessary.

16. On October 4, 2022, the strata filed bylaw 9(5) with the LTO. I find this is the only bylaw that applies to dispute ST-2022-004622, which I discuss in detail below.

EVIDENCE AND ANALYSIS

Dispute ST-2022-003587

Has the strata reasonably investigated Mr. Mack's noise complaints?

17. I summarize the relevant strata bylaws for this dispute as follows:

> Bylaw 3(1)(a) to (c) requires an owner, tenant, or occupant to use a strata lot in a way that does not cause a nuisance to another person, unreasonable noise, or unreasonably interferes with the rights of other persons to use and enjoy another strata lot.
>
> Bylaw 6(1)(a) says an owner, tenant or occupant must not make, cause, or produce undue noise in or about any strata lot which will interfere unreasonably with any other owner, tenant, or occupant.

Bylaw 11(g) requires an owner to obtain written approval from the strata before altering parts of a strata lot which the strata must insure under SPA section 149, which include flooring.

Bylaw 11(6)(a) says an owner who installs hard floor surfaces such as hardwood in their strata lot "must take all reasonable steps to satisfy noise complaints from neighbours."

Bylaw 11(6)(b) says "any proposal presented by an Owner for change of floor covering must guarantee and Impact Insulation Class (IIC) rating of 60 or greater."

18. In September 2019, the owners of SL13 obtained the strata's permission to replace laminate flooring in SL13 with hardwood flooring using underlay with an IIC rating of 75. In its approval letter, the strata expressly noted the requirements of bylaw 11(6)(b) were the owners' responsibility.

19. It is unclear when the hardwood flooring was installed, but on November 7, 2020, Mr. Mack first wrote to the strata to complain about "noise generated by the replacement flooring installed in SL13." In the letter, he identified various noises from SL13 that occurred at different times of the day. Mr. Mack described the noises as "impact flooring noise'", something being dragged or pushed across the floor resulting in a "loud scaping noise", and "footfalls that resound like the thump of a drum." He asked the strata to provide him with a copy of its flooring approval letter and the "rating guarantee", which I find is in reference to bylaw 11(6)(b).

20. Mr. Mack emailed a similar letter to the strata on December 30, 2020 and requested the strata define "guarantee" referenced in bylaw 11(6)(b) and explain the process to address non-compliance of the bylaw. The strata manager replied on January 25, 2021 by providing a copy of the strata's September 19, 2019 approval letter and suggested Mr. Mack contact an acoustics specialist "to determine more information." The email did not address the rating guarantee or explain the process to address bylaw non-compliance.

21. At some point, the strata retained legal counsel to draft new bylaws. It appears the strata discussed the draft bylaws, including proposed amendments to bylaw 11(6), at

a Town Hall meeting held in March 2021. There is no evidence the strata owners have ever voted on the draft bylaws.

22. The next complaint in evidence is dated November 21, 2021, about 1 year after Mr. Mack's last complaint. Mr. Mack emailed the strata stating he was awakened by "footfalls and other indiscernible impact noise" emanating from SL13 at about 11 PM, which he again asserted was because of the new flooring in SL13. He also stated the SL13 owners were contravening bylaw 3(1)(c) and the strata council was not enforcing bylaw 11(6)(b).

23. On December 27, 2021, Mr. Mack wrote to the strata, stating there is no proof the hard surface flooring installed in SL13 met the IIC rating standard of 60 and that the strata was in contravention of the SPA and bylaws. He did not specify any SPA or bylaw provisions, but he did request the strata perform AIIC testing of the floor-ceiling assembly between SL13 and SL8 to verify compliance.

24. On April 18, 2022, Mr. Mack requested a council hearing to address "the strata's failure to uphold bylaw [11(6)(b)]" resulting in the SL13 owners' violation of bylaw 3(1) and to seek a decision of the strata on retaining an acoustical engineer to perform an AIIC test of the floor-ceiling assembly of SL13 and SL8. Mr. Mack attached a copy of an email exchange between himself and a professional engineer with BAP Acoustics Ltd. that discussed the difference between an IIC rating (obtained from lab testing) and an AIIC rating (obtained from in-site testing). The engineer agreed with Mr. Mack that an AIIC test would be "the only viable means for obtaining the required 'guarantee'". The engineer estimated the cost to conduct the test was $2,000 plus GST.

