CONDOMINIUM AUTHORITY TRIBUNAL

DATE: June 14, 2023
CASE: 2022-00215N
Citation: Tarski v. York Region Standard Condominium Corporation No. 1179, 2023 ONCAT 80

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

Member: Marisa Victor, Member

The Applicant,
Vitali Tarski
Represented by Richard MacGregor, Counsel

The Respondent,
York Region Standard Condominium Corporation No. 1179
Represented by Natalia Polis, Counsel

Hearing: Written Online Hearing – November 10, 2022 to May 15, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] Vitali Tarski ("Applicant") is the owner of a penthouse unit in York Region Standard Condominium Corporation No. 1179 ("Respondent" or "YRSCC 1179"). Mr. Tarski alleges that there is an unreasonable noise coming from the mechanical room above his unit causing a nuisance. He says that the noise has been ongoing since 2019 and that it has interfered with the use and quiet enjoyment of his unit.

[2] YRSCC 1179 is a high-rise condominium. YRSCC 1179 says since 2019 it has retained several engineering firms to investigate and conduct acoustic testing of the noise coming from the mechanical room. YRSCC 1179 has spent approximately $40,000 in engineering investigations and repairs to the mechanical room.

[3] I have considered all the evidence and submissions in this hearing as well as the

Tribunal's jurisdiction under the *Condominium Act, 1998*[1] (the "Act"). For the reasons set out below, I find that the Applicant's complaint about the noise from the mechanical room falls within the Respondent's duties to maintain and repair common elements. The application is therefore outside the jurisdiction of the Tribunal. As a result, I must dismiss the application.

B. BACKGROUND

[4] The parties provided evidence and submissions on all issues in this application. The evidence and submissions provide important context for the determination of the Tribunal's jurisdiction over this application. The following were the issues that the parties provided submissions on:

1. Does the Tribunal have jurisdiction over the Applicant's application?
2. Has YRSCC 1179 taken reasonable steps to address the Applicant's noise complaints?
3. Which acoustic standard should be followed in assessing the sound in the Applicant's unit?
4. What orders can the Tribunal make to address the Applicant's complaint?
5. Is the Applicant entitled to reimbursement of expert fees, compensation for additional living costs including rental fees for a different residence, abatement of condominium fees, legal costs and costs of the application.

[5] Both parties relied on extensive expert reports which also provide context to the jurisdictional question.

[6] The Applicant submitted several expert reports by its acoustical consultant engineers, Soft dB.[2] Soft dB conducted sound measurements and compared them to:

1. World Health Organization ("WHO") recommendations for ambient sounds within bedrooms to avoid sleep disturbance;
2. Canadian Mortgage and Housing Corporations ("CHMC") recommendations

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[1] SO 1998, c. 19

[2] Exhibits 7, 9, and 58. Reports jointly written by Todd Busch, Dhruv Suthar, Harsh Parikh and Carlos Yoong, Dhruv Suthar, Roderick MacKenzie and Ryan Matheson of Soft dB ("Soft dB").

for noise produced by the operation of shared mechanical and electrical equipment in multi-family residential buildings; and

3. American Society for Heating, Refrigerating and Air-Conditioning ("ASHRAE") handbook on sound and vibration.[3]

[7] Soft dB proposed potential remedies including:

1. Vibration isolation for the boilers;

2. Acoustical treatment within the boiler room;

3. Expansion joints for pipes connected to boilers; and/or

4. Upgraded floor-ceiling assembly for the separation between the boiler room and condominium.

[8] Soft dB concluded that remedial work as close as possible to the source of the sound would be most beneficial.

[9] Soft dB returned in August 2022 to provide further testing and a further report after remedial work was done.[4] It found then that there were sound improvements in the dining and living area but that there was a new 500 Hz tone in the second bedroom that had not been there before.

[10] The Respondent relied on expert reports by consulting engineers with SS Wilson Associates ("SS Wilson)[5] and acoustical engineer Martin Villeneuve of Englobe Corp ("Englobe).[6] These experts primarily compared the acoustic measurements taken in the penthouse suite to the ASHRAE handbook on the basis that this is the standard referenced in the Ontario Building Code.[7]

[11] The first SS Wilson report, issued in 2019,[8] found that the equipment in the mechanical room contributing to noise issues were the chiller and pumps, chilled water pump, make-up-air unit, condenser pump and cooling tower and incline pumps. The items causing the most significant concern were the chiller and pumps, and the chilled water pump. The SS Wilson report proposed potential

