

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 8, 2023

CASE: 2022-00073N

Citation: Di Domenico v. Halton Condominium Corporation No. 118, 2023 ONCAT 67

Order under section 1.44 of the Condominium Act, 1998.

Member: Laurie Sanford, Member

The Applicant,

Anna Di Domenico

Represented by Jackie Bartlett, Counsel

The Respondent,

Halton Condominium Corporation No. 118

Represented by David Thiel, Counsel

MOTION DECISION AND ORDER

- [1] Halton Condominium Corporation No. 118 (“HCC 118”) brings this motion for an order dismissing this application, with costs on a full indemnity basis. HCC 118 contends that the Tribunal lacks the jurisdiction to decide the application. Ms. Di Domenico, a unit owner in HCC 118 and the Applicant in this matter, complains of a disruptive noise of water rushing through the water pipes in her unit, which she asserts is a nuisance. HCC 118 denies that any noise experienced by Ms. Di Domenico is unreasonable. Alternatively, it is HCC 118’s submission that any noise experienced by Ms. Di Domenico relates to HCC 118’s obligations under section 89 and 90 of the *Condominium Act, 1998* (the “Act”), to repair and maintain portions of the condominium building, including the common elements. HCC 118 submits that the Tribunal does not have the jurisdiction to hear or decide applications brought under these sections.
- [2] Ms. Di Domenico argues that the Tribunal does have the jurisdiction to deal with this matter as it is an application under subsection 117 (2) of the Act, which deals with, among other things, nuisance caused by noise. Further, Ms. Di Domenico submits, the Tribunal gains jurisdiction under the provisions of HCC 118’s governing documents.
- [3] In order to understand which section or sections of the Act govern this application, some background is required. In 2016, Ms. Di Domenico complained of a noise coming from her water pipes, which she reports has been ongoing since then. Ms.

Di Domenico says that noise sounds like rushing water and may last anywhere from five minutes to an hour. The noise occurs in her bedroom and disrupts her sleep. HCC 118 retained plumbers and acoustical engineers in what became a multi-year attempt to find the source of the problem. HCC 118 at first believed that the sound might be caused by a jetted tub in a unit above Ms. Di Domenico's. Eventually, the pump for the jetted tub was disconnected and the pressure in the plumbing system was re-balanced. However, the noise persisted. Ms. Di Domenico retained a lawyer and her own acoustical engineer who prepared a separate report showing the noise criteria level significantly above that recommended by The American Society of Heating, Refrigeration and Air-Conditioning Engineers ("ASHRAE"). HCC 118's experts postulated that the continuing noise might be caused by older faucets or shower heads in other units in the same riser. HCC 118 took a number of actions to replace or modify those faucets and shower heads and also made some modifications to Ms. Di Domenico's en suite bathroom. While the noise was moderated, Ms. Di Domenico still experiences it as disruptive.

- [4] In November, 2019, HCC 118's acoustical engineers reported that the noise levels in Ms. Di Domenico's bedroom were within ASHRAE guidelines and no further action was required. Ms. Di Domenico's acoustical engineer questioned the methodology used in the November, 2019 report. HCC 118 declined to replace shower heads in any other units as it reported no indication that they were producing higher sound levels. Ms. Di Domenico brought this application in February, 2022. At the outset of the hearing, Ms. Di Domenico framed the issue as a noise nuisance under subsection 117 (2) of the Act. She cited rules of PCC 118 prohibiting a noise nuisance or interference with the rights of other residents. However, in her closing submissions, she referred to HCC 118's aging plumbing infrastructure and re-framed the issue as HCC 118's failure to meet its obligations under sections 89 and 90 of the Act. Ms. Di Domenico cited sections of HCC 118's governing documents that confirm that obligation. For example, Section 8 (b) of HCC 118's Declaration provides that HCC 118 will repair and maintain the common elements. In its closing submissions, HCC 118 raised the jurisdictional issue and, at my direction, brought this motion.
- [5] The Tribunal gains its jurisdiction under the Act and regulations to it. Under subparagraphs 1 (1) (c.1) and 1 (1) (d) (iii) of Regulation 179/17 to the Act, the Tribunal has jurisdiction to deal with disputes relating to subsection 117 (2) of the Act or provisions in a condominium corporation's governing documents which prohibit, restrict or otherwise govern disputes described in subsection 117 (2). That subsection says:

No person shall carry on an activity . . . in a unit, the common elements or the assets, if any, of the corporation, if the activity results in the creation or continuation of any unreasonable noise that is a nuisance . . . to an individual in a unit . . .

Subsection 117 (2) specifies that the nuisance must be the result of activities of a person.

