

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: December 22, 2022

CASE: 2022-00290N

Citation: Lee v. Wong et al. 2022 ONCAT 147

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

Member: Nicole Aylwin, Member

The Applicant,

Marlene Lee

Self-Represented

The Respondents,

Ming-Keung Wong

Self-Represented

Victoria Poh

Self-Represented

The Intervenor,

Toronto Standard Condominium Corporation No. 2806

Represented by Dominique Menard, Counsel

Hearing: Written Online Hearing – August 8, 2022 to December 9, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Marlene Lee, is the owner of a unit in Toronto Standard Condominium Corporation No. 2806 (“TSCC 2806”). She claims that she is experiencing unreasonable noise and nuisance from the Respondents Ming-Keung Wong and Victoria Poh who own the unit above Ms. Lee’s. Ms. Lee states that she is subjected to noises daily such as banging, heavy footsteps, the slamming of chairs on the floor, loud bodily functions, the loud unrolling of toilet paper and shower noise, among other noises. She further claims that Mr. Wong and Ms. Poh are overwatering the plants they keep on their balcony causing the water to leak on to her terrace disrupting her ability to use and enjoy the terrace. Ms. Lee has asked this Tribunal to order that Mr. Wong and Ms. Poh cease making unreasonable noise and causing a nuisance, which is prohibited by the *Condominium Act, 1998* (“the Act”) and governing documents of TSCC 2806. Ms. Lee did not request any costs.

- [2] The position of Mr. Wong and Ms. Poh is that this application should be dismissed. They submit that they have at no time created any noise, nuisance, annoyance, or disruption in violation of the condominium's governing documents or the Act. They further submit that Ms. Lee is engaging in harassing behavior towards them regarding the noise and has made several derogatory comments and unfair assumptions about their cultural background in attempting to make her arguments. They argue that Ms. Lee has become fixated on them as the imagined source of the noise. Mr. Wong and Ms. Poh also argue that in the interests of being good neighbours they have tried to respond to the noise complaints by putting felt pads on all their chairs and ensuring the plants on their balcony have water catchers. However, they deny being the source of the noise and nuisance. Mr. Wong and Ms. Poh have requested that this Tribunal order Ms. Lee to cease and desist a series of what they consider to be harassing behaviors, such as lodging unfounded complaints against them, calling the police on them, and knocking on their door without warning to complain about the noise. They did not request any costs.
- [3] As the Intervenor in this case, TSCC 2806 takes no position on the application and their submissions were limited to a request for costs.
- [4] For the reasons set out below, I find that the evidence does not show that there is unreasonable noise or nuisance and I conclude therefore that Mr. Wong and Ms. Poh are not in violation of TSCC 2806's governing documents or the Act. I dismiss Ms. Lee's application and order that she pay TSCC 2806 costs in the amount of \$210, for behavior during the hearing that added additional expense and delay.
- [5] Before setting out the reasons for this decision, I highlight that this has been a very acrimonious dispute between the parties and the situation is frustrating, stressful, and difficult all around. Ms. Lee, Mr. Wong and Ms. Poh made several unsubstantiated claims and speculations about the reasons for each other's alleged behavior. In reaching my decision I only relied on those claims and statements which were corroborated by other evidence or flowed on a balance of probabilities from my findings. And, while I do not find that the evidence supports a finding of unreasonable noise and nuisance, I recognize that Ms. Lee's experience of noise is real and stressful to her. However, at the same time, it is also clear that Mr. Wong and Ms. Poh have been subject to a litany of complaints, often accompanied by derogatory statements, from Ms. Lee, in support of which there is scant evidence and there is no call for the assumptions Ms. Lee makes about Mr. Wong or Ms. Poh. Regarding Mr. Wong and Ms. Poh's request that I issue a finding of harassment against Ms. Lee and order her to change her behaviour, issues of harassment are not properly before me, and I make no finding or order in relation to the request; however, I acknowledge that this has also been incredibly stressful for Mr. Wong and Ms. Poh and has impacted their ability to enjoy their unit.
- [6] I do not expect that my decision will decrease this acrimony, however, considering my conclusion that there has been no violation of the rules, I strongly encourage all parties to consider how going forward any noise and nuisance complaints

involving these two units be handled with dignity, respect, as well as due diligence, in the form of proper investigation of the noise and nuisance and verifiable evidence of any perceived violation of the rules.

