Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES adn IMH 415 & 435 MICHIGAN APARTMENTS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, FF

Introduction

The tenant applies for compensation for loss of quiet enjoyment of her rental unit as defined by the *Residential Tenancy Act* (the "*Act*"), caused by repair and renovation work carried out by the landlord during this tenancy.

The listed parties and persons attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

At the request of the respondent DP and by agreement of the parties, the second respondent IMH was added as a respondent. It is the owner of the building. DP is a property management company and was acting as IMH's agent during the relevant time period.

Issue(s) to be Decided

Has the landlord failed to comply with its obligation to provide quiet enjoyment of the rental unit to this tenant? If so, what if anything is the tenant entitled to as compensation?

Background and Evidence

The rental unit is a one bedroom apartment on the top floor of a fourteen floor, 72 unit apartment building constructed in the early sixties.

This tenancy started in April 2008. The tenant vacated the rental unit on June 15, 2017. Her last rent was $1095.00. A copy of the original written tenancy agreement was not submitted.

The tenant is a single person in her seventies. She describes herself as a correspondent for a local newspaper and as a researcher and a writer. As well, she is employed off and on as a walking tour guide, sharing her knowledge of the history of the city with tourists and others.

From the start of her tenancy in 2008, the tenant found this apartment building to be a very pleasant place to live. It was quiet and open. The resident managers were pleasant and took good care of the building and grounds. The tenants in the building were friendly and "looked out for each other." The lobby in the building was a "beautiful" place according to the tenant and a pleasant meeting place. Tenants would congregate there at Christmas and on birthdays. It had been recently remodelled before she move in and there were many places to sit and meet.

She has lived in three different suites in the building, ending with this rental unit on the top floor, where she had a view of the ocean and the Olympic range of mountains in the state of Washington. She felt she would be living in this apartment for the rest of her life.

Each suite on three sides of the building had a balcony including the tenant's suite. The balcony floors were reinforced concrete extensions of each floor's floor slab. At the outside end of the slab was a concrete guard wall to secure against falling. The sides of each balcony were secured by metal side railings spanning the gap between the building and the guard wall.

IMH acquired the property in December 2015. Prior to purchase, in October 2015, it had been informed in a report by an engineering company P that after reviewing the state of the building structure it determined that in regard to the balcony, there was a "major deficiency." It noted concrete deterioration on the balcony soffits, on the

concrete guard walls and corroded balcony hardware with damaged concrete around the railing posts. It recommended immediate repairs of the concrete damage and at the deteriorating railing mount locations. The report indicated that, assuming the concrete repairs were completed at the railing attachment points and that regular annual maintenance was performed, the balcony system presently in the building should perform in a satisfactory manner.

The respondent IMH purchased the building and proceeded to conduct a variety or repairs and renovations. It determined that the entire concrete guard walls for all balconies would be removed and replaced.

In early December 2015, a new property management company, not the present management company DP, issued a notice to tenants announcing itself, providing its contact information and indicating that rent should be re-directed to it. The notice also stated that the owner's parent company S intended to proceed "in the short term" with maintenance, repairs and capital work described as "corridor, lobby and entrance refurbishment, security upgrades, elevator modernization, painting building envelope, balconies, windows & doors, unit renovations, energy efficient systems and mechanical equipment replacement."

It was indicated that the work was expected to take 24 months. A later notice for another building nearby, the twin of this apartment building, indicated 36 months for the same work. The notice warned that there may be noise, vibration, dust and inconvenience to access and egress at the property, however, the property manager would take steps to minimize inconvenience and would provide status updates as work progressed.

The work on this building and its nearby twin started shortly afterward. As the tenant describes it:

> Our previously quiet, clean, well-managed, safe building quickly degenerated into a noisy, dirty and unsafe environment, with inside renovation workers removing interior walls, taking over elevators for tools and open wheelbarrow-loads of hazardous building materials, etc.; outside workers hammering and drilling on the roof above my apartment ceiling; the building entrance door propped open all day to facilitate electrical cords and worker movements; and no resident manager to oversee issues, maintain cleanliness, or ensure the safety and security of me or my possessions. Living on the top floor, I was inconvenienced from January 2016 by drilling and disturbance outside my door, on the roof directly above my

> head, and from elsewhere in[*the building*], as well as from [*the twin building*] (noise bounced off my building); suffered increased claustrophobia when opaque plastic coverings denied access to air and light; then endured constant, unnerving noise when the two layers of opaque plastic tore in high winds and was not repaired/removed.