- [6] Sections 89 and 90 of the Act address a condominium corporation's obligations to repair and maintain portions of the condominium building, including the common elements, such as the plumbing infrastructure. Neither the Act nor the regulations to it give the Tribunal the jurisdiction to deal with disputes about those provisions. The fact that HCC 118 has provisions in its governing documents, including in its Declaration, setting out HCC 118's repair and maintenance obligations, does not change that.
- [7] HCC 118 submits that it has addressed Ms. Di Domenico's complaints but, even if it has not, the remaining noise is not the result of the activities of another person but rather a function of HCC 118's plumbing infrastructure, which it acknowledges is aging. It cites reports of its acoustical engineers in support of this conclusion.
- [8] In arguing this motion, Ms. Di Domenico resiled from her position that the noise she experiences is a result of HCC 118's failure to meet its obligations under sections 89 and 90 of the Act. She again takes the position that the noise is a nuisance under subsection 117 (2) of the Act and under the rules of HCC 118 prohibiting residents from creating a noise nuisance or an interference with the rights of other residents. The problem with this position is that neither she nor HCC 118 can suggest possible activities of any other person which might be causing the noise. Ms. Di Domenico submits that the source of the noise has not been "definitively determined". She submits that earlier noises she experienced, unrelated to this application, may have originally appeared to relate to HCC 118's plumbing infrastructure but were subsequently determined by HCC 118 to be the result of faulty plumbing equipment in other units. However, it does not follow from this that the noise she currently experiences results from the activity of a person in another unit. She speculates that the noise might be the result of a combination of factors which had been identified as possible sources in HCC 118's acoustical reports. However, HCC 118's acoustical engineers did not suggest a combination of factors as a possible source of the noise and in the absence of that, it remains speculation.
- [9] Both parties referred to the case of *Brady v. Peel Condominium Corporation No. 947*, 2023 ONCAT 8 (CanLII). In that case, as here, there was no evidence that

the noise was the result of an activity of another person. The Tribunal in the *Brady* case was not able to conclude that the noise was coming from the plumbing infrastructure. However, it determined that, in the absence of evidence which might invoke subsection 117 (2) and in the face of the possibility that the noise was a result of a structural issue, the Tribunal lacked the jurisdiction to proceed. If anything, the situation is clearer in the present case. In this case, HCC 118 has taken several steps to address noise that might be resulting from activity in another unit. Neither party can put forward any source of the noise other than what both parties describe as the aging plumbing system of HCC 118. In all the circumstances of this case, I conclude there is no evidence to support the application of subsection 117 (2). There is a strong possibility that the source of the noise is the plumbing infrastructure of HCC 118. As such, the matter might relate to HCC 118's obligations to maintain and repair those systems under sections 89 and 90 of the Act. The Tribunal does not have the jurisdiction to hear disputes about HCC 118's obligations under those sections. Having said this, I am not ruling out the possibility that there may be situations in which a condominium corporation's repair and maintenance activities constitute "activities" giving rise to a nuisance under subsection 117 (2) of the Act. I am not persuaded on the evidence before me that this is the case here.

[10] Ms. Di Domenico submits that it is prejudicial to her to raise the jurisdictional issue so late in the proceedings and to potentially force her to pursue the matter in a forum having jurisdiction. This hearing began in July, 2022 but HCC 118 did not raise the jurisdictional issue until its closing submissions in March, 2023. While this delay undoubtedly cost Ms. Di Domenico both time and money, under Rule 19.1 of the Condominium Authority Tribunal Rules of Practice, effective January 1, 2022, (the "Tribunal Rules of Practice") the Tribunal can dismiss an application at any time where an application is about issues that the Tribunal "has no legal power to hear or decide". That is the case here.

[11] While it is true that HCC 118 might have raised this issue sooner, certainly when Ms. Di Domenico began to re-frame the issue as one under sections 89 and 90 of the Act, it was also open to Ms. Di Domenico, who was represented during this hearing, to question whether she was in the right forum at any time.

[12] HCC 118 requests its costs. Ms. Di Domenico also requests costs. As noted above, this hearing began in July, 2022 and continued to this motion. This was a substantially longer hearing than is usual at the Tribunal. The extra time was partly the result of conflicting schedules but also the result of the technical nature of the evidence. HCC 118's delay in raising the jurisdictional issue, forced Ms. Di Domenico to incur significant additional expense. I am not persuaded, and Ms. Di

Domenico does not allege, that HCC 118 deliberately delayed raising the jurisdictional issue. I acknowledge that HCC 118 has also been put to significant expense as a result of the lengthy hearing. As between the two parties, I conclude that, in all the circumstances of this case, the fairest outcome is to make no order as to costs.

[13] HCC 118 also moved to have Ms. Di Domenico's potential damages limited under the *Limitations Act, 2002*. In light of my decision to dismiss this application, it is not necessary to consider this matter.

ORDER

[14] Under Rule 19.1 of the Tribunal Rules of Practice, this application is dismissed.

Laurie Sanford
Member, Condominium Authority Tribunal

Released on: May 8, 2023