



# Civil Resolution Tribunal

Date Issued: January 28, 2019

File: ST-2018-002589

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan VR 2588 v. David*, 2019 BCCRT 106

**B E T W E E N :**

The Owners, Strata Plan VR 2588

**APPLICANT**

**A N D :**

Richard David

**RESPONDENT**

**AND:**

The Owners, Strata Plan VR 2588

**RESPONDENT BY COUNTERCLAIM**

---

## **REASONS FOR DECISION**

---

Tribunal Member:

Lynn Scrivener

## INTRODUCTION

1. This is a dispute about the installation of flooring in a strata lot. The applicant, The Owners, Strata Plan VR 2558 (strata), says the respondent, Richard David, installed vinyl-plank flooring in his strata lot without approval from the strata and in contravention of the strata's bylaws. Mr. David denies that his flooring is in breach of the bylaws. He brings a counterclaim against the strata seeking an order that it desist what he describes as bad faith conduct. Both parties ask for reimbursement of legal fees.
2. Mr. David is self-represented. The strata is represented by a member of the strata council.

## JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 121 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

6. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

7. The issues in this dispute are:
  - a. Whether the strata is entitled to an order that Mr. David remove the flooring installed contrary to the bylaws;
  - b. Whether the strata is entitled to an order that Mr. David provide access to his strata lot for inspection and acoustic testing;
  - c. Whether Mr. David is entitled to a declaration that he is not in breach of the bylaw regarding hard surface floors;
  - d. Whether Mr. David is entitled to a declaration that permission to alter his strata lot or that his flooring request was unreasonably denied;
  - e. Whether Mr. David is entitled to an order that the strata cease enforcement action and act in good faith pursuant to section 31 of the *Strata Property Act* (SPA); and
  - f. Whether the parties are entitled to reimbursement of their legal fees.

## **BACKGROUND AND EVIDENCE**

8. In a civil dispute such as this, an applicant (whether by claim or counterclaim) bears the burden of proof on a balance of probabilities. The parties have provided submissions and evidence in support of their respective positions. While I have read all of this information, I will refer only to that which is necessary to provide context to my decision.
9. The strata is located in Whistler, British Columbia and is comprised of 108 strata lots.

10. At some point prior to 2003, a previous owner of strata lot 98 (suite 607) installed tile flooring in some areas of the strata lot. This resulted in noise transference to the strata lot below. It would appear that noise travelling between strata lots was a concern in the building as a whole.
11. One relevant bylaw was filed at the Land Title Office in 2003. Among other amendments, this filing included an amendment at section 7 of bylaw 3, Use of Property, which states that hard surface floors are only permitted in kitchens, bathrooms, and entry areas, unless the unit is located above an area which does not have another suite immediately beneath.
12. Other relevant bylaws are set out in the 2011 consolidated version of the bylaws, bylaw 3 also requires that a strata lot must not be used in a way that causes a nuisance to another person, causes unreasonable noise, or unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets, or another strata lot. Bylaw 5 requires an owner to obtain approval from the strata corporation before altering prescribed portions of a strata lot, and such approval must not be unreasonably withheld.
13. Mr. David purchased strata lot 98 as an individual owner in 2015, having previously owned it jointly with another person who is not a party to this dispute. In 2015, Mr. David began correspondence with the strata about renovations he wished to undertake in his strata lot. Concern arose over Mr. David's proposal to replace the existing flooring with a vinyl-plank system given the prohibition on hard surface flooring contained in bylaw 3(7).
14. Mr. David's position was that the vinyl-plank flooring was not hard flooring, and that it had sound dampening qualities similar or superior to carpet. The strata proposed that the vinyl-plank flooring be installed with a number of conditions, including a provision that 75% of the surface be covered in rugs. Mr. David declined to accept the conditions proposed by the strata. Later, strata decided not to approve Mr. David's renovation on the basis that his proposed flooring was contrary to bylaw 3(7).

