CONDOMINIUM AUTHORITY TRIBUNAL

DATE: December 6, 2022
CASE: 2022-00033N
Citation: Jones v. Toronto Standard Condominium Corporation No. 2017, 2022 ONCAT 139

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

Member: Monica Goyal, Member

The Applicant,
Nerine Jones
Represented by Rachel Gibbons, Paralegal

The Respondent,
Toronto Standard Condominium Corporation No. 2017
Represented by Evan Holt, Counsel

Hearing: Written Online Hearing – July 25, 2022 to November 4, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] Nerine Jones (the "Applicant") is a unit owner of Toronto Standard Condominium Corporation No. 2017 ("TSCC 2017" or the "Corporation"). Ms. Jones alleges that there is unreasonable noise from the heat pumps from the unit above and below hers since 2019 (the "Noise Nuisance") that has affected her right to reasonable, quiet enjoyment of her unit. She further alleged that TSCC 2017 failed to meet its obligation under the Act to deal with the Noise Nuisance. Ms. Jones is seeking $25,000 in general damages on the basis that the Corporation had interfered with her use and enjoyment of her unit.

[2] TSCC 2017 says that they acted appropriately in response to Ms. Jones' Noise Nuisance complaints. TSCC 2017 says the application should be dismissed for two reasons. First, there is no excessive noise in the Applicant's unit and second, if there was excessive noise it was due to the operation of the heat pump in Ms. Jones' unit which she has failed to address, and that Ms. Jones is responsible for maintaining and repairing the heat pump in her unit.

[3] For the reasons set out below, I find that there was a noise nuisance in violation of TSCC 2017's governing documents and the *Condominium Act, 1998* (the "Act"). I find that TSCC 2017 did not take reasonable steps to address the nuisance. I award Ms. Jones $700 in costs and $1400 in damages for reimbursement of the

cost of the expert noise reports.

B. BACKGROUND

[4] Ms. Jones testified on her own behalf. She stated that she moved into her unit in the condominium (the "Unit") in October 2018.

[5] Shortly after moving into the Unit, Ms. Jones says she experienced noise from the neighbouring units above and below the Unit. The first time she reported the noise issue was on January 4, 2019. Email communications between Ms. Jones and the condominium manager of TSCC 2017, show that Ms. Jones reported the noise incident to the concierge several times prior to the Corporation taking steps to investigate the noise issue.

[6] On March 6, 2019, Ms. Jones says that an inspection was conducted by the condominium manager, who determined the noise was not emanating from the plumbing but most likely from the HVAC units above and below her Unit. Leslie Hayman, the director and vice-president of TSCC 2017, testifying on behalf of TSCC 2017, says the Corporations' concierge and/or condominium manager attended at the Unit and identified the noise from the equipment to be normal operating noise of heat pumps.

[7] On or around March 8, 2019, Ms. Jones contacted the Corporation's engineer to provide a proposal for sound testing for which Ms. Jones understood that the Corporation would pay for. The Corporation's engineer, WSP Canada Inc. ("WSP"), arranged for a representative to attend at the condominium complex on March 19, 2019, to provide a preliminary assessment of the noise issue. In their proposal, WSP said they observed intermittent distinct noise within the Unit from the HVAC equipment, which they said appeared to be originating from the unit above. The Corporation declined to pay for the WSP proposal, as they did not find the noise to be excessive.

[8] On May 2, 2019, J.E. Coulter & Associates Limited ("Coulter") was retained by Ms. Jones to conduct acoustical testing in the Unit, and the units above and below hers. Tobin Cooper of Coulter prepared the report (the "First Coulter Report"). A copy of the First Coulter Report was provided to the Corporation on May 15, 2019. Mr. Hayman confirms the Corporation received the report.

[9] The First Coulter Report found that the overall sound level of the operation of both heat pumps in the units above and below exceed the American Society for Heating Refrigeration and Air Conditioning Engineers ("ASHRAE") threshold noise criteria for mechanical equipment. The acceptable noise level is 35dB; when both of the neighbouring units above and below had their heat on, then the noise level was reported to be 45 dB. In particular, the noise from the unit above was described in the report as buzzier than the other units tested, and that the compressor in the unit above was substantially louder than the others tested.

