

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: December 20, 2022

CASE: 2022-00361SA

Citation: Toronto Standard Condominium Corporation No. 1978 v. Hackman, 2022 ONCAT 143

Order under section 1.47 of the *Condominium Act, 1998*.

Member: Brian Cook, Member

The Applicant,

Toronto Standard Condominium Corporation No. 1978
Represented by Natalia Polis, Counsel

The Respondent,

Cody Hackman
Represented by Richard MacGregor, Counsel

Hearing: Written Online Hearing – June 8, 2022 to November 28, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] This case started when Toronto Standard Condominium Corporation No. 1978 (“TSCC 1978”) filed an application under section 1.47 of the Condominium Act 1998, S.O. 1998, c. 19 (“the Act”), alleging that Cody Hackman contravened a settlement agreement between Mr. Hackman and TSCC 1978. The settlement agreement resolved an earlier application filed with the tribunal. It required Mr. Hackman to comply with the condominium declaration, by-laws and rules and ensure that any guests or visitors also comply. Specifically, Mr. Hackman agreed to:

cease and desist from creating or permitting the creation of any excessive noise or nuisance which, in the opinion of the TSCC 1978’s board (the “Board”), management or its service providers, including security/concierge, acting reasonably, may or will disturb the comfort and quiet enjoyment of other residents, owners or service providers of TSCC 1978.

[2] TSCC 1978 alleges that Mr. Hackman has continued to create or permit excessive noise and that he has contravened the settlement agreement.

- [3] Mr. Hackman does not agree that excessive noise has emanated from his unit. He alleges that the noises complained of are only those related to ordinary activities of living in a condominium, including having social gatherings and playing music at volumes that should not reasonably impact others.
- [4] Mr. Hackman also submits that if others are bothered by his activities, the problem is insufficient sound insulation in the walls and ceiling of his unit. In the early stages of this current application, Mr. Hackman indicated that he wished to file an application against TSCC 1978 about sounds that he experiences in his unit. He alleges that he regularly hears noise related to ordinary activities of living coming from his neighbours. His position is that since he can hear this noise in his unit, the sound insulation is inadequate and that this explains any complaints about noise coming from his unit. Mr. Hackman seeks an order directing TSCC 1978 to investigate these complaints. In addition, he alleges that complaints of odours he experienced were not investigated.
- [5] Since these allegations are, at least in part, offered as a defence to the contravention of settlement allegation, I determined that it would be appropriate to combine these issues into the current application rather than requiring Mr. Hackman to file a separate application. Both parties agreed to this approach.

B. BACKGROUND

- [6] TSCC 1978 is an old building, originally constructed as a factory in 1912. It was converted to a condominium in 2006. The building is advertised as a boutique “hard loft”. There are 218 units. Mr. Hackman purchased his unit in December 2021. The complaints of noise coming from his unit started shortly after the purchase. Mr. Hackman owns other properties and stays at the unit in TSCC 1978 about two days a week. His evidence is that he has guests two to four times a month on average. These social gatherings usually happen late at night, typically between 11:00 p.m. and 6:00 a.m.

C. PROCEDURAL ISSUES

Mediation/adjudication

At an early stage in the proceeding, I suggested that the parties might want to try mediation/adjudication to see if there was a basis for resolving the issues in dispute through a settlement mediated by me on the understanding that the adjudication would continue if a settlement was not reached. The parties agreed to try this but, after some preliminary discussion, it became clear that settlement was not likely to happen and the adjudication/mediation process was closed.

The settlement discussions took place in a topic within the Tribunal’s on-line dispute resolution process created for that purpose. I did not consider anything communicated within that topic for the purpose of the hearing or this decision and it will not form part of the record in this case.

Records request

- [7] In the course of the hearing of this matter, Mr. Hackman submitted a request for records. The Board responded and indicated that Mr. Hackman was entitled to the records he had requested with two exceptions. The first was a request for all emails between management, board members and other unit owners concerning his unit. The second was a request for all email complaints about noise and nuisances in the building.
- [8] To clarify, I have not considered this request for records or the board's response in this decision.

