

Headline: The Case of the Partying Penthouse Owner

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As noted in the previous case law report, the case of "The Noisy Neighbour", resolving complaints about disruptive owners who are unwilling to comply with a strata corporation's bylaws can be very difficult and may require the strata corporation to apply to Court to obtain an injunction.

The recent case of *The Owners, Strata Plan LMS 4255 v. Newell* reinforces the fact that such Court applications may be necessary and can be an effective way to obtain compliance and peace and quiet for surrounding neighbours. The *Newell* case also points out the importance of having clear and specific bylaws that the Judge can enforce.

Mr. Newell owned a penthouse in a high-rise building in Yaletown. The penthouse had exclusive use of a limited common property deck above the strata lot and a limited common property balcony adjacent to it. Mr. Newell installed an air conditioning unit and hot tub on the deck and equipped the outdoor area with a large barbecue grill and an entertainment system that included a big screen TV, two wall mounted speakers above the hot tub, two speakers mounted into the balcony railings on either side of the TV and a large speaker below the grill.

After Mr. Newell moved into the unit, neighbours complained about loud music being played and parties continuing into the early hours of the morning. The strata corporation alleged that the gatherings and noise breached several of the strata corporation's bylaws including a bylaw that established a quiet period between 11 p.m. and 8 a.m. every day. Additionally, the strata corporation alleged that the installation of the air conditioning unit and the hot tub was contrary to the bylaws which required permission before an alteration could be made to common property. The strata council had specifically denied Mr. Newell permission to install the air conditioning unit and hot tub.

The Court considered the numerous complaints that had been filed by the neighbours adjacent to and below Mr. Newell as well as complaints from an adjacent building. Although the strata corporation had proceeded to take bylaw enforcement action and had fined Mr. Newell on numerous occasions, Mr. Newell simply paid the fines. The Judge noted that notwithstanding the levying of fines "there comes a point where a strata corporation must pursue injunctive relief".

The strata corporation stated that since Mr. Newell moved in it had received more than 35 complaints of disturbances between 11 p.m. and 8 a.m. relating to loud music and noise. The music and noise had resulted in numerous calls and interventions by the police. Mr. Newell argued that the gatherings were normal social gatherings with normal frequency and that they could not be considered to be a continuing nuisance. Mr. Newell also argued that the neighbours expectations for peace and tranquility exceeded what prevails generally in the Yaletown neighbourhood and the standard of reasonable people living in that area.

The strata corporation argued that it did not have to prove that Mr. Newell's conduct constituted a nuisance in view of the strata corporation's bylaws that prohibited unreasonable noise and which established quiet hours. Mr. Newell also argued that the hot tub and air conditioning unit were not an alteration of common property.

Hot Tub

The Judge did not find that the installation of the hot tub and air conditioning unit, without permission, was a breach of the strata corporation's bylaws. The Judge relied on an Ontario case which had determined that in order to be an alteration, there must be some degree of permanence in respect of the changed common property. The Judge in *Newell* held that neither the air conditioning unit nor the hot tub was intended to be permanent and concluded that neither was an alteration of common property. Had the strata corporation had a bylaw that specifically prohibited the placing of hot tubs or air conditioning units on common property and limited common property the outcome may well have been different.

Noise

The Judge found that Mr. Newell breached the strata corporation's bylaws by causing unreasonable noise, creating unreasonable interference with the rights of others to enjoy their strata lots and by not observing the quiet hours between 11 p.m. and 8 a.m. The Judge prohibited Mr. Newell from using or operating any entertainment system, TV, speakers or musical instruments on the deck or balcony between the hours of 11 p.m. and 8 a.m. The Judge also prohibited Mr. Newell from using the hot tub on the deck between those hours.

Having a bylaw that established quiet hours was undoubtedly helpful in permitting the Judge to find that Mr. Newell's conduct was beyond what the owners, as a collective, agreed to tolerate.

Conclusion

The *Newell* case confirms that when an owner refuses to comply with the bylaws the strata corporation must obtain a Court order as a means of enforcing the bylaws. More significantly however the case establishes that where a strata corporation wishes to control certain behaviour having specific bylaws may be necessary to achieve the desired outcome. Specifically having a bylaw that prohibits the placement of specific items such as hot tubs and air conditioning units on decks and balconies rather than relying on a general bylaw that prohibits alterations to common property may be necessary.

Strata corporations that are having difficulty obtaining compliance with the bylaws should firstly review the bylaws to confirm that they clearly address the behaviour in question and then, if compliance cannot be achieved, put forward a resolution to obtain authority from the owners to proceed with Court action. The strata corporation should seek legal advice at this point for assistance in drafting the resolution.