

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: September 9, 2022

CASE: 2022-00096N

Citation: Toronto Standard Condominium Corporation No. 1791 v. Franklin, 2022 ONCAT 96

Order under section 1.44 of the *Condominium Act, 1998*.

Member: Nicole Aylwin, Member

The Applicant,

Toronto Standard Condominium Corporation No. 1791

Represented by Victor Yee, Counsel

The Respondent,

Trevor Franklin

Represented by George Brown, Agent

Hearing: Written Online Hearing – March 18, 2022 to August 11, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] Toronto Standard Condominium Corporation No. 1791 (“TSCC 1791”) submits that the Respondent, Trevor Franklin, who is the owner and occupant of a unit in TSCC 1791, has repeatedly breached the provisions in its governing documents that prohibit unreasonable noise or nuisance. TSCC 1791 requests that the Tribunal order Mr. Franklin to comply with its governing documents and prohibit him from taking any action which violates the noise and nuisance provisions. TSCC 1791 also requests the Tribunal order that Mr. Franklin pay its legal costs in this matter pursuant to the indemnification provisions in its declaration and rules.
- [2] Mr. Franklin denies that he is causing unreasonable noise and nuisance. He takes the position that the noise complained about by his neighbours is not emanating from his unit. He asserts that the building is known for having issues with noise penetration and that his neighbours and TSCC 1791 have unfairly levelled these complaints against him as they do not get along.
- [3] For the reasons set out below, I find that Mr. Franklin has failed to comply with TSCC 1791’s governing documents and order him to comply with the provisions in the governing document that relate to unreasonable noise and nuisance. I also order him to pay legal costs of \$3500 and costs for Tribunal filing fees to TSCC 1791 within 30 days of the date of this decision.

[4] Before setting out my reasons, I note that the evidence provided by both parties clearly shows that there is a very high level of acrimony not just between the two parties in front of me, who have a history of legal disputes between them, but also between Mr. Franklin and his neighbours. Perhaps as a result, a significant amount of time was spent attempting to present evidence and arguments that demonstrated each other's "bad behavior" but was unrelated to the issues properly in front of me. So, while I have reviewed all the evidence, in this decision I comment only on that which is relevant.

B. PROCEDURAL MATTERS

[5] During the hearing Mr. Franklin's representative questioned whether the Tribunal had the jurisdiction to hear this case. He argued that because this dispute dates to at least 2018 and arose prior to the expansion of the Tribunal's jurisdiction, which only expanded to include noise and nuisance disputes on January 1, 2022, the dispute cannot be heard by the Tribunal. TSCC 1791 responded, arguing that the Tribunal does have the authority to decide the dispute as the *Limitations Act, 2002*, which in Ontario provides limitation periods for making claims and commencing legal proceedings, does not apply and that the Tribunal can hear historical evidence as it relates to an ongoing compliance issue.

[6] The Tribunal does have the jurisdiction to hear this dispute. The *Limitations Act, 2002* does not apply to administrative tribunals, and there is nothing in the *Condominium Act, 1998* ("the Act") or the Regulations that restricts the ability of the Tribunal to hear noise and nuisance disputes that emerged prior to the expansion of the Tribunal's jurisdiction. Regardless, the issues in front of me relate to a current and ongoing dispute of noise, nuisance, and compliance, with the most recent complaint of noise emanating from Mr. Franklin's unit being filed with TSCC 1791 in February 2022.

[7] Additionally, throughout the proceedings Mr. Franklin's representative continued to raise two other issues that were not properly in front of me. He made several claims of oppression under s. 135 of the Act and spent considerable time arguing that under s.132(1) of the Act, TSCC 1791 should have been required to mediate this case prior to bringing it to the Tribunal.

[8] In response to these claims, Mr. Franklin's representative was advised repeatedly that s. 135 is not within the Tribunal's jurisdiction and claims of oppression would not be addressed in this hearing. Despite acknowledging this, he continued to make arguments in this regard, none of which will be addressed here.

[9] Regarding the arguments around s. 132(1) of the Act, s.132 (4.1) clearly states that s. 132(1) does not apply to "any matter in dispute for which a person may apply for resolution under section 1.36 to the Condominium Authority Tribunal". As discussed above, TSCC 1791 was within their rights to apply to the Tribunal for resolution and Section 132(1) does not apply in this case.

