

IN THE MATTER between **KATHRYN BIRCHWOOD**, Applicant, and **THE EXECUTIVE LTD.**, Respondent;

AND IN THE MATTER of the **Residential Tenancies Act** R.S.N.W.T. 1988, Chapter R-5 (the "Act") and amendments thereto;

AND IN THE MATTER of a Hearing before, **HAL LOGSDON**, Rental Officer, regarding the rental premises at **YELLOWKNIFE, NT.**

BETWEEN:

KATHRYN BIRCHWOOD

Applicant/Tenant

- and -

THE EXECUTIVE LTD.

Respondent/Landlord

ORDER

IT IS HEREBY ORDERED:

1. Pursuant to section 30(4)(a) of the *Residential Tenancies Act*, the respondent shall complete the installation of ceiling insulation in the commercial premises rented to Just Fitness no later than January 31, 2016.
2. Pursuant to sections 30(4)(d) and 34(2)(c) of the *Residential Tenancies Act*, the respondent shall pay compensation to the respondent in the amount of three thousand eight hundred fifty five dollars (\$3855.00). The applicant may elect to receive the compensation as a rent credit or a lump sum cash payment.

3. The applicant is granted leave to file a future application should the ordered repairs not be completed in accordance with this order or the repairs are insufficient to reasonably reduce the noise created by the downstairs fitness centre.

DATED at the City of Yellowknife, in the Northwest Territories this 6th day of January,
2016.

Hal Logsdon
Rental Officer

IN THE MATTER between **KATHRYN BIRCHWOOD**, Applicant, and **THE EXECUTIVE LTD.**, Respondent.

AND IN THE MATTER of the **Residential Tenancies Act** R.S.N.W.T. 1988, Chapter R-5 (the "Act");

AND IN THE MATTER of a Hearing before **Hal Logsdon**, Rental Officer.

BETWEEN:

KATHRYN BIRCHWOOD

Applicant/Tenant

-and-

THE EXECUTIVE LTD.

Respondent/Landlord

REASONS FOR DECISION

<u>Date of the Hearing:</u>	February 18, 2015 continued on December 9, 2015
<u>Place of the Hearing:</u>	Yellowknife, NT
<u>Appearances at Hearing:</u>	Kathryn Birchwood, applicant Kathy Yurris, representing the respondent (February 18, 2015) Jamie Kerr, representing the respondent (December 9, 2015)
<u>Date of Decision:</u>	January 6, 2016

REASONS FOR DECISION

The applicant rents an apartment in a residential complex of 24 units. The tenancy agreement between the parties commenced in October, 2011 and has been renewed several times. Located on the main floor of the complex is a fitness centre. The applicant alleged that since the fitness centre was established in January, 2014 her quiet enjoyment of the apartment has been repeatedly disturbed. The applicant sought an order requiring the respondent to install soundproofing at the fitness centre and to compensate her for the loss of full enjoyment of the premises.

The respondent acknowledged that they were aware of the problem and had arranged to have soundproofing installed at the fitness centre. The matter was adjourned sine die to give the landlord an opportunity to install the soundproofing and determine if the noise from the fitness centre had been successfully mitigated. The hearing was reconvened on December 9, 2015.

The applicant provided email correspondence in evidence indicating that she had voiced her concerns about the noise from the fitness centre in September, 2014 after receiving a notice of rent increase. She expressed her concern that the rent was being increased without the noise problems being addressed and proposed that the rent increase be rescinded. She also acknowledged that tenants had been advised when the fitness centre was established that mats were being installed and that tenants had been asked to be patient while the noise issue was addressed. The landlord replied, stating that the mats had been installed and that she was unaware that the noise problem had not been resolved.

The applicant notified the landlord again in October and November, 2014 that the noise situation had not been resolved and presented the respondent with a petition on January 18, 2015 signed by eleven other tenants attesting to the noise created by the fitness centre. The applicant filed an application to a rental officer on January 23, 2015.

Along with the applicant's written description of the noise produced by the fitness centre, a recording of the thumping noise was provided in evidence. As well, the applicant provided three written statements from other tenants in the residential complex attesting to the disturbing noise created by the fitness centre.

I attended the fitness centre on December 8, 2015. There was a fitness session in progress with 4-5 participants. I did not hear any excessive noise from the activity but several participants were tossing medicine balls against the wall which I am sure created some noise transmission in the wall cavity. The wall did not appear to have any mats or other sound proofing material.

At the continuation of the hearing on December 9, the respondent stated that approximately 85-90% of the ceiling insulation had been installed and they expected the remainder to be completed in January, 2016. The applicant stated that the noise had been abated somewhat but a thumping sound persisted.