B. ISSUES & ANALYSIS

Issue no 1: Are the Respondents creating an unreasonable noise, nuisance, annoyance or disruption in violation of the Act or condominium's governing documents?

[7] Ms. Lee claims that Mr. Wong and Ms. Poh are causing unreasonable noise and nuisance contrary to either s. 117(2) of the Act or TSCC 2806's Declaration Part 8, s. 36 or TSCC 2806's Rule 10.

[8] Section 117(2) of the Act states:

No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements, or the assets, if any, of the corporation if the activity results in the creation of or continuation of,

(a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements of the assets, if any, or the corporation.

(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.

[9] The Declaration of TSCC 2806, Part 8, s. 36 reads:

No unit shall be occupied or used by an owner, or by anyone else in such a manner as is likely to damage or injure any person or property (including any other units or any portion of the common elements), nor in any manner that will unreasonably interfere with the use or enjoyment of other owners of the common elements or their respective units....

[10] TSCC 2806 Rule 10 states:

No one shall create or permit the creation of, nor the continuation of any noise, disturbance, or nuisance that does (or may) disturb the comfort and/or quiet enjoyment of the units and/or common elements by other occupants, or which cause or create a substantial interference with the quiet enjoyment of the units or common elements by others.

[11] I will first address the issue of noise and then the issue of the overwatering of plants on the balcony.

Noise

[12] It is Ms. Lee's position that since approximately June 2021 Mr. Wong and Ms. Poh

have been disturbing the comfort and quiet enjoyment of her unit by causing noises such as the pushing of chairs around and slamming of the legs down, heavy footsteps, walking in high heels, loud bodily noises, and shower noises, among others. She submits that Mr. Wong and Ms. Poh are making these noises “on purpose” to annoy her.

- [13] According to Ms. Lee, she made several complaints to condominium management about these noises in June and July of 2021. She submits that because of her complaints, condominium management was in contact several times with Mr. Wong and Ms. Poh to remind them to be more considerate neighbours. Ms. Lee further submits that the noises she was hearing intensified in November and December of 2021 and that new unreasonable noises such as “banging with a tool” and “dropping objects of weight” began during this period. Again, Ms. Lee submits that the making of the noises was a purposeful attempt by Mr. Wong and Ms. Poh to use “high handed tactics to cause extreme irritation and disturbance”.
- [14] It is Mr. Wong’s and Ms. Poh’s position that they are not making unreasonable noise or causing a nuisance. They challenge Ms. Lee’s claims that they are making the noises she has complained about – especially at the intensity and frequency that she alleges. They submit that they are doing nothing more in their unit than carrying out the activities of daily living.
- [15] They submit that they moved into their unit in August of 2020 and that there were no complaints from Ms. Lee for nearly a year and that no noise complaints have ever been filed against them by the owners or residents of any other unit. Ms. Lee continues to be the only complainant. They assert that the complaints against them from Ms. Lee began only after Ms. Lee made the mistaken assumption that they had dripped water on to her balcony and that Ms. Lee’s complaints are malicious and unfounded. They submit she has lodged several complaints against them when they have not even been in their unit. They point to a period in September 2022, during which time they submit that they were out of the country and could not have been making the noise that Ms. Lee attributed to them. During their absence, they set timers on their lights which is why Ms. Lee may have believed them to be home during this period. They did inform condominium management that they would be away.
- [16] Mr. Wong and Ms. Poh do not dispute the fact that they have been contacted on three occasions by condominium management after complaints from Ms. Lee but argue that the communications were not ‘formal warnings’ but rather requests from management to be mindful of their neighbours. They submit that they have tried to cooperate with management and be considerate of Ms. Lee’s complaints. For example, they placed felt pads on their chairs and sent photographs to management showing that they had done this. However, despite their cooperation they feel that they are being unfairly targeted by Ms. Lee.
- [17] The Tribunal has consistently held that for there to be a nuisance, there must be “substantial and unreasonable” interference with the quiet enjoyment of the

property. While the noise being experienced by Ms. Lee may be very distressing to her, the evidence in this case does not lead me to conclude that Mr. Wong and Ms. Poh are making any noise that rises to the level of a nuisance as per the Act, or as TSCC 2806's Declaration states, "unreasonably interfere[s]" (or in the case of TSCC 2806's Rules, "may disturb" or "create a substantial interference") with the quiet enjoyment of Ms. Lee's unit. Nor, does it cause me to conclude that they are the sole source (or in fact the originating source) of all of the noises experienced by Ms. Lee.