The hammering and drilling work originating above her top floor suite that had started in January according to this statement, and in early March 2016 according to another statement the tenant made, was work to secure a lift system for workers to reach the balconies and exterior of the building. The tenant submitted a 33 minute recording composed of ten separate recordings taken of the hammering and drilling "on the roof above my head" recorded between August 1 and December 2016.

The tenant also submitted audio recordings of general noise in the building recorded by others in different locations but said to be the same noise she was hearing. The noise is startling loud and percussive.

In or around June or July 2016 scaffolding was erected around the building and in front of this apartment. The scaffolding was swathed in an opaque plastic tarp or wrap. As a result, the tenant lost the view from her top floor apartment and the light into her suite was significantly diminished. This wrap, in one form or another, remained outside her balcony and windows until shortly before she vacated the premises in June 2017. It was replaced near the end of her tenancy with blue netting that similarly obstructed the view and the light.

Earlier, in approximately January 2016, the balconies of the twin building started to be removed. The removal process involved jackhammering, drilling and grinding. The twin building is approximately 200 meters away. The buildings are close enough that they share a common swimming pool located between them. The noise carried over to this tenant's suite and produced significant, constant noise during the weekdays.

Mr. R.M. gave evidence for the tenant. He was offered as an expert in the area of workplace hygiene involving sound and hazardous materials. After asserting his qualifications, including a B.Sc., his certification as an industrial hygienist, his accreditation from the American Industrial Hygiene Association and his 28 years as an occupational health officer for what is now knows as WorkSafeBC and after being questioned about his qualifications by counsel for the landlord, I was satisfied that Mr. R.M. was qualified as a person capable of giving an expert opinion in the area of workplace safety and the effects of hazardous materials and excessive noise.

Mr. R.M. indicated that jackhammer sounds being emitted from one of the buildings and received directly, without any sound breaking barrier at the other could exceed the levels permitted by local government bylaws. He also described the effect of the low, repetitive percussive noise like that given off by a jackhammer type tool being operated on a concrete structure of this kind, likening it to a bell being struck. The noise is not diminished by the structure and can be accentuated by it.

Not long after the first work started in this apartment building, on January 13, 2016, WorkSafeBC inspected the site and determined that the workers were not following required rules regarding the assessment for asbestos containing materials. It is appropriate to note at this point that not infrequently during the renovation of older buildings, hazardous materials safely entombed in building materials like drywall joint compound and tiling are disturbed and sent airborne as the material containing them is removed and disposed of. In that airborne state they pose a significant health risk. Special rules exist to ensure their capture and safe disposal. In this instance WorkSafeBC made certain orders to ensure compliance and worker safety.

In February 2016 work began on the renovation of two suites on the tenant's floor. She describes drilling, grinding and much of hammering continuing for several weeks. The work would take place Monday to Saturday and would often go well into the evening hours. After that the noise from interior work would peak at the start of each month, whenever a tenant moved out. During the day one of the two elevators in the building would be restricted for the use of workers.

Within four months of its first caution about asbestos containing material, on May 6, 2016, WorkSafeBC ordered interior renovation work to stop in thirteen empty suites undergoing renovations. It determined that the rules regarding removal of asbestos bearing material were not being followed. Asbestos containing debris was observed in the suites. It imposed a work stoppage until the employer (the owner or its prime contractor) complied with the rules regarding testing, removal and disposal of asbestos bearing material being disturbed by the renovation work.

At that time the suites would have been taped off and signs posted warning of asbestos. The signs would indicate not to enter the area without the proper equipment, including a respirator. This tenant would have seen those signs. Two of the cordoned suites were on her floor.

The work on balcony removal at this building appears to have started in July 2016. That work involved the use of jackhammers to chip away at concrete. The grinding and drilling noise intensified.

Not long after, on July 18, 2016, WorkSafeBC ordered work to stop again for a day because the landlord's workmen had failed to isolate the entire interior of the scaffolding around the building with shrink wrap plastic. The coating on the outside of the building, the parging, was being removed and it contained hazardous materials so care had to be taken to prevent hazardous dust particles from escaping into areas where workers might breathe them in.