The respondent stated that they had made an offer to settle the matter by rolling back all of the rent increases made after the fitness centre was established. They proposed that a rent credit of

\$1280 be provided to the applicant and that the rent would be reduced to the pre-fitness centre rate of \$1650 until October, 2016 when it would be raised to \$1690. As an alternative, the respondent offered to rent the applicant another apartment, either in the same complex or in another that was operated by the landlord. The respondent offered to pay for moving costs and costs to transfer the utility accounts.

The applicant did not accept either of the offers suggested by the landlord. She stated that she liked her current premises and simply wanted the noise abatement work completed and the noise from the fitness centre addressed. The applicant also felt that the compensation offered was inadequate to offset the loss of quiet enjoyment that she had suffered since the fitness centre was established. She suggested that the roll-back of the rent increases plus an additional \$200/month would be reasonable.

Sections 30 and 34 of the *Residential Tenancies Act* are relevant to this matter.

30. (1) A landlord shall

- (a) provide and maintain the rental premises, the residential complex and all services and facilities provided by the landlord, whether or not included in a written tenancy agreement, in a good state of repair and fit for habitation during the tenancy; and**
- (b) ensure that the rental premises, the residential complex and all services and facilities provided by the landlord comply with all health, safety and maintenance and occupancy standards required by law.**

Subsection 5 obligates a tenant to notify the landlord of any breach of the obligations imposed by subsection 1.

30.(5) A tenant shall give reasonable notice to the landlord of any substantial breach of the obligation imposed by subsection (1) that comes to the attention of the tenant.

34. (1) No landlord shall disturb a tenant's possession or enjoyment of the rental premises or residential complex.

The voluntary improvements to the fitness centre suggest that the landlord has recognized that the fitness centre is creating disturbance for the residential tenants. Although the respondent noted that there had been a fitness centre at that location previously (before the applicant's tenancy agreement commenced), it should be noted that the current centre is somewhat different than most others. The current fitness centre offers high intensity training including "Warrior built", "Warrior Woman" and "Fight Team Practices" in contrast to many gyms which offer less aggressive regimes of fitness training. In my opinion, the evidence supports the allegations that the applicant has been deprived of her full enjoyment of the rental premises since the fitness centre was established.

It is difficult to ascertain whether the completion of the ceiling insulation at the fitness centre will satisfactorily resolve the noise problem. I suspect that some work on the walls where the medicine ball exercises are conducted may be necessary to resolve the thumping noises which persist. In my opinion, an order to complete the ceiling insulation is reasonable. I would suggest, as has the landlord, that further work on the walls be undertaken if the thumping noise continues.

I shall grant leave to make another application should that become necessary, although it appears that the landlord is willing to undertake this work voluntarily if it proves necessary.

In the matter of compensation, the landlord is offering \$1280 for the period from January, 2014 to December 31, 2015 which represents, by their calculations, a roll-back of rent increases to a level that existed prior to the establishment of the fitness centre. This represents compensation of 3% of the gross rents from January, 2014 to December 31, 2015:

$$\text{Compensation } (\$1280) / \text{Gross rent } (\$39,140) = 3\%$$

The respondent argued that the landlord should roll back the rent increases and provide additional compensation of \$200/month. This represents compensation of 15% of the gross rents over the same period:

$$\text{Compensation } (\$1280 + (23 \text{ months} \times \$200)) / \text{Gross rent } (\$39,140) = 15\%$$

In my opinion, given the severity of the disturbances, compensation of 15% of the gross rents is reasonable. However, in my opinion, the compensation should not be retroactive to January, 2014 but to September, 2014 when the landlord was notified by the applicant that, notwithstanding the installation of the mats in the fitness centre, the noise had not been significantly reduced. The evidence suggests that the landlord was under the impression that the noise problem had been resolved until notified otherwise by the applicant. Therefore I find reasonable compensation to December 31, 2015 to be \$3855 calculated as follows:

$$\text{Gross rents (September 2014 to December 31, 2015)} \ \$25,700 \times 15\% = \$3855$$

Summary

An order shall issue requiring the respondent to complete the ceiling insulation in the fitness centre no later than January 31, 2015 and to pay the applicant compensation for loss of full enjoyment of the rental premises in the amount of \$3855. The applicant may elect to receive the compensation as a lump sum payment or as a rent credit. The applicant is also granted leave to make a future application if the repairs are not completed as ordered or if the completed repairs do not result in acceptable levels of noise created by the fitness centre. The landlord is permitted to continue charging a monthly rent of \$1750/month.

Hal Logsdon
Rental Officer