25. The council hearing was held on April 21, 2022. The strata council minutes show the strata council voted to reject Mr. Mack's request for the strata to retain an acoustical engineer. The reason stated in the minutes was "the lack of valid substantiating evidence to support expending over $2,000 on a test that does not appear necessary". There is no correspondence from the strata to Mr. Mack as a result of the hearing.

26. Mr. Mack filed his initial request for dispute resolution with the CRT on May 27, 2022 and the original Dispute Notice was issued on June 6, 2022, as mentioned. At some point, SL13 was sold to a new owner. The strata wrote to the new owner on June 25, 2022 advising of Mr. Mack's CRT claim and asking the owner to take all reasonable steps to mitigate noise transfer in accordance with bylaw 11(6)(a).

27. Mr. Mack wrote further noise complaints to the strata on August 10, 29, September 24, and October 16, 2022. The emails were nearly identical and expressed Mr. Mack's assertions that "footfalls" from SL13 had awakened him. He said the actions of the SL13 owners were contrary to bylaw 3(1) in that the noise was unreasonable and interfered with his use and enjoyment of SL8. The letters indicate the noises occurred between 5:30 and 9:00 AM. The strata council president forwarded Mr. Mack's October 16, 2022 email to the SL13 owner and requested a response on the measures they were taking to mitigate the noise issue. The SL13 owner responded the next day by saying the morning of the October complaint was no different than any other morning. They also said they had placed a large area rug under their bed and do not wear hard-soled shoes in SL13.

28. Mr. Mack issued further similar noise complaints to the strata on November 1, 7, 15, 30, and December 16, 2022 concerning the noise of "footfalls" and suggesting the conduct of the SL13 owner was contrary to bylaw 3(1).

29. In a June 1, 2023 memo to the strata's lawyer, the strata council president summarized the noise issues as "footfalls emanating from the unit above" and stated that each of Mr. Mack's letters were brought to the strata council's attention with potential action discussed at strata council meetings. The memo also states the strata council had monthly discussions with the SL13 owner, who expressed a desire to mitigate the noise and installed a large rug in their main bedroom, and rugs in the second bedroom, dining room, hallway, entrance foyer, and most of the living room. The memo concluded by saying the strata council was unable to act to because there was a "lack of specific data such as what room the noise was emanating from, measurements of the noise volume or any independent collaboration to determine if a noise nuisance existed".

30. With that background in mind, I begin by reviewing relevant sections of the SPA and associated case law.

31. Section 26 requires the strata council to exercise the powers and perform the duties of the strata, including bylaw enforcement. This includes a duty to enforce bylaws, such as the nuisance or noise bylaws of Bylaw 3(1). When performing these duties, the strata council must act reasonably: see *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 at paragraph 237.

32. The SPA does not set out any procedures for assessing bylaw complaints. The bylaws are also silent on this process. The courts have held that a strata corporation may investigate bylaw contravention complaints as its council sees fit, so long as 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 at paragraph 52. In other words, the strata must be reasonable in how it assesses bylaw complaints.

33. The strata's investigation must also be objective, as established in *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd*., 2018 BCSC 1502 at paragraph 33. In *Triple P*, the court found that nuisance in the strata context is an unreasonable interference with an owner's use and enjoyment of their property. Whether an interference is unreasonable depends on several factors, such as its nature, severity, duration, and frequency. The interference must also be substantial such that it is intolerable to an ordinary person. See *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.

34. Here, I find the strata has not reasonably investigated Mr. Mack's noise complaints. While the strata council may have discussed his complaints at its meetings, there is no evidence the strata council acknowledged or responded to Mr. Mack's complaints or did any investigation. For example, the strata did not request to observe the noise from within SL8 or confirm what steps the SL13 took to mitigate any noise, such as by inspecting SL13. Nor did the strata give Mr. Mack direction on what he must do for the strata to act, such as provide more objective evidence in the form of audio or decibel recordings, or sufficiently detailed noise logs. The strata appears to have

accepted the SL13 owner's statement that rugs were added at various locations and determined Mr. Mack's complaints were unfounded and unreasonable without doing any investigation.