D. ISSUES

- [9] The issues in this case are as follows:
1. Has Mr. Hackman contravened the settlement agreement by causing or allowing excessive noise that has disturbed the comfort and quiet enjoyment of others and is the board's conclusion that Mr. Hackman has allowed excessive noise that has disturbed the comfort and quiet enjoyment of others reasonable?
 2. If so, what is the appropriate remedy?
 3. Has Mr. Hackman experienced noise or odours coming from outside his unit that are unreasonable?
 4. If so, what is the appropriate remedy?
- [10] For the reasons that follow, I find that Mr. Hackman has contravened the settlement agreement and that the board has a duty to investigate Mr. Hackman's complaints.

E. ANALYSIS

No objective data

- [11] Neither party has provided any objective data to support their allegations. Neither party has attempted to quantify the noises at issue, for example, measurement of decibel levels. Both parties did file video recorded on phones which are intended to reproduce the noise being experienced. It is not possible to give any weight to these recordings. The audio quality is not very good and even if it was, a cell phone recording provides no information about the level of the recording or where the sounds are coming from.
- [12] During this proceeding, Mr. Hackman has asked TSCC 1978 to provide copies of any engineering reports that have been generated about noise and sound issues in the building. TSCC 1978 asserts that there have not been any such reports. Mr. Hackman questions this but has not offered any evidence to show that there are

such reports. I accept the evidence of TSCC 1978 that there have been no engineering reports generated about sound or noise issues in the building.

- [13] Objective evidence of noise levels can be important, and a failure to provide such evidence can lead to a finding that there is insufficient evidence to support a claim of unreasonable noise (see, for example, *Delia v. Ranches et al.*, 2022 ONCAT 127). However, objective evidence can be expensive to obtain and may or may not be helpful. In this case, the noise that is complained of is not constant. The complaints about noise coming from Mr. Hackman's unit are about noise that happens periodically and unpredictably and mostly in the middle of the night. These circumstances would make it difficult to arrange for noise level measurement. Mr. Hackman's complaint is not so much that the sounds he hears are loud (with the exception of alleged stomping on the floor above him), but that it is unreasonable that he hears sounds from activities that should not be heard if the insulation was better.
- [14] As discussed in more detail below, I find that TSCC 1978 has produced sufficient evidence to establish that Mr. Hackman has contravened the settlement and Mr. Hackman has provided sufficient evidence to justify his request that TSCC 1978 investigate his complaints.

The settlement agreement

- [15] The settlement agreement was made in an earlier application filed by TSCC 1978 ("the first application"). The first application alleged that noise emanating from Mr. Hackman's unit was unreasonable and interfering with the rights of other residents. The settlement was reached in Stage 1 of the Tribunal's process. Stage 1 is intended to allow the parties to explore a negotiated resolution of the issues between themselves and without any involvement from a Tribunal member. A settlement reached in Stage 1 is a settlement reached between the parties to a proceeding before the Tribunal and is therefore subject to the provisions of section 1.47 of the Act. Under that section, a party who believes that another party to the settlement has contravened the settlement may apply to the Tribunal. If the Tribunal determines that a contravention has occurred, the Tribunal "may make an order that it considers appropriate to remedy the contravention".

Duress

- [16] There is an issue in this case about whether Mr. Hackman agreed to the settlement agreement under duress. I raised this issue in questions to Mr. Hackman because of comments made in his witness statement. Counsel for TSCC 1978 objected to my question and asked that her objection be noted.
- [17] As stated by the Ontario Court of Appeal in *S.A. v. A.A.*, 2017 ONCA 243, a case referred to by both counsel, "duress is one basis upon which an otherwise valid contract can be rendered unenforceable". This is the reason for my question. The Court discussed the test for duress and noted that it is high, requiring evidence

that the person agreed against their will, in the face of “coercive acts by the party exerting the pressure” (paragraph 28). *Black’s Law Dictionary* (6th ed.) offers the following definition of duress:

Any unlawful threat or coercion used by a person to induce another to act (or to refrain from acting) in a manner he or she otherwise would not (or would). Subjecting person to improper pressure which overcomes his will and coerces him to comply with a demand to which he would not yield if acting as free agent.

[18] Mr. Hackman submits that he agreed to the settlement under duress and that the settlement agreement should be set aside on that basis. His reasons are that he was not represented by counsel, and he was worried that he might be evicted from his unit if he did not agree to the settlement because he was experiencing intense pressure from the board. Mr. Hackman further submits that he mistakenly understood that the lawyer representing TSCC 1978 was acting as a neutral mediator who was looking out for his interests. He came to this conclusion because the settlement agreement required him to pay TSCC 1978’s legal costs. He felt that since he was paying for her legal services, she was in some way working for him.

