

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 3, 2023

CASE: 2023-00195N

Citation: Reany v. Waterloo Standard Condominium Corporation No. 670, 2023 ONCAT 163

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

Member: Nicole Aylwin, Member

The Applicant,

Joel Reany
Self-Represented

The Respondent,

Waterloo Standard Condominium Corporation No. 670
Represented by Megan Alexander, Paralegal

Hearing: Written Online Hearing – July 7, 2023 to October 17, 2023

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, Joel Reany is the owner of a unit in the Respondent, Waterloo Standard Condominium Corporation No. 670 (“WSCC 670”). Mr. Reany’s unit is on the second floor of the condominium, which is the same floor as WSCC 670’s gym. Mr. Reany alleges that the use of free weights; in particular, the dropping of free weights onto the floor, in WSCC 670’s gym is causing unreasonable noise and vibration that is a nuisance and interferes with the quiet enjoyment of his unit.
- [2] WSCC 670 takes two positions in this matter. The first is that this application should be dismissed because it falls outside the Tribunal’s jurisdiction. WSCC 670 claims this is a dispute over repair and maintenance, not an issue of noise and nuisance. Second, WSCC 670 argues that if the application is found to be within the Tribunal’s power to decide, that the noise experienced by Mr. Reany does not rise to the level of a nuisance but is within a normal range of noise that one should expect having purchased a unit on the same floor as a condominium gym. They further submit that they have undertaken all reasonable steps to address Mr. Reany’s complaints.

- [3] For the reasons that follow, I find that this application is within the jurisdiction of the Tribunal to decide, and I find that Mr. Reany has proven, on a balance of probabilities, that the noise and vibration he experiences in his unit rises to the level of a nuisance. I further find that, although it was with significant delay, WSCC 670 has now either taken or planned to take reasonable steps to address the nuisance. However, to ensure that the planned steps are completed and adequately address the issue, I order several remedies including the completion of an acoustical test in Mr. Reany's unit once the planned installation of the new gym floors is complete.
- [4] Finally, while I have reviewed all the evidence provided to me, I refer only to the evidence and arguments that are directly related to the issues I must decide. I note that Mr. Reany, who is self-represented, did make some reference in his submissions to confidential discussions the parties had in Stage 2 – Mediation and he was wrong to do so. However, in my assessment, this was most likely the result of lack of familiarity with the Tribunal's rules and processes and I did not consider this evidence when making the decision. Only evidence that was properly before me in this hearing was considered.

B. ISSUES & ANALYSIS

Issue No. 1: Does the Tribunal have the authority to hear this dispute?

- [5] According to Mr. Reany, this case is about unreasonable noise and vibration that is a nuisance under s. 117 (2) of the *Condominium Act, 1998* (the "Act"). He submits that when owners and occupants drop the free weights located in the gym, it causes noise that is beyond "normal condo noise" but noise and vibration that is unreasonable to the level of nuisance.
- [6] Early in the proceeding, WSCC 670 challenged Mr. Reany's articulation of the issues in this case. In its opening statement, WSCC 670 argued that the noise and vibration Mr. Reany was complaining about was the result of deficient gym flooring that needs repair, thus making this case one about the maintenance and repair of common elements, which is outside of the jurisdiction of the Tribunal.
- [7] I asked both parties for submissions on the question of jurisdiction, since under Rule 19.1 of the Tribunal's Rules of Practice, the Tribunal can dismiss an application or case at any time where a case is about issues that the Tribunal has no legal power to hear or decide.
- [8] After considering the submissions by both parties on the issue, I found that WSCC 670 had not established that Mr. Reany's case related to maintenance and repair

of the common elements such that it was clearly outside of the jurisdiction of the Tribunal.¹ I decided to reserve final judgment on this issue until after I had seen all the evidence.