There is no direct evidence of when the tenant became aware of the landlord's failure to comply with hazardous material abatement rules but it was likely in early 2016. It is not clear that that this stop work order was posted at the building but she notes that the stop work orders caused her "considerable distress and inconvenience." At one time in her life she had been a nurse and was aware of the deleterious effect of inhaling hazardous material like asbestos. Her questions/concerns were expressed to the landlord but, she says, went unacknowledged or not satisfactorily addressed.

Starting in February 2016, during renovations she saw wheelbarrows full of fixtures, fittings, floor coverings and "asbestos-containing wall material" standing in the 14th-floor hallway. During a period when work had been stopped she saw wheelbarrows full of asbestos-laden concrete dust in bags clearly labelled "Asbestos" that had been piled up on the scaffolding outside the ground-floor fire-exit (completely blocking it) and which were hastily removed, taken by two workers across the driveway beneath her window while she watched, and thrown into a large, empty yellow container in the "builders yard" portion of the front lawn, and the container sealed shut, just before WorkSafeBC inspectors arrived. She says she was distressed by blockage of the one and only main floor fire exit and the threat to her personal safety inherent in it.

The tenant's faith in the competency of the landlord's workers would have suffered another blow when, on July 13, 2016 a ten foot by 3 foot concrete guard wall on a balcony fell to the ground fourteen floors below. She was out at the time. She indicated that it clipped a balcony on the eighth floor as it fell. No one was injured. It was known by some tenants to have been the second time such a slab had accidentally fallen. In fairness, the WorkSafeBC report discloses that all other guard walls removed on this building and its twin had been joined to the balcony floor slab with rebar, preventing such an occurrence. This particular guard wall had not been; an original construction error apparently not easily discernible at the time the slab was detached.

As the tenant describes the loss of her balcony:

> The principal factor in my decision to take this apartment was its sunny, SW-facing balcony. From the third week of August 2016 until the day I left, I was denied use of my balcony, of access to fresh air or (because of opaque white and orange plastic coverings), to natural light. On CH south end, scaffolding went up weeks before removal of balcony fronts commenced. Sliding doors and windows were locked off, stopping access to the balcony even though no work was being done. In December 2016, layers of heavy white and orange opaque plastic were tied to the scaffolding, stretching up and onto the roof right above my head, completely cutting off natural light and creating a horrible feeling of claustrophobia. Workmens' tools littered the scaffolding outside my window from December 2016 to April 2017. I was unable to use my balcony from mid-August 2016. Its only occupants were a pair of pigeons who twice persisted (twice) in building a nest out of rubbish, bits of industrial tubing and plastic construction ties. Two eggs were laid in the "nest." When strong winds blew it away, the pigeons built another one. No workers had been near my balcony since December 2016; The remains of the nest was eventually cleared away by workmen in May 2017.

The tenant lost her balcony for the remainder of her tenancy. As noted, the balcony door was altered so that it could not be opened more than about 5 cm.

The noise disturbance increased as a result of the balcony work: it was right outside the tenant's balcony door. Audio evidence submitted by the tenant shows the noise to be the same percussive noise she had heard from a distance before only much louder. It is hard to overstate the annoyance that it must have cause to anyone inside. It would not be reasonable to attempt to carry on a conversation, watch television or make a phone call during the noise. The sounds usually lasted for a minute or less then stopped, then shortly the noise would start again without warning.

On December 2, 2016 the tenant received a notice to vacate her apartment for a short period and to move her furnishings away from the windows. Workers entered and removed the trim from around the interior of her windows. The workers left without installing new trim, leaving significant cracks around the windows, exposing underlying concrete. The cracks were taped over with duct tape. The windows remained like that for the rest of her tenancy.

The work on or near the tenant's balcony and the building continued on until December 2016. On December 15 WorkSafeBC issued an order that all work on the interior of this building's twin must stop. Its report noted that areas in front of building elevators on floors 2-14 had bulkheads installed over top of asbestos containing ceiling texture coat. The contractor who performed the work did not use appropriate safe work procedures and a clearance letter from a qualified person pertaining to the work was not available on the job site. Delaminating texture coat, containing asbestos, was observed. Asbestos containing floor tiles were in poor condition. The report stated:

> Failure to ensure that appropriate safe work procedures are [*sic*] during asbestos disturbance and failure to ensure that a qualified person confirms in writing that asbestos containing materials have been safely contained or removed following disturbance represents a high risk of serious illness in the form of asbestos related disease to workers who would have been present during work or following the completion of work in the form of residual asbestos contamination in the building.

