



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Preshaw v. The Owners, Strata Plan LMS 864*, 2020 BCCRT 840

B E T W E E N :

JENS PRESCHAW

APPLICANT

A N D :

The Owners, Strata Plan LMS 864 and LAURA HARGRAVE

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This is a dispute over noise and disturbance in a strata corporation.
2. The applicant, Jens Preschaw, owes strata lot 34 (SL34) in the respondent strata corporation, The Owners, Strata Plan LMS 864 (strata). The respondent, Laura Hargrave, owns strata lot 25 (SL25), which is the strata lot directly below SL34.

3. Mr. Preshaw says that Ms. Hargrave's dog barks in her strata lot and patio, which negatively interferes with his quality of life and is in violation of the strata's bylaws. Mr. Preshaw says the strata has failed to enforce its bylaws. He seeks the following orders:
 - a. the strata stop Ms. Hargrave's dog from "nuisance barking" in her strata lot and patio;
 - b. Ms. Hargrave stop her dog from barking in her strata lot and patio or find a new home for the dog, and
 - c. reimbursement of \$1,646.98 in legal fees.
4. Ms. Hargrave says her dog occasionally barks but denies that it is "nuisance barking". The strata says it has investigated Mr. Preshaw's noise complaint and found no "reasonable basis" to conclude that Ms. Hargrave was violating the bylaws. Both respondents ask that Mr. Preshaw's claims be dismissed.
5. Mr. Preshaw and Ms. Hargrave are self-represented. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.
7. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

8. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.
9. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

ISSUES

10. Has Ms. Hargrave contravened the strata bylaws and if so, has the strata failed to enforce its bylaws and what is the appropriate remedy?
11. Must the respondents reimburse Mr. Preshaw \$1,646.98 in legal fees?

EVIDENCE AND ANALYSIS

12. In a civil proceeding such as this, the applicant, Mr. Preshaw must prove his claims on a balance of probabilities.
13. I have read all the evidence and arguments provided but only refer to that which I find relevant to provide context to my decision.
14. The strata was created in 1993 under the *Condominium Act* and continues to exist under the *Strata Property Act* (SPA). The strata plan filed in the Land Title Office (LTO) shows that it is a 4-floor building consisting of 35 strata lots. Mr. Preshaw refers to Ms. Hargrave's dog barking on her patio or balcony. I find he means to refer to the limited common property deck attached to SL25, as shown on the strata plan. There is no patio attached to SL25.
15. The strata filed consolidated amended bylaws in the LTO on April 16, 2012, and some amendments on May 19, 2017. I find relevant parts of the bylaws to this dispute can be paraphrased as follows:

3(1) An owner must not use a strata lot, the common property, or common assets in a way that causes a nuisance, unreasonable noise, or unreasonable interference with the rights of other persons to use and enjoy the common property, common assets or other strata lots.

3(3) An owner must not keep more than one domestic pet, being a dog or a cat (the “Pet”) on a strata lot, unless otherwise approved in writing by the strata council. An owner must comply with these bylaws and any rules with respect to the keeping of Pets.

3(7) No owner shall permit its Pet to interfere with any other person, Pet or object, or permit its Pet to disturb any other owner, tenant or occupant with uncontrolled barking or howling.

3(9) If the council receives a complaint about a Pet, a bylaw enforcement hearing will be held in accordance with the provisions of the SPA. At the end of the hearing, the council may take no action, fine the owner, require the person to pay the costs of remedying the contravention, or order the immediate removal of the Pet from the strata lot in which case the Pet will be immediately removed. The owner of the Pet will be advised about the outcome of the hearing in writing.

3(16) Quiet hours are in effect in the building on weekdays from 10:00 p.m. to 8:00 am and weekends from Midnight to 10:00 am.

3(17) An owner must not use a strata lot for any purpose which involves undue traffic or undue noise or makes, causes or produces undue noise.