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[3] The Applicant's expert, Soft dB, relied on the WHO, CMHC standards. The Respondent's experts, SS Wilson and Englobe primarily relied on ASHRAE standards.
[4] Exhibit 9.
[5] Exhibits 30, 37, 39 and 46. Reports jointly written by Azad Rizwan, Hazem Gidamy and Neil McCann.
[6] Exhibit 52. Report written by Martin Villeneuve.
[7] *Building Code Act*, 1992, SO 1992, c. 23.
[8] Exhibit 30.

remedies including:

1. Consulting with the manufacturer of the equipment;

2. Install the chiller on a more efficient vibration isolation support ring;

3. Modifying the base support and piping connections to the support system for the circulating pumps;

4. Replace deformed cooling tower springs;

5. Isolate pipes that currently make noise;

6. Install sound absorbing material in the chiller room.

[12] The second SS Wilson report, issued in February 2022,[9] found that the primary noise of concern came from two pumps: Pump 9A and Pump 9B which exceeded the applicable acoustic standard. The second SS Wilson report recommended the following:

1. Replace pump support pads with vibration springs and rubber pads;

2. Install vibration isolation spring hangers;

3. Identify cause of noise in second bedroom of the penthouse unit which does not appear to be related to any penthouse mechanical equipment.

[13] The Respondent then retained Carmichael Engineering to conduct remedial work in the mechanical room in the spring of 2022. Carmichael Engineering carried out heating and cooling pump insulation and installed new hanging materials and replaced spring isolators for Pump 9A and Pump 9B in the mechanical room.

[14] The Respondent also contacted Hart Pump to investigate Pumps 9A and 9B. Hart Pump noted the pumps were five years old and provided the option of rebuilding the pumps but recommended that no work be done.[10]

[15] Following the remedial work, SS Wilson returned to conduct further acoustical testing. This resulted in the third SS Wilson report issued in August 2022.[11] It found no change in some areas of the penthouse, a reduction of sound in other rooms, and a new 500 hz sound in the second bedroom. SS Wilson noted some

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[9] Exhibit 5.
[10] Exhibit 33.
[11] Exhibit 39.

sounds were still audible coming from Pumps 9A and 9B. Nevertheless, SS Wilson considered the sound issues coming from the mechanical room resolved. It noted that the new 500 hz sound now being measured in the second bedroom of the penthouse unit was not coming from the mechanical room and was therefore beyond the scope of its investigation.

[16] The Respondent then retained Englobe for a further expert report.[12] Englobe opined that the difference in sound measurements and tonality by both Soft dB and SS Wilson should be re-assessed to determine whether or not the noise level criteria had been met in the penthouse suite. On the issue of the second bedroom sound only, Englobe opined that the noise in the second bedroom should form part of the noise investigation and suggested that Soft dB should investigate the cause.

C. ISSUE: DOES THE TRIBUNAL HAVE JURISDICTION OVER THIS APPLICATION?

Applicant's Submissions

[17] The Applicant submits that the Tribunal has jurisdiction over this application because the Respondent's mechanical room noise is causing a nuisance and noise disruption and because the Respondent has breached the Act, Declaration, By-Laws and Rules of the Corporation (collectively referred to as the "governing documents").

[18] The Applicant relies on the following to show that the Tribunal has jurisdiction over this application:

1. Section 117(2) of the Act which states that the no person shall carry on an activity that results in the creation of or continuation of an unreasonable noise that is a nuisance.

2. Section 119(1) of the Act which requires that a corporation comply with the Act and its governing documents.

3. Section 89(1) of the Act which states that a corporation shall repair the units and common elements after damage.

4. Section 91 of the Act which allows a condominium's governing documents to alter the obligation to repair after damage.

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[12] Exhibit 52.

5. Section 5.2 of the Declaration that states that the Respondent is responsible for the repair and maintenance of the common elements.

6. Section 4.1 of the Respondent's By-Law No. 1 which sets out the duties of the Respondent as:

   (a) Controlling, managing and administering the Common Elements and assets of the corporation

   (e) Repairing and restoring the common elements

   (k) Effecting compliance with the Act and the governing documents.

[19] The Applicant submits that the Tribunal has jurisdiction over a noise related issue caused by the common elements that is causing an unreasonable nuisance, annoyance or disruption. He also states the Tribunal has jurisdiction over a noise that violates the Act and/or the Respondent's governing documents. The Applicant says that his reliance on some of the above sections (including s. 89(1) of the Act) is simply to show that YRSCC 1179 is responsible for the common elements.

[20] The Applicant relied on several court cases, issued prior to the Tribunal gaining jurisdiction over nuisances and noise disruptions in 2022.[13] These cases considered oppression remedies and the obligation of a corporation to enforce its governing documents. The Applicant submits that these cases illustrate the types of remedies the Tribunal could consider in this case.