35. The strata cites *Donatelli v. The Owners, Strata Plan 535*, 2022 BCCRT 1297 as an example of a CRT decision where an owner's subjective complaint about noise was insufficient to establish a bylaw contravention. However, in *Donatelli*, the strata offered to complete sound testing and the applicant owner rejected that offer, so I find I can distinguish the facts in *Donatelli* from the facts here.

36. For these reasons, I find the strata has failed to properly investigate Mr. Mack's noise complaints under its bylaws. Mr. Mack requested an order that the strata enforce bylaw 3(1), but I do not make that order because I find there is insufficient evidence to establish the SL13 owners are contravening bylaw 3(1), or parts of it. Rather, I order the strata to immediately begin a reasonable investigation of Mr. Mack's noise complaints bearing in mind the case law I have set out above and take appropriate action as a result of its investigation, which it must communicate to Mr. Mack.

Is the strata responsible for conducting AIIC sounding testing?

37. I do not order the strata to conduct AIIC sound testing between SL8 and SL13, although it is open for the strata to do so. I decline to make this order because Mr. Mack has not been proven that the noise is unreasonable. It may be that reasonable investigation by the strata will conclude the noises are unreasonable, in which case sound testing would not be necessary.

38. I also disagree with Mr. Mack's interpretation of bylaw 11(6)(b). I interpret the bylaw to require ***proposed*** underlay for hard surface flooring requests to meet an IIC rating of 60 or greater. Put another way, it is only the underlay proposed by an owner that must meet these guidelines. Underlay with IIC ratings of under 60 would not meet the bylaw requirements. The use of the word "guarantee" in the bylaw is unfortunate but I find the bylaw only requires the proposal to guarantee the underlay rating of 60 or greater. It is reasonable for the strata to accept brochures for proposed underlay that establish an IIC rating as accurate. That does not mean the installed underlay will

have a similar AIIC rating because the 2 rating scales are different, as the parties appear to agree.

39. Mr. Mack's arguments focus on the installed underlay having an AIIC rating of 60 or greater which he says is unproven. However, as explained, that is not what the bylaw requires. So, even if sound testing were completed that proved the flooring and ceiling components of SL13 and SL8 had an AIIC rating of less than 60, that would not assist Mr. Mack because the current bylaws do not establish any level of AIIC is required.

40. Mr. Mack cites *Lucas v. The Owners, Strata Plan 200*, 2020 BCCRT 238 to support his argument that AIIC sound testing could prove the AIIC sound rating of the SL13 and SL8 floor-ceiling assembly was less than 60. However, since the bylaws do not establish any AIIC rating level, I find *Lucas* does not assist Mr. Mack.

41. For these reasons, I find the strata is not required to conduct AIIC sound testing. I dismiss Mr. Mack's claim in this regard.

Must the strata propose its lawyer's bylaw amendments to its owners?

42. I do not agree with the strata's argument that Mr. Mack seeks an order that the strata adopt its lawyer's proposed hard surface flooring bylaw. Rather, I find Mr. Mack seeks an order that the strata put its lawyer's proposed hard surface flooring bylaw before the owners for a vote. I do not make such an order on the basis such a decision should be left to the strata council and owners.

43. As the strata correctly identifies, several Court decisions state that a court should not interfere with the democratic governance of a strata unless absolutely necessary. See for example, *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493, *Oldaker v. The Owners, Strata Plan VR 1008*, 2010 BCSC 776, and *Norenger Development (Canada) Inc. v. Strata Plan NW 3271*, 2016 BCCA 118. Further, many CRT decisions have found this reasoning applies to the CRT, with which I agree. See for example, *Nadjafov v. The Owners, Strata Plan BCS 1362*, 2021 BCCRT 814, *Butler v. The Owners, Strata Plan NWS 3403*, 2023 BCCRT 460, and *Zoetica Wildlife Research Services Inc. v. The Owners, Strata Plan LMS2749*, 2023 BCCRT 486.

44. For these reasons, I make no order about what bylaws the strata should put to its owners.

45. It is open to Mr. Mack to obtain support of 20% of the strata's owners under SPA section 43 to demand the lawyer's proposed hard surface flooring bylaw be put to the owners for a vote at an upcoming general meeting of the strata.

Is Mr. Mack entitled to damages related to the strata's conduct about his noise complaints?