C. ISSUES & ANALYSIS

Issue no 1: Is Mr. Franklin in breach of the TSCC 1791's governing documents, specifically the provisions that prohibit unreasonable noise or nuisance?

[10] TSCC 1791 submits that Mr. Franklin is required under s. 119(1) of the Act to comply with the provisions of the Act as well as TSCC 1791's declaration, bylaws, and rules, known collectively as the "governing documents."

[11] It is TSCC 1791's position that Mr. Franklin has not done so. It argues that Mr. Franklin failed to comply with the provisions in the governing documents that prohibit unreasonable noise and nuisance, specifically TSCC 1791's Declaration Article IV 4.1 (a) which reads,

No Unit shall be occupied or used by an Owner or anyone else, in such a manner as it is likely to damage or injure any person or property (including any other Units or any portion of the Common Elements) or in a manner that will impair the structural integrity either patently or latently, of the Units and/or Common Elements, or in a manner that will unreasonably interfere with the use for enjoyment by other Owners of the Common Elements or their respective Units...

and, TSCC 1791's Rule 2, which reads:

Owners and their families, guests, visitors, servants and agents shall not create nor permit the creation or continuation of any noise or nuisance which, in the opinion of the Board or the Manager, if any, may or does disturb the comfort or quiet enjoyment of the Units or Common elements by other Owners or their respective families, guests, visitors, servants and persons having business with them.

[12] According to TSCC 1791, since at least June 3, 2018, TSCC 1791 has received noise complaints about unreasonable noise coming from Mr. Franklin's unit, largely in the form of loud music, television sounds and banging noises between 10pm and 7am. They contend that despite several attempts to communicate with Mr. Franklin about the complaints in the form of emails, letters from management and letters from legal counsel, all advising him of the complaints, the impact of this noise on his neighbors and his obligation to comply with the governing documents, Mr. Franklin has persisted in making noise, which is an unreasonable nuisance and interfering with the other unit owner's quiet enjoyment of their units.

[13] As evidence, TSCC 1791 submitted copies of email complaints about the noise received by management over several years, testimony from the current condominium manager, Andrew Tameel, and unit owner Patricia Borges, who has made the majority of the complaints. TSCC 1791 asserts that the email complaints submitted show a consistent and ongoing pattern of unreasonable noise emanating from Mr. Franklin's unit. As noted, most of the complaints were sent to the management office by Patricia Borges, who owns a unit on the first floor of the condominium. In his witness testimony, Mr. Tameel submitted that the

management office received complaints from Ms. Borges about disruptive noise emanating from Mr. Franklin's unit on the following dates: June 3, 2018; September 30, 2018; October 5, 2018; November 22, 2018; January 14, 2019; March 3 2019; April 11, 2019; April 18, 2019; April 22, 2019; April 27, 2019; April 29th 2019, June 30, 2019; January 21, 2021; January 22, 2021 (two complaints); October 19, 2021; Feb 3, 2022, February 4, 2022; February 6, 2022; February 7, 2022 (two complaints).