Respondent's Submissions

[21] The Respondent submits that the Applicant's case falls outside the jurisdiction of the Tribunal because it does not come within s. 117(2) of the Act.

[22] The Respondent submits that the Applicant's case is about the maintenance and repair of common elements, pursuant to s. 5.2 of the Declaration, and that maintenance and repair issues are outside the jurisdiction of the Tribunal. The Respondent states that the Tribunal has held in other cases that it lacks

[13] *Zaman v Toronto Standard Condominium Corporation No. 1643*, ONSC 1262, *Wu v Peel Condominium Corporation No. 245*, 2015 ONSC 2801, and *Moran v Peel Condominium Corporation No. 485*, 2022 ONSC 6539.

jurisdiction over such maintenance and repair issues.[14]

[23] The Respondent submits, in addition, that s. 89(1) of the Act is irrelevant to this case as that section relates to repair "after damage" and there is no evidence of damage to the common elements here.

[24] The Respondent also states that the Applicant relied heavily on cases related to oppression remedies under s. 135 of the Act.[15] The Respondent argues that these cases are not relevant to this application and that the remedies discussed in those cases are outside the jurisdiction of the Tribunal.

[25] The Respondent submits that although the Tribunal has limited jurisdiction over noise and nuisance issues, it has no jurisdiction over a corporation's responsibility to maintain and repair its common elements. The Respondent relies on this Tribunal's decision in *Brady* for the proposition that there is no jurisdiction to enforce repair obligations.[16] The Respondent states that the facts in *Brady*, which dealt with noise from pipes running vertically through the floor in the condominium building, are similar to the facts in this case, which deals with noise from the mechanical room.

Analysis

[26] There are two ways that a noise complaint can fall within the jurisdiction of the Tribunal:

1. The application falls within s. 117(2) of the Act; and/or

2. The application is about a provision in the condominium's governing documents that prohibits, restricts or otherwise governs noise.[17]

[27] There is no debate that the application is about noise coming from the mechanical room that the Applicant alleges is causing a nuisance. However, just because the complaint is about noise, the issue must still fall within s. 117(2) of the Act. That section of the Act says:

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[14] See *Nadine Brady v Peel Standard Condominium Corporation No. 947,* 2023 ONCAT 8 (CanLII) (*Brady*) at para. 4 and *Zachepylenko v Toronto Standard Condominium Corporation No. 2680 et al.*, 2023 ONCAT 42 (CanLII) at para. 7

[15] *Zaman v Toronto Standard Condominium Corporation No. 1643*, ONSC 1262, *Wu v Peel Condominium Corporation No. 245*, 2015 ONSC 2801, and *Moran v Peel Condominium Corporation No. 485*, 2022 ONSC 6539.

[16] 2023 ONCAT 8 (CanLII) at para 4

[17] Section 1.(1)(d)(iii.1) and (iii.2) of Ontario Regulation 179/17 (the "Regulation")

> (2) 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, (*emphasis added*)
>
> (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.

[28] Subsection 117(2) of the Act describes controlling activities that cause noise, and further that such noise is unreasonable and a nuisance. I accept that a "person" includes a corporation.[18] The wording of the subsection that is critical is that it is intended to govern an activity. This interpretation of s. 117(2) of the Act is supported by O. Reg 179/17 (the "Regulation") where it specifically says that the Tribunal has jurisdiction over:

> Provisions that prohibit, restrict or otherwise govern the activities describes in subsection 117(2) of the Act.[19] (*emphasis added)*

[29] Therefore, the first step in jurisdictional analysis is that the application must allege that a person is carrying on an activity or permitting the carrying on of an activity. It is the activity that is at issue. This means that the subsection applies to an activity that could be prohibited or restricted in order to prevent an unreasonable noise.

[30] I find that this application does not get past this first step in the analysis because the "carrying on of an activity" in question is the required functioning of the mechanical room in YRSCC 1179's building. Here, YRSCC 1179 cannot prohibit or restrict the required functioning of the pumps and equipment in the mechanical room to prevent noise. The equipment in the mechanical room is necessary to maintain the proper functioning of the building.

[31] The evidence supports the conclusion that the issue in this case is one of maintenance or repair. The submissions from both parties show that the Applicant's complaint relates to the noise coming from the equipment and the supporting structures to the equipment in the mechanical room. The evidence from the experts shows that the proposed solutions have been to repair the various pumps and connections to prevent noise and vibration from being transmitted into the Applicant's penthouse unit. This is not for me to determine as maintenance and repair are outside my jurisdiction.