[10] Mr. Hayman stated that after receiving the First Coulter Report, the Corporation

asked Merit Building Solution Inc. (“Merit”), an HVAC consultant, to investigate the noise levels of the heating pumps in units above and below Ms. Jones’. Merit advised the Corporation after their investigation that the heat pump noise was normal operating noise. Mr. Hayman did not provide a copy of the report by Merit as evidence or to Ms. Jones, nor did she say that Merit conducted any acoustical testing.

[11] Mr. Hayman also stated that after receiving the First Coulter Report, the Corporation advised the neighbouring unit owners of the noise complaints by Ms. Jones.

[12] Mr. Hayman testified that the Corporation attempted to follow the recommendations in the First Coulter Report by installing isolation pads beneath the heat pumps. However, the pads could not be installed as the heat pumps are installed using a drawer like system that does not permit the installation of isolation pads underneath them.

[13] On December 6, 2019, a letter was sent to the Corporation by Ms. Jones’ representative. This was the first of numerous communications that Ms. Jones’ representative sent to the Corporation and their counsel. The letter was asking the Corporation to take steps to deal with the Noise Nuisance, after the Corporation had indicated to Ms. Jones that the matter was closed from their end, and that they would not require the neighbouring owners to carry out repair work to their heat pumps.

[14] On December 10, 2019, the Corporation’s counsel acknowledged receipt of the letter and stated he would be speaking with his clients. Then, on January 14, 2020, Mr. Hayman advised that the board had passed a motion to allow the Corporation to do an acoustical engineering study. On February 14, 2020, Ms. Jones' representative followed up with the Corporation’s counsel, requesting an update. On March 13, 2020, the Counsel responded to say that the Corporation would be conducting their own tests to verify the findings in the First Coulter Report. Then shortly afterwards, Covid-19 restrictions required the Corporation on March 25, 2020, to postpone the testing indefinitely.

[15] Internal communications of the Corporation’s condominium manager in July 2020 show that Ms. Jones would not allow access to her unit due to concerns over Covid. No further communications were provided by Mr. Hayman on the scheduling of the acoustical engineer, nor to support his claim that the Applicant caused the delay in the acoustical testing.

[16] On December 17, 2020, Ms. Jones’ representative followed up once again inquiring about the scheduling of the testing. Counsel for the Corporation advised that there was a new condominium manager, and he would need time to confer with him. However, on February 22, 2021, Ms. Jones’ representative had to follow up once again with the Corporation’s counsel after receiving no response. Again, counsel for the Corporation claimed that Covid restrictions prevented acoustic

testing to be completed. On June 10, 2021, Ms. Jones' representative once again followed up on the status of the testing. Corporation's counsel asked for a phone call, but it appears that the counsels did not speak. On October 20, 2021, Ms. Jones' representative followed up again, there is no evidence that testing was scheduled by the Corporation. Ms. Jones says it was after this last communication that she decided to file this case on January 14, 2022, with the Tribunal.

[17] Mr. Hayman says that at some point after July 2020, he and the Corporation's condominium manager attended the neighbouring units and were satisfied the heat pumps did not create an excessive level of noise. He says that they would have attended Ms. Jones' unit but were refused access. Mr. Hayman did not specify when exactly he visited the units. In support of his claim, he produced a security incident report from October 28, 2021. From the security incident report, it appears that the condominium manager went to the neighbouring units to investigate a noise complaint from Ms. Jones. When the condominium manager arrived at the unit above, the heat pump was off and so he could not confirm whether there was a noise emitting from it. The condominium manager stated that the neighbouring owner above the Unit said repairs were done to the heat pump in April of that year. The neighbouring owner below Ms. Jones' Unit was empty and the heat was off, so the condominium manager concluded that no noise could have been emitting from that heat pump. Ms. Jones did refuse entry to her unit that day. There was no further evidence provided by Mr. Hayman to support his claim that Ms. Jones repeatedly denied access to her Unit, or that the Corporation had taken other steps to investigate the noise.

