Corrected Decision
This decision includes a correction to the citation

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: March 3, 2025
CASE: 2024-00400N
Citation: Mishibinijima v. Sapsford, Simcoe Condominium Corporation No. 60, 2025 ONCAT 36

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

Member: Patricia McQuaid, Vice-Chair

The Applicant,
Steve Mishibinijima
Self-Represented

The Respondents,
Christine Sapsford
Self-Represented

Simcoe Condominium Corporation No. 60
Represented by Sonja Hodis, Counsel

Hearing: Written Online Hearing – October 28, 2024 to February 24, 2025

REASONS FOR DECISION

A. INTRODUCTION

[1] At the core of this dispute are allegations about noise between two units, one above the other. The Applicant, Steve Mishibinijima, alleges that the noise emanating from Respondent Christine Sapsford's unit, which is located above his, is unreasonable and a nuisance under s. 117(2) of the Condominium Act, 1998 (the "Act"). The Applicant also alleges that Simcoe Condominium Corporation No. 60 ("SCC 60") has not fulfilled its obligations to investigate and remedy the noise issue. This is not so much a case where an applicant is alleging that the occupant of the unit above them is carrying on activities that are creating unreasonable noise; rather the Applicant asserts that the noise arises from an unauthorized repair to the floor and damage to the subfloor by the previous owner of Ms.

Sapsford's unit with the result that just walking on the floor creates noise. The Applicant requests an order that SCC 60 and/or Ms. Sapsford repair the subfloors.

B. BACKGROUND

[2] This is not the first Tribunal case between the Applicant and SCC 60 about this noise issue. In October 2023 they resolved the previous case by a consent order. By the terms of that order[1], SCC 60 was to retain Aspire Engineering Inc. ("Aspire") to complete an investigation which it had started for the Applicant in October 2022 in relation to his noise complaints. SCC 60 agreed to pay for the costs associated with Aspire's re-attendance and a copy of the report was to be provided to all parties (including Ms. Sapsford, who was an intervenor in that case).

[3] Aspire's report was sent to SCC 60's counsel in a letter dated November 21, 2023. The Applicant made various submissions during the hearing about when and how the report was provided to him – clearly a point of contention, but not relevant to the issues before me. In any event, the Applicant had the report prior to February 2024, as the report's findings are referred to in a letter sent by the Applicant's lawyer at that time to SCC 60's counsel. Counsel communicated with each other about the Applicant's complaints; however, there was no resolution. The Applicant then filed this case in August 2024.

[4] SCC 60 immediately brought a motion to dismiss the application on two grounds: that the new application is a re-litigation of the issue raised previously and resolved by the consent order and that the Tribunal did not have jurisdiction to deal with maintenance and repair issues under the Act. The Tribunal member decided that the consent order was a resolution of the noise issues the Applicant was experiencing up until that date, but did not bar the Applicant from subsequently raising noise issues that occurred since that date.[2] Regarding the fact that the Applicant is seeking, as a remedy, repair of the subfloor, the Tribunal stated that the request for a repair as a remedy, if there is a noise nuisance, does not automatically remove a case from its jurisdiction. The case was allowed to proceed, with the parameters set out in the motion decision.

[5] The Applicant has the burden to prove that there is an activity carried on in the unit that results in unreasonable noise that is a nuisance, annoyance or disruption. He has not. For the reasons set out below, I find that the evidence before me does not

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[1] *Mishibinijima v. Simcoe Condominium Corporation No.60 et al,* 2023 ONCAT 151 (CanLII)

[2] *Mishibinijima v. Simcoe Condominium Corporation No.60 et al,* 2024 ONCAT 144 (CanLII) at paragraph 8.

support a finding of unreasonable noise in violation of s. 117(2) of the Act. The application is dismissed, with costs ordered to be paid by the Applicant to SCC 60 in the amount of $2500.

C. ISSUES & ANALYSIS

[6] As was repeated to the parties on several occasions throughout this hearing, there are three issues to be decided:

1. Is Ms. Sapsford carrying on an activity or permitting an activity which results in the creation or continuation of unreasonable noise that is a nuisance, annoyance or disruption contrary to s. 117(2) of the Act?

2. If Ms. Sapsford is, what is the appropriate remedy and who should be ordered to provide the remedy?

3. Should costs be awarded to any party?

[7] The Applicant and SCC 60, as noted above, have been embroiled in disputes about noise for some time. The Applicant has been complaining to the SCC 60 board since about 2020. As was apparent from the Applicant's statements in this hearing, he is clearly frustrated by SCC 60's response and puts much of the blame on the board and their legal counsel for not giving him the relief that he seeks. Some of his submissions about counsel were personal and disparaging. I have given no consideration to those submissions. I have only considered and will only refer to the evidence from the parties which is material and relevant to the issues I have to decide.

