

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 8, 2023

CASE: 2023-00453N

Citation: Peel Condominium Corporation No. 112 v. Uthayachandran et al., 2023 ONCAT 167

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

Member: Anne Gottlieb, Member

The Applicant,

Peel Condominium Corporation No. 112
Mohiminol Khandaker, Counsel

The Respondents,

Dilanrajh Uthayachandran and Karajubi Dilanrajh Uthayachandran
Self-Represented

Hearing: Written Online Hearing – October 4, 2023 to November 2, 2023
Videoconference – November 1, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Peel Condominium Corporation No. 112 (“PCC112”) is a 352-unit residential condominium complex. The Respondents are husband and wife and own and live in a unit of PCC112. The Respondents were each sent notices of this hearing on August 25, 2023, and September 7, 2023. They did not participate in Stage 1—Negotiation or Stage 2—Mediation of this Tribunal process. Each Respondent was sent a Notice of Default Proceeding on September 25, 2023.

[2] At my request, a member of Tribunal staff contacted the Respondents. I have been advised that Tribunal staff spoke with Kajarubi Dilanrajh Uthayachandran (“Kajarubi”) on October 20, 2023, and advised her and her husband to join the case. The Tribunal staff member offered to assist Kajarubi in accessing the online system and told her that if she and her husband did not join the case, a decision would be made in their absence and without their input or participation.

[3] On or before October 23, 2023, Kajarubi did join Stage 3—Tribunal Decision

("Stage 3") in the online platform. The Respondents were given several opportunities and were encouraged to participate in the hearing. I am satisfied that the Respondents were aware of this hearing and had access to the hearing.

- [4] PCC112 claims that the Respondents are making unreasonable noise causing a nuisance that is in violation of s.117 (2) of the *Condominium Act, 1998* ("the Act") and PCC112's governing documents and asks the Tribunal to order the Respondents to immediately and permanently cease and desist from creating unreasonable noise. PCC112 also requests an order regarding legal fees and costs related to this application.
- [5] The only evidence before me, is evidence provided by PCC112. For the reasons outlined below, I find that the Respondents have not complied with the Act and with PCC112's declaration and rules and have caused or allowed unreasonable noise that is a nuisance, annoyance and disruption to other owners and residents of the condominium corporation. I order the Respondents to come into compliance with the Act and the condominium corporation's governing documents and immediately cease and desist from making or allowing unreasonable noise causing a nuisance. I order the Respondents to pay the Tribunal filing fee of \$150. I order the Respondents to pay the legal costs of this proceeding in the amount of \$3,317.96.

B. BACKGROUND

- [6] Evidence provided indicates that in August 2022 the Respondents and their children moved into their unit, which was previously leased to tenants. Since December 2022, the condominium corporation has received many complaints of noise coming from the Respondents' unit. There is evidence of 19 incident reports, between December 2022 and October 2023. In each instance, PCC112's security staff or a superintendent of the building investigated complaints of unreasonable noise. The complaints were initiated by other unit owners at different times and relate to loud noise and noise disturbances. Upon each investigation, the noise was found to be coming from the Respondents' unit.
- [7] The incident report from December 28, 2022, relates to complaints from multiple residents (4-5 complainants) of yelling, shouting, and hooting from the balcony of the unit at 1:38 a.m. The report states that it was necessary for security to attend at least twice, at 15–20-minute intervals. The report indicates that the noise continued and could be heard in the hallway even after the second attendance by security. The incident report of December 30-31, 2022, relates to a complaint of noise at 7 p.m. of drilling, construction and jumping and another complaint at 1:30 a.m. of loud music and running coming from the Respondents' unit. The incident

report of January 3, 2023, relates to an incident after midnight of running and loud items dropped on the floor of that unit.

- [8] Management wrote to the Respondents on January 3, 2023, and referred to the incidents reported on December 28, 2022, December 30-31, 2022, and January 3, 2023. The letter asked that noise levels be kept to a minimum and quoted Article 1 paragraph 9 of the general rules of the condominium corporation which states that:

owners... shall not create or permit the continuation of any noise or nuisance...which in the opinion of the Board or manager may or does disturb the quiet enjoyment of the property by other owners and tenants.... This includes but is not limited to raised voices, noisy games, or music.

- [9] There were further incident reports, submitted as evidence and dated: January 14 and 20; February 9, 13 and 27; March 1 and 12; May 18 and 20; June 9; July 7; September 23, 25, 26 and 27, and October 13, 2023. They include complaints of children running and jumping, and children screaming at various times of the day and in the evening and night including at 6:30-10:00 p.m., at 7:45 p.m., at 9:45 p.m., at 10:30 p.m., at 10:49 p.m., and at 12 a.m. They include reports of banging on the floor, of loud noises and yelling from the unit's balcony. There was also an incident report of intoxicated yelling from the balcony and of the Respondent Dilanrajh Uthayachandran chasing security down a hallway and banging on the door of a neighbour in a threatening manner in the middle of the night.