15. In 2016, Mr. David proceeded with his renovation and, despite the strata's decision, installed vinyl-plank flooring in the strata lot. An owner of the suite below advised the strata that he had spoken with the construction foreman, who told him that the vinyl-plank flooring was being installed throughout the strata lot.
16. In May of 2017, the strata council decided to initiate a hard surface flooring investigation to conduct sound transference and resonance testing in certain strata lots. The strata appeared to be considering the possibility that bylaw 3(7) could be amended. In pursuing the possibility of acoustic testing, the strata became aware that Mr. David had engaged his own sound engineer. The strata canvassed Mr. David's willingness to participate in acoustic testing and provide the results of his own testing, but the parties did not reach an agreement in this regard.
17. In a letter dated February 7, 2018, the strata's property manager advised Mr. David that "there are reasonable grounds to believe that you are in breach of bylaw 3(7)" which prohibits hard surface flooring. The letter also referenced bylaw 3(1) and stated that the strata had received complaints of unreasonable noise that was impacting the strata lot below. The strata advised Mr. David that, as part of its enforcement obligations, it would investigate the noise complaints, including an inspection from an acoustical engineer. It asked Mr. David to make his unit available for testing on February 20, 2018 and agree to an exchange of acoustic engineering reports.
18. The February 7, 2018 letter contained the statement "[t]his notice complies with section 135 of the [SPA]" and advised Mr. David that he was entitled to provide a response. According to the letter, the strata would, based on his response and the results of the investigation, provide him with a decision regarding the bylaw contravention complaints and possibly bylaw enforcement.
19. Mr. David responded to the strata and its property manager in a February 14, 2018 letter. He disagreed that the February 7, 2018 letter was in compliance with section 135 of the SPA, as he has never received any written communication of, or an opportunity to respond to, a complaint. He asked to be provided details of any

complaints, as well as the strata's basis for determining that his flooring breaches bylaw 3(7). Mr. David also stated that he had not received responses from the strata to his past queries about the proposed acoustic testing and declined to provide access to his strata lot for this purpose.

20. The strata's property manager wrote to Mr. David on February 16, 2018, and again stated that Mr. David had installed vinyl plank flooring without strata approval and was aware of noise complaints. The letter stated that the strata "has not determined that you are in breach of any bylaws; it has simply explained to you why it wishes to include your suite in the testing". On behalf of the strata, the property manager again asked for access to Mr. David's strata lot on February 20, 2018 for the purpose of the acoustic testing.
21. Mr. David replied in a February 19, 2018 letter, to which he attached a July 7, 2016 email message in which an owner of unit 507 advised that he was disturbed by the noise associated with the renovation process. Mr. David stated that he did not regard this email as a formal complaint and noted that the strata had not brought any noise complaints to his attention.
22. In a June 13, 2018 email, a strata council member provided a "non-exhaustive list of complaints surrounding Mr David's unauthorised flooring". The complaints are comprised of email messages from the occupant of the strata lot below Mr. David's and span from July of 2016 to January of 2017. One particular complaint concerned activity during the Christmas season of 2016, which involved footsteps and "any other floor contact noise". According to the neighbour, the noise from Mr. David's strata lot increased after the renovations, which he attributed to the removal of carpet from some areas. The neighbour also stated that he had stopped making complaints about the noise at some point.
23. In reply, Mr. David wrote a June 14, 2018 email message in which he advised that he was not in Canada around Christmas of 2016. He asked whether he was deemed to be in contravention of the bylaw and whether grounds exist to enforce

the request for acoustic testing. Mr. David expressed the view that there had been “zero valid noise complaints and therefore there is no breach of the bylaw”.

24. Although the strata has conducted some acoustic testing in other areas, Mr. David has not agreed to provide access to his strata lot for this purpose.
25. The strata’s Dispute Notice was issued by the tribunal on April 13, 2018. The Dispute Notice regarding Mr. David’s counterclaim was issued on June 25, 2018.