[19] I am satisfied that Mr. Hackman was not under duress. He is clearly a sophisticated person with the resources to obtain independent legal advice if he had any concerns. While there is evidence of heightened emotion on the part of all the parties, there is no evidence of any coercion on the part of TSCC 1978. I do not accept that the fact that the agreement required him to pay the corporation’s legal costs in the context of an application to this Tribunal naming him as respondent could reasonably cause him to believe that he had retained the lawyer or that the lawyer was working for him. In his testimony, he agreed that he understood that the lawyer was retained by TSCC 1978. It is also relevant that apart from agreeing to pay legal costs, the only thing that the agreement obliged Mr. Hackman to do going forward was to comply with the declaration and rules, something all unit owners are obliged to do.

Provisions of the settlement agreement

[20] The first part of the agreement sets out the allegations and remedies identified by TSCC 1978 in the first application and seems to have been copied from the application as filed. I take this as background to the settlement. The fact that the allegations are set out in the agreement does not mean that Mr. Hackman conceded that the allegations were true.

[21] The agreement does include the following under the heading “Agreement”:

Mr. Hackman concedes that he has, on occasion, caused excessive noise, including hosting parties in his unit in the late evenings and early mornings, which have caused excessive noise and have disturbed the comfort and quiet enjoyment of other residents.

- [22] I find that this is part of the agreement and something that Mr. Hackman agreed was a fact at the time of the settlement. The fact that this is part of the agreement means that Mr. Hackman cannot now contend, as he has suggested in submissions, that he has never hosted parties which caused excessive noise or disturbed the comfort and quiet enjoyment of other residents in the period before the settlement agreement.
- [23] Mr. Hackman also agreed to pay \$1,778.50 plus HST for the corporation's legal costs for the period before the first application was filed. There is no dispute that he made that payment.
- [24] Apart from the concession about excessive noise and the agreement to pay costs, the agreement obliges Mr. Hackman to comply with the Act, and the declaration and condominium rules.
- [25] Since a unit owner is required to comply with the Act, the declaration and rules, the question of whether Mr. Hackman has contravened the settlement is no different than the question of whether he has complied with these provisions.
- [26] The agreement obliges TSCC 1978 to "investigate any and all future noise complaints issued against Mr. Hackman and inform Mr. Hackman of same before commencing any further proceedings against Mr. Hackman." In submissions, Mr. Hackman suggests that TSCC 1978 contravened that provision because it filed this application without informing him. However, I note that counsel for TSCC 1978 did advise Mr. Hackman that the corporation intended to file the application before it was filed. The complaints about noise coming from his unit were investigated by security staff. In most instances, security confirmed that there was noise coming from the unit although on two occasions, they indicated there was not unreasonable noise at the time they attended the unit. Since the agreement did not stipulate the nature of any investigation to be done, I find that the fact that complaints were investigated by security means that TSCC 1978 did not breach the settlement.

Relevant provisions of the declaration and rules

- [27] Section 20(g) of Part 5 of the declaration provides as follows:

Without limiting the generality of what may otherwise be contained herein, in the event the board determines, in its sole discretion, acting reasonably, that any noise, odour or offensive action is being transmitted to another unit and that such noise, odour or offensive action is an annoyance and/or a nuisance and/or disruptive (regardless of whether that unit is adjacent to or wherever situated in relation to the offending unit), then the owner of such unit shall at his/her own expense take such steps as shall be necessary to abate such noise, odour or offensive action to the satisfaction of the board. In the event the owner of such unit fails to abate the noise, odour or offensive action, 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, odour or offensive action, which expenses are to include reasonable solicitor's fees on a solicitor and his/her own client basis which shall be deemed to be additional contributions to common expenses and recoverable as such.

- [28] Rule C.1. of the condominium rules includes similar language and expands the scope of unreasonable noise to include transmission from one unit to another or from one balcony, patio, or terrace to another or to the common elements.