Issue: Is Ms. Sapsford carrying on an activity or permitting an activity which results in the creation or continuation of unreasonable noise that is a nuisance, annoyance or disruption contrary to s. 117(2) of the Act?

[8] The Applicant's evidence on this issue focusses largely on the Aspire report of November 21, 2023. I will therefore highlight some of the salient points from that report.

[9] Aspire's engineer did a site visit on November 8, 2023. The condominium manager, the Applicant and Ms. Sapsford were present. A walk through of both units was done, walking around normally and with a 'heavy foot fall' in Ms. Sapsford's unit. Audio recordings were made. The engineer's audio recordings were submitted into evidence – at times the sounds heard were 'pretty quiet', as described by him, or with a 'heavy foot' clearly discernible. The engineer was told that the finished floor in Ms. Sapsford's unit had been replaced by the unit's

previous owner. He was able to detect several irregularities in the feel of the floor and identified problems with the subfloor which the flooring installer attempted to resolve by adding additional screws at the time the new flooring was put in. The engineer stated that this may not have fully addressed the apparent squeaks which were likely inherent to the floor composition and attributable to the use of a relatively soft subfloor material which seemed to loosen and deform over time. Noise was detected in the Applicant's unit when walking and moving about the entire floor area in Ms. Sapsford's unit, whether walking on or off the area rugs. Distinct and relatively loud creaking noise was apparent at the threshold of the kitchen and about a foot or so from either side. Creaking noises were also heard under foot when walking around the living room and dining area in front of the kitchen and in certain areas of the main bedroom. Comparatively less or no perceivable creaking was heard in the hallway and second bedroom. The engineer stated that they were making "no claims regarding the reasonableness of any noises heard".

[10] Though the Aspire engineer opined that the existing ceiling/floor assembly is below current Building Code standards from a sound proofness standpoint for a multi-unit residential building, he stated that he was not saying that it did not meet Building Code standards at the time of construction. I note that the building in which the Applicant and Ms. Sapsford reside is a three storey 12-unit building of wood construction and built in the 1980's. Given the floor assembly, he observed that the transmission of air and floor borne noises are to be expected. Because the creaking was not uniform throughout the unit, this implied to him that there are possible irregularities in the floor assembly which are likely attributed to the subfloor and not the condition of the finished flooring.

[11] The engineer concluded that the creaking noises were generated by normal walking over the floor area while wearing socks, and not a consequence of impact which was clearly discernible as a much louder thumping. He went on to state: "Short of correcting any possible issues with the subfloor in [Ms. Sapsford's] unit, additional soundproofing measures at the ceiling side of the assembly in [the Applicant's] unit could be implemented in an attempt to muffle or block floor-bourn (sic) noises".

[12] Based on the findings and conclusions of the Aspire report, I do not doubt that the Applicant hears creaking noises from the floor above. The Applicant has stated that the noise he reports is the result of everyday living – normal walking about. There is no compelling evidence of unreasonable noise and that Ms. Sapsford is carrying on an activity that is creating unreasonable noise.

[13] I do not doubt that the Applicant is hearing some sounds. Through his previous counsel (prior to filing this application) the Applicant provided noise logs to SCC 60 for the period of March 18 to April 14, 2024. He noted incidents of noise on 13 different dates in that period and several times on some of those dates, lasting between one to seven minutes. The noises are described variously by him as "crunching, snapping, cracking, squeaking, flexion and binding" These are sounds which are consistent with what was identified by Aspire to be sounds resulting from walking on the ceiling/floor assembly. The Applicant has not reported any thumping, stamping or heavy foot fall sounds that might arise from any activities carried on by Ms. Sapsford, who stated that to mitigate causing any noise, given the Applicant's complaints, she has placed area rugs in her unit and avoids doing activities such as vacuuming and laundry until the afternoon.

[14] The Applicant suggested that Ms. Sapsford "creeps" around her unit yet still makes noises, and in the hearing stated that the noises shake his ceiling at 3-4 am. There is no objective support for that latter assertion. The logs provided record noises between approximately 8 am and 6 pm with one recorded time at 12:18 am for two minutes, a 'squeaking/ flexion" sound. Nor is there any evidence before me of complaints submitted to SCC 60 by the Applicant about Ms. Sapsford's activities, and it is reasonable to infer that if she was creating noise at 3 am, he would have submitted such a complaint.

[15] Therefore, based on the evidence before me, there is no basis to conclude, on the balance of probabilities, that Ms. Sapsford is carrying on activities resulting in unreasonable noise that is a nuisance, annoyance or disruption as alleged by the Applicant.