## **POSITION OF THE PARTIES**

26. The strata’s position is that Mr. David’s flooring was installed without its permission and in contravention of the hard flooring bylaw.
27. The strata seeks an order that Mr. David provide access to his strata lot for acoustic testing. The strata says that this testing would assist it with its investigation and also to allow it to consider options about the installation of hard surface flooring and how best to deal with noise complaints.
28. The strata says the order for access to the strata lot is secondary to its request for an order that the vinyl-plank flooring installed contrary to bylaw 3(7) be removed at no cost to the strata.
29. Mr. David does not deny that he installed vinyl-plank flooring in areas of his strata lot prohibited by bylaw 3(7). His view is that his choice of flooring does not offend the hard-surface flooring bylaw, and that the strata should not have denied him permission to install it. He questions whether permission from the strata to install his flooring was required given the wording of bylaw 5. Mr. David also submits that the strata has not dealt with him in good faith.
30. Mr. David seeks a declaration that he is not in breach of bylaw 3(7). He requests orders that the strata cease and desist all further actions against him, and that the strata act honestly and in good faith pursuant to section 31 of the SPA.

## ANALYSIS

### *Vinyl-Plank Flooring*

31. As noted above, bylaw 3(7) states that hard surface floors are only permitted in kitchens, bathrooms, and entry areas, unless the unit is located above an area which does not have another suite immediately beneath. There is no dispute that Mr. David's strata lot has a suite directly beneath it. Thus, bylaw 3(7) applies to him, and restricts the areas in which he may install hard surface flooring.
32. Mr. David questioned whether permission from the strata was required to install his flooring given that bylaw 5 does not specifically mention flooring. According to the working drawings provided to the strata, Mr. David's proposed renovation involved more than just an update of the flooring in his strata lot. I do not find that it was impermissible for the strata to consider bylaw 3(7) in the context of the renovation project, notwithstanding the wording or interpretation of bylaw 5. Further, bylaw 5 did not restrict the strata's ability to make a decision about flooring pursuant to bylaw 3(7).
33. The strata provided a report from a certified inspector in carpet and hard flooring installation in support of its position. Mr. David objected to this report. As the key issue is the interpretation of the meaning of bylaw 3(7), I find that I do not need to consider evidence from the strata's expert, or any expert evidence about the nature of flooring in order to decide this issue.
34. I must determine whether the strata reasonably interpreted and applied bylaw 3(7) when deciding to deny Mr. David's request to install vinyl-plank flooring in areas of his strata lot where hard surface floors are not permitted. I must confine my analysis to the version of the bylaw that was in force at the time of the decision in 2016 and am not able to consider proposed or enacted amendments.
35. The bylaw does not contain a definition of what amounts to a hard surface floor. In an exchange of email messages with Mr. David in March of 2016, a member of the strata council stated that "hard is something that is not soft". In an April 16, 2016

email message to Mr. David, the strata council expressed the view that “soft” flooring was “carpet or wall-to-wall permanent rug”.

36. Mr. David made submissions to the strata during the decision-making process about what he perceived to be the positive attributes of the vinyl-plank flooring, and information about the impact insulation rating associated with the products he proposed to use. According to Mr. David, this information establishes that his flooring has similar or better sound insulation properties than carpet. However, bylaw 3(7) does not restrict the installation of flooring with greater sound transference than carpet. Similarly, it does not permit the installation of flooring with similar or better sound insulation properties than carpet. Instead, it places restrictions on the locations in which hard surface flooring may be installed, without including any requirement that noise transmission be proven before the bylaw may be breached.
37. I find that the language of bylaw 3(7) is clear. The evidence before me supports the conclusion that the strata interpreted the meaning of the word “hard” in accordance with its plain meaning. I find that it was reasonable for the strata to determine that the proposed vinyl-plank flooring was hard in nature, and that carpeting was the appropriate flooring for areas other than kitchens, bathrooms, and entry areas.
38. Although Mr. David may have preferred that the bylaw was worded in a different manner or that the strata came to a different decision, I find that it was reasonable for the strata to determine that vinyl-plank flooring has a hard surface, and to deny permission for its installation in areas of the strata lot prohibited by bylaw 3(7).
39. As discussed, I have determined that there is no requirement in bylaw 3(7) for noise transmission to be assessed or proven before the bylaw is breached. I find that a breach occurs when hard surface flooring is installed in areas not permitted by the bylaw. By proceeding with the installation of the vinyl-plank flooring despite the strata’s decision, Mr. David breached the bylaw. As there is no indication that he has removed the vinyl-plank flooring from the impermissible areas, I also find that

he remains in breach. I decline to provide Mr. David with the declarations or orders he seeks in this regard.