The evidence of TSCC 1978

- [29] The evidence from TSCC 1978 consists mostly of a witness statement from Mr. Gagliano, the president of the board, with attachments and a statement from one of Mr. Hackman's neighbours.
- [30] Much of that evidence concerns issues and complaints from the time before the settlement agreement was entered into. I have considered that evidence as background. As noted earlier, in the agreement, Mr. Hackman conceded that he had in the past caused excessive noise, including hosting parties in his unit in the late evenings and early mornings, which have caused excessive noise and have disturbed the comfort and quiet enjoyment of other residents. However, evidence about things that happened before the settlement agreement is not direct evidence about whether Mr. Hackman has caused unreasonable noise since the agreement was entered into.
- [31] The agreement was entered into on March 31, 2022. According to Mr. Gagliano's affidavit, there were noise complaints on nine occasions after that date. Most of these were verified by security. Most of the complaints were made by the owner of a neighbouring unit. That person has provided a detailed witness statement with attached supporting documents. Most of the neighbour's complaints were about noise allegedly experienced after 11:00 p.m. with several incidents between 2:00 and 5:00 in the morning. On several occasions, there were gatherings of people in Mr. Hackman's unit with loud music, loud conversation, and banging of doors. On two occasions, no one answered the door when security came to the unit, and no one answered when security called the unit by phone. According to the neighbour's witness statement, during the week of September 22, 2022, he was disturbed by gatherings in Mr. Hackman's unit every night but two. The gatherings took place after midnight and lasted for several hours. The noise included loud music, loud conversation and door slamming.
- [32] There is also evidence that there were complaints of noise on some occasions when the security staff reported that they did not think the noise coming from Mr. Hackman's unit was unreasonably loud. On other occasions however, their assessment was the noise was "very loud". One time, security noted that the noise from Mr. Hackman's unit could be heard in the lobby.

Mr. Hackman's evidence

- [33] Mr. Hackman's evidence is set out in a detailed witness statement with supporting statements from acquaintances of his.
- [34] Mr. Hackman alleges that there is inadequate sound insulation in the walls and ceiling of his unit. He alleges that he can hear sounds of his neighbours going about their daily activities, including when they use the toilet, having normal conversations, having sexual relations, and walking in their unit. On at least one occasion he heard what seemed to be his neighbour drawing or sketching.
- [35] Mr. Hackman asserts that he has brought these issues to the attention of the board but nothing has been done to investigate his complaints. On this point, TSCC 1978 notes that these complaints were only brought to the board's attention during this proceeding and that Mr. Hackman has never asked security to come to his unit to investigate and verify his complaints of noise.
- [36] Mr. Hackman asserts that while he has social gatherings in his unit, he is entitled to do so as part of his regular enjoyment of his unit. He asserts that these do not involve unreasonably loud noise. He believes that since the sound insulation in his unit is so inadequate that he can hear his neighbours going about their usual activities of daily living, it is no wonder that his social gatherings generate sounds that are audible to his neighbours. However, he insists that those sounds are not unreasonable. He agrees that he plays music and text messages from the neighbour indicate that on some occasions, Mr. Hackman turned down the music when asked to do so. Similarly, the security reports indicate that Mr. Hackman did sometimes turn down the music when asked to do so. However, both the neighbour and security indicate that this did not always happen.
- [37] Witness statements provided by Mr. Hackman from others indicate that these individuals have been surprised to receive complaints about noise when they were staying in the unit because they did not believe they were making excessive noise. They indicate that they will not stay in the unit again because they were unjustly accused of making too much noise. One of the friends indicates that he has been present at social gatherings at Mr. Hackman's unit when there were unjustified complaints of noise. The statements also corroborate Mr. Hackman's evidence that he hears noise from his neighbours even though the noises are only from activities of daily living.
- [38] Mr. Hackman alleges that he has been harassed since he moved into the building. On two occasions he was exploring the building and received a strongly worded message from Mr. Gagliano. He asserts that the allegations of excessive noise are part of this unreasonable campaign of harassment. He recently discovered some sort of white grease on his door handle and is concerned that this may have been put there deliberately to harass him.
- [39] In final submissions, Mr. Hackman submits that the alleged harassment by Mr. Gagliano and other representatives of TSCC 1978 have resulted in psychological injury, contrary to section 117(1) of the Act. Apart from the fact that this argument

arose only in final submissions, pursuant to section 1.36(4), this Tribunal does not have jurisdiction to deal with complaints under section 117(1).