Has Ms. Hargrave contravened the strata’s bylaws and if so, has the strata failed to enforce its bylaws and what is the appropriate remedy?

16. Mr. Preshaw’s complaints are mainly about Ms. Hargrave’s dog barking inside SL25, on her deck, and outside the strata building. Mr. Preshaw says the strata failed to take enforcement action in response to his noise complaints.

2018 Alleged Dog Barking Incidents

17. Mr. Preshaw's first complaint to the strata in evidence is dated March 30, 2018. He complained that Ms. Hargrave recently got a new puppy and it "constantly barks, whines and yelps". He told council that "listening to a dog barking for many hours" was annoying and stressful. By email dated April 4, 2018, the strata's property manager informed Mr. Preshaw that council "approached the owner in violation and made sure the incident was not going to repeat". The property manager invited Mr. Preshaw to inform them if he had any further issues so they could address them.
18. Mr. Preshaw complained again about Ms. Hargrave's dog barking on April 23, 2018. The correspondence shows the strata followed up with Ms. Hargrave. She admitted her puppy barks but denied it was "nuisance barking" and said she was working with a trainer. According to the April 26, 2018 strata council minutes, Mr. Preshaw's noise complaint was considered "resolved". However, for some unexplained reason the property manager sent Ms. Hargrave a bylaw enforcement notice on May 7, 2018 about the April 2018 complaint. There are no documents in evidence showing the strata took any further enforcement action and so, I find it did not.
19. Mr. Preshaw complained to the strata again on July 18, 2018, September 4, 2018, October 14, 2018 and October 21, 2018 about Ms. Hargrave's dog barking and being left alone in SL25 at times. There are October 2018 emails between the strata and Ms. Hargrave discussing the noise complaints. In her emails, Ms. Hargrave admitted that her dog sometimes barks but denied the barking incidents as alleged in Mr. Preshaw's complaints.
20. The records do not show that the strata conducted a bylaw hearing after each complaint as required under bylaw 3(9) in response to Mr. Preshaw's 2018 complaints. I find the strata failed to follow bylaw 3(9) in 2018.
21. As I discuss below, Mr. Preshaw did not continue to complain directly to the strata about the dog barking. However, after Mr. Preshaw involved his lawyer in September 2019 and submitted a list of alleged dog barking incidents the strata

held a council hearing in December 2019. I discuss this further in the following section.

2019 and 2020 Alleged Dog Barking Incidents

22. Mr. Preshaw's requested remedies concern the present status of Ms. Hargrave's dog. I find the issues before me are whether Ms. Hargrave is currently contravening the bylaws by allowing her dog to uncontrollably bark, cause a nuisance, or cause unreasonable noise and whether the strata has failed to enforce the bylaws. I must also consider whether it is appropriate to order that the dog stop barking or is removed.
23. As summarized above, the bylaws allow a person to keep a dog in their strata lot. However, the bylaws prevent a person from allowing a dog to cause a nuisance, unreasonable noise, unreasonable interference, with uncontrolled barking or howling. The BC Supreme Court in *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502, described nuisance in the strata context as a substantial, non-trivial interference with an owner's use and enjoyment of their property and that the interference is unreasonable.
24. As in *Triple P*, I find the word "nuisance" in the strata's bylaw 3(1) requires that Ms. Hargrave not allow her dog's noise, barking, or howling to unreasonably interfere with Mr. Preshaw's use and enjoyment of his strata lot. I find the standard is an objective one.
25. On September 20, 2019, Mr. Preshaw's lawyer wrote the strata alleging that it failed to take action "after a year and a half of regular and disruptive barking". In his letter, the lawyer demanded that the strata take bylaw enforcement action against Ms. Hargrave. In response to the lawyer's letter, the property manager requested a list of Mr. Preshaw's complaints and noise logs, "so everyone can have the same baseline".
26. Apart from the lawyer's letter, the strata's communication records in evidence do not include any complaints from Mr. Preshaw to the strata after October 2018. Mr.