The landlord ceased interior work on the tenant's building at that time as well.

It appears that concurrently all work on the building inside and outside stopped as a result of another "stop work" order issued by WorkSafeBC.

On December 22, 2016, Canada Post posted a notice to the tenants of the building, no doubt as a result of the stop work order, indicating,

> Your building is undergoing construction that has become a hazard to our Letter Carrier. Therefore, until WorkSafe BC declares it is safe for us to enter your building, we have temporarily suspended mail delivery to your building.

As a result tenant was required to collect her mail at the main post office for three months. On many days she could not get to the post office during its business hours and when she did, the lineups were "ridiculously long" costing sometimes an hour or more of her time.

This tenant continued to reside in her suite during this time, a time when all workers had been effectively banned from entering the building, including the mailman, due to the health risk the building posed. It would appear that the Vancouver Island Health Authority became involved with WorkSafeBC. Hazardous material tests were done on standing dust in some of the suites and, on or about January 25, 2017, the tenant and

all the others in her building were given 48 hours notice to evacuate. All tenants were to be put up in hotels during that time at the expense of the landlord. A notice issued by the landlord indicates the evacuation was to be for two weeks.

Unfortunately, the tenant was out of town when she received the notice to evacuate. She hurried home, collected belongings sufficient for two or three weeks away and proceeded to a hotel on a bus provided by the landlord. The evacuation lasted six weeks, during which the tenant was not permitted back in the building.

During the evacuation workers in “hazmat” gear: coveralls, gloves and special masks, entered the building and cleaned all the suites and common areas. The landlord paid for the tenant’s accommodation and refunded or credited tenants for rent for this period: January 27 to March 9, 2017. It also provided the tenant with money or credits for food at the hotel.

After the tenant returned to her home on March 10 no more work was done on the building until after she left in mid-June. Her balcony remained off limits and the scaffolding and plastic sheeting remained up outside her suite. In the tenant’s words, the evacuation was the last straw. She located a new place but could not find one in this same community.

The tenant describes the general and significant decline in the building. She considers the loss of the resident managers to be significant. It resulted in a “loss of community” and the security resident managers provided by having a staffed office at the front door.

In her view the lobby and laundry room quickly degenerated into a disgusting state, with debris, dog urine inside the elevators, and badly-stained carpet outside elevators at lobby level. She noted little attempt to instigate a regular routine of thorough cleaning in hallways and common areas.

She states that the exteriors of her windows were not cleaned during her tenancy and that they construction dirt and salt spray from the ocean breeze made it “impossible” to see through the glass.

The presence of the numerous workers, some of whom began living in the building, coming in and out of the building through an unlocked door reduced the tenant’s sense of security. She states that on two occasions in February 2016 workers living in the building roughly and loudly pushed their way into the building behind her despite her questioning their authority to enter.

As well, workers regularly left a maintenance door open and unattended, allowing free access to the inner hallways of the building for anyone so inclined. Similarly, the scaffolding around the building provided another means of access. According to the tenant, an intruder could walk through the fencing around the site, climb the scaffolding and enter a suite through any balcony door. She heard the sound of feet on the scaffolding in the evening on more than one occasion. Ultimately, she fabricated her own device to block her balcony door closed from the inside.

The grounds around the apartment building deteriorated immediately and significantly starting in December 2015. What had been lawn was either fenced off, cluttered with worker equipment or building supplies, messy with debris, cleared of greenery, or otherwise in poorly kept condition. Photos supplied by the tenant confirm the grounds had evolved into a construction site.

With the commencement of balcony work on her rental unit in August 2016, the tenant lost use of a bicycle shed to store her bicycle. The scaffolding prevented its use. The landlord offered the use of the bicycle shed at the twin building but it was not comparable. The tenant indicates it was in disrepair with holes in the doors and walls and with bicycles strewn all over the place. She has provided photographs showing the replacement shed to have a hollow core door that has been punched or hit through and shed walls that appear to have suffered damage from vandalism. She thereafter locked her bike to an upright in the parking lot and worried about having it stolen.