- [14] Mr. Tameel further testified that in addition to Ms. Borges' email complaints, management had received complaints from other units describing similar noises coming from Mr. Franklin's unit. Two additional email complaints were submitted as evidence. One that was sent to management on February 24, 2022, and specifically describes "loud music late at night" and a "banging" from Mr. Franklin's unit, and another more general complaint, from a unit owner who describes over the course of "several years...being woken up in the middle of the night to loud music playing".
- [15] The complaints, all of which were sent by email to management are time stamped. While some of the complaints are sent by email to management the morning or day(s) after the disturbance, many of the complaint emails sent by the primary complainant, Ms. Borges, were sent at the time she submits she was actually hearing the noise. There are, for example, complaint emails that are time stamped at 11:35pm, 12:27am, 1:04am, 2:46am, and 3:43am. In these emails, Ms. Borges complains that the TV and/or music coming from Mr. Franklin's unit is so loud that she cannot sleep, and, in many instances, she complains that the noise is disturbing her children's sleep. She often reports hearing loud banging noises. In many of these complaints, Ms. Borges notes that she must work the following day and is unable to get any rest. These complaints also express an increasing frustration with Mr. Franklin for continuing to make loud noise in the middle of the night and with TSCC 1791 for not compelling Mr. Franklin to reduce the noise.
- [16] Ms. Borges also provided witness testimony confirming that she had made complaints on the dates noted above and provided additional details on the impact the noise has had on her and her family. She testified that she often works early in the morning and her sleep is repeatedly disturbed by the noise coming from Mr. Franklin's unit. She indicated that the noise regularly wakes her children once they are asleep. She further stated that the noise from Mr. Franklin's unit has caused her and her family significant "stress, anxiety, sleep loss and inconvenience". Her testimony is consistent with the complaints she sent to management and the descriptions of the impact the noise is having on her and her family.
- [17] Mr. Franklin denies that he is making the noise. Although Mr. Franklin never provided any sworn witness testimony, he argued in his submissions that he is often sleeping during the times the neighbors hear the noise and, in some cases was not even home during the time of the complaint. To support these arguments, Mr. Franklin submitted witness testimony from his girlfriend Caroline Mcmillan who testified that on February 3 and 4, 2022 – two dates on which complaints were

made against Mr. Franklin – Mr. Franklin was at her house and that she dropped him off at the morning before she went to work.

- [18] Mr. Franklin further submits that the building is known for having issues with noise penetration and that he himself has made complaints about loud noises coming from his neighbors' units. He provides two email complaints he made to management as evidence. In one of the complaints, Mr. Franklin complains about hearing his neighbors walk up and down the stairs, and in the other complaint Mr. Franklin identifies hearing noise from other units such as "running up stairs, music, and construction like work" He is not specific about when he heard the noise or where it was coming from. In Ms. Mcmillan's testimony, she recalled having heard similar noises, noting that she often visits Mr. Franklin's residence two to three times per week and hears noises emanating from other units including "including, people watching TV playing music, people slamming doors, etc."
- [19] Finally, both parties submitted engineering reports that looked at sound transmission in the building, specifically to/from Mr. Franklin's unit. Each party's engineering report drew a different conclusion about whether the building met the current standards for buffering noise transmission between units. What the reports did agree on was that it is not possible to fully eliminate noise transmission between units (although some mitigation may be possible) and that sound can and is likely to travel through "demising walls" or "party walls", that is, the walls that are shared by units. Mr. Franklin's report notes "Loud or amplified speech is audible, loud music audible, bass notes particularly strong and annoying to occupants on the other side of the wall. The party wall transmits noise equally in both directions. Neighbours can hear each other". Neither report made any conclusive comments on actual sound levels perceived or claimed by other unit owners.
- [20] To decide this issue, I must determine two things. First, on the balance of probabilities is Mr. Franklin making the noise complained about by other unit owners and, second, if so, is that noise unreasonable and does it interfere with unit owners' right to the quiet enjoyment of their unit, which is a breach of the governing documents.
- [21] While Mr. Franklin takes issues with Ms. Borges' complaints and testimony, arguing that Ms. Borges has regularly acted aggressively towards him and that her complaints are malicious, Ms. Borges' email complaints, which are sent over almost a 4-year period, are specific, dated to the time of each disturbance, and consistent in their description of the noise and where the noise is coming from. Ms. Borges' testimony is also consistent with her complaint emails. While it is the case that a significant number of the email complaints submitted to management from Ms. Borges are rude and the language often inappropriate and probably contributed to the escalation of an already contentious scenario, I accept Ms. Borges' testimony as credible and find the email complaints from Ms. Borges to be persuasive evidence. They are specific and consistent in describing the noise Ms. Borges is hearing, when she is hearing it, and they clearly identify where the noise is coming from.