- [9] Having now heard all the evidence and submissions, I find that the issues in this case are within the jurisdiction of the Tribunal to hear and decide.
- [10] Section 1 (1) (c.1) of Ontario Regulation 179/17 (“O. Reg 179/17”) establishes the Tribunal’s jurisdiction over disputes that include noise and vibration pursuant to s. 117(2) of the Act. Section 117 (2) of the Act states:
- (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,
- (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; or
- (b) any other prescribed nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation. 2015, c. 28, Sched. 1, s. 102.
- [11] The “other prescribed” nuisances are defined in s. 26 of Ontario Regulation 48/01 (“O. Reg 48/01”) and include vibration.
- [12] For the issues of this case to be captured by this section of the Act, there must be an activity, either carried on or permitted to be carried on, that results in the creation of or continuation of unreasonable noise or vibration that is a nuisance, annoyance or disruption.
- [13] WSCC 670’s position that this is a maintenance and repair issue primarily rests on a HGC Engineering report from an acoustical engineer. In this report, it is recommended that tiles be installed above the existing flooring in the gym to reduce the transmission of sound and vibration to nearby units. WSCC 670 submits that the fact that the gym floor may need to be altered to prevent or reduce noise and vibration means the floor needs to be ‘repaired’. Thus, they claim this is a maintenance and repair issue.
- [14] I am not satisfied by WSCC 670’s argument that because a ‘repair’ of the floor in the gym may reduce the transmission of noise, that this is a case about

¹ Reany v. Waterloo Standard Condominium Corporation No. 670, 2023 ONCAT 121

maintenance and repair. Just because a repair may be a remedy requested or required, does not automatically remove a case from the jurisdiction of the Tribunal.

- [15] WSCC 670 referred me to several cases in its original submissions on jurisdiction; the facts of which I found, at that time, to be significantly different than those in this case². WSCC 670 did not refer me to all these cases again in its full submissions, although having now seen all the facts my conclusion remains the same. However, WSCC 670 did renew its reference to *Sieviewright v. Toronto Standard Condominium Corporation No. 1793 et al., 2023 ONCAT 68* (“Sieviewright”) so I will address this decision specifically.
- [16] In *Sieviewright*, the Tribunal dismissed the application because it found that the noise at issue, which was a grate in the parking garage floor that made noise when owners drove over it, was the result of owners using the common elements properly for its intended purpose, i.e., driving in and out of the garage. Thus, the Tribunal concluded it was the broken grate not the driver’s activity which was the source of the noise. WSCC 670 submits that this case is similar insofar as the users of the gym are simply using the weights for their intended purpose and are not engaged in disruptive activity.
- [17] Unlike in *Seivewright*, where the grate was the actual source of the noise, in this case it is the activity of the gym users dropping weights that is the source of the noise. Without the dropping of the weights in the gym there would be no noise. This is affirmed by Mr. Reany’s submission that when the weights were removed from the gym by condominium management the noise and vibration ceased. Additionally, the HGC Engineering report submitted by WSCC 670 describes the method that was used to test the noise levels in Mr. Reany’s unit. To test the noise level, the engineer simulated the activity of dropping a 30 lbs weight on the floor. Clearly it is the activity of dropping the weights that is causing the noise. The current flooring is merely allowing the transmission of the noise and vibration. The floor, unlike the grate, is not the cause of noise. And dropping weights is an activity that can be prohibited or restricted.
- [18] In this case, the dropping of weights is an activity causing noise and vibration. Whether the noise and vibration being caused by the dropping of weights rises to the level of a nuisance as per s. 117(2) of the Act, is an issue to be decided. However, for the purposes of determining if the Tribunal has jurisdiction, I find it

² Reany v. Waterloo Standard Condominium Corporation No. 670, 2023 ONCAT 121, para 11-17.

does.

Issue No. 2: Does the noise and vibration experienced by Mr. Reany constitute a nuisance, annoyance or disruption as per section 117 (2) of the Act?