Preshaw also does not say that he complained to the strata about the dog over those months. So, I find that Mr. Preshaw did not complain about Ms. Hargrave's dog between October 2018 and his lawyer letter in September 2019.

27. On November 18, 2019, Mr. Preshaw sent the property manager an email with a list of alleged noise incidents from January 20, 2019 to November 2, 2019 related to both Ms. Hargrave or her dog. Mr. Preshaw told the strata he had been documenting the noise incidents over the 10-month period. I find the alleged incidents amount to the dog barking a few times per week. Mr. Preshaw's list does not state the barking duration of each alleged incident. I also find that Mr. Preshaw did not complain to the strata at the time of the alleged incidents in his November 18, 2019 emailed list, as I mentioned above and discuss further below.
28. After providing notice to Mr. Preshaw and Ms. Hargrave, the strata held a bylaw enforcement hearing on December 9, 2019 in a council member's strata lot. The hearing was scheduled for 5:30 pm but was delayed because the council member "host" was allegedly stuck in traffic. Mr. Preshaw says he waited 15 minutes and then "gave up". Hearing notes in evidence prepared separately by Ms. Hargrave and the strata both say that Mr. Preshaw left and returned to his strata lot at about 5:35 when the host arrived. I accept on the contemporaneous meeting notes that the host arrived only about 5 minutes late and Mr. Preshaw left at about the same time.
29. The strata's hearing notes say that Mr. Preshaw went into his strata lot, the council members knocked and called out to him that the hearing was beginning but received no answer. They also say they left a voice message and he did not respond. So, the hearing was convened without Mr. Preshaw. Mr. Preshaw does not explain why he decided not to attend the hearing. I find, in the circumstances, that the strata provided Mr. Preshaw with a fair opportunity to participate in the hearing. I find that the strata complied with bylaw 3(9) by holding the hearing in response to his 2019 complaints even though he chose not to attend.

30. Following the hearing, the strata concluded that there was no reasonable basis to conclude that Ms. Hargrave was violating its bylaws. It sent letters to both Mr. Hargrave and Mr. Preshaw stating that the complaint was “resolved”. The strata states that in coming to this conclusion, it “investigated this matter at length, including canvassing neighbour owners, [and] detailed review of accusations, response and counter accusations”. I note that the strata did not produce any interview records or written record of it having canvassed other owners. It does not say whether it canvassed the other owners informally. So, I have no details of these interviews.
31. However, I accept that other owners or occupants did not complain to the strata about the dog’s barking because there is no evidence that the strata received complaints from others. Also, Mr. Preshaw provided no audio of the barking or statements from other owners who heard the dog barking or howling uncontrollably or causing a nuisance. Mr. Preshaw submitted a statement from owners of another strata lot who did state they heard the dog “occasionally, but its not as bad as from were you are”. The statement submitted by Ms. Hargrave’s neighbour states that she works from home, is home all day, and never hears Ms. Hargrave’s dog but that she does hear other dogs. The neighbours on the other side of Ms. Hargrave’s SL25 stated that they hear Ms. Hargrave’s dog bark, once or twice, but days apart, never excessive, and it never happens during quiet hours. They say they are never bothered by the dog but have heard other dogs in the strata “courtyard” or outside.
32. I acknowledge others may hear Ms. Hargrave’s dog differently depending on their location within the strata building. So, I find their evidence is not conclusive on what Mr. Preshaw might hear in his strata lot. However, these witnesses do say that they hear Ms. Hargrave’s dog and they do not say it was barking or howling uncontrollably or for any long duration of time. I find their statements support that the dog does not bark or howl uncontrollably contrary to bylaw 3(7).
33. For this hearing, Mr. Preshaw provided a list of further incidents that he says are Ms. Hargrave’s dog barking between November 2, 2019 and April 27, 2020. Mr. Preshaw does not say when he prepared the incident list or whether he made the

list's entries concurrent with the alleged incidents. The incident list records alleged dog barking a few times a week. There is only one entry that states the dog barked for any duration of time and that entry was for an alleged incident about 6 months before the last recorded incident on the list. Mr. Preshaw did not complain to the strata about Ms. Hargrave's dog at the time of that incident. The other alleged incidents state only that the "dog barked" or had a "barking frenzy", and do not state the duration. Mr. Preshaw does not describe what he means by "barking frenzy". Mr. Preshaw also did not complain to the strata at the time of these other alleged incidents.