Odour complaints

- [40] Mr. Hackman alleges that on two occasions, he experienced a strong odour in his unit. On March 29, 2022, he reported to security that there was a strong odour in his unit that smelled like paint remover or some other chemical. The security staff came to the unit and verified there was a smell, which they felt was like perfume. A few hours later they returned to the unit and the smell was stronger. They advised Mr. Hackman to open a window and check with neighbours about a possible cause.
- [41] On May 4, 2022, Mr. Hackman called security because of a chemical smell in his unit. Security confirmed that there was an odour. In his witness statement, Mr. Gagliano indicated that the cause may have been related to road work happening outside the building. Mr. Hackman takes exception to the fact that this theory was not communicated to him earlier.

F. CONCLUSIONS

Odours

- [42] Mr. Hackman does not suggest that the odours he experienced were persistent and has not provided any evidence to show that these odours were related to an ongoing issue or a defect in the building. His initial complaint was investigated by security. Since the problem did not continue, there was really nothing more to investigate. I do agree that it would have been appropriate to tell Mr. Hackman about the likely cause of the odours but I do not see that anything turns on the failure to do so as he did not seek to pursue the issue until it arose in this application.

Noise coming from Mr. Hackman's unit

- [43] My first observation about the allegations of unreasonable noise coming from Mr. Hackman's unit is that the fact that Mr. Hackman experiences noise related to the normal activities of daily life of his neighbours should reasonably suggest that his neighbours could also experience noise that he creates. When that noise results from socializing with groups of people and playing music, it would seem reasonable to suppose that this noise will impact neighbours, especially if it occurs at times when they can be supposed to be trying to sleep.
- [44] Mr. Hackman's evidence is that the socializing involves only a few people, and music is played at volumes that are not excessive. He knows this in part because he plays music at similar volumes in other dwellings including units in other condominiums, without any complaints. This is not evidence that the noise from these activities is reasonable in the unit in question here. It may instead be evidence that what may be reasonable in one dwelling is not reasonable in

another. Some condominium buildings are designed to minimize noise transmission more than others. Based on his experience of hearing ordinary sounds of daily living from his neighbours, he should reasonably be aware that the louder noise associated with social gatherings could be experienced as unreasonable noise by his neighbours.

[45] That this might be the case should have been bolstered by the fact that his neighbours told him that the noise was unreasonable. According to his evidence, on several occasions, neighbours or security asked him to turn down the volume and he did.

[46] More importantly, I do not accept that the noise experienced by Mr. Hackman is comparable to the noise experienced by his neighbours. Noise of people going to the toilet, or sketching are not of the same order as noises associated with social gatherings with music. Another significant difference is that the neighbours experience of noise coming from Mr. Hackman's unit predominantly occur in the early hours of the morning. As noted in *Toronto Standard Condominium Corporation No. 1791 v. Franklin*, 2022 ONCAT 96 at paragraph 27:

[T]he 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.

[47] Mr. Hackman suggests that his neighbours, and in particular the neighbour who filed the witness statement, is overly sensitive and should tolerate noise from him in the same way that he is required to tolerate the noise he experiences. My assessment of the evidence of the neighbour is that he is not overly sensitive to noise or otherwise unreasonable. His own evidence on this point includes the following from his witness statement:

I do not consider myself overly sensitive to noise. In fact, I believe that I am a tolerant and laid back person when it comes to noise. To my knowledge, I have never been told that I am overly sensitive to noise. In fact, the other unit beside my unit sometimes has get-togethers in her unit however she is extremely respectful and the get-togethers do not go past 11:00 p.m. on weekends.

With all that being said, I am a resident-owner of a unit in a condominium corporation. I know, as a resident-owner of a condominium unit, that I should expect some normal day-to-day noises, especially in a hard-loft conversion, however such noises cannot cause unreasonable nuisance, disruption or interference. In my opinion, unreasonable noise, nuisance, disruption or interference relates to both the nature of the noise, the time of the noise, the frequency of the noise and the duration of the noise. In my opinion, this includes noise, such as loud music, yelling, screaming, singing, and talking, or doors continually slamming, during the late nights and early mornings, typically past 11:00 p.m. and before 8:00 a.m.