46. As noted, Mr. Mack claims $5,000 as compensation for "disruptive flooring noise" in SL8. However, his noise complaints are unproven, and he did not provide any objective evidence he suffered from the noise, such as a doctor's note. Therefore, I decline to order the strata pay Mr. Mack any damages amount.

Dispute ST-2022-004622

Does bylaw 9(5) contravene the SPA and if so, what is an appropriate remedy?

47. SPA section 63(1) addresses how a "notice or other record or document that is required or permitted under [the SPA], the bylaws or rules" ***must*** be given to a strata corporation. Generally speaking, the options are by leaving it with a council member, mailing, faxing, or emailing it to the strata corporation, or putting it through the mail slot or in the mailbox used by the strata corporation. Section 63(2) says that a notice, record, or document is conclusively deemed to be given 4 days after it is mailed, faxed, or put through the mail slot or in the mailbox. This implies a notice, record or document left with a council member is received when it is given.

48. The relevant part of bylaw 9(5) at issue here is the first sentence of subsection (1). It reads as follows:

> With the exception of emergencies, owners, occupants, and tenants may only submit criticisms, bylaw infraction complaints, demands for documents, or requests for action to the Council in writing through the property manager or the council's email account.

49. As mentioned, Mr. Mack says this part of bylaw 9(5)(1) restricts in-person delivery of correspondence to the strata by leaving it with a council member. He says this is contrary to SPA section 63(1) and is unenforceable because it contravenes the SPA, as set out in SPA section 121. The strata acknowledges that 1 method of providing a notice, record, or document to the strata is by leaving it with a council member. However, it argues this method of delivery is only intended for time-sensitive documents, such as initiation of complaints or requests for council hearings, and not for general correspondence or on-going issues. It says it has designated its strata manager "as its agent for receipt of correspondence, notices, requests, etc.".

50. For the following reasons, I agree with Mr. Mack.

51. First, the language of SPA section 63 is clear and unambiguous. I find that "notice, record or document required or permitted" under the SPA, bylaws and rules captures letters written by owners to the strata.

52. Second, section 63(1) is clear that the methods of delivery set out in the section are mandatory. While the strata has discretion to establish a mailing address and fax number to be those of its strata manager under section 63(1), it must also allow owners and tenants to leave correspondence with council members.

53. Third, there is nothing in section 63(1) to suggest it only applies to time-sensitive or other specified notices, records, or documents.

54. Finally, the fact that an owner or tenant may exhibit aggressive behaviour at the front door of some council members or even "harass" a council member does not restrict the owner from hand-delivering letters to council members on behalf of the strata. I note the strata's assertions of aggressive behaviour and harassment exhibited by Mr. Mack are not before me.

55. I turn now to the remedy. The strata cannot restrict owners and tenants from leaving notices, records, and documents to individual council members. I find the first sentence of bylaw 9(5)(1) clearly contravenes SPA section 121, so I find that part of the bylaw is unenforceable. I order the strata to immediately stop enforcing it.

56. As for Mr. Mack's request for $1,000 in damages for stress, he again did not provide any objective evidence that he suffered stress or any other harm, such as a doctor's note. Therefore, I decline to order the strata pay Mr. Mack any damages amount.

CRT FEES AND EXPENSES

57. 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. Neither party claimed dispute-related expenses. I find the parties were equally successful in dispute ST-2022-003587, so I make no order for fees and expenses for that dispute. However, I find Mr. Mack was successful in dispute ST-2022-004622, so I order the strata to reimburse Mr. Mack $125, which is the amount of CRT fees he paid in that dispute.

58. Under section 189.4 of the SPA, the strata may not charge any dispute-related expenses against Mr. Mack.

DECISION AND ORDERS

59. I order the strata to immediately:

    a. Begin a reasonable investigation of Mr. Mack's noise complaints bearing in mind the case law I have set out above and take appropriate action as a result of its investigation, which it must communicate to Mr. Mack.

    b. Stop enforcing the first sentence of Bylaw 9(5)(1).

60. I order the strata to pay Mr. Mack $125 for CRT fees, within 15 days of the date of this decision.

61. Mr. Mack's remaining claims are dismissed.

62. Mr. Mack is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

63. 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.

J. Garth Cambrey, Vice Chair