[18] On August 17, 2022, Ms. Jones' received notice that the Corporation's engineers would be entering the Unit on September 6, 2022, to conduct acoustic testing. On September 6, 2022, after the hearing had begun in this case, the Corporation had Arbitech Inc. conduct an acoustical engineering test on the Unit (the "Arbitech Report"). The Arbitech Report found that the noise levels in the Unit exceeded the maximum background noise recommended by the ASHRAE. The Arbitech Report also said that the sound transmission to the Unit from the units above and below did not exceed the maximum background noise recommended by ASHRAE. The Arbitech Report said that "the excessive sound reported by some of the residents at TSCC 2017 may be explained by individual sensitivities to varying sound pressure levels and frequencies." Arbitech took issue with Mr. Cooper applying a 5dB tonal penalty to his results in the First Coulter Report. However, they did note that the First Coulter Report found that all operating heat pumps in the suites exceeded ASHRAE's recommended maximum noise criteria of 35 dB before applying the 5dB tonal penalty, which rendered the tonal penalty redundant. The inference from this being that the finding of the First Coulter Report showed that the maximum noise criteria of 35dB was exceeded, even before the 5dB tonal penalty was applied.

[19] Mr. Cooper conducted a second acoustic test along with Arbitech (the "Second Coulter Report"), which confirmed that the noise transmission from the units above and below Ms. Jones' Unit was within normal operating noise but still detectable.

The Second Coulter Report said that “it is clear the conditions that caused an excess above the ASHRAE criteria in [the Unit] has been resolved.” Mr. Hayman in his testimony confirmed that the neighbouring unit owners had taken steps to reduce noise transmission. The evidence was unclear on what changes and when those changes had been made to the heat pumps. The Second Coulter Report then goes on to outline some recommendations to reduce the sound further, even though he said that the noise transmission was within normal operating noise threshold.

[20] Mr. Hayman in his testimony stated that even after the noise transmission was resolved Ms. Jones continues to complain of noise. In support of this, Mr. Hayman provided several security incident reports from May and June 2022, where Ms. Jones had complained of TV noise from neighbouring units. The security incident reports do not appear to relate to the noise from heat pumps which was the noise issue in this case.

[21] Ms. Jones testified that even though the Second Coulter Report says that the noise levels are within the acceptable range, she continues to find that audible noise from the units above and below her affects her sleep and the quiet enjoyment of the Unit.

C. ISSUES & ANALYSIS

[22] The issues to be decided are as follows:

1. Did Ms. Jones experience unreasonable noise that is a nuisance, annoyance, or disruption in violation of TSCC 2017’s noise rules?

2. Did the Corporation meet their duty to take all reasonable steps to ensure that the owners comply with the Act, and the governing documents of the Corporation?

3. Is Ms. Jones entitled to compensation, and/or costs?

[23] In deciding these issues, I have reviewed all the submissions and evidence provided to me by the parties, but only refer to those that are relevant and necessary to making my decision

Issue no. 1: Did Ms. Jones experience unreasonable noise that is a nuisance, annoyance, or disruption in violation of TSCC 2017’s noise rules?

[24] TSCC 2017’s Rules 1 and 2 under Quiet Enjoyment state (“Rule 1 and Rule 2”):

1. No owners, guests, visitors, or workers retained by Owners shall create or permit the creation of or continuation of any noise or nuisance, which, in the sole discretion of the Board of Directors or Management, may or does disturb the comfort or quiet enjoyment of the Units and Common Elements by other Residents.

2. No noise, caused by an instrument, device, or otherwise, which in the sole discretion of the Board of Directors or Management, disturbs the comfort of any Resident of the Units shall be permitted. This includes, but is not limited to stereos, televisions, radios, musical instruments and electronic devices.

[25] Section1 (1) (c.1) of Ontario Regulation 179/17 ("O. Reg. 179/17") establishes that the Tribunal has jurisdiction over disputes with respect to noise nuisance disputes pursuant to subsection 117(2) of the Act. Section 117 (2) of the Act states:

> No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,
>
> (a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation;

[26] In *Carleton Condominium Corporation No 132 v. Evans*, 2022 ONCAT 97, the Tribunal found that the case law related to the law of nuisance was instructive in the absence of a definition and set out these key points related to the law of nuisance:

> [20] …To support a claim of nuisance, the interference must be substantial and unreasonable; the requirement for substantial interference can incorporate a component of frequency and duration of the interference. A 'trivial' interference will not suffice to support a claim in nuisance.