- [10] Management again wrote to the Respondents on May 19, 2023, and listed multiple complaints captured in incident reports "regarding constant noise such as loud voices, heavy things being dropped on the floor, and children running and jumping." Management again cited Article 1 paragraph 9 of the general rules of the condominium corporation and asked that noise be kept to a minimum, so as not to disturb the quiet enjoyment of neighbours. There is no evidence of any response from the Respondents or any attempts to reduce the noise.

- [11] On June 30, 2023, management wrote to the Respondents and advised that complaints relating to noise coming from their unit were continuing and that the matter would be referred to the Condominium Authority Tribunal.

C. ISSUES & ANALYSIS

- [12] The issues to be decided in this case are summarized as follows:

1. Are the Respondents causing or permitting unreasonable noise that is a nuisance contrary to section 117 (2) of the Act or PCC112's governing documents?

2. What remedy is appropriate in this case?
3. Should costs be awarded, and if so, in what amount?

Issue No. 1- Are the Respondents causing or permitting unreasonable noise that is a nuisance contrary to section 117 (2) of the Act or PCC 112's governing documents?

- [13] Section 117 (2) of the Act prohibits activity that results in an unreasonable noise that is a nuisance, annoyance, or disruption in a condominium unit or the common elements of a condominium. While the Act does not define the term "nuisance," previous Tribunal decisions refer to established case law, that have found that to support a claim of nuisance, the interference must be substantial and serious.
- [14] The evidence submitted by PCC112 demonstrates that the frequency and duration of the incidents' involving noise is escalating. Of particular concern are the reports of evening and nighttime noise. Management provided testimony indicating that the Respondents' unit is an 'end unit' and that the noise complained of is loud and comes through the hall and often starts from the balcony. A neighbour provided testimony that it is difficult to obtain six hours of uninterrupted sleep, because of the excessive banging of items on the floor or walls and the slamming of doors, loud music, and noise from the Respondents' unit. I am satisfied of the credibility of the witness and her description of her inability to sleep because of the noise caused by the Respondents. I have evidence before me that the Respondents have been asked to be respectful of their neighbours and to keep noise to a reasonable level.
- [15] I find that the noise complained of is a continued pattern of noise and disruption to the quiet enjoyment of other owners and residents in the building. I find the noise is both substantial and unreasonable. The noise is of a frequency and duration as to create a nuisance, on each occasion investigated by security. The noise is a result of the conduct of the Respondents, which continues despite multiple attendances by security to the unit, in response to complaints. The unreasonable noise rises to the level of nuisance and continues, despite letters and requests written from management requiring that the noise stop. I find that the Respondents are in violation of s. 117(2) of the Act and the condominium's governing documents as outlined in the management letters sent to the Respondents.

Issue No. 2- What remedy is appropriate in this case?

- [16] PCC112 submits that section 119(1) of the Act requires all owners and occupants

of a unit to comply with the Act and with the condominium's declaration, by-laws, and rules. Section 119(2) further imposes an obligation upon unit owners to take all reasonable steps to ensure their occupants, guests and invitees comply with the same.

[17] PCC112 also states that pursuant to Article IV (d) of its declaration, the “owner of each unit shall comply and shall require all residents and visitors to his/her unit to comply with the Act, this declaration, and the by-laws, and the rules and regulations passed pursuant thereto”.

[18] PCC112 requests an order that the Respondents cease and desist from making unreasonable noise that is considered a nuisance. I have found that the Respondents are in violation of provisions of the Act and the condominium corporation’s governing documents. The Respondents are to cease and desist from creating or allowing the creation of noise complained of in this case. I direct the Respondents to bring themselves into immediate compliance, by ordering them to cease and desist from creating or allowing the creation of unreasonable noise within their unit or in the common elements including the balcony, which constitutes a nuisance that is interfering with the ordinary use and enjoyment of other unit owners and residents. Such prohibited noise includes but is not limited to yelling, shouting, jumping, running, banging, and slamming of doors and playing of loud music.

Issue No. 3 - Should costs be awarded, and if so, in what amount?