- [19] Both parties agree that the dropping of weights in the fitness center generates noise and vibration. Where they disagree is whether the noise and vibration rise to the level that would constitute it as a nuisance, annoyance or disruption under s. 117(2) of the Act.
- [20] In determining whether a noise or vibration constitute a nuisance, the Tribunal has established that to support a claim of nuisance the interference caused must be substantial and unreasonable; a trivial interference will not suffice to support such a claim. To determine this, the frequency of the interference, its duration, and the times it occurs, and the impact on the unit owner(s)/occupant(s) are among the factors examined.
- [21] In this case, WSCC 670, asserts that there is no evidence to suggest that the noise is frequent or lasting for extended periods of time. I disagree. At the time of Mr. Reany's original complaint, the gym hours were 7am – 11pm; they are now 8:30am-10:30pm, meaning that even with adjusted gym hours, the gym is still available for use for 14 hours each day and well into the evening hours. Mr. Reany submits that because gym users use the fitness center all day, the noise and vibration are irregular but frequent because weights are dropped throughout the day as users work through their routines. He notes that as one gym user finishes their routine another arrives, etc. Given WSCC 670's evidence that the gym is a "popular common element" as are the weights (which, according to the condominium manager, when removed resulted in "many complaints from owners/occupants of the property...as this is a core aspect of the fitness center"), it is reasonable to conclude that while the noise from the weights may not be continuous, it is frequent throughout the day and into the evening.
- [22] Additionally, the time at which the noise and vibrations are heard/and felt matters. Mr. Reany submits that he has been woken up on several occasions in the middle of the night and early morning hours (e.g., 2 a.m., 5 a.m.) by occupants/residents using the gym outside of its posted hours. At one point, Mr. Reany sent an email complaint to the condominium manager at 1:20 a.m. complaining of the noise occurring at that hour. The evidence before me confirms that due to a programming issue with the FOB system in the building users were able to access the gym outside of the posted gym hours and I find Mr. Reany's evidence credible that gym users were dropping weights causing noise and vibrations at hours that would be reasonably considered to be quiet hours.

- [23] Moreover, while the noise and vibration experienced by Mr. Reany may not be continual, a loud unexpected banging noise that happens frequently but at irregular intervals, particularly during the hours of when one might be sleeping or attempting to fall asleep can be disruptive.
- [24] Finally, WSCC 670 has also argued that the fitness center has set hours and noise is to be expected during those hours. While it may be reasonable that some noise and vibration from the gym is to be expected during normal gym hours, the evidence does not support the proposition that the noise and vibrations Mr. Reany is experiencing is within levels that would be considered normal or expected. Mr. Reany describes the noise from the weight drops as loud enough to wake him up from sleep and submits that the vibrations from the weight drops shake the windows, doors, and floors of the unit. Mr. Reany's experience is supported by the conclusions of the acoustical engineer in their report to WSCC 670.
- [25] In April of this year, three years after Mr. Reany's original complaint in November of 2020, WSCC 670 commissioned an acoustical engineer to conduct a sound transmission test to evaluate the extent of the noise transmission from the dropping of weights to the surrounding units (two units were tested: Mr. Reany's unit and another unit close by). That report found that there was "above average noise transmission" and the sound levels in each suite were "well above the target criteria and are considered excessive".
- [26] To qualify as a nuisance, a noise does not have to be unrelenting, rather it must be found to be non-trivial and rise to a level that adversely impacts a owner's ability to use and enjoy their property. Based on the above, I am persuaded, that the noise and vibration experienced by Mr. Reany from the dropping of weights meets the criteria for establishing it as a nuisance. It is considered by an engineer to be excessive; it takes place frequently throughout the day and has taken place during overnight hours when relative quiet is expected. I find the noise and vibration has interfered with Mr. Reany's ability to enjoy his unit.

Issue No. 3: What remedy, if any, should the Tribunal order?

- [27] It is WSCC 670 position that it has taken all reasonable steps to ensure that Mr. Reany's complaints regarding the noise and vibration from the gym were addressed in a "prompt and reasonable manner" and that it has fulfilled its responsibilities under s. 17(3) of the Act.

- [28] Under s. 17(3) of the Act:

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.