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[18] *Sievewright v Toronto Standard Condominium Corporation No. 2023,* ONCAT 68 (CanLII) at paragraph 8 (*Sievewright*).
[19] Section 1(.(1)(d)(iii.1) of the Regulation

[32] The Tribunal has previously found that building functions are not an “activity” within the meaning of s. 117(2) of the Act.

[33] In *Brady*, the Tribunal found that the noise was being caused by pipes in the building, not by an activity of an owner or the corporation.[20] The Tribunal stated that it was “not an issue of an activity created or permitted to be carried on by an owner/tenant in another unit which is addressed by…s. 117(2) of the Act.”

[34] Similarly, in *Sievewright,* the Tribunal found that the cause of the noise of the cars going over the parking garage grate was “an owner using the common elements properly for their intended purpose (in this case, driving into the garage) [and] is not engaged in a disruptive activity: it is the garage grate, not the drivers’ activity which is the source of the alleged disruptive noise”.[21]

[35] In both *Brady* and *Sievewright*, this Tribunal found that the issues were ones of maintenance and repair and not activities caught by s. 117(2) of the Act.

[36] With regard to the 500 hz sound now audible in the second bedroom, none of the experts were sure of its source. If it is the result of repairs done to the mechanical room, as Soft dB opined, then the sound falls under s. 89(1) of the Act as the damage done was during the remedial work. Again, this would be an issue of maintenance and repair of the mechanical room. What is clear to me is that there is no evidence before me that establishes that the sound is due to an activity carried out by YRSCC 1179 or an activity permitted by YRSCC 1179 and therefore it is not within the Tribunal’s jurisdiction.

[37] I find that, in this case, the Tribunal does not have jurisdiction over this application because it is not about an activity being carried out by YRSCC 1179 or an activity permitted by YRSCC 1179. If there is an unreasonable noise, then it may be an issue of maintenance and repair of the equipment and structure of the mechanical room which is not within the jurisdiction of this Tribunal.

[38] I have also reviewed the Respondent’s governing documents. There are no By-Laws or Rules that apply in this case. The Applicant has only cited those provisions that relate to the Respondent’s obligation to maintain and repair common elements.

D. COSTS

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[20] *Brady*, para. 11
[21] *Sievewright* at para. 12.

[39] I decline to order any costs for the reasons that follow.

[40] The Applicant asked for reimbursement of expert fees, compensation for additional living costs including rental fees for a different residence, abatement of condominium fees, legal costs and costs of the application.

[41] Given that I have found that the Tribunal does not have jurisdiction to hear this application, the Applicant has been unsuccessful. Therefore, under Rule 48.1 of the Tribunal's Rules of Practice, he is not entitled to reimbursement of his costs for filing the application.

[42] Under Rule 48.2, the CAT generally will not order one party to reimburse another party for legal fees or disbursements incurred in the course of the proceeding. Costs may be provided if directly related to a party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense. I do not find that the Respondent has behaved in a manner that warrants costs against it. Therefore, the Applicant is not entitled to the other costs he has claimed.

[43] The Respondent submitted that it was entitled to full indemnity of its legal fees, or in the alternative, partial indemnity of its legal fees if it was successful in the Application.

[44] Pursuant to Rule 48.2, I do not find that the Respondent is entitled to costs either. I do not find that the Applicant has behaved in a way that warrants costs against him. Therefore, the Respondent is not entitled to the costs it has claimed.

E. CONCLUSION

[45] This case is dismissed because the Tribunal does not have jurisdiction over the duties of a condominium to maintain and repair common elements. The Applicant's case does not fall within s. 117(2) of the Act because YRSCC 1179 is not carrying on or permitting the carrying on of an activity. Further, the activity does not fall within YRSCC 1179's governing documents. The issue relates to the maintenance and repair of the equipment in the mechanical room. As such, the application falls within YRSCC 1179's duty to maintain and repair the common elements which is outside the jurisdiction of the Tribunal.

[46] I understand the Applicant's frustration. No matter which expert was used, after remedial repairs had been made, there was, at a minimum, a noise in the second bedroom that exceeded acoustical standards. There may also be sounds exceeding the standard in the rest of the penthouse unit, depending on which

expert is relied upon. It would be prudent for the corporation to explore a resolution of these issues given that its own expert, Englobe, suggested that all the experts' measurement of tonality needed to be disclosed and reassessed to determine whether compliance with noise level criteria had been achieved throughout the penthouse unit. Finally, if there is a continuing noise issue that exceeds acoustical standards, then it may indicate that there is an issue of maintenance and repair that is YRSCC 1179's responsibility.

F. ORDER

[47] The Tribunal dismisses this application without costs.

Marisa Victor
Member, Condominium Authority Tribunal

Released on: June 14, 2023