From January 2016 the lobby became a storage area for workers' tools and equipment. Extension cords would run through the propped open front door. The tenant indicates the state of the lobby made her ashamed to invite visitors to her apartment.

In September 2016, the carpeting was removed from the hallway outside the tenant's door. The hallway remained bare until the end of tenancy in mid-June 2017. The removal of the carpet left a significant gap under her door. The footsteps and voices of people in the hall were no longer muffled by carpet and they were much louder. She describes the hallway as an unsightly mess of carpet bits and other debris. She states that the hallway was not cleaned by the landlord until January 2017 with the general cleaning conducted during the evacuation. The gap under her door also permitted the entry of concrete dust and debris, particularly during the renovation work being conducted in unit across the hall. Throughout the tenancy she found fine white dust on the window sills, floor and furnishings. She indicates she was constantly cleaning her apartment. In the tenant's words:

> The presence of dust was constant during internal renovations and removal of asbestos-containing materials, as evidenced by a constant dry tightness in my throat and a cough, particularly noticeable when I re-entered the building after a period of time outside. This was exacerbated once windows were sealed. As I usually spent a great deal of time in my home, relaxing, reading, researching and writing, I was concerned for my physical safety, and resented having to go outside just to breathe fresh, dust-free air.

The plastic tarp enshrouding the scaffolding outside the tenant's suite began to fray and part. The photo submitted shows badly torn or parted plastic hanging loosely from the scaffolding erected immediately outside a window or balcony door. As a result, the tenant says, the tarp would make cracking and snapping noises in the wind. The tenant described it as being like the noise of a freight train going by when the wind blew. She indicates that it was unremitting, day and night for more than eight months and inhibited her from watching television, holding a conversation or sleeping.

Starting December 2016 the tenant experienced leaking windows. She reported it to the landlord but leaks through her balcony door continued to occur on rainy days for the duration of her tenancy. She would place high absorption cloth inside her sliding balcony door in order to catch the water coming in.

The tenant also indicates that this apartment building had been a "pets free" building but that this landlord began permitting pets after it took over. She says that the introduction of pets, including several large dogs, created an immediate nuisance from their barking and snarling at each other. There would be dog urine in the elevator and dog droppings outside the entrance.

When workers were on the scaffolding outside her apartment the tenant would have to draw her drapes for privacy. She indicates this occurred many times.

The tenant indicates that her water was shut off "many times" to facilitate the work in the building, often with little notice. She is unhappy with the new plumbing in her shower. The new fixture, a cost saving shower head, provides only a light rain of water.

She shows that the swimming pool, a common facility for both apartment buildings and located between them, became a storage area for construction material like windows, pipe and lumber.

The tenant indicates that workers would commandeer and lock out one of the two elevators and that it was not uncommon for her to wait ten to fifteen minutes for an elevator. Being of the age that she is and as she lived fourteen floors up, she did not attempt the stairs.

On occasion she would find her designated parking spot occupied, she suspects, by worker vehicles. The workers and tradesmen would use the visitors parking and the "residents only" parking on the street.

In response to the tenant's evidence the landlord submits the affidavits of two of the building managers as well as a portion of an engineering report from October 2015 regarding work thought to be required on the balconies of the building. Additionally the landlord submits copies of various notices to the tenants and portions of certain reports relating to the evacuation in January 2017 and the building generally.

The affidavit of Ms. G.W. is not particularly helpful. She started as an employee of the landlord only in January 2017, near the end of this tenancy and after the work had all been stopped. She reports that the landlord's "core services" like cleaning services resumed "on or before January 31, 2017," assumedly after having been stopped for some unstated reason. She sets out the cleaning protocols in her schedule of duties.

The affidavit of Ms. N. A. is more relevant. She started her job as building manager for this building in December 2015. After January 1, 2017 she only covered for the building manager at this building, assumedly that would be Ms. G.W. She states that the "quiet work" on the interior hallways and lobby started in October 2016 and that the renovation of suites started in December 2015 and that it caused only "minimal noise." Her affidavit states she "did not receive numerous complaints from residents regarding excessive or unreasonable noise" between January 2016 and June 2016. She then states (in para 15) that "construction workers would not start their work involving excessive noise, such as jackhammering until around 8:00 a.m. to 3:30 p.m. in the afternoon." Perhaps in conflict with Ms. G.W., Ms. N.A. swears that cleaning services returned to the building "on or before March, 2017." Ms. N.A. also sets out the cleaning protocols involved in her duties.