- [18] As evidence of the noise, Ms. Lee relied primarily on her own complaints and her own list of the dates and times she heard the noises. As there is no corroborating evidence to support most of the incidents on this this list, I give this list little weight.
- [19] Ms. Lee has also relied on a report filed by the condominium concierge related to a noise complaint she made on April 8, 2022. According to Ms. Lee, on the evening of April 8 she experienced "extreme noise" that felt like a "terror" that she attributed to Mr. Wong and Ms. Poh. She describes this noise as lifting the front legs of a chair and slamming them down. Ms. Lee submits she contacted the concierge who came up to her unit to investigate her complaint and then spoke to Mr. Wong and Ms. Poh about it.
- [20] Mr. Wong and Ms. Poh do acknowledge that shortly after this incident they received a letter from the Condominium that outlined the complaint received and reminded them of the rules. However, they submit that when they contacted the condominium manager regarding this letter, they were told it was sent not to "take sides" but just to acknowledge Ms. Lee's complaint.
- [21] The report of the concierge, which was the only objective evidence submitted regarding this event, does not support Ms. Lee's claim of "extreme noise". According to the report, the concierge responded to Ms. Lee's complaint by joining her in her unit at approximately 6:50pm and waited 10 minutes. At 7pm, the concierge reported hearing loud footsteps and thus knocked on Mr. Wong and Ms. Poh's door and asked them to "keep it down". The report while indicating noise in the form of loud footsteps, does not suggest the noise was excessive or unreasonable and certainly does not suggest that it rose to a level of "terror".
- [22] Based on the report, it would not be reasonable to conclude that "loud footsteps" at 7pm was an example of unreasonable noise and nuisance. I also cannot conclude based on the report that the original noise Ms. Lee states she heard was from Mr. Wong and Ms. Poh's unit as the concierge waited 10 minutes to hear any noise at all and then heard only the footsteps.
- [23] Additionally, Ms. Lee's own evidence does not support a finding of unreasonable noise. For example, regarding the bathroom noises that Ms. Lee claims Mr. Wong and Ms. Poh are making intentionally to disturb her (a noise that sounds like a "loud gong") Ms. Lee noted that a Tarion representative inspected the noise issue on May 6, 2022 and informed her that the noise comes from a valve that drops

down when the water faucet is turned off and that this is normal. Yet, she continues to claim that that Mr. Wong and Ms. Poh are making this noise “on purpose”. In describing another incident in January of 2022, Ms. Lee submits that she called the police on Mr. Wong and Ms. Poh regarding excessive noise and that the police showed up at 10:45pm and could not detect any issue with noise. Finally, in describing the issues with the noise in her unit, Ms. Lee has indicated that a person must sit “very quietly” in her unit to hear the noise.

- [24] In the submissions of both parties there was reference to various inspections meant to examine noise levels in the units. One such inspection was done by Tridel. No party provided any information regarding the specifics of the inspection, who retained the inspector or what qualifications they had, and both parties have different interpretations of the inspector’s findings. Ms. Lee, claims that the report from Tridel indicated that Mr. Wong and Ms. Poh should install carpeting to minimize noise transmission. Mr. Wong and Ms. Poh dispute this conclusion. They acknowledge that when Tridel came to evaluate the noise levels in the unit, Tridel did suggest carpeting – but assert they were told the installation of carpet would be more of a “goodwill gesture” since Tridel made no finding that excessive noise was coming from their unit. Neither party submitted a copy of this report into evidence, making the subjective accounting of the contents of the report of limited value and thus I can give it no weight.
- [25] Mr. Wong and Ms. Poh did submit into evidence the results from an Apparent Sound Transmission Class (ASTC) test conducted by HGC Engineering in February 2022, which tested the wall and floor/ceiling assemblies demising suites beside and above Ms. Lee’s unit. The results of the test showed that ASTC ratings met and exceed the minimum Building Code requirements. While these test results show that the sound attenuation measures are up to Code in the units tested, this does not provide any conclusive evidence regarding whether there is or is not *unreasonable* noise being made and where that noise may be coming from. Thus, I give it little weight.
- [26] Therefore, while I accept that Ms. Lee’s experience has been disturbing for her and that she may be hearing noise in her unit, there is very little objective evidence that the noise she is experiencing is beyond that of what might be considered usual noises of daily living. And, while different individuals may have different sensitivities to such noises, an individual’s level of tolerance is not an objective marker of “unreasonableness”. The evidence in front of me does not support a finding that Mr. Wong or Ms. Poh are generating noises at the intensity, frequency or duration described by Ms. Lee and there is no evidence to substantiate Ms. Lee’s complaint that the noises she hears are unreasonable.
- [27] Thus, for all the reasons above I conclude that Mr. Wong and Ms. Poh are not creating a noise that is a nuisance, annoyance or disruption to an individual in a unit, and are not in violation of Part 8 s.36 of TSCC 2806’s Declaration, it’s Rule 10, or s. 117(2) of the Act.