34. Ms. Hargrave admits in her submissions here that her dog occasionally barks, but says it is only for a few seconds and she has been working with a trainer to control its bark response. Ms. Hargrave disputes the accuracy of Mr. Preshaw's incident list and says he did not complaint to her at the time of the alleged barking. Ms. Hargrave says some other dogs' barking can be heard from within her strata lot and she disputes that the alleged barking incidents in Mr. Preshaw's list are all related to her dog. She states that her dog was not in the building for some of the alleged incidents or she was home with her dog and does not remember it barking. Ms. Hargrave undisputedly co-owns the dog and the dog is sometimes with the co-owner who lives elsewhere.
35. I find Mr. Preshaw's incident list on its own falls short of proving that all the listed barking incidents were Ms. Hargrave's dog. I say this because there is some evidence that Ms. Hargrave's dog might not have been in the strata lot at the time of the barking, there is evidence from 2 independent witness of noise from other dogs barking, and Mr. Preshaw made no complaint about Ms. Hargrave's dog at the time to the strata or to Ms. Hargrave. He also did not provide the incident list's source document, such as a log book and there is no other evidence, such as audio recording, to corroborate the list. Even if I accept the incident list is accurate, which is not proven, I find the barking must not have caused a substantial and unreasonable interference or he would have made a complaint to the strata at the time.

36. I find the facts in this dispute are different than those in the CRT decision, *Wu v. The Owners, Strata Plan BCS 3237*, 2019 BCCRT 1061 (*Wu*). In *Wu* there was audio recordings and witness statements of the dog in question barking for an extended time. The bylaws in *Wu* stated that an owner must not permit a pet to cause a nuisance or disturb any other owner due to barking, howling, or other noise. The tribunal member held that “occasional barking would not likely be considered a nuisance or disturbance, as prohibited” under its bylaws. However, the tribunal member found on audio recordings of ongoing and repeated barking and 3 strata lot owners’ complaints that the dog barked for 2.5 hours at a time, what it was not occasional barking. The tribunal member found the owner breached the bylaws due to their barking dog.
37. I find on the evidence before me that Ms. Hargrave’s dog barked occasionally. However, I find the evidence does not support a finding that Ms. Hargrave allowed her dog to bark or howl uncontrollably or cause unreasonable noise, or that it caused a substantial and unreasonable interference to Mr. Preshaw.
38. Mr. Preshaw carries the burden of proof and I find he has not established that Ms. Hargrave breached the bylaws or caused a nuisance because of dog barking. I dismiss Mr. Preshaw’s requested orders to remove Ms. Hargrave’s dog or stop the dog from barking.

Alleged Entry and Exist Noise

39. Apart from the barking, Mr. Preshaw complains about noise allegedly caused by Ms. Hargrave leaving her strata lot late at night or very early in the morning to walk her dog. He says this occurs during the buildings’ quiet hours set out in bylaw 3(16). Mr. Preshaw says his bedroom window is directly above Ms. Hargrave’s exterior door and when she leaves it wakes him up and he cannot get back to sleep.
40. In Mr. Preshaw’s incident list referenced above, he includes about 8 entries where he states that Ms. Hargrave exited and entered the building after quiet hours. In 4 of those entries Mr. Preshaw stated that he found her to be “very noisy” or loud. Ms. Hargrave denies the list is accurate.