- [22] I am not persuaded by Mr. Franklin's very general assertion that he is either sleeping or not home during the periods when the complaints have been made. The evidence submitted by Mr. Franklin in this regard is not compelling. Mr. Franklin submitted as evidence only one email that he sent to management in May 2020 in response to a single noise complaint, where he says he was sleeping during the indicated times.
- [23] Moreover, as discussed above, Mr. Franklin did submit sworn testimony from Ms. Mcmillan in which she stated that Mr. Franklin was not home on February 3 and 4, 2022 – two of the dates on which complaints were made. However, I do not find this testimony compelling as evidence that he was not responsible for the noise on these dates. Ms. Mcmillan testified that she dropped Mr. Franklin off at this unit each of these mornings before she went to work. One of the email complaints by Ms. Borges describes the noise she heard on February 3 as beginning at 6:35am, thus Ms. Mcmillan's testimony does not rule out the possibility that Mr. Franklin was home in the early morning making the noise described by Ms. Borges. It also does not rule out the possibility that Mr. Franklin was making noise at 11:35pm that evening as Ms. McMillan was not specific about what time Mr. Franklin left the unit that evening to go to her home.
- [24] Finally, I am also not persuaded by the argument that because Mr. Franklin may experience noise from other units that he is not responsible for creating unreasonable noise that is heard in other units. Both things can be true. The engineering report submitted by Mr. Franklin himself is clear on the fact that noise such as music or television sounds, particularly when played at high volume, can easily travel between units. Therefore, loud music and/or a television played at a high volume in Mr. Franklin's unit – which are the primary noises described in the complaints– can travel to other units.
- [25] This fact, when combined with the complaints, which clearly and consistently identify Mr. Franklin's unit as the unit that noise is originating from, leads me to find that on the balance of probabilities Mr. Franklin is making the noise complained about by Ms. Borges and other unit owners.
- [26] Nonetheless, it is worth reiterating that what I must decide is not simply whether Mr. Franklin is making noise, but, rather, is he, in the words of TSCC 1791's governing documents, making noise that is "unreasonably interfer[ing] with the use for enjoyment by other Owners of the Common Elements or their respective Units..." and creating a "noise or nuisance which...may or does disturb the comfort or quiet enjoyment of the Units or Common elements by other Owners or their respective families, guests, visitors, servants and persons having business with them." I find he is.
- [27] In any condominium where walls are shared, some noise transmission between units is to be expected. However, in this case, the evidence demonstrates an ongoing pattern of loud noise emanating from Mr. Franklin's unit during hours when a reasonable unit owner would expect relative quiet from their neighbours.

Although not limited to these times, most of the complaints take issue with the noise coming from Mr. Franklin's unit during the early mornings (before 7am), late evening (often after 10pm) and overnight when people are typically asleep. In this case, the time of the noise matters. Noise which may be tolerable or expected during the day, may be intolerable and a nuisance in the overnight hours when people are asleep. In this case, the evidence shows that the noise, which is often being made at night is, in many instances, loud enough to disturb the sleep of Ms. Borges and her children and thus is disturbing her quiet enjoyment of her unit.

- [28] The evidence also shows a reoccurring pattern of conduct. Mr. Franklin's own evidence demonstrates that he is aware that sound will travel between the units, yet despite years of complaints there is no evidence that he has taken any action to reduce the noise, particularly during the overnight hours. So, while I accept that Mr. Franklin may well be hearing noise from other units, and while I accept that he has made complaints about noise himself, this does not change the fact that on a balance of probabilities Mr. Franklin is making loud noise, during the hours in which people are typically asleep, and is thus disturbing their right to the quiet enjoyment of their units, which is a breach of TSCC 1791's Declaration Article IV 4.1 (a) and Rule 2(1).

Issue no 2: Should the Tribunal grant TSCC 1791's request for an order to have Mr. Franklin comply with the noise and nuisance provisions in TSCC 1791's governing documents?