- [29] Mr. Reany's original complaint was in 2020, when Mr. Reany sent an email to condominium management raising his concerns. However, no meaningful investigative action was taken by WSCC 670 until April of 2023. And, while some of the delay can be excused due to COVID 19 and the closure of the gym, it is clear from the evidence that the issue was revived and of great concern to Mr. Reany as soon as the gym was reopened. Yet, despite Mr. Reany's invitation to management to come to his unit to hear the noise and vibration in April 2022, there is no evidence that anyone from management or the board took him up on this offer or did any independent investigation of his complaint until early 2023 (after Mr. Reany applied to the Tribunal) when WSCC 670 contracted an acoustical engineer to assess the level of the noise and vibration complained of by Mr. Reany.
- [30] And, while the evidence does demonstrate that at various times throughout 2022, WSCC 670 acknowledged Mr. Reany's complaints and tasked the condominium manager with looking into solutions, very few solutions appear to have been undertaken in a timely manner, raising doubt about how seriously WSCC 670 took Mr. Reany's concerns until he filed an application with this Tribunal. For example, testimony from WSCC 670's manager indicates that although WSCC 670 was aware as early as April 2022 of an issue with the FOB system that allowed key holders to access to the gym after hours this issue was not fixed until August 9, 2023, well over one year later. It was also not until July of 2023 that WSCC 670 posted signs in the fitness center and sent a message through the condominium communication portal advising users not to drop the weights. This is a minimal cost action that could have easily been done much earlier.
- [31] There is also evidence that in December of 2022, WSCC 670 did remove the weights from the gym as management investigated soundproofing options. However, the evidence also shows that these were placed back in the gym one month later (due to gym user complaints) with no material changes having been made to help reduce the noise levels.
- [32] The initial lack of investigation into Mr. Reany's complaints and the relative lag in taking concrete steps to implement possible solutions does suggest that despite the acknowledgement of Mr. Reany's complaints, WSCC 670 did not take Mr. Reany's complaints seriously until he applied to the Tribunal.
- [33] Nevertheless, WSCC 670 has now taken concrete steps to investigate and

respond to Mr. Reany's concerns and reduce the noise and vibration. These steps include:

1. Adjusting the lock/FOB system that was allowing access to the gym after hours. The system has now been fixed to prevent access once the gym closes.
2. The approval of a security guard to patrol the fitness centre between with hours of 10pm and 6am to ensure the gym is not being utilized after hours.
3. The approval of a contractor to install the flooring recommended in the engineer's report and the removal of the weights in the gym until the flooring is completed.
4. The posting of signage in the gym that advises users not to drop the weights.
5. The reduction of gym hours (now 8:30 a.m. - 10:30 p.m.) to limit noise during the early morning and evening hours.
6. The removal of the gym weights – as a temporary measure – as the board explored noise reduction options.

[34] These steps are encouraging and are in line with some of the remedies that Mr. Reany requested, and this Tribunal might have considered ordering. However, based on the evidence before me, the intervention likely to make the largest impact is the installation of the flooring recommended by the HGC Acoustical engineer, who indicated that installing the recommended floor throughout the whole of the gym would be likely to bring the sound levels within the target criteria.

[35] According to WSCC 670 a contractor has been approved to install the floor and a date set for the week of November 23, 2023, for installation. Thus, to ensure this item is executed and effective, I will order that WSCC 670 notify Mr. Reany in writing when the gym floor has been replaced and/or if the date of installation changes.

[36] Once the floor is replaced, WSCC 670 will be ordered at its expense, to have the same acoustical engineers who did the original testing, conduct another sound transmission test to ensure that the noise and vibration in Mr. Reany's unit are within the target criteria. WSCC 670 will be required to provide a copy of this report to Mr. Reany. This will provide both parties with an objective measure of how the installation of the flooring has impacted the noise and vibration and ensure that the flooring has produced the intended result.

[37] Until the noise and vibration are within the target criteria as defined by the acoustical engineer, the free weights should not be placed back in the gym.

[38] Finally, no costs have been requested and none are awarded.

C. ORDER

[39] The Tribunal Orders that:

1. WSCC 670 notify Mr. Reany in writing when the installation of the new gym floor is complete and/or if the date of installation changes from that provided in this hearing.
2. After the installation of the new gym floor is complete, WSCC 670 conduct, at its own expense, another sound transmission test. This test should be the same test originally conducted by HGC Engineering as per its May 15, 2023, report, and must be conducted by the same engineering firm that did the original testing.
3. WSCC 670 will provide a copy of the completed report to Mr. Reany with 14 days of receiving the report.
4. Until the noise and vibration are within the target criteria as defined by the acoustical engineer in the May 15, 2023, report (35 dBA), the free weights should not be placed back in the gym.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: November 3, 2023