[48] I accept the evidence of the neighbour that since the settlement agreement, he has experienced unreasonable noise coming from Mr. Hackman's unit and that the noise is particularly unreasonable because it tends to happen in the middle of the

night. The evidence of the neighbour is supported by the security reports. Although it is true that on some occasions, security found that the noise was not excessive, on other occasions, security reported that the noise was “very loud”.

- [49] I do not accept Mr. Hackman’s submission that he has never held gatherings which produced sound that could be experienced as unreasonable by others. As noted earlier, he agreed in the settlement agreement that he had caused excessive noise, “including hosting parties in his unit in the late evenings and early mornings, which have caused excessive noise and have disturbed the comfort and quiet enjoyment of other residents.” Mr. Hackman asserts that since the agreement, he tried to limit noise but it is clear that this was not the experience of others.
- [50] The issue in this case is not whether the sound coming from Mr. Hackman’s unit is reasonable in his opinion or based on his experience in other places he has lived and visited. The question is whether the determination by the board that sound coming from his unit in TSCC 1978 disturbs the comfort and quiet enjoyment of others was reasonable.
- [51] I conclude that it is more probable than not that sound coming from Mr. Hackman’s unit disturbs the comfort and quiet enjoyment of others, particularly when the sound is produced at night. I find that Mr. Hackman has not complied with the settlement agreement, the declaration, and rules and that the board acted reasonably in coming to the same conclusion.

Noise coming into Mr. Hackman’s unit

- [52] Mr. Hackman complains of three types of noise. One type is noise from his neighbours’ normal activities of living. The other is from “stomping” or loud walking in the unit above his and another is the sound of doors closing.
- [53] I accept that Mr. Hackman hears noises in his unit coming from neighbouring units, and I agree with him that TSCC 1978 has an obligation to investigate to determine if the noises are unreasonable, and what may be done to abate the noise.
- [54] The obligation to investigate in this case comes from the declaration. Section 20(g) of Part 5 of the declaration, was noted earlier in these reasons but it is helpful to note it again for the purpose of this discussion:

Without limiting the generality of what may otherwise be contained herein, in the event the board determines, in its sole discretion, acting reasonably, that any noise, odour or offensive action is being transmitted to another unit and that such noise, odour or offensive action is an annoyance and/or a nuisance and/or disruptive (regardless of whether that unit is adjacent to or wherever situated in relation to the offending unit), then the owner of such unit shall at his/her own expense take such steps as shall be necessary to abate such noise, odour or offensive action to the satisfaction of the board. In the event the owner of such unit fails to abate the noise, odour or offensive action, 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, odour or offensive action, which expenses are to include reasonable solicitor's fees on a solicitor and his/her own client basis which shall be deemed to be additional contributions to common expenses and recoverable as such.

- [55] This section requires the board to determine if noise is being transmitted to another unit is an annoyance, a nuisance, or disruptive and, if it is, what needs to be done to abate the noise.
- [56] Mr. Hackman believes that there is little or no sound insulation and that as a result, normal sounds that would not usually be heard in a neighbouring unit are experienced as very loud.
- [57] On this point, I note that if Mr. Hackman is correct that there is inadequate insulation or some sort of defect in the building, there would be an issue about whether this is a responsibility of the corporation because of provisions in the purchase of sale agreement and the provisions of section 20(g) of the declaration, noted above.
- [58] Mr. Hackman believes that the floor of the unit above his may have been retrofitted by the owner in a way contrary to the declaration and rules. While this is conjecture on Mr. Hackman's part, if it were true, the corporation would have to determine if the owner of that unit is in compliance, and if not what needs to be done.
- [59] The complaint of noise from doors slamming also features in the complaints from Mr. Hackman's neighbours. Investigation of this issue might lead to low cost solutions to abate the noise associated with closing doors. It might also lead to the conclusion that doors need to be closed with more care.
- [60] Before any possible solutions are developed, Mr. Hackman's complaints need to be investigated to determine if he is experiencing unreasonable noise or noise that is an annoyance, a nuisance, or disruptive.
- [61] I conclude that TSCC 1978 has an obligation to investigate Mr. Hackman's complaints of noise to determine if the noises are unreasonable, or an annoyance, nuisance or disruption and, if so, what, if any, abatement measures may be appropriate. After that, the issue of who may be responsible for any abatement measures that may be necessary can be considered.
- [62] I therefore order TSCC 1978 to conduct an investigation and pay for any costs involved in the investigation to determine the nature and source of noises that may be coming into Mr. Hackman's unit, if they are unreasonable, and what could be done to abate the noise if it is determined to be unreasonable. The investigation should include noise coming from the floor of the unit above Mr. Hackman's unit. The board shall ensure that Mr. Hackman has notice of the investigation so that he

can be present if he wants to be. The board shall share the part of any report that pertains to Mr. Hackman's unit with Mr. Hackman.