[27] I find, based on the First Coulter Report, and has been noted previously by WSP, there was noise transmission from the neighbouring units' heat pumps above the ASHRAE noise threshold of 35dB. The noise emitting from the heat pumps was a substantial and unreasonable interference with Ms. Jones' quiet enjoyment of her unit and constituted a noise nuisance in violation of the noise rules.

[28] However, at some point in time between when Ms. Jones first complained of the noise, and when the acoustical engineering tests were conducted on September 6, 2022, the neighbouring units had taken corrective steps to reduce the noise level emitting from their heat pumps. The exact date the neighbours made those changes is unknown and the effect of those changes was not confirmed until the tests were conducted by Arbitech and Coulter in September 2022. The acoustical tests conducted by Arbitech and Coulter confirm that the noise transmission from the neighbouring units are presently within an acceptable threshold based on ASHRAE noise criteria.

[29] Though Ms. Jones submits that she continues to experience noise from the heat pumps which is a nuisance, there is no evidence before me upon which I can find that any noise which she may continue to experience supports a claim of nuisance. An assertion that there is noise from the heat pump, in the absence of any evidence, does not suffice.

Issue no. 2: Did the Corporation meet their obligation to ensure that an owner takes all reasonable steps to comply with the Act, and the governing documents of the Corporation?

[30] Section 119(1) of the Condominium Act, 1998 sets out the requirement that the TSCC 2017, its directors, officers, and employees of the corporation must comply with the Act, the declaration, by-laws and the rules of a corporation:

> A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

Section 17(3) of the Act sets out the duty of a corporation to ensure owners and occupiers of units comply with the Act and its governing documents:

> The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.

[31] The Corporation did not have an obligation to maintain the heat pumps, the onus was on the unit owners. The evidence showed that the heat pumps were located in the owner's unit. Section 90(1) of the Act sets out the obligation that each owner shall maintain their unit. Subsection 23(a) of the declaration of TSCC 2017 states that each owner shall repair his/her unit after damage, at their own expense.

[32] Mr. Hayman testified that the Corporation investigated the Noise Nuisance and spoke to the neighbouring unit owners. However, the Corporation did not provide written evidence to demonstrate that the neighbouring unit owners were advised of the nuisance nor did the evidence show that the neighbouring unit owners were asked to take steps to rectify the Noise Nuisance.

[33] In fact, the communications show that the Corporation advised Ms. Jones in December 2019 that they had closed the matter and would not be asking the other units to do repair work to their heat pumps, even after she had provided them with the First Coulter Report, where acoustical tests showed that there was a noise nuisance. Only after Ms. Jones had retained legal representation did the Corporation's board of directors agree to investigate the Noise Nuisance. The written communication between counsel showed that the Board of Directors of the Corporation did not accept the findings of the First Coulter Reported and wanted to conduct their own acoustical test. Mr. Hayman in his testimony said that the Corporation provided the First Coulter Report to the neighbouring unit owners; however, no evidence in the form of email, or a letter was provided to support this. Again, there is no evidence to demonstrate that the Corporation had asked the neighbouring unit owners to take remedial action to rectify the noise nuisance. In fact, the written record shows that for two years, Ms. Jones' representative

followed up with letter after letter. Corporation's counsel responded, but Corporation's counsel never indicated that steps had been taken by the Corporation to have the neighbouring unit owners rectify the Noise Nuisance or schedule the acoustical test. The Corporation in their submission said that Covid delayed the acoustical testing. That is a partial answer to explain the delay in this case. It could explain a delay for some months but not for the two years and nine months it took the Corporation to conduct the testing.

[34] I find that the Corporation failed to discharge their obligation pursuant to section 17(3) to ensure that neighbouring unit owners take necessary steps to comply with the Act, and TSCC 2017's rules. However, as the neighbouring unit owners appear to have rectified the Noise Nuisance issue before me, the Corporation is not required to take any further steps in this regard.

Issue No. 3: Is Ms. Jones entitled to compensation, and/or costs?