Issue: If Ms. Sapsford is creating unreasonable noise which is a nuisance, annoyance or disruption, what is the appropriate remedy and who should be ordered to provide the remedy?

[16] I find that Ms. Sapsford is not creating an unreasonable noise and thus no remedy is warranted, I accept that the Applicant is hearing noises. He is clearly subjectively annoyed by the sounds he hears – the squeaking noises that result from Ms. Sapsford walking, even in her sock feet, in certain areas of her unit – and I note, a person is permitted to walk about in their home. But based on the Aspire report on which the Applicant places much weight, the sounds result from the building construction; specifically, the state of the subfloor and the ceiling/floor assembly.

[17] The Applicant has, at various times, alleged that these sounds come from Ms. Sapsford's unit are "ruining his peaceful enjoyment of life and his unit". He views

himself as a victim of SCC 60's inaction in fixing the subfloor damaged by the previous owner of Ms. Sapsford's unit. As noted by the Tribunal in the motion decision referred to in paragraph 4, above, the request for a repair does not necessarily remove a case from the Tribunal's jurisdiction, but any such remedy must flow from a finding of unreasonableness – unreasonable noise, or unreasonable interference. The Applicant submits that the noise is severe and loudly travels throughout his unit. The evidence, as outlined above, does not support that conclusion. The Applicant's level of tolerance for the sounds he is hearing is not an objective indication of "unreasonableness".

[18] In coming to these conclusions, I am not making a finding about whether SCC 60 is required under the Act to investigate the subflooring issues and make a repair, or whether it has properly maintained the common elements. That is, in this case, not within my jurisdiction to do. The Applicant is clearly frustrated by what he perceives as the corporation's failure to address his complaints and make repairs to the flooring or install soundproofing in his unit's ceiling. There may be other provisions in the Act which the Applicant can pursue; however, the recourse is not to the Tribunal.

Issue: Should costs be awarded to either party?

[19] The Applicant has been unsuccessful and therefore I make no award for costs in his favour.

[20] SCC 60 requests reimbursement of its legal costs, on a partial indemnity basis of $8207.19 (60% of the actual fee of $13678.65).

[21] The cost-related rule of the Tribunal's Rules of Practice relevant to this request is:

> 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.

[22] The Tribunal's "Practice Direction: Approach to Ordering Costs" provides guidance regarding the awarding of costs. Among the factors to be considered are whether a party or representative's conduct was unreasonable, for an improper purpose, or caused a delay or expense; whether the case was filed in bad faith or for an improper purpose; the conduct of all parties and representatives; the potential impact an order for costs would have on the parties; whether a party has failed to follow or comply with a previous order or direction of the Tribunal.

[23] SCC 60 submits that the Applicant's conduct was unreasonable, undertaken for an improper purpose and that his behavior in Stage 3 – Tribunal Decision caused delay and additional expenses. While I do not find that the Applicant's conduct caused any appreciable delay or ought to have caused additional expenses to SCC 60, I do accept SCC 60's submission that the Applicant's communications throughout Stage 3 – Tribunal Decision, including his closing submissions, show that he is fixated on the conduct of counsel and condominium management. He was directed on several occasions by me that the conduct of SCC 60's counsel was not an issue before me, including for example when he indicated that he wished to cross examine counsel.

[24] Regarding 'improper purpose,' as I noted above, the Applicant is very vexed by the squeaky noises that he sometimes hears. Yet he submitted little relevant evidence. He wants a 'fix", and, perhaps, has lost some perspective on how this may be addressed. He is self-represented in this hearing. But, as apparent from the documents filed in this case, and his own submissions, he did have the benefit of legal counsel about these issues as recently as June 2024, just two months before he filed this application.

[25] The Applicant chose to pursue his case before the Tribunal, as he is entitled to do, but that cannot always be without costs consequences when unsuccessful and when a party submits little relevant evidence to support their case. It is not appropriate in this case that the other unit owners should be required to contribute to the full amount of the costs incurred.

[26] In exercising my discretion to award costs to SCC 60 (the Respondent Ms. Sapsford did not request costs) I must consider what is fair and reasonable. This case was not a complex one and as SCC 60's counsel noted in her submissions, the same issues had, essentially, been before the Tribunal previously. In light of this, I am not persuaded that the costs incurred are proportionate to the issues before me to decide in this case.

[27] Weighing these various factors, I find that an award of costs to SCC 60, payable by the Applicant, in the amount of $2500 is appropriate.

D. ORDER

[28] The Tribunal orders that:

1. The application be dismissed.

2. Pursuant to s. 1.44 (1) 4 of the Act, and within 30 days of the date of this decision, Steve Mishibinijima shall pay SCC 60 costs in the amount of $2500.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: March 3, 2025