Ms. E.S., an employee of the landlord's management company testified. She indicated that if a building manager was unable to complete a cleaning protocol, then a private cleaning company could be hired to do it. She indicated that the time the renovations were going to take was always an uncertain question. In once case, flooring had taken two years to finally arrive.

Analysis

The tenant's evidence establishes that from roughly January 2016 to mid December 2016, this tenant's occupancy of her rental unit was disturbed to an extraordinary extent by the noise and intrusion of work on and in the building. Her privacy was interrupted on a regular basis and she lost use of common areas like the lobby and the grounds. At an early stage in the work, this tenant became aware that she was at risk of exposure to hazardous material, particularly asbestos, being cast into the air by the landlord's workers.

The landlord presents little evidence to contradict the tenant's version of events. Ms. G.W. did not start working for the landlord until January 2017. Her presentation of cleaning protocols is not evidence that the protocols were followed. Ms. N.A. makes a similar averment about cleaning protocols. Ms. N.A.'s statement that there were not "numerous" complaints about noise is a subjective statement that, unexplained, has little meaning. Her affidavit confirms that there was "excessive" noise, but again that is a subjective statement of little meaning. The affidavits appear to contradict each other about when cleaning services recommenced. As Ms. G.W. would have it, those services recommenced while workers in hazmat suites were removing asbestos laden dust from all the suites in the building and into which not even a letter carrier would enter out of concern for his or her health.

Neither affidavit mentions the letters and emails the tenant sent nor deals with the tenant's assertion that she could not leave phone messages with the building manager because the building manager's message box was full.

There is no indication about what the building manager Ms. G.W. did about the complaints she did receive or what she would have done or would have been able to do had there been "numerous" or even any complaints about excessive or unreasonable noise. Certainly the landlord would not order the work to stop to convenience a complaining tenant.

The tenant's evidence was given in a sincere and matter-of-fact manner. Cross examination did not raise any concern about the truthfulness of her testimony. Many of the statements the tenant made were supported by objective evidence in the form of document, audio or video evidence.

The evidence shows that starting in January 2016 to roughly June 2016 the tenant experienced a loss of any reasonable use of the building lobby, which she was in the

habit of using to meet and visit with guests and other tenants. She lost the use of a considerable portion of common area grounds she had previously enjoyed because they were taken over by the work being done. Her building was virtually overrun with workmen coming and going and with their equipment and materials taking up common areas. As well, interior renovation work had started and during the day there was the frequent noise of power tools audible in the tenant's apartment. This noise increased significantly when renovation work started on the apartments on the tenant's floor. The work involved some "demolition" in that the plumbing the suites was being changed and cupboards and counters were being removed. Heavy tools were in use to take apart the old suites.

At the start of this period, January 2016, the tenant became aware that the landlord's workers were not following procedures set by law for the capture and disposal of asbestos containing materials. She observed bags with "asbestos" labels thrown into a container. She was aware of WorkSafeBC's interdiction due to the lack of required care being shown in the removal or disturbance of hazardous material contained in the building.

The evidence of Mr. R.M., the workplace safety expert does not establish that the tenant actually inhaled hazardous material but that the;

> verified presence of settled hazardous material dust in tenant and common areas that were evaluated establishes the possibility of tenants, and other unprotected persons, to be exposed to hazardous materials consisting of asbestos, lead and respirable crystalline silica. The absence of exposure monitoring makes it difficult if not impossible to substantiate tenants and other unprotected persons present in the building between approximately July 5, 2016 to January 30, 2017 were not exposed to hazardous material particulate.

Mr. R.M. specifies the incidents of neglect by the landlord's workmen to take required precautions to keep the workplace; the building, safe from the threat of hazardous material like asbestos (or respiratory crystallized silica or lead). The question of whether or not the landlord's alleged negligence has caused the tenant a physical injury by exposing her to hazardous material is not an issue fairly before this dispute resolution proceeding. The tenant has framed her claim as a recovery of a portion or all of rent paid due to the landlord's failure to ensure her quiet enjoyment of the premises. In that light, the question is whether or not the tenant's enjoyment of her rental unit has been lessened because of her awareness of the threat of exposure; whether her rental

unit was reduced in its amenity or was of a lower rental value than what she was paying.