The Overwatering of Plants on the Balcony

- [28] In addition to Ms. Lee's claim that Mr. Wong and Ms. Poh are causing unreasonable noise, she also claims that Mr. Wong and Ms. Poh are violating TSCC 2806's Declaration and the Act, by overwatering the plants they keep on their balcony, which she claims causes water to cascade onto her balcony and unreasonably interferes with her use or enjoyment of her terrace.
- [29] Ms. Lee submits that between July and August 2021 a pool of water could be found on her terrace around 6am. She made a complaint to condominium management about the water, which according to Ms. Lee led management to implement the "Balcony Etiquette Rule" which was distributed as a notice to all units. A copy of this notice was submitted into evidence, and I note that although Ms. Lee refers to this notice as a "rule", it is in fact a broad notice to residents reminding them generally of "Balcony Etiquette". It reminds residents that there should be no cooking or barbecuing on balconies, that pets are not to defecate or urinate on balconies, and it also reminds residents to be considerate when watering their plants to avoid water dripping on balconies below. Given the general nature of this notice there is nothing to suggest that this notice is an acknowledgment by management or others of any wrongdoing by Mr. Wong or Ms. Poh.
- [30] Ms. Lee also submitted photographs of water splashes on her balcony and a report by condominium management that was logged after they responded to her complaint. Ms. Lee asserts that these photographs and this report are evidence of Mr. Wong and Ms. Poh's overwatering.
- [31] I do not agree. The photos submitted by Ms. Lee show only wet spots on her terrace; the origin of the water is not evident in the photos. Moreover, the report of the condominium employee states that when they visited her unit they did find water on her balcony, but did not see water dripping from Mr. Wong and Ms. Poh's unit at that time.
- [32] Mr. Wong and Ms. Poh do have plants on their balcony. However, they deny overwatering the plants. Mr. Wong and Ms. Poh provided photographs of their balcony to condominium management which show that they have, at least at the time the photograph was taken, water catchers under all their plants. They also claim that they have seen water cascading from balconies as high as the 10th floor which then leaves water on their balcony as well as the balconies below them. They deny that the water dripping onto Ms. Lee's terrace is from them.
- [33] Based on the evidence before me, I cannot conclude that Mr. Wong and Ms. Lee are responsible for the water landing on Ms. Lee's terrace and cannot find that Mr. Wong and Ms. Poh are using their unit in a manner that as per TSCC 2806's declaration would "unreasonably interfere with the use or enjoyment of other owners of the common elements or their respective units" or violates 117(2) (b) of the Act which prohibits any person from carry on an activity if that activity results in

the creation or continuation of a prescribed nuisance annoyance or disputing to an individual unit, the common elements or the assess, if any, of the corporation. There is simply insufficient evidence to support such a finding.

Issue no 2: Should any party be awarded costs?

- [34] The only party claiming costs in this this case is the Intervenor, TSCC 2806. They claim that the condominium was required to join the case as a party, even though they “have not taken a position with respect to the main issue.” They argue that they have participated only when required to minimize costs and that it would not be fair for unit owners to bear the costs of their participation. They claim costs in the full amount of \$5,996.40, or on a substantial indemnity basis in the amount of \$5,392.36.
- [35] Regarding who should pay the costs, they first argue that the party found to have breached the governing documents or violated the Act, should be responsible for bearing the costs of the proceeding. They cite several provisions in their Declaration (s. 13, s. 51) and its Rule 29 which they submit would require an owner to indemnify the corporation for costs resulting from their breach of the governing documents or provisions of the Act.
- [36] In this case, I have found that Mr. Wong and Ms. Poh have not violated TSCC 2806 governing documents or the Act; therefore, s. 13, s. 15 of the Declaration and Rule 29 do not apply.
- [37] TSCC 2806 also cited s. 12 of its Declaration that points to Schedule E, which lists common expenses. TSCC 2806 cites three of the provisions in Schedule E arguing that these provisions show that legal expenses are included in the common expenses. The three provisions cited read:
1. All expenses of the Corporation incurred by it in the performance of its objects and duties, whether such objects and duties are imposed under the provisions of the Act, the declaration and by-laws or rules of the Corporation.
 - ...
 5. All sums of money paid or payable by the Corporation for legal, engineering, accounting , auditing, expert appraising, maintenance, managerial and secretarial advise and serviced required by the Corporation in the performance of its objectives and duties;
 - ...
 15. All costs and expenses (including legal fees on a solicitor and client basis or substantial-indemnity scale, together with all applicable disbursements) incurred by the Corporation in the Course of enforcing any of the provisions of the declaration, by-laws and/or rules of the Corporation from time to time...and effecting compliance therewith by all unit owners...[save and except for those costs and expenses collected or recoverable by the Corporation against any