### ***Bylaw Enforcement***

40. Section 26 of the SPA states that a strata council must exercise and perform the duties of the strata corporation, including the enforcement of bylaws and rules.

41. Section 135 of the SPA (which is entitled “Complaint, Right to Answer, and Notice of Decision”) provides that:

The strata corporation must not

(a) impose a fine against a person,

(b) require a person to pay the costs of remedying a contravention, or

(c) deny a person the use of a recreational facility

for a contravention of a bylaw or rule unless the strata corporation has

(d) received a complaint about the contravention,

(e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and

(f) if the person is a tenant, given notice of the complaint to the person’s landlord and to the owner .

42. The February 7, 2018 notice of infraction cited both bylaw 3(1) and 3(7) and noted that the council had received noise complaints. It states that the notice was made in compliance with section 135 of the SPA. Mr. David expressed the view that the February 7, 2018 letter was not in compliance with section 135. For the reasons that follow, I agree.

43. The notice of infraction stated that the strata had previously made Mr. David aware of the particulars of the noise complaints. I find that this is not the case. While the issue of noise transference may have been discussed, the evidence does not establish that Mr. David was provided with specific information about any noise

complaints by the strata until June of 2018. I do not find it necessary to assess the validity of the complaints. It does not appear that Mr. David requested a hearing under section 135 after receiving these particulars, but I note that this dispute had already been commenced with the tribunal by that point.

44. I am not satisfied that the notice of infraction for the alleged breach of bylaw 3(1) is in compliance with section 135 of the SPA because Mr. David was not given the particulars of the complaints. As the request for acoustic testing was related to these complaints, I decline to make an order that Mr. David provide access to his unit for this purpose.
45. However, this is not determinative of the matter. The strata has not asked for the payment of a fine, or asked that Mr. David pay the costs of remedying a contravention in respect of bylaw 3(7). Instead, the strata is asking for enforcement of the flooring restrictions in that bylaw.
46. I acknowledge, but do not agree with, Mr. David's position that the enforcement of bylaw 3(7) cannot occur in the absence of a noise complaint. Bylaw 3(1) addresses the noise issues and bylaw 3(7) deals with flooring. While bylaw 3(7) may have been implemented with noise transference in mind, there is no requirement that a noise complaint be made or dealt with before it may be enforced.
47. The British Columbia Supreme Court has held that a lack of compliance with the requirements of section 135 does not prevent a strata from remedying a contravention to a flooring bylaw (see *The Owners, Strata Plan VR19 v. Collins et al*, 2004 BCSC 1743, at para. 17). In that decision, notwithstanding the strata's failure to provide a hearing as requested under section 135 of the SPA, the Court stated that "since [the owners] blatantly contravened the Flooring Bylaw when they either knew of the Flooring Bylaw or should have made an effort to read the Strata Corporation bylaws or made a diligent enquiry as to whether laminate flooring was permitted in SL 22, they should be required to bear the financial burden of replacing the hard flooring with carpeting". I find that I may rely upon this interpretation that

the failure to comply with section 135 of the SPA does not prevent enforcement of strata bylaws.