I find that with knowledge of the landlord's failure to properly abate the asbestos containing material in the building the tenant suffered a level of anxiety about it. She had been a nurse and was alive to the risk it could pose. It was an unreasonable disturbance of the tenant's enjoyment of her apartment. However, after March 10, 2017, reasonable inquiry would have shown her that on her return to her apartment the building had been professionally confirmed to be free of dangerous particulate.

In or around June 2016 scaffolding went up around the building and plastic wrap went up around the scaffolding. They remained throughout the tenancy, though the plastic wrap may have been exchanged for fine blue netting in early June 2017. The scaffolding with workmen on it occasionally outside her windows during weekdays was an unexpected intrusion on her privacy. The view from her apartment was lost. The quiet that she was entitled to was gone, either by workmen and the sound of jackhammering, grinding and drilling during the day or by the sound of the plastic wrap flapping in the wind; a sound that progressed in its ability to annoy as the plastic ripped and deteriorated over time.

The tenant suffered an increase in dust when the balcony work on the building started in or around June 2016 and, I find, the requirement of regular cleaning and dusting her apartment increased. As well, with the closing off of the windows and balcony and with plastic wrap all around, she suffered a significant diminution in the amount of fresh air entering her apartment.

With the erection of the scaffolding the tenant lost the use of the bike shed for this building. I accept her evidence that the alternative offered by the landlord was not a reasonable one. While an objective view of such a loss of a facility may show it to be a small one, it was yet another thorn in the tenant's side.

There is insufficient evidence to show that the tenant was affected by loss of use of the swimming pool at any time or that parking difficulties caused by the work were anything more than a rarity.

The loss of the original building managers to ones the tenant did not think to be as friendly or efficient is not a compensable item, though the resulting lack of security at the front office in the building is a valid aspect of the tenant's damage and loss claim.

The tenant did not present a tenancy agreement or other document to show that she rented an apartment in a “pets free” building and so the fact of pets showing up in the building and disturbing her is not a compensable item.

In the fall of 2016 the hallway outside the tenant’s apartment had its carpeting removed. I accept the tenant’s evidence that the remaining bare concrete floor was not cleaned until the emergency cleaning done during the evacuation in January 2017. In the meantime, workers travelled up and down the hall, clogged it with tools and materials and left dust and debris, which was easily tracked into the tenant’s apartment. With the loss of the carpet, the tenant’s apartment was left with a considerable gap under her apartment door, creating more interrupting noise and another avenue for dust to enter until she finally vacated.

While the tenant complains about the landlord’s failure to clean the outside of her windows during her tenancy, it would appear that such a cleaning would only have improved the tenant’s view of the scaffolding and plastic wrap.

In January 2017 the tenant was relocated for the period January 27 to March 9 or 10. Her rent was adjusted so that she neither lived in the apartment nor paid rent for it during that time. Even if it could be said that the tenant suffered a loss of quiet enjoyment during this period, a proposition of some doubt, there is no rent or portion of rent to be recovered because she did not pay any. The tenant’s advocate Mr. P.M. indicates that an earlier decision involving a similar claim from a tenant in the same building awarded a portion of the rent that would have been paid for this period. As the parties are aware, arbitrators are not bound by the decisions of other arbitrators. Though it is in the interests of justice that previous decisions should be respected and should be followed in proper circumstances, I consider that the awarding of a portion of rent for a period when no rent was paid to have most likely been an oversight.

Upon her return to her apartment in March 2017, the tenant was freed of the noise of renovation. For the remaining three months and a week she lived in an apartment shrouded in plastic that whipped noisily in the wind. She had no balcony. Her hallway remained barren of finishing and the lobby and surrounding grounds remained a construction site.

Section 28 of the *Act* provides:

> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(a) reasonable privacy;
(b) freedom from unreasonable disturbance;
(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
d) use of common areas for reasonable and lawful purposes, free from significant interference.