- [29] Having found that Mr. Franklin is in breach of TSCC 1791's governing documents, TSCC 1791 has asked the Tribunal to issue an order that Mr. Franklin comply with those documents. While this order is unnecessary, since as TSCC 1791 has argued, all unit owners are required by s.119(1) of the Act to "comply with this Act, the declaration, by-laws and the rules", for the purposes of clarity and so there is no further questions about compliance, I will order that Mr. Franklin comply with the Act and TSCC 1791's declaration Article IV 4.1 (a) and Rule 2(a) which compel owners to refrain from making noise and creating any nuisance which may interfere with another unit owners' quiet use and enjoyment of their unit.
- [30] TSCC 1791 has also requested an order under s. 1.44(1)2(2) of the Act requiring Mr. Franklin to take steps to reduce the impact of the noise he is making on his neighbors. They note that under Article 4.2(e) of its Declaration and Rule 2(b) the responsibility is on the unit owner to take steps to "abate such noise" that is being complained of at the unit owner's own cost. However, there is no firm indication that there is a single "fix" to Mr. Franklin's unit that will reduce the impact of the noise through the building walls (both engineering reports suggest different mitigations) and TSCC 1791 has proposed no firm criteria for evaluating how actions taken by Mr. Franklin, if any, will be deemed successful. Thus, I will not issue the requested order, but note that it is not unreasonable to request that Mr. Franklin take steps to reduce the impact of the noise he is making and note that a very simple solution (although not the only one) given that the noise complaints identify loud television and music as the primary complaint, may be to turn down

the volume particularly during times when people are sleeping.

- [31] Regardless, Mr. Franklin would be well advised to take the steps necessary to reduce the noise or impact of the noise on other units, in whatever manner he chooses. Having now been ordered to comply with the noise provisions in the governing documents, should TSCC 1791 be required to pursue further litigation to resolve the issue of noise emanating from his unit, Mr. Franklin risks being held liable for potentially substantial legal costs.

Issue no 3: Is TSCC 1791 entitled to an order requiring Mr. Franklin to pay for any costs it incurred, because of alleged non-compliance with the governing documents?

- [32] TSCC 1791 is requesting the Tribunal order Mr. Franklin to pay costs of \$105.09, for the legal costs incurred by TSCC 1791 for filing this application and \$200 in Tribunal filing fees. It is also seeking \$17691.29 for the legal costs incurred for participating in this Tribunal proceeding and the \$4932.45 that it spent to procure an engineering report which it submitted as evidence during the hearing.
- [33] Section 1.44(1)4 of the Act states that the Tribunal may make “an order directing a party to the proceeding to pay the costs of another party to the proceeding.” Section 1.44 (2) states that an order for costs “shall be determined...in accordance with the rules of the Tribunal.”
- [34] The cost-related rules of the Tribunal’s Rules of Practice relevant to this case are:
- 48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party’s CAT fees unless the CAT member decides otherwise.
- 48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements (“costs”) incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party’s behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.
- [35] TSCC 1791 was successful in this case and therefore, in accordance with Rule 48.1 of the Rules of Practice, I will order Mr. Franklin to pay \$200 in costs in respect of the Tribunal fees it paid.
- [36] With respect to the \$105.09 and \$17691.29 in legal fees that TSCC 1791 is requesting, although TSCC 1791 distinguishes between these costs as “pre-CAT” and “in-CAT” costs – both are costs incurred to participate in the Tribunal process. The \$105.09 are the legal fees that TSCC 1791 paid to have its legal counsel “file this case” which is a cost related to this proceeding. Thus, I will not distinguish between the two.