[19] PCC112 asks that the Respondents fully indemnify the condominium corporation for the costs in this matter, in the amount of \$5,529.94. The bill of costs identifies 13.05 hours of work at the lawyer’s rate of \$375, plus HST. In the alternative, they have submitted calculations for substantial indemnity costs and partial indemnity costs with a respective reduction of 20% and 40% in fees plus HST. During the videoconference portion of the hearing, Counsel for PCC112 elaborated on the breakdown of the hours and steps taken regarding this tribunal hearing. PCC112 also asks for filing fees paid to the Tribunal.

[20] This hearing was a hybrid hearing, in that some of the hearing was conducted in writing and there was also a videoconference portion of the hearing. I find the number of hours indicated to be reasonable, given the necessity to prepare witnesses and submissions and opening remarks and exchanges with this Tribunal Member.

[21] PCC112 maintains that pursuant to Article X of its Declaration:

“each owner shall indemnify and save harmless the corporation from and against any loss, costs, damage, injury or liability whatsoever which the corporation may suffer or incur resulting from or caused by an act or omission of such owner, his/her family or any member thereof, any other resident of his/her unit or any guests, invitees or licensees of such owner or resident to or with respect to the common elements and/or all other units.”

[22] PCC112 further refers me to Article I – Section 20 Applicant's updated/new Rules which provide:

any loss, cost or damages incurred by the Corporation by reason of a breach of any rules or regulations in force from time to time by any owner, his family, guests, employees, agents or occupants of his unit shall be borne by such owner and may be recovered by the Corporation against such owner.

[23] PCC112 tried to resolve the issues in dispute prior to filing this application. There is no evidence of any efforts from the Respondents to reduce the noise they caused, which I have found to rise to the level of nuisance. It is apparent that PCC112 saw no alternative but to have this matter addressed through Tribunal proceedings. Even after filing this case, there seems to have been an escalation in the frequency of the noise and the noise complaints.

[24] I must consider the Tribunal's Rule and particularly Rules 48.2 which states:

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.

[25] I have consulted the Tribunal's Practice Direction: Approach to Ordering Costs, issued January 1, 2022, where the Tribunal outlines some of the factors to be considered in deciding whether to award costs under Rule 48. These include the conduct of a party, and whether the parties attempted to resolve the issues before filing the case. The idea of proportionality is also a factor to consider in determining the appropriate amount of costs to be awarded.

[26] I reject the notion that this was an exceptional case in which costs should be awarded, as in the case of *Peel Condominium Corporation No. 96 v. Psofimis*, 2021 ONCAT 48, cited by PCC112. I have taken into account the lack of participation by the Respondents. The case was shorter in duration and was straightforward, as a result. The lack of participation by the Respondents however, points to a lack of regard for the condominium's declaration and rules and the Act.

I recognize that innocent unit owners should not bear costs incurred in relation to someone's unreasonable conduct. This submission was put forth by PCC112 when it cited the case of *Toronto Standard Condominium Corporation No. 2136 v. Longhurst et al.*, 2023 ONCAT 30. The case of *Toronto Standard Condominium Corporation No. 2630 v. Fernandes*, 2022 ONCAT 94 was also cited as a basis for awarding partial indemnity of legal fees.

[27] While I find the bill of costs to be reasonable, given the Tribunal's Rules and the Practice Direction, an award of costs at full indemnity is not warranted. I conclude that the amount of \$3,317.96 (inclusive of HST), which is 60% of the total bill, is appropriate for the Respondents to pay to PCC112.

[28] PCC112 has been successful before this Tribunal and is entitled to the filing fees paid to this Tribunal. I conclude that the Respondents are liable for the \$150 fee the condominium corporation paid.

[29] Section 1.45 of The Act provides that a costs award is payable within 30 days after the order is made unless the order specifies a different time limit. If the amount is not paid within the applicable time frame, it can be added to the common expenses payable on account of the unit. This gives the condominium corporation the ability to collect in a manner that is both efficient and effective. I am informed that the Respondents are selling their unit, and that the sale could take place within days of the issuance of this order. I therefore order that the costs award is payable as of the date on which this decision and order are issued.

D. ORDER

[30] The Tribunal Orders that:

1. The Respondents shall immediately comply with s. 117(2) of the Act and provisions in PCC112's declaration and rules regarding noise, and for specificity, the Respondents shall immediately cease and desist from creating or allowing loud noises caused by yelling, shouting, jumping, banging, slamming of doors, and playing loud music.
 2. Upon the issuance of this Order, the Respondents, Dilanrajh Uthayachandran and Karajubi Dilanrajh Uthayachandran shall pay Tribunal fees of \$150 and legal costs of \$3,317.96 to Peel Condominium Corporation No. 112.
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Anne Gottlieb
Member, Condominium Authority Tribunal

Released on: November 8, 2023