Section 32 provides:

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that
(a) complies with the health, safety and housing standards required by law, and
(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

In this case, the landlord argues that the work it conducted on the building during this tenancy, or much of it, was work required to repair and maintain the building and so the tenant is obliged to put up with it.

Residential Tenancy Policy Guideline 6, “Entitlement to Quiet Enjoyment” addresses the conflict between a tenant’s right to quiet enjoyment (as defined by the *Act*) and the inconvenience associated with a landlord carrying out its s. 32 duties. The relevant portion of the guideline says:

A landlord is obligated to ensure that the tenant’s entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

> In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

The evidence indicates that the only work required to be done in order to repair and maintain the apartment building was the work described in the October 2015 engineering report from P. It directed repairs of the balcony systems at the concrete damage locations, notably at the railing attachment points. The report stated that assuming the concrete repairs were completed at the railing attachment points and that there was regular annual maintenance, the balcony system should perform satisfactorily "throughout the term of the analysis."

It may be, as suggested by Mr. R.M. that further damage was discovered during the repair process, but it has not been shown that removal of the concrete guard walls, a project causing significant noise and interference to this tenant, was a required repair.

In any event, the evidence shows that the work undertaken by the landlord was done in a haphazard fashion with little care for or attention being shown to the tenants who continued to reside in the building. Further, the work was extended over an inordinate time due to the landlord's failure to comply with rules and regulations governing that work.

I find that the disturbance and interference that the tenant endured during his tenancy was not a temporary discomfort or inconvenience. It was an ongoing discomfort and interference. The work far exceeded normal maintenance and repair. It was a major construction project well exceeding the initial October 2015 site survey and, additionally, it was work that exceeded what a tenant who is required to continue to pay full rent might expect or be obliged to countenance.

The landlord suggests that the tenant was carrying on business at the apartment and that should be a factor in determining any award. I do not agree. The tenant was carrying on a normal activity not uncommon in residential premises and compatible with her tenancy.

The landlord suggests that the tenant failed to mitigate her loss by ending the tenancy and moving earlier. No authority was offered for the proposition that a party must repudiate a contract in order to mitigate her loss. I find that the tenant acted reasonably in response to the situation as it presented itself and that she did not fail to mitigate the damage and loss she was suffering.

I consider that the tenant is entitled to recover a significant award for damage and loss incurred as a result of the landlord's actions during this tenancy. In past cases of this type arbitrators have generally awarded a percentage of rent returned to a successful tenant. Given the broad nature of the complaints and the frequency or infrequency of occurrences over a tenancy, such a global approach has merit over an attempt to parse each item of justified complaint and attempt to assess its contribution to the general loss of quiet enjoyment. The tenant has divided her tenancy into three periods relating to the different work and circumstances at the time. I consider that to be appropriate though her dates for each period are not.

The first period is from January 2016 through June 2016, the period during which the building was like a construction site, major interior renovations were going on with associated hammering and drilling during the day, into the evening and on Saturdays. After June 2016 and until mid December 2016, in addition to the foregoing, the tenant was burdened by the fact of the balcony work on the building, which involved loud, percussive noise of a much higher level than before. Her apartment was surrounded by scaffolding and plastic wrap. The third period is from mid December 2016 to mid June 2017 when she left. This period excludes the six week evacuation interlude. During this period there was no noisy work on the building and no workers in and about the place (but for three contractors found to violating a WorkSafeBC stop work order). The tenant's apartment was still shrouded in flapping noisy plastic with no view. She had no balcony and the lobby and grounds were still a construction site.

In assessing an award it is of prime importance to keep in mind that this tenant spent a great deal of time in her home. She did not go off to work each day. Her days involved writing and researching on the computer, talking of the phone and generally enjoying the solitude and amenity of her apartment. The tenant's ability to do these things deteriorated sharply with the work generated in and around her apartment.

For the first period I award the tenant $3195.00: 50% of the rent she paid. For the second period I award her $3895.50: 65% of the rent she paid for that period. For the third portion I award the tenant $2000.20: 40% of the rent she paid (excluding 43 days of rent credited for the period January 27 to March 10).

Conclusion

In result, the tenant's application is allowed. I award her $9090.70 plus recovery of the $100.00 filing fee for this application. She will have a monetary order against the landlord in the amount of $9190.70.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: January 01, 2019

Residential Tenancy Branch