41. The photograph in evidence shows a large window directly above SL25's exterior front door. There is no dispute that it is Mr. Preshaw's bedroom window. It is unfortunate that his bedroom's large window is located directly over an exterior door. I accept that Mr. Preshaw can hear Ms. Hargrave entering and exiting the building. However, I find that using the exterior door to enter or exit the strata building is simply normal strata lot use. Mr. Preshaw did not complain at the time and Mr. Preshaw provided no objective evidence apart from his assertions about her noise level. I find that Mr. Preshaw has not established Ms. Hargrave caused unreasonable noise or interference when entering and exiting the building. The evidence does not support a finding that Ms. Hargrave breached bylaw 3(1) or 3(16).

Conclusion

42. As explained above, I find Mr. Preshaw has not established that Ms. Hargrave breached the strata's bylaws. I dismiss Mr. Preshaw's claims.

43. Nothing prevents Mr. Preshaw from making a complaint to the strata in the future if Ms. Hargrave allows her dog to bark or howl uncontrollably or if she causes a nuisance, or unreasonable noise. I acknowledge Mr. Preshaw says he is concerned that the council members might be biased against him or not take his complaints seriously due to his past dealings. While I found the strata failed to follow bylaw 3(9) in 2018, the evidence does not support a finding that the strata will treat him inequitably or unjustly in the future.

44. The courts have held that the discretion to enforce bylaws is limited and the strata must act reasonably and consider the reasonable expectation of the owners (see *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings Inc.*, 2016 BCSC 32 and *Abdoh v. The Owners of Strata Plan KAS 2003*, 2014 BCCA 270). The SPA and the bylaws already require the strata to respond if Mr. Preshaw makes a further complaint, including a reasonable investigation, a hearing, and any resulting bylaw enforcement action. I find no reason for the CRT to intervene here in the strata's future governance.

CRT FEES AND EXPENSES

45. Mr. Preshaw seeks an order for reimbursement of \$1,646.98 in legal fees. CRT rule 9.5(3)(b) says that the CRT will not order one party to pay another party any fees charged by a lawyer in a strata dispute, unless there are extraordinary circumstances.
46. In *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330, a CRT Vice Chair found that the CRT's authority to order reimbursement of legal fees in extraordinary circumstances is similar or analogous to an award of special costs. Though other CRT decisions are not binding on me, I find the Vice Chair's decision persuasive. I find that Mr. Preshaw's claim for legal fees is similar to a request for special costs.
47. Special costs are an order for one party to pay another party's legal fees. The rules for special costs are set out in the BC Supreme Court Rules, which I note, do not apply to the CRT. The courts have said that a special costs award is only made in exceptional circumstances and it is intended to reprimand a party's reprehensible or bad behaviour (see *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, at paragraph 73). In *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 (BCCA), the Court of Appeal said that special costs should be ordered against a party when their conduct in the litigation was reprehensible, in the sense of deserving reproof or blame. While the Supreme Court Rules do not apply, I find the same legal test factors for what are exceptional circumstances can be applied to a request for reimbursement of legal fees here.
48. I find that Mr. Preshaw has not provided any evidence that the strata or Ms. Hargrave's conduct during the CRT dispute process was reprehensible or deserving of rebuke. I find there is no evidence of exceptional circumstances that warrant an award of legal fees. Also, under section 49 of the CRTA, and the CRT rules, the CRT will generally not order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Since I did not award his requested remedies, I find that Mr. Preshaw was the unsuccessful party in this

dispute and so, I find he is not entitled to reimbursement of his legal fees. As the unsuccessful party, I also dismiss his request for reimbursement of his CRT fees.

49. The strata and Ms. Hargrave paid no fees and claimed no dispute-related expense, and so I award none.

50. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Mr. Preshaw.

ORDER

51. I order that Mr. Preshaw's claims and this dispute are dismissed.

Trisha Apland, Tribunal Member