- [63] To be clear, even if Mr. Hackman is experiencing unreasonable noise from sounds coming into his unit, he still has an obligation to avoid the transmission of noise from his unit that disturbs the comfort and quiet enjoyment of others, especially at night. Investigations may also suggest measures that Mr. Hackman could take to make his unit more soundproof so that his activities do not disturb the comfort and quiet enjoyment of others.

Costs

- [64] TSCC 1978 seeks an order that Mr. Hackman pay legal costs in the amount of approximately \$15,500.

- [65] The Tribunal's rule 48 deals with costs and provides as follows:

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. Reimbursement of Legal Costs and Disbursements at any stage

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.

- [66] The Tribunal has developed a Practice Direction to provide direction that identifies factors that can be considered when determining if costs should be awarded:

- a) Whether a party or representative's conduct was unreasonable, for an improper purpose, or caused a delay or expense;
- b) Whether the Case was filed in bad faith or for an improper purpose;
- c) The conduct of all parties and representatives, including the party requesting costs;
- d) The potential impact an order for costs would have on the parties;
- e) Whether the parties attempted to resolve the issues in dispute before the CAT Case was filed;
- f) Whether a Party has failed to follow or comply with a previous order or direction of the CAT;

- g) The provisions of the condominium corporation's declaration, by-laws and rules (collectively referred to as the condominium corporation's "governing documents");
- h) Any other factors the CAT considers relevant.

[67] The Tribunal filing fees paid by TSCC 1978 were \$125. TSCC 1978 has been successful in respect of this application but Mr. Hackman has also been successful in respect of his request for an investigation of noise coming into his unit. In these circumstances, the filing fee should be split equally. Mr. Hackman shall pay TSCC 1978 \$62.50.

[68] Both parties incurred legal costs. Counsel for TSCC 1978 has provided invoices showing the work done in connection with the case. Mr. Hackman's counsel submits that if costs are awarded for either party, they should not exceed \$5,000.

[69] This application was filed as a contravention of settlement application, and I have found that Mr. Hackman did contravene the settlement. These facts suggest that an award of costs in favour of TSCC 1978 is warranted. I have also found that TSCC 1978 has a duty to investigate Mr. Hackman's complaints of noise, even though those complaints may have only arisen in the context of this application.

[70] In these circumstances, I conclude that Mr. Hackman is responsible for half of the legal costs incurred by TSCC 1978. The actual legal costs according to the invoices is \$15,453 (the first invoice included the \$125 filing fee). Half of this is \$7,726. Mr. Hackman is ordered to pay TSCC 1978 \$7,726.

[71] With regard to Mr. Hackman's legal costs, in consideration of the factors described in the practice direction, I find there are no circumstances that would cause a departure from the Tribunal's usual practice of not awarding costs incurred during a proceeding. Mr. Hackman is not entitled to an award for his own legal costs.

G. ORDER

[72] The Tribunal Orders that:

1. Mr. Hackman is ordered to respect the comfort and quiet enjoyment of people living in other units and ensure that he is not responsible for unreasonable noise or noise that is an annoyance, a nuisance, or disruptive to others.
2. TSCC 1978 is ordered to investigate Mr. Hackman's complaints about noise that he experiences in his unit. TSCC 1978 shall give reasonable notice to Mr. Hackman of any investigation and shall provide him with the results of the investigation. The investigation shall be done within 60 days of the date of this decision, or over such longer period as the parties may mutually agree to.

3. Mr. Hackman is ordered to pay TSCC 1978 \$62.50, representing half of the tribunal filing fees, and \$7,726, representing half of TSCC 1978's legal costs. Pursuant to section 20(g) of the declaration, if these amounts are not paid within 30 days of the date of this decision, the amounts may be added as additional contributions to common expenses allocated to Mr. Hackman's unit, and recoverable as such.

Brian Cook
Member, Condominium Authority Tribunal

Released on: December 20, 2022