[35] Ms. Jones requested $25,000 in general damages on the basis that the Corporation had interfered with her use and enjoyment of the Unit from the period of January 4, 2019 up to and including September 6, 2022 (the date the tests for the Second Coulter Report were conducted). Ms. Jones submits the noise in the Unit has negatively impacted her sleep, which has affected her energy levels, mood and general ability to focus on daily tasks. Ms. Jones also states she has had to deal with the stress of dealing with the Corporation and its unwillingness to take her complaints seriously or take action.

[36] The Tribunal has authority under section 1.44 (1) 3 of the Act to order a party to pay compensation to another for damages incurred on account of an act of non-compliance up to $25,000 or the amount, if any that is prescribed. Mr. Cooper testified that he was paid $900 for conducting the first acoustical test and preparing the First Coulter Report. Mr. Cooper also testified that he was paid $500 for the second acoustical test, and the Second Coulter Report.

[37] Before bringing this application, Ms. Jones retained an engineering company to conduct acoustical testing. Without the First Coulter Report, Ms. Jones would not have been able to demonstrate there was a Noise Nuisance, and the Corporation would likely have continued to ignore her complaints. Therefore, I order that the Corporation reimburse Ms. Jones for the acoustical tests in the amount of $1400.

[38] The Applicant provided the invoice receipts demonstrating the amount paid for the acoustical tests. I have awarded reimbursement of these costs to Ms. Jones. I decline to award damages for the claimed loss of sleep, because the Applicant failed to provide evidence to support the claimed loss or how it impacted her livelihood

[39] The authority of the Tribunal to make orders for costs is set out in section 1.44 of the Act. Section 1.44 (2) of the Act states that an order for costs "shall be determined…in accordance with the rules of the Tribunal." 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.

[40] Ms. Jones was successful in this case and therefore I award her $200 in Tribunal fees.

[41] With respect to the legal fees incurred relating to this proceeding, the Tribunal's Practice Direction: Approach to Ordering Costs, issued January 1, 2022, provides guidance regarding the awarding of costs. Among the factors to be considered are whether a party or representative's conduct was unreasonable, for an improper purpose, or causes a delay or expense; whether the case was filed in bad faith or for an improper purpose; the conduct of all parties and their representatives; the potential impact an order for costs would have on the parties; and, whether the parties attempted to resolve the issue in dispute before the CAT case was filed.

[42] Ms. Jones retained legal representation prior to the Corporation agreeing to take steps to investigate the Noise Nuisance. There was no meaningful action taken by the Corporation prior to receiving a letter from Ms. Jones' representative. After which, the Corporation insisted on conducting their own acoustical test before they would take any action to address the Noise Nuisance. This acoustical test was not completed until the case had gone through mediation and was at the hearing phase. Had the Corporation not delayed the testing in this way, some of Ms. Jones' legal costs would likely not have been incurred. The Corporation acted unreasonably in this regard therefore an award of costs is warranted pursuant to Rule 48.2. I have not been provided with a bill of costs; however, given the evidence and submissions that were put forward in this case, I have determined that an award of costs in the amount of $500 is reasonable.

D. CONCLUSION

[43] I have concluded that Ms. Jones did experience a noise nuisance contrary to s.117(2) of the Act. I have also found that the neighbouring units have taken reasonable steps to stop the nuisance, and the noise is within a reasonable range. I have also found that the Corporation failed to discharge their obligation pursuant to section 17(3) to ensure that owners take necessary steps to comply with the Act, and TSCC 2017's Rules. I am ordering the Corporation to compensate Ms. Jones $1400 for retaining and conducting the acoustical tests. I am also ordering

the Corporation to pay her Tribunal fees of $200, and legal costs of $500.

E. ORDER

[44] The Tribunal Orders that:

1. Under section 1.44(1)3 of the Act, within 30 days of this order, TSCC 2017 shall pay compensation of $1400 to Ms. Jones.

2. Under section 1.44(1)4 of the Act, within 30 days of this Order, TSCC 2017 shall pay costs of $700 to Ms. Jones.

Monica Goyal
Member, Condominium Authority Tribunal

Released on: December 6, 2022