48. I have determined that Mr. David breached bylaw 3(7) when he installed vinyl-plank flooring in impermissible areas of his strata lot. I have considered the statement in the February 16, 2018 letter that the “strata council has not determined that you are in breach of any bylaws”. However, I have also considered previous correspondence and determined that Mr. David had been advised already of the strata’s view that his flooring did not comply with bylaw 3(7).
49. Although Mr. David did not agree with the decision he received, he did have a hearing about his flooring and was informed of the strata council’s view that it contravened bylaw 3(7). This decision was communicated in writing on more than one occasion. In a May 1, 2016 email message (which appears to have been received by Mr. David on May 2, 2016), a council member wrote that the “strata council does not approve your renovation because of your proposed use of hard surface flooring”. In addition, a May 20, 2016 email message stated, in part, “your proposed use of hard surface flooring is contrary to the bylaws”.
50. Despite clear communication of the strata’s position, Mr. David chose to disregard it and install non-compliant flooring in his strata lot. The equivocal language in the February 18, 2018 letter (which did not amount to a notice of infraction) does not change the fact that Mr. David knew about the strata’s earlier decision.
51. The strata requests an order that Mr. David remove his non-compliant flooring. I am satisfied that this remedy is reasonable and justified in the circumstances of this case. I also find that the requested remedy is contemplated by the strata’s bylaw. I order that, within 180 days of this decision, Mr. David remove the vinyl-plank flooring from areas of his strata lot where it is not permitted by bylaw 3(7). Any replacement flooring must be in compliance with the strata’s bylaws. Mr. David must bear the cost of the removal and replacement of his flooring.
52. If Mr. David does not comply with this order, the strata is entitled to remedy the contravention by removing the flooring under section 133 of the SPA.

53. As noted above, I decline to order that Mr. David provide access to his strata lot for acoustic testing. However, nothing in my decision restricts the parties from reaching an alternative agreement that may include acoustic testing. I also decline to make an order that the strata cease enforcement action against Mr. David.

### ***Conduct of the Strata***

54. Section 31 of the SPA requires that, in exercising the powers and performing the duties of a strata corporation, a member of a strata council must act honestly and in good faith with a view to the best interests of the strata. Further, the member must exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

55. Mr. David's position is that the strata council has not acted in good faith when dealing with his renovation proposal or requests for information. While Mr. David may not agree with the decisions made or actions taken by the strata council, I do not find that the evidence establishes bad faith or a lack of reasonable care, diligence, or skill. This is so despite the fact that some queries posed by Mr. David to the council were not answered as quickly as he would have wished. Further, Mr. David has not named individual members of the strata council as parties in this dispute.

56. Even if I had made a finding that the members of the strata council breached their duty of care under section 31 of the SPA, the tribunal does not have the jurisdiction to address a remedy (see, for example, *Mykle-Hotzon v. The Owners, Strata Plan LMS 1372 et al*, 2018 BCCRT 609 at paras. 37 – 38). Accordingly, I decline to make an order in this regard.

### **TRIBUNAL FEES AND EXPENSES**

57. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case to deviate from

the general rule. As the strata has been largely successful, I order Mr. David to reimburse the strata for tribunal fees of \$225.00.

58. Neither party claimed dispute-related expenses, but both parties requested reimbursement of legal fees related to this dispute. Rule 131 provides that, except in extraordinary cases, the tribunal will not order one party to pay another party any fees charged by a lawyer or another representative in the tribunal dispute process. Although it was open to the applicants to choose to consult with counsel, I do not find that the circumstances of this case are extraordinary such that an order for reimbursement would be appropriate. I decline to make an order in this regard.
59. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

## **DECISION AND ORDERS**

60. I order that:

- a. Within 180 days of the date of this order, Mr. David must, at his own cost, remove the vinyl-plank flooring from those areas of his strata lot where hard-surface flooring is prohibited by bylaw 3(7).
- b. Any replacement flooring installed in the strata lot must be at Mr. David's own cost, and in compliance with the strata's bylaws.
- c. Within 30 days of the date of this order, Mr. David must reimburse the strata \$225.00 in tribunal fees.

61. The remainder of the strata's claims are dismissed.

62. Mr. David's claims by counterclaim are dismissed.

63. The strata is also entitled to post-judgment interest under the *Court Order Interest Act* R.S.B.C. 1996, c. 79, as amended, as applicable.

64. Under section 57 of the Act, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.
65. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the Act, the Applicant can enforce this final decision by filing in the Provincial Court of British Columbia a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

---

Lynn Scrivener, Tribunal Member