- [37] When considering this request for legal costs, I am guided by the Tribunal's "Practice Direction: Approach to Ordering Costs" which includes, among other factors to be considered, whether the parties attempted to resolve the issues before the case was filed, the provisions of the governing documents and whether the parties had a clear understanding of the potential consequences for contravening them, and if the costs are proportional to the nature and complexity of the issues in dispute.
- [38] TSCC 1791's submits that Mr. Franklin should be responsible for these costs for two reasons. First, they argue that Mr. Franklin and his representative's behavior during the proceeding was unreasonable. At the outset of this proceeding, Mr. Franklin and his representative did miss several deadlines and engaged in some behavior which was admonished by me. This behavior did delay the hearing, necessitating a small amount of additional work by both the Tribunal and TSCC 1791's legal counsel, although the majority of the extra work fell on the Tribunal.
- [39] Additionally, as noted above, despite being advised that s. 135 disputes were outside that jurisdiction of the Tribunal and the fact that the Tribunal had jurisdiction to hear this case, Mr. Franklin's counsel continued to make submissions on these points throughout the hearing, necessitating both a response from me and prompting further additional work by TSCC 1791's counsel to respond to the submissions made.
- [40] Second, TSCC 1791 submits that Mr. Franklin was aware of the cost consequences should he breach or continue to breach the noise provisions in the condominium's governing documents and that other unit owners should not be responsible for the costs of enforcement, which include the legal fees spent to bring this case to the Tribunal. To support this position, TSCC 1791 referred me to two Tribunal decisions, the recent decision of *York Condominium Corporation No. 229 v. Rockson*, 2022 ONCAT 46 ("Rockson") and *Peel Condominium Corporation No.96 v. Psofimis* 2021 ONCAT 48 ("Psofimis"). In *Rockson*, the Tribunal ordered the Respondent, Mr. Rockson pay 100 percent of the legal costs incurred by the Applicant after it found that he had breached the condominium's noise rule. In *Psofimis*, the Tribunal found that the Respondent, Mr. Psofimis was responsible for 100 percent of the legal fees incurred by the Applicant when he failed to comply with the condominium's pet rule, even after signing a written agreement stating that he would not contravene the pet rule in the future.
- [41] I find that the *Rockson* case differs from this one in a few respects. The Respondent, Mr. Rockson did not participate in the Stage 3 – Tribunal Decision process and he was found to be "willfully" disregarding the rules. There was evidence of over 40 security reports documenting noise complaints about Mr. Rockson even after he had received legal compliance letters. The Tribunal noted that it appeared that after being asked to comply with the rules there was an "apparent escalation" of incidents that showed "little regard for his obligations as condominium owner or his responsibilities as neighbour in a condominium community".

- [42] While I have found Mr. Franklin to be non-compliant with the provisions regarding noise, I would not characterize Mr. Franklin as “willfully” disregarding the rules. The noise complaints in this case, while made over years and clear in their disruptive impact on neighbouring units, come in handfuls – for example according to TSCC 1791’s evidence, there is a series of complaints in January of 2021 and then again in October of 2021 and then again in February of 2022. This pattern of complaints suggests that while there is a recurring pattern of conduct where Mr. Franklin is making noise that is a nuisance and interferes with the right of other unit owner’s quiet enjoyment of their units, and while Mr. Franklin does need to ensure that he follows the rules and ceases to make noise that is disruptive, the evidence does not support the assertion that Mr. Franklin has gone out of his way to escalate his behavior or “willfully” disregard the rules. TSCC 1791’s attempt to compare Mr. Franklin’s behavior to that of Mr. Rockson is a stretch and appears to be an attempt to tie a long history of continuing conflict with Mr. Franklin and what may very well be a legitimate concern over other behaviors by Mr. Franklin, to his conduct in this case.
- [43] The present case is also different than Psofimis. Although TSCC 1791 submits that just as in Psofimis, Mr. Franklin signed a compliance agreement where he agreed to abide by the governing documents of the condominium and disregarded it, the agreement signed by Mr. Psofimis was specific regarding the pet rules he was being asked to obey and Mr. Psofimis clearly breached these despite a very specific promise to comply with them. In this case, however, Mr. Franklin signed an agreement that very generally references all the governing documents of the condominium - an obligation that exists under the Act in any event, so the agreement added nothing either meaningful or specific to Mr. Franklin's duties or the condominium's expectations. Even though I have found that Mr. Franklin has made noise contrary to the corporation's declaration and rules, on the facts of this case it is reaching to suggest that this constitutes bad faith or a “wilful disregard” of the rules or the agreement that should attract a costs award on a 100 percent scale as in Psofimis.
- [44] Finally, in both Rockson and Psofimis the legal costs claimed by the Applicants were \$9101.02 and \$3926.75 respectively. In this case, TSCC 1791 is requesting nearly double what was awarded in Rockson and nearly triple what was awarded in Psofimis, when as discussed above, the behavior of the Respondent in those two cases was worse than that of Mr. Franklin. I am also not persuaded that the costs claimed by TSCC 1791 in this case are proportional to the nature and complexity of the issue in dispute and the hearing process. The issues in this case were straightforward and the hearing uncomplicated, yet the fees claimed are substantial. While there was, as noted above, some delay in the hearing due to inappropriate behaviour and some additional work required, the extra work was largely borne by the Tribunal and the behaviour ceased after several warnings. It should not have accounted for a substantial increase in legal costs.
- [45] It is also worth noting that enforcing compliance – which includes, at times, litigating – is part of “doing business” for a condominium corporation. Not all issues

of non-compliance will or should result in a condominium being awarded the full or even partial legal costs associated with enforcing their rules. This is the kind of activity for which unit owners contribute to the common expenses. Consistent with this, the Tribunal's Rule 48.1 is clear on the fact that "[t]he CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding."

- [46] Nonetheless, I do agree with TSCC 1791 that it would not be fair to require all unit owners to pay the entirety of the legal costs associated with Mr. Franklin's non-compliance, particularly since Mr. Franklin was aware of the complaints against him and the impact of the noise on his neighbours for several years, and yet evidently did not address them. On at least two occasions, Mr. Franklin was sent legal enforcement letters (May 20, 2020 and January 25, 2021) informing him of the noise complaints TSCC 1791 had received, asking him to cease making the noise, and indicating that failure to comply with the noise provisions may result in legal costs being awarded against him as per article 4.2 (e) of TSCC 1791's declaration, which reads, in part,

"...In the event the Owner of such Unit fails to abate the noise, the Board shall take such steps as shall be necessary to abate the noise, odour or offensive action and the Owner shall be liable to the Corporation for all expenses incurred by the Corporation in abating the noise, which expense are to include reasonable solicitor's fees."

- [47] While Mr. Franklin claims he only received one of these letters, there is also ample evidence to show that condominium management communicated by email with Mr. Franklin many times about the noise complaints and requested his compliance with the rules. These requests were ignored. I am convinced that Mr. Franklin was well aware of the complaints against him, the rules governing noise and the consequences of not complying with the rules, which included the possibility of paying legal costs associated with actions taken to "abate the noise" – which in this case, meant bringing this case to the Tribunal for enforcement. Yet there is no evidence that he has taken steps to adjust his behavior or make any changes to his unit despite being aware of his neighbors' complaints and having an engineering report in his possession that provides suggestions for mitigating the noise coming from his unit.

- [48] In deciding on the appropriate costs award, I have weighed all of the factors above and, in summary, taking into account the fact that despite being well aware of the rules, his duty to comply with them, the noise complaints against him, the impact of his behavior on his neighbors and the potential cost consequences of failing to comply, Mr. Franklin has continued to make noise that is a nuisance in violation of TSCC 1791's declaration and rules. I have also taken into account that while, generally, as per CAT Rule 48.2 the Tribunal will not order one party to be reimbursed for the other parties legal fees and disbursements, in this case some of the behavior of Mr. Franklin and his counsel did result in additional work being required although not nearly enough to justify the awarding full costs, of

\$17796.38, particularly given when proportionality and complexity is considered: the issues in this case and the hearing were not complicated. Weighing all of the factors above, I award costs in the amount of \$3500.

[49] Finally, regarding TSCC 1791's request for \$4932.45 that it spent to procure an engineering report which it submitted as evidence during the hearing. I award no costs in this respect. While TSCC 1791 submitted that they procured this report because they had received yet another complaint about Mr. Franklin's unit - TSCC 1791 only set out to procure this report once the hearing had begun, and it was clear that Mr. Franklin was intending to argue that his complaints had not been adequately addressed and the building itself was responsible for the noise issues. TSCC 1791 had four years (the first complaint being from 2018) to have an engineer investigate Mr. Franklin's complaints about noise transmission and seek solutions, they chose not to do so. There is no evidence that this cost was reasonably incurred as a cost related to enforcing compliance and Mr. Franklin should not be responsible for this cost in this case.

D. ORDER

[50] The Tribunal Orders that:

1. Under section 1.44(1) of the Act, Trevor Franklin shall immediately comply with Article IV 4.1 (a) of Toronto Standard Condominium Corporation 1791's Declaration and its Rule 2(1) respecting noise.
2. Under section 1.44(1)(4) of the Act, within 30 days of this Order, Trevor Franklin will pay costs of \$3700 to Toronto Standard Condominium Corporation 1791.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: September 9, 2022