unit owners in the event of any breach of the provisions of the declaration, by law/rules pursuant to the general indemnity provision of section 53 of the declaration, or any other applicable provisions of the declaration entitled the /corporation to see reimbursement of costs or indemnification from any owner(s)].

- [38] S. 12 and its accompanying “Schedule E” are not indemnification provisions. They simply provide a list of what makes up the condominium common expenses. These are things that the condominium must pay for – in this case Schedule E lists legal expenses as a common expense except where expenses recoverable by the Corporation due to a breach of the governing documents and as per its general indemnity provisions. Again, in this case, there has been no breach and thus no costs are awarded or recoverable on these grounds.
- [39] However, TSCC 2806 further argues that should no one be found in breach of the rules that both Ms. Lee and Mr. Wong and Ms. Poh both pay a portion of its costs. I do not find that TSCC 2806’s governing documents would support such a costs award. The provisions cited by TSCC 2806 clearly indicate that indemnification of cost by a unit owner flows from a breach of the governing documents and/or the Act. Neither of these parties have been found to be in violation of the Act or to have breached the governing documents.
- [40] Finally, TSCC 2806 argues that under the CAT Rules of Practice they should be awarded costs from the Applicant due to her unreasonable behavior during the proceeding.
- [41] Section 1.44(1)4 of the Act states that the Tribunal may make “an order directing a party to the proceeding to pay the costs of another party to the proceeding.”
- [42] Section 1.44 (2) states that an order for costs “shall be determined...in accordance with the rules of the Tribunal.”
- [43] The cost-related rules of the Tribunal’s Rules of Practice relevant to this case are:
- 48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party’s CAT fees unless the CAT member decides otherwise.
- 48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements (“costs”) incurred during 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.
- [44] TSCC 2806 cites several examples of unreasonable behavior by Ms. Lee during the proceeding – such as Ms. Lee’s failure to follow directions which necessitated a case conference to reinforce appropriate behavior in the hearing process and

repeated attempts by Ms. Lee to call and email TSCC 2806's counsel outside of the CAT platform even after being advised that that was inappropriate and would increase costs.

[45] I do not find that the case conference was a result of unreasonable behavior. For self-representatives in particular, the Tribunal process is often a new experience. There may be confusion or uncertainty about how it works, what they can and cannot do and what the adjudicator can and cannot do. In this case, I find that the behavior exhibited by Ms. Lee in the early stages of the process may have been the result of lack of clarity – which is why a case conference was held. While it did add additional time to the proceeding it was not because Ms. Lee was being unreasonable.

[46] However, regarding the communications with counsel outside of the CAT platform, here I do find Ms. Lee did engage in some unreasonable behavior that added additional time and expense, particularly at the start of the proceeding. Ms. Lee did repeatedly call and email the counsel of TSCC 2306 outside the CAT system, which required additional messages by counsel and several warnings, posted messages and eventually the issuing of instructions by me that she cease doing so. This behavior was limited to the start of the hearing process. Thus, I find it appropriate that Ms. Lee pay a costs award to TSCC 2806 in the amount of \$210, which is the amount TSCC 2806 has claimed they spent on responding to correspondence from Ms. Lee regarding this case outside of the CAT system. Beyond this amount, I do not find that the facts of this case warrant any further cost award, as the CAT Rules of Practice, are clear on the fact that Tribunal will generally will not order one Party to pay another Party compensation for time spent related to the CAT proceeding.

C. ORDER

[47] The Tribunal Orders that:

1. The application is dismissed.
2. Ms. Lee will pay TSCC 2806 costs in the amount of \$210 no later than January 4, 